ANNOTATIONS INCLUDE 231 N. C.

NORTH CAROLINA REPORTS

VOL. 171

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1915
(IN PART)
SPRING TERM, 1916

BY

ROBERT C. STRONG
STATE REPORTER

ANNOTATED

The numbers in parenthesis following the annotation indicate the number of the digest in the annotated case which is discussed in the case cited. The letters following the numbers indicate the treatment in the cited case: c indicates cited; cc, cited as controlling; d, distinguished; e, converse of principle applied; j, cited in concurring or dissenting opinion; l, limited; o, overruled; p, parallel; q, questioned.

RALEIGH
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1950

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5 Iredell Law	"	27	"
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1 Iredell Equity	"	36	"
2 Iredell Equity	"	37	"
3 Iredell Equity	"	38	"
4 Iredell Equity	"	39	"
5 Iredell Equity	"	40	"
6 Iredell Equity	"	41	"
7 Iredell Equity	"	42	"
8 Iredell Equity	"	43	"
Busbee Law	"	44	"
Busbee Equity	"	45	"
1 Jones Law	"	46	"
2 Jones Law	"	47	"
3 Jones Law	"	48	"
4 Jones Law	"	49	"
5 Jones Law	"	50	"
6 Jones Law	"	51	"
7 Jones Law	"	52	"
8 Jones Law	"	53	"
1 Jones Equity	"	54	"
2 Jones Equity	"	55	"
3 Jones Equity	"	56	"
4 Jones Equity	"	57	"
5 Jones Equity	"	58	"
6 Jones Equity	"	59	"
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Phillips Law	"	61	"
Phillips Equity	"	62	"

In quoting from the reprinted Reports counsel will cite always the marginal (*i.e.*, the *original*) paging, except 1 N. C. and 20 N. C., which are repaged throughout, without marginal paging.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

PLATT D. WALKER,
GEORGE H. BROWN,
WILLIAM A. HOKE,
WILLIAM R. ALLEN.

ATTORNEY-GENERAL:

T. W. BICKETT.

ASSISTANT ATTORNEY-GENERAL:

T. H. CALVERT

SUPREME COURT REPORTER:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

JOSEPH L. SEAWELL.

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

W. M. Bond	First	Chowan.
George W. Connor	Second	Wilson.
*R. B. Peebles	Third	Northampton.
F. A. Daniels	Fourth	Wayne.
H. W. Whedbee	Fifth	Pitt.
O. H. Allen	Sixth	Lenoir.
C. M. Cooke	Seventh	Franklin.
W. P. Stacy	Eighth	New Hanover.
C. C. Lyon	Ninth	Bladen.
W. A. Devin	Tenth	Granville.

WESTERN DIVISION

H. P. Lane	Eleventh	Rockingham.
Thomas J. Shaw	Twelfth	Guilford.
W. J. Adams	Thirteenth	Moore.
W. F. Harding	Fourteenth	Mecklenburg.
B. F. Long	Fifteenth	Iredell.
J. L. Webb	Sixteenth	Cleveland.
E. B. Cline	Seventeenth	Catawba.
M. H. Justice	Eighteenth	Rutherford.
Frank Carter	Nineteenth	Buncombe.
G. S. Ferguson	Twentieth	Haywood.

*Hon. Francis D. Winston appointed his successor, upon his death, by the Governor.

SOLICITORS

EASTERN DIVISION

J. C. B EHRINGHAUS	First	Pasquotank.
RICHARD G. ALLSBROOK	Second	Edgecombe.
JOHN H. KERR	Third	Warren.
WALTER D. SILER	Fourth	Chatham.
CHARLES L. ABERNATHY	Fifth	Carteret.
H. E. SHAW	Sixth	Lenoir.
H. E. NORRIS	Seventh	Wake.
H. L. LYON	Eighth	Columbus.
S. B. MCLEAN	Ninth	Robeson.
S. M. GATTIS	Tenth	Orange.

WESTERN DIVISION

S. P. GRAVES	Eleventh	Surry.
JOHN C. BOWER	Twelfth	Davidson.
W. E. BROCK	Thirteenth	Anson.
G. W. WILSON	Fourteenth	Gaston.
H. CLEMENT	Fifteenth	Rowan.
*THOMAS M. NEWLAND	Sixteenth	Caldwell.
J. J. HAYES	Seventeenth	Wilkes.
MICHAEL SCHENCK	Eighteenth	Henderson.
J. E. SWAIN	Nineteenth	Buncombe.
G. L. JONES	Twentieth	Macon.

*Died, and R. L. HUFFMAN, of Morganton, appointed August 21st.

LICENSED ATTORNEYS

SPRING TERM, 1916

Name.	*Town.*
ASHCRAFT, FRANK BICKETT	Monroe.
BARBER, J. WADE	Pittsboro.
BECKWITH, CLIFTON WARREN	Raleigh.
BELL, CLIFTON LINWOOD	Swan Quarter.
BELLAMY, EMMETT HARGROVE	Wilmington.
BLOUNT, MARVIN KEY	Bethel.
BRYAN, ROBERT THOMAS, JR.	Warsaw.
BURRUS, DANIEL WARWICK	Wilmington.
CASTEEN, JACOB	Hallsville.
CLAYTON, MARK DANIEL	Brevard.
CLEMENT, LILLIAN EXUM	Asheville.
COCKERHAM, JOSEPH LEWELLYN	Lowgap.
COOPER, THOMAS JEFFERSON	Asheville.
COX, CLIFFORD NEWTON	Asheboro.
COX, EDWARD BLACKMAN	Wilmington.
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DIXON, LEONIDAS POLK	Ore Hill.
DOUGLASS, SAMUEL ERNEST	Mount Gilead.
FRANKS, CLAUDE ROBERT	Hiwassee.
GALLOWAY, THOMAS COLEMAN	Brevard.
GARDNER, PARISH CLEVELAND	Shelby.
GATLING, JOHN MORRIS	Windsor.
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GRAY, JOS. BURKE	Cherokee.
GRIMSLEY, HARRY BARNETTE	Greensboro.
HAIR, GEORGE WILLIAM	Stedman.
HUGHES, CLINTON KELLY	Asheville.
HUNTER, FRED CALDWELL	Newell.
JONES, FRANK CARLTON	Plymouth.
LAND, CALEB MCCOWN	Carthage.
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MCDUFFIE, FULTON JONES	Sanford.
MICK, ERNEST GRANT	Weaverville.
MOTT, MARSHALL LOCKHART, JR.	Wake Forest.
MURPHY, JOSEPH	Hickory.
NORMAN, ZEB VANCE	Plymouth.
ODOM, JOHN DAFFIN	Rocky Mount.
OLIVE, BURRELL RAYMOND	Apex.
PERRY, HUGH WINSTON	Mapleville.

Name.	*Town.*
POU, JAMES HINTON, JR.	Raleigh.
PRIVETTE, HENRY CLYDE	Statesville.
RIPER, HAROLD VAN	New York, N. Y.
ROUSE, WALTER BRYAN	Dover.
SHUFORD, RICHARD HARVEY	Hickory.
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VASS, RUSH FRANKLIN	Wilmington.
WARREN, CASPAR CARL	Dunn.
WHITLEY, JOHN BAYLUS	Wake Forest.
WHITLEY, ENNIS PARKER	Wake Forest.
WILKINSON, WILLIAM STRONACH	Rocky Mount.
WRIGHT, JAMES LINEBERRY	Greensboro.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL OF 1916.

SUPREME COURT

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August in every year. The examination for applicants for license to practice law, to be conducted in writing, takes place on the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

First District	August	29
Second District	September	5
*Third and Fourth Districts	September	12
Fifth District	September	19
Sixth District	September	26
Seventh District	October	3
*Eighth and Ninth Districts	October	10
Tenth District	October	17
Eleventh District	October	24
Twelfth District	October	31
Thirteenth District	November	7
Fourteenth District	November	14
*Fifteenth and Sixteenth Districts	November	21
*Seventeenth and Eighteenth Districts	November	28
Nineteenth District	December	5
Twentieth District	December	12

*Cases docketed in order received by clerk. Cases in later district in number will not be called before Wednesday of the week.

SUPERIOR COURTS, FALL TERM, 1916

The parenthesis numeral following the date of a term indicates the number of weeks during which the court may hold.

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Whedbee.*

Camden—July 17† (1); Nov. 6 (1).
Gates—July 31 (1); Dec. 11 (1).
Washington—Aug. 7 (1).
Currituck—Sept. 4 (1).
Chowan—Sept. 11 (1); Dec. 4 (1).
Pasquotank—Sept. 18 (1); Sept. 25† (1); Nov. 13† (1).
Beaufort—Oct. 2† (2); Nov. 20 (1); Dec. 18† (1).
Hyde—Oct. 16 (1).
Dare—Oct. 23 (1).
Perquimans—Oct. 30 (1).
Tyrrell—Nov. 27 (1).

SECOND JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Allen.*

Nash—Aug. 28 (1); Oct. 9 (1); Nov. 27 (2).
Wilson—Sept. 4 (1); Oct. 2 (1); Nov. 13† (2); Dec. 18* (1).
Edgecombe—Sept. 11 (1); Oct. 30† (2).
Martin—Sept. 18 (2); Dec. 11 (1).

THIRD JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Cooke.*

Bertie—July 3† (1); Aug. 28 (2); Nov. 13 (1).
Hertford—July 31 (1); Oct. 16 (2).
Northampton—Aug. 7‡ (1); Oct. 30 (2).
Halifax—Aug. 14 (2); Nov. 27 (2).
Warren—Sept. 18 (2).
Vance—Oct. 2 (2).

FOURTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge W. P. Stacy.*

Lee—July 17 (2); Oct. 23† (1); Nov. 6 (1).
Chatham—Aug. 7† (1); Oct. 30 (1).
Johnston—Aug. 14* (1); Sept. 25† (2); Dec. 11 (2).
Wayne—Aug. 21 (2); Oct. 9† (2); Nov. 27 (2).
Harnett—Sept. 4 (1); Sept. 11† (1); Nov. 13† (2).

FIFTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Lyon.*

Pitt—Aug. 21† (1); Aug. 28* (1); Sept. 18 (1); Nov. 6† (1); Nov. 13* (1).
Craven—Sept. 4* (1); Oct. 2† (2); Nov. 20† (2).
Carteret—Oct. 16 (1).
Pamlico—Oct. 23 (2).
Jones—Dec. 4 (1).
Greene—Dec. 11 (2).

SIXTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Devin.*

Onslow—July 17† (1); Oct. 9 (1); Dec. 4† (1).
Duplin—July 24* (1); Aug. 28† (2); Nov. 20 (1); Nov. 27† (1).
Sampson—Aug. 7 (2); Sept. 18† (2); Oct. 23 (2).
Lenoir—Aug. 21* (1); Oct. 16‡ (1); Nov. 6† (2); Dec. 11* (1).

SEVENTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Bond.*

Wake—July 10* (1); Sept. 11* (1); Sept. 18† (3); Oct. 9* (1); Oct. 23† (2); Nov. 6* (1); Nov. 27† (1); Dec. 4* (1); Dec. 11† (1).
Franklin—Aug. 28† (2); Oct. 16* (1); Nov. 13† (2).

EIGHTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Connor*

Brunswick—Aug. 21† (1); Oct. 9 (1).
Columbus—Aug. 28 (2); Nov. 20† (2); Dec. 8* (1).
New Hanover—Sept. 11* (2); Oct. 23† (2); Nov. 13 (1); Dec. 4† (2).
Pender—Sept. 25† (2); Nov. 6 (1).

NINTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Winston.*

Robeson—July 10* (1); Sept. 4† (2); Oct. 2† (2); Nov. 6* (1); Dec. 4† (2).
Bladen—Aug. 7* (1); Oct. 16† (1).
Hoke—Aug. 14 (1); Nov. 27 (1).
Cumberland—Aug. 28* (1); Sept. 18† (2); Oct. 23† (2); Nov. 20* (1).

TENTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Daniels.*

Granville—July 24 (1); Nov. 13 (2).
Person—Aug. 14 (1); Oct. 16 (1).
Alamance—Aug. 21* (1); Sept. 11† (2); Nov. 27* (1).
Durham—Aug. 28* (1); Sept. 25† (2); Nov. 6† (1); Dec. 11* (1).
Orange—Sept. 4 (1); Dec. 4 (1).

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Long.*

Ashe—July 10 (2); Oct. 16 (1).
Forsyth—July 24* (2); Sept. 11† (2); Oct. 2 (2); Nov. 6† (2); Dec. 11* (1).
Rockingham—Aug. 7* (2); Nov. 20† (2); Dec. 18* (1).
Caswell—Aug. 21 (1); Dec. 4 (1).
Surry—Aug. 28 (2); Oct. 23 (2).
Alleghany—Sept. 25 (1).

TWELFTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Webb.*

Davidson—July 31 (2); Nov. 20† (2).
Guilford—Aug. 14† (2); Sept. 4† (2); Sept. 18* (1); Sept. 25† (1); Oct. 9† (2); Nov. 6† (2); Dec. 4† (1); Dec. 11* (2).
Stokes—Oct. 23* (1); Oct. 30† (1).

THIRTEENTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Cline.*

Richmond—July 3† (1); July 17* (1); Sept. 4† (1); Sept. 25* (1); Dec. 4† (1); Dec. 18† (1).
Stanly—July 10 (1); Oct. 9† (1); Nov. 20 (1).
Union—July 31* (1); Aug. 21† (2); Oct. 16 (1); Oct. 23† (1).
Moore—Aug. 14* (1); Sept. 18† (1); Dec. 11† (1).
Anson—Sept. 11* (1); Oct. 2† (1); Nov. 13† (1).
Scotland—Oct. 30† (1); Nov. 27 (1).

FOURTEENTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Justice.*

Mecklenburg—July 10* (2); Aug. 28* (1); Sept. 4† (2); Oct. 2* (1); Oct. 9† (2); Oct. 30† (2); Nov. 13* (1); Nov. 20† (2).
Gaston—Aug. 14† (1); Aug. 21* (1); Sept. 18† (2); Oct. 23* (1); Dec. 4† (2).

FIFTEENTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Carter*

Randolph—July 17† (2); Sept. 4* (1); Dec. 4 (2).
Iredell—July 31 (2).
Cabarrus—Aug. 14 (2); Oct. 30 (2).
Davie—Aug. 28 (1); Nov. 13 (1).
Rowan—Sept. 11 (1); Oct. 9† (1); Nov. 20 (2).
Montgomery—Sept. 25† (2); Oct. 16 (2).

SIXTEENTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Ferguson.*

Lincoln—July 17 (1); Oct. 16 (1); Oct. 23† (1).
Cleveland—July 24 (2); Oct. 30 (2).
Burke—Aug. 7 (2); Oct. 2† (2); Dec. 4† (2).
Caldwell—Aug. 21 (2); Nov. 13 (2).
Polk—Sept. 28 (2).

SEVENTEENTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Lane.*

Avery—July 3† (1); Oct. 16 (2).
Catawba—July 10 (2); Oct. 30 (2).
Mitchell—July 24† (2); Nov. 13 (2).
Wilkes—Aug. 7 (2); Oct. 2† (2).
Yadkin—Aug. 21 (1); Nov. 27 (1).
Watauga—Sept. 4 (2).
Alexander—Sept. 18 (2).

EIGHTEENTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Shaw.*

McDowell—July 10 (2); Sept. 18 (2).
Transylvania—July 24 (2); Nov. 27 (2).
Yancey—Aug. 14† (1); Oct. 30 (2).
Rutherford—Aug. 21† (2); Oct. 16 (2).
Henderson—Oct. 2* (2); Nov. 13† (1).

NINETEENTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Adams.*

Buncombe—July 10 (3); July 31† (3); Aug. 28† (3); Sept. 25 (3); Oct. 23† (3); Nov. 20† (4).
Madison—Aug. 21 (1); Sept. 18† (1); Oct. 16† (1); Nov. 13† (1).

TWENTIETH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Harding.*

Haywood—July 10 (2); Sept. 18 (2).
Swain—July 24 (2); Oct. 23 (2).
Cherokee—Aug. 7 (2); Nov. 6 (2).
Macon—Aug. 21 (2); Nov. 20 (2).
Graham—Sept. 4 (2); Dec. 4 (2).
Jackson—Oct. 9 (2).
Clay—Oct. 2 (1).

*Criminal cases. †Civil cases. ‡Civil and jail cases.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—HENRY G. CONNOR, Judge, Wilson.
Western District—JAMES E. BOYD, Judge, Greensboro.

EASTERN DISTRICT

Terms.—District terms are held at the time and place, as follows:

Raleigh, fourth Monday after the fourth Monday in April and October, LEO D. HEARTT, Clerk.

Elizabeth City, second Monday in April and October, HARRY T. GREENLEAF, JR., Deputy Clerk, Elizabeth City.

Washington, third Monday in April and October. ARTHUR MAYO, Deputy Clerk, Washington.

New Bern, fourth Monday in April and October. WALTER DUFFY, Deputy Clerk, New Bern.

Wilmington, second Monday after the fourth Monday in April and October. SAMUEL P. COLLIER, Deputy Clerk, Wilmington.

Terms of court for Laurinburg and Wilson are now created, but not definitely fixed.

OFFICERS

J. O. CARR, United States District Attorney, Wilmington.

E. M. GREENE, Assistant United States District Attorney, New Bern.

W. T. DORTCH, United States Marshal, Raleigh.

WESTERN DISTRICT

Terms.—District terms are held at the time and place, as follows:

Greensboro, first Monday in June and December. J. M. MILLIKEN, Clerk, Greensboro.

Statesville, third Monday in April and October.

Asheville, first Monday in May and November. W. S. HYAMS, Deputy Clerk, Asheville.

Charlotte, first Monday in April and October.

Salisbury, fourth Monday in April and October.

Wilkesboro, fourth Monday in May and November.

OFFICERS

WILLIAM C. HAMMER, United States District Attorney, Asheboro.

CLYDE R. HOEY, Assistant United States District Attorney, Charlotte.

CHARLES A. WEBB, United States Marshal, Asheville.

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NOTE

In *Bray v. Baxter*, p. 6, the appeal should have been stated from *Bond, J.*, instead of *Whedbee, J.*, and from the January Term, 1916, instead of the March Term, 1915, of Currituck Superior Court.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1915

J. H. CLARK v. HENRY WHITEHURST.

(Filed 15 September, 1915.)

1. Appeal and Error—Questions Reviewable—Nonsuit—Evidence.

On appeal from a nonsuit the evidence must be taken as true.

2. Trover and Conversion—Acts Constituting—Liability.

An occasional employee, who took the employer's mule at night and drove it off without the knowledge or consent of the employer, was guilty of a tortious conversion, and an act indictable under Revisal 1905, sec. 3509; and where the mule died in his possession he was liable for its value, at least in the absence of any evidence in support of his claim that the death was accidental.

APPEAL by plaintiff from *Justice, J.*, at February Term, 1915, of BEAUFORT.

From a judgment of nonsuit, plaintiff appeals.

Ward & Grimes for plaintiff.

No counsel contra.

CLARK, C. J. The complaint alleges that the defendant wrongfully took from the stables of the plaintiff a bay mule, the property of the plaintiff, without his knowledge or consent, and drove him a distance unknown to the plaintiff, and so cruelly mistreated and abused said mule

that he died, and this action is to recover the sum of $200, alleged to be the value of the mule.

At the trial the evidence for the plaintiff was that the defend-
(2) ant, who was in the employment of the plaintiff as an occasional laborer, took the mule in question from the plaintiff's stables at night, and drove her off without his knowledge or consent, and that while in his possession the mule died; that the mule was worth $200; and he asks damages in that amount. There was evidence that the defendant was cruel to teams, but no direct evidence that the death of the mule had been caused by overdriving or bad treatment, and doubtless on that ground the court directed a nonsuit. In this there was error.

In *Bethea v. McLennon,* 23 N. C., 531, it is said: "There is a marked distinction between the action of detinue and that of trover, though, in many cases, it is at the option of the plaintiff to bring which he will. The former asserts a continuing property in the plaintiff, and alleges the wrong to consist wholly in the withholding the possession of his goods from him by his bailee; while the latter affirms that, although they were once the proper goods of the plaintiff, they have been made the goods of the defendant, and complains of the injury caused by this conversion. If, after being thus converted, the goods perish by unavoidable accident, the loss falls upon the defendant, who has made them his; and this misfortune shall not exonerate him from answering for the prior wrongful conversion."

The defendant in this case was not a bailee, and this was a tortious conversion under circumstances which made the defendant indictable, if the evidence is true; and it must be taken as true upon a nonsuit. Revisal, sec. 3509; *S. v. Darden,* 117 N. C., 697. Besides, though the defendant so averred in his answer, he has offered no evidence that the death of the mule was caused by accident, which at most was a matter of defense and in his knowledge. The defendant, having taken the mule wrongfully and not having returned him, is liable for his value. In *Skipper v. Hargrove,* 1 N. C., 27, it was held that where one had wrongfully taken a slave, who died pending the action to recover her, he was liable for her value. It is true that this case was criticised in *Bethea v. McLennon, supra,* but solely upon the ground that the action was brought in detinue, and not in trover, as in the present case. These refinements as to the distinction of the forms of action have now long since disappeared. But if they had not, the present is an action not for the specific property as in detinue, but for damages for the conversion and for the failure to return.

In *Taylor v. Welsh,* 138 Ill. App., 190 it was held that even in an action to recover the animal, if it proved to be in a dying condition when returned, the defendant was liable for the loss. In Sedgwick Damages,

sec. 536a, it is said that in replevin, if the loss to the property by death or otherwise occurs through the default of the defendant, "he is of course responsible. There seems no reason why the same rule should not apply to the loss of other property by inevitable accident; it (3) has been held in such case that the possessor must answer for its value, though the loss happened without his fault," citing *Jennings v. Sparkman,* 48 Mo. App., 246; *Suppiger v. Gruaz,* 137 Ill., 216, 27 N. E., 22; *Lumber Co. v. Blanks,* 133 Fed., 479, 66 C. C. A., 353, 69 L. R. A., 283.

The defendant was in possession of the animal wrongfully, even criminally, if this evidence is to be believed. The animal died while in his possession. He has failed to restore it to the owner in good condition, or show any excuse, and is liable for its value. This case differs entirely from *Sawyer v. Wilkinson,* 166 N. C., 497, where a mule was hired to the defendant, to be returned in good condition, and the mule was burned to death when a fire destroyed the defendant's stables without any negligence on his part. In that case it was held that the bailee, being in lawful possession of the mule, was responsible only for ordinary care in its preservation and protection, and was not responsible for its destruction and consequent failure to return it, in the absence of any negligence on his part. Though this decision is in accordance with the weight of authority, there are many cases which hold that even where the party holds under a contract of bailment, if there is a special contract to return the horse in good condition, and the horse dies in the bailee's possession, though without fault on his part, he is liable for its value as insurer. *Grady v. Schweinler,* 16 N. D., 452, 125 Am. St., 676, 15 Anno. Cases, 161, and cases there cited.

In *Doolittle v. Shaw,* 92 Iowa, 348, 26 L. R. A., 370, 54 Am. St., 562, it is held that even in a contract of bailment, if the bailee acts in such way, in violation of the terms of the contract, as to indicate an appropriation of the property temporarily, or permanently, to his own use, or exercises acts of ownership over it inconsistent with the owner's rights, he is liable for its value if it dies or is injured. *Scott v. Elliott,* 63 N. C., 215, is largely taken up with a discussion of the distinction between detinue, replevin, and trover, matters which have happily ceased to be of any interest; but it holds, which is relevant to this case, that where the action is brought for damages for wrongful conversion the measure of damages is the value of the property at the time of the taking.

The judgment of nonsuit is

Reversed.

Cited: Collins v. Casualty Co., 172 N.C. 546 (1c); *Sams v. Cochran*, 188 N. C., 735 (2c); *Whitford v. Lane*, 190 N. C., 349 (2d); *Lacy v. Indemnity Co.*, 193 N.C. 182 (2c).

(4)

MARY A. STALLINGS ET AL. v. RICHARD HURDLE.

(Filed 15 September, 1915.)

1. Evidence—Hearsay—Declarations.

Declarations made by a person on a survey, in which he was representing a third person and acting for him in a controversy, not between plaintiff and defendant, or their ancestors in title, but between defendant and the third person, were incompetent, where they were in the interest of the third person.

2. Adverse Possession—Evidence—Sufficiency.

Evidence *held* to sustain a finding that plaintiffs had been in the adverse possession of a strip of land for the statutory period.

3. Appeal and Error—Questions Reviewable—Questions Not Raised in Trial Court.

It is too late on appeal to raise a question by exception to the charge, entered after trial, which if made at the time could have been cured by proof, which was not offered owing to an admission of appellant. An exception to a charge, that the court erred in charging that twenty years adverse possession was sufficient, raised for the first time on appeal, is equivalent to an exception after trial that the judge did not charge that the evidence was not sufficient to go to the jury, and cannot be entertained.

APPEAL by defendant from *Ferguson, J.*, at April Term, 1914, of PERQUIMANS.

From a judgment for plaintiffs, defendant appeals.

Ward & Grimes and Charles Whedbee for plaintiffs.

Ward & Thompson and P. W. McMullan for defendant.

CLARK, C. J. This action was brought to determine the boundary line between plaintiffs and defendant, and the complaint alleged that in an action determined in 1892, in which this defendant was plaintiff and the ancestor in title of the plaintiffs was the then defendant, there was an award duly entered of record in accordance with law, and a plat attached thereto, and that thereunder the land now claimed by the plaintiffs was awarded their ancestor, the then defendant, and such award is pleaded in this action as an estoppel against this defendant. The de-

fendant admits the said award, but denies that the line then adjudicated is as claimed in the complaint, and further pleads that since the entering of said award, and for more than twenty years prior to the beginning of this action, the defendant had been in possession of the land in controversy openly, notoriously, and adversely.

At the beginning of the trial the following admission was (5) entered on the record: "Admitted by both parties that the plaintiffs owned east of the black line on the map and the defendant owned west of the red line."

In the charge the court stated (to which there is no exception): "It is conceded upon the part of the plaintiffs that the defendant owns the land west of the true line lying between the respective tracts, and it is conceded upon the part of the defendant that the plaintiffs own the land east of the true line between them."

The controversy was, therefore, not one of title, but simply a question of boundary, and it is over 2½ acres of land, on which the plaintiffs allege that the defendant has trespassed by cutting and removing a log. The jury found the boundary to be as claimed by the plaintiffs, and assessed the damages at 5 cents.

The assignments of error may be grouped into three:

1. The defendant excepted to the refusal of the court to allow the defendant to testify as to the statement made by one Elsbury Riddick in regard to the location of the line.

The statement was made by Riddick during a survey in which he was representing one Eason, and acting for him in a controversy not between the defendant and present plaintiffs, or their ancestor in title, but between the defendant in this action and said Eason. The statement sought to be brought out would have extended the boundaries of Eason, whom Riddick was then representing, and was a declaration in the interest of the party he was representing. It was, therefore, incompetent. The law as to the admission of declarations in such cases is so clearly stated, with citation of authorities, by *Mr. Justice Allen* in *Sullivan v. Blount,* 165 N. C., 7, that it is not necessary to discuss the proposition.

2. The assignments of error 3 to 11, inclusive, relate to the question whether there was any evidence that the plaintiffs had shown twenty years possession of the strip of land claimed by them outside of the fence; the black line approximately representing the fence around the cleared land of the plaintiffs. Aside from the finding of the arbitrators in 1892, and the Babb plat, there was evidence of a line of marked trees through the woods, and that the plaintiffs and their father had used the piece of land between the fence and the Babb line continuously and for such purposes as it was susceptible of; that they had hogpens on it;

that they cut wood on it every year; that all their stovewood was cut therefrom, and that the defendant had recognized the line and had sold timber up to it.

The doctrine as to what evidence is sufficient to show possession is fully stated by *Mr. Justice Walker* in *Locklear v. Savage,* 159 N. C., 236, and in the authorities there collected.

(6) 3. The third ground urged as error is that the court charged the jury that twenty years adverse possession on the part of the plaintiffs was sufficient, and that he should have charged, instead, that thirty years possession was necessary in order to show title out of the State.

The defendant at the beginning of the trial admitted that the plaintiffs owned the land on the east side of the true line, and the plaintiffs admitted that the defendant owned the land on the west side of the true line, and the whole case was tried upon the theory of determining the boundary, and not the question of title. It is too late on appeal to raise a question by exception to the charge, entered after the trial, which if made at the time could have been cured, doubtless, by proof which was not offered owing to the admission of the defendant. Such exception to the charge after trial is equivalent to an exception after the trial that the judge did not charge that the evidence was not sufficient to go to the jury and cannot be entertained. *S. v. Houston,* 155 N. C., 433, and cases cited.

No error.

Cited: Alexander v. Cedar Works, 177 N.C. 146 (2c).

P. N. BRAY v. T. W. BAXTER.

(Filed 15 September, 1915.)

1. Elections—Ballots—Marking—Statute.

Under Revisal 1905, sec. 4347, providing that when the election shall be finished the boxes shall be opened and the ballots counted, reading aloud the names appearing on each ticket, and if there shall be two or more tickets rolled together, or if any ticket contains the name of more persons than the elector may vote for, or has a device upon it, such tickets shall not be included in counting the ballots, but shall be void, a ballot for one claiming the office of register of deeds, thrown out because containing two unmarked names, instead of one, for the office of recorder of the county, was improperly rejected as a vote for register, the elector's choice for such office being properly indicated, as the statute does not contemplate throwing out the whole ballot for voting one ticket for too

many candidates, its language distinguishing between the ballot and the ticket, of several of which (each office voted for being a separate ticket on the same ballot) the ballot is made up.

2. Elections—Ballots—Marking—Statute.

A ballot the only defect of which was that it contained unmarked names of four persons for the office of county commissioner, while only three commissioners were to be elected, was likewise improperly rejected.

3. Elections—Voter's Mistake as to Precinct.

Where a voter lived in the township in which he voted, but was registered and voted in a different precinct in such township than where he lived, being otherwise a qualified elector, and having voted where he did in good faith, having done so for a long number of years, under the belief that it was the proper precinct, his vote was valid.

4. Elections—Vote by Unregistered Voters—Validity.

Where the registration book for 1914, the year of an election, contained only part of the names of all who voted in a certain precinct, the election having there been regularly and fairly held, all who voted having been actually qualified as voters, and all their names being on the registration books of 1903 to 1910 or that for 1914, the old registration books for the precinct having either been lost or misplaced, the vote of such precinct was valid.

5. Elections—Torn Ballot—Validity.

Where a voter had simply torn off the top part of a ballot, declining to vote for the first names, but cast the balance of the ballot intact, the vote was valid for the candidates indicated.

6. Elections—Canvass—Tie Vote—Statute.

Under Revisal 1905, sec. 4355, providing that if two or more county candidates having the greatest number of votes shall have an equal number, the county board of elections shall determine which shall be elected, where there was a tie vote for register of deeds, and the county board of elections decided in favor of one candidate, not as their choice under the statute, but on a canvass of ballots erroneously giving such candidate a majority, it was no valid election; the board not having exercised its statutory power.

ALLEN, J., dissenting.

APPEAL by plaintiff from *Whedbee, J.*, at March Term, 1915, (7) of CURRITUCK.

Quo warranto by the State, on the relation of P. N. Bray, against T. W. Baxter. Judgment for respondent, and the relator appeals.

Aydlett & Simpson and Ward & Thompson for plaintiff.
Ehringhaus & Small for defendant.

CLARK, C. J. This is a *quo warranto* for the office of register of deeds of Currituck. At the November election of 1914 the respondent was awarded the certificate of election, and the relator began this action to assert his title to the office. The court referred the matter, and the referee filed his report confirming the title of the respondent, which upon exceptions was affirmed by the judge.

The referee found that the respondent had a plurality of three votes. The referee sustained the action of the canvassing board in throwing out three ballots cast for the relator because there were more names on each of said ballots than the elector had a right to vote for. One of the ballots thus thrown out contained unmarked the names of two persons for the office of recorder of said county, and the other two of said ballots contained unmarked the names of four persons for the office of county commissioner, while there were only three commissioners to be elected.

(8) But none of these ballots had the name of more than one candidate for register of deeds unmarked. The whole of these three ballots were thrown out and not counted. This was error. The three ballots should have been counted for the relator. The referee based his conclusion, which was affirmed by the judge, upon Revisal, sec. 4347, and the decisions in *Mitchell v. Alley,* 126 N. C., 84, and *Deloatch v. Rogers,* 86 N. C., 357. But these authorities have no bearing upon this case.

In *Mitchell v. Alley* the tickets held to be illegal were cast for justice of the peace (no other officer being voted for), and contained the names of four persons for that office, when only three were to be voted for. These were properly thrown out, because it was impossible to determine which three of the four candidates were voted for.

In *Deloatch v. Rogers, supra,* the question before the Court was whether certain tickets were void which contained the name of an office and a candidate therefor which was not to be voted for at that election. The court held the ticket void upon the ground that the insertion of the superfluous office and name was a "device" which served to distinguish the ticket from the other tickets voted. We question the correctness of that decision, unless it was found affirmatively as a fact that the superfluous name and office were, in fact, a device. But, if correct, it has no application to this case. Here there were no party nominations. All persons desiring to run for the various offices had their names placed on one ticket, and the voters were supposed to scratch out the names of the persons for whom they did not desire to vote. The voters who cast the three tickets in question voted for only one person for register of deeds, the office here in contest, and the fact that these three voters voted for two recorders, when they should have voted for but one, or for four commissioners out of the nine candidates

named on the ticket, when they should have voted for only three, ought not to invalidate their votes for register of deeds, and thereby deprive them of their choice for that office for whom they intended to vote and legally voted. The ticket containing candidates for several offices was in reality equivalent to putting into the box, though on one slip, ballots for each of the several offices. An ambiguity, therefore, by voting for too many names for any of the other offices does not invalidate a legal vote for this office.

Revisal, sec. 4347, does not contemplate throwing out the whole ballot. The language of the statute distinguishes between the word "ballot" and the word "ticket." It is the latter that is not to be counted. The ballot is made up of several tickets; each office voted for being a separate ticket on the same ballot.

The relator also excepts because the vote of H. D. Doxey was counted for the respondent. The facts found were that H. D. Doxey lived in the township in which he voted, but was registered and voted in a different precinct in that township; that he was (9) otherwise a qualified elector, and in good faith voted where he did; that in the belief that it was the proper precinct, he had voted at that precinct for a long number of years. Another voter under exactly the same state of facts voted at that box for the relator. Both of these votes were allowed by the referee and approved by the court. To disallow one of these votes would require the disallowance of the other, leaving the result the same. However, they were both properly counted. In *Quinn v. Lattimore,* 120 N. C., 431, it was held that "where qualified voters living near the dividing line of two townships, which line was not definitely located, in good faith registered and voted in the township in which they did not actually reside," but the election was for a county office, the votes should be counted. In this case the township had been divided into precincts, and the voters *bona fide* voted in the township, but in the wrong precinct, for a county officer, and had been so voting at that precinct under a genuine mistake as to the dividing line of the precinct for many years. The vote of Doxey was properly allowed by the referee and court.

The relator also excepted because of the allowance of the vote at North Banks Precinct, which had been received by the county canvassers and held valid by the referee and the judge. It was found as a fact that the election at that precinct was regularly and fairly held; that all who voted at that precinct were qualified as voters, and the names were all on the registration books of 1903 to 1910 or on the 1914 book, and that the old registration book was either lost or misplaced. There were but 34 votes at the precinct, and the registrar, who had been registrar at that precinct for thirty years, except in

1910, testified that he was personally acquainted with all the voters, and that all who voted had been registered and were qualified voters. The "challenge to the array" at North Banks Precinct was properly disallowed.

The only other exception that needs to be noted is to two ballots cast for the respondent which had been thrown out by the canvassers, and not counted for him by the judges of election, because they were torn in two, but which the referee, affirmed by the judge, had reinstated and counted for him. The evidence showed that the voters had simply torn off the top part of these ballots, declining to vote for the first names on the same, but had cast the balance of the ballot intact. They were properly counted. *S. v. Spires,* 152 N. C., 4.

As the only error found on this appeal is the disallowance of three ballots cast for the relator, this leaves the result a tie. If this had been a town election, the result should be "determined by lot" (Revisal, sec. 2966), and we should have to remand the case for that
(10) purpose. This being a county election, it was the duty of the county board of elections to determine which candidate should be elected. Revisal, sec. 4355. The board did decide in favor of the respondent, not as their choice under the statute, but on a canvass of the ballots which erroneously gave the respondent a majority.

We must, therefore, declare that the vote was a tie, and remand the case to the county board of elections, who shall "determine which shall be elected," and not which had been elected, as they have done on an erroneous count of the ballots cast. Each party will pay his own costs on this appeal.

Remanded.

ALLEN, J., dissenting.

E. D. J. DOYLE v. CHARLES W. BUSH.

(Filed 15 September, 1915.)

1. Execution—Execution Against Person.

An execution against the person can issue only when the facts alleged entitling the plaintiff thereto have been passed upon and enters into the judgment.

2. Tenancy in Common—Conversion of Personalty.

A tenant in common of a chattel cannot maintain an action of trover against his cotenant merely on the ground that his demand for the possession of the common property has been refused by the latter, unless he can

show the cotenant had subsequently consumed it or placed it beyond recovery by legal process.

3. Tenancy in Common—Conversion of Personalty.

Where a tenant in common in possession of chattels withholds them from his cotenant, or takes them from him, exercising dominion thereover, either in direct denial of or inconsistent with the latter's rights, trover will lie for the conversion.

4. Execution—Execution Against Person—Statutes.

Under Revisal 1905, sec. 625, providing that an execution may issue against the person if the action be one in which the defendant might have been arrested, and section 727, subsec. 1, providing that a defendant may be arrested when the action is for wrongfully taking, detaining, or converting personal property, where defendant cotenant of a race horse converted it by selling the horse while in his (defendant's) possession, such defendant was subject to execution against the person.

5. Tenancy in Common—Conversion by Cotenant—Defense—Ratification of Sale of Chattel.

Where plaintiff, cotenant of a horse, ratified an unauthorized sale thereof by defendant cotenant, such ratification did not preclude plaintiff from recovery for the wrongful conversion of the proceeds of the sale.

APPEAL by plaintiff from *Justice, J.*, at January Term, 1915, (11) of PASQUOTANK.

Plaintiff appeals.

This is an action to recover $600 for the wrongful conversion of a horse or for the wrongful conversion of the proceeds of the sale of the horse.

Evidence was introduced by plaintiff tending to show that plaintiff and defendant bought a race horse together; that as a part of their contract with each other the plaintiff paid $100 on the purchase price of the horse, and the balance of the purchase money, to wit, $300, was to be paid out of the earnings of the horse in racing; that the horse was raced by the defendant, and enough received to pay the balance of the purchase money; that the horse was in possession of the defendant; that afterwards the defendant sold the horse for $1,200, without consulting plaintiff, and when plaintiff afterwards heard of the sale and wrote defendant concerning it, defendant answered that he had received from the sale $400. Defendant refused to pay plaintiff any part of the money for which the horse was sold, claiming that they were not tenants in common in the horse, and converted the same to his own use.

The plaintiff tendered the following issue: "Has the defendant wrongfully and fraudently converted to his own use the proceeds arising from the sale of the horse Farmer Gentry?"

The court refused to submit this issue, and plaintiff excepted. The jury returned the following verdict:

1. Were the plaintiff Doyle and the defendant Bush tenants in common in equal interest of the horse Farmer Gentry? Answer: "Yes."

2. For what sum did the defendant sell the horse Farmer Gentry? Answer: "$1,200."

3. In what sum, if any, is the defendant indebted to the plaintiff? Answer: "$600, with no interest."

4. What sum, if anything, is the defendant entitled to recover against plaintiff by reason of his counterclaim? Answer: "Nothing."

Judgment was entered in accordance with the verdict, and the plaintiff appealed.

Aydlett & Simpson and W. A. Worth for plaintiff.

Ward & Thompson for defendant.

ALLEN, J. It was decided in *Ledford v. Emerson,* 143 N. C., 527, that an execution against the person cannot issue simply because of allegations in the complaint, and that the facts alleged entitling the plaintiff to such an execution must be passed upon and must
(12) enter into the judgment. It is therefore apparent that the issue tendered by the plaintiff is material, and that the refusal to submit it is a denial of a substantial right if the pleadings raised the issue, and an examination of the complaint discloses that a fraudulent and wrongful conversion of the horse referred to in the evidence and of the proceeds of the sale of the horse is alleged. Two questions are, then, involved in the appeal:

1. Can one tenant in common maintain an action against his cotenant for a wrongful conversion of the property belonging to them?

2. If so, is a cause of action for the wrongful conversion of personal property one in which an execution against the person may issue?

The first question is determined by the case of *Waller v. Bowling,* 108 N. C., 294, in which the Court says: "A tenant in common of a chattel cannot maintain an action of or in the nature of trover against his cotenant upon the ground merely that his demand for possession of the common property has been refused by the latter, unless he can show that the cotenant had subsequently consumed it or placed it beyond recovery by means of legal process. *Newby v. Harrell,* 99 N. C., 149; *Pitt v. Petway,* 34 N. C., 69; *Lucas v. Wasson,* 14 N. C., 398; Cooley on Torts, 455; *Ripley v. Davis,* 15 Mich., 75, 90 Am. Dec., 262. But where the tenant in possession of personal chattels withholds the common property from his cotenant, or wrests it from him and exer-

cises a dominion over it, either in direct denial of or inconsistent with the rights of the latter, an action will lie for conversion. *Shearin v. Riggsbee,* 97 N. C., 221; 2 Greenleaf, par. 642; *University v. Bank,* 96 N. C., 284; Cooley on Torts, *supra;* 2 Greenleaf Ev., 636a; *Grove v. Wise,* 39 Mich., 161."

This case is also reported in 12 L. R. A., 265, and in the note many authorities are collected which show that this is the general rule. The same principle was also applied in the later case of *Ledford v. Emerson,* 140 N. C., 288, upon facts similar in many respects to those in the record before us.

The other question presents no difficulty, because it is provided by section 625 of the Revisal that an execution may issue against the person "if the action be one in which the defendant might have been arrested," and by Revisal, sec. 727, subsec. 1, that the defendant may be arrested when the action is "for injuring, or for wrongfully taking, detaining, or converting property, real or personal."

If it be said that the plaintiff cannot recover for a wrongful conversion of the horse, upon the ground that he has ratified the sale, this does not preclude a recovery for the wrongful conversion of the proceeds of the sale, which the defendant received for himself and the plaintiff. *Organ Co. v. Snyder,* 147 N. C., 271.

We are, therefore, of opinion that it was error to refuse to (13) submit the issue tendered by the plaintiff.

The judgment will be set aside, with directions to submit an issue or issues involving the question of fraudulent and wrongful conversion in addition to the issues already determined by the jury.

Partial new trial.

Cited: Allen v. McMillan, 191 N.C. 520 (2c); *Enloe v. Ragle,* 195 N.C. 40 (3c); *Lovegrove v. Josey,* 202 N.C. 836 (3d); *Barham v. Perry,* 205 N.C. 430 (3c); *Fertilizer Co. v. Hardee,* 211 N.C. 656 (4c).

GEORGE SAWYER v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 15 September, 1915.)

1. Carriers—Carriage of Passengers—Contract of Carriage—Performance.

Where a railroad sold transportation between two points, it being necessary for the passenger to change, for the performance of the road's contract, the conductor, after taking up the passenger's ticket, should return it to him before reaching the changing point, or give him something in place thereof that the new conductor would accept for passage to destination.

2. Carriers—Carriage of Passengers—Action for Ejection—Contributory Negligence.

Where passenger bought a ticket to a point to reach which it was necessary to change, if the company, in the passenger's action for ejection from the train because he had no ticket acceptable on the train to which he changed, claimed that the passenger was guilty of contributory negligence in not having demanded the return of his ticket from the conductor on the first train, such charge should have been pleaded as contributory negligence, and issue tendered.

3. Carriers—Carriage of Passengers—Ejection—Negligence of Conductor.

Where plaintiff purchased through transportation to a destination to reach which it was necessary to change, and the conductor on the first train neglected to return passenger's ticket, he having no money, and, when the conductor of the second train asked for his fare, vainly attempted to borrow from men who had been on the first train with him, it was negligence on the conductor's part not to have satisfied himself by inquiring of such men whether plaintiff had been on the train with them prior to reaching the changing point, before ejecting plaintiff.

4. Carriers—Carriage of Passengers—Wrongful Ejection—Payment of Fare—Duty of Passenger.

Under Revisal 1905, sec. 2611, providing that every railroad corporation shall transport passengers on due payment of the fare legally authorized for the trip, where a passenger is about to be wrongfully ejected from a train, having paid his fare thereon, but being unable to produce his ticket, it is not incumbent on him, by paying money which the conductor has no right to exact, to avoid ejection from the train, as he is not required to buy again his right to remain on the train to his destination.

5. Carriers—Carriage of Passengers—Refusal of Double Fare—Rights of Parties.

Where a railroad passenger cannot produce a ticket on the conductor's demand, the road and the passenger can each stand upon their rights. The road can eject the passenger, subject to liability if he has paid his fare, and the passenger to suffer ejection, subject to his right to recover if it was wrongful.

6. Carriers—Carriage of Passengers—Wrongful Ejection—Right of Action—Statute.

Under Revisal 1905, sec. 2611, providing that every railroad shall start and run their cars for the transportation of passengers, and shall take, transport, and discharge such passengers at, from, and to usual stopping places on due payment of the fare legally authorized, and shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises, plaintiff passenger, ejected from train of defendant road for failure to pay again fare which he had paid once upon purchasing ticket, had a right of action.

7. Carriers—Wrongful Ejection—Damages.

Where a railroad wrongfully ejected a passenger at night in a desolate country, without money or friends, forcing him to walk 30 miles to his

destination, he was entitled to recover for the humiliation and wrong done him by his ejection and the damage caused by his enforced walk without food.

APPEAL by defendant from *Justice, J.,* at January Term, (14) 1915, of PASQUOTANK.

Judgment for plaintiff, and defendant appeals.

I. M. Meekins for plaintiff.

J. Kenyon Wilson for defendant.

CLARK, C. J. This is an action for damages for ejection from defendant's train. The plaintiff was a passenger thereon, 24 March, 1913, having purchased a ticket from Norfolk, Va., to New Bern, N. C. At that time the defendant required passengers from Norfolk to New Bern to change at Chocowinity, where another train of defendant took passengers to New Bern; the original train from Norfolk going on to Raleigh.

The facts as found by the jury are that on the night in question, soon after the train pulled out of the station at Norfolk, the defendant's conductor took up plaintiff's ticket, but failed to return the same to him, giving him the usual conductor's check. At Chocowinity the conductor showed him the train he should take for New Bern, but did not return his ticket. The plaintiff was an inexperienced traveler, having traveled only between Pantego and Norfolk. He knew nothing about the defendant's custom as to passengers transferring at Chocowinity, nor that the conductor's check would not be good (15) beyond that point. After leaving Chocowinity the new conductor demanded his ticket and refused to take the check. The defendant explained what had happened, and endeavored to borrow the necessary fare from two men near by, who had been on the train with him before he reached Chocowinity, but was unable to do so. Thereupon the conductor put him off, between 2 and 3 o'clock at night on 25 March, 1913, at Frederick, N. C. There were no lights in the station at Frederick, the season was blustering and inclement, the plaintiff did not have any money to secure lodging or food and no means to protect himself from attack, and was a stranger at that place. He then walked to New Bern, a distance of 30 miles, reaching there at 5 p. m. The walk produced great blisters and footsores on plaintiff's feet, and caused his ankles and feet to swell badly, and for some time he was laid up and unable to work. The court properly told the jury that if they found that the conductor returned the ticket to the plaintiff, to answer the issues "No."

The conductor having taken up the plaintiff's ticket, it was incumbent upon him to return the ticket to the plaintiff at or before reach-

ing Chocowinity, or have given him something in lieu thereof that the new conductor would accept for the passage to New Bern, in accordance with the contract expressed by the ticket. The defendant's counsel suggests that the plaintiff should have asked for the return of the ticket, and that it was a "frame up" on his part not to do so. But there is no evidence in the record that the plaintiff knew that the conductor had erred in not returning his ticket, or that his check would not be good beyond Chocowinity. If there had been grounds for such charge, it should have been pleaded as contributory negligence, and an issue tendered in that view.

The defendant further insists that the plaintiff should have paid his fare when called upon. He showed that he had no money, and that he tried in vain to borrow from two other men who had been on the train with him before arriving at Chocowinity. It was negligence on the part of the conductor not to have satisfied himself, by inquiring of those men then and there whether the plaintiff had been on the train with them before reaching Chocowinity, and thus have satisfied himself of the correctness of the plaintiff's statement.

Besides, when a passenger is about to be wrongfully ejected from the train, it is not incumbent upon him to prevent the wrong by paying money which the carrier's servant has no right to exact. He is not required to submit to imposition, or to buy again his right to remain on the train to his destination. Revisal, sec. 2611. If this were not so, carriers would be above the law, because there could never be punishment exacted for a wrongful violation of the contract of carriage.

(16) If it be said that the passenger could pay the money and recover it back, this would not right the wrong, because he could not afford to pay counsel's fees and bear the expenses of litigation for so small a sum. It would be fairer to say that, in cases of doubt, the carrier should carry the passenger to his destination and sue him to recover the fare which he should have paid. But neither is required to do this. Each party can stand upon his rights, if he so chooses. This has been often held. *Harvey v. R. R.*, 153 N. C., 575, and cases there cited. The statute (Rev., sec. 2611) confers the right of action.

"Where one has been injured by the wrongful conduct of another, he must do what he can to avoid or lessen the effects of the wrong. But this principle does not apply till after the contract has been broken or the tort has been committed. It does not deprive the party of the right to insist on his legal rights." *Harvey v. R. R., supra.* It does not appear that after the plaintiff was ejected he failed to do anything he could in reason to lessen the damages. He was a stranger, at night, in a desolate country, without money or friends, and he set out to walk to his destination at New Bern. He was entitled to compensation for

the humiliation and wrong done him by the ejection and for the substantial damages sustained by his enforced walk, without food, to New Bern. The duties and liabilities of carriers in such cases have been stated fully, in accordance with the above views, in *Hutchinson v. R. R.*, 140 N. C., 124; *Williams v. R. R.*, 144 N. C., 503; *Mace v. R. R.*, 151 N. C., 404; *Harvey v. R. R.*, 153 N. C., 567; *Elliott v. R. R.*, 166 N. C., 481, and *Hallman v. R. R.*, 169 N. C., 130. The only case to the contrary (*Smith v. R. R.*, 130 N. C., 304) was expressly overruled in *Hutchinson v. R. R.*, 140 N. C., 127, and *Williams v. R. R.*, 144 N. C., 503.

No error.

Cited: McNairy v. R. R., 172 N.C. 510 (4c); *Creech v. R. R.*, 174 N.C. 63 (4c).

H. T. SHANNONHOUSE ET AL. v. T. S. WHITE ET AL.

(Filed 15 September, 1915.)

1. Trial—Issues—Submission.

The form of issues submitted is of little consequence, if they submit the questions involved, and under them evidence is introduced by both parties presenting their sides of the controversy.

2. Navigable Waters—Water Rights—Wharves.

Under Revisal 1905, sec. 1696, declaring that persons owning lands on any navigable water may, for the purpose of erecting wharves, make entries of the lands covered by water adjacent to their own, the low-water mark in a navigable stream in which the sea tides do not ebb and flow is the boundary of the adjacent land, though the height of the water fluctuated according to the winds.

APPEAL by defendants from *Justice, J.*, at January Term, (17) 1915, of PERQUIMANS.

Proceeding under the entry laws, whereby H. T. Shannonhouse and another protested against an entry by T. S. White and others. From the judgment White and others appeal.

This is a proceeding under the entry laws, tried upon these issues:

1. Is the enterer entitled to entry of any of the water front in question? Answer: "Yes."

2. If so, how many feet east of wooden stake in protestants' western line, as claimed by protestants? Answer: "Eight feet."

From the judgment rendered, defendants, enterers, appealed.

Ward & Thompson for plaintiffs.
Charles Whedbee and P. W. McMullan for defendants.

BROWN, J. The defendants T. S. White and others laid an entry for wharf purposes, as prescribed by section 1696, Revisal of 1905, for a certain piece or parcel of land covered by the waters of Perquimans River, claiming that said land was adjacent to the front of a certain shore land which they owned. The plaintiffs, protestants, duly filed protest.

T. C. Blanchard & Bro. originally owned a tract of land in the town of Hertford, extending from Grubb Street between parallel lines northwardly to the Perquimans River. In 1906 said T. C. Blanchard & Bro. conveyed to the Supply and Development Company, subject to certain easements immaterial to this controversy, "a certain piece of swamp land 50 feet wide, extending across said lot, being 15 feet north from the center of the railroad track and 35 feet south of the center of the railroad track."

This strip of land, 50 feet wide, descended by mesne conveyances to the defendants. The remainder of the property descended by mesne conveyances to the protestants in this cause.

The defendants contended that at ordinary high tide Perquimans River came within 15 feet of the center of the railroad track and south of the northern line of said 50-foot strip from the eastern extremity of said strip, clear across to the western extremity thereof, and that there was no land between the northern line of said strip and the margin of Perquimans River. The defendants further contend that at normal low tide the Perquimans River came within 15 feet of the center of the railroad track and south of the northern line of said 50-foot strip for a distance extending 33 feet eastwardly from a stake in what was originally the western line of the Blanchard lot, and for that distance of 33 feet there was no land between the northern line of said strip and the margin of Perquimans River.

(18) The plaintiffs contend that at normal low tide Perquimans River did not come within 15 feet of the center of the railroad track, or south of the northern line of said 50-foot strip, and that there was land between the northern line of said strip and the margin of Perquimans River across the whole front of said strip.

There was evidence to support the contentions of both parties, and also evidence which tended to show that at normal low tide Perquimans River came within 15 feet of the center of the railroad track and south of the northern line of said 50-foot strip for a distance extending 8 feet only eastwardly from the stake in what was originally the western line

of the Blanchard lot, and for that distance of 8 feet there was no land between the northern line of the 50-foot strip and Perquimans River.

Section 1696, Revisal, provides: "Persons owning lands on any navigable sound, river, creek, or arm of the sea, for the purpose of erecting wharves on the side of the deep waters thereof, next to their lands, may make entries of the lands covered by water, *adjacent to their own,* as far as the deep water of such sound, river, creek, or arm of the sea, and obtain title as in other cases. But persons making such entries shall be confined to straight lines, *including only the fronts of their own tracts,* and shall in no respect obstruct or impair navigation."

There are two assignments of error set out and discussed in the brief of defendants, viz.:

1. The refusal of the court to submit this issue: "What portion, if any, of plaintiff's land is bounded by Perquimans River at ordinary high tide?"

2. The court charged the jury, in effect, that claimants were entitled to lay entry upon the water front to so much of said water front only as abutted and bounded their lot at ordinary low tide.

The issues submitted by the court present the questions at issue, and under them evidence has been introduced by both parties, presenting fully both sides of the controversy. The form of issues is of little consequence, if the material facts at issue are clearly presented by them. *Paper Co. v. Chronicle,* 115 N. C., 147; *Simmons v. Allison,* 118 N. C., 778. It is admitted that the Blanchards owned to and along the river. Unless the portion of the land they conveyed out of their tract, and now owned by defendants, runs to and borders on the river, then under the statute the defendants have no right of entry. The finding of the jury gives to plaintiffs a strip of land between the defendants' land and the river, with the exception of 8 feet. The jury have found that 8 feet of defendants' land borders on the river.

The case seems to turn upon what is the edge or margin of the stream. Upon this his Honor charged:

"Now, I will say to you that ordinarily, in a section where there is no navigable water, the center of the stream is what you would go to when the stream is not navigable. Where there is navigable (19) water, and it is affected by the daily tide, the ebb and the flow of the tide twice in twenty-four hours, then, because everybody knows where the high tide comes, and it comes there twice a day, the law is that the margin of the river at high tide governs.

"Neither one of those conditions obtains in this case. But there is another condition, and another rule. In a case like this they have, it appears from this testimony, in the Perquimans River what is known as wind tides. There is no regularity about them. They don't rise and

fall daily, but a high wind from one direction will bring the water from the sound and from the mouth of the river, and back it up into the river, and make what they call a high wind tide.

"Now, it may be that you know more about that than I do. It is also true that the reverse of that proposition would be true naturally, and that a high wind in the opposite direction, or about the opposite direction, would blow the water the other way. They say that is so in this testimony. It would strike any reasonable man that that would be so. If the wind can blow the water in, an opposite wind can blow it out.

"Now, gentlemen, the court lays down this rule in a case like this: This is a navigable stream, admitted on all sides; it is navigable for sea-going vessels. A ship can get up in this river, and go from this river into the sea, as I understand it; a stream not affected by the daily tide, but affected by the wind tide. Now, isn't that about the condition that we have, according to the testimony?

"Then, the court lays down this rule to you, that what governs as the margin of the stream is what it is in low tide—naturally low tide; not a low tide brought about by some extraordinary condition of affairs, not a low tide that might come from a long blowing of the wind from the opposite direction, and blowing out the water, and making it an unusually low tide, but what is meant by a low tide is the normal low tide. That is to say, the tide that would exist if there was no condition to make it high or low—a long calm time, when there was no wind blowing from either way, and has not been; then what would be the low tide at this time is what is contemplated by the law as the low tide. You can conceive, gentlemen, and they say that that is so at this very time; the witnesses tell us that this is an extraordinary high tide, and that but few times in the knowledge of your oldest citizens has the tide been so high as it is now. The witnesses say that there have been times when the wind blew in an opposite direction, and when the tide was low, extraordinarily low, when very much of the water had been blown out of the river in the direction of the sound, and then that was an unusual condition of affairs.

"It would not do to say that that was simply low tide as contemplated by the law. The law does not contemplate the extraordinary
(20) condition of things in a case like this at all—the extreme high tide, nor the extreme low tide—but where there is no condition which tends to make a high tide or a low tide, and you find the river at what one of the witnesses has described as a standing tide, a standing low tide is what the law contemplates."

This charge appears to us to be a clear and correct presentation of the case, and could not well have been misunderstood by the jury. It is well known that in inland rivers as far from the inlets of the sea as the Per-

quimans River the effect of the ocean tides is not felt. His Honor made it plain that in using the terms "low tide" and "high tide" he referred to conditions of the river brought about by winds, freshets, or other extraordinary causes, and not to the ocean tides. The sum and substance of the charge is that the jury should find from the evidence where the margin of the river was when it was in a normal condition, and then to locate the low-water line, and not to locate it at the edge of the water when much of it was blown out.

The Pamlico River, at Washington, in this State, is a navigable stream, and at that point the force and effect of the ocean tide is not usually felt. In that respect it is similar to the Perquimans River. In *S. v. Eason,* 114 N. C., 792, the question presented was the location of a boundary of the town of Washington, which ran with the Pamlico River. The Court said: "It follows, therefore, that a grant to a riparian proprietor, running with a navigable stream, such as the Pamlico River at Washington, from one designated point on its banks to another above or below on the same bank, must be so located as to extend, not *ad filum aquæ,* but only to the low-water mark along the margin of the stream."

In *Wilson v. Forbes,* 13 N. C., 30, it is held that: "A stream 8 feet deep, 60 yards wide, and with an unobstructed navigation for sea vessels from its mouth to the ocean is a navigable stream, and *its edge at low-water mark is the boundary of the adjacent land.*"

This case is cited with approval in *Collins v. Benbury,* 25 N. C., 282; *Lewis v. Lumber Co.,* 113 N. C., 55.

The same rule seems to obtain in other jurisdictions. *Bullock v. Wilson,* 2 Port. (Ala.), 436; *Webb v. Demopolis,* 95 Ala., 116, 13 South., 289, 21 L. R. A., 62; *Williams v. Glover,* 66 Ala., 189; *Martin v. Evansville,* 32 Ind., 85; *Bainbridge v. Sherlock,* 29 Ind., 364, 95 Am. Dec., 644; *Hogan v. McMurty,* 5 T. B. Mon. (21 Ky.), 181; *Schurmeier v. R. R.,* 10 Minn., 82 (Gil. 59), 88 Am. Dec., 59; *Brisbine v. R. R.,* 23 Minn., 114; *Arnold v. Mundy,* 6 N. J. Law, 1, 10 Am. Dec., 356; *Palmer v. Farrell,* 129 Pa., 162, 18 Atl., 761, 15 Am. St. Rep., 708; *Stover v. Jack,* 60 Pa. 339, 100 Am. Dec., 566; *Martin v. Nance,* 3 Head (40 Tenn.), 649; *Com. v. Garner,* 3 Grat. (Va.), 655; *Barre v. Fleming,* 29 W. Va., 314, 1 S. E., 731; *Oil Co. v. Caldwell,* 35 W. (21) Va., 95, 13 S.E., 42, 29 Am. St. Rep., 793.

The judgment of the Superior Court is

Affirmed.

E. C. WHITE v. TOWN OF EDENTON.

(Filed 15 September, 1915.)

1. Adverse Possession—Burden of Proof.

In ejectment by one claiming by color of title and adverse possession, upon showing color of title, the burden of proof was still on plaintiff to show adverse possession, and not upon defendant to disprove it.

2. Highways—Use by Public—Permissive Character—Burden of Proof.

In ejectment to recover land claimed by defendant town as a public way, where there was evidence that people had been in the habit of using the street, the burden was on plaintiff to show that such user was permissive.

3. Adverse Possession—Burden of Proof.

In ejectment to recover land claimed by adverse possession, which is such possession of another's land as, when accompanied by certain circumstances, will vest title in the possessor, the burden is on plaintiff to show such acts and conduct on his part as tend to prove a continuous assertion of ownership for the requisite time.

APPEAL by defendant from *Whedbee, J.*, at March Term, 1915, of CHOWAN.

This is a civil action, tried upon these issues:

1. Is the plantiff the owner and entitled to the possession of that portion of the land described in the complaint which is embraced within the lines 9, 8, 10, 5, 4, 11, 12, 13, 1, to 9, on the map, or any part thereof, and, if so, what part? Answer: "Yes; the whole thereof."

2. If "yes" to the first issue, has defendant trespassed upon the same, as alleged? Answer: "Yes."

3. What damages, if any, is plaintiff entitled to recover of defendant? Answer: "$5."

From the judgment rendered, the defendant appealed.

W. S. Privott and Ward & Thompson for plaintiff.

Pruden & Pruden, E. G. Bond, and S. Brown Shepherd for defendant.

BROWN, J. This action was brought to determine the title to a certain strip of land in the town of Edenton called "Dock Alley." The only evidence of title which the plaintiff introduced was certain deeds, which are color of title, together with evidence of adverse possession. (22) The defendant claimed that this property has been used as a public street in the town for a great number of years, and that the public had acquired a right to use it.

His Honor charged the jury as follows: "The law also says that when a man introduces a deed that covers a particular piece of land, and he

is in possession of some part of it, the law extends that possession to the outer boundaries of the property. In this case it is admitted by the defendant that White has been in possession of a portion of this property for more than forty years, and, therefore, nothing else appearing, the law would extend that possession to the outer boundaries of the deed; but they say that by reason of user they are the owners of these pieces of land included in the streets. I charge you, gentlemen, if you believe the evidence as to the beginning and location, White's deed covers the land in controversy, and the burden then shifts to the defendant to satisfy you that they are the owners of the streets."

The court further charged that the "burden is upon the town to show, either by dedication, or grant, or adverse possession for twenty years, it obtained title to the street. Now, if they have failed in that, it will be your duty to answer the issue 'Yes.'"

The defendant excepted to this part of the charge. We think the exception is well taken. The complaint alleges that the plaintiff is the owner in fee simple of the land in controversy and described in Exhibit A. The only title the plaintiff has undertaken to show is color of title and adverse possession. *Mobley v. Griffin*, 104 N. C., 115. In order for the plaintiff to recover against the defendant upon the pleadings in this case, the burden of proof is upon the plaintiff to show title to the land in controversy. It is as much incumbent upon him to show adverse possession as it is to show color of title, and that burden does not shift. It is true, there is evidence that the people have been in the habit of using this street, and, if so, the burden would be upon the plaintiff to show that such user was permissive, and not adverse to him.

In order to constitute adverse possession, the burden is on the plaintiff to show such acts and conduct upon his part as would tend to prove a continuous assertion to ownership and claim upon his part for the requisite period of time. Adverse possession, generally speaking, is such possession of another's land as, when accompanied by certain acts and circumstances, will vest title in the possessor, and the burden of proof is upon the one who claims adverse possession to prove it.

New trial.

Cited: White v. Edenton, 173 N.C. 32, S. c.

(23)

C. DANIEL v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 15 September, 1915.)

1. Parent and Child—Earnings of Child—Actions.

In an action by a father to recover from his minor son's employer wages earned, an instruction to find a certain sum in favor of plaintiff if the jury believe the evidence was not error, where it did not appear that the father's authority over the son had been destroyed or renounced.

2. Infants—Emancipation—What Constitutes.

That a child is allowed to live away from his parents and receive his wages for work, and pays his expenses therefrom, does not constitute an emancipation, in the absence of a manifest intention of the parent to release his authority and control.

3. Parent and Child—Earnings of Child—Contract with Employer.

Where a father allows his minor son to work for a third party under an agreement whereby the son's wages are to be paid to him, payment to the son will be protected until the agreement is rescinded, whereupon the father is entitled to the wages.

APPEAL by defendant from *Carter, J.*, at April Term, 1915, of NASH.

The case was tried upon this issue:

1. Is the defendant indebted to plaintiff; and, if so, in what amount? Answer: "$23.43, with interest from 18 January, 1913."

From the judgment rendered, the defendant appealed.

M. V. Barnhill for plaintiff.

F. S. Spruill for defendant.

BROWN, J. This is an action brought by the father of James L. Daniel, the infant son of the plaintiff, against the defendant, to recover wages paid to the said son. At the conclusion of the evidence, his Honor instructed the jury, if they believed the evidence, to answer the issue, $23.40," this being the admitted amount due for the services of the said infant after deducting $15 board for one month. To this instruction the defendant excepted.

The uncontradicted evidence tends to prove that the said minor was in the employ of the defendant; that for a period of time he received his wages regularly with his father's consent and in pursuance of an arrangement with his father; that he boarded with his sister and paid her $15 per month board out of his said wages. The evidence tends further to prove that the father notified the defendant company at the end of the second month of his son's employment, at its office, not to pay

(24) the minor his wages; that the defendant received this notice, and,

notwithstanding, paid the minor. It is in evidence that the father, prior to that time, had permitted the son to receive the wages and, after paying his board and other expenses, to pay the remainder to him.

The minor testifies that there was an express agreement with his father that the minor was to collect the money, and, after paying expenses, to pay the balance to the father, which agreement was terminated when the father notified the railroad company not to pay the wages to the son. There is evidence that the son ran away from the father because he drove his father's horse too hard, but that the father never drove the son away from him. The son testifies: "I am now living with my father, and he has always taken care of me."

Upon this state of facts, which seems to be uncontradicted, we think the court did not err in giving the instructions. There is no sufficient evidence in this case of the destruction or renunciation of the parental authority, and the test to be applied is that of the preservation of the parental and filial relations. 29 Cyc., 1673.

The fact that the child is allowed to live away from its parents and receive his wages for work, and pays his expenses out of the same, does not amount to an emancipation, unless it is the manifest intention of the parent to release all parental authority and control. 29 Cyc., 1674.

In this case the son evidently was the agent of the father in making the contract and collecting his wages. He had no other authority than that which his father had conferred upon him. While the defendant was justified in paying the wages to the minor under this agreement, and would be protected by it, yet, when the consent of the father was withdrawn, the agreement rescinded, and the defendant duly notified, it was the duty of the defendant to pay the wages then accrued and thereafter earned to the plaintiff.

The judgment of the Superior Court is

Affirmed.

Cited: Holland v. Hartley, 171 N.C. 377 (2e); *Pridgen v. Pridgen,* 190 N.C. 107 (3p); *White v. Comrs. of Johnston,* 217 N. C. 332 (2c).

HENRY C. BALLARD v. W. A. BOYETTE.

(Filed 15 September, 1915.)

1. Specific Performance—Part Performance—Sale of Realty.

The doctrine of enforcing a parol contract to convey land on the ground of part performance does not prevail in North Carolina.

2. Vendor and Purchaser—Parol Sale—Repudiation—Effect.

Where the owner of land makes a parol contract to sell it, he cannot repudiate the agreement and retain benefits received, whether money on the purchase price or the enhanced value of the land by reason of improvements.

3. Trusts—Parol Agreement—Transferring Land.

Where there was a verbal agreement between plaintiff, defendant, and the party conveying the land to the plaintiff, that the plaintiff, on payment of the price to him by defendant, should convey to the defendant, there was a valid and enforcible patrol trust in defendant's favor.

4. Vendor and Purchaser—Parol Contract of Sale—Recovery for Improvements.

Where defendant, vendee of land under a parol contract repudiated by the vendor, sought to recover for improvements, seeking relief under the general principles of equity, it was no objection that defendant showed no color of title, as required in a proceeding under Revisal 1905, sec. 652, providing that any defendant against whom a judgment shall be rendered for land may, before execution, petition the court, stating that he, while holding the premises under color of title, made permanent improvements, etc., and that a jury may assess plaintiff's damages and defendant's allowances for improvements.

(25) APPEAL by plaintiff from *Whedbee, J.*, at March Term, 1914, of GATES.

This is an action to recover land, in which the defendant alleged in his answer that at the time of the execution of the deed to the plaintiff, under which he claims, an agreement was entered into between the vendor and the plaintiff and the defendant that title should be made to the plaintiff and that he would reconvey the land to the defendant upon the payment of the purchase price. This was denied by the plaintiff, and he refused to recognize any rights of the defendant in the land.

The defendant testified upon the trial that the plaintiff Ballard purchased the land and took deed in his own name upon a parol contract and understanding at the time that he (the defendant) should pay the purchase money, and, upon doing so, that the plaintiff would convey the title to him; that he entered into possession under this contract, and paid $157.50 of the purchase money, and made material improvements upon the land. The plaintiff offered evidence to the contrary. At the

time of the execution of the deed to the plaintiff he executed a deed of trust to the trustee, John E. Vann, to secure the purchase price.

The jury returned the following verdict:

1. Is the plaintiff the owner and entitled to the possession of the land described in the complaint? Answer: "Yes."

2. What was the rental value of the said land for the years 1913, 1912, 1911, 1910, 1909, 1908, and 1907? Answer: "1913, 1912, 1911, $90; 1907, 1908, 1909, 1910, $15."

3. What amount of money did defendant pay Mr. Vann, or to the plaintiff Ballard, on account of interest on the note of plaintiff? Answer: "74.25."

4. What permanent improvements has the defendant placed (26) on the said land under the *bona fide* belief that he was the equitable owner of said land? Answer: "$200."

Judgment was entered upon the verdict in favor of the defendant, his rights, however, being subordinated to the right of Vann, trustee, and the plaintiff appealed.

Smith & Banks and Ehringhaus & Small for plaintiff.

A. P. Godwin and Ward & Grimes for defendant.

ALLEN, J. The doctrine of enforcing a parol contract to convey land upon the ground of part performance does not prevail in this State. *Ellis v. Ellis,* 16 N. C., 341; *Rhea v. Craig,* 141 N. C., 610. But it is well settled that the owner of land who has entered into a contract of this character cannot repudiate the contract and retain the benefits which he has received under it, whether in the form of money paid upon the purchase price or of the enhanced value of the land by reason of improvements. *Albea v. Griffin,* 22 N. C., 9; *Luton v. Badham,* 127 N. C., 96; *Kelly v. Johnson,* 135 N. C., 647; *Ford v. Stroud,* 150 N. C., 364. As was said in *Pitt v. Moore,* 99 N. C., 90: "Whatever may have been the ancient rule, it is now well settled by many decisions, from *Baker v. Carson,* 21 N. C., 381, in which there was a divided Court, but *Ruffin, C. J.,* and *Gaston, J.,* concurring, and *Albea v. Griffin,* 22 N. C., 9, by a unanimous Court, to *Hedgepeth v. Rose,* 95 N. C., 41, that where the labor or money of a person has been expended in a permanent improvement and enrichment of the property of another by a parol contract or agreement which cannot be enforced because, and only because, it is not in writing, the party repudiating the contract, as he may do, will not be allowed to take and hold the property thus improved and enriched, 'without compensation for the additional value which these improvements have conferred upon the property,' and it rests upon the broad

principle that it is against conscience that one man shall be enriched to the injury and cost of another, induced by his own act."

The position of the defendant is, however, stronger than this, because, when the verdict is considered in connection with the pleadings and the evidence, an agreement is established to convey the land to the defendant upon the payment of the purchase price, entered into between the plaintiff and the party who conveyed to him, and the defendant, at the time of the transmission of the legal title to the plaintiff, and this constitutes a valid and enforcible parol trust. *Wood v. Cherry,* 73 N. C., 110; *Sykes v. Boone,* 132 N. C., 202. And the plaintiff, having refused to perform his part of the contract, cannot retain benefits received thereunder. 6 Ruling Case Law, 936. The case of *Wood v. Tinsley,* 138 N. C., 507, if otherwise applicable, has no bearing, as the right of Vann, trustee, is given priority in the decree over the rights of the defendant.

(27) The objection of the plaintiff that the defendant cannot recover for improvements made, because he has shown no color of title, would be important if the defendant was proceeding under the statute (Rev., 652); but it appears that he is not doing so, and, on the contrary, is seeking relief upon familiar equitable principles.

No error.

Cited: Ferrell v. Mining Co., 176 N.C. 477 (2c); *Perry v. Norton,* 182 N.C. 587 (2c); *Gray v. Davis,* 184 N.C. 100 (2c); *Bank v. Scott,* 184 N.C. 315 (3cc); *Pridgen v. Pridgen,* 190 N.C. 106 (3p); *Grantham v. Grantham,* 205 N.C. 366 (1cc); *Knowles v. Wallace,* 210 N.C. 607 (2c); *Grimes v. Guion,* 220 N.C. 679 (2l); *Atkinson v. Atkinson,* 225 N.C. 128 (3d); *Atkinson v. Atkinson,* 225 N.C. 134 (3j); *Williams v. Joines,* 228 N.C. 143 (2p).

WILSON WOOD AND LUMBER COMPANY v. C. L. HINTON ET AL.

(Filed 15 September, 1915.)

1. Evidence—Hearsay—Declarations.

Declarations as to boundary, to be admissible, must have been made before suit brought, and declarant must have been disinterested when declarations were made, and dead when they were offered in evidence.

2. Evidence—Hearsay—Declarations.

Where the summons in an action involving boundary was dated July, 1913, and there was nothing to indicate that the controversy originated for any length of time prior to actual litigation, the testimony of a witness as to declarations made by a third person as to boundary that the decla-

rations were made years before, and that the third person was dead, and that he did not claim any of the land when making the declarations, showed sufficient foundation for the admissibility of the declarations.

3. Evidence—Hearsay—Declarations—Admissibility.

Declarations of a deceased person on pointing out a line that it bound a third person's old field to a party's land around the edge of a hill, a swamp edge, and then on across to an old field to a dead tree, were sufficiently definite to be admissible on the issue of boundary.

4. Boundaries—Evidence—Calls of Older Grants and Deeds.

Calls of older grants and deeds are admissible in evidence on the issue of boundary, on the same principle that hearsay evidence of common reputation on the issue of private boundary is admissible, but deeds not on their face calling for lines or corners common to them and deeds under which plaintiff in a suit involving boundary claimed are properly excluded.

5. Boundaries—Evidence—Admissibility.

Where in a suit involving a boundary the single issue was as to which of two named lines was the boundary line of plaintiff's land, deeds offered by defendant tending only to show a different line from either were properly excluded.

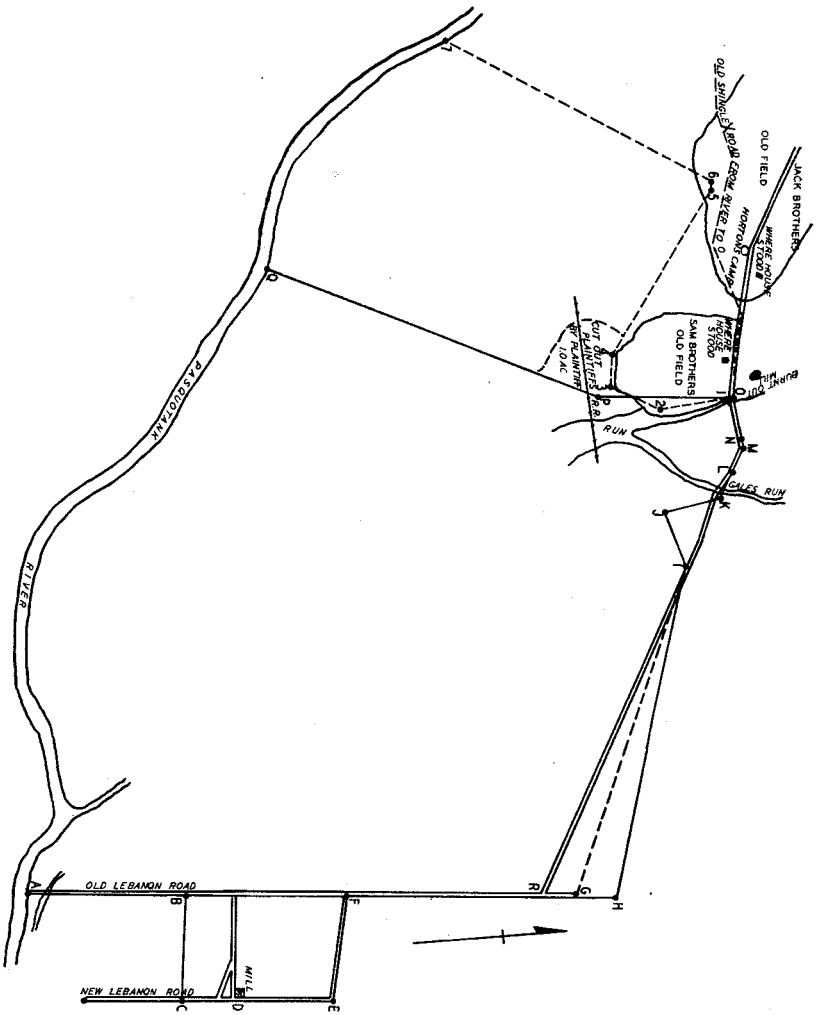
APPEAL by defendants from *Carter, J.*, at November Term, 1914, of CAMDEN.

Civil action of trespass to realty, involving also the right to (28) an injunction, tried on an issue as to title. Plaintiff claimed and offered evidence tending to show title to a tract of land on Pasquotank River, known as the Horseshoe tract, and which, according to the deeds in evidence, calling for a beginning point at A, on the Pasquotank River, and ran thence in a northerly and northwesterly direction (29) to the point K, as shown on the annexed plat; thence to L, M, N, O, 2, 3, 4, 5, 6, to 7 on the river; thence with the river to the beginning.

The defendants claimed and offered evidence tending to show title to a tract lying west of plaintiff's and abutting on same.

There was no dispute between the parties as to the correct location of plaintiff's boundaries from A around the line to O, and from that point defendants contended and offered evidence tending to show that the true divisional line between the parties was O, P, Q, on the river, and thence with the river to the beginning. It was proved that on some prior occasion the line O, 2, 3, 4, 5, 6, 7, had been run by a surveyor named Burnham, and was designated and spoken of on the trial as the "Burnham line," and that the line contended for by defendants had been formerly run by a surveyor named Colvin, and had come to be known and designated as the "Colvin line," and it was agreed that the title to the lands in dispute and the rights of the parties litigant in reference there-

to should be properly made to depend on the issue, "Is the western line of plaintiff's land the Burnham or the Colvin line?" To which the jury



answered: "The Burnham line." On this verdict there was judgment for plaintiff, and defendants excepted and appealed.

W. I. Halstead and Ehringhaus & Small for plaintiff.
Ward & Thompson for defendant.

HOKE, J., after stating the facts as above: Objection is made to the validity of the trial chiefly on account of two rulings of the court on questions of evidence, appellant excepting: (1) That on the examination of the witness T. C. Jones, the declarations of a deceased witness, Miles Edney, were received in evidence as to the location of part of plaintiff's boundary, along the line O, 2, 3, 4, 5, 6, in terms as follows:

"Q. Did Edney point out the lines of the Hintons from Gale's Run? (Objection. Overruled. First exception.) A. Yes, sir.

"Q. What did he point to you as the line; what did he say to you? (Objection. Overruled. Second exception.) A. He said it binds Jackie Brothers' old field to the Hinton land around the edge of the hill.

"Q. What natural boundary? Did the land run to the shingle road? A. Sammie Brothers' old field first; then to the edge of the hill; then on across there to Jackie Brothers' old field to an apple tree that was dead. By edge I mean the swamp edge."

Defendants admit that hearsay evidence on questions of private boundary is at times admissible with us, but they insist that the conditions required for the reception of such evidence have not been established in the present case, as the facts fail to show that the declarations objected to were made *ante litem motam.* It is well recognized in many former and more recent decisions of the Court on the (30) subject that, in order to the admissibility of evidence of this character, the declarations should have been made *ante litem motam;* that the declarant should have been disinterested when they were made, and dead at the time when they are offered (*Bank v. Whilden,* 159 N. C., 280; *Lamb v. Copeland,* 158 N. C., 136; *Bullard v. Hollingsworth,* 140 N. C., 634; *Hemphill v. Hemphill,* 138 N. C., 504; *Yow v. Hamilton,* 136 N. C., 357); but the objection is not open to defendant, because from a perusal of the facts in evidence we are of opinion that the conditions required for admissibility of such evidence have been properly met.

Before the declarations were received the witness Jones, speaking to the subject, said: "I knew Miles Edney when he lived there years ago. He pointed out some points with reference to this land to me. He is dead. He was not claiming any of the land," etc.

The summons in this action bears date 19 July, 1913, and there is no testimony in the record that the controversy in this action had its origin for any length of time prior to the actual litigation commenced between them, and we think it a fair and reasonable inference from the statement of the witness "that the declarations were made years before," that these preceded the beginning of the controversy which resulted in the suit.

Again, it was objected that the declarations, in themselves, were not sufficiently definite and did not attach themselves to any specific data tending to give them significance. This seems to be a requirement both as to declarations of deceased witnesses and to evidence of common reputation (*Hemphill v. Hemphill, supra, Shaffer v. Gaynor,* 117 N. C., 15); but this, too, on the record, must be resolved against the appellants. Thus the witness said: "It binds Jackie Brothers' old field to the Hinton land around the edge of the hill." And again: "What natural boundary? Did the line run to the shingle road? A. Sammie Brothers' old field first; then to the edge of the hill; then on across these to Jackie Brothers' old field to an apple tree that was dead. By edge I mean the swamp edge."

In *Hemphill's case,* applying the principle that the evidence of common reputation, to be admissible, must attach itself to "some monument of boundary or natural object or evidence of occupation and acquiescence tending to give the land a fixed and definite location," it was held that "evidence of common reputation was properly received, and that a line ran along the top of a certain ridge to the Vance line," and it will be seen that the declarations in the present case come well within the principle. Again, it appears that some deeds under which plaintiff claimed title, referring to the boundaries of the land now in dispute, described the lines as running to "the line of the John L. Roper
(31) Lumber Company, formerly Baird & Roper; thence along the line of the said John L. Roper Lumber Company a westerly course to John L. Hinton's land; thence along said Hinton line to the mouth of an old shingle road, formerly used by Baird & Roper; thence a southerly course on the John L. Roper Company land to the Pasquotank River," etc.

In order to controvert the plaintiff's position on the issue, defendants introduced a line of deeds for the purpose of showing that the Roper Lumber Company owned a tract of land in that locality, and that the boundaries of the same did not coincide with the locations as claimed by plaintiff, and contended that the calls of the older deeds were relevant as to the true location of plaintiff's land. The court admitted the deeds as evidence of title in the Roper Lumber Company, but not as evidence of the proper physical location of plaintiff's lines. It is held with us that the calls of older grants and deeds are, under certain conditions, admissible evidence on questions of boundary of a tract of land. In *Dobson v. Finley,* 53 N. C., 495, the ruling was referred to the principle of admitting hearsay evidence of common reputation on questions of private boundary and is subject to the limitations imposed on that character of testimony. *Bland v. Beasley,* 140 N. C., 628. The ruling of the court, however, excluding the evidence, can well

be supported in this instance on the ground that there is nothing on the face of the deeds offered by defendants that in itself shows that the deeds called for lines or corners common to them and the deeds under which plaintiff claimed. The descriptions in the deeds of defendants, therefore, had in themselves no significance on the question of the disputed boundary, except in connection with parol testimony offered by defendant and admitted in aid of the description. *King v. Watkins* (C. C.), 98 Fed., 913; 5 Cyc., p. 968. And, furthermore, this parol testimony which was offered on that subject tended to place the western line of the Roper lands, embraced in these deeds, as running south to Pasquotank River from the point K, a considerable distance east of the boundary line as claimed by either plaintiff or defendants.

As heretofore shown, the parties had agreed that their rights should be determined on the single issue, "Is the western line of plaintiff's land the Burnham or the Colvin line?" As the deeds offered by defendants only tended to show a line entirely different from either of them, it would tend to confuse rather than aid the jury, and must be held irrelevant to the issue agreed upon.

There is no error, and the judgment of the court below is affirmed.

No error.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1916

W. H. WARD, ADMINISTRATOR, v. MOREHEAD CITY SEA FOOD COMPANY.

(Filed 23 February, 1916.)

Fish and Oysters—Unsafe Condition—Knowledge—Duty of Packer—Negligence—Evidence—Questions for Jury—Trials.

Where the packer of salt fish puts this article of food on the market for sale in a dangerous condition it is its duty to protect the public from the consequences thereof, when it should have known the danger from the circumstances or is afterwards informed thereof; and where the retail dealer has sold the plaintiff's intestate fish from a shipment from the packer, which had theretofore made its customers in several localities sick, resulting in the death of one of them, of which the packer had been informed, and there is further evidence that there was a delay by the defendant in cleaning and packing the fish for thirty-six hours after they were placed on the wharf in the month of September, and that except for the unreasonable delay of the defendant (packer) in notifying the retailer, by telegram or otherwise, the intestate's death might not have resulted, the defendant is liable for negligence.

APPEAL by defendant from *Cooke, J.*, at December Term, 1915, of CHOWAN.

Pruden & Pruden, Ehringhaus & Small, and E. G. Bond for plaintiff.
W. M. Bond, Jr., and Guion & Guion for defendant.

CLARK, C. J. This is an action for the death of the plaintiff's intestate, caused, as admitted by the defendant and found by the jury, by eating

salt mullets bought by plaintiff's intestate from W. S. White, a retail grocery dealer in Edenton, who had bought them from the defendant, the original packer of the mullets. The defendant in its answer (34) admits that it shipped the mullets to said retail dealer on 18 September, 1914, and that said White offered them for sale in its regular business.

The plaintiff alleged its cause of action under three different heads:

1. That there is a warranty which runs with the sale of food for human consumption that the article is fit for food and does not contain dangerous and deleterious substances, injurious or fatal to human life and health. This cause of action is presented under the second and third issues, which were answered by the court in the affirmative as a matter of law and as a result of the answer by the jury to other issues.

2. That said packer, the defendant, was negligent in the preparation of said mullets; and that said fish were unfit and dangerous for human consumption, which condition was known or ought to have been known by the defendant, and was due to its careless and negligent preparation of the fish and lack of care in packing.

3. That after the fish were sold by the defendant to said retail dealer, and before plaintiff's intestate had eaten them, the defendant was put on notice by information that some of the same lot of fish shipped to said retailer had made people dangerously ill, and that the defendant could have gotten information to the said retailer to stop the sale of said fish in time to have warned the plaintiff's intestate, and thus could have prevented his eating them; and that failure to do so was negligence which caused the death of plaintiff's intestate.

The authorities are numerous that there is an implied warranty that runs with the sale of food for human consumption, that it is fit for food and is not dangerous and deleterious. *Watson v. Brewing Co.*, 1 L. R. A. (N. S.), 1178; *s. c.*, 110 Am. St., 157. It is not necessary to discuss this question or that of the liability of the subsequent dealer who buys the articles in good faith from a reputable manufacturer or wholesale dealer without notice of any defect, for the issues as to the negligence of the defendant are sufficient to support the judgment.

4. The fourth issue is, "Was the death of the plaintiff's intestate brought about by the negligence of defendant, as alleged?" This issue was comprehensive of the idea of negligence, alleged in the complaint in the preparation, care, and packing of the fish, and also as to the duty and care of giving notice if the defendant could thereby have avoided the injury, and it was sufficient, for the defendant presented its evidence upon both points.

Both the State and Federal Governments have enacted statutes to protect the public against impure articles of food. Our statutes, Revisal,

sec. 3969, *et seq.*, and Revisal, 3442 and 3444, make it an indictable offense, under certain circumstances, to sell adulterated food. When the defendant had put this food on the market for sale, if it was in a dangerous condition it was the defendant's duty to protect the public from the consequences thereof. There was evidence that there (35) was a delay by the defendant in cleaning and packing this fish for some thirty-six hours after they were placed on the wharf in the month of September. They knew the effect upon fish of that delay in one of the most heated months of the year.

The defendant learned, on the very day that this particular lot was shipped to the retail dealer who sold the plaintiff's intestate, that fish from this lot were making people sick. A second notice was received on the following day that this had happened in several localities. A little later the defendant learned that a man had been actually killed by eating fish from the same lot. The defendant recognized its duty to notify those to whom it had sold to stop the sale, by writing letters, but it failed to do what an ordinarily prudent man would have done under the circumstances, in that it did not wire immediately to the parties to whom this lot had been sold and did not even mail a letter till twenty-four hours after receiving notice. There was evidence that if a telegram had been promptly sent the life of the intestate might have been saved.

The evidence is that eleven persons in five families were made sick by buying of this lot of fish from White, a retail dealer in Edenton, of whom the deceased bought. The defendant consented that the first issue that "the death of the intestate was caused by eating the mullets bought of White, the retail dealer, and which had been shipped to him by the defendant for sale," should be answered "Yes."

There was evidence to justify the finding of the jury that there was negligence on the part of the defendant which was the proximate cause of the death of plaintiff's intestate.

Upon consideration of all the exceptions we find

No error.

Cited: Grant v. Bottling Co., 176 N.C. 260 (c); *Poovey v. Sugar Co.*, 191 N.C. 724 (l); *Lamb v. Boyles*, 192 N.C. 543 (e); *Perry v. Bottling Co.*, 196 N.C. 177 (p); *Broadway v. Grimes*, 204 N.C. 627 (c); *Thomason v. Ballard & Ballard & Co.*, 208 N.C. 4 (c); *Enloe v. Bottling Co.*, 208 N.C. 307 (c); *Keith v. Gregg*, 210 N.C. 803 (p); *Williams v. Elson*, 218 N.C. 160 (c); *Caudle v. Tobacco Co.*, 220 N.C. 110 (c).

TOWN OF ROPER v. J. L. LEARY.

(Filed 23 February, 1916.)

1. Injunction—Municipal Corporations—Cities and Towns—Sewerage—Obstruction—Nuisance.

The remedy of a town against the owner of a lot obstructing its drainage ditch where it crosses a portion thereof may either be by indictment or a suit to enjoin its continued obstruction, without recourse to the former remedy.

2. Pleadings—Allegations—Issues.

All matters alleged on one side and denied on the other are not necessarily at issue in a legal sense, but only such as are necessary to the determination of the controversy; and when the issues submitted by the trial judge are comprehensive and cover every phase of the controversy as set out in the pleadings, giving the objecting party opportunity to offer any pertinent evidence, they are sufficient, the form thereof being of little consequence.

3. Municipal Corporations — Cities and Towns — Sewerage—Prescriptive Rights—Purchaser and Notice.

Where a well settled community has been in existence for more than thirty years, using a ditch for drainage at a certain place, and then is incorporated into a town and thereafter a purchaser of a lot within the town limits, across which the ditch runs, has been given notice, at the time of his purchase, of the purposes for which the ditch was used by the town, and that it would remain open as it then existed: *Held*, those using the ditch acquired a prescriptive right to do so, of which the purchaser of the lot had full notice; and in a suit by the town to enjoin its obstruction the defendant's motion to nonsuit on the ground that it was the taking of his property without just compensation was properly overruled.

4. Instructions, Improper—Appeal and Error.

Objection to the charge in this case that it was unjudicial, prejudicial to the appellant's rights, and, in effect, coerced the jury to find adversely to him, is without merit, it appearing further that the judge may properly have charged the jury to find adversely to the appellant upon the evidence, if they should believe it.

(36) APPEAL by defendant from *Rountree, J.*, at October Special Term, 1915, of WASHINGTON.

Civil action tried upon these issues:

1. Was the ditch described in complaint a drain ditch for a part of the locality embraced by the town of Roper and some of its streets at time said town was incorporated? Answer: "Yes."

2. Had said drainage ditch existed and was same used for said drainage for the past thirty years? Answer: "Yes."

3. Did the defendant fill up said ditch upon his own land and thereby pond back water upon said streets and obstruct the proper drainage of same? Answer: "Yes."

4. Does the town of Roper empty sewage into said ditch so as to create a nuisance? Answer: "No."

From the judgment rendered, the defendant appealed.

William M. Bond, Jr., for plaintiff.

Ward & Grimes for defendant.

BROWN, J. This action is brought by plaintiff to enjoin defendant from obstructing a ditch within the corporate limits of the town, a small part of which crosses a corner of defendant's land. It is contended by defendant that injunction is not the proper remedy and that plaintiff should proceed by indictment. Both remedies (37) may be available, and the remedy by injunction certainly is. To obstruct the drainage system of a city or town is a serious matter, and may amount to a public nuisance and be extremely detrimental in its consequences to the community. To abate it the community, acting through its officials, need not wait until an indictment can be tried, but may ask for injunctive relief to abate the nuisance at once.

It is contended that the court erred in refusing to submit certain issues tendered by defendant. The issues submitted and answered by the jury are very comprehensive and cover every phase of the controversy as set out in the pleadings, and under them either party had opportunity to offer any pertinent evidence. It is not every matter averred on one side and denied on the other that in a legal sense is an issue. The only issues proper to be submitted are those matters alleged on one side and denied on the other which are necessary to determine the controversy. *Kirk v. R. R.*, 97 N. C., 82.

The form of the issues is of little consequence, if the material facts are clearly presented by them.

It is contended that the motion to nonsuit should have been granted, upon the ground "that the drainage of the town across the private property of the defendant without compensation was in fact a condemnation of private property to the use of the town without compensation to the owner."

All the evidence in the record tends to prove that the plaintiff was incorporated in 1907, that the territory had been a well settled community for more than thirty years previous, and that during all that time this drainage ditch, emptying into a creek, had been in existence and used by the citizens of that community for drainage purposes. The defendant purchased his land at a public sale in 1910 from

one L. G. Roper. It is in evidence, and not denied by defendant, that at the sale when defendant purchased his land public notice was given in the hearing of defendant and all present that this drainage ditch should remain open as it then existed.

It is manifest that upon this evidence the persons using the ditch for drainage purposes had acquired a prescriptive right to do so and that the defendant purchased with full notice and subject to such right. The motion to nonsuit was therefore properly overruled.

The remaining exceptions, 7, 8, and 9, are directed to the charge of the court. In these three exceptions the appellant insists "that the attitude of the judge to his position was unjudicial and largely prejudicial to a fair and impartial consideration of it by the jury," and further that the jurors "by the style, manner, directness, and force of the charge, were coerced into a finding" adverse to defendant. We
(38) do not think the charge of the learned judge and his admonitions to the jury are fairly amenable to this criticism.

In the view we take of the case, upon the uncontradicted evidence, and in any view of it, his Honor might well have instructed the jury to find for the plaintiff upon the essential issues, 1, 2, and 3, if they believed it. There is nothing that we see to prevent defendant from covering or tiling the ditch where it passes through his land so as to make it less objectionable, provided he does not obstruct it.

No error.

Cited: Clinton v. Ross, 226 N.C. 689 (1c); *Transit Co. v. Coach Co.,* 228 N.C. 773 (1c); *Pake v. Morris,* 230 N.C. 426 (2cc).

J. H. PERRY v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 23 February, 1916.)

1. Railroads—Damages—Land Crop Issues.

Where the damages are sought by the owner of lands, in his action against a railroad company alleged to have been caused to his lands and crops by the defendant's negligent failure to keep open the culverts under its roadbed, it is not necessary to submit issues as to damages to the crop and lands separately; but, at times, it is desirable to do so in order to present the questions involved, and such a course has been approved by the Supreme Court.

2. Issues—Verdict, Directions—General New Trial—Appeal and Error—Court's Discretion.

In an action to recover damages from a railroad company to the plaintiff's crop and lands, alleged to have been caused by the negligence of the defendant in failing to keep its culverts under its roadbed open, the trial judge erroneously instructed the jury to answer the issue as to whether the crops had been injured, "Yes," and owing to the connection between this and the other issues, the Supreme Court grants a general new trial, as a matter within its discretion.

3. Limitation of Actions — Railroads — Permanent Damages—Recurrent Damages.

In an action for damages against a railroad company arising from alleged negligence with respect to its roadbed, it is *Held*, that for injuries arising from the original and permanent construction of the road, properly maintained, the five-year statute of limitations, Revisal, sec. 394, applies; but those arising from the negligent failure of the defendant to properly maintain the road, such as keeping open culverts and the like, actions may be brought from time to time for the three years preceding the institution of the action, as in ordinary cases of recurrent injury.

APPEAL by defendant from *Cooke,* J., at December Term, 1915, of CHOWAN.

Civil action to recover damages to plaintiff's land and crops (39) grown thereon by the construction of defendant's road through said land and by alleged negligent failure to keep open the culverts under the road-bed. On denial of liability, the jury rendered the following verdict:

1. Is the plaintiff the owner of the land described in the complaint? Answer: "Yes."

2. Have the lands of the plaintiff been damaged by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

3. If so, in what amount? Answer: "$400."

4. Have the crops of plaintiff been damaged by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

5. If so, in what amount? Answer: "$600."

6. Is plaintiff's cause of action barred by the statute of limitations? Answer: "No."

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

Pruden & Pruden and S. Brown Shepherd for plaintiff.

Small, MacLean, Bragaw & Rodman for defendant.

HOKE, J. The submission of a controversy of this character on issues addressed to the land and crops separately, while not always

necessary, is at times desirable for the proper presentation of the questions involved, and such a course has been approved with us by direct decisions on the subject. *Beasley v. R. R.*, 147 N. C., 362; *Ridley v. R. R.*, 124 N. C., 37.

We are of opinion, however, that there was error committed to defendant's prejudice in charging the jury on the fourth issue: "That if they believed the evidence in this case they would answer the issue 'Yes.'"

While there are facts in evidence tending to support plaintiff's position, there is also testimony on the part of the defendant to the effect that plaintiff has suffered no injury from the construction and maintenance of the defendant road, either to his land or crops, and the issue should have been submitted as an open question for the jury to determine.

And, owing to the connection between the issues on the question of liability, for the error indicated, we think that, in the discretion of the court, a general new trial should be awarded.

On the issue as to the statute of limitations it has been held with us that for injuries arising from the original and permanent construction of a railroad, properly maintained, the action is controlled by section 394 of Revisal, requiring that the same shall be instituted within five years from the infraction of substantial damages to the property.
(40) But for injuries arising from negligent failure to properly maintain the road, such as keeping open culverts and the like, actions may be brought from time to time and recovery had for the three years preceding the institution of the suit, as in ordinary cases of recurrent injury.

The differing views will be found presented and illustrated in *Rice v. R. R.*, 167 N. C., 1; *Duval v. R. R.*, 161 N. C., 448; *Campbell v. R. R.*, 159 N. C., 586, and other like cases, and it may be in the further trial of the cause that the issue on the statute of limitations should also be submitted to the jury.

For the reasons heretofore stated, defendant is entitled to a new trial of the case, and it is so ordered.

New trial.

Cited: Barclift v. R. R., 175 N.C. 116 (3c); *Barcliff v. R. R.*, 176 N.C. 41 (3e); *Midgett v. Transportation Co.*, 180 N.C. 72 (2c); *Lightner v. Raleigh*, 206 N.C. 504 (3c); *Ivester v. Winston-Salem*, 215 N.C. 8 (3c).

JESSE C. ANGE v. THE SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD.

(Filed 23 February, 1916.)

Removal of Causes—Transference of Causes—Fraternal Societies—Local Lodge—Venue.

In an action to recover damages alleged to have been received by the plaintiff while being initiated into a fraternal insurance society, in consequence of rough treatment, brought in a different county from that of the residence of the plaintiff and the one wherein the injury was alleged to have been received, it appeared that the defendant, the head lodge, had a local lodge in the county of the venue, in which members were received, the usual business of such lodges transacted, and membership fees collected and remitted to it: *Held*, the transactions of the local lodge were such usual or continuous business as contemplated by the statute, and the cause was improperly transferred to the county in which the plaintiff resided and the injury was alleged to have been received. Revisal, sec. 423.

CIVIL ACTION to recover damages for personal injury, heard by *Bond, J.*, at January Term of WASHINGTON, on a motion to remove the case for trial to Martin County.

It appears from the complaint, made a part of the case on appeal, that defendant is a fraternal insurance society, having separate lodges in this State, one in Washington County and one in Martin County, the members paying initiation fees, and dues, and taking insurance for premiums, the defendant, in this respect, not being unlike other fraternal insurance societies.

Plaintiff alleges that while being initiated as a member of the subordinate lodge at Jamesville in Martin County he was assaulted and subjected to rough treatment, being severely shocked by a (41) current of electricity, which resulted in serious and permanent injury to him.

Defendant, before answering, asked that the case be removed for trial to Martin County, where plaintiff resides, and where the cause of action arose, plaintiff contending that the action was properly brought in Washington County, as defendant is a nonresident corporation, and usually did business in Washington County at the time this action was brought and the injury was inflicted. For the purpose of passing upon the motion, the following facts were admitted by the parties:

1. The plaintiff was at the time that the action was commenced, and now is, a resident of Martin County, and the defendant is a nonresident corporation, being the only defendant.

2. The defendant when suit began had, and now has, subordinate lodges in different places, one of which is in Martin County, one in Washington County, and others in various other counties.

3. The cause of action, if any ever existed, arose in Martin County.

4. The subordinate lodges in various counties each has authority, through its officials, to collect fees due to the head lodge, which is the defendant.

The court removed the case to Martin County, and plaintiff appealed.

W. M. Bond, Jr., for plaintiff.

G. V. Cowper and R. H. Lewis, Jr., for defendant.

WALKER, J., after stating the case: It is provided by statute that an action against a corporation chartered by another State, country, or government may be brought in the Superior Court of any county in which the cause of action arose, or in which it usually did business, or in which it has property, or in which the plaintiffs, or either of them, reside. Revisal, sec. 423. There are four cases, therefore, in which the place of trial may be determined differently, and it is possible, under this provision, that the action may [be] brought in any one of four counties, at the election of the plaintiff, as the cases are stated alternatively. Under this view of the law, as plaintiff resided in Martin County and the cause of action arose therein, he could have sued in that county, but was not bound to do so, if the defendant either had property or usually did business in Washington or any other county. Our opinion, upon the facts stated, is that it usually did business in Washington County, if also it did not have property there. It had a lodge there, which, according to the accepted definition, means the meeting room of an association, as well as the regularly constituted body of members which meets therein, for the transaction of its business or the conduct of its affairs. The lodge collected the fees due to the defendant, as "the head lodge." The regular collection of fees
(42) due from members of the local lodge clearly and unmistakably indicates the transaction of business, which was not only "usual," but continuous in its nature, and necessarily so. It appears that the lodge admitted persons to membership in defendant corporation, collected their dues, and presumably conducted such business as is usually characteristic of such institutions. Why such transactions are not "usual business" within the meaning and intent of our statute we are unable to see. Two cases seem to be direct authorities for this view of the facts: *International Harvester Co. v. Commonwealth*, 147 Ky., 655, 666; *Inter. Text-book Co. v. Pigg*, 217 U. S., 91, 104. In the former case, the agent of the plaintiff took orders for the sale of goods

and collected money due his employer, and in the latter plaintiff conducted a correspondence school at Scranton, Pa., by selling scholarships in Kansas (and other States) and collecting fees from its pupils, though it had no office in Kansas, but carried on its business solely by correspondence. It was held in each case that the plaintiff was conducting business in the State where the collections were made, and that it was continuous and, of course, "usual." The Court in the *Pigg case* held that upon any reasonable interpretation of the statute, the company, both at the date of the contract sued on and when the action was brought, must be held as "doing business" in Kansas. It had an agent in the State, who was employed to secure scholars for the schools conducted by correspondence from Scranton, and to receive and forward any money obtained from such scholars. Its transactions in Kansas, by means of which it secured applications from numerous persons for scholarships, were not single or casual transactions, such as might be deemed incidental to its general business as a foreign corporation, but were parts of its regular business continuously conducted in many States for the benefit of its correspondence schools; that while the Supreme Court of Kansas has distinctly held that the statute did not embrace single transactions that were only incidentally necessary to the business of a foreign corporation, it also adjudged that the business done by the text-book company in Kansas was not of that kind, but indicated a purpose to regularly transact its business from time to time in Kansas, and therefore it was to be regarded as doing business in that State, within the meaning of the statute; and that it "was the intention of the Legislature that the State should reach every continuous exercise of a foreign franchise," and that it should apply even where the business of the foreign corporation was "purely interstate commerce." The Court further said that the construction given to the statute by the Kansas court was correct. The two cases are parallel with this one, and the same rule of construction must govern. If it was "usual business" to receive orders for goods and collect the money due for them, it is equally "usual business" to receive members into the lodge and collect their dues or fees, and, it may be added, to sell them (43) insurance, if desired. But there are other reasons for holding that defendant was conducting its usual business in Washington County, which need not be mentioned, as we have adequately disposed of the question raised by the exception to the ruling, which is reviewable in this Court. *Cedar Works v. Lumber Co.*, 161 N. C., 603.

We, therefore, conclude that the venue was correctly laid in Washington County, and that the court erred in removing the case.

Reversed.

Cited: Palmer v. Lowe, 194 N.C. 704 (d).

WILLIAM H. CROPSEY v. THOMAS J. MARKHAM, ADMINISTRATOR OF ANDREW G. CROPSEY.

(Filed 23 February, 1916.)

1. Judgment—Estoppel—Former Record.

The rule under the common-law system that pleas of estoppel by judgment be determined by the inspection of the record alone has been modified under the modern system of pleading where records are sometimes vague and uncertain, but not to the extent of destroying the integrity and conclusiveness of the judgment as to the matters that do appear on the record.

2. Same—Parol Evidence—Trials.

Upon plea of estoppel by former judgment, parol evidence is only permissible in aid of the record when the record is uncertain and does not clearly show the matters adjudicated, and not for the purpose of contradicting it; and the judgment estops as to all issuable matters contained in the pleadings.

3. Same—Account—Bill of Particulars.

Upon the plea of estoppel by the former judgment in an action upon an account for services rendered it appeared that in the former action the defendant asked for a bill of particulars which was furnished by the plaintiff, and included therein the item sued for in the present action: *Held*, that parol evidence in the present action was incompetent to contradict the record in the former one, and the judgment therein operated as an estoppel.

APPEAL by plaintiff from *Cooke*, J., at September Term, 1915, of PASQUOTANK.

Civil action to recover $117, alleged to be due for services rendered after the death of the intestate of the defendant and before the qualification of the defendant as administrator.

The defendant denied that there was any amount due the plaintiff and, in addition, pleaded an estoppel by a former judgment.

(44) The plaintiff introduced evidence tending to prove that after the death of the defendant's intestate he rendered certain services in taking care of the farm and the stock and that the services were reasonably worth $1.50 per day, making a total of $117.

The defendant introduced the record in the former action between the same parties, from which it appeared that the plaintiff filed a complaint in said action alleging that the defendant as administrator was indebted to him in the sum of $520.15 for services; that the defendant in said action demanded a bill of particulars; that a bill of particulars was filed by the plaintiff in which appear the items for services, amounting to $117, which are involved in this action; that the defendant filed an answer denying any indebtedness to the plaintiff; that an

issue of indebtedness was submitted to jury and was answered $153.83, and that final judgment was entered upon the verdict.

After the introduction of the record the plaintiff in this action offered to prove by parol that the items in controversy in this action were not considered in the former action, and that his Honor before whom the action was tried refused to admit evidence in support of said items.

This evidence was excluded upon objection by the defendant, and the plaintiff excepted.

At the conclusion of the evidence his Honor entered judgment of nonsuit, and the plaintiff appealed.

J. Kenyon Wilson for plaintiff.

W. A. Worth for defendant.

ALLEN, J. The plaintiff sues to recover $117, alleged to be due for services rendered after the death of the intestate of the defendant and before the qualification of the defendant as administrator. The defendant denies the indebtedness, and pleads an estoppel by former judgment. The plaintiff replies that the items in controversy in this action did not enter into the former judgment, and he has offered parol evidence to sustain his allegation, which was excluded by the court.

Was this evidence competent?

The answer to this question requires an examination of the record in the former action and the determination of the effect of the judgment rendered therein.

Under the common-law system, the pleadings being more accurate and precise than at the present day, and having as their object to reduce the controversy to a single issue, there was but little difficulty in determining the question adjudicated, and the rule prevailed of trying the plea of estoppel by former judgment by an inspection of the record alone (*Yates v. Yates*, 81 N. C., 403; *Whitaker v. Garren*, 167 N. C., 662); but as under the modern system of pleadings records are sometimes vague and uncertain, this rule has been modified, but (45) not to the extent of destroying the integrity and conclusiveness of the judgment as to matters that do appear on the record. *Long v. Baugas*, 24 N. C., 290; *Yates v. Yates*, 81 N. C., 403; *Bryan v. Malloy*, 90 N. C., 513; *Person v. Roberts*, 159 N. C., 173; *Clothing Co. v. Hay*, 163 N. C., 499; *Whitaker v. Garren*, 167 N. C., 662.

In *Bryan v. Malloy* the Court, after discussing the question, deduces the following as the controlling principle: "The principle established in these adjudications is that parol proof is admissible and only admissible in aid of the record; that is, whenever the record of the first trial fails to disclose the precise point on which it was decided, it is

competent for the party pleading it as an estoppel to aver the identity of the point or question on which the decision was had, and to support it by proof."

If, then, parol evidence can only be admitted in aid of the record, and when it does not disclose the point decided, we must look to the record in the former action, and it must be examined in the light of the authorities which show what the law says enters into and is concluded by the judgment.

The Court said in *Tyler v. Capehart,* 125 N. C., 64: "A judgment is decisive of the points raised by the pleadings, or which might be properly predicated upon them; but does not embrace any matters which might have been brought into the litigation, or cause of action which the plaintiff might have joined, but which in fact are neither joined nor embraced by the pleadings"; and in *Coltrane v. Laughlin,* 157 N. C., 282: "It is well recognized here and elsewhere that when a court having jurisdiction of a cause and the parties renders judgment therein, it estops the parties and their privies as to all issuable matter contained in the pleadings, and though not issuable in the technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined on the hearing.

This language from these two cases was quoted with approval in *Ferrebee v. Sawyer,* 167 N. C., 203, and many other authorities were there cited in support of the principle.

We have, then, the rule established that parol evidence is only permissible in aid of the record when it is uncertain and does not show clearly the matters adjudicated, and not for the purpose of contradicting it, and that the judgment estops as to all issuable matters contained in the pleadings; and if this rule is applied to the record in the former action it is clear that the plaintiff is estopped.

In this action the plaintiff sued to recover $117 for services alleged to have been rendered.

(46) In the former action between the same parties he sued to recover $520.15 alleged to be due for services.

The defendant in the former action asked for a bill of particulars, which was filed by the plaintiff and in which appears the item of $117 as a part of the $520.15.

The defendant denied any indebtedness to the plaintiff and an issue of indebtedness was submitted to the jury and answered $153.83, and judgment was entered upon the verdict.

As was said in *Wiggins v. Guthrie,* 101 N. C., 675, speaking of the statute requiring a bill of particulars: "This enactment, which, in case of a disregard of the demand, shuts out all proof of the items of the

claim coming from any witness (and does not close the mouth of the party making it alone), is intended to meet the case of a complaint that does not set out the particulars, and confine the evidence at the trial to such as are set forth. Its aim is to supply an ommission to give them in the pleadings, and hence, when furnished, they become substantially and in legal effect a part of the complaint itself."

If so, and the bill of particulars became a part of the complaint, each item of the bill was put in issue by the denial in the answer, and as the issue submitted to the jury was comprehensive enough to permit the introduction of evidence upon all the items, the judgment concludes as to all and is an adjudication that each item was litigated, and as the facts therefore appear on the record, parol evidence will not be received to contradict them.

If, as the plaintiff contends, the fact is otherwise, and he was prevented from introducing his evidence on the former trial by the rulings of the judge, his remedy was to appeal from the judgment rendered or to strike out from the bill of particulars the items that are involved in this action, and his failure to do so will not justify us in destroying the integrity of the judgment which has been rendered.

There is also much authority in this State in support of the contention of the defendant that no debt can be created against the estate of an intestate by matters occurring after his death, but it is not necessary to consider that question. *Devane v. Royall,* 52 N. C., 426; *Lindsay v. Darden,* 124 N. C., 309; *Kelly v. Odum,* 139 N. C., 282, and cases cited.

We find no error.

Affirmed.

Cited: Propst v. Caldwell, 172 N.C. 598 (2c); *Whisnant v. Price,* 175 N.C. 614 (j); *Holloway v. Durham,* 176 N.C. 553 (2c); *Price v. Edwards,* 178 N.C. 502 (2c); *Nash v. Shute,* 182 N.C. 530 (2c); *S. v. Lumber Co.,* 199 N.C. 201 (3e); *Savage v. McGlawhorn,* 199 N.C. 429 (1c).

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(47)

J. B. KILLINGSWORTH v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 23 February, 1916.)

Carriers of Goods—Bills of Lading—Delivery Upon "Order, Notify"—Evidence—Nonsuit—Trials.

In an action against a railroad company to recover damages for its alleged wrongful failure to deliver a shipment of goods when it appeared from the bill of lading that the goods were to be delivered only upon the order of a certain bank, it is the duty of the plaintiff, having paid the

draft to which the bill of lading was attached, to have the latter properly indorsed, or obtain the proper order for the delivery of the goods, and when he has failed to do so a judgment as of nonsuit upon the evidence should be allowed.

APPEAL by defendant from *Cooke,* J., at October Term, 1915, of BEAUFORT.

Civil action, tried upon these issues:

1. Did the defendant wrongfully refuse to deliver to the plaintiff the shipment of wire fencing referred to in the complaint? Answer: "Yes."

2. If so, what damages, if any, did the plaintiff sustain thereby? Answer: "$200."

From the judgment rendered, defendant appealed.

Harry McCullan, John G. Tooly for plaintiff.

Small, MacLean, Bragaw & Rodman for defendant.

BROWN, J. The admitted facts are that a shipment of wire fencing was made by the Chicago House Wrecking Company from Chicago, consigned to Chicago House Wrecking Company, Pinetown, N. C., notify J. B. Killingsworth. The bill of lading bore the following indorsement: "Deliver the goods specified on this bill of lading only on order of Savings and Trust Company, Washington, N. C." The shipment arrived in Pinetown and the plaintiff was promptly notified of its arrival. The plaintiff testified that he went to the First National Bank, paid the draft, and obtained the bill of lading. The defendant's evidence showed that the original bill of lading was never presented, but a copy only. Plaintiff admitted that he never called at the Savings and Trust Company for their indorsement, as required by the bill of lading, and the bill of lading was not so indorsed, nor did plaintiff have any order from the Savings and Trust Company for the delivery of the goods.

The motion to nonsuit should have been sustained. It was the plaintiff's duty, and not the defendant's, to procure the indorsement of the trust company, or else to write to the consignor and get authority for the delivery of the goods to him. It is well settled that a bill of lading must be properly indorsed before the carrier is justified in
(48) making delivery. The authorities are numerous and all in accord. *R. R. v. Bank,* 73 S. E., 637; *Stone v. Swift,* 16 Anno. Dec., 349; *Douglass v. Bank,* 9 Am. St. Rep., 276; 1 Hutch. on Carriers, sec. 177.

Michie on Carriers, sec. 530, says: "A carrier of property which by the terms of the bill of lading is deliverable to the shipper's order is liable for its value to the true owner if he delivers the property to the

consignee or any one else without such order." Moore on Carriers, p. 162 (1 Ed.), and cases cited in notes.

The fact that the defendant was instructed to notify plaintiff of arrival of the goods gave him no right to require a delivery without the production and surrender of the bill of lading properly indorsed. On this subject 4 Ruling Case Law, 842, sec. 294, says: "The fact that a bill of lading contains a direction to notify a certain person of the arrival of the goods is no indication that he has any interest in them, for, as is well known, the practice of 'notifying' a person of the arrival of goods is generally resorted to by the vendor, who, while consigning goods to himself or to his own order, wishes at the same time to have the vendee notified of the arrival so that he may be afforded an opportunity of receiving them on payment of the draft drawn on him and the delivery of the bill of lading thereto attached. Therefore, in such a case, the carrier has no authority to make a delivery to the person so to be notified without the production of the bill of lading properly indorsed, or without being otherwise ordered by the shipper so to do; and if he does make such a delivery, he becomes liable for the full value of the shipment." The text is supported by the authorities cited in Note 5.

The motion to nonsuit is allowed.

Reversed.

Cited: R. R. v. Armfield, 189 N.C. 583 (c); *Griggs v. York-Shipley, Inc.,* 229 N.C. 579 (d).

W. S. CLARK v. ANNIE L. WIMBERLY AND JAMES PENDER, TRUSTEE UNDER THE WILL OF JOHN LAWRENCE.

(Filed 23 February, 1916.)

1. Wills—Trust Funds—Life Interest—Contingent Interests—Estates.

An estate devised to M. "during her natural life, free from the control of her husband, and at her death to be paid to such of her children as she may have surviving her, and to the issue of such of her children as may have died in her lifetime leaving issue," the children to take *per stirpes: Held,* the children of M. held an estate dependent upon their being alive and filling the description at the time of the death of their mother, the life tenant; but if they died before then without issue, their interest became extinct, and if they so died leaving issue, these last became the owners of the interest of their deceased parent, but holding directly from the testator.

2. Same.

M. held by devise a life interest in a trust fund created under the will, with the remainder to her children, J., L., and A., contingent upon their surviving her, with further limitation over to their surviving children, to take *per stirpes* upon the nonhappening of the contingency stated. The life tenant and her children, J., L., and A., assigned "all our right, title, and interest in and to $800 in value of said fund" to secure a creditor of J., and J. and L. having predeceased their mother, the former leaving children surviving and the latter none, it is *Held*, by the terms of the assignment, the interest of A., having survived her mother, liable to the debt, is one-third of $800, the full amount specified, and not her entire interest in the funds; and this interpretation is not affected by a later clause in the writing of assignment, that the indebtedness be credited "with $800 if the interest of the parties hereto in the trust fund now in the hands of the trustee shall amount to so much."

(49) APPEAL by defendant from *Rountree*, J., at November Term, 1915, of EDGECOMBE.

Civil action, heard on case agreed.

From the facts agreed upon it appeared that a trust fund of $1,800 is now in the hands of defendant James Pender, coming from John Lawrence, deceased, and impressed by his will with the following trust: "To be held for the sole, separate, and exclusive use of my daughter, Martha L. Wimberly, during her natural life, free from the control of her said husband or any future husband, and, at her death, to be paid to such of her children as she may leave surviving her, and to the issue of such of her children as may have died in her lifetime leaving issue, the issue to stand in the place of their deceased parent and to take such share as such parent would if living." John Lawrence having died on 18 January, 1892, there were surviving the life tenant, Martha, and her four children, John L., Annie, Lucy L., and Mrs. Fields, and, on that date, John L. Wimberly being indebted in a large amount to plaintiff, he and his mother, the life tenant, and two of his sisters, Annie and Lucy, executed a contract assigning to plaintiff certain specified portions or interests in the trust fund to secure his claim. Thereafter, on 11 October, 1893, John died, leaving two children. On 16 October, 1895, Lucy died without issue. On 25 June, 1915, the mother, the life tenant, died, leaving her surviving her two daughters, Mrs. Fields and Annie L., and the two children of John, only Annie having executed the contract declared on.

The question presented was whether, by correct construction of the contract, the interest of Annie L. in the entire trust fund was applicable to plaintiff's claim or whether her interest only in $800 of the fund was so applicable.

The court being of opinion that the interest in the entire fund was bound, provided same did not exceed $800, so entered its judgment, and defendant Annie L. excepted and appealed.

James Norfleet for plaintiff. (50)
James Pender and W. O. Howard for defendant.

HOKE, J. By the terms of the will the children of Martha L. Wimberly held an estate dependent upon their being alive and filling the description at the time of the death of their mother, the life tenant. If they died before that time without issue their interest became extinct; and if they so died leaving issue, these last became the owners of the interest of their deceased parent, but holding directly from the testator. *Sessoms v. Sessoms,* 144 N. C., 122; *Latham v. Lumber Co.,* 139 N. C., 9; *Bowen v. Hackney,* 136 N. C., 187; *Ebey v. Adams,* 135 Ill., 80. This being true, and the contract in question having been executed by Martha, the life tenant, John, the son, and two of his sisters, Lucy and Annie, the defendant, and, it appearing that Lucy died before her mother without issue, that John died before the mother, leaving two children, who take and hold direct from the testator, and the life tenant having also died, the trust fund is now held and owned, one-third by Mrs. Fields, one-third by the children of John, and one-third by Annie, whose interest alone is subject to the terms of the contract, and, as heretofore stated, the question presented is whether this is one-third of the entire trust fund, not to exceed $800, or is the amount restricted to one-third of $800.

Recurring, then, to the terms of the contract, after reciting that a trust fund of $1,800 is held by a trustee under the terms of the will of John Lawrence, the portion of same more directly relevant proceeds as follows: "And whereas the said J. L. Wimberly is indebted to W. S. Clark in a large sum, and desires, as do all the parties hereto, to assign and set over to the said W. S. Clark their interest in $800 of said fund now in the hands of said Staton, trustee, as security for the said debt due Clark: Now, therefore, know all men by these presents, that we, Martha L. Wimberly, J. L. Wimberly, Lucy L. Wimberly, and Annie L. Wimberly, for and in consideration of the premises and of $1 in hand paid, do assign, transfer, and set over unto the said Clark all our right and interest in and to $800 in value of the said fund now in the hands of the said Staton, trustee, together with such interest as may accrue upon said $800 from this date, at the rate of 8 per cent per annum, and do hereby authorize and empower the said Staton, trustee, to credit the said indebtedness of the said Clark with the interest which may accrue upon the said $800 during the lifetime of the said Martha L., and at

her death to credit the said indebtedness of the said Clark with $800, if the interest of the parties hereto in the said trust fund now in the hands of said trustee shall amount to so much. The said Clark is to credit his indebtedness against the said J. L. Wimberly with whatever he may receive under and by virtue of this instrument." And on careful
(51) perusal of the contract we are of opinion that only the amount, $800, is included therein, and that it may not be extended so as to include the entire trust fund. This is undoubtedly the meaning of the recital, "desires to assign over their interest in $800 of the fund," and is the primary and more natural interpretation of the operative terms in the body of the contract, "do assign, transfer, and set over unto said Clark all our right, title, and interest in and to $800 in value of said fund."

It is insisted for plaintiff that a different significance is given to these stipulations by the closing terms of the instrument, "to credit the indebtedness of said Clark (on an amount due from him to the trust fund) with $800, if the interest of the parties hereto in the said trust fund now in the hands of the trustee shall amount to so much"; but to our minds there is nothing in the closing terms of the contract necessarily inconsistent with the stipulations referred to. The parties were evidently aware that the interest of any of the signatories might be withdrawn by the contingency attaching to their ownership, and the terms should be referred to the interest of all the parties as events might determine and in that part of the trust fund designated and assigned in the former portion of the instrument.

From the circumstances of the transaction it should not be readily inferred that these parties, plaintiff or defendant, contemplated that Annie should become the sole paymaster of John's indebtedness to the extent of her entire interest in the fund, and, if it be conceded that there is a repugnancy in the first and last clauses of the contract, we are of opinion that the former expressed the controlling purpose, and should be held determinative of its meaning. See 6 Ruling Case Law, article "Contracts," sec. 236.

This will be certified, that judgment be entered restricting the liability of defendant Annie to one-third of $800 of the fund.

Reversed.

Cited: Cilley v. Geitner, 182 N.C. 718 (1cc).

SOUTHERN COTTON OIL COMPANY v. A. E. SHORE ET AL., TRADING AS E. BREEN & CO.

(Filed 23 February, 1916.)

Trials—Voluntary Nonsuit—Appeal and Error.

The plaintiff in an action may, in proper instances, take a voluntary nonsuit at any time before the rendition of the verdict; and where the court has obtained the issues from the jury during their deliberation thereon, in an action upon contract, and the first issues have been answered in the plaintiff's favor and made known to them, but the answers to the issues as to damages are not known to them, and the judge delivers the issues again to the jury with the instruction that they may deliberate upon the issues and make such changes as they may desire, it is reversible error to refuse the plaintiff's motion for a voluntary nonsuit, made as the jury were retiring to again consider the issues.

APPEAL by plaintiff from *Bond, J.*, at April Term, 1915, of (52) WAYNE.

Civil action. The plaintiff sought to recover damages for the breach of a contract, dated 15 October, 1913, which was alleged to have been made between it and the defendants for the sale of certain "mill-run linters" and "second-cut linters," the defendants, as alleged, having agreed to take the entire output of the plaintiff's mill for the season of the years 1913 and 1914, and plaintiffs agreeing to deliver them, as fast as they could be made ready for shipment, at the prices stated in the contract.

The question as to the liability of A. E. and P. C. Shore turned upon the authority of S. Breen, who assumed to act for the defendants, to make the contract for them, and the subsequent ratification of the contract by the Shores.

The case was submitted to the jury upon issues which, with the answers thereto, are as follows:

1. Was the act and conduct of S. Breen, in making the contract sued on in the complaint, beyond the scope of the partnership business? Answer: "Yes."

2. Was the defendant S. Breen, in making the contract with the plaintiff, acting within the apparent scope of his authority? Answer: "No."

3. Did the defendants Shore and Shore have knowledge that S. Breen had made or entered into the contract sued on? Answer: "No."

4. If there was any limitation upon the authority of S. Breen to make the contract, did plaintiff have any knowledge or notice thereof? Answer: "No."

5. Did Southern Cotton Oil Company have notice at or before making of said alleged contract of any facts or circumstances calculated to put

a prudent man on notice that S. Breen was making said purchase for purposes outside of the scope of said partnership business? Answer: "No."

6. Did the defendants Shore and Shore, by their acts and conduct, ratify the transaction? Answer: "Yes."

7. Were the linters shipped from Tarboro worthless and without commercial value, as alleged in the answer? Answer: "No."

8. What was the difference in market value, if anything, of the linters shipped from Tarboro (52 bales) and the contract price at time Shore and Shore refused to take them? Answer: "No difference."

9. At contract price, what sum would represent the 52 bales sent from Tarboro at time it was refused by Shore and Shore, if
(53) said goods were of kind bought under alleged contract? Answer: $815.25" (by consent).

9½. Did plaintiff Southern Cotton Oil Company, to whose order the 52 bales were shipped from Rocky Mount, leave same with the railroad so they were lost, after plaintiff was notified by the defendants, Shore and Shore, that they would not receive same? Answer: "Yes."

10. What amount are defendants Shore and Shore indebted to the plaintiff? Answer: "$1."

11. In what amount is defendant S. Breen indebted to plaintiff? Answer: "$1."

The jury retired with the issues, after being charged by the court upon the law.

The following statement appears in the record:

"About 7 p. m. the judge was sent for, and, counsel for both sides being present, the jury handed the issues to the judge with part of the issues, including issues 10 and 11 as to damages, answered.

"The court having, at plaintiff's request, charged the jury to answer all the issues as to liability in favor of plaintiff in any view of the evidence, counsel for defendant agreed that, subject to defendant's exceptions to the correctness of the charge, the court could write the answers in favor of plaintiff to issues numbers 4, 5, and 6, and by consent of plaintiff the court wrote the answers to numbers 9 and 9½. This left all the issues answered, as appears in record, except the issues numbered 7 and 8. Each issue, with the answers to the same, except issues 7 and 8 and the issues as to amount of damages, was then read aloud in presence of counsel for both sides, and the jury agreed that such was their verdict as to all the issues then answered. The court then handed the paper back to the jury and told them to retire and consider their answers as to issues 7 and 8, and to return when they had answered them, if they wished no change in any others; and the jury then retired.

to their room. All of the above occurrences took place in presence of counsel for both sides, and without any objection.

"The plaintiff's counsel, soon after the jury went in their room, arose and said that plaintiff would take a nonsuit. Defendant objected; objection sustained, and plaintiff excepted.

"A few moments thereafter some question arose as to the exact language of issues 7 and 8, and the court told the officer to knock on the door of the jury room and ask the jury to send the paper to the court for a moment. The court took the paper and read issues 7 and 8, and asked if counsel for defendant objected to the withdrawal of issues 7 and 8, to which the reply was 'No.'

"The court then had the jury called in and, in the presence of counsel for both sides, stated that it had concluded to withdraw issues 7 and 8, and then did so. Counsel for plaintiff objected to the withdrawal of issues 7 and 8, and excepted to the action of the court in with- (54) drawing same. The jury was then called in and, the issues and answers to same, except the 7th and 8th, being read aloud, and being exactly as they were when the jury was sent out to consider issues 7 and 8, were again asked if that was their verdict before they were sent out to consider issues 7 and 8, and if it was still their verdict. They answered both questions in the affirmative. The court ordered the verdict as to all the issues except 7 and 8 to be recorded, and the plaintiff excepted. Before the jury was sent out to consider issues 7 and 8 counsel for plaintiff knew the answers to all the other issues, except the issues relating to damages, which had been answered by the jury before they first came in. When the court sent out to borrow the issues, as above stated, and got the paper, answers to issues 7 and 8 had been written by the jury, but, as far as the court knows, neither side knew what the answers to 7 and 8 were."

The following statement also is in the case:

"After the jury retired to consider its verdict the occurrences hereinbefore related took place, as shown by the memorandum made by the court at the time, the court now adding thereto this statement: 'At the time the verdict was handed back by the judge to the jury, and they were told to retire and answer issues 7 and 8, which were afterwards withdrawn, the court then regarded said verdict as in all respects completed except as to said issues 7 and 8, and would have had same recorded without handing them back to the jury but for the opinion of the court, at that time, that it would perhaps be better to have the answers to 7 and 8 as well as to the other issues, which answers as to 7 and 8 the court soon thereafter concluded were immaterial, as set out in the recital of the occurrences which precedes this statement. The court did not at any time regard issues 7 and 8 as being necessary to a deter-

mination of the action, but was actuated simply by a desire to have all facts before the Supreme Court, in the event that the court might mistake the law in laying down the proper rule as to the measure of damages. The court charged the jury fully as to the measure of damages, and no exception was taken to this part of the charge by the plaintiff, either at the trial or in its case on appeal.' "

This statement by the judge also appears:

"By inspection of the issues, it will be noticed that issues 7 and 8 were not necessary to the determination of case, but were more in the nature of questions of fact, so that in the event of an appeal, if the court did not lay down the correct rule as to the measure of damages, a new trial might be rendered unnecessary by reason of the facts to be ascertained by those two questions. That was the purpose of the court in submitting those two issues, as they were not tendered by either side nor objected to by either side."

(55) There was a verdict in favor of the plaintiff, assessing its damages, as shown by the record, and judgment was entered thereon. Plaintiff, after reserving all of its exceptions, appealed to this Court.

Langston, Allen & Taylor and Murray Allen for plaintiff.

F. S. Spruill for defendant.

WALKER, J., after stating the case: There was a petition in this Court for a *certiorari* to bring up the evidence and the judge's charge, which do not appear in the record, for the purpose of showing, as stated by counsel, the materiality of the 7th and 8th issues, if this Court failed to reverse the ruling upon plaintiff's voluntary tender of a nonsuit. But in the view we take of the case it is unnecessary to consider the petition.

A voluntary nonsuit is an abandonment of his cause by a plaintiff who allows a judgment for costs to be entered against him by absenting himself, or failing to answer when called upon to hear the verdict. 14 Cyc., 393. Plaintiff also may elect to enter a nonsuit, and this may be done at any time before the verdict is rendered. Under the early English practice the plaintiff had a right to be nonsuited at any stage of the proceedings he might prefer, and thereby reserve to himself the power of bringing a fresh action for the same subject-matter; and this right continued to the last moment of the trial, even till after verdict rendered, or, where the case was tried by the court without a jury, until the judge had pronounced his judgment; but this practice was not adopted here, and was abolished in England by 2 Henry IV., ch. 7, as early as the year 1400. See 6 A. and E. Pl. and Pr., p. 836 and note 4;

14 Cyc., 400; *Washburn v. Allen,* 77 Me., 344. The rule with us has been that the nonsuit may be taken at any time before verdict.

It was said by *Pearson, C. J.,* for the Court, in *Graham v. Tate,* 77 N. C., 120, 123: "A plaintiff can at any time before verdict withdraw his suit, or, as it is termed, 'take a nonsuit,' by absenting himself at the trial term. If he does so, and fails to answer, when called, by himself or by his attorney, the court directs a nonsuit to be entered, the cost is taxed against him, and that is an end of the case. Even when the plaintiff appears at the trial, takes a part in it by challenging jurors, examining and cross-examining witnesses, and by the argument of his counsel, if he finds from an intimation of the court that the charge will be against him, he may submit to a nonsuit and appeal. This is every day's practice. It is based upon the idea that the plaintiff announces his purpose not to answer when called to hear the verdict, and the advantage is that the plaintiff can have his Honor's opinion reviewed, and should the decision of the Supreme Court be against him, he can commence another action; whereas if he allows a verdict to be entered, it is conclusive unless set aside. Nay, according to the (56) course of the court, the plaintiff is at liberty to take a nonsuit by announcing his purpose to absent himself even after the judge has charged the jury and their verdict is made up, provided he does so before the verdict is made known."

Our case is much like that of *Cahoon v. Brinkley,* 168 N. C., 257. There six issues were submitted to the jury. The last three issues were answered by the court with the consent of the parties. The jury returned to the courtroom and stated that they had not agreed on the first three issues, but one of the jurors remarked that they had agreed or could agree on the first issue. The court directed the jury to retire to their room and answer the first issue, if they had agreed as to it, or could agree. They started toward the jury room, when plaintiff announced that he would take a nonsuit; but the court refused to permit him to do so, and he excepted. The jury returned with their answer to the first issue. The court received the verdict, withdrew the second and third issues, and entered judgment on the verdict as thus reformed. We held that the court erred in refusing the nonsuit, *Justice Brown* saying that "the plaintiff had a right to submit to a judgment of nonsuit, inasmuch as no verdict had been rendered," and the judgment was reversed because of the erroneous ruling. This case is not essentially different from that one. Eleven issues were submitted to the jury. They returned with all the issues practically answered, except those numbered 7 and 8. The court told the jury to retire and consider issues 7 and 8 and to return when they had answered them, "if they wished no change in any others." It was at this time that the nonsuit was taken,

or rather tendered, and refused. It is evident that when plaintiff chose to be nonsuited there had been no complete verdict rendered, because the jury had not answered all the issues, as they had been instructed to do; and the judge at that time apparently so regarded it, for he "concluded thereafter" that issues 7 and 8 were immaterial, and he sent the jury back to their room with the direction to complete their verdict by answering the 7th and 8th issues, and to change the answers to other issues if they were so minded. This left the entire verdict within the control of the jury, except, perhaps, the issues answered by the court. They had the power to change the answers to the last two issues and award substantial instead of nominal damages. The plaintiff did not know what had been the answers of the jury to the issues 10 and 11, when it elected to be nonsuited, and they were the vital issues. The cause of action or liability of defendants had already been established, and the remaining inquiry related to the amount of damages. So that the plaintiff had no advantage of the defendant in that respect, having no superior knowledge as to the contents of the verdict; but if it had, the fact remains that there had been no verdict at the time it
(57) tried to withdraw from the court by a nonsuit. Because the court may have afterwards stated its view as to the materiality of issues 7 and 8 can make no difference in the result. The jury had delivered no verdict, and the court had not accepted what they had done as a verdict, otherwise they would not have been told to retire and fill out their verdict, or change it if they wished to do so. There was no reason at that stage of the case why the plaintiff should have become frightened and run away from the verdict. He knew that his cause of action was secure, and he was ignorant of what would be the damages. So far as then appeared to him, he could have gone on with the case in perfect safety. From some undisclosed motive he decided that it was better to withdraw, as he had the right to do.

No harm has come to the defendant, except delay, for the plaintiff must pay the costs. The mere prospect of annoyance from a second litigation is not considered as legally prejudicial to defendant. *Pullman Palace Car Co. v. Cent. Tr. Co.*, 171 U. S., 138 (43 L. Ed., 108).

It is worthy of serious consideration whether issues 7 and 8 were not material or, at least, proper issues in view of the averment in the answer that the linters were "commercially worthless"; but we will express no opinion upon this question until it becomes necessary to do so. We merely decide the single proposition that, without any regard to the real or legal merits of the controversy, there was error in refusing the nonsuit, and there must be a reversal of the judgment for this reason, with a direction to enter judgment below upon the voluntary nonsuit, with costs in that court against the plaintiff.

Reversed.

Cited: Corey v. Hooker, 171 N.C. 230 (c); *Light Co. v. Mfg. Co.,* 209 N.C. 561 (c); *Sink v. Hire,* 210 N.C. 403 (cc); *McFetters v. McFetters,* 219 N.C. 734 (p).

J. D. OWEN v. TOWN OF WILLIAMSTON.

(Filed 23 February, 1916.)

1. Municipal Corporations—Cities and Towns—Animals at Large—Ordinances—Nuisance.

An ordinance of a town in a county not having the fence law declared the running at large of hogs, etc., within the town limits a nuisance and provided for impounding them, and imposed a penalty upon the owner, together with a charge for the cost of keeping them. *Held,* the ordinance applied to owners who resided in the county as well as those residing in the town, and is a valid one.

2. Same—Charge for Impounding—Statutes.

A town ordinance in a county not having the fence law declared the running at large of hogs, etc., within the town limits a nuisance, and provided for impounding them and collection of the cost of keeping them, as well as a penalty on the owner. The plaintiff lived in the county, and his hogs were taken up in the corporate limits of the town, were impounded, and he was charged the cost for keeping them. *Held,* the law recognizes the difference between imposing a penalty for the violation of the ordinance and a charge for keeping up the hogs. Revisal, secs. 1679, 1682.

3. Municipal Corporations—Cities and Towns—Animals at Large—Nuisance—Particular Instances.

Permitting hogs to run at large within the corporate limits of a town in violation of a town ordinance is a nuisance, and where the ordinance itself so declares, it is unnecessary, in order to convict for a violation thereof, to show that any particular instance amounted to a nuisance.

APPEAL by plaintiff from *Rountree, J.,* at September Term, (58) 1915, of MARTIN.

This is claim and delivery for three hogs, begun before a justice of the peace and submitted upon case agreed.

B. A. Critcher for plaintiff.

No counsel for defendant.

CLARK, C. J. This is an appeal from a judgment upon a case agreed, in claim and delivery. It is agreed that the plaintiff lives 2 miles

from Williamston, Martin County, on a farm; that his three hogs in controversy strayed into the corporate limits of Williamston, where they were taken up by the town officers and impounded. It was the first time that his hogs had strayed into the town. The officers of the town did not exact any impounding fees, but required the plaintiff to pay 75 cents for feeding and caring for them until called for. He refused to pay the same, and brought this action for claim and delivery before a justice of the peace. Judgment against plaintiff for 75 cents cost of feeding the hogs.

The ordinance of the town under which the hogs were taken up provides:

"ORDINANCE 36. Whereas running at large of horses, mules, jennets, jacks, cows, hogs, goats, sheep, and geese in the town of Williamston is hereby declared a nuisance to the citizens of said town: It shall be the duty of the constable to take up such animals so running at large in said town, for which he shall receive from the owner of said animals a fee" (here followed the fee specified for each of the animals named) and "10 cents a day for feeding and keeping such animal." With further provision for advertisement and sale and for payment into the treasury of the town. There is a further provision: "The fees from impounding country stock shall be one-half the above fee in each instance, and may not be charged against the owner until after the third impounding. Fees for feeding shall be the same in both cases."

(59) The case agreed finds: "The plaintiff has not been charged any fee for impounding, but the 75 cents for feeding and caring for the said hogs for three days. In Martin County there is the fence law and stock is permitted to run at large in the country."

The exceptions are to the judgment against plaintiff for 75 cents for feeding the hogs:

1. That the plaintiff lives 2 miles from town, and that the stock ordinance is void as to the stock of a nonresident of the town.

2. That before the town can subject the stock of a nonresident to its regulations it has got to declare the animal itself a nuisance.

3. That under the general law of the State the citizens of Martin County have the right to let their stock run at large, and nonresidents are not subject to town regulations unless the particular stock is declared a nuisance.

The court properly adjudged that the plaintiff should pay the 75 cents. It is true that Martin County has not, as a county, the no-fence or stock law. But the town of Williamston has such provision, and doubtless there are other localities in the county which forbid the running of stock at large. It was within the authority of the town commissioners to pass such ordinance, as has been repeatedly held by this Court. In

S. v. Tweedy, 115 N. C., 705, it is said: "It was competent for the town to enact the ordinance that no hogs should run at large within the town limits, and to prescribe a penalty for violation of such ordinance, and it would make no difference if the owner of the hog should live outside of such limits," citing *Rose v. Hardie,* 98 N. C., 44; *Hellen v. Noe,* 25 N. C., 493; *Whitfield v. Longest,* 28 N. C., 268.

When stock is found running at large in forbidden territory it is a violation of the law in that territory, and it makes no difference whether the owners live within the territory or without. Those living without the territory are not privileged to violate the law any more than those living within the territory. In *S. v. Mathis,* 149 N. C., 548, *Connor, J.,* held that when the stock law is in force in a county and the owner of stock over the dividing line in another county willfully permits his stock to run at large, it is not a valid defense that no fence had been built on the line to prevent the stock from the adjoining county running at large in the county where the trespass was committed. It is true, the act had declared the county line a lawful fence, but *Connor, J.,* said: "While it is usual for the counties or townships which adopt a 'stock law' to build a common fence, it is not necessary that they do so." In *S. v. Garner,* 158 N. C., 630, the Court held that the owner of cattle who permits them to run at large in fence territory, but they stray across the line into a no-fence territory, is liable, though he does not turn them out for that purpose. He purposely turns them out and is responsible for the fact that they violate the law by stray- (60) ing into territory where stock are forbidden to run at large.

This is recognized to be the law by chapter 141, Laws 1895, which provides that where any city or town prohibits stock running at large it cannot collect fees for impounding the cattle of persons who live more than a mile from the corporate limits which have strayed into the town limits less than three times. This act was construed and held to be valid in *Broadfoot v. Fayetteville,* 121 N. C., 418. The plaintiff himself cites us to Revisal, 5453, to show that this act of 1895 has been repealed. If so, the effect would be simply to repeal the prohibition against the town exacting fees for impounding where the stock have strayed therein from outside territory not more than three times. But that question is not presented, because it is stated in the agreed facts that the town did not exact any fees for impounding, but merely compensation for the cost of feeding the stock, which is a different matter. *Aydlett v. Elizabeth City,* 121 N. C., 4.

The law recognizes the difference, for Revisal, 1679, prescribes the impounding fees for taking up stock running at large, and 1682 prescribes for payment for feeding such stock when taken up. The former fees go to the officer or the town or county, and the latter is a humane

provision without which the stock might suffer for want of food and water.

The town ordinance makes it a nuisance for the animals named to run at large within town limits. It had authority to do this, and it was not necessary to go through the solemn form that the court should adjudge in each instance that the act is a nuisance. The owner of the stock has violated a valid ordinance by allowing his stock to run at large. Besides, it is a self-evident fact, even if the ordinance had forbidden stock from running at large without specifically declaring that it was a nuisance. The owner of the hogs is not authorized to violate the town ordinace by permitting his hogs to run at large therein either by the fact that he lives outside of the town limits nor because his hogs do. *S. v. Tweedy,* 115 N. C., 705; *Aydlett v. Elizabeth City,* 121 N. C., 7; *Jones v. Duncan,* 127 N. C., 119.

Affirmed.

Cited: Marshburn v. Jones, 176 N.C. 524 (1c).

EDWARD LUDWICK BY HIS NEXT FRIEND v. UWARRA MINING COMPANY.

(Filed 23 February, 1916.)

1. Appeal and Error—Frivolous Appeals—Motions.

While ordinarily an appeal lies to the Supreme from the Superior Court as a matter of right, it is required that it must be *bona fide* for the purpose of reviewing some alleged error; and when from the record it appears that the appeal is frivolous and made solely for delay, it will, upon due notice to the appellant, be dismissed upon appellee's motion.

2. Same—Record—Removal of Causes—Discretion.

Upon refusal of defendant's motion to transfer a cause for improper venue, the defendant gave notice of appeal which he did not perfect, and at some subsequent term renewed the motion, but upon another ground—for the convenience of witnesses and to promote the ends of justice, etc., under Revisal, sec. 425 (2), and appealed from the refusal of this motion, and perfected it. *Held,* the granting or refusing of the second motion was in the discretion of the trial judge, and upon the record the appeal will be held frivolous by the Supreme Court and dismissed upon appellee's motion therein properly made.

(61) THIS is a motion to remove this cause, made before *Lane, J.,* at December Term, 1915, Superior Court of RANDOLPH. The motion was overruled, and defendant appealed.

Hammer & Kelly for plaintiff.
Charles A. Armstrong, J. A. Spence for defendant.

BROWN, J. The plaintiff moves upon due notice to dismiss this appeal upon the ground that it appears upon the face of the record that it is frivolous and made for purpose of delay only. At September Term, 1915, the defendant moved for a change of venue to Montgomery County, upon the ground that plaintiff was not a resident of Randolph County, but resided with his father in Gadsden, Ala., and that the cause of action arose in Montgomery County, of which county defendant is a resident, having its property and principal place of business there. No other ground of removal was set out in the affidavits or written motion. Upon the hearing, *Lane, J.*, denied the motion, and defendant appealed. That appeal was never prosecuted.

At December Term, 1915, before the same judge, the defendant again moved the court to remove the cause to Montgomery County, under section 425, subsection 2, Revisal, which reads as follows: "An action may be changed by order of the court when the convenience of witnesses and the ends of justice would be promoted by the change."

The judge, upon considering the affidavits offered, denied the motion. The defendant appealed to the Supreme Court. The transcript of appeal having been duly docketed, the plaintiff moves to dismiss upon the ground stated. We are of opinion that the motion should be granted.

While an appeal to this Court from the lower court is a matter of right, the appeal must be *bona fide* for the purpose of reviewing some alleged error committed by such court. Where it appears upon the record that the appeal is frivolous and made solely for delay, the appeal will be dismissed. A demurrer will be overruled and, frequently, final judgment rendered when it appears on its face to be friv- (62) olous and filed for purpose of delay. When the defendant moved upon affidavit for a change of venue at September term only one ground of removal was set out. At same time defendant had opportunity and might as well have set out the other grounds upon which a change of venue is now asked, but failed to do so.

The defendant appealed from the refusal of the court at September term to remove the cause, and failed to prosecute that appeal. At December term, when the cause stood for trial, defendant renews the motion to remove to Montgomery County, basing it upon a different ground, viz., the convenience of witnesses, and when the court again refuses to remove the cause, defendant again appeals.

A party to an action cannot be permitted to move repeatedly at each succeeding term for a change of venue and then appeal from each successive refusal for purposes of delay.

The ground upon which this last motion to remove is based is a matter solely within the discretion of the judge below. There is not a scintilla of evidence in the record that the judge grossly abused his discretion, and in the absence of it this Court has repeatedly held, and as late as the last term, that the Superior Court may change the place of trial for the convenience of witnesses and to promote the ends of justice, but that such motion is addressed entirely to the discretion of the court, and that a denial of such motion will not be reviewed by this Court upon appeal in the absence of evidence of a gross abuse of such discretion. *Craven v. Munger,* 170 N. C., 424; *Lassiter v. R. R.,* 126 N. C., 508; *Baruch v. Long,* 117 N. C., 511, and cases cited in notes.

This question has been so often decided by this Court that we must conclude that this appeal is frivolous and taken solely for delay.

The motion is allowed.

Defendant's appeal dismissed.

Cited: Blount v. Jones, 175 N.C. 708 (1cc); *Barnes v. Saleeby,* 177 N.C. 260 (1cc); *Hotel Co. v. Griffin,* 182 N.C. 540, 541 (1cc); *Ross v. Robinson,* 185 N.C. 550 (1cc); *Indemnity Co. v. Hood, Comr.,* 225 N.C. 362 (2c); *Stephenson v. Watson,* 226 N.C. 743 (1cc).

WINBORNE & CO., INCORPORATED, v. FULTON BAG AND COTTON MILLS.

(Filed 23 February, 1916.)

1. Vendor and Purchaser—Alternate Obligation—Election of Vendor.

Where an obligation is in the alternative, the selection is usually at the will of the obligor; and where it is provided in a contract of sale of burlap bags that the seller shall not be liable for damages for failure to ship the goods under certain conditions, if imported, the terms specified refer to imported goods at the election of the seller to furnish them.

2. Same—Contracts—Limiting Liability—Burden of Proof.

The defendant contracted to sell and deliver burlap bags to the plaintiff, to be imported at his election, and by its terms excluding liability of the defendant for failure to deliver due to storms, etc., or other causes beyond his control. The failure of the defendant to deliver the goods was admitted. *Held,* the burden of the issue was on the defendant, and its evidence tending only to show that it had elected to supply imported goods for which it had placed its orders in foreign parts; that the goods had been shipped, but the vessel had never arrived in New York, is insufficient, and not meeting the requirement that the defendant show that the vessel was seaworthy or a proper one, or that it had exercised due diligence in performing the obligations of its contract.

3. Same—Trials—Evidence—Appeal and Error.

Where the seller of goods seeks to avoid liability for his failure to deliver them under the terms of the contract, under a stipulation therein that he should not be held responsible for conditions affecting their delivery which were beyond his control; and his evidence is insufficient to shift the burden of the issue placed on him, its rejection by the trial judge is not reversible error, though it is relevant to the inquiry.

4. Vendor and Purchaser—Contract—Breach—Measure of Damages.

Where the seller of goods has wrongfully failed to deliver them in accordance with his contract, the measure of damages is the difference between the contract price and the market value at the time when and the place where they should have been delivered.

APPEAL by defendant from *Peebles, J.*, at September Term, (63) 1915, of CHOWAN.

Civil action to recover damages for alleged breach of contract on part of the defendant in failing to deliver 25,000 burlap bags, whereby plaintiff was greatly damaged.

On denial of liability, verdict was rendered as follows:

1. Was defendant's failure to deliver these bags to the plaintiff caused by conditions or circumstances beyond the defendant's control, as alleged?

2. What damage, if any, is plaintiff company entitled to recover?

The jury answered the first issue "No" and the second issue "$1,000 and interest."

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

Pruden & Pruden and S. Brown Shepherd for plaintiff.

W. M. Bond, Jr., and E. G. Bond for defendant.

HOKE, J. Plaintiff declared on and offered in evidence a written contract of sale of the burlap bags for October delivery, 1914, signed by both of the parties, the portions of same relevant to the inquiry being in terms as follows:

Order No. 32. (64)

Sold to WINBORNE & Co.

Routing, Norfolk, Va. Ship about (see below).

Terms: Net 10 days. Payable at New York in New York funds.

Subject to revision at any time by our credit department.

Quantity	*Brands*	*Price*
25,000	Burlap Bags, 70 inches, 7½ oz.	at $78.

Ship as ordered. During October, 1914; mostly between 10th and 20th.

Freight prepaid to Norfolk.

FREIGHT.

It is agreed that seller shall not be liable for any damage for failure to ship goods, provided it should be prevented from so doing by storms, floods, fires, strikes, or any other condition or circumstance affecting either the safe arrival of goods, if imported, or in the factory of seller, or from any other cause beyond its control.

Defendant admitted the execution of the contract and failure to deliver, claiming in defense that by the terms of the agreement the contract contemplated and applied to "imported goods," and that the failure to import the same arose from causes beyond its control, and so not in breach of its obligations.

We are inclined to approve the position of the defendant that the contract referred to "imported goods," and, in any event, that it did so at the option of the defendant; the principle being that when an obligation is in the alternative, the selection is usually at the will of the obligor. *Horner v. Electric Co.,* 153 N. C., pp. 535-539, citing *Holmesley v. Elias & Cohens,* 75 N. C., 573; *Exchange and Building Co.,* 90 Va., 83; *Powell v. City of Duluth,* 91 Minn., 53; Page on Contracts, sec. 1391; 7 A. and E. (2 Ed.), 125. But if this be conceded, we find no reversible error in the record to defendant's prejudice.

On the trial it was made to appear that these bags were made at Dundee, Scotland, from raw material procured in India; that imported goods were those that had to be so obtained after contract made, and bags already here in stock at such time were termed spot goods, and on the first issue, that as to liability, defendant offered witnesses for the purpose of showing that, electing to apply the contract to imported goods, defendant had placed an order for the raw material sufficient in quantity to fill its contract with plaintiff, and same had been shipped from Calcutta, India, in July, 1914, on the German steamer *Stumfeld;* that said ship sailed from Calcutta on 8 July, 1914, and same had never arrived at New York.

This evidence, on objection, was excluded by the court, and, being all that defendant proposed to introduce directly relevant to the
(65) issue, the court very properly charged that a failure to deliver having been admitted, the burden of the issue was on defendant, and there were no facts in evidence to show legal excuse for its failure. Nor can the ruling of the court in excluding the evidence be held for reversible error, for, while the defendant, in our opinion, was entitled, at its election, to apply the obligations of the contract to "imported goods," it should be held to due diligence in procuring the same, the apposite terms of the contract justifying its failure only for "causes beyond its

control," and the proposed evidence fails to meet such requirement. It does not show that the raw material was shipped in time for manufacture and subsequent delivery; that it was shipped on a seaworthy vessel or even one engaged in that line of business or along the usual route, or that the failure of the arrival and delivery of the goods could have been overcome by proper effort on defendant's part.

The evidence offered being, therefore, immaterial or clearly insufficient, if true, to have affected the result, its exclusion may not be held for reversible error, even though it may be in some respects relevant to the inquiry. *Smith v. Lumber Co.,* 142 N. C., 26; *Puffer v. Baker,* 104 N. C., 148.

On the issue as to damages the charge of the court, taken as a whole, presented the question fairly to the jury, directing them, in effect, that "if there was wrongful failure to deliver on the part of defendant, the measure of damages was the difference between the contract price and the market value at the time when and place where they should have been delivered."

The charge is in accord with the decision to which we were cited by counsel, *Tillinghast v. Cotton Mills,* 143 N. C., 268; *Hosiery Co. v. Cotton Mills,* 140 N. C., 452, and the verdict shows that the jury made fair and intelligent response to the ruling.

There is no error, and the judgment in plaintiff's favor must be affirmed.

No error.

(66)

WASHINGTON HORSE EXCHANGE v. L. AND N. RAILROAD COMPANY.

(Filed 23 February, 1916.)

1. Carriers of Goods—Live Stock—Damages—Weather Conditions—Improper Cars—Instructions.

In an action to recover damages against a railroad company for its negligence in transporting a car-load shipment of live stock, when there is conflicting evidence as to whether the damages were caused by an improper car or by the condition of the weather, an instruction not as full or explicit as it might have been, but which gave the defendant the benefit of any finding that the injury to the animals was not due to its negligence, but solely to the condition of the weather, is not reversible error on defendant's appeal.

2. Carriers of Goods—Negligence—Live Stock—Improper Cars—Shipper's Inspection.

A railroad company is not relieved of its liability for damages arising to a car-load shipment of live stock, caused by the selection of an improper car, because of the fact that the shipper had examined the car and accepted it as suitable and sufficient.

3. Carriers of Goods—Live Stock—Negligence—Evidence.

Where the evidence tends to show that a railroad company had received a car-load shipment of live stock in good condition, and delivered it at destination with the animals in bad condition, the jury may reasonably and fairly infer that the damages were caused by the defendant's negligence.

4. Carriers of Goods—Live Stock—Damages—Injury—Written Notice—Waiver.

The stipulation in a bill of lading issued by the railroad company for the interstate transportation of live stock, requiring that written notice of any claim for damages be given the company before removal of the stock at place of destination, is waived by the actual knowledge of the carrier's agent of the condition of the stock before the removal took place, or such knowledge will be considered as in substitution of the written notice.

5. Commerce—Interstate—Carriers of Goods—Live Stock—Limited Valuation—Measure of Damages—Statutes.

Where a shipment of animals in interstate commerce was made before the enactment of the Cummins amendment (4 March, 1915) under a live-stock bill of lading which stipulates that in consideration of a less rate of freight the value of each animal shall not exceed $100, the valuation to be made at the point of shipment, the measure of damages for injury to the stock caused by the negligence of the defendant must be based upon a valuation not exceeding $100, and the jury should determine to what extent the animals were damaged or their value impaired; assuming $100 to be the limit of value as to each one of them, and assess the damages accordingly, the true value of the animals to be ascertained at the place of shipment, as required in the bill of lading.

6. Appeal and Error—Instructions—Objections and Exceptions.

Where damages to a car-load shipment of live stock, caused by the negligence of a railroad, with an agreed limited valuation, are to be determined by a jury in accordance with the valuation at the point of shipment, under the bill of lading issued therefor, and it is clearly implied in the charge of the court that the damages should accordingly be determined, and no exception to the charge is taken in this respect, a new trial will not be granted on appeal.

7. Appeal and Error—Instructions Requested—Correct in Part.

It is not reversible error for the trial judge to refuse a special request for an instruction which, though correct in part, is in some respect objectionable. The instruction must be correct as a whole.

(67) APPEAL by defendant from *Cooke, J.*, at October Term, 1915, of BEAUFORT.

The plaintiff sued to recover damages for injuries to horses and mules shipped by it from East St. Louis, in the State of Illinois, to Washington, N. C., over the defendant's line of railway, the Norfolk Southern

Railroad, and the lines of intermediate carriers. There were two shipments. One, consisting of twenty-six horses and twenty-six mules, was made on 2 January, 1912, and the other, consisting of twenty-two horses and four mules, on 18 January, 1912. Plaintiff alleged that some of the animals were either killed or missing, and others seriously injured and damaged by the negligence of the carriers in the course of the transportation. He claimed that the total loss to him on both shipments was $2,701.30, for which he prayed judgment. The defendant L. and N. Railroad Company, the initial carrier, in its answer, relied upon the character of the shipment, as being interstate, and especially upon the provisions of the act of Congress known as "An act to regulate commerce" and the several acts supplementary thereto and amendatory thereof, and more especially the acts of Congress known as "The Hepburn Act" and "The Carmack Amendment," and it specially claimed the benefit and protection of the said Federal legislation. It also averred that it issued bills of lading for the two shipments of stock, each of which contained a clause limiting the liability of the carrier for any loss of or damage to the animals, to the value thereof at the place of shipment, the maximum of which is agreed to be in this case $100 for each animal, the total recovery for loss or injury not to exceed that amount; and there was this futher provision, that the shipper, before removing the animals from the place of final delivery to him, should, as a condition precedent to his right of recovery for loss or injury, give the last carrier, or the one from whom he is to receive the animals, written notice of his claim before removing them, both stipulations being based on reduced rates of transportation as shown in the regular tariffs properly filed and promulgated. The two identical clauses in the bills of lading are in these words and figures:

"Should damage occur for which the said carrier may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed, for a jack $150, for a horse or mule $100, mare and colt together $100, yearling colt $50, cow and calf together $35, domestic horned animals $30 each, yearling cattle each $15, calves, hogs, sheep, or goats $5 each, chickens, ducks, and guinea fowls $2.50 per dozen, geese $3.50 per dozen, and turkeys $5 per dozen, which amounts it is agreed are as much as such animals as are herein agreed to be transported are reasonably worth.

"As a condition precedent to the shipper's (or consignee's) right to recover any damages for loss or injury to said animals, he will give notice, in writing, of his claim therefor to the agent of the rail- (68) road company, or other carrier from whom he receives said animals, before said animals are removed from the place of destination above mentioned, or from the place of delivery of the same to the said

shipper (or consignee) and before said animals are mingled with other animals."

The defendant then avers that the plaintiff failed to give the written notice of his claim for loss or damage before removing the animals, and that his recovery should be based upon the valuation of each animal at not more than $100, and not upon any higher value.

The plaintiff replied that, while there was written notice given as to the first shipment and none as to the other, defendant had actual notice of the loss of and injury to the animals in the second shipment before their removal from the station or premises of the Norfolk Southern Railroad Company at Washington, N. C.

The court charged the jury with reference to the notice as follows: "On the 2d issue I charge you that if you find from the evidence and by its greater weight that the manager of plaintiff while unloading the stock at Washington gave the agent of the Norfolk Southern Railroad Company the writing introduced in evidence and relied on as the notice, you will answer it yes; and as to the 6th issue I charge you that if you find by the greater weight of the evidence that while the second shipment was being unloaded the plaintiff brought to the attention of the station agent, Singleton, the condition of the stock, and Singleton saw and understood it, and that the agent Myers went up to the stables next day and saw the stock, you will answer it yes."

With regard to the notice, the court refused to instruct the jury, as requested by the defendant, that neither actual knowledge of the receiving agent at Washington, N. C., even if the matter had been brought specially to his attention, nor a verbal notice of the plaintiff's claim would take the place of the written notice required by the terms of the bill of lading.

The court then charged the jury, upon the question of notice, as follows: "It is stipulated in the 9th section of the contract that the value of a horse or mule injured by the negligence of the defendant should be fixed by its value at the time and place of shipment, and it was agreed between the parties that the value of a horse or mule should not exceed $100. The court charges you that if you come to assess damages under the 3d issue, you should allow to the plaintiff the value of such horse or horses or mules as may have been lost by the negligence of the defendant or its connecting carriers, not to exceed $100 for the total loss of each. The court charges you that if you come to the 5th and 10th issues, that the proper measure of damages by which you will be guided is the actual market value of the damaged horses or mules in their damaged condition, if you find they were damaged, at the
(69) time and place of shipment; and if you should find that any of the horses and mules would have been worth in that condition at

the time and place of shipment $100, then the plaintiff is not entitled to recover any sum for such damaged horses or mules."

The court further charged, as to the negligence of the defendant, that "It was the duty of the defendant to use reasonable care and prudence in loading and in the selection of cars and in handling the stock and in unloading and reloading for feeding, and that this care should have reference to the weather conditions; and if you find by the greater weight of the evidence that the railroad company failed in this duty, and this failure was the proximate cause of the injury to the stock, you should answer the first issue yes."

The jury returned the following verdict:

1. Was the shipment of 2 January, set out in the first cause of action, injured by the negligence of the defendant or its connecting carriers, as alleged? Answer: "Yes."

2. If so, was notice thereof given by plaintiff before or at the time of receiving same? Answer: "Yes."

3. If so, what damages, if any, is plaintiff entitled to recover for such horses or mules as were totally lost by reason of such negligence? Answer: "$200."

4. What damages, if any, is plaintiff entitled to recover for extra attention and feed and medicine given said animals by reason of injuries caused by the negligence of the defendant or its connecting carriers? Answer: "$192,"

5. Was the shipment of 18 January, set out in the second cause of action, injured by the negligence of defendant or its connecting carriers, as alleged? Answer: "Yes."

6. If so, did plaintiff give notice thereof before or at the time of receiving same, as required? Answer: "Yes."

7. If so, what damages, if any, is plaintiff entitled to recover for such horses or mules as were totally lost by such negligence? Answer: "$400."

8. If so, what damages, if any, is plaintiff entitled to recover for extra service and attention and feed necessarily given said animals by reason of such negligence? Answer: "$72."

Judgment was entered upon the verdict, and defendant appealed.

Ward & Grimes for plaintiff.

Small, MacLean, Bragaw & Rodman for defendant.

WALKER, J., after stating the case: First. While the charge of the court in this case was not as full or as explicit as it might have been, it was sufficiently clear for the jury to understand what was the rule of law as to the liability of defendant for negligence, and (70)

it gave the defendant the benefit of any finding that the injury to the animals was due not to defendant's negligence, but solely to the condition of the weather. We discussed fully, in *Kime v. R. R.*, 160 N. C., 457, the duty and responsibility of a carrier by rail with respect to the selection of a suitable car, and also with regard to the care of the animals during the transportation, and it is not necessary that more should be said here. We there held that the fact that the shipper happened to examine the car and believed it to be suitable and sufficient would not relieve the defendant of liability if in fact it was defective. We said in that case: "A general stipulation that the shipper has examined the car in which the stock is shipped, and accepts it as suitable and sufficient, will not estop him from recovering for injuries due to a defective car, inasmuch as the carrier cannot limit his common-law liability so as to exempt himself from the consequences of his own negligence." 6 Cyc., p. 441; 2 Hutchison on Carriers (1906), sec. 646 (324), and p. 712; *R. R. v. Dies,* 91 Tenn., 177.

Second. There was some evidence that the stock was in good condition when delivered to the initial carrier at East St. Louis, or, at least, there were facts and circumstances from which an inference to that effect could fairly and reasonably have been drawn by the jury. The defendant's evidence furnished some proof of the fact, and also the plaintiff's.

Third. The defendant contends that the plaintiff has not shown compliance with the stipulation in the bill of lading requiring written notice of any claim for damages to be given before removal of the stock at the place of destination, but there was evidence that there was actual knowledge by the agent of the condition of the stock before the removal took place, and we have held this to be a waiver, or rather a substitute for such notice in writing. Whether right or wrong, we have so decided. The case of *Baldwin v. R. R.*, 170 N. C., 12, settled the following points:

1. Stipulations in bills of lading covering interstate shipments of live stock, requiring written notice of claims for damages to be given before the stock is removed from the carrier's possession, are valid.

2. The requirement in an interstate bill of lading that notice of damage to live stock shall be in writing is waived by actual knowledge on the part of the carrier of the injury.

3. The rules laid down by this Court after the passage of the Elkins Act of 1903. (act Cong. 19 February, 1903), ch. 708, 32 Stat., 847 (U. S. Com. Stat., 1913, secs. 8597-8599), that stipulations in bills of lading covering interstate shipments of live stock, requiring written notice of claims for damages, are valid, and that such written notice is waived by actual knowledge of the injury on the part of the carrier, will be

adhered to until a declaration by the United States Supreme Court (71) that such rules are abrogated by the act.

4. The rule permitting knowledge to supply the place of written notice, being a mode of proof applicable alike to all railroads and in favor of all shippers, and enforced against a carrier who has had possession, with every opportunity to know the extent of the injury and its cause, is not a discrimination between railroads, nor a preference in favor of a particular shipper at the expense of others.

That case was approved in the later case, at the same term, of *Mewborn v. R. R.,* 170 N. C., 205. This question, therefore, is closed so far as this Court is concerned. We simply follow our own precedents, which, as stated in the *Baldwin case,* must stand until reviewed and reversed. But we will again refer to this subject.

Under the rule laid down in *Baldwin's case,* to which we have referred, actual knowledge by the last carrier, or its agent, at the place for delivery to the consignee will in law be ascribed to the initial and other carriers in the line of transportation, and it was so held, we think, in that case, and also in *Mewborn's case, supra,* where the action was brought against this same defendant, though the horses and mules were deliverable, and were actually delivered, at Kinston, N. C., by the Southern Railway Company, which was the last carrier.

Fourth. We are of the opinion that the court gave to the jury the correct instruction as to the measure of damages. It cannot be that if the horses or mules were lost or injured by defendant's negligence, but were still worth as much as $100 apiece, the plaintiff would not be entitled to recover anything for the loss of or damage to them. The clause of the contract, as to value, was intended to limit the recovery to an amount not exceeding the stipulated value, in consideration of the reduced freight rate, and not to deprive the shipper of any redress for the defendant's breach of its contract to safely carry and deliver to the consignee, or for the tort growing out of its negligence in failing to properly transport and care for the stock. The correct rule of damages requires that the jury should determine to what extent the horses and mules were damaged or their value impaired, assuming $100 to be the limit of the value as to each one of them, and assess the damages accordingly; or, in other words, the assessment of damages, as to each animal, must be based upon a valuation not exceeding $100, it being the contract limitation and not the actual valuation which determines the measure of damages. If the rule as stated by the defendant in its prayer for instructions should govern, damages would rarely be recovered under such contracts of carriage, however apparent it may be that the carriers' negligence caused the injury. The true value, within the restriction mentioned, should be ascertained at the place of shipment, as that is

provided for in the bill of lading. 4 Ruling Case Law, 930;
(72) *M. & M. Transportation Co. v. Eichenberg,* 109 Md., 211 (130 Am. State Rep., 524). This Court held the clause in the bill of lading fixing or limiting the value of the stock to be invalid so far as it is an exemption from its liability for negligence or is unjust or unreasonable. *Pace Mule Co. v. R. R.,* 160 N. C., 215, 224; *Stehli v. Express Co., ibid.,* 493. In the former case the Court said at p. 224: "It is upon these principles that we have held that the valuation clause in a bill of lading is inoperative when relied on to exempt from liability for negligence, and cannot diminish the recovery of damages caused by such negligence. *Gardner v. R. R.,* 127 N. C., 293; *Everett v. R. R.,* 138 N. C., 71; *Stringfield v. R. R.,* 152 N. C., 128; *Kissenger v. R. R.,* 152 N. C., 247; *Harden v. R. R.,* 157 N. C., 238. It has heretofore been recognized that the cases of *Jones v. R. R.,* 148 N. C., 449, and *Winslow v. R. R.,* 151 N. C., 250, are not in harmony with the authorities in this State and elsewhere, and they are now overruled." But in *Adams Express Co. v. Croninger,* 226 U. S., 491; *M. K. & T. R. Co. v. Harriman,* 227 U. S., 657 (57 L. Ed., 690); *K. C. So. Ry. Co. v. Carl,* 227 U. S., 683; *S. A. L. Ry. Co. v. Pace Mule Co.,* 234 U. S., 751 (58 L. Ed., 1571); *Southern Express Co. v. Stelhi,* 238 U. S., 605 (59 L. Ed., 1485), and other cases, which are collected in 59 L. Ed., at p. 1485, the Federal Supreme Court held that:

1. State laws or policy nullifying contracts limiting the liability of a carrier for loss or damage to the agreed or declared value upon which the rate was based are superseded, so far as interstate shipments are concerned, by the Carmack amendment of 29 June, 1906, sec. 7 (34 Stat. at L., 593, ch. 3591, U. S. Com. Stat., Supp. 1911, p. 1304), to the act of 4 February, 1887 (24 Stat. at L., 386, ch. 104), which furnishes the exclusive rule on the subject of the liability of a carrier under contracts for interstate shipment.

2. The shipper and carrier of an interstate shipment are not forbidden to contract to limit the carrier's liability to an agreed value made to adjust the rate by the provisions of the Carmack amendment of 29 June, 1906, to the act of 4 February, 1887, sec. 20, prohibiting exemptions from the liability imposed by the act.

We have to follow what is there decided in construing such contracts, and the cases apply as well to the place of valuation as to the valuation itself.

While the trial court did not expressly state in the charge, as to damages, that the value of the horses and mules must be confined to the place of shipment, we think this is clearly implied. But if it is not, it was a mere inadvertent omission of the court, to which no exception was definitely taken, or, so far as we can see from the record, no exception

at all. Defendant may have, by implication, requested an instruction as to this matter, which is the subject of its 16th assignment of error, but the prayer, if it does sufficiently state the rule as to (73) the place of valuation, was blended with another one, to the effect that if the horses and mules were worth $100 apiece, after they were damaged, plaintiff could not recover anything, which is erroneous, as we have seen. The instruction, under the well settled rule, must be good as a whole, for otherwise it can properly be refused. The judge charged the jury, in respect to this matter, with substantial correctness.

We may further say, as to the written notice required to be given before removing the stock from the terminal station, that this Court has consistently held such a stipulation in a bill of lading to be valid. *Selby v. R. R.*, 113 N. C., 594; *Austin v. R. R.*, 151 N. C., 137; *Kime v. R. R.*, 153 N. C., 400; *Duvall v. R. A.*, 167 N. C., 24. As already noted, we have also said that it may be waived, or that knowledge of the condition of the animals before they are taken away will supply the place of a written notice. It is suggested that this provision in the contract of shipment for written notice is governed by the same rule of decision laid down in the Federal cases as to the valuation clause, already cited and commented upon, and that since the Carmack amendment was passed the State courts cannot adopt a construction in opposition to it, the entire contract being based upon the rate fixed by the carrier and approved by the Interstate Commerce Commission, and no such construction being allowable under the Carmack amendment; and further, that the agent's authority was limited by the express terms of the bill of lading to receiving a written notice, and he therefore could not waive this stipulation without the consent or ratification of his principal, such a waiver not being within the scope of his duty or authority, because a power to receive notice does not include one to waive it, either expressly or by conduct. These might be persuasive if not cogent reasons, were it now an open question in this Court, but we have decided the other way too often to retrace our steps and enter upon the investigation anew as if it were an original one (*res novo*). We must await, if it is a Federal question, the judgment of a higher court upon it, which, if unfavorable to the view heretofore taken by this Court, will be followed as the proper law.

A discussion of the question as to value will not much longer be a practical one, as Congress, on 4 March, 1915, enacted a law (known as the Cummins amendment) abolishing all exemptions from liability for loss or injury or damage to property transported in interstate commerce which is caused by the carrier, and making the carrier liable to the shipper for the full actual loss, damage, or injury to the property, notwithstanding any limitation of liability or limitation of the amount

of recovery, or any representation or agreement as to the value in any receipt or bill of lading or in any contract, rule or regulation, or in any tariff schedule, or in any manner or form whatsoever, and de-
(74) claring all such limitations unlawful and void, with certain exceptions not applicable here.

We have found no error in the rulings and judgment of the court.

No error.

Cited: Reynolds v. Express Co., 172 N.C. 494 (4cc); *Bryan v. R. R.*, 174 N.C. 181 (4o); *Taft v. R. R.*, 174 N.C. 212 (4o); *Dixon v. Davis*, 184 N.C. 210 (4l).

IN RE WILL OF DUNCAN COLE.

(Filed 1 March, 1916.)

Wills, Joint—Holograph Wills—Surplusage.

A holograph will of a testator signed by him and by his wife also, found among his valuable papers after his death, and duly probated, is valid as to the property disposed of therein by the husband; and the signature of the wife and other extraneous matters therein appearing in the handwriting of another will be disregarded as surplusage.

APPEAL by caveators from *Devin, J.*, at October Term, 1915, of LEE.

Williams & Williams and Winston & Biggs for propounders.

A. A. F. Seawell for caveators.

CLARK, C. J. The paper-writing purporting to be the will of Duncan Cole and Georgia S. Cole, his wife, is as follows:

We give and bequeath to the Methodist Orphanage, situated at Raleigh, North Carolina, all our real and personal property after paying all our just debts and giving a decent burial and headstones to our graves.

This 30 January, 1912. DUNCAN COLE.
GEORGIA COLE.

SANFORD, LEE COUNTY, N. C.

This will was probated in common form as the will of Duncan Cole.

The case was heard by the court below upon a "case agreed," which sets out that said Duncan Cole died 18 October, 1912, without issue, his wife, Georgia S. Cole, surviving him; that the paper-writing above set

out was admitted to probate in common form in Lee County 7 February, 1913, as the holographic will of said Duncan Cole; that said paper-writing and every part thereof, save and except the signature of said Georgia S. Cole, which is in her handwriting, is in the genuine handwriting of said Duncan Cole, and that after the death of said Duncan Cole the said paper-writing was found among his valuable papers and effects. Upon said agreed state of facts the court properly entered judgment holding that the said paper-writing was the (75) will of Duncan Cole and should be admitted to probate as his holographic will.

The will in every respect was entitled to probate as the holographic will of Duncan Cole. The signature of his wife thereto was mere surplusage, and could in no wise invalidate the instrument as the will of her husband.

This was in no wise a mutual will, and the authorities applicable to such wills do not apply. This was a joint will, which has been defined as "a testamentary instrument, executed by two or more persons in pursuance of a common intention, for the purpose of disposing of their several interests in property owned by them in common, or of their separate property treated as a common fund, to a third person or persons." 30 A. and E. Enc., 556; 40 Cyc., 2110; Gardner on Wills, 87.

In re Davis's Will, 120 N. C., 9, 38 L. R. A., 289, it is said: "There is nothing from which it can be implied even that there was any agreement that if one should devise to these devisees the other would do so, or that if one should afterwards revoke the other would do so. Either had the right to do so, and without notice to the other." The fact that his wife signed this will cannot affect its validity as the will of Duncan Cole. It purports to be the intention of each maker. As the will of Duncan Cole it fulfills all the statutory requirements. The signature of the wife does not purport to be a part of the will of Duncan Cole, and her signature only purports to be an expression of her testamentary intention, and could be considered only if it were offered to be proved as her will.

The validity of joint wills was settled in this State *In re Davis's Will,* 120 N. C., 9, in which it was said: "An instrument of writing, jointly executed by husband and wife, purporting to be their joint will, devising to a third person lands belonging partly to each, may upon the death of the husband, and during the life of the wife, be probated as his will as to his property, devised thereby, and upon the death of the wife, unless revoked, may be probated as to her property." It is true that this could not be done in this case as to the wife, as it does not comply, and could not comply, with the requirements of the statutory provisions as to a holographic will, for two people could not write such will.

This will is not caveated by the wife. She having died since this proceeding was instituted, her personal representative has been made a party, and it may be added that a copy of her will made since the death of her husband has been filed in this cause showing that she subsequently executed her will in proper form, devising all her property according to the intention expressed by herself and husband in this will. If, however, she had executed a will devising the property to other parties, this would not invalidate this instrument as the will of her husband.

(76) The validity of joint wills is beyond dispute. It has been uniformly held that on the death of one of the testators the will thus executed may be admitted to probate as his last will and testament so far as it disposes of his property. Underhill on Wills, secs. 11 and 12; *Frazier v. Patterson,* 17 Anno. Cases, 1013.

The fact that words in a will amounting to mere surplusage are not in testator's handwriting will not vitiate the will. 40 Cyc., 1130. A joint will as to property owned by one testator is valid, the execution by the other testator being mere surplusage. *Allen v. Allen,* 28 Kansas, 18; *Rogers, appellant,* 11 Me., 303; 2 Anno. Cases, 26, note.

The fact that a holographic will is found "among the valuable papers and effects" of the deceased implies that it was placed there by him or with his knowledge and consent, with the intention that it should operate as his will. *In re Jenkins,* 157 N. C., 429.

In *Clayton v. Liverman,* 19 N. C., 558, the majority of the Court held that a will jointly executed by two sisters could not be probated either as a joint will or as their separate wills, upon the ground that such a will was a novelty and unknown to the laws of this country, relying upon *Hobson v. Blackburn,* 2 Eng. Eccl., 115. *Daniel, J.,* dissented in an able opinion, insisting that the Court had misconceived the ruling in *Hobson v. Blackburn.* In the above case of *Davis's Will* this Court, reviewing the decision in *Clayton v. Liverman, supra,* overruled that case and held with the dissenting opinion of *Daniel, J.,* that the majority of the Court had misconceived the decision in *Hobson v. Blackburn. In re Davis* was the unanimous opinion of the Court, and, besides, we think, is supported by the reason of the thing. This has been the ruling elsewhere. See notes to *In re Davis's Will,* 38 L. R. A., 289, and notes to same case, 58 Am. St., 773.

Affirmed.

Cited: In re Will of Edwards, 172 N.C. 371 (c); *Ginn v. Edmundson,* 173 N.C. 86, 87 (c); *In re Foy,* 193 N.C. 495 (c).

BANK OF COLERAIN v. DAVID COX ET AL.

(Filed 1 March, 1916.)

1. Mortgages—Personalty—Registration—Statutes.

Our statute, Revisal, sec. 982, requires that a mortgage of personal property be registered where the mortgagor resides, and where a mortgage on such property has been registered in the wrong county, and subsequently registered in the right one, but after a mortgage on the same property has been given to another and properly registered, the second mortgage has priority of lien over the first one, and no other notice, however full, will take the place of that of registration required by the statute.

2. Same—Fixtures.

Where there is nothing to show that a sawmill has been annexed to the land, and a mortgage and a conveyance to the owner thereof describes it as personal property, it will be so regarded, and in order to create a valid lien it must be registered in the county wherein the mortgagor resides; and a recital in the mortgage that it was located on or occupied lands in another county will not be construed in contradiction of the express words of the mortgage describing the property as personalty.

APPEAL by defendants from *Bond, J.*, upon a case agreed at (77) November Term, 1915, of BERTIE.

Civil action, upon a case agreed, brought to recover a sawmill and its fixtures and appurtenances sold and conveyed, on 28 August, 1912, by the Yeopim Lumber Company to E. L. Crumpler, with certain timber and a lease of five years on the mill yard occupied by the sawmill; and the latter on the said day conveyed the same property to Charles Whedbee, as trustee, to secure $4,850, part of the purchase money, with power of sale in case of default in payment of the debt. The deed to E. L. Crumpler and the deed of trust to Charles Whedbee were registered in Perquimans County, and the deed of trust, on 15 October, 1915, was registered in Bertie County, where, on and before 28 August, 1912, E. L. Crumpler resided and was domiciled. Charles Whedbee, as trustee, on 23 September, 1915, duly and regularly sold that part of the property which was also and afterwards mortgaged to the plaintiff, the Bank of Colerain, to David Cox, L. W. Norman, and R. M. Fowler, defendants, for $500, that being the full value thereof. On 22 September, 1915, E. L. Crumpler mortgaged the said sawmill and its fixtures to the plaintiff as security for an antecedent debt of $400 due by him, they being described in the mortgage as follows: "One sawmill complete, situated in Bethel Township, on the lands formerly owned by Yeopim Lumber Company, and being the same sawmill they sold to E. L. Crumpler, with the addition of any and all fixtures, appliances, pulleys, belts, saws, shaftings, pipings, injectors,

brasses, crank-shaft for engine, chains, collars for edger and trimmer, grate bars for boiler, rafting gears, chains and dogs, and every other fixture and appliance which was annexed to such sawmill at the time of said purchase of same, and every fixture, appliance, and machinery, of every kind and description, which has been annexed thereto by said Crumpler since said purchase. The said description is intended to include and does include said sawmill complete and everything connected therewith." The mortgage from Crumpler to the plaintiff was duly registered in Bertie County on 22 September, 1915, and at the time of taking the mortgage from Crumpler the plaintiff had actual knowledge of the prior deed of trust or mortgage of Crumpler to Charles Whedbee.

(78) Soon after the conveyance to him by the Yeopim Lumber Company, as aforesaid, and the execution by him of the deed of trust aforesaid to Whedbee, the said Crumpler entered into possession of the mill and operated the same in Perquimans County until October, 1914, but has not operated it since that time, although the mill had remained on the land where it was located at the time of his purchase. No part of the lands of the Yeopim Lumber Company, except the lease of the mill site for five years and the timber with right to cut the same for one year, was conveyed to the said Crumpler, unless the court on the facts herein stated shall hold the mill and its fixtures to be real estate, but after the lease and conveyance aforesaid to Crumpler, the Yeopim Lumber Company sold the said land on which the lease rested to one P. H. Small, who now owns the same.

The deed of the Yeopim Lumber Company to E. L. Crumpler described the property generally as certain "personal property and timber situate in Bethel Township, Perquimans County, N. C.," and then comes the particular description of the sawmill with its fixtures, and lastly these words: "with the right to use land occupied by mill and mill yard for a term of five years from date of this indenture. When said land ceases to be used as a mill site then it reverts to said Yeopim Lumber Company." In the deed of trust to Charles Whedbee there is a description of the property conveyed, as "all the following described personal property and the different tracts of timber described as follows: The sawmill and fixtures thereto this day had of said Yeopim Lumber Company." Then comes a description of the sawmill and fixtures similar to the one above given, except that there is no reference to the words, "the use of the land occupied by the mill and mill yard for a term of five years from date of this indenture," and no reference at all to the lease or its expiration. The case also states that on 28 August, 1912, E. L. Crumpler was the owner of "certain timber lands situated and being in Perquimans County, North Carolina, and also certain other property described in deed of trust to Charles Whedbee as follows:

"All the following described personal property and the different tracts of timber land described as follows: " Then follows a description of the sawmill and fixtures, as above given, closing with these words: "The mill and fixtures above described being at the time located upon the said lands."

It was agreed that if the court was of opinion with the plaintiff, judgment should be entered for $400, with interest and costs.

Upon consideration, the court, holding that plaintiff was entitled to recover, entered judgment accordingly, and defendants appealed.

Pruden & Pruden, Gilliam & Davenport for plaintiff.

P. W. McMullan and Charles W. Whedbee for defendants.

WALKER, J., after stating the case: The decision of this ap- (79) peal turns upon the question whether the sawmill with its fixtures and appurtenances was real or personal property. If it was real property, the deed of trust to Mr. Whedbee was properly registered in Perquimans County, and the defendants would be entitled to the judgment; but if it was personal property, the registration should have been in Bertie County, where the mortgagor resided, and where plaintiff had its mortgage registered, and the judgment below was correct. Our statute, Revisal of 1905, sec. 982, provides that, "No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration but from the registration of such deed of trust or mortgage in the county where the land lieth, or, in case of personal estate, where the donor, bargainor, or mortgagor resides, or, in the case donor, bargainor, or mortgagor shall reside out of the State, then in the county where the personal estate or some part of the same is situated, or, in case of choses in action, where the donee, bargainee, or mortgagee resides." This statute was construed in *Weaver v. Chunn*, 99 N. C., 431, where it appeared that the mortgagor had personal property in Yancey County and also in Buncombe County where he resided. He executed a deed of trust on his property in Yancey County which was duly registered in that county, and afterwards he executed a deed of trust to another party (appellees) on his property both in Yancey and Buncombe counties, which was recorded in the latter county. This Court held that registration in Buncombe County was essential to the validity of the appellant's mortgage, and *Justice Merrimon* added: "Before it was registered in the last mentioned county the bargainor, by his second deed of trust, conveyed the same and other property to the appellee, and this deed was duly registered on the day of its execution in the county of Buncombe. The appellees, as had been decided in like

cases, were purchasers for a valuable consideration, and, as their deed was registered in the proper county before that of the defendant, they got the title to the property in controversy. *Fleming v. Burgin,* 37 N. C., 584; *Robinson v. Willoughby,* 70 N. C., 358; *Todd v. Outlaw,* 79 N. C., 235; *Bank v. Manufacturing Co.,* 96 N. C., 305. The mere fact that he had personal property there (Yancey County) did not constitute residence. The purpose of the statute is to have the deed of trust or mortgage registered in the county where the donor, bargainor, or mortgagor has actual personal residence; and the reason is that persons interested to have knowledge in such respect would go to the county where a person resides to see what disposition he had made of his personal property by deeds and other instruments required to be registered; they would not ordinarily look elsewhere. The statutory requirement is too plain to be mistaken." *Harris v. Allen,* 104 N. C., 86.

(80) This brings us to the decisive question, whether the deed of trust to Mr. Whedbee was registered in the proper county, or, in other words, whether the sawmill with its fixtures was personal property. If it was, the registration should have been made in Bertie County and not in Perquimans. There is nothing in the case to show that the sawmill was annexed to the realty or constituted a fixture, not even a trade fixture.

Discussing the question of fixtures and the character of property as personality, *Justice Manning* said in *Cox v. Lighting Co.,* 151 N. C., 62: "Upon the third point of the contention of Smallwood, to wit, the knowledge of the Empire Company that its apparatus was to be annexed to the gas company's plant or to become additions thereto or as a substitution for other apparatus then in use. In the case of *Binkley v. Forkner,* 117 Ind., 176, the Court, in a well considered opinion upon this point, said: "Accordingly, the proposition is well sustained that one who purchases machinery with a view that it shall be annexed to or placed in a building, of which he is the owner, and who executes a chattel mortgage on the property so purchased, thereby evinces his intention that the property shall retain its character as personality, regardless of the manner in which it may be annexed to the freehold. *Eaves v. Estes,* 10 Kan., 314; *Ford v. Cobb,* 20 N. Y., 344; *Sisson v. Hubbard,* 75 N. Y., 542; *Tift v. Horton,* 53 N. Y., 377; *Campbell v. Roddy,* 44 N. J. Eq., 244. But it will not be understood that parties may, by their convention and at their will, convert chattels real into chattels personal. If at the time of the agreement the chattels personal have been annexed to and become affixed to the realty, their character as a part of the real estate cannot be subsequently changed by a convention of the owner of the real estate with a stranger so as to conclude the rights of prior mortgagees or creditors or subsequent pur-

chasers for value." And to the same effect is *Lancaster v. Ins. Co.*, 153 N. C., 285, which cites and approves *Cox v. Lighting Co.*

In *Lancaster's case* the Court construed a clause of the policy upon which the suit was brought, which provides against encumbrances on personal property, which was, in that case, "a steam engine, the engine and boiler inclosed in brick, and the same was being used for farm ginning." *Justice Hoke* said for the Court: "Under our decisions, where a vendor, as here, has sold goods, taking notes for the purchase money, and delivered possession, retaining title as security, and the contract has been properly registered according to the statute, Revisal, 983, the property, the subject-matter of the contract, retains its character as personalty, both as between the parties and others claiming adversely to the lien. *Cox v. Lighting Co.*, 151 N. C., 62. The goods, therefore, retained their character as personality, and, in that aspect, the claim of the vendor, in this instance, was only an encumbrance in the nature of a chattel mortgage to secure the purchase money, and, on the facts, the stipulation as to the nonexistence (81) of such an encumbrance has been violated."

But aside from any authority upon the question, there is nothing to show that this sawmill was annexed to the realty so as to become a part of it as a fixture, but, on the contrary, the parties had described and treated it in their conveyances as personal property. With this declaration on their part, and in the absence of countervailing proof, we must take it that their description of the sawmill was correct. There is not enough in the use of the words "located" on the land or "occupying" the yard for us to justly or legally infer that the parties intended thereby to regard it as realty, or a fixture, when they had expressly stated to the contrary. There must be some more definite and satisfactory proof than we find in this record to show that the sawmill was other than personalty. This being so, the deed of trust to Mr. Whedbee on the sawmill should have been registered in Bertie instead of Perquimans County, and the plaintiffs having obtained a subsequent mortgage for its claim, and had it duly registered in Bertie County before the Whedbee deed of trust was recorded there, acquired the title, unless the other objections of the defendants are tenable.

They contend that plaintiff was not a purchaser for value within the meaning of the registration laws, because its mortgage was made to secure an antecedent debt; but we have decided otherwise in numerous cases. *Odom v. Clark*, 146 N. C., 554, 552, where it was said that "Claimants who now object to the judgment are holders of preëxisting debts provided for in these deeds. It has been held with us that such debts are sufficient to constitute the holders purchasers for value, within the meaning of our registration laws. *Brem v. Lockhart*, 93 N. C., 191,

cited with approval in *Moore v. Sugg,* 114 N. C., 292. And under these laws (Revsial, sec. 982) defendants would hold the property, if the deeds themselves are good." See, also, *Potts v. Blackwell,* 57 N. C., 58; *Southerland v. Fremont,* 107 N. C., 565, 572; *Brown v. Mitchell,* 168 N. C., 312. It is next contended that plaintiff had actual knowledge of the Whedbee deed of trust when it took the mortgage from E. L. Crumpler. It is thoroughly well settled that "no notice, however full or formal, will supply the want of registration." *Robinson v. Willoughby,* 70 N. C., 358; *Quinnerly v. Quinnerly,* 114 N. C., 145; *Tremaine v. Williams,* 144 N. C., 114; *Todd v. Outlaw,* 79 N. C., 235; *Wood v. Tinsley,* 138 N. C., 507; *Collins v. Davis,* 132 N. C., 106; and the numerous cases cited in *Piano Co. v. Spruill,* 150 N. C., 168, 169. It was said in *Collins v. Davis, supra,* quoting language of *Justice Reade* in *Robinson v. Willoughby:* "The decisions have been uniform that deeds in trust and mortgages are of no validity whatever as against purchasers for value and creditors, unless they are registered, and
(82) that they take effect only from and after registration, just as if they had been executed then and there . . . No notice, however full or formal, will supply the want of registration. The same rule as stated in the earlier cases has been uniformly applied since chapter 147, Public Laws 1885 (Revisal, secs. 980, 981), was enacted.

We have not discussed the question as to the effect of a mortgage for a preëxisting debt upon a prior equity existing against the mortgagor, as the question is not presented. It was considered in *Southerland v. Fremont, supra.* Nor need we advert to the fact that the parties to this suit have no interest in the land where the sawmill was, nor in the lease thereof, but simply have mortgages upon the sawmill and its fixtures or attachments, considered and treated by them and their mortgagor as personal property, wholly detached and separated from the land.

There was no error in rendering judgment upon the facts, as agreed upon by the parties, in favor of the plaintiff.

Affirmed.

Cited: Starr v. Wharton, 177 N.C. 324 (1cc); *Discount Corp. v. Radecky,* 205 N.C. 164 (1c); *Springs v. Refining Co.,* 205 N.C. 450 (2c); *Weil v. Herring,* 207 N.C. 9 (1c); *Sansom v. Warren,* 215 N.C. 436 (1c); *Finance Corp. v. Hodges,* 230 N.C. 582 (1d); *Discount Corp. v. McKinney,* 230 N.C. 732 (1p); *Montague Bros. v. Shepherd Co.,* 231 N.C. 554, 555 (1c); *Sheffield v. Walker,* 231 N.C. 559, 560 (1c).

MRS. R. E. WOODARD v. CHARLES M. STIEFF.

(Filed 1 March, 1916.)

Principal and Agent—Undisclosed Principal—Contract—Breach of Warranty—Parties.

Where a husband, acting for his wife, executes in his own name a simple contract of purchase of a piano, without disclosing his representative capacity, the wife may maintain an action in her own name for damages on a breach of warranty of the instrument.

APPEAL by defendant from *Rountree, J.*, at November Term, 1915, of WILSON.

Civil action to recover damages for breach of a contract of warranty in the sale of a piano.

The contract was in writing and was signed by the husband of the plaintiff, apparently in his own right, but the plaintiff introduced evidence tending to prove that it was her contract, and that her husband was acting as her agent in signing it.

There was no evidence that the defendant knew that the plaintiff was a party to the contract.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed, assigning the following as errors:

1. For that the court refused, upon the defendant's request, to give the following special instruction to the jury: "That the measure of damages in this case should be the difference between the (83) purchase price of the instrument and the actual worth of the same at the time it was purchased."

2. For that the court, over defendant's objection and exception, instructed the jury as follows: "Now, he could have made a contract for her and signed her name and his as agent, or he could have signed his name without disclosing her identity or the fact that he was her agent, and still he might have been her agent. I may make a contract for you and sign my name to the contract, and the contract may be apparently my own, and yet you may be, in reality, the purchaser; and you could do the same for me or anybody. He could sue you or me. The Stieff Piano Company could have sued Mr. Fred Woodard on that contract, because he signed it and said it was his contract; and the Stieff Piano Company could have sued Mrs. Woodard if, as a matter of fact, she made the contract through the agency of her husband; and she could sue on the contract. After all, it is merely a question of fact."

3. For that the court denied the defendant's motion to set aside the verdict, and for a new trial.

4. For that the court signed judgment.

H. G. Connor, Jr., for plaintiff.

O. P. Dickinson for defendant.

ALLEN, J. The first assignment of error is abandoned in the brief of the appellant, and the third and fourth are formal for the purpose of preserving the other exceptions.

The authority to set aside a verdict because against the weight of the evidence, which is vested in the trial judge, is discussed in the brief, but this is a discretionary power, which will not be reviewed except when there has been a gross abuse of discretion, of which there is no evidence in this record. *Harvey v. R. R.*, 153 N. C., 567.

The second assignment presents the question of the right of an undisclosed principal to maintain an action upon a contract executed by his agent in his own name, and the ruling and instruction of his Honor are in accord with authority here and elsewhere.

As was said in *Barham v. Bell,* 112 N. C., 133, and quoted with approval in *Nicholson v. Dover,* 145 N. C., 20, "It is a well established rule of law that when a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it, the defendant in the latter case being entitled to be placed in the same position at the time of the disclosure of the real principal as if the agent had been the real contracting party." Ewell's Evans on Agency, 379; Story on Agency, 420; Wharton on Agency and Agents, 403.

No error.

Cited: Watts v. R. R., 183 N.C. 13 (c).

A. H. TAYLOR v. A. F. AND A. M. JOHNSON.

(Filed 1 March, 1916.)

1. Appeal and Error—Superior Courts—Recorder's Court—Statutes—Certiorari.

Where the statute establishing a recorder's court does not provide for an appeal the remedy is by application, at the next term of the Superior Court following the trial, for a writ of *certiorari*, requiring, except in very restricted instances, a show of merits by the applicant, upon affidavit; and where a term of the Superior Court, commenced more than ten days from the trial, has intervened, and the complaining party has not caused his appeal to be docketed at the next ensuing term, and without having pursued the remedy prescribed, his appeal will be dismissed.

2. Appeal and Error—Superior Courts—Recorder's Court—Statutes—Objections and Exceptions—Court's Jurisdiction.

Where the statute establishing a recorder's court has not provided for an appeal, but an appeal has been entered in the Superior Court without objection, the jurisdiction of the Superior Court will attach, and its disposition of the cause will not be disturbed on the ground that an appeal had not been provided by the statute.

3. Appeal and Error—Supreme Court—Discretion—Opinion—Appeal Dismissed.

Where the defendant has appealed from a judgment rendered against him in a recorder's court, and the statute does not provide for one, and the plaintiff moves to dismiss it, the practice is for the plaintiff to except to the refusal of the court to sustain his motion, and continue with the trial; but the Court, on this appeal, in its discretion, expresses its opinion upon the merits and dismisses the appeal.

APPEAL by plaintiff from *Devin, J.*, at November Term, 1915, (84) of HARNETT.

Civil action heard on motion to dismiss defendant's appeal from the recorder's court.

It appeared that the action, one of debt, was instituted in the recorder's court of said county and judgment was rendered in plaintiff's favor in August, and defendants took an appeal therefrom more than ten days before the next or September term of Superior Court of said county, and at the next term of Superior Court said appeal was not entered or docketed, nor was there any motion made for *recordari* or *certiorari*. At the following the November term Superior Court, the appeal having in the meantime been entered on the docket, plaintiff, by his counsel, moved that said appeal be dismissed, and, on judgment denying plaintiff's motion, he excepted and appealed.

E. F. Young for plaintiff.
Charles Ross for defendant.

HOKE, J. The statute establishing a recorder's court for Har- (85) nett County, Public-Local Laws 1913, ch. 602, confers criminal jurisdiction in certain specified causes, with the right of appeal therein. The act also confers jurisdiction in cases of contract and tort, the former to the amount of $500 and the latter of $300; but in civil causes no appeal is provided for. This right of appeal from a lower to a higher court was not recognized at common law in causes of this character. In such cases relief from erroneous judgments was obtained by writ of error or of false judgment; these writs emanating from some higher court. *S. v. Bailey*, 65 N. C., 426; 2 Cyc., p. 519. In our State this method of review can be made available by writs of *certiorari* or

recordari, the former being the appropriate term when it issues to a court of record, and, except in very restricted instances, such a writ will be issued only on a proper show of merits, on affidavit filed, and at the next term of the supervising court following a trial of the cause in the court below. *Marler v. Clothing Co.,* 150 N. C., 519; *Johnson v. Reformers,* 135 N. C., 385; *Boing v. R. R.,* 88 N. C., 62; *Koonce v. Pelletier,* 82 N. C., 237. And under our decisions these writs, in proper instances, are to be applied for in orderly procedure to our Superior Courts as courts of general jurisdiction, vested by our Constitution and statutes with appellate and supervisory powers over the judicial action of all the inferior courts of the State. *S. v. Tripp,* 168 N. C., 150; *Rhyne v. Lipscombe,* 122 N. C., 650; Rev. 1905, sec. 584.

Speaking to this question in *Tripp's case,* the Court said: "Both under our Constiution and statutes the writs of *certiorari, recordari,* and *supersedeas,* 'as heretofore in use,' have full vigor, in this State (Constiution, Art. IV, sec. 8, and Revisal, sec. 584), and whenever a substantial wrong has been done in judicial proceedings, giving a litigant legal right to redress, and no appeal has been provided by law, or the appeal that is provided proves inadequate, the Supreme Court, under the constitutional provisions, to all courts of the State and the Superior Courts of higher jurisdiction, by reason of the statute (and well sustained precedents), to all subordinate courts over which they exercise appellate power, may issue one or more of these important writs and under it see that the error is corrected and justice duly administered. The principle in this jurisdiction applies to criminal as well as to civil causes and enables our Superior Courts to supervise the judicial action of recorders, justices of the peace, and all courts, as stated, over which they are given appellate power," citing *S. v. Locke,* 86 N. C., 647; *S. v. Swepson,* 83 N. C., 585; *S. v. McGimsey,* 80 N. C., 377; *Brooks v. Morgan,* 27 N. C., pp. 481-485; 4 Pl. and Pr., 27-55; 12 Cyc., p. 794.

It thus appears that while a litigant in this recorder's court is not without right of review in case an erroneous judgment has been
(86) entered against him, no right of appeal having been given by the statute, he must proceed as indicated, by applying to the next term of the Supreme Court for a writ of *certiorari,* and this not having been done, and no valid excuse for this omission being shown or alleged, on the record as it now appears the case should have been dismissed on the plaintiff's motion. While we hold that no right of review by direct appeal now lies under the statute establishing this recorder's court of Harnett County, we consider it well to say that where a cause has been heretofore brought up and tried on appeal from the recorder's court without objection being made thereto, the jurisdiction of the

Superior Court would attach and its disposition of the same would not be disturbed merely for the reason that no right of appeal had been expressly given.

Under our decisions it seems that an appeal to the Supreme Court does not lie from a ruling of this character, the better practice being to note an exception and proceed to a further disposition of the cause. We have considered it better, however, to express our opinion on the question the parties desired to present, a course sometimes pursued where the matter is of moment and a decision may serve to save the parties the cost and harassments of further litigation. *Jester v. Packet Co.*, 131 N. C., 54; *S. v. Wylde*, 110 N. C., 500; *Guilford v. Ga. Co.*, 109 N. C., 310.

In recognition of these authorities, the present appeal must also be dismissed.

Appeal dismissed.

Cited: Drug Co. v. R. R., 173 N.C. 88 (1d); *Yates v. Ins. Co.*, 173 N.C. 478 (3c); *Bargain House v. Jefferson*, 180 N.C. 33 (3c); *Sneed v. Highway Com.*, 194 N.C. 48 (3c); *Allen v. Ins. Co.*, 213 N.C. 588 (1c); *Cox v. Kinston*, 217 N.C. 397 (1c); *Knight v. Little*, 217 N.C. 682 (3c); *Washington v. Bus, Inc.*, 219 N.C. 860 (3j); *S. v. King*, 222 N.C. 140 (1c); *Pue v. Hood, Comr. of Banks*, 222 N.C. 312 (1c); *Belk's Department Store v. Guilford County*, 222 N.C. 444 (1l); *Hunsucker v. Winborne*, 223 N.C. 657 (1c).

J. A. BYNUM v. R. W. TURNER AND THE BOARD OF EDUCATION, ETC.

(Filed 1 March, 1916.)

Pardon—Fines Returned—Courts—Procedure.

Where one convicted of a crime has paid the fine imposed by the court and then has obtained a pardon from the Governor, it is the duty of the court to return the fine upon his application and presenting the pardon, so long as the money remains in its possession and the rights of third persons have not intervened; but where the fine collected has reached its final destination, it is beyond the reach of Executive clemency, and may not be recovered.

CIVIL ACTION commenced before a justice of the peace and tried on appeal at November Term, 1915, of PASQUOTANK, before *Cooke, J.*, upon this issue:

Is plaintiff entitled to recover the $200 sued for in this action? Answer: "Yes."

(87) The court rendered judgment against both defendants. The Board of Education only appealed.

Aydlett & Simpson for plaintiff.
Ward & Thompson for defendant.

BROWN, J. The plaintiff, with others, was convicted in the local criminal court of the crime of gambling, the defendant Turner being the trial justice, and a fine of $200 was imposed. The plaintiff paid the fine to the chief of police, who paid it to Turner. Plaintiff was soon thereafter pardoned by the Governor, and now seeks in this action to recover the money.

When a full and absolute pardon is granted it exempts the recipient from the punishment which the law inflicts, whether death, imprisonment, or fine. If a fine has been imposed and has been paid into the Treasury of the State, or in this State to the treasurer of the Board of Education, *before the pardon is granted,* the money cannot be recovered back. 29 Cyc., 1568; *Oxford v. U. S.*, 91 U. S., 474.

But a pardon will work a remission of a fine, although it has been paid, and will entitle the person pardoned to have the money returned if it is still within the control of the Executive, and the rights of third persons have not attached. 24 A. and E. Enc., 586. Therefore, a pardon by the President entitles the offender to restitution of the fine after it has been paid to the marshal and deposited by him in court. *Opinion of Atty.-Gen. U. S.*, vol. 14, 599. But not if it has been paid into the treasury. It follows that plaintiff cannot recover of the defendant the Board of Education, for two reasons: First, it is admitted that the fine has never been paid to its treasurer; second, if it had been paid, an action could not be sustained against the board after the fine had been paid to its treasurer, for then the fine has reached its final destination and is beyond the reach of Executive clemency.

It is very doubtful if a civil action can be maintained against the trial justice, Turner, to recover a fine paid to him in his official capacity. The proper remedy of plaintiff was to go into the magistrate's court and move for restitution of the money upon pleading and exhibiting the pardon. If the money was still in the custody of that court it would be its duty to return it. As a personal judgment has been rendered against defendant Turner, from which he did not appeal, the regularity of this proceeding as to him is not before us. The judgment is valid and must stand.

Turner admits in his answer that he has the money in his possession. If so, it is his duty to pay it to plaintiff in satisfaction of the judgment. If he has paid it over to the trial justice's court, as is stated in the

brief by counsel, the plaintiff may move in that court for its restitution, and it will be the duty of the trial justice to order its (88) restitution, when it must be applied to the satisfaction of the judgment.

The action is dismissed as to the Board of Education.

The costs of the Superior Court will be taxed against the plaintiff.

Action dismissed.

Cited: McPherson v. Motor Sales Corp., 201 N.C. 308 (c).

MATTHEW D. WRIGHT v. THOMPSON & MOSELEY, INC.

(Filed 1 March, 1916.)

1. Master and Servant—Ordinary Tools—Negligence—Defective Tools—Knowledge.

The rule which relieves the employer from liability for an injury resulting from the use of ordinary or simple tools to be used by his employee in the prosecution of his work does not obtain where the tools thus furnished are unfitted for the work and the defect is readily observable and likely to result in injury, which condition has been brought to the attention of the employer or should reasonably have been observed by him.

2. Same—Trials—Evidence—Questions for Jury—Nonsuit.

In an action brought by an employer to recover damages for a personal injury there was evidence tending to show that the plaintiff was employed as a craneman for a dredging company, using a crane and dipper handle, at the end of which was a dipper made of iron and composed of several parts known as lips and ears, fastened together by bolts, which became loose in its operation and fell out; that to replace the bolts it was necessary to get the holes in the ears in line with those in the dipper, and a drive or drift pin was used, which were pieces of tapering steel of various lengths, required to be driven in the hole by a sledge hammer, having one man to supervise and another to do the driving; that the drift pin furnished was burred and battered at the end, and while being driven in by his coemployee under the plaintiff's supervision a piece of steel flew off from the burred end of the drift pin and caused the injury complained of, and that the condition of the drift pin had been called to the attention of the defendant's foreman or superintendent and also under circumstances wherein they should have known of the defects. *Held,* evidence sufficient of defendant's actionable negligence; and the question of assumption of risk was also a question for the jury.

APPEAL by plaintiff from *Cooke, J.,* at November Term, 1915, of PASQUOTANK.

Civil action to recover damages for physical injuries arising from alleged negligence of the defendant.

There was evidence on part of plaintiff tending to show that plaintiff, a young man 23 years of age, was working as a craneman for a dredging company near Lake Drummond. Plaintiff had been
(89) working for defendant about three months when he was hurt.

The dredge which was being used had what is known as a crane and dipper handle, and at the end of the dipper handle a "dipper," which is made of iron and is composed of several parts known as the "lip" and "ears." These parts are fastened together by means of bolts, and in the course of using the dipper these bolts became loose and fell out. At the time in question five or six of these bolts were out and the "ears" were out of line with the remainder of the dipper, and in order that the bolts might be driven in place and the parts of the dipper fastened together, it was necessary to get the holes in the ears in line with the holes in the dipper (that is, to "line up" the two sets of holes). The parts of the dipper were too heavy to raise until the holes were in line, and it was necessary to drive a pin, known as a "drift pin," through one of the holes in the "ears" and the corresponding hole in the dipper until bolts could be inserted and fastened in the remaining holes. Drift pins are pieces of steel without handles, of varying lengths and larger at one end than at the other, and are driven in the holes with sledge hammers. One workingman supervises and holds the pin while another does the driving. The plaintiff in the case at bar was holding the drift pin and one Kirkman was doing the driving. Kirkman was driving the pin and plaintiff holding the same. He backed, and was looking to see if the holes were lined up, when Kirkman struck it another lick, and a piece of steel from the drift pin flew off and struck plaintiff in the left eye and put it entirely out.

It further appeared that J. C. Dodd was superintendent in charge of the work; that next in charge was C. R. Jellison, the foreman, and, when the superintendent was temporarily away, as he was on this occasion, the foreman had full charge; that Mr. Halleck, termed the runner, was in charge of this machine and this shift, or relay of hands, which included plaintiff; that he had control of plaintiff in this matter and had directed him to do this particular work in which he was then engaged.

Speaking to this, plaintiff, among other things, testified as follows: "Mr. Halleck, dredge runner, told me to put the bolts in the dipper. I was under Mr. Halleck. I do not say that he could discharge me, but he could have me discharged if he reported me.

"Halleck was in charge of the hands of this particular machine.

"Mr. Halleck was in charge of the shift on which I was working. I was supposed to do whatever Mr. Halleck told me to do. Mr. J. G. Dodd hired me. I was working under Mr. Halleck at the time in question. Kirkman was helping me.

"I had orders from Mr. Halleck to put these bolts in, and for Kirkman to help me. He was doing the same kind of work. We were both under Mr. Halleck.

"We had a drift pin, hammer, and bolts to work with; had to (90) put bolts in the holes; the drift pin was used for lining up the holes. Kirkman was doing the driving. I was holding the drift pin for Kirkman to drive. Kirkman was striking the drift pin and drove it until it got so I could turn it loose. Then I backed back, and was looking to see if the holes were lined up. It was a part of my duty to look and see if the holes were lined up so the drift pin would go in."

It further appeared that the tools of the company were in bad shape; that the pin, which was the only one they had for this work, was a piece of steel about 15 inches long, 7/8 of an inch at the larger end and tapering to 1/2 inch; that it had been used for the three months witness was on the work; was "battered and burred at the end" and, about a month before, it had broken off; that it had not been used much since, but did go for a "short drift."

One T. G. Castine, company employee and witness for plaintiff, among other things, testified: "I saw the tools the company had there to work with; their condition was very bad; for instance, the drift pin was burred very badly; the head was battered and in bad shape; slivers would fly off."

Plaintiff himself testified further: "I told Mr. Jellison, the foreman, that all of the tools were in bad shape; that we did not have anything fit to work with. That was two or three weeks before I got hurt. I do not remember him getting any drifts or punches, but he did get some wrenches."

Upon these, the controlling features of the testimony making in favor of plaintiff's claim, on motion made in apt time, there was judgment of nonsuit, and plaintiff excepted and appealed.

Ward & Thompson for plaintiff.

J. Kenyon Wilson and S. M. Brandt for defendant.

HOKE, J. In *House v. R. R.*, 152 N. C., pp. 397 and 398, where an employee had had her arm and hand cut in the effort to raise a car window which had become tightened by effects of weather and otherwise, the Court, in denying recovery, among other things, said: "We have repeatedly decided that an employer of labor is required to pro-

vide for his employees a reasonably safe place to work, and to supply them with implements and appliances reasonably safe and suitable for the work in which they were engaged. As stated in *Hicks v. Mfg. Co.*, 138 N. C., 319-325, and other cases of like import, the principle more readily obtains in the case of 'machinery more or less complicated, and more especially when driven by mechanical power,' and does not, as a rule, apply to the use of ordinary everyday tools, nor to ordinary everyday conditions, requiring no special care, preparation, or pro-
(91) vision, where the defects are readily observable, and where there was no good reason to suppose that the injury complained of would result."

In thus recognizing the distinction in the degree of care in regard to simple tools and ordinary conditions and those more complex, the Court did not at all intend to hold that an employer was released from all responsibility concerning such implements.

Referring to the terms used, it will be noted that the distinction is approved in case of simple tools where "no special care, preparation, or prevision is required; where the defects are *readily observable,* and where there is no good reason to suppose that the injury complained of would result."

In seeking a basic principle upon which the position could generally and properly be made to rest, it was further said that, under conditions suggested, the element of proximate cause was usually lacking, an essential feature of which is said to be that it is a cause which produces the harmful result in continuous sequence and one from which a man of ordinary prudence could foresee that such result was probable under all the facts as they existed. *Ramsbottom v. R. R.,* 138 N. C., 39; *Brewster v. Elizabeth City,* 137 N. C., 392.

In the recent case of *Bunn v. R. R.,* 169 N. C., 648, the position was approved and applied where the company had sent two capable and experienced workmen to repair a box car which was stationary on the railroad yards, having been placed there for the purpose. In the prosecution of the work, one of them having back-set all the nails into the sill which held the side of the car upright in its then condition, driving them through into the sill, the side fell over on him, causing serious injuries. The men had been left to their own methods of doing this work, and recovery was denied, the Court holding that, on the facts presented, "two experienced and capable workmen sent to repair a box car stationary on defendant's yard, left entirely to their own methods, with present power to call for any help that might be required, that there was nothing to show that an injury to these men or either of them was likely to occur, and, therefore, no breach of legal duty had been established which could be considered as the proximate cause of

plaintiff's hurt." And there are numerous cases in this jurisdiction where the same position was approved, and usually for like reason. See *Bradley v. Coal Co.*, 169 N. C., 255, where a wire snapped that held a wagon bed together, causing the seat to fall; *Briley v. R. R.*, 160 N. C., 88; *Simpson v. R. R.*, 154 N. C., 51; *Rumbly v. R. R.*, 153 N. C., 457; *Brookshire v. Electric Co.*, 152 N. C., 669; *Dunn v. R. R.*, 151 N. C., 313, case where a sledge hammer flew off the helve, and *Martin v. Mfg. Co.*, 128 N. C., 264.

In well considered cases the principle has been extended to relieve an employer of continued and careful inspection in reference to simple tools and in reference to defects existent or which may (92) develop in the course of use and which any employee of average intelligence and prudence would readily note and provide against. *R. R. v. Larkin*, 98 Texas, 225; *Stork v. Cooperage Co.*, 127 Wic., 318.

But under our decisions an employer may be held for culpable breach of duty when he provides a tool unfitted for the work an employee is given to do, simple or other, and the defect is one that is likely to result in injury, a case presented in *Young v. Fiber Co.*, where an employee was engaged in operating a heavy machine; had been given, for the purpose of setting "dies" in same, a hammer of hardened steel, the dies being also of highly tempered steel, when he should have been supplied with a soft-metal hammer, and he was injured in consequence; or when the implement, though not specially complicated, is one requiring some preparation and prevision on the part of an employer and presenting a case where an employee is not afforded equal opportunity to observe and note defects, instances presented in *Mercer v. R. R.*, 154 N. C., 399, injury from a defective chisel driven by a sledge hammer in cutting rivets from an iron boiler, and *Cotton v. R. R.*, 149 N. C., 227, a railroad truck, where the pin had become worn, allowing the wheel to come off, causing an injury; or where the employer is aware of the defect causing the injury or should have been in the proper performance of his general duty to provide for the safety of his employees, and, from the nature and present use of the tool, the defect is one that is likely to result in injury. *Mincey v. R. R.*, 161 N. C., pp. 467-471; *Reid v. Rees*, 155 N. C., 230.

In *Mincey's case*, *Walker, J.*, after referring to the obligation of an employer to provide suitable and safe appliances, and the limitations upon the principle at times obtaining in case of simple tools, continued as follows: "But this relaxation of the rule can have no application to a defect of which the master is actually cognizant and which, as a reasonable man, he should appreciate is likely to result in injury to one using the implement as it is likely to be used, and which is neither known to the employee nor of such a character as to be apparent from

observation likely to accompany its use. In such case the general rule of negligence is fully effective, and the master who knowingly and negligently exposes his employee to a peril unknown to the latter must respond for the damage which results." And in *Reid's case, supra,* it was held: "The distinction drawn with reference to inspection owed by the master between simple and complicated tools and implements which he has furnished his employees for the purpose of their work has no application when a defect which approximately caused an injury had theretofore been called to the master's attention, and he had promised to repair it, and the injury occurred within a reasonable time thereafter." And it may be well to note that, in *Martin v. Mfg.*
(93) *Co., supra,* recovery was denied because the defect in the hammer was latent, and it was expressly recognized that if the defect had been known to the employer or open to ordinary observation and one from which injury would probably result, that liability might attach. On the record, therefore, with evidence on the part of plaintiff tending to show that he was given a drift pin, the only one available, that was "burred and battered" at the end; that it had broken off and had remained so for at least thirty days, necessarily to the observation of Halleck, plaintiff's immediate boss, and that plaintiff had notified the foreman that the tools were in bad shape and unfitted for the uses they were designed for, an order of nonsuit could not be sustained in reference to the first issue, that as to the alleged negligence of the defendant. And in reference to the conduct of the plaintiff, presented chiefly under averment of assumption of risk, it is established in this jurisdiction that dangers arising from negligent failure of an employer to supply safe and suitable implements and appliances are not considered among the ordinary risks assumed by an employee under and by virtue of his contract of employment, and, in reference to this position, the Court has repeatedly held that "While an employee assumes all the ordinary risks incident to his employment, he does not assume the risk of defective appliances due to his employer's negligence, unless the defect is obvious and so immediately dangerous that no prudent man would continue to work on and incur the attendant risks. *Pressly v. Yarn Mills,* 138 N. C., 410; *Hicks v. Mfg. Co.,* 138 N. C., pp. 319-327, citing *Lloyd v. Hanes,* 126 N. C., 359; *Sims v. Lindsay,* 122 N. C., 678; *Patterson v. Pittsburg,* 76 Pa. St., 359; *Kane v. R. R.,* 128 U. S., 95. And in recognition of the principle, the question is usually one of fact for the jury to decide, upon all the facts and attendant circumstances of the case, including the nature and use of the tool, the character and extent of the damage incident to its use; whether the employee was presently working with the defective tool under orders of his superior; whether he had complained of the conditions, and continued to work on in the reasonable ex-

pectation that they would be remedied: these considerations, if present, and all other facts in evidence and relevant to the inquiry, are to be weighed by the jury and the issue determined whether an employee was guilty of contributory negligence in continuing to work on in the presence of a known danger.

In a well considered case on this subject, *N. Y., N. H. and Hartford R. R. v. Vizvari,* reported in 210 Fed., 18, the Court, among other things, quotes with approval from Bevin on Negligence (3 Ed.), p. 620, as follows: "Whether continued working in circumstances of danger amounts to an acceptance of the risk or not is now settled to be a question of fact that must not be withdrawn from the jury." And *Rodgers, J.,* delivering the opinion, further said: "That the question of negligence must go to the jury where the facts are in dispute (94) and men of fair minds might draw different conclusions from the facts in evidence, citing Thompson on Negligence, secs. 429-430. And so in reference to assumption of risks, where an employee having knowledge of a defect or danger calls, as in this case, the attention of his employer or representative to it, and is ordered to go on with his work, the question should go to the jury to say whether the danger was so manifest that a person of ordinary prudence and caution would not have incurred it, and also whether the risk was imminent." An addenda that seems to have the sanction of the Supreme Court of the United States in the very recent case of *Seaboard R. R. v. Horton,* Current Reporter, Vol. 36, No. 6, p. 180.

Considering the record and the facts in evidence in the light of these decisions, we are of opinion that there was error in the order of nonsuit, and the cause should have been submitted to jury on the questions whether defendant company was guilty of negligence, the proximate cause of plaintiff's injury, and whether plaintiff, under all the facts and attendant circumstances, was guilty of contributory negligence in continuing to work and use the drift pin when aware of its defects and dangerous condition.

Reversed.

Cited: Morris v. R. R., 171 N.C. 534, 535 (1d); *Hickman v. Rutledge,* 173 N.C. 179 (c); *Rogerson v. Hontz,* 174 N.C. 28 (1cc); *King v. R. R.,* 174 N.C. 39 (1cc); *Thompson v. Oil Co.,* 177 N.C. 282 (1c); *Winborne v. Cooperage Co.,* 178 N.C. 90, 91 (1d); *Hensley v. Lumber Co.,* 180 N.C. 576 (1c); *McKinney v. Adams,* 184 N.C. 564 (1c); *Bryant v. Furniture Co.,* 186 N.C. 443 (1c); *Medford v. Spinning Co.,* 188 N.C. 128 (2c); *Crisp v. Thread Mills,* 189 N.C. 92 (2c); *Fowler v. Conduit Co.,* 192 N.C. 17 (1c); *Watson v. Construction Co.,* 197 N.C. 594 (1c); *Thomas v. Tea Co.,* 198 N.C. 823 (1e, 2e); *Cole v. R. R.,* 199

N.C. 393 (1c); *Highfill v. Mills Co.*, 206 N.C. 585 (1c); *Lee v. Roberson*, 220 N.C. 62 (1c).

L. D. BURWELL ET AL. v. TOWN OF LILLINGTON.

(Filed 1 March, 1916.)

1. Municipal Corporations—Bond Issues—Necessary Expense—Legislative Powers—Constitutional Law—Voters.

While an incorporated town may issue bonds for necessary expenses without submitting the question of their issuance to its voters, the authority resides in the Legislature to restrict its power so as to prevent abuses in that respect; and where the Legislature has passed an act authorizing a town to issue bonds, provided the proposition is submitted to and approved by its voters, issuance of bonds without meeting this requirement is invalid. Constitution, Art. VIII, sec. 4.

2. Same — Statutes — Amendatory Acts — Rate of Interest — Material Changes.

Where the Legislature has authorized a town to issue bonds for a necessary expense upon the approval of its voters, specifying that the bonds bear interest at a rate not exceeding 5 per cent, and after such issuance has met the approval of the voters of the town the Legislature authorizes the bonds at 6 per cent interest, the latter act will be construed as amendatory of and incorporated into the first, and the difference between the rates of interest authorized being material, bonds issued at the higher rate are invalid without the required approval of the voters of the town.

3. Municipal Corporations—Bonds—Sewerage—Water-works—Local Questions—Courts.

The validity of bonds for sewerage purposes issued in compliance with a statute requiring the approval of the voters of a town are not affected by the invalidity of bonds issued under a separate and distinct act authorizing the town to issue bonds for water-works and sewerage purposes, passed by another Legislature, the question as to whether the sewerage would be advantageous without a water-works system being one for the local authorities, and resting with the voters of the town or upon subsequent legislation.

ALLEN, J., dissenting.

(95) CIVIL ACTION from HARNETT, heard by *Lyon, J.*, on 12 January, 1916, upon a motion to continue to the hearing a restraining order previously issued by *Judge Daniels*, for the purpose of enjoining the issue of certain water-works and sewerage bonds to the amount of $25,000.

The town of Lillington was authorized by Private Laws, 1911, ch. 283, to issue bonds to the amount of $15,000, bearing interest at a rate not exceeding 5 per cent, for water-works and sewerage purposes. The act provided for an election by the people upon the question whether or not the bonds should be issued. This election was duly held and the issue was authorized by a majority of the qualified voters of the town. After this election was held and the result in favor of the bonds declared, the Legislature, by Private Laws 1913, ch. 55, amended the prior act of 1911, ch. 283, by striking out "five" in section 2 and inserting "six," so that the bonds would bear not exceeding 6 per cent interest. There was nothing else in the act. Subsequently, by Private Laws 1913, ch. 141, the town was authorized to issue $10,000 of bonds for the purpose of constructing and maintaining a sewerage system and a sewage disposal plant, after a like vote by the people. An election was thereafter held and the bonds authorized by a majority of the voters. There was no objection urged against either of the elections, it being admitted that they were duly and regularly held and conducted. The court refused to continue the injunction to the hearing and dissolved the restraining order, and plaintiff appealed.

M. T. Spears and Charles Ross for plaintiffs.
Manning & Kitchin for defendant.

WALKER, J., after stating the case. The plaintiff contends that the town is not authorized to issue $15,000 of bonds for water-works and sewerage purposes, as the original act was amended in a material respect, the limit of the rate of interest having been raised from 5 to 6 per cent, which necessitated a new election upon the question of issuing those bonds, the Legislature not having directed in the amending act that another election should be dispensed with. As the bonds in question are proposed to be issued for necessary expenses, the (96) town might have acted without a vote of the people, as we have so often held, but the authority resides in the Legislature, under Constitution, Art. VIII, sec. 4, to restrict the power of cities and towns in respect to taxation, contracting debts, or loaning their credit, so as to prevent abuses in that respect by municipal corporations. It may provide that before bonds are issued by such a corporation there shall be an election held, at which the people may express their will in regard to the matter, and that no bonds shall be issued, and no debt contracted, even for its necessary expenses, without the approval of the people at the polls. The question is fully discussed in *Town of Murphy v. Webb*, 156 N. C., 402, and the authorities cited, and there is no need of further comment upon it.

The legislative acts under which it is proposed to issue the bonds are valid, and the latter will not be valid unless the requirements of those statutes are complied with. The change from 5 to 6 per cent was a radical one. The people might be willing to vote in favor of an issue of bonds at the lower rate when they would not give their assent to one at the higher rate. The water-works bonds, under act of 1911, ch. 283, could run for a period of not less than fifty years. If the date of their maturity had been fixed at fifty years the difference in interest for the entire period would be $7,500, and if allowed to run for the shorter period of thirty years, the difference would be $4,500. So that it is easily seen that the two proposals, one for an issue of $15,000 at 5 per cent and the other for the same amount at 6 per cent, are widely different. It may be that the town could not float the bonds at 5 per cent, but, if not, the difficulty is for the Legislature and not for us to remedy. It may that the Legislature did not provide in the amending act that no further elections should be necessary for the very reason that it considered the increase in the rate of interest as a material change in the former act, and one that the people should approve before it becomes effective.

The power to provide for necessary expenses by taxation or the contraction of a debt without consulting the people, upon whom the burden of payment will rest, is one that should be exercised with great care and circumspection, and while due regard should be had for the public welfare, the consequent burden which will fall upon the people should be made as light or as little onerous as is consistent therewith. It is for this reason that the Legislature has frequently required that the power to tax or to issue bonds shall be exercised only with the consent of the people, upon the just and equitable principle that he who is to pay should have some voice in creating the debt or imposing the liability. Not a bad policy for the State to adopt when it does not seriously interfere with raising current necessary expenses and can be done
(97) without detriment to the public weal. The amendment to the act of 1911, ch. 283, by which the rate of interest was increased to 6 per cent so changed the substance of it, therefore, as in effect to make it a new act, and one so essentially different from the original as to require another election.

It was said in *Brown v. Spray,* 158 N. C., 44, 47: "It is familiar doctrine that an original act and an amendment to it shall be considered as one act, and, so far as regards a cause of action after the amendment is adopted, shall be construed as if it had read from the beginning as it does with the amendment added to it or incorporated in it. Black on Interpretation of Laws, pp. 356, 357." Revisal, sec. 2832. However that may be, it is clear that the Legislature, when it increased the rate

of interest by the amendment, did not intend to repeal the clause requiring an election. If it had intended to do so, it was quite easy to say as much in the amending act. We are of the opinion that there must be another election to determine whether bonds bearing a rate of interest not exceeding 6 per cent shall be issued, and that the court erred in dissolving the restraining order and refusing to grant an injunction to the hearing, as to the water-works and sewerage bonds authorized by the original act.

As to the sewerage bonds authorized by the act of 1913, and a vote of the people at an election held thereunder, we do not see why they are not valid. The objection to them urged by the plaintiff is that they are so connected with and dependent upon the other issue of bonds for water-works that if the latter cannot be issued without another election, the sewerage bonds for $10,000 should not be. But this is a matter which we cannot determine. We have nothing to do with the question as to how the town will dispose of the bonds, or apply the proceeds of their sale in constructing a sewerage system, what kind of sewerage plant it will adopt and what provision it will make for utilizing it. These are matters for the decision of the local authorities. The two acts were passed at different sessions of the General Assembly and do not refer to each other, although they may relate somewhat to the same subject-matter. The Legislature has, by a separate and independent statute, authorized the issue of bonds to the amount of $10,000 for sewerage purposes, if the issue should be approved by the people at an election to be held as provided by the act. This approval has been given, and the bonds, if issued, will be valid.

Suppose an election had been held to determine whether bonds for sewerage purposes should be issued, and this was done and the issue of bonds approved by the people before any election had been held upon the other question as to the water-works bonds, could it be successfully contended that the election as to sewerage bonds is void because the one as to water-works bond had not been held? Or, if the issue of sewerage bonds had been approved by the people, and they had (98) disapproved the issue of water-works bonds, would the sewerage bonds be invalidated by disapproval of the other bonds? The answer to this question obviously must be in the negative. The two propositions are not made interdependent by the statutes. The Legislature could have made them so, but did not.

What must be done to make the issue of sewerage bonds practically serviceable or useful to the town is a question not for our determination, but is one concerning the administration of the town's business affairs.

It may not be wise or expedient to issue bonds for the purpose of constructing and maintaining a sewerage plant, without having the means or facilities for operating it or making it effective. But this is a a question, as we have said, for the decision of the local authorities, and we must leave it with them. They may not be embarrassed by a lack of authority to issue the water-works bonds, as the people may yet give their consent at the polls, and confer the necessary power to issue them, or the Legislature may grant relief, or some other way found out of the dilemma; but however this may be, we are confined simply to the question of law involved, and cannot go beyond it.

The other objections urged to the validity of the bonds, if issued, are wholly untenable, and require no separate discussion.

In respect to sewerage bonds the decision was right, and as to the other bonds it was wrong. Judgment will be modified according to this opinion. The costs of this Court will be divided equally between the parties.

Modified and affirmed.

ALLEN, J., dissenting.

W. P. SKINNER ET AL. v. J. B. THOMAS, CHIEF OF POLICE, ETC.

(Filed 1 March, 1916.)

1. Intoxicating Liquors—Forfeitures—Police Powers—Courts.

Chapter 197, Public Laws 1915, requiring the police officer to take into his possession and keep any vessel, carriage, automobile, etc., used in conveying, concealing, etc., spirituous liquors, etc., and keep the same until the innocence or guilt of the defendant has been determined, and upon conviction of a violation of the prohibition law the "defendant shall lose all right, title, and interest in the property so seized," is a valid exercise of the police power of the State, which is left largely to the discretion of the lawmaking body; and the authority of the courts cannot be invoked unless there is an unnecessary interference with the rights of the citizen, or when there is no reasonable relation between the statute enacted and the end or purpose sought to be accomplished.

2. Same—Mortgages—Innocent Parties.

Statutes providing for forfeitures should be strictly construed and not extended beyond the meaning of the words employed; and chapter 197, Public Laws 1915, providing for a forfeiture of carriages, automobiles, etc., used in conveying or concealing intoxicating liquors in violation of our prohibition law, etc., by its express terms has reference to the right, title, and interest of the person so using them in violation of the law,

and does not extend to that of a mortgagee of a conveyance who is an innocent party and in no wise connected with the offense charged.

3. Same—Interpretation of Statutes.

The construction of the first section of chapter 197, Public Laws 1915, providing for a forfeiture of the vehicle wherein intoxicating liquors are conveyed or concealed, under the conditions named, that the forfeiture does not apply to the mortgagee of the vehicle who is a party innocent of the offense, is not varied by the provisions of section 2, as to the sale of the property seized when no person is arrested, or those of section 3, regarding the distribution of the proceeds of the sale.

CLARK, C. J., dissenting.

CIVIL ACTION tried before *Bond, J.*, on case agreed, at January (99) Term, 1916, of PASQUOTANK.

This is an action to recover an automobile or a part of the proceeds of its sale, tried on the following agreed statement of facts:

1. That on or about 23 April, 1915, one Richard C. Webb was the owner of a Ford touring car No. 566967, purchased of the Auto and Gas Engine Works of Elizabeth City, N. C.

2. That on 23 April, 1915, said Richard Webb executed a mortgage on said automobile to the Auto and Gas Engine Works of Elizabeth City, N. C., in the amount of $425.

3. That there is now due on account of said mortgage indebtedness $280 and interest in the amount of $8.10, which amount is due the plaintiff after all credits have been allowed.

4. That on or about 7 December, 1915, the said Richard Webb, together with one Ed. Burnett and one Will Woodhouse, while conveying in the town of Elizabeth City, N. C., in the said automobile 44 gallons of intoxicating liquors in half-pints, pints, and quarts, were arrested by defendant as chief of police of Elizabeth City, N. C., and the said automobile seized. On 27 December, 1915, the said Richard Webb, together with the said Ed. Burnett and Will Woodhouse, were duly tried and convicted before Ernest L. Sawyer, trial justice of Pasquotank County, N. C., for violation of the liquor laws under Public Acts 1913 and 1915, and were duly sentenced by said trial justice, and that the said Richard Webb and Ed. Burnett have not appealed from judgment of said court; that after the conviction of the defendants aforesaid and on said 27 December, 1915, the said automobile was ordered confiscated by the said Ernest L. Sawyer, trial justice, as provided in chapter 197, Public Laws 1915; that said automobile is now ad- (100) vertised for sale at public auction 29 January, 1916, by defendant J. B. Thomas, chief of police of Elizabeth City, N. C., as provided in said chapter 197, Public Laws 1915.

5. That the said plaintiffs were innocent third parties respecting the contraband conveyed in said car by the said Richard Webb, and the said plaintiffs claim an interest in said automobile to the extent of the indebtedness alleged in the premises.

6. That the value of the automobile is in excess of $200.

Judgment was rendered in favor of the plaintiffs, and the defendant excepted and appealed.

C. R. Pugh, Ehringhaus & Small for plaintiffs.

Ward & Thompson for defendant.

ALLEN, J. The plaintiffs sold an automobile to Richard Webb on 23 April, 1915, for $425, and on the same day Webb executed a mortgage to the plaintiffs conveying the automobile to secure the purchase price. Webb has made payments on the mortgage debt, and the amount now due thereon, including interest, is $288.10.

On or about 7 December, 1915, the automobile was seized by officers of the law, while in the possession of Webb, and it was at the time being used illegally to transport intoxicating liquors. Webb has been convicted of a violation of law.

The plaintiffs had no knowledge of the illegal use of the automobile, and were not connected in any way with the intoxicating liquors or with their transportation.

It is not denied upon these facts that the interest of Webb is forfeited to the State, and the sole question presented by the appeal is whether the rights of property of the plaintiffs, as mortgagees who have done no wrong, can be confiscated on account of the illegal acts of Webb.

The principle involved is important to the public because the enforcement of the prohibition law of the State may be affected, and to the individual citizen, whose property rights should not be impaired or destroyed on account of the wrongful acts of others except upon the ground of public necessity, and when the legislative authority to do so is clear and unambiguous.

The authority to confiscate the property of the plaintiffs, if it exists, is under the police power of the State, conferred by chapter 199, Laws 1915.

The police power is an attribute of sovereignty, possessed by every sovereign State, and is a necessary attribute of every civilized government. 6 Rul. Case L., 183. "It is the power to protect the public health and the public safety, to preserve good order and the public
(101) morals, to protect the lives and property of the citizens, the power to govern men and things by any legislation appropriate

to that end." 9 Ency. of U. S. Reports, 473. "Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly-populated community, the enjoyment of private and social life, and the beneficial use of property." *Slaughterhouse cases,* 16 Wall., 36, 21 L. Ed., 394.

The exercise of this power is left largely to the discretion of the law-making body, and the authority of the courts cannot be invoked unless there is an unnecessary interference with the rights of the citizen, or when there is no reasonable relation between the statute enacted and the end or purpose sought to be accomplished. 6 Rul. Case L., 236. Following this line of authority, it was held at the last term, in *Glenn v. Express Co.,* 170 N. C., 286, that intoxicating liquors are within the scope of the police power, and a statute was sustained as a valid exercise of that power which forbids the delivery of more than one quart of intoxicating liquors each fifteen days, although intended for personal use.

Statutes providing for the forfeiture and destruction of intoxicating liquors illegally kept have been uniformly sustained (*Kirkland v. State,* 2 A. and E. Anno. Cases, 245), and the authorities go further, and hold that animals and conveyances used in the illegal traffic are the subject of forfeiture, 22 Cyc., 1681; *U. S. v. Two Bay Mules,* 36 Fed., 84; *U. S. v. Two Horses,* 28 Fed. Cases, No. 16578; *U. S. v. One Black Horse,* 129 Fed., 167; *Mugler v. Kansas,* 123 U. S., 623.

The names of the cases cited from the Federal Reporter (*U. S. v. Two Bay Mules,* etc.) are significant, and go far to illustrate the principle upon which the courts proceed, and upon which *Daniels v. Homer,* 139 N. C., 219, was decided, that the property being used for an illegal purpose is the offender.

Applying these principles to chapter 197, Public Laws 1915, and considering it in connection with the policy of the State in favor of prohibition, we have no doubt that it is a valid exercise of the police power.

We must, however, go further, and see whether the act purports to deal with the property rights of innocent parties, and to declare a forfeiture against one who has done no wrong.

The rule of construction controlling when a forfeiture is claimed is well established.

Lord Holt said in Calloday v. Pilkington, 12 Mod., 513: "Let a statute be ever so charitable, if it gives away the property of the subject it ought not to be countenanced"; and the Supreme Court of the United States in *Farmers Bank v. Dearing,* 91 U. S., 29: "Forfeitures are not favored in the law. Courts always incline against them."

(102) In Sutherland Statutory Construction, 547, the rule is stated to be that "Statutes are construed strictly against forfeiture. A statute which subjects one man's property to be affected by, charged, or forfeited for the acts of another, on grounds of public policy, should be strictly construed; it cannot be done by implication."

The authorities in our State are to the same effect.

The Court said in *Smithwick v. Williams,* 30 N. C., 268: "Penal statutes cannot be extended by equitable construction beyond the plain import of their language"; in *Coble v. Shoffner,* 75 N. C., 43: "There is no question but that a statute prescribing a forfeiture of all interest is a penal statute, and is to be construed strictly. It cannot be construed by implication, or otherwise than by express letter. It cannot be extended, by even an equitable construction, beyond the plain import of its language"; and in *McGloughan v. Mitchell,* 126 N. C., 683: "It is a well settled rule that penal statutes must be strictly construed. They will receive no equitable construction beyond their plain language."

In the *Freight Discrimination Cases,* 95 N. C., 437, the Court also defined the term "strict construction" as follows: "It is an old but not very precisely defined rule of law that penal statutes must be construed strictly. By this is meant no more than that the Court in ascertaining the meaning of such a statute cannot go beyond the plain meaning of the words and phraseology employed in search for an intention not certainly implied by them. If there is no ambiguity in the words or phraseology, nothing is left to construction—their plain meaning must not be extended by inference, and when there is reasonable doubt as to their true meaning the Court will not give them such interpretation as to impose the penalty. Nor will the purpose of the statute be extended by implication so as to embrace cases not clearly within its meaning. If there be reasonable doubt arising as to whether the acts charged to have been done are within its meaning, the party of whom the penalty is demanded is entitled to the benefit of that doubt. The spirit of the rule is that of tenderness and care for the rights of individuals, and it must always be taken that penalties are imposed by the legislative authority only by clear and explicit enactments; that is, the purpose to impose the penalty must clearly appear. Such enactments, as to their words, clauses, several parts and the whole, must be construed strictly together, but as well, and as certainly in all respects, in the light of reason."

Let us, then, examine the statute, keeping before us the principle that, while the language used must receive a reasonable and not a strained construction, no case is within the statute that is not embraced by its terms.

The first section of the act requires the officer who seizes intoxicating liquors unlawfully held or possessed, "to seize and take into his custody any vessel, boat, cart, carriage, automobile, and all horses (103) and other animals or things used in conveying, concealing, or removing such spiritous, vinous, or malt liquors, and safely keep the same until the guilt or innocence of the defendant has been determined upon his said trial for the violation of any such law making it unlawful to so keep in his, their, or its possession any spiritous, vinous, or malt liquors; and upon conviction of a violation of said law said defendant shall forfeit and lose all right, title, and interest in and to the said property so seized."

The second section provides for the sale of property seized when no person is arrested, and the third for the distribution of the proceeds of sale. No forfeiture is declared and no property is subjected to confiscation when an arrest is made as in this case, except by the language quoted from the first section of the act, and this restricts and limits the forfeiture to the right, title, and interest in the property of the defendant who has been convicted.

The operative and material part of the statute is, "and upon conviction of a violation of said law said *defendant shall lose all right, title, and interest in and to the property so seized,*" and as this confines the forfeiture to the right, title, and interest of the defendant, we are without power to extend its terms and embrace the right, title, and interest of the plaintiffs, mortgagees, who were not defendants and who have had no connection with the illegal conduct of the defendant. The language of the second and third sections of the act is somewhat broader than that used in the first section, but as we have seen, the second section only deals with the sale of property *when no person is arrested,* and the third with the distribution of the proceeds of sale, and cannot be held to extend the forfeiture in the first section beyond its terms.

The distinction between the case before us and the Federal cases cited by the defendant (*U. S. v. Two Bay Mules,* 36 Fed., 84; *Distillery v. U. S.,* 96 U. S., 395; *U. S. v. One Black Horse,* 129 Fed., 167; *U. S. v. Two Horses,* Fed. Cases, No. 16578; *U. S. v. Distillery,* Fed. Cases, No. 14963) is clear, as the Federal cases are based on statutes which declare *the property* forfeited, while our statute only confiscates *the right, title, and interest of the defendant in the property.*

The decision in *Daniels v. Homer, supra,* is upon the same ground, the statute then before the Court declaring that the *nets* used illegally, and not *the interest of the defendant in the nets,* should be forfeited.

The case of *Felia v. Belton,* 170 N. C., 112, also relied on, has, we think, no bearing on the right of the plaintiffs to maintain this action. That action was brought to recover 40 gallons of wine received unlaw-

fully by the plaintiff, who was tried and convicted, and in the criminal action the wine was confiscated. It was also found as a fact in the civil action that it was the purpose of the plaintiff to use the wine, if
(104) permitted to recover it, in violation of ch. 97, sec. 7, Laws 1915, regulating the serving of drinks with meals.

The court properly held that the plaintiff could not recover because the property—the wine—had been received illegally and was declared forfeited in the criminal action, to which he was a party, and further because of his purpose to use the property in violation of law; and all of these elements, weighing against the right of the plaintiff, are absent from this record.

The plaintiffs in this action have been convicted of no offense; they have had no intoxicating liquors in their possession; they have neither been engaged in nor encouraged dealing in liquors; they are innocent of any unlawful conduct or illegal intent, and if their property right can be destroyed on account of the acts of another under a statute which only forfeits the right, title, and interest of the defendant who has been convicted, upon the same principle the horse and buggy and wagon and team lent to a neighbor for a legitimate purpose may be lost to the innocent owner if the borrower uses it in the unlawful transportation of liquor without the knowledge or consent of the owner.

Upon the whole record we are of opinion there is no error.

Affirmed.

CLARK, C. J., dissenting: The public policy of a State is declared, ordinarily, by its Legislature, sometimes by a Convention in framing its Constitution, and sometimes by a *Referendum* to the people at the ballot box. It was in the latter method that Prohibition was declared to be the public policy of this State. It has, therefore, the dignity of a constitutional provision, though it is not in the Constitution.

The statute now in question was adopted to carry out and make more effective this policy. The violation of the statute by intoxicating liquors being brought across the State line from Virginia became notorious, and it was utterly impossible to enforce the law unless this were prevented. Hence the enactment of a statute not merely punishing the individual who should thus violate the law, but forfeiting the automobile or other conveyance by which the liquor was brought in. This has long been the policy of the United States Government in dealing with illicit distillery and sale. Property thus illegally used would be forfeitable at common law *ipso facto* without a statute.

The material parts of chapter 197, Public Laws 1915, *i. e.*, sections 1 and 3, read as follows: "If any person shall have in his possession any spiritous liquors in violation of any State law now existing, the

sheriff or other officer of any county, city, or town who shall seize such liquors as provided by chapter 44, Public Laws 1913, or by any other authority provided by law, is hereby authorized and required to seize and take into his custody any automobile used in conveying, concealing, or removing such spiritous liquors, and safely keep (105) the same until the guilt or innocence of the defendant has been determined upon his said trial for the violation of any such law making it unlawful to so keep in his possession any spiritous liquors, and upon conviction of a violation of said law said defendant shall forfeit and lose all right, title, and interest in and to the property so seized; and it shall be the duty of the sheriff having in his possession said automobile to advertise and sell same under the laws governing the sale of personal property under execution. The proceeds derived from the sale of such property after paying for the reasonable expenses of such sale shall be paid by the sheriff to the county treasurer, and be applied by the treasurer to the credit of the public school fund of the county." This act was passed by the Legislature by virtue of the police power vested in it, and is in analogy to those statutes authorizing police officers to summarily destroy gaming tables, etc. (sections 3720, 3722, and 3723 of the Revisal), and authorizing the fish commissioner to seize and sell all nets setting in violation of the fishing laws.

The United States Government began stocking our waters with young fish, which after a definite period return to the rivers in which they originate. Certain parties adopted the custom of setting their nets in such a way as to prevent the return of the fish up the rivers, and thus confiscated to their own use the benefits which the Government had intended for the public. To prevent this the State forbade the nets being thus used, and provided as a part of the penalty the forfeiture of the nets, using almost exactly the same words as in section 2 of this statute, that the officers should "seize and remove all nets or other appliances setting or being used in violation of this act, sell the same at public auction, and apply proceeds of sale to payment of costs and expenses of such removal, and pay any balance remaining to the school fund of a county nearest to where the offense is committed." This Court sustained this statute in *Daniels v. Homer,* 139 N. C., 219, which has since been cited as authority, *Daniels v. Homer,* 146 N. C., 275; *S. v. Blake,* 157 N. C., 609. *Daniels v. Homer, supra,* was based upon *Lawton v. Steele,* 119 N. Y., 226, affirmed on writ of error, 152 U. S., 133, which has ever since been held as authority.

Indeed, the plaintiff does not deny the right of the State to confiscate conveyances used for this illegal purpose, but rests his case upon the wording of the statute. The statute is almost a verbatim copy of section 2 of the statute construed in *Daniels v. Homer* and of the Federal

statute on the subject. Laws 1915, ch. 197, sec. 2, after providing that "the sheriff or other officer shall seize the forbidden liquor," provides that if he fail to capture or arrest the owner, or party in possession, so using the vessel, boat, automobile, horse, and so forth, he shall advertise for the owners to come forward and institute proper proceedings (106) to secure possession of said property, and "upon the failure of such person to come forward—if an individual, in person—and make such claim within thirty days after such notice shall have appeared in at least one issue of some newspaper published in the county where such seizure was made, and after such notice and time the sheriff shall advertise such property so seized for sale, and sell as provided in section 1 of this act," and section 3 provides that the net proceeds derived from the sale of such property shall be paid into the county treasury to the credit of the public school fund.

The parties engaged in bringing the liquor across the State line were convicted and did not appeal, and the automobile was ordered confiscated by the trial court as provided by the law above, and was advertised for sale at public auction. The plaintiffs now bring this action of claim and delivery of the automobile against the defendant, who holds the same by order of a court of competent jurisdiction, on the ground that they hold a mortgage thereon. The plaintiffs cannot thus get possession of the property, which is *in custodia legis. Santa Felia v. Belton,* 170 N. C., 112, which is exactly in point. The remedy was by motion in the cause. There the liquor was confiscated, and it was held the owner could not recover it by claim and delivery from the officer.

If a party engaged in the illegal traffic of bringing intoxicating liquors across the State line can protect himself by putting a mortgage on the conveyance or team used by him, then this device will be a complete nullification of that part of the statute which the General Assembly enacted for its prevention by confiscating the conveyance or team used.

The same defense as here has often been attempted to be set up in the Federal Court in cases of the confiscation of conveyances and teams used for carrying liquors on which the tax had not been paid. In *U. S. v. Two Bay Mules,* 36 Fed., 84, *Dick, J.,* in the United States District Court of North Carolina held that "Animals and conveyances used in removing spiritous liquors to evade payment of the tax are subject to be forfeited, though used by a person who had hired them from the owner representing that they would be used for another purpose," the Court saying: "When property becomes liable to forfeiture, under the positive provisions of a statute, owners who have in no way participated in the frauds which caused the forfeiture must seek redress from the wrong-doers who unlawfully use the property with which they were

intrusted; or they can apply to the officer of the Government invested with the authority to remit forfeitures." *Judge Dick* then went on to give the reason as follows: "This proceeding is *in rem;* the mules and wagon are considerd the offenders, and are liable to forfeiture without any regard whatsoever to the personal misconduct or responsibility of the owner."

Judge Dick cited as authority *Distillery v. U. S.*, 96 U. S., 395, (107) which fully sustained his views and which cited divers cases. In that case the United States Supreme Court held that where the owner of property leased it for the purpose of distilling, which was a lawful purpose, but the lessee in carrying on the business of the distillery, defrauded the revenue, though this was unknown to the owner, the distillery and the property connected therewith was forfeited to the Government. This case cites many others and has been cited by many since, to be found in 8 Rose's Notes, 458, and later cases in the Supplements to Rose's Notes.

In *U. S. v. One Black Horse,* 129 Fed., 167, the Court held that a vehicle and horse owned and let by a liveryman, used in smuggling liquor across the line into the United States was subject to seizure and forfeiture, though the liveryman who owned them had no knowledge of the purpose for which the team and vehicle was to be used. This case cites *U. S. v. Two Bay Mules, supra,* saying: "In this case, as in that, the redress of the innocent claimant must be from the wrong-doer himself, or by application to the officers of the Government invested with authority to remit forfeitures."

In *U. S. v. Two Horses,* Fed. Cases, No. 16578, it was held: "Knowledge or intent on the part of the owner of a conveyance used in transporting spirits subject to tax that are being removed contrary to law is not required to be shown in order to a forfeiture of such conveyance," citing many cases to the same effect. Among others, *U. S. v. Distillery,* Fed. Cases, No. 14963, in which *Judge Woodruff* remarked: "It is expected that the owner of property will see to the use that is made of it, at his peril."

The same reasoning was used in *Daniels v. Homer,* 139 N. C., 223, which referred to the common law under which any personal chattel that even accidentally caused the death of a human being was forfeited and sold and the proceeds distributed to the poor, or like a deodand under which a weapon used in killing a human being was likewise forfeited, whether it belonged to the murderer or not, 1 Bl. Com., 300, or the case of a town ordinance which authorized hogs running at large to be impounded and sold for the penalty, *Rose v. Hardie,* 98 N. C., 44; and the ordinance which authorized a dog to be killed for failure to pay tax, *Mowery v. Salisbury,* 82 N. C., 175.

Among many State cases is *Boggs v. Commonwealth,* 76 Va., 994, sustaining the forfeiture of a vessel whose lessee violated the oyster law of that State, though without the knowledge or consent of the owner.

The law is thus summed up in 22 Cyc., 1643: "All personal property employed in the business of illicit distilling is subject to forfeiture, irrespective of ownership." In same volume, at p. 1681, it is said: "In addition to the penalties imposed upon persons who remove or
(108) conceal goods upon which the tax has not been paid, with intent to defraud, all conveyances and animals used in the accomplishment of this unlawful purpose are forfeitable. Knowledge or intent on the part of the owner of a conveyance to use it illegally is not required to be shown. The conveyance and animals are considered the offenders, and are liable without regard to the misconduct or responsibility of the owner. Innocent owners of property forfeited must obtain redress from those who were intrusted with the property and use it unlawfully or by application to the officers of the Government who have been invested with authority to remit forfeitures," citing many authorities in the notes.

The authorities are thus practically uniform that when property is used in violation of law it is subject to forfeiture, although the owner had no knowledge of the purpose. The proceeding is *in rem* against the property which has been devoted to an illegal purpose. These decisions are nearly all in cases where the owner had rented the property to the person thus using it illegally, and without knowledge on the part of the owner that it was to be so used. The case is much stronger here because the owner of the property was the violator of the law himself; and the plaintiff had merely a claim on it as a security for debt. The right of the Government to the forfeiture against the owner is prior to the lien of the mortgagee, just as a tax due upon the property takes priority of a mortgage. The Government's right to forfeit property, like its right to the tax, is against the property, and since the forfeiture takes priority over an innocent lessor, it is certainly good against a mortgagee who leaves it in the hands of the owner himself, who has devoted it to an illegal purpose. If the mortgagee can thus protect conveyances used to violate the law, then confiscation would become a nullity by this easy device of always using property on which a mortgage or lien has been given to some one else.

As has been said by the United States Supreme Court, *supra,* and in the other cases above cited, "The recourse of the owner whose property is thus forfeited is against the wrong-doer." It is his own fault that he has leased it to a person who has used it in defiance of the law. For a stronger reason the mortgagee here cannot claim exemption of the property from liability to the State, for he could have taken possession of the property under his mortgage, and it was by his consent that the

mortgagor remained in possession and was enabled to use it for an unlawful purpose. Practically, the mortgagor in possession was the agent of the mortgagee, and the mortgaged property is liable for the illegal use made of it.

Cited: Johnson v. Ins. Co., 172 N.C. 146 (2c); *Board of Health v. Comrs.,* 173 N.C. 254, 255 (1c); *Thomas v. Sanderlin,* 173 N.C. 332 (1c); *S. v. Perley,* 173 N.C. 786 (1c); *Smith v. Ins. Co.,* 175 N.C. 318 (2c); *S. v. Johnson,* 181 N.C. 642 (2cc); *S. v. Johnson,* 181 N.C. 643 (2j); *Motor Co. v. Jackson,* 184 N.C. 330 (2cc); *Motor Co. v. Jackson,* 184 N.C. 332, 333 (2j); *Reed v. Engineering Co.,* 188 N.C. 42 (1c); *Calcutt v. McGeachy,* 213 N.C. 7, 9 (1c); *Habit v. Stephenson,* 217 N.C. 449 (2c); *Barker, Solicitor, v. Palmer,* 217 N.C. 525 (1c); *Cab Co. v. Casualty Co.,* 219 N.C. 794 (2c); *S. v. Ballance,* 229 N.C. 770 (1e).

(109)

D. C. DORSETT v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 8 March, 1916.)

1. Railroads—Municipal Corporations—Town Ordinances—Speed of Trains—Trials—Evidence—Negligence.

Where an ordinance of an incorporated town forbids the operation of through trains at a certain crossing within its limits at a greater speed than 4 miles an hour, and requires that a trainman shall go before the train at this place a distance of 50 feet to warn pedestrians, it is reversible error for the trial judge to refuse to instruct the jury that the violation of this ordinance was evidence of negligence on the part of the defendant, and they should answer the issue in plaintiff's favor if they found such was the proximate cause of the personal injury sued on, when there is evidence to sustain the request so to charge.

2. Railroads—Municipal Corporations—Town Ordinances—Through Trains—Local Switching.

A locomotive from a through train is considered as a part thereof while switching cars therefrom to be left at its local stop, within the meaning of an ordinance of the town requiring that the speed of such trains at a certain crossing within the town shall not exceed a speed of 4 miles an hour, etc.

APPEAL by plaintiff from *Devin, J.,* at October Term, 1916, of WAYNE.

Langston, Allen & Taylor for plaintiff.

O. H. Guion for defendant.

CLARK, C. J. This was a civil action for the recovery of damages for personal injuries sustained by plaintiff at a railroad crossing in Goldsboro. The plaintiff, who lived in the eastern part of Goldsboro, several blocks from his place of work with a manufacturing company, crossed the railroad track at Elm Street going from his home to his work. Elm Street runs east and west and the defendant's track runs north and south on Center Street. Elm Street crossing is a regular crossing within the corporate limits of the town. The railroad tracks at that crossing are 5 or 6 feet lower than the street. There is an embankment on both sides of the crossing and, in addition, there were cross-ties piled up on the left-hand side. The freight depot of defendant is 200 or 300 yards south of this crossing and the track makes a slight curve between the crossing and the freight depot.

The plaintiff testified that as he approached the crossing on his bicycle he looked to the left towards the freight depot for a train, and then looked to his right just as he was nearing the first track, and at that moment the tender of the engine struck him; that he was going slow and the wheels of the tender caught his right foot; that he
(110) was knocked unconscious. He testified that he looked in both directions for the light of the train; that he did not hear any engine; that he looked as he was starting down the grade and looked again when about halfway down, and neither saw nor heard any train. There was evidence that the train was running 25 or 30 miles an hour, and that it was not blowing a whistle or ringing a bell, and that the embankment and cross-ties prevented the plaintiff seeing it. There was evidence on the part of the defendant that it was running only some 4 miles an hour, and that it was ringing the bell at every crossing.

The ordinance of the city was put in evidence, which was as follows: "It shall be unlawful for any railroad or railway company to operate any through or local freight train or passenger trains through the city of Goldsboro on East and West Center Street at a rate of speed exceeding 4 miles per hour, and the said railroads and railway companies are hereby required to have a flagman proceed 50 feet in front of every through or local freight train or passenger train to warn persons of the approach of said train. Any railroad or railway company violating this ordinance shall be subject to a fine of $50 for each offense."

The plaintiff requested the court to charge the jury as follows: "If you shall find from the evidence that the defendant company was operating its trains at the time of the injury, through the city of Goldsboro, on East Center Street, at a rate of speed exceeding 4 miles per hour, and in violation of the city ordinance, the court charges that such violation would be evidence of negligence." The court refused, and the plaintiff excepted.

The plaintiff requested the court to charge as follows: "If you shall find from the evidence that the defendant company was operating the train which injured the plaintiff either at a rate of speed exceeding 4 miles per hour or was operating the train which injured the plaintiff without having a flagman proceed 50 feet in front of said train, in violation of the city ordinance, and you shall further find that either the running of the train in excess of a rate of speed of 4 miles per hour or of the failure to have a flagman 50 feet in front of the train was the proximate cause of the injury received, it would be your duty to answer the first issue 'Yes.'" The court refused, and the plaintiff again excepted.

The refusal to give the above prayers was error. It appears that the judge refused these instructions on the ground that the train in question, which consisted of an engine and tender, did not come within the description in the ordinance, "to operate any through or local freight train or passenger train through the city of Goldsboro." From the evidence, this was part of a through freight train passing by Goldsboro. In doing so it cut off six cars which the engine ran up Center Street and onto a siding, where it left the six cars, and then the engine and tender of the train were passing back to the freight depot to be (111) connected onto the rest of the train. The engine and tender were a part of the through train, and in cutting off these six cars to be left at Goldsboro and then proceeding back to the main line to reconnect with the train, it was doing a necessary part of "operating a through train." This was not the work of a shifting engine, which is kept locally at a point to move cars from one location to another, or to shift them about in making up a train, but it was an essential part of the duty of this through train, which had to drop or take up cars at different stations on its journey. The evidence of the defendant was that this engine and tender were a part of such through train, and that having placed six cars on the siding, the engine and tender were proceeding to the freight station to reconnect with the cars it had left there.

There are other errors assigned which we need not consider, as they may not happen in another trial. There was evidence on the part of the defendant that the engine was not running more than 4 miles an hour, and that the bell was rung at every crossing. The evidence of the plaintiff contradicted this, and it was for the jury to settle the controversy. The plaintiff was entitled to have the jury consider whether at the time of the injury the defendant was operating any part of its through train, *i. e.*, the engine and tender thereof, in violation of the ordinance.

In refusing the above instructions there was

Error.

Cited: Ingle v. Power Co., 172 N.C. 753 (1c).

HARRY McBEE v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 8 March, 1916.)

Railroads — Right of Way — Foul Conditions — Evidence—Negligence—Trials.

In order to recover damages of a railroad company for fires caused on its foul right of way, it must be affirmatively shown that the condition of the right of way was foul, and that it was caused by a spark from the defendant's locomotive.

APPEAL by defendant from *Lyon, J.*, at October Term, 1915, of VANCE.

Civil action to recover damages for negligently burning plaintiff's woods. There was a verdict and judgment for plaintiff. Defendant appealed.

J. C. Kittrell, Thomas M. Pittman for plaintiff.

Murray Allen for defendant.

BROWN, J. Plaintiff sues to recover for damages by fire alleged to have been caused by the negligence of the defendant in permitting its
(112) right of way to become foul with combustible material and in so negligently operating its engine as to set fire to the foul right of way, and in negligently permitting the fire to be communicated to the plaintiff's land. It is alleged that the fire occurred on or about 6 November, 1912. The defendant denied all of the allegations of the complaint.

Taking all the evidence in its most favorable aspect for plaintiff, there was no sufficient evidence to go to the jury. The evidence tends to prove that the fire started on the right of way of defendant and burned in the direction of plaintiff's land. There is no evidence that there was combustible material on that part of the right of way where the fire started at the time of the fire. The defendant's evidence tends to prove that the right of way was burned off as usual in November, 1912, but what time in November does not appear.

It is undoubtedly the duty of a railroad company to keep its right of way for a reasonable distance from its track clear of such substances as are liable to be ignited by sparks and cinders from its engines. *Maguire v. R. R.*, 154 N. C., 384; *McCoy v. R. R.*, 142 N. C., 383. But to establish negligence in that respect there must be affirmative evidence of an accumulation of combustible matter on the right of way. *Black v. R. R.*, 115 N. C., 667; *Livermon v. R. R.*, 131 N. C., 527; *Simpson v. Lumber Co.*, 133 N. C., 95.

Again, mere proof of a foul right of way without evidence that the fire was set out by a spark from a passing engine is insufficient to establish actionable negligence. It has been repeatedly held that in addition to the foul condition of the defendant's right of way, plaintiff must prove that the fire was set out by the defendant in order to establish negligence. *Williams v. R. R.*, 140 N. C., 623; *Bowers v. R. R.*, 144 N. C., 684; *Hardy v. Lumber Co.*, 160 N. C., 113; *Aman v. Lumber Co.*, 160 N. C., 369.

In *Maguire v. R. R., supra,* it is said: "To recover damages of a railroad company for carelessly and negligently communicating fire to its right of way which spread to and burned plaintiff's lands, the burden of proof is on plaintiff to show that defendant negligently permitted combustible matter to accumulate on its right of way, and *that defendant communicated fire from its engine to its foul right of way,* and from thence it was communicated to plaintiff's land and caused the injury." This has been settled law in this State since *Black's case.*

There is no evidence whatever that connects any engine of the defendant with the origin of the fire, nor any evidence that the fire was caused by any act of negligence upon the part of the defendant. There was error in instructing the jury that if they found that the fire was set out by a passing engine, to answer the first issue "Yes."

New trial.

Cited: Denny v. R. R., 179 N.C. 534, 535 (c); *Wilson v. Lumber Co.*, 194 N.C. 376 (c); *Sutton v. Herrin*, 202 N.C. 604 (c).

(113)

WILLIAM FOUNTAIN v. COUNTY OF PITT.

(Filed 8 March, 1916.)

1. Counties—Process—Pleadings—Commencement of Actions—Statutes.

While Revisal, sec. 1310, provides that a county must be sued in its own name, the corporate powers and authority of the county are exercised by its board of commissioners, Revisal, sec. 1309; and where in an action by the county physician to recover for services alleged to have been rendered the county, the summons is issued to the board of commissioners of the county (Code, sec. 704), and the cause of action is unmistakably and plainly alleged against the county, and not personally against its individual commissioners, the cause of action will be taken as having commenced from the issuance of the summons. *Semble,* the wording in the summons as to the board of commissioners, preceding the name of the county, will be treated as surplusage.

2. Same—Limitation of Actions.

Where the summons against a county has been issued to the board of commissioners of the county, and the cause of action alleged is against the county, and the judge of the Superior Court has permitted an amendment, and process has been served upon the county by name (Revisal, sec. 1310), but after the time prescribed for bringing the action, the bar of the statute cannot be successfully pleaded if the summons to the commissioners of the named county has been served in time.

3. Counties — Corporations — Contracts — Services Requested—Quantum Meruit.

In plaintiff's action to recover for services alleged to have been rendered the county, the defendant's liability, as in other such actions against corporations, depends upon whether an express contract has been made by the parties, stating the compensation, in which event the recovery will be according to its terms and the facts established; or if the services had been requested, without stating compensation, it would be for their reasonable value, if rendered, as upon a *quantum meruit.*

APPEAL by plaintiff from *Bond, J.,* at September Term, 1915, of PITT.

Civil action. Plaintiff sued for an amount alleged to be due for professional services rendered the defendant in the years 1909, 1910, and 1911, as county physician, or superintendent of health and quarantine officer of the county. The action was originally entitled *William Fountain v. The Board of County Commissioners of the County of Pitt.* Defendant demurred to the complaint upon the ground that the action should have been against "The County of Pitt" or "Pitt County" in its corporate capacity as a county and not against the board of commissioners of the county of Pitt, as the complaint does not allege any personal liability of the commissioners and they are not mentioned by their individual names, and that an action cannot be maintained against the board of commissioners of Pitt County, as this is not au-
(114) thorized by law, as formerly. The court, *Judge Daniels* presiding, overruled the demurrer and directed that the county of Pitt be made a party. Summons issued for the county on 18 May, 1914.

Defendant reserved an exception to the overruling of the demurrer and answered the complaint, pleading that three years had elapsed from the accrual of the cause of action to 18 May, 1914, the date on which the summons was issued to the county of Pitt after the demurrer was overruled. The court was of the opinion that plaintiff's cause of action was barred by the statute of limitations, and entered judgment in favor of the defendant. Plaintiff appealed.

F. M. Wooten for plaintiff.

S. J. Everett and Julius Brown for defendant.

WALKER, J., after stating the case: It is evident from the pleadings in this case that the action was intended to be brought against the county of Pitt, and in the third ground of demurrer the defendant says that such was the intention. The plaintiff nowhere in the complaint alleged any cause of action against the board, but in the first section thereof he says that in May, 1909, he was duly elected to the position of superintendent of health and as quarantine officer for the "county of Pitt." There is no suggestion in the other sections of the complaint of any other liability than that of the county. Prior to the amendment by Revisal, sec. 1310, a suit for a claim due by a county was required to be brought against its board of commissioners, as Code, sec. 704, provided that a county should "sue and be sued in the name of the board of commissioners," while Revisal, sec. 1310, provides that a county must "sue and be sued in the name of the county." The corporate powers and authority of the county are exercised by the board of commissioners, Revisal, sec. 1309. The original summons was properly served on 18 April, 1912, and that service would have been just as good and valid if the suit had been, in form, one against the county of Pitt, *eo nomine.* While the process ran against the board, it is apparent from it, and from the pleadings, as we have shown, that the suit was in reality against the county, and in the body of the complaint the defendant is designated as "the county of Pitt." In addition to this consideration, the words, "the board of commissioners for," in the designation of the defendant as "the board of commissioners for the county of Pitt" may well be regarded as surplusage, and eliminated, which would leave only the name of the true defendant, the county of Pitt. Our statute in regard to amendments is very broad. "The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleadings, process, or proceedings by adding or striking out the name of any party, *or by correcting a mistake in the name of a party, or a mistake in any other respect,* or by inserting other allegations material to the case, or, when the amendment (115) does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved." The object of our present system of procedure is to try cases upon their merits, regardless of those technicalities which do not promote but defeat justice, at the same time preserving the substantial rights of parties. We do not think the plaintiff could reasonably have been misled in this case. Any one looking at the process and pleadings would not fail to understand that the county was the alleged debtor and was sued for the debt. Revisal, sec. 509, provides: "The court, or judge thereof, shall in every stage of the action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment

shall be reversed or affected by reason of such error or defect." But we put our decision on the broad ground that this was in effect, and from the beginning, an action against the county, and the misnaming of the defendant could not have misled the defendant as to the nature of the action or as to the party who was sued. *Judge Daniels* took the right view of the matter when he allowed the amendment. We do not think, though, that fresh process against the county was necessary to carry out that view. The original process had already been properly served and was sufficient to bring the county into court, and the amendment, as to the name, if necessary at all, was only so for the sake of conformity in process and pleadings.

It follows that there was error in the ruling as to the statute of limitations, for which a new trial is ordered.

Whether the plaintiff is entitled to recover on the merits we cannot determine as the complaint is now drawn. The facts disclosed by the evidence must settle that question. We have mentioned the subject for the purpose of referring to several authorities upon the liability of a corporation for extra services of an officer or employee, who in this case received a salary, where there was no express contract for his compensation, or no request that the services be rendered. When there is an express contract, the party will recover according to its terms, and where there is a request for services he may recover, as upon a *quantum meruit*, for their reasonable value, if they are rendered. Where there is no such contract or request the general rule is that the corporation is not liable. *Copple v. Comrs.*, 138 N. C., 127; *Caho v. R. R.*, 147 N. C., 20; *Chiles v. Mfg. Co.*, 167 N. C., 574. Attention is called, in the case last cited, to a limitation of the general rule, as laid down in *Taussig v. R. R.*, 166 Mo., 28. We cannot, of course, decide what the law is upon the facts of this case until they are fully disclosed.

The demurrer was properly overruled. There was error in the ruling as to the statute of limitations.

Error.

Cited: Brinson v. Duplin County, 173 N.C. 137 (1c); *S. v. Jennette*, 190 N.C. 101 (1c); *Credit Corp. v. Boushall*, 193 N.C. 607, 608 (3c); *Comrs. of McDowell v. Bond Co.*, 194 N.C. 138 (1c); *Jones v. Vanstory*, 200 N.C. 585 (2d); *Clevenger v. Grover*, 212 N.C. 16 (2c); *Lee v. Hoff*, 221 N.C. 237, 239 (2c); *Johnson v. Marrow*, 228 N.C. 60 (1c); *Electric Membership Corp. v. Grannis Bros.*, 231 N.C. 719 (2d).

(116)

K. N. BELL AND WIFE v. THOMAS SMITH ET AL.

(Filed 8 March, 1916.)

1. Navigable Waters—Grants—Exclusive Fishing—Statutes.

A grant of land bordering upon or partly under navigable waters cannot confer upon the grantee the sole or exclusive right of fishing in such waters, nor can such right be acquired by prescriptive use. Revisal, sec. 1693 (1). Revisal, secs. 1698, 2450, 1696, 1697, have no application to the facts of this case, and it was no error for the court to refuse to submit an issue under sections 1698 and 2450.

2. Same—Judgments—Interpretation—Appeal and Error.

In this action the jury found for their verdict that defendant "had wrongfully fished in front of the plaintiff's lands on navigable waters in such way as to interfere with or prevent the operation of plaintiff's seine from this beach," whereupon a judgment was signed enjoining defendant from wrongfully interfering with or preventing the plaintiff, her agents, etc., from operating a seine from her shore. *Held*, the judgment, by correct interpretation, is that the defendant is restrained from wrongfully interfering with plaintiff's right to fish in navigable waters in common with all persons, and the defendant having appealed, it was for him to show error in the judgment of the lower court.

APPEAL by defendants from *Bond, J.*, at October Term, 1915, of CARTERET.

Abernathy & Davis, Claud Wheatley, and G. V. Cowper for plaintiffs.
E. H. Gorham and J. F. Duncan for defendants.

CLARK, C. J. The *feme* plaintiff owns a grant to certain lands near the mouth of Bogue Inlet, on Bogue Sound, through which runs the channel cut by the United States Government on the route to Swansboro, and has a seine fishery thereon. She alleges that the defendants wrongfully fished in front of said seine beach in such way as to interfere with the fishing operations of the seine used by her agents and servants from the shore.

The defendants admit that they have been catching fish in the navigable waters in which the plaintiff draws her seine, but *feme* plaintiff admits that the defendants have not trespassed on the shore owned by her. There seems to be no controversy as to the ownership of the marsh and the land by the plaintiff, nor that the plaintiff's seine fishery has been long established and used.

It is not contended that the plaintiff has improved the location "by clearing and cutting off logs, roots or stumps, or other obstructions," so as to make the spot suitable for hauling a seine. There was no

(117) error, therefore, in the court declining to submit an issue on that point under Revisal, 1698 and 2450; nor has the plaintiff acquired title to the navigable waters for a wharf, under Revisal, 1696 and 1697.

The single question presented is this: The plaintiff is the owner of the land and has been using this beach for a seine for many years, and contends that she has the exclusive right to cast the seine in the navigable waters in front of such beach. The defendants contend that there can be no ownership of land beneath navigable waters, Revisal, 1693 (1).

The defendants' brief frankly says: "The sole question presented by this appeal is whether the grant gives the plaintiff the exclusive right of fishing in the waters of Bogue Sound covered by its description." So far as said grant embraces land covered by navigable waters, it is void by the express terms of Revisal, 1693 (1).

The defendants, admittedly, have not trespassed upon the shore or beach owned by the plaintiff. It follows that in the navigable waters opposite plaintiff's beach she has no exclusive right of fishing, though such spot is within the bounds of her grant.

The right to fish in navigable waters is open to all, and the proprietorship of the adjacent beach gives no exclusive right of fishing in the navigable waters in front thereof; nor does the fact that the plaintiff as owner of the adjacent beach has been in the habit of drawing a seine up to her beach at that point to give her such exclusive fishery, no matter for how many years she has exercised or enjoyed such privilege. No title to land under navigable waters can be acquired by user, since even an express grant of land covered by navigable waters is void by the terms of the statute.

It appears that by statute all seines in the county of Carteret are restricted to 225 yards in length. As the defendants cannot use the adjacent beach, their enjoyment of fishing with a seine of that length cannot be very extensive as to area. But the defendants and all other citizens of the State have the right to fish in any navigable waters. No exclusive right can be reserved to the owners of the adjacent beach. The order in which the right can be enjoyed is that observed at the Pool of Bethesda.

The jury found in this case that the defendants had "wrongfully fished in front of the lands owned by the plaintiff in such a way as to interfere with or prevent the operation of a seine by the plaintiff from this beach." The judgment enjoins the defendants, their servants, etc., "from interfering or preventing the plaintiff Mary E. Bell, her agents, etc., from operation of a seine from her shore for fishing." We must understand this verdict and judgment not as holding that plaintiff has the exclusive right to draw a seine in the navigable waters in front of

her beach, but that the defendants are enjoined from "wrongfully interfering so as to prevent her doing so."

If it had appeared from the issue found and the judgment that (118) it was intended to hold that the plaintiff had the exclusive right of fishing in the navigable waters in front of her beach we should have felt compelled to grant a new trial for such error. The plaintiff contends in the argument here that such was not the meaning of the issue or the judgment, and as the burden is upon the appellants to show error, we must sustain the judgment below. In doing so, however, we must be understood as construing such judgment as not recognizing any exclusive right of fishery in the plaintiff and as enjoining the defendants simply from wrongfully interfering with her lawful exercise of fishery.

The right of fishery in navigable waters is open to all, and must be exercised by each, in due turn, without interfering with the reasonable exercise of the same right by others. Such right is similar, though not identical, with the enjoyment of property by tenants in common. The whole matter has been thoroughly discussed in the following cases: *Collins v. Benbury,* 25 N. C., 277; *Winder v. Blake,* 49 N. C., 332; *Skinner v. Hettrick,* 73 N. C., 57; and *Hettrick v. Page,* 82 N. C., 68.

In *Collins v. Benbury,* 27 N. C., 118, it is said: "The mere circumstance of fishing at a particular place, no matter for how long a time, raises no presumption of such a grant, because the person so fishing exercises *prima facie* only a right which belongs to him in common with all others." This was the case of a seine fishery the owner of which claimed an exclusive right. The grant under which the plaintiff claims is silent with reference to any fishing right, and there is nothing therein indicating an intention to give the grantee an exclusive right of fishery.

No person has a several or exclusive right of fishery in any of the public navigable waters of the State. *Daniels v. Homer,* 139 N. C., 219; *S. v. Gallop,* 126 N. C., 983; *Rea v. Hampton,* 101 N. C., 51.

The right of fishing in the navigable waters of the State belongs to the people in common, to be exercised by them with due regard to the rights of each other, and cannot be reduced to exclusive or individual control either by grant or by long user by any one at a given point. Such right must be exercised, in the absence of express regulations by the State, with due regard to the rights of all under the general custom of fishing in the sound. There could be no valid entry of lands covered by navigable waters. Revisal, 1693 (1); *Land Co. v. Hotel,* 132 N. C., 526; *Holley v. Smith,* 130 N. C., 86; *Lenoir v. Crabtree,* 158 N. C., 361.

The defendants contend on the argument here that the judgment confers an exclusive right of fishery upon the plaintiff. The plaintiff contends that it does not. The latter construction is permissable and

is according to law. The burden is upon the defendants to show error. The restraining order was erroneous, as it forbade the defendants from fishing at all at the *locus in quo,* but the injunction to the hearing (119) was more restricted, and the final judgment is more so, as above stated. The plaintiff probably began the action to assert an exclusive right, but we have to pass upon the question whether there is error in the result reached by the judgment. In that we find

No error.

Cited: Power Co. v. Elizabeth City, 188 N.C. 295 (1c); *Hampton v. Pulp Co.,* 223 N.C. 542 (2c); *Distributing Corp. v. Indemnity Co.,* 224 N.C. 378 (2j).

B. T. STURTEVANT v. THE SELMA COTTON MILLS.

(Filed 8 March, 1916.)

Appeal and Error—References—Exceptions—Findings—Presumptions.

Where the trial judge sustained exceptions to a referee's report, made findings and thereon rendered the judgment appealed from, to which judgment the appellant excepted and assigned for error that the court sustained the exceptions, the exceptions thus taken are broadside and too indefinite to be considered on appeal, and it will be presumed that the findings of the judge were based upon sufficient evidence.

APPEAL by defendant from *Bond, J.,* at April Term, 1916, of JOHNSTON.

Civil action, heard upon exceptions to report of referee. Upon the hearing the judge allowed all of plaintiff's exceptions to the report, and found the facts himself and rendered judgment for plaintiff. Defendant excepted to the judgment and appealed.

John W. Hinsdale for plaintiff.

F. H. Brooks, N. Y. Gulley for defendant.

BROWN, J. This action is brought to recover damages for an alleged breach of contract for the purchase of certain machinery and appliances for use in defendant's factory to be manufactured by the defendant especially and according to specifications to fit the mill. The contract contained these provisions: "Delivery subject to delays beyond our control"; also, "all to be delivered f. o. b. cars at our works, Readville, Mass. We to have four weeks written notice of desired shipments."

The cause was referred, and upon hearing plaintiff's exceptions to the report and findings of the referee, the court sustained them and rendered judgment as follows:

"After argument, it is considered and adjudged that the exceptions of the plaintiff are allowed, and the facts are found by the court accordingly, and the exceptions of the defendant are overruled; and the court finds that the time limit in the contract sued on was inserted for the plaintiff's benefit, and that it did not require plaintiff (120) to deliver within four weeks notice; that the contract provided that the plaintiff should not be liable for delay beyond the plaintiff's control, and the delay in delivery was beyond plaintiff's control; that even if all this were not so, the defendant waived an earlier delivery, and the plaintiff under the circumstances delivered in reasonable time, and the defendant had no right to cancel the contract; that the defendant is indebted to plaintiff in the sum of $535, with interest on $267.50 from 7 January, 1905, and on $267.50 from 7 March, 1905. It is adjudged that the report of the referee be and is amended accordingly, and as so amended is in all respects confirmed.

"It is, therefore, upon the motion of John W. Hinsdale, plaintiff's attorney, adjudged that the plaintiff above named do recover of the defendant above named the sum of $535 and interest on $267.50 from 7 January, 1905, and on $267.50 from 7 March, 1905. It is adjudged that the defendant recover nothing on its counterclaim."

"To this judgment defendant excepts" and appeals. This broadside exception is insufficient to bring up for review the findings of the judge. The alleged errors should be pointed out by specific exceptions as to findings of fact as well as law. Findings of fact by the judge are binding on us where supported by evidence, and when it is claimed that such finding is not supported by any evidence the exceptions and assignments of error should so specify. Such objections cannot be taken for the first time in this Court. *Joyner v. Stancill,* 108 N. C., 153; *Hawkins v. Cedar Works,* 122 N. C., 87.

The assignments of error that the court erred in sustaining the exceptions of plaintiff and in overruling those of defendant are entirely too general to fulfill the requirements of the rules of this Court. *Usry v. Suit,* 91 N. C., 406; *Wadesboro v. Atkinson,* 107 N. C., 317; *Hanner v. McAdoo,* 86 N. C., 370; *Jordan v. Bryan,* 103 N. C., 59; see cases collated in Revisal, pp. 253-4-5.

The judgment of his Honor is based upon his findings of fact and not upon those of the referee, and as those findings are presumed, in the absence of specific exception, to be supported by evidence, they are binding upon us. The judgment based upon those findings is correct.

Affirmed.

Cited: Johnson v. Roberson, 171 N.C. 196 (c); *Marler v. Golden,* 172 N.C. 826 (c); *McGeorge v. Nicola,* 173 N.C. 709 (c); *Boyer v. Jarrell,* 180 N.C. 483 (c); *Thomas v. Products Co.,* 194 N.C. 731 (c); *Cecil v. Lumber Co.,* 197 N.C. 82 (c); *Roberts v. Davis,* 200 N.C. 426 (c); *In re Will of Beard,* 202 N.C. 662 (c); *Baker v. Clayton,* 202 N.C. 744 (c); *Hickory v. Catawba County,* 206 N.C. 171 (c); *S. v. Bittings,* 206 N.C. 801 (c); *McDaniel v. Leggett,* 224 N.C. 810 (c); *Wilson v. Robinson,* 224 N.C. 852, 853 (c); *Mullen v. Louisburg,* 225 N.C. 57 (c); *Rader v. Coach Co.,* 225 N.C. 539, 540 (c); *Burnsville v. Boone,* 231 N.C. 579 (c).

(121)

THOMAS A. VICK v. L. H. WOOTEN ET ALS.

(Filed 8 March, 1916.)

Parties—Infants—Partition—Estoppel.

Where an infant residing with his grandmother has an interest in lands the subject of proceedings for partition, and was not properly represented therein, but his grandmother was a party thereto; and in such proceedings a division is made, allotting to the grandmother and himself her share as well as that of the infant; and after coming of age he joins in the conveyance, or executes a quitclaim deed to certain of the lands allotted to his grandmother and himself and receives at least his share of the purchase price, he is estopped by his acts and conduct to deny the validity of the judgment entered in the former proceedings, or to question the same in another proceeding for partition brought seven years after he has reached his majority, especially where the rights of innocent parties have intervened.

WALKER, J., dissenting.

APPEAL by plaintiff from *Bond,* J., at November Term, 1915 of PITT.

Harry Skinner, Manning & Kitchin, W. F. Evans, and Don. Gilliam for plaintiff.

Winston & Biggs for defendants.

CLARK, C. J. This is an appeal by plaintiff in two actions brought by him and consolidated. Many of the questions presented in this record were before this Court in *Vick v. Tripp,* 153 N. C., 90. The question again presented is as to how far the plaintiff's rights were concluded by the partition proceeding. In that proceeding he was not a party, but he had an interest therein as a remainderman in fee under the will of T. A. Cherry, who was a tenant in common of a one-fourth

undivided interest as one of the residuary devisees of his father, T. R. Cherry, who died in 1890. His son, T. A. Cherry, died in 1891, having devised all his estate to his mother, Sallie A. Cherry, for life, with the remainder to the plaintiff, who is the nephew of T. A. Cherry. A special proceeding for partition was brought in the Superior Court of Pitt County by J. B. Cherry, Sallie A. Cherry, and others. The plaintiff Thomas A. Vick was at that time an infant of tender years, and was not made a party nor represented by a guardian *ad litem,* nor was his name mentioned in the proceeding.

At the time the special proceeding began the title to the land which had belonged to the partnership stood as follows: J. B. Cherry, surviving partner, owned one undivided half interest therein; Lilian Cherry one-fourth of one-half; Mrs. Maggie S. James one-fourth of one-half; Mrs. Sallie Cherry one-fourth of one-half and a life estate in one-fourth of a half, and the plaintiff Vick the remainder after said life estate in said one-fourth of one-half. Though the plaintiff Vick was not a party to that proceeding, one-half of one-half was al- (122) lotted to Mrs. Sallie Cherry. At that time the plaintiff and his grandmother, Mrs. Sallie Cherry, were living together, and it is manifest that said double portion allotted to her embraced the one-fourth of one-half which she owned in fee and the one-fourth of one-half in which she had a life estate, with the remainder to her grandson, this plaintiff. The allotment was thus of their entire joint interests in said real estate.

On 21 July, 1905, the plaintiff Vick, being of full age, joined his grandmother, Mrs. Sallie Cherry, in conveying the store lot, which was a part of the allotment, to one Brown, for the full price of $3,900. This was held in *Vick v. Tripp,* 153 N. C., 95, to be a ratification by the plaintiff in selling the store and receiving the proceeds. The property allotted to Mrs. Sallie Cherry consisted of three pieces of property in which the plaintiff held a remainder interest as to one-half. This property consisted of the store in the conveyance of which the plaintiff joined, the Tripp farm of 192½ acres, and 3⅕ acres in Greenville.

When the case was here before, *Vick v. Tripp, supra,* the Court held that the effect of the partition proceedings was to set apart to Mrs. Sallie Cherry and the plaintiff their entire interests in the land, and that the joinder of the plaintiff in the conveyance to Brown of the store and his receipt of one-half of the proceeds was a ratification to that extent only. In the former action he sued to recover one-half of the Tripp farm and was declared entitled to it by the opinion in that case. But it appearing now that he has sold and disposed of all or nearly all of the 3⅕ acres of land that was allotted to Mrs. Sallie Cherry as his own, selling the same to divers parties and receiving their money under his deeds, and waiting more than seven years after coming of age,

21 July, 1915, before beginning this action in August, 1912, he is estopped, certainly in equity, if indeed it is not a legal bar, to institute this proceeding for a new partition of the whole property.

The plaintiff has not paid back any part of the $1,900 which he received for his half interest in the sale of the Brown store. His deeds to various parties purchasing the 3⅕ acres from him are a declaration of his intention to ratify the partition proceedings, as was his action to recover half of the Tripp farm. It can make no difference that these deeds were quitclaims. If after his arrival at age he had written a letter to his cotenants, ratifying the previous partition, it would have been sufficient.

In *Dawkins v. Dawkins,* 104 N. C., 302, the Court said that if an heir at law "receives his share of the purchase money he must be deemed to hold to, and impliedly assent to, and acquiesce in, the irregular order directing the title of the land to be made." The Court further said that this was especially so when there was long acquiescence without any complaint or notice of dissatisfaction, adding: "The Court will (123) not allow parties to temporize, trifle, and acquiesce in irregular proceedings and actions, taking the benefit of them for an unreasonable length of time to the prejudice of other parties, especially where the rights of third parties have supervened." In this case, so far as appears, there was no reasonable excuse for the long delay to move to set aside the judgment in question.

In *Love v. Love,* 38 N. C., 109, where an attempted division of the property of an intestate father had been made, and there was no administration on the estate, *Ruffin, C. J.,* held that the children of the intestate, who were infants at the time of the division, having after becoming adults acquiesced by long possession in severalty of the land, were bound and concluded by such division.

In cases of acquiescence for a great length of time by parties in the division irregularly made of realty the Court has always laid stress upon the absence of fraud and gross inequality in the division. In this case it is found as a fact that the two shares allotted to Mrs. Sallie Cherry in partition proceedings of *Cherry v. Cherry* in 1891 were double in value of either of the other shares allotted to the heirs of T. R. Cherry.

When the plaintiff came of age he had his election to ratify the division of the land or to disaffirm. By his conduct as above set out, and long acquiescence, he is estopped in good conscience to proceed now to have a new partition made when the rights of third parties have intervened and when it appears that he has received under the partition proceedings his full value of the property so partitioned.

Affirmed.

WALKER, J., dissenting.

Cited: Griggs v. York-Shipley, Inc., 229 N.C. 579 (p).

S. A. WOOTEN ET AL. v. N. C. CUNNINGHAM.

(Filed 8 March, 1916.)

1. Court's Jurisdiction—Irregularities—Appearance—Waiver.

Where tenants in common have their lands divided into lots and sold at public outcry through a realty company, whereat C. became a purchaser of several of the lots, and paid 10 per cent of his bid to a third person, and afterwards the tenants filed proceedings for partition among themselves to perfect the title, as to certain infants, in which C. was not made a party, but in which a commissioner was appointed by the clerk to execute title to the purchasers at the private sale upon payment of the purchase price, and an order was made approving the private sale theretofore made, all of which proceedings were afterwards confirmed, and on appeal from the clerk, C., upon notice, was made a party, and filed an answer denying title: *Held*, though the proceedings were not had in the due course and practice of the courts, the appearance of C. was a general one, waiving the irregularities, and thereby the Superior Court obtained jurisdiction and properly proceeded with the cause. Revisal, sec. 614.

2. Same—Trials—Questions of Law—Demurrer.

Where the defendant in a civil action appears and pleads to the merits of the cause, or makes a defense which can only be sustained by the exercise of the court's jurisdiction upon the merits, his appearance is a general one, notwithstanding the view in which he may regard it; and where he has withdrawn his answer going to the merits of the cause, and enters a demurrer with the permission of the court, it cannot change the character of his appearance or make it a special one. The judgment in this case overruling the demurrer is sustained, with leave to plead over.

SPECIAL PROCEEDING heard by *Whedbee, J.,* at December Term, (124) 1915, of GREENE.

It appears that the petitioners, through the Atlantic Coast Realty Company, had on 3 November, 1913, sold, in small farms or parcels, certain lands which they owned, to several parties, among them being the respondent N. C. Cunningham, who purchased three of the lots at the price of $10,732.80. This was a private sale, that is, not made under any judgment or order of a court, but merely by the petitioners at public outcry, through the realty company.

Petitioners afterward brought this proceeding for the purpose of having the land sold for partition among them, alleging in their petition that they are tenants in common of the land. They further allege that they had sold the land in small lots through the realty company and

that respondent had purchased three of the parcels at $10,732.80. They prayed that said sale be confirmed and that a comimssioner be appointed to execute title to the several purchasers at the sale upon payment of the purchase money. The respondent was not a party to the proceeding and his name was not mentioned in the same except as otherwise above set forth.

The proceeding was commenced before the clerk of the court, and he entered judgment confirming the several sales and appointed S. A. Wooten and M. E. Bizzell commissioners to execute deeds to the purchasers, and, further, for the distribution of the proceeds of the sale. On appeal the judgment of the clerk was affirmed by the Superior Court.

At February Term, 1914, petitioners filed an affidavit in which they alleged that the said sale had been made and that N. C. Cunningham had purchased three of the parcels of land for $10,732.80, and at the time of the sale had deposited 10 per cent of his bid, or $1,073.28, with one W. G. Carr, and that the sale to respondent had been approved and confirmed by the court; that the deposit with Carr was made for the purpose of insuring a compliance by Cunningham with the bid by making the other payments and receiving a deed for his lots, and that a tender of a good and sufficient deed had been made by the commissioners appointed and authorized by the court to make the same.

(125) The petitioners prayed that judgment be entered against the respondent for the amount of his bid, $10,732.80, with interest, less the amount of the deposit, $1,073.28, which should be retained by the comissioners, and further, that if respondent failed to pay the balance due by him, the land be sold and the proceeds of the sale applied to the payment of the judgment, including costs and expenses, and for further and general relief. Notice of the motion, or petition, was duly given to the respondent and he came in under a general appearance and answered, among other things, that he had declined to comply with his bid "because there was a shortage of thirteen (13) acres in the tracts of land sold to him." He was allowed to withdraw this answer and demur upon the grounds that the sale to him was invalid, as there were infants who were interested in the land, and the sale was not made in this judicial proceeding, and that the motion to bring him into this action is irregular and that the court cannot give the relief demanded against him. The court overruled the demurrer and defendant appealed.

Rouse & Land for plaintiff.

J. Paul Frizzelle and George M. Lindsay for defendant.

WALKER, J., after stating the case: We agree with the respondent that this proceeding against him is somewhat irregular and not strictly

according to the course and practice of the court. After perfecting the title in this proceeding for partition, an independent action should have been brought against the respondent to enforce the contract of purchase. But while this was the regular course to pursue, it seems to us that the rights of the parties may just as well be adjudicated in this proceeding, in view of the respondent's conduct in appearing generally and answering to the merits of the petition or motion, and then withdrawing his answer and demurring. His general appearance is still there. If he had appeared specially and moved to dismiss the petition, a different question might be presented, and, besides, as he has come into the case by his appearance, answer, and demurrer, and thereby waived the irregularity, we do not see why the court should not proceed to judgment, extending to him all the benefits and advantages he would have had if a separate action had been brought. He cannot be prejudiced by so treating this proceeding. If the court had first authorized the commissioners to accept private bids for the land in parcels, and respondent had made the same offer as he did at the sale, he would have been in the same position as a purchaser at a sale made under a judicial decree. He would have been a "preferred proposer" for the purchase of the land at the amount of the bid, and when the court had accepted his proposal and confirmed the sale the bargain would have been struck. *Joyner v. Futrell,* 136 N. C., 301.

The court may authorize its commissioner to receive, and re- (126) port to it, a private offer or bid for the land. This has too frequently been decided by this Court to be now an open question. *Rowland v. Thompson,* 73 N. C., 504; *Sutton v. Schonwald,* 86 N. C., 202; *Barcello v. Hapgood,* 118 N. C., 712; *McAfee v. Green,* 143 N. C., 411; *Thompson v. Rospigliosi,* 162 N. C., 145.

By the appeal from the clerk the Superior Court at term acquired full jurisdiction of the cause, under Laws 1887, ch. 276; Revisal, sec. 614. See *Thompson v. Rospigliosi, supra,* and cases cited. This jurisdiction included the right of the court to accept a private bid through its commissioner. When the bid is accepted, whether it was made at public or private sale, the court has jurisdiction over the purchaser for the purpose of enforcing compliance with it. 24 Cyc., 52; *In re Yates,* 59 N. C., 212; *Ex Parte Pettillo,* 80 N. C., 50; *Marsh v. Nimocks,* 122 N. C., 478. The difference between the cases we have mentioned and this one is that there the usual procedure was adopted, by which the land was first ordered to be sold in a regular judicial proceeding, brought and prosecuted for that purpose, and the commissioner authorized to receive and report a private bid, while here the private sale was first made and the judicial proceeding for the sale of the land afterwards instituted. But respondent did not challenge the jurisdiction of

the court *in limine,* but elected to appear generally and answer to the merits. The fact that he withdrew the answer and demurred does not change the nature of his appearance into a special one. *Scott v. Life Assn.,* 137 N. C., 515; *Currie v. Mining Co.,* 157 N. C., 209; *Grant v. Grant,* 159 N. C., 528; *Dell School v. Peirce,* 163 N. C., 424. We said in the latter case: "If the appearance is in effect general, the fact that the party styles it a special appearance will not change its real character. 3 Cyc., pp. 502, 503. The question always is, what a party has done, and not what he intended to do. If the relief prayed affects the merits or the motion involves the merits, and a motion to vacate a judgment is such a motion, then the appearance is in law a general one. *Ibid.,* pp. 508, 509. The court will not hear a party upon a special appearance except for the purpose of moving to dismiss an action or to vacate a judgment for want of jurisdiction, and the authorities seem to hold that such a motion cannot be coupled with another based upon grounds which relate to the merits. An appearance for any other purpose than to question the jurisdiction of the court is general. 2 Enc. of Pl. and Pr., 632. The effort of the company evidently was to try the matter and obtain a judgment on the merits while standing just outside the threshold of the court. This it could not do. A party cannot be permitted to occupy so ambiguous a position. If a defendant invokes the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general. If he appeals to the merits, no statement
(127) that he does not will avail him, and if he makes a defense which can only be sustained by an exercise of jurisdiction, the appearance is general, whether it is in terms limited to a special purpose or not. It all comes to this, that he cannot take the inconsistent position of denying the authority of the court to take cognizance of the cause by reason of some defect in the process, and at the same time seek judgment in his favor upon the merits." It is familiar learning that a general appearance or pleading to the merits waives defects in process and in the jurisdiction of the person. *Harris v. Bennett,* 160 N. C., 339; *Hassell v. D. R. R. Steamboat Co.,* 168 N. C., 296. The Superior Court has general jurisdiction of the subject-matter of this proceeding, and if it did not have jurisdiction of the person, that might be waived, as we have shown, by general appearance or pleading to the merits.

We affirm the judgment, not because we approve this method of enforcing performance of a bid at private sale, but for the reason that respondent submitted to the jurisdiction of the court in this particular case, and it will save costs, and accomplish the same purpose, if we let the matter proceed rather than drive the petitioners to a separate action. The judgment overruling the demurrer is affirmed, with directions to

permit respondent to answer and to set up any defense which would be available to him in an independent action, or in this, if it were strictly a proceeding to enforce compliance with a bid made at a judicial sale.

It appears from the record, by implication, that this special proceeding was brought to perfect the title, as there are infants who are interested, and that it was contemplated when the land was sold. This but adds another reason for sustaining the petition to confirm the sale and for such relief as the case requires.

No error.

Cited: Ryder v. Oates, 173 N.C. 573 (1c); *Crawford v. Allen,* 180 N.C. 246 (1c); *Mann v. Archbell,* 186 N.C. 74 (1c); *Burton v. Smith,* 191 N.C. 602 (1p); *Trust Co. v. Nichols,* 195 N.C. 858 (1cc); *Gilliam v. Sanders,* 198 N.C. 637 (1c); *Corp. Com. v. Bank,* 200 N.C. 424 (2c); *Hargett v. Lee,* 206 N.C. 539 (1p); *Keen v. Parker,* 217 N.C. 389 (1c); *Asheboro v. Miller,* 220 N.C. 300 (1c); *Wilson, Ex Parte,* 222 N.C. 101 (1c); *McDaniel v. Leggett,* 224 N.C. 809 (1c); *Wilson v. Thaggard,* 225 N.C. 350 (1c).

TURNER & PARKER v. H. A. VANN ET AL.

(Filed 8 March, 1916.)

Deeds and Conveyances—Tract of Land—Shortage of Acreage—Abatement in Price.

Where a tract of land is sold as a whole, without representation or warranty as to the number of acres it contains, and in the absence of fraud, the purchaser may not recover an abatement of the price for a shortage of a number of acres the tract was supposed to contain, in this case about 170 acres.

APPEAL by plaintiffs from *Ferguson,* J., at April Term, 1915, of HERTFORD.

Civil action to recover damages for shortage in acreage in a (128) tract of land bought by the plaintiffs from the defendants.

The plaintiffs allege in their complaint that they purchased the land relying on representations made by the defendants that the tract of land contained 550 acres; that these representations were false; that in fact the tract of land only contained 379 acres, and that the representations were fraudulently made.

These allegations were denied by the defendants.

On the trial the plaintiffs abandoned all allegations of fraud.

Evidence was introduced on behalf of the plaintiffs tending to prove that the defendants represented that the tract of land contained 550 acres, when in fact there were only 379 acres of the land.

The defendants introduced evidence tending to prove that they made no representation as to the number of acres in the land and that, on the contrary, they told the plaintiffs at the time of the purchase that they did not know how many acres were in the tract, but that it was supposed to contain 550 acres.

The jury found that the defendants did not represent the tract of land to contain 550 acres.

Judgment was entered in favor of the defendants, and the plaintiffs appealed.

R. C. Bridger for the plaintiffs.

Pruden & Pruden, J. E. Vann, and S. Brown Shepherd for defendants.

ALLEN, J. The learned counsel for the plaintiffs concedes in his carefully prepared brief that the judgment of the Superior Court cannot be reversed unless the following propositions are established:

1. That there is an actual shortage of $169\frac{1}{16}$ acres or thereabouts in the land in controversy, as averred in the complaint, and the said fact should have been found to exist as a matter of fact by the court below.

2. That the sale was one by the acre and not in the gross.

3. That the plaintiffs, when they purchased the said land, fully relied upon the representations made to them by the appellees, that the tract contained 550 acres. That appellees knew at the time of the deficiency in acreage, as represented, made said representations, and appellants relied upon them and purchased the land for 550 acres, when in fact the tract contained only $379\frac{15}{16}$ acres.

4. That assuming the shortage, the appellants were entitled to a judgment for the deficiency by reason of representations made by appellees and relied on by appellants, or mutual mistake of fact.

The first of these propositions seems to be established by the undisputed evidence, but there is neither allegation nor proof to sustain the second.

(129) It is not alleged in the complaint that the sale of the tract of land was made by the acre; on the contrary, the whole burden of the complaint is that the defendant sold a tract of land, falsely representing that it contained 550 acres, when in fact there were only 379 acres.

The third proposition is fully met by the verdict of the jury rendered upon competent evidence, finding that the defendants made no representation as to the acerage of the land.

The fourth proposition is based upon the idea that, although there were no representations as to the acreage of the land, and no fraud, the deficiency in acreage is so great that a court of equity will give relief to the plaintiffs by deducting a proportionate amount of the purchase price or by compelling its return to the plaintiffs.

Authorities are cited from other jurisdictions tending to support the position of the plaintiffs, but the doctrine is well established otherwise in this State. *Smathers v. Gilmer,* 126 N. C., 757; *Stern v. Benbow,* 151 N. C., 462; *Bethell v. McKinney,* 164 N. C., 71.

In *Smathers v. Gilmer, supra,* a recovery was denied for shortage in acreage when there was no representation and no fraud, although the deficiency was 238 acres in a tract of land supposed to contain 500 acres, which is greater than in the case before us, and this was approved in *Bethell v. McKinney, supra,* the Court saying in the latter case: "The other exception is to decreeing an abatement by reason of the alleged shortage in the acreage. As to that, the law in this State is well settled. In *Smathers v. Gilmer,* 126 N. C., 757, the Court held that where a definite tract of land was sold, or contracted to be sold, in the absence of fraud and false representation, a party purchases the tract agreed upon, and, in the absence of a guarantee as to quantity, is entitled to no abatement if there is a shortage, nor is the vendor entitled to an addition to the price if there is an excess. In that case, as in this, the sale was of a solid body of land, and not by the acre. The description was, 'containing 500 acres, more or less.' It turned out on survey that there were only 262 acres, but the court allowed the purchaser no abatement, because he could have protected himself by examination or survey, or he could have required a covenant as to the number of acres, citing *Walsh v. Hall,* 66 N. C., 233; *Etheridge v. Vernoy,* 70 N. C., 713, and cases there cited. *Smathers v. Gilmer, supra,* has been cited with approval in *Stern v. Benbow,* 151 N. C., 462. It would be otherwise if there was a covenant as to the acreage, or if the purchase was by the acre and not for a definite tract of land as to which sources of information were open to both parties."

We have examined all of the exceptions appearing in the record and find none that would justify disturbing the finding upon the first issue, which is determinative of the rights of the parties.

No error.

Cited: Galloway v. Goolsby, 176 N.C. 639 (c); *Henofer v. Realty Co.,* 178 N.C. 585 (c); *Evans v. Davis,* 186 N.C. 45 (c); *Buckman v. Bragaw,* 192 N.C. 154 (c); *Patrick v. Worthington,* 201 N.C. 484 (e); *Guy v. Bank,* 205 N.C. 358 (p).

(130)

LIZZIE JOHNSON v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 8 March, 1916.)

1. Pleadings—Amendments—Court's Discretion—Telegraphs.

It is within the discretionary power of the trial judge, in an action to recover damages for mental anguish against a telegraph company in negligently failing to promptly deliver a telegram relating to sickness, to allow the plaintiff to amend his complaint so as to allege that he could and would have gone to the bedside of his relatives, etc., and such is not reviewable on appeal, in the absence of any evidence that this discretion had been abused.

2. Telegraphs—Delay in Delivery—Prima Facie Case—Burden of Proof.

A delay of three days by a telegraph company to deliver a message relating to sickness is sufficient evidence of the company's negligence to place the burden on the defendant to rebut the *prima facie* case.

3. Telegraphs—Service Message——Negligence—Evidence—Trials.

On trial of an action against a telegraph company for its alleged negligent failure to deliver, at its destination, a telegram relating to sickness, wherein defendant moved to nonsuit upon plaintiff's evidence, tending to show a diligent search had been made for the addressee at destination, but that no service message was sent back to the sending office: *Held*, the failure to send such service message was evidence of defendant's actionable negligence, which could not be rebutted by the assumption of the defendant's agent that no better address could have been given under the circumstances, the addressee living some 12 miles from the town given as his address.

APPEAL by defendant from *Devin, J.*, at September Term, 1915, of JOHNSTON.

Civil action, tried upon these issues:

1. Did the defendant negligently fail to deliver the message with reasonable promptness, as alleged in the complaint? Answer: "Yes."

2. If so, did the acts and omissions constituting negligence occur in the State of North Carolina? Answer: "Yes."

3. If the message had been delivered in a reasonable time, could and would the plaintiff have gone to and been with her son, as alleged in the complaint? Answer: "Yes."

4. What damage, if any, has the plaintiff sustained on account of mental anguish caused by the negligence of the defendant? Answer: "$400."

From the judgment rendered, defendant appealed.

S. S. Holt, Wellons & Wellons, Manning & Kitchin for plaintiff.

Pace & Boushall for defendant.

BROWN, J. This is an action to recover damages brought by (131) the sendee of the following telegram:

MOUNT HOLLY, S. C., January 6, 1914.

MRS. LIZZIE JOHNSON, *Smithfield, N. C.*

DEAR MOTHER:—Please come at once. I am very low.

Your son, R. L. JOHNSON.

It is admitted that there was due diligence in the transmission of the message, but the negligence consists in failure to use due diligence to deliver the message to sendee at Smithfield. It was received at that office at 8:41 p. m., 6 January, in about two hours after it was filed in the Mount Holly office. It was not delivered until 9 January at 3:30 p. m., a period of nearly three days after it had been received by the defendant for transmission.

The defendant excepts because the court permitted an amendment to the complaint by averring that "had plaintiff received the message promptly she could and would have gone to Mount Holly and been at the bedside of her son." This is a matter within the sound discretion of the judge, and in the absence of any evidence of an abuse of such discretion this Court will not review his action. *Henry v. Cannon,* 86 N. C., 24; Clark's Code, sec. 274. The amendment added no new cause of action, and even if we could review the action of the judge, we must say we see no impropriety in allowing it. The several assignments of error relating to the testimony appear to be without merit, and need not be discussed. The defendant made the usual motion to nonsuit, and also requested the court to instruct the jury as follows: "Upon all the evidence, the jury will answer the first issue 'No.'" The court properly overruled the motion and denied the prayer.

It must be admitted that a delay of three days in delivering a telegram is evidence of negligence so as to place the burden on the defendant to rebut the *prima facie* case.

As this Court said in *Woods v. Tel. Co.,* 148 N. C., 1: "This Court, in *Hendricks v. Tel. Co.,* 126 N. C., 304, held it as well settled by the authorities that when a telegraph company receives a message for delivery to the addressee and fails to deliver it, it becomes *prima facie* liable, and the burden rests upon it of proving such facts as will excuse its failure.

It is true that the evidence introduced by plaintiff (the defendant introduced none) tends to prove that defendant manager at Smithfield made a diligent search for plaintiff, but he failed to send a service message notifying sending office of failure to deliver and asking for better address.

We have held that when a message is received at a terminal office to which it has been transmitted for delivery to the person address-
(132) ed, it is the duty of the company to make diligent search to find him, and, if he cannot be found, to wire back to the office from which the message came for a better address. In *Smith v. Tel. Co.,* 168 N. C., page 515, this Court said: "But we have not gone so far, and deem our rule the more reasonable one, viz., that the company should notify the sender by a service message if the message cannot be delivered within the limits prescribed for the place to which it is addressed, so that he may furnish a better address, or, if the addressee lives beyond the said limits, provide for the payment of the charge for the extra service required."

See, also, *Woods v. Tel. Co.,* 148 N. C., 6, in which it is said: "If due search had been made for him and he could not be found, it was required to wire back for a better address, which it did not do, and this was evidence of negligence. *Hendricks v. Tel. Co.,* 126 N. C., 304; *Cogdell v. Tel. Co.,* 135 N. C., 431." *Hoaglin v. Tel. Co.,* 161 N. C., 390.

The defendant's contention is that it was relieved of its duty to send a service message back to Mount Holly by reason of the fact that the sender lived at Otranto, to which Mount Holly was the nearest telegraph station, and it would have received no better address of the sendee.

The defendant's agent had no right to assume this. The evidence is that Mount Holly is the nearest telegraph station to where sender resided and only 12 miles distant. It is highly probable he could have been reached by phone. It was the duty of the Smithfield operator at least to send the usual service message, and there is nothing in the facts of this case that relieved him of such duty.

The charge of the court presented every phase of the case clearly to the jury, and we find nothing in it of which defendant can reasonably complain.

No error.

Cited: Mumpower v. R. R., 174 N.C. 745 (1e); *Gadsden v. Crafts,* 175 N.C. 361 (1c); *Dorsey v. Corbett,* 190 N.C. 785 (1c).

J. B. PRICE v. W. H. HARRINGTON ET AL.

(Filed 8 March, 1916.)

1. Deeds and Conveyances—Consideration—Parol Evidence.

While the recited consideration in a deed to lands may not be contradicted so as to impair the validity of the conveyance, it may be varied by parol evidence as a receipt of the amount stated; and when such deed recites the consideration to be a certain sum, it may be shown by parol that the conveyance was made upon the further consideration that the grantee should satisfy an outstanding judgment against the mortgagor, so as to prevent him from taking an assignment thereof for his own benefit and thereunder selling the mortgagor's lands.

2. Same—Statute of Frauds.

A parol agreement in further consideration of that stated in a deed, that the mortgagee should pay off a judgment against the mortgagor, does not fall within the meaning of the statute of frauds.

APPEAL by defendants from *Bond, J.*, at October Term, 1915, (133) of CRAVEN.

D. E. Henderson for plaintiff.
D. L. Ward for defendants.

CLARK, C. J. This is an action for cancellation of a judgment and to restrain defendants in the meantime from selling thereunder. The plaintiff gave the defendant Harrington a deed for certain timber, reciting therein as the consideration the sum of $1,000; but the complaint alleges that there was, orally, the further consideration that Harrington would pay off a judgment which one Brothers had obtained against the plaintiff and which was then pending in the Superior Court, provided that the said judgment or any part thereof was affirmed on appeal. Said judgment was affirmed on appeal, but Harrington, instead of canceling the judgment, caused it to be transferred to himself, and then undertook to sell the plaintiff's land under it. The jury found as a fact that the defendant Harrington verbally agreed, as a part of the consideration, to pay off said judgment of Brothers in addition to the $1,000.

The only question presented is whether the plaintiff can show by parol testimony as a part of the consideration that the defendant Harrington agreed to pay off the said judgment in addition to the $1,000 recited in the deed as the consideration.

In *Deaver v. Deaver,* 137 N. C., 243, it is said: "Where the payment of the consideration is necessary to sustain the validity of the deed or the contract in question, the acknowledgment of payment is contractual

in its nature and cannot be contradicted by parol proof; but where it is to be treated as a receipt for money, it is only *prima facie* evidence of the payment, and the fact that there is no payment, or that the consideration was other than that expressed in the deed, may be shown by oral evidence." That case cites 3 Washburn Real Property (5 Ed.), 614, as follows: "Although it is always competent to contradict the recital in the deed as to the amount paid, in an action involving the recovery of the purchase money or as to the measure of damages, in an action upon the covenants in the deed, it is not competent to contradict the acknowledgment of a consideration paid in order to affect the validity of the deed in creating or passing a title to the estate thereby granted." This is quoted and approved, *Kendrick v. Ins. Co.,* 124 N. C., 315; 70 Am. St., 592.

The same proposition is discussed and settled in *Barbee v. Barbee,* 108 N. C., 581, and the cases therein cited. These cases have been repeatedly cited since, among the latest being *Jones v. Jones,* 164 N. C., 324.

(134) This contract is not barred by the statute of frauds, which invalidates an oral agreement of suretyship in favor of the creditor. This is an original contract by the defendant to the plaintiff, the debtor, to pay off the debt for a consideration.

No error.

Cited: Whedbee v. Ruffin, 189 N.C. 259 (1c, 2c); *Westmoreland v. Lowe,* 225 N.C. 555 (11).

J. A. BLALOCK v. J. H. HODGES AND WIFE ET ALS.

(Filed 8 March, 1916.)

Deeds and Conveyances—Options—Specific Performance—Registration—Judgments.

An option on land is the subject of specific performance; and if when registered the owner sells to another subject thereto, and in suit brought thereunder the defendants deny the tender in accordance with the terms of the option, but allege their readiness to convey the lands excepting one acre, a decree that on payment of the consideration the defendants convey the lands excepting one acre, and requiring the plaintiff to pay the costs, is not open to valid objection by the defendants.

APPEAL by defendants from *Lyon, J.,* at January Term, 1916, of HARNETT.

Civil action commenced on 29 November, 1915, to compel the defendants to execute a deed conveying a certain tract of land pursuant to an option executed by the defendants Hodges and wife to the plaintiff, which was duly registered.

The option gave to the plaintiff the right to tender the money on or before 1 December, 1915, and to secure a deed for the land.

The defendant Hodges and wife conveyed the land described in the option to the defendant Tilghman, but with the express agreement that the conveyance was subject to the option.

The plaintiff alleges in his complaint the execution of the option; that the purchase price had been tendered to the defendants and demand made for the execution of the deed, and that the defendants had refused to perform their contract prior to the commencement of the action.

The defendants admit the execution of the option and deny the tender of the purchase money, but they also allege their readiness to convey the land described in the option with the exception of one acre, which they say was not intended to be covered by the option.

The sixth paragraph of the complaint is as follows:

6. That the defendants refused and still refuse and fail to accept the amount so tendered, and refused and still refuse to execute and deliver unto the plaintiff a conveyance of the land described in said option.

The defendants denied this paragraph of the complaint. (135)

Judgment was entered upon the pleadings compelling the execution of the deed by the defendants to the plaintiff, but excepting therefrom the one acre of land referred to in the answer, and adjudging that the plaintiffs pay the costs of the action, and the defendants excepted and appealed.

R. L. Godwin, C. L. Guy, and Clifford & Townsend for plaintiff.

E. F. Young for defendants.

ALLEN, J. We see no reason for disturbing the judgment. The option is a valid contract and one of which the specific performance will be enforced (*Ward v. Albertson,* 165 N. C., 223), and the defendants not only admit the execution of the option in the answer, but they aver their readiness to perform it, and the only objection made is that one acre of land was included by mistake.

The decree entered in the Superior Court gives the defendants all for which they contend by excepting the one acre of land from the deed which the defendants are required to execute, and the plaintiff is required to pay the costs of the action.

There is nothing in the decree of which the defendants can justly complain.

Affirmed.

Cited: Dill v. Reynolds, 186 N.C. 296.

LUCIE C. CARSON v. THE NATIONAL LIFE INSURANCE COMPANY ET AL.

(Filed 15 March, 1916.)

1. Appeal and Error—Assignments of Error—Immaterial Error.

A new trial will not be ordered on appeal when the assignments of error, considered as a whole, are not regarded of sufficient importance, or so material, as to disturb the verdict, and when, dealt with *seriatim*, there is no technical error.

2. Same—Insurance, Life—Policy—Assignment—Evidence.

Where in an action upon a policy of life insurance the plaintiff relies solely on the validity of an assignment thereof made by deceased, and the jury has found that the physical assignment had been made, but that it was procured by fraud, the exclusion of her testimony to the effect that the policy sued on was her property is immaterial.

3. Appeal and Error—Insurance, Life—Policy—Assignment—Evidence—Verdict.

In this action upon a policy of life insurance the only question presented on appeal was whether there was error committed by the jury in rendering a verdict adverse to plaintiff on the issue of whether an assignment of the policy was procured through fraud. *Held,* excluding testimony of plaintiff of negotiations before the assignment was not erroneous, the assignment being in writing and in evidence; and it is further held in this case that the evidence was objectionable, it being of conversation between the plaintiff and her husband, and irrelevant, not bearing upon the issue of fraud.

4. Evidence—Deceased—Transactions—Surety—Interest—Trials.

In an action involving the validity of an assignment, by the insured, since deceased, of a life insurance policy, testimony of the surety on the plaintiff's prosecution bond as to what occurred at the time is incompetent under the statute, he being interested in the event of the action, and further incompetent when the proposed evidence appears in the writing itself.

5. Evidence—Deceased—Insurance—Policies—Assignments—Evidence.

Where an action upon a policy of life insurance depends upon the validity of an assignment of the policy to the plaintiff, which had been made by the deceased insured, it is competent for the widow of the deceased

to testify as to an agreement made in the presence of the plaintiff's husband, also present at the trial, and who was acting for her, that the deceased was to pay back the money and get the policy again.

6. Appeal and Error—Questions and Answers—Harmless Error.

Certain questions asked a witness in this case, involved in an issue of fraud in securing an assignment of a life insurance policy, taken together, are held competent, though the first may be objectionable, but this and the second question being preliminary to the third, which was competent and involved them, it is not held as reversible error.

7. Contracts — Fraud — Burden of Proof — Insurance—Policies—Assignments.

In an action involving the issue as to whether an assignment of a life insurance policy had been procured by fraud, the burden of proof is on the party alleging the fraud, when it is shown that the insured had signed the writing.

APPEAL by plaintiff from *Bond, J.*, at August Term, 1915, of (136) PITT.

Civil action to recover the amount of a certain policy of insurance issued by the defendant insurance company on the life of Eason Matthews and payable to his estate. The administrator of Matthews is a party to the action.

The plaintiff claims that she is the owner of said policy by reason of an assignment made to her by the insured. The defendants deny the execution of the assignment, and allege that if it was executed it was procured by fraud.

The jury returned the following verdict:

1. Did the insured, under the policy in suit, fail to pay premium due on 5 May, 1911, or within thirty-one days thereafter, as alleged, and thereby cause policy to become lapsed? Answer: "Yes."

2. Did Eason Matthews sign certificate of health dated 3 July, 1911? Answer: "No."

3. Was said policy reinstated upon consideration of the cer- (137) tificate of good health bearing date 3 July, 1911, and in reliance upon statements therein? Answer: "Yes."

4. Did said certificate of health, if made by Eason Matthews, represent that insured was in good health on the date thereof, to his best knowledge and belief? Answer: "Yes."

5. Was Eason Matthews, on 3 July, 1911, in good health, the best of his knowledge and belief? Answer: "No."

6. Did the insured execute the assignment of the policy in suit to Lucy J. Carson, the plaintiff, as alleged? Answer: "Yes."

7. If so, was said assignment procured through the fraud of S. T. Carson, agent of the plaintiff, as alleged? Answer: "Yes."

8. Is the defendant company indebted on said policy, and, if so, to whom, and in what amount? Answer: "No, owes nothing on it."

Judgment was entered upon the verdict in favor of the defendant insurance company, and the plaintiff appealed.

Julius Brown, S. J. Everett, and W. F. Evans for plaintiff.

D. H. Bland, L. G. Cooper, and Harry Skinner for defendant.

ALLEN, J. It is stated in the case on appeal, as an admission of the plaintiff made on the trial, that she has no title to the policy of insurance sued on except by virtue of the assignment made to her by the insured, and as the jury has found that this assignment was procured by fraud, she cannot recover while this finding stands.

It is, therefore, only necessary to examine the assignments of error bearing on this issue unless there is error in these, and upon full consideration of the record we find none.

If these assignments are considered as a whole, they are not of sufficient importance and were not so material as to justify disturbing the verdict, and when dealt with *seriatim* there is no technical error.

1. The plaintiff, who was examined as a witness, was asked the question, "Was policy No. 207800, issued by the National Life Insurance Company on the life of Eason Matthews, your property, and is it now your property?" to which she would have answered "Yes." The question and answer were excluded, and the plaintiff excepted.

It is sometimes competent for a party to testify to the ownership of property which is in dispute, but as the sixth issue, finding that the assignment was executed to the plaintiff, was answered in her favor, and as the only question in controversy on this phase of the case was on the issue of fraud in procuring the assignment, the question and answer are immaterial.

2. The same witness was asked, "State if you know of any negotiations for said policy before the assignment to you," to which she
(138) would have answered, "Yes, sir; we had talked of my buying the policy." This was excluded, and the plaintiff excepted.

This question assumes that there was an assignment of the policy, and was asked before the assignment was introduced in evidence, and the answer is objectionable upon the additional ground that it purports to give an account of a conversation between the plaintiff and her husband. Again, it does not bear upon the issue of fraud, but upon the question of the purchase and assignment of the policy.

3. S. T. Carson, husband of the plaintiff, and who was the only other person present at the time the assignment was made, was examined as a witness and was asked, "Did you explain to Mr. Matthews what he was

signing when he signed this paper?" to which the witness would have replied that he did. This evidence was excluded, and the plaintiff excepted.

S. T. Carson is a surety on the prosecution bond of the plaintiff, and as such was interested in the event of the action and could not testify to a conversation with the deceased, under section 1631 of Revisal. *Mason v. McCormick,* 75 N. C., 263.

Again, the only thing proposed to be proved by the witness is that he told the insured that the paper he was signing was an absolute assignment of the policy, and this appeared from the paper itself.

4. Mrs. Matthews, widow of the insured, who was examined as a witness, was asked, "State if you know the contract and agreement between Mr. Carson and your husband at the time he took out this policy," and she answered: "The agreement was that Mr. Carson was to pay him his money back, with the interest on it, and Mr. Carson was to give him up the policy." This was objected to by the plaintiff.

We see no reason for refusing to permit the witness to speak of the agreement with the husband of the plaintiff, who was present at the trial, and there is nothing to show that she was not speaking of her own knowledge.

It also appears from the evidence of S. T. Carson that he gave substantially the same account of the transaction at the time the policy was taken out. This evidence also refers to the taking out of the policy and not to fraud in procuring its assignment.

5. The same witness was permitted to state that "Eason Matthews was not able to go to Carson, so sent for him to come, but never got him there." This was objected to by the plaintiff.

This bears remotely on the issue of fraud, but as she was testifying of her own knowledge so far as the record discloses, the evidence was competent.

6. J. W. Coburn, administrator of Eason Matthews, was examined as a witness, and the following questions and answers appear in his evidence, to which the plaintiff excepted:

Q. Did you ever see Mr. Carson for Mr. Matthews about re- (139) turning the policy? Answer: "Yes, during the year 1911."

Q. State if you, at the instance of Mr. Matthews, went to Mr. Carson to get the policy. Answer: "Yes, sir."

Q. State what you said to Mr. Carson in reference to the policy? Answer: "I went to Mr. Carson and told him Mr. Matthews got me to come to him and tell him he wanted to take the policy up."

The first of these questions might be objectionable, standing alone, because it involves inferentially a declaration of the insured, Matthews; but this and the succeeding questions were only preliminary to the last

one, and the answer to the last, which gives an account of the conversation between the witness and S. T. Carson, was competent and involves all that was in the preceding questions. When he told Mr. Carson that the insured got him to come to him and tell him he wanted to take up the policy, it was equivalent to saying that he went to see him at the instance of Mr. Matthews.

7. His Honor charged the jury, among other things, as follows: "If you find that Matthews signed the paper voluntarily, and if he knew what was in the paper that his mark was being made to, then the burden would be on the defendant to show by the greater weight of the evidence that it was procured by fraud. This was excepted to by the plaintiff, but it properly places the burden of proof on the defendant, and there is nothing of which the plaintiff can justly complain in the charge.

There are exceptions bearing upon the other issues, some of them presenting questions that are not free from difficulty, but, as we have before stated, it is not necessary to consider them, in view of the finding upon the seventh issue, which makes it impossible for the plaintiff to recover.

No error.

Cited: Perry v. Mfg. Co., 176 N.C. 72 (1c); *S. v. Herring*, 226 N.C. 215 (2c).

KENEFICK-HOFFMAN COMPANY v. RALEIGH, CHARLOTTE AND SOUTHERN RAILWAY COMPANY.

(Filed 15 March, 1916.)

1. Appeal and Error—Findings—Contracts—Railroads—Judgments—Evidence.

In this action to recover of a railroad company upon a contract to construct defendant's road, by agreement the trial judge found the facts, and, as to an item claimed for "overhaul," that the contract was ambiguous, disallowed the plaintiff's claim upon evidence tending to show that both the plaintiff and defendant by their acts and conduct between themselves and the subcontractors assumed that no such charges were contemplated, and the evidence is held sufficient to sustain the judgment in defendant's favor.

2. Same—Excavations.

In this action to recover upon contract for constructing defendant railroad company's road, the question was presented as a matter of fact, to be found by the judge under the agreement of the parties, whether the measurement should be made by the fills or excavations, and the court's

finding that from the character of the soil they could be made from the fills was sustained by the evidence.

3. Same—Extras.

Plaintiff offered to construct defendant's railroad at a certain price per cubic foot on a 1 per cent grade, if allowed to manipulate, which was rejected, and the contract sued on was made on a greater maximum grade as per profile furnished by defendant at a less price per cubic foot, with the right of defendant to manipulate the grade, and the grade was afterwards made to conform to the 1 per cent grade. The court found that the defendant was entitled to charge for extra work. *Held*, the evidence afforded by the profile map, and that defendant's engineer told plaintiff to await the completion of the work to ascertain the extras, letters, etc., was sufficient to sustain the judge's finding and the judgment in plaintiff's favor.

4. Contracts—Extras—Railroads—Subcontractors—Releases—Actions.

In this action upon contract for construction of a railroad it appears that the subcontractors executed releases for the protection of the railroad, the defendant, and the charges for extra work were to be taken from such amount, if any, as the defendant may be due plaintiff. *Held*, the defendants, having accepted the releases upon the conditions named, cannot maintain the position that the subcontractors should have been paid as a prerequisite to the plaintiff's action.

5. Contracts—Subcontractors—Railroads—Extras—Evidence.

It appeared that the president of defendant railroad company, in an action on contract to build its road, agreed with the plaintiff that, in addition to releases executed by the subcontractors of the plaintiff, the plaintiff should give a bond of $40,000 to protect the defendant from claims of subcontractors, provided for under a certain clause of the contract. *Held*, the conclusion of the trial judge, who by agreement found the facts, that the defendant was not entitled to deduct amounts due subcontractors, was sustained by the evidence, and the judgment is sustained on appeal.

APPEAL by both parties from *Shaw, J.*, at Special June Term, (140) 1914, of STANLY.

Cansler & Cansler and James H. Pou for plaintiff.

W. B. Rodman and Tillett & Guthrie for defendants.

CLARK, C. J. This action is brought for a balance of $403,405.17, with interest from 26 July, 1913, alleged to be due the plaintiffs for the construction of the defendants' railroad between Mount Gilead and Charlotte. At May Term, 1914, of STANLY, by consent of parties, a special term for said county was asked of the Governor, who (141) was also requested to assign *Shaw, J.*, to hold the same, with an agreement to waive a jury trial, the judge in trying said cause to sit

both as judge and jury. The Governor ordered said special term and assigned *Judge Shaw* to hold the same.

The cause was accordingly tried by his Honor acting as both judge and jury. The evidence was submitted in full, and upon the facts as found by him he entered judgment in favor of the plaintiff and against the defendants for the sum of $64,550.66, with interest from 9 September, 1913.

The printed record covers 811 pages and shows on every page the earnestness and ability with which counsel on both sides presented their contentions and the marked care and ability with which the learned and careful judge considered these contentions and arrived at his conclusions. Indeed, the care with which the judge has considered the cause has very much diminshed the number of points requiring our consideration, and greatly lightened our labors as to these.

The plaintiffs' appeal presents but one exception, and that is that the judge disallowed their claim of $45,000 for "overhaul." On this proposition the court found that there was an ambiguity or contradiction in the contract, but that at the time the plaintiffs went over the proposed line of road, prior to submitting their first bid, they were informed by Mr. J. M. Clark, one of the defendants' engineers, then at work on said road, that it was to be a "no overhaul" contract, and that from the execution of the contract up to the conclusion of the work the defendants construed the contract as a "no overhaul" contract; that in making all the monthly estimates and final estimate nothing was allowed plaintiffs for overhaul; that the plaintiffs a short time after the execution of the contract discovered this ambiguity in the contract, and in subleting the work informed the subcontractors that their contract with defendants was a "no overhaul" contract, and made all their contracts with them on that basis; that the plaintiffs subsequently made this statement to all their subcontractors; that plaintiffs accepted the monthly statements furnished by defendants, which contained no allowance for overhaul, till some time in the first part of 1913, without protesting against the omission of such allowance, though if the plaintiffs had been entitled to it, such allowance should have been credited in some of the monthly estimates prior to that time. The court further found as a fact that it was not intended by the parties that plaintiffs should be paid for overhaul as a separate unit (which is customary when such charge is provided for in the contract), and that the overhaul, if any, was included in the price of "46 cents per cubic yard for excavation and all necessary haul," and that there was no haul limit in the contract except that plaintiffs were not required to haul
(142) across impassable barriers (such as trestles, bridges, and viaducts); and the court further found that in the construction of

this roadbed defendants did not require plaintiffs to haul across such barriers, and that both parties during the first five or six months of the contract treated the same as a "no haul limit" contract.

There was evidence that fully justified these findings of fact, and upon such findings of fact the court properly held, as a matter of law, that the defendants were not indebted to the plaintiffs in any amount by reason of their claim for overhaul; and we affirm the judgment on the plaintiffs' appeal.

The defendants' appeal presents only four exceptions:

1. The defendants contend that under the contract the measurement could be made only by measuring the excavations, unless there was a finding that this method was impracticable, and that then it could be done by measuring the fills.

The only question presented by this exception is as to the method of measurement, and upon the evidence the court was justified in finding that, taking into consideration the character of the soil and the intermixture of rock, there was no difference in the quantity, whether ascertained by measuring the excavation or the fills.

2. The next item is on account of changes in the roadbed after the contract was made, and involves two charges, one for a deduction of $7,000 and one for $27,000. The defendants, as appears from the record, asked for bids on a 1 per cent grade. The plaintiffs made a bid of 51½ cents per cubic yard with 5 per cent off if allowed to manipulate, that is, to modify the line as laid out with a view of making lighter cuts and lower fills. This was rejected. A profile was then submitted, showing a maximum grade of 1 3/10 per cent, reserving to the defendants the right to manipulate the grade. The plaintiffs thereupon bid 46 cents per cubic yard for the work. This was accepted. Afterwards the grade was changed to conform practically to the 1 per cent grade, and the two items of $7,000 and $27,000 are for alleged extra work in making these changes. The defendants contend that there could be no recovery for extra work because the contract provided for a supplemental contract, and there was no such contract. But the court found upon the evidence, especially upon the profile of 26 November and the letters following, that the chief engineer of the defendants told the plaintiffs to wait until the work was completed to ascertain the extra work. The evidence justified such finding, and as a matter of law the contractors were entitled to rely upon this instruction of the defendants' chief engineer.

3. A part of the $27,000 above stated, amounting to $18,000, is due to subcontractors. The court finds as a fact from the evidence in this case that the subcontractors "executed releases to the plain- (143) tiffs and defendants for all claims which they might have for

work performed by them, and further found as a fact that these releases were executed by said contractors in order to comply with section 19 of the general contract requiring the contractor to furnish releases from subcontractors before receiving final payment for work done under the general contract, and that these releases were made under an arrangement between the defendants, the contractors and the subcontractors, by which is was agreed that the releases so signed by said subcontractors could only protect the railroad in making payment to the contractors, and if upon a final settlement it should appear that the subcontractors were entitled to receive additional compensation for extra work done by them on account of changes made in the alignment or grade of the railroad, that then the subcontractors should be entitled to receive from the contractors their proportionate part of any amounts paid the contractors by the railroad on account thereof, notwithstanding they had executed such releases."

4. The last contention of the defendants is that under section 31 of the contract the plaintiffs cannot recover until all claims and liens for labor, material, and actions for damages on account of alleged negligence, all growing out of the construction of the road by plaintiffs and existing at the institution of this action, had been discharged by the defendants, and that they should be allowed to deduct from any sum found due the plaintiffs any sum which the defendants may be called upon to pay on account of such matters.

The court found as a fact that it was agreed between the plaintiffs and the president of the road that in addition to the releases by the subcontractors as above stated, the plaintiffs should give a bond of $40,000 to protect the defendants against any claims coming under said section 31, and thereupon the plaintiffs would not be required to comply further with said section 31 of the contract.

This action is far a large amount, but all the points in controversy have been admirably presented by the diligence of counsel both on the trial below and in this Court. After full and careful consideration of all the exceptions, we find that the findings of fact by the learned judge below are not only sustained by some evidence, but by the preponderance of evidence, and upon the facts found by him, by consent of parties in lieu of a jury trial, his conclusions of law are correct.

In the defendants' appeal, as in the appeal by the plaintiffs, we find

No error.

(144)

SARAH E. LEE ET ALS. v. G. D. B. PARKER.

(Filed 15 March, 1916.)

1. Tenants in Common—Deeds and Conveyances—Possession—Ouster—Limitations of Actions.

In order for one tenant in common to acquire the title to lands against the other tenants there must be some act of ouster amounting to disseizin; and where he has acquired an invalid deed from the other tenant, and they both live on the land as theretofore, the deed so acquired is not color of title.

2. Deeds and Conveyances—Signing and Delivery—Cross Mark—Request and Consent—Intent.

The due execution of a deed requires the signing, sealing, and delivery by the grantor with the intent of the grantor that it should operate as his conveyance and pass title to the grantee; and where the grantor's cross mark or other appropriate symbol to the signature of his name is written by another, it must appear to have been done at his request, or with his consent, expressed or implied.

3. Deeds and Conveyances—Signing and Delivery—Cross Mark—Trials—Questions for Jury—Courts—Matters of Law.

Whether the grantor in a deed adopted the signature thereto made for him by another is a question for the jury, but the legal sufficiency of the evidence, as well as the valid delivery of the deed thereon, is a question for the court.

4. Deeds and Conveyances—Execution—Signing and Delivery—Intent—Evidence—Trials—Questions for Jury.

Upon a trial of title to lands depending upon the valid execution of a deed made by a daughter to her father, there was evidence tending to show she was at the home of her father at the time, confined to her bed; that her father entered her room with the probate officer, the latter having the deed, and said: "Here is the deed for you to sign;" that the father lifted her hand to the pen, which another person held, and made her cross mark, though she could read and write; that before her father entered with it she had expressed herself averse to executing the deed, but saying she was afraid not to do so; that she said nothing at the time or thereafter about making her cross mark. *Held*, it was for the jury to consider the evidence with its surrounding circumstances, and decide whether the grantor had exercised her will and executed the paper with the intent that it should operate as her deed.

5. Deeds and Conveyances—Signing and Delivery—Instructions.

Where upon the trial of an action involving the question of whether a deed in defendant's chain of title had been properly executed, a charge by the court to the jury that if certain facts existed the signature would have been a forgery is not prejudicial to the defendant, if erroneous, the jury having been further and properly instructed how to answer the issue in the event they made such finding, for the charge should be construed as a whole.

6. Deeds and Conveyances—Improper Execution—Fraud—Evidence—Duress—Trials—Questions for Jury.

Where the jury have found from the evidence that a deed in the chain of title to the *locus in quo* under which a party claims is defective for improper execution, the deed can pass no title to the lands, and they need not then consider whether it was procured by fraud or duress, or pass upon the rights of innocent purchasers for value and without notice.

ALLEN, J., did not sit.

(145) APPEAL by defendant from *Connor, J.*, at August Term, 1915, of DUPLIN.

Civil action brought to recover the interest of the plaintiffs in a tract of land which they alleged is owned by them and defendants as tenants in common. It was admitted that if plaintiffs own any interest in the land it is three-eighths, the defendant owning the remaining five-eighths.

The decision of the case turns upon the validity of a deed purporting to have been made on 7 September, 1905, by Mary E. Wade to Clark M. Wade and wife, Kizziah Wade, and Harriet M. Wade and Bertie A. Wade for the "Sand Hill tract of land," upon a consideration of $50. Mary E. Wade, called Bettie, was a daughter of Clark M. Wade by his first wife, Sarah E. Wade. His second wife was Kizziah Wade, by whom he had two children, Bertha Wade and Harriet Wade. On the day the deed from Mary E. Wade is alleged to have been executed she was living on the land with her father, and at the time was tenant in common of the land with her father and her brother in the proportion of three-eighths and five-eighths thereof. She had been in feeble health for some time before the date of the deed, and on that day was bedridden. One of plaintiff's witnesses (Mrs. Sarah Garvey), who was present when the deed is alleged to have been signed and delivered, testified: "In 1895 I lived near Sand Hill in Duplin County, about 200 or 300 yards from Clark M. Wade's. I knew him and his daughter, Mary E. Wade. She died during the month of July, in her father's home, on the land in controversy. Her physical condition for several weeks before her death was bad. She could not lie down at all, on account of shortness of breath. She could move her body a bit, but could not get up and walk about, she was swollen so. She was in this condition a month or two before her death. A short time before her death—a week or two—I was at Mr. Wade's home. Mary's condition was bad that day. She could move her hands and arms, but could not get up or walk. Mr. Burton was there that day. Mr. Wade and Mr. Burton came into the room where Mary was. Mr. Wade said: 'Bettie, I am ready for you to sign this deed,' and he reached and took her hand and put it to the deed, and he said, 'Joe, make her mark,' and he made the mark. Mr.

Burton had the deed when they came into the room. He held the pen to the deed. Mary Wade never said anything when her (146) father took her hand from her lap and held it to the pen while Mr. Burton was making the mark. I was sitting near enough to her to take hold of her. Immediately prior to the time when her father and Mr. Burton came into the house with the paper she told me that he was trying to make her sign away her right in the land. She said he wanted it for his two children, Bertha and Harriet. She said: "I don't want to do it; but if I don't he will drive me away. He won't let me stay here.' And about that time they came in, and she never said any more. I saw Mary Wade nearly every day from this time until her death. She never could get up or move about. She had two children at this time, Sarah and Hattie, the plaintiffs. Mr. Wade's children and mine were there when this took place. I am no kin to plaintiffs. I was there that day to see Mary Wade because she needed waiting on. Her condition was as good, to all appearances, as it was any time that summer. I do not know what the paper was or what was in it. I knew Mr. Burton. I always took him to be a perfect gentleman. Mary Wade and Mr. Wade's family were all staying there in the same house. Mr. Burton was a magistrate. He is dead. Mary Wade lived a little while after that—maybe a month. She went there in May of that year. She was about 35 years old. Mary Wade could write her name. She had a right good education. She tried to get a school to teach one time, but never got it. My boy, Levy, is 31 years old. When her father put her hand to the pen Mary just dropped her head, with her arms folded in her lap. She did not put her fingers to the pen. Her father just took her hand and put it there. Mr. Burton did not ask her any questions. I was sitting near enough to her to touch her."

Levy Garvey testified: "I am 31 years old. Mrs. Sarah Garvey is my mother. I remember being with her at Clark Wade's that day when Mr. Burton was there. Mr. Wade and Mr. Burton went in there where Miss Mary Wade was sitting on the edge of the bed. Mr. Burton had the paper. Mr. Wade told her he wanted her to sign it. She never made any move at all. He took hold of her hand and laid it on the pen and said, 'Here, Joe, make her mark.' I don't know what became of the paper. I was 10 or 12 years old at this time. Don't remember what month it was, but it was warm weather. I just went there that day with my mother. I was playing with the children. I don't know whether Mr. Wade or Mr. Burton held the pen; I remember seeing the pen, but do not know which one had it. I do not know what the paper was. It was white."

Amos Hall testified: "I am 33 years old. Clark Wade's second wife was my mother. He was not my father. I remember the day Mr. Joe

Burton came to Clark Wade's house with a paper. They called it a deed. He told her that she must sign the paper when Mr. Burton
(147) came, and if she didn't sign it he would put her out of the house. When Mr. Burton came I was out in the yard."

A. J. Sumner testified: "I am 72 years old. I know Mary Wade; she was called 'Bettie.' I raised one of her children, Sarah. I took her when she was 2 or 3 years old; she is older than Hattie. Hattie lived with Mr. Wade until she was married. Neither I nor my wife are related to them. I know the Sand Hill tract. A fair rental value of the land in 1905 was $20 to $30."

D. B. Rhodes testified: "I cultivated the Sand Hill tract in 1902 and 1903. I knew Mary Wade. Her condition in 1895 was very bad. She was swollen mighty bad in her body and her legs. She could not get about, but her hands were not swollen. She had a fair education; could read, and wrote a nice hand."

Defendants objected to some of this testimony. The deed from Mary E. Wade to Clark Wade and others was probated 7 September, 1905, on the oath of David Burton as to the handwriting of J. L. Burton, the subscribing witness, and was registered on the same day.

C. M. Wade and wife, Kizziah Wade, and Henry H. Wade conveyed the land on 1 September, 1905, to the defendant G. D. B. Parker, by deed, which was registered on 6 March, 1906, and on 24 January, 1910, Harriet M. Wade and Bertha (Wade) Smith conveyed the land to the defendant by deed registered 17 August, 1910. On 8 December, 1913, Harriet (Wade) Smith and Bertha (Wade) Smith and their husbands, Isaac and Isaiah Smith, conveyed the land to the defendant by deed registered 16 December, 1913. This action was commenced 3 December, 1913. It was admitted that on 3 December, 1913, the plaintiff Sarah E. Lee, formerly Sarah E. Wade, was about 22 years of age, and plaintiff Hattie Howard, formerly Hattie Lee, was about 10 years old, they being the illegitimate children and heirs at law of Mary E. Wade.

Clark M. Wade and Mary E. Wade were in actual possession of the land until Mary's death in 1895, and after her death Clark M. Wade continued in possession of the land until 1 September, 1905, when he conveyed the land to the defendant, who at once entered into possession of the same and has continued in the sole and exclusive possession thereof since that time.

Defendants tendered the following issues:

1. Was the deed from Mary E. Wade to Clark M. Wade and others procured by the fraud and duress of the said Clark M. Wade, as alleged in the complaint?

2. Are the plaintiffs the owners of any part of the lands in controversy, and if so, what part?

3. Is the claim of plaintiffs barred by the statute of limitations?

The court submitted issues which, with the answers thereto, are as follows:

1. Is the paper-writing, a copy of which is attached to the (148) complaint, marked "Exhibit C," and which is recorded in the office of the register of deeds of Duplin County, in Book No. 91 at page 443, the act and deed of Mary E. Wade? Answer: "No."

2. If so, was the execution of the said deed procured by the fraud, force, undue influence and duress of Clark M. Wade, as alleged in the complaint? Answer: .....

3. Are the plaintiffs Sarah E. Lee and Hattie Howard the owners of the land described in the complaint, or of any interest therein; and if so, what interest? Answer: "Yes, three-eighths interest."

4. What is the reasonable annual rental value of said land? Answer: "$15."

The court then charged the jury upon the first issue as follows: "You will answer this issue upon the facts as you find them to be from the evidence which has been introduced, and according to the instructions which the court will give you. The plaintiffs contend that you should answer this issue 'No'; the defendant contends that you should answer this issue 'Yes.' I instruct you that the paper-writing purporting to be a deed from Mary Wade to Clark M. Wade and others, having been admitted to record and offered in evidence in this case, the law presumes that the said paper-writing was properly executed by Mary E. Wade, the grantor named therein. Therefore, the burden of proof is upon the plaintiffs to satisfy the jury, not only by the greater weight of the evidence, but by evidence which is clear, strong, cogent, and convincing, that the paper-writing was not executed by Mary Wade as her act and deed; and unless you shall be so satisfied by such evidence, you should answer the issue 'Yes.'"

After fully stating the contentions of the parties with respect to this issue, the court, at the request of the plaintiff, instructed the jury as follows: "When you come to consider the evidence relative to the first issue, I instruct you that in order for a person to execute a paper-writing so as to make the paper-writing his or her deed there must be a purpose to execute it and a physical act indicating the purpose. There must be a will and an exercise of the will indicated by some act. Did Mary Wade authorize Burton to make her mark? Did she by her conduct ratify and confirm his act as her act? If you find that she did so with intent and purpose to execute the paper as her deed, then it is her deed, regardless of whether she was acting under duress or not."

The court then instructed the jury in substance that if they found the facts to be as stated by the witnesses, as to the manner of making the

mark on the deed and as to what occurred at the bedside of Mary E. Wade at the time, and "if the jury further find from the evidence that she did or said nothing to indicate her intention of executing the paper-writing or of signing her name thereto for the purpose of execut-
(149) ing the same; and if the jury shall further find all the foregoing facts from evidence, strong, clear, cogent, and convincing, then the court charges you that the purported execution of said paper-writing is in law a forgery, and that said paper-writing is void and is not the act and deed of Mary E. Wade, and you will answer the first issue 'No.'

"If you answer the first issue 'No,' that is, if you find that the paper-writing is not the act and deed of Mary E. Wade, then you need not consider the second issue, nor the third issue (which it is agreed the court shall answer)."

It appears inferentially from the record as though the court had, at first, submitted an issue as to defendant's possession and the statute of limitations, and charged the jury in respect thereto, and that all of this was withdrawn, when certain admissions which appear in the judgment were made.

The court entered the following judgment: "It being admitted in open court that Mary E. Wade died about one month after 24 June, 1895, leaving surviving her two infants, one two or three months old and the other two or three years old, her only heirs at law, and that the plaintiffs Sarah E. Lee and Hattie Howard are the children of said Mary E. Wade; and it being further admitted that the plaintiffs, if entitled to recover at all, are entitled to recover a three-eighths undivided interest in the lands described in the complaint: it is now, upon the verdict and upon the admissions in open court, considered, adjudged, and decreed that the plaintiffs Sarah E. Lee and Hattie Howard do recover of the defendant G. D. B. Parker, a three-eighths undivided interest in the tract of land described in the complaint, known as the Sand Hill tract, and that the said plaintiffs be let into the possession of said land with the defendant G. D. B. Parker as tenants in common." The judgment also included a recovery of damages and costs. Defendants excepted in apt time to all rulings, and appealed from the judgment.

H. D. Williams for plaintiff.

Gavin & Wallace for defendant.

WALKER, J., after stating the case: The court submitted the four issues as set forth in the statement of the case, and as now appears, by amendment of the record, a fifth issue was added, as to the statute of limitations. The first and third issues only were answered, under the

final instruction of the court, that if they answered the first issue "No" they need not answer the other issues, as possession under color and the statute of limitations would be immaterial.

We had just as well dispose of this point in the beginning and before passing to a discussion of the principal question.

After the date of the alleged deed, Mary E. Wade continued (150) in possession of the land, with her father, and the occupation was the same as it had always been. There was no claim of adverse possession, and nothing done to oust her or to assert title under the deed. The case, therefore, falls within the principle of *Fowle v. Whitley,* 166 N. C., 445, and *Brown v. Brown,* 168 N. C., 4, 13. The Court said in *Fowle v. Whitley, supra:* "There is no act of disseizin shown. From all that appears, both continued to live on the land as prior to the sale, without any change in the attitude of the parties to the possession. There is no evidence of the exclusive possession or any acknowledgment on the part of Rowe."

There Warner had purchased under a tax deed, which he claimed to be color of title, but Rowe continued in joint possession with him. The facts in this case are stronger in favor of these plaintiffs, as here the parties were tenants in common, which requires an ouster to sever the tenancy. It would be straining the law to hold that there was any adverse possession by Clark Wade and the other grantees, during the life of Mary E. Wade, under the circumstances of this case. If there was such a possession either by Clark Wade and his associates or the defendant, who claims under them, after the death of Mary E. Wade, it cannot avail the defendant, as her heirs were infants, and one of them was not of age when the suit was brought and the other only 22 years old, so that the question of adverse possession under color is thus eliminated, even if it would not require such a possession for twenty years to bar the plaintiff's right of entry as tenants in common. In this view of the case it is unnecessary to discuss the question as to color of title.

The only matter we need consider is whether there was any error in regard to the first issue; for if the deed is void, and there is no other source of title, the plaintiffs are entitled to recover their share, as adjudged by the court. The execution of a deed includes signing, sealing, and delivery. It is unquestionably true that signing may be done either by the grantor affixing his own signature or by adopting one written for him, or by making his mark, or impressing some other sign or symbol on the paper by which the signature, though written by another for him, may be identified. He may, therefore, either sign himself or sign by the adoption of his name as written by another, or he may make his mark, even though he may not be able to write himself.

Devlin on Deeds, sec. 237; *Devereux v. McMahon,* 108 N. C., 134. And the grantor may have the assistance of another to steady or direct his hand. Devlin, sec. 236 and notes; *Carroll v. McGee,* 25 N. C., 13. But the signature, if written by another, must be made at the request or with the consent of the grantor, and the delivery as well; and (151) whether there was a signing or a delivery by him is a question of fact, what act is a sufficient signing or delivery being a question of law.

It was said in *Huddleston v. Hardy,* 164 N. C., 210, quoting from *Tarlton v. Griggs,* 131 N. C., 216: "There must be an intention of the grantor to pass the deed from his possession and beyond his control, and he must actually do so, with the intent that it shall be taken by the grantee or some one for him. Both the intent and the act are necessary to the valid delivery. Whether such existed is a fact to be found by the jury." And the same rule applies to the signing of the deed. If another acts for the grantor, he must do so at the request of the grantor, or he must be either expressly or impliedly authorized by him to affix his signature. It is not sufficient that the grantor's name is signed by a third party, unless he has authority in some way conferred to act for him. Devlin on Deeds, sec. 232. The signing and delivery must be acts done by the grantor, either by himself or through the agency of another. Whether Mary E. Wade made her mark on the deed to Clark Wade, or J. L. Burton was requested to make it for her, is manifestly a question of fact for the jury, and it was for them to say whether it was her mark, or theirs alone. We think there were circumstances from which the jury could infer that she did not consent to the execution of the deed, either to the signing or the delivery of it, and they had the right, as the authorities show, to consider all the attendant circumstances.

The court, in its charge, gave the defendant the full benefit of the legal presumption arising from the probate and registration of the deed, and then instructed the jury, in accordance with the principles we have stated, that they must find as a fact whether the transaction in the room was conducted with her consent, or, in other words, whether she exercised her will at all, and signed and delivered the paper-writing with the intent that it should operate as her deed; and if she did so sign and deliver it as her deed, it was binding upon her, without regard to any question of fraud or duress, the simple matter being whether she executed it or not. "The question of the delivery of a deed is generally one of intention of the parties, and it is essential to a valid delivery that there should be some act or declaration from which an intention to deliver may be inferred. A formal delivery, however, is not essential; nor are express words necessary. Nor is a manual delivery of the instru-

ment to the grantee required, it being sufficient if it is apparent either from the words or acts of the grantor that it was his intention to treat the deed as his and to make a delivery of the same." *Fitzgerald v. Goff*, 99 Ind., 28.

The court further instructed the jury that the plaintiffs must establish the negative of the issue by strong, clear, cogent, and convincing evidence. The mere fact that in one part of the charge the jury were told that if they found certain facts to have existed at the time of the transaction the deed would in law be a forgery was not (152) prejudicial to defendant, if erroneous, as they were also instructed how to answer the issue in the event that they made such a finding. The charge must be construed as a whole.

The complaint and answer sufficiently raised the issues submitted to the jury, and the evidence was unobjectionable. We do not see why it was not relevant, as the witnesses deposed merely to the occurrences in the room, and it was competent to show them by oral testimony.

As there was evidence to sustain the verdict, the motion to nonsuit and the prayers for instructions were properly denied. It was not necessary to inquire whether the deed was procured by fraud or duress, and whether defendant was a *bona fide* purchaser for value and without notice, when the jury had found that it was not the deed of Mary E. Wade, because it had never been executed by her, as it was a nullity. *Henry v. Carson*, 96 Ind., 412. It is there said, at p. 422: "A deed delivered without the knowledge, consent, or acquiescence of the grantor is no more effectual to pass title to the grantee than if it were a total forgery, although the instrument may be spread upon the record, and innocent purchasers are not protected. *John v. Hatfield*, 84 Ind., 75; Pom. Eq. Jur., 735, 779, 807, 821; Bigelow Fraud, 156; *Austin v. Dean*, 40 Mich., 386; *Ramsey v. Riley*, 13 Ohio, 157; *Van Amringe v. Morton*, 4 Whart., 382. These cases show that even if the appellants purchased in good faith for a valuable consideration and without notice, such facts will not avail against the appellee; his equitites are at least equal to those of the appellants, and in equal equities the legal title prevails." See, also, *Tisher v. Beckwith*, 30 Wisc., 55, where it is said: "It is essential to the validity of a deed that it should be delivered, and such delivery to be valid must be voluntary, that it, made with the assent and in pursuance of an intention on the part of the grantor to deliver it, and if not so delivered it conveys no title." It was held in *Black v. Shreve*, 13 N. J. Eq., 455, 457: "Until an instrument under seal is delivered by those who sealed it, or with their consent, it has no legal operation as a deed; delivery is essential for that purpose. It must go into the hands of the grantees or covenantees by the consent of the grantors or covenantors; possession acquired by force or finding, or in

any other mode than by the full consent of the party to be bound, is ineffectual." The case of *Abee v. Bargas,* 65 S. W. Rep., 489, is in some essential respects like this one, and there the deed was held to be void.

While we hold that the paper-writing claimed to be the deed of Mary E. Wade is a nullity, and cannot, therefore, operate as a deed for want of signing and delivery, which are component elements of such an instrument and essential to its valid execution, it is proper and just to say that the defendant G. D. B. Parker appears not to have had any (153) knowledge of the circumstances and surroundings under which the said paper-writing was obtained; but, as we have shown, this fact cannot avail him as a defense.

There was no error at the trial of the case.

No error.

ALLEN, J., did not sit in this case.

Cited: S. v. Abernathy, 190 N.C. 771 (2c); *In re Will of Kelly,* 206 N.C. 553 (2p); *Ins. Co. v. Cordon,* 208 N.C. 726 (3p); *Barnes v. Aycock,* 219 N.C. 362 (2c); *Winstead v. Woolard,* 223 N.C. 817 (1c); *Lerner Shops v. Rosenthal,* 225 N.C. 321 (3p); *Johnson v. Johnson,* 229 N.C. 546 (4c); *Cannon v. Blair,* 229 N.C. 611 (4c); *Ballard v. Ballard,* 230 N.C. 633 (4c).

FRED S. JOHNSON, TRUSTEE, AND R. W. AND JACOB BURNETT, HEIRS AT LAW OF JACOB S. BURNETT, DECEASED, v. H. B. WHILDEN.

(Filed 15 March, 1916.)

1. Judgment—Parties—Void Judgment.

A judgment in an action affecting the vested rights of a citizen, to which he is not a party, is void, and may be treated by him as a nullity whenever it is brought to the attention of the court.

2. Same—Record—Collateral Attack.

While ordinarily a judgment reciting the jurisdiction of the court, or an adjudication of proper service, may not be collaterally impeached, the judgment should be construed in connection with the record in the action and with reference to it, and where therein is disclosed the precise and only method by which the jurisdiction was attempted, and such method conclusively shows that no service was had, the principle that the judgment is conclusive unless and until set aside in direct proceedings does not obtain.

3. Public Sales—Purchaser—Void Judgments—Issues—Verdict.

A purchaser at an execution sale under a judgment which is an absolute nullity can acquire no interest in the lands thus sold, and where in a subsequent action against such purchaser to recover the land the jury have found that the plaintiff is entitled to recover the land, but the defendant is entitled to a certain interest therein, it is proper for the trial judge to set aside the second issue and render judgment on the first issue in plaintiff's favor.

PETITION to rehear cause decided by this Court at Spring Term, 1914, and reported in 166 N. C., 104.

Petition having been allowed, the cause was again duly considered and the former judgment affirmed.

Zebulon Weaver for plaintiff.

Bryson & Black, Merrimon, Adams & Adams, and Jones & Williams for defendant.

HOKE, J. The facts relevant to the present inquiry are fully stated in a former decision in the cause, reported in 166 N. C., 104, and from these facts it appears that plaintiff Fred S. Johnson is successor of Jacob Burnett, a former trustee, now deceased, and the co- (154) plaintiffs are the latter's sons and heirs at law; that the lands in controversy, bought with money of the Tuckaseigee Mining Company, a foreign corporation, were held by Jacob Burnett, the original trustee, "in trust and with full power to sell said tracts of land at private sale upon such terms as he may think best and to convey the titles to same to the purchasers by deeds in fee simple, and out of the proceeds of such sales to first pay off and discharge the indebtedness of the Tuckaseigee Mining Company, etc., and to pay over to the stockholders any surplus that may remain in his hands after discharging said indebtedness," etc. The defendant claimed said lands as purchaser at execution sale, issued on a judgment obtained by A. M. Frye against the Tuckaseigee Mining Company while the lands were so held by Burnett, trustee. The said judgment having been rendered in a suit *in personam* against the company for legal services by said A. M. Frye for the company, it will appear on examination of the record in that action, the same having been introduced in evidence, that summons in the cause was served only by publication on affidavit of plaintiff A. M. Frye; that the then trustee, J. S. Bennett, was a nonresident and the Tuckaseigee Mining Company was a foreign corporation, and that personal service on neither could be made in this State, and, further, that a warrant of attachment in said suit was issued and purports to have been levied on the lands in controversy, and a verdict having been rendered in favor of said Frye

on his claim for services, for $1,500, there was judgment in his favor against the company for that sum, the judgment reciting that service was by publication, and an attachment levied and containing an "adjudication that the defendants had been duly served with process, and that they are properly in court." Upon these the claims of the respective parties there was judgment below that plaintiff was the owner of the land, and this judgment was affirmed on appeal, the Court being of opinion that "the judgment in the name of A. M. Frye was a nullity, and that defendant acquired no title by his attempted purchase thereunder at execution sale."

On the present petition we are asked to review this ruling, on the ground chiefly that this judgment contains, among other things, the adjudication, as stated, "that defendants have been duly served with process and are properly in court."

It is a fully established position in this State and elsewhere that "a judgment rendered by a court against a citizen affecting his vested rights, in an action or proceeding to which he is not a party, is absolutely void, and may be treated as a nullity whenever it is brought to the attention of the Court." *Card v. Finch,* 142 N. C., 140; *Flowers v. King,* 145 N. C., 235; *Holt v. Ziglar,* 159 N. C., 272; *Hughes v. Pritchard,* 153 N. C., 135. And the authorities here are also to the
(155) effect that when on the record of a case it appears that a court has jurisdiction of the parties and subject-matter, a judgment therein may not be collaterally impeached. *England v. Garner,* 90 N. C., 197; *Rackley v. Roberts,* 147 N. C., 201; *Doyle v. Brown,* 72 N. C., 393. And in applying this latter principle there are numerous decisions to the effect that the recitals in the judgment showing the jurisdictional facts or an adjudication of proper service appearing therein shall conclude until the judgment is set aside by direct proceedings. *Harrison v. Hargrove,* 120 N. C., 96, and authorities cited. But this position, we apprehend, should not be allowed to prevail when the recitals are necessarily contradicted by other portions of the record more directly relevant, nor to an adjudication of service, general in terms, when it is affirmatively disclosed on the face of the record itself the precise and only method by which the acquirement of jurisdiction was attempted, and such method conclusively shows that no service was had. This limitation on the effect of recitals in a judgment and adjudications of service will be found approved in *Card v. Finch, supra,* and other cases with us, and is in accord with well considered decisions on the subject in other jurisdictions. *Settlemeyer v. Sullivan,* 97 U. S., 444; *Town of Point Pleasant v. Greenlea and Harden,* 63 W. Va., 207; *Harris v. Lester,* 80 Ill., 307; *Mayfield v. Bennett,* 48 Iowa, 194; *Mickel v. Hicks,* 19 Kans., 578; *Laney v. Garbee,* 105 Mo., 255; *Gould v. Jacobson,* 58 Mich., 288;

Fowler v. Simpson, 79 Texas, 611; 1 Black on Judgments, sec. 273 *et seq.;* 1 Freeman on Judgments (4 Ed.), sec. 130, p. 230; 23 Cyc., p. 1086.

In *Settlemeyer v. Sullivan, supra,* the method of service was shown on the writ, and was defective. There was judgment by default, the judgment reciting "That defendant, although duly served with process, came not, but made default," and it was held: "That said recital was not evidence of due service, but must be read in connection with that part of the record which sets forth, as prescribed by statute, the proof of service; that such proof must prevail over the recital, as the latter, in the absence of averment to the contrary, the record being complete, can only be considered as referring to the former." In *Mickel v. Hicks* it was held that "The recital of a judgment of 'due service' of notice cannot prevail against evidence furnished in the same record that the notice was not duly served." In *Laney v. Garbee* it was held: "That in determining whether a court had jurisdiction, the whole record must be inspected, and if the judgment itself declares that defendant, though duly served, comes not, etc., but the return found shows a service which is insufficient and unauthorized by law, the judgment must be disregarded as void." Recitals in a judgment of the service of a process are deemed to refer to the kind of service shown in other parts of the record. And speaking generally to the question in *Card v. Finch,* after referring to the principle that one not a party to a suit is not bound by a judgment therein, but may treat it as void whenever (156) there is an attempt to use it in prejudice of his vested rights, *Connor, J.,* said: "The learned counsel for defendants does not controvert this elementary principle. He calls to our attention several cases in which it is held, as in the cases cited by us, that if there be a recital in the record or a return on the summons showing service, the proceeding is not void, but only voidable. It is also true that in several cases the courts used the expression that a purchaser at a judicial sale is not called upon to do more than see that the decree authorizes the sale. It must be conceded that expressions may be found which, unless the facts in the case are examined, are calculated to mislead. It will be found upon a careful reading of the cases, the underlying principle is, as stated by *Mr. Justice Avery* in *Dickens v. Long,* 112 N. C., 311, 'All that the purchaser in such case is required to know is that the court had jurisdiction of the subject-matter and the person,' " and more especially in reference to *Harrison's case,* the learned judge said further: "The defendant cites a line of cases in which it is held that if the decrees, etc., recite that the parties are before the court, such recitals will support the judgment and protect it against collateral attack. Such was the case of *Harrison v. Hargrove, supra.* In this appeal the names of

the defendants in the proceeding to sell the land appear and are described as the widow and heirs at law of the decedent. The summons also contains the names of the heirs at law who are made parties defendant. The recitals, therefore, in the order of sale and other decrees, that service of process was duly made 'on the defendants,' are correct and speak the truth."

Applying the principle, it appears affirmatively in the record in question that in an action strictly *in personam* no service was had within the jurisdiction of the court; that the only method attempted or relied on to acquire jurisdiction was that by publication and attachment of property, the land held under the terms of the deed of trust, and this not being the subject of levy by execution or attachment, we must adhere to the decision made on the former hearing, that the attempted judgment was a nullity. The ruling as to defendant's tax title must also be reaffirmed, the evidence showing that no notice was given or attempted to be given on the trustee, such a notice being required by the provisions of the law. See *Rexford v. Phillips,* 159 N. C., 213.

We find no error in the former disposition of the cause, and the judgment therein is reaffirmed.

Affirmed.

PLAINTIFF'S APPEAL.

Zebulon Weaver for plaintiff.

Bryson & Black, Gilmer & Gilmer, and Jones & Williams for defendant.

HOKE, J. On the hearing of the defendant's appeal in this cause, 166 N. C., 104, an examination of the record disclosed that two (157) issues were determined by the jury, one as to plaintiff's ownership of the land and the second as to whether the defendant had any interest therein.

To the first of these the jury answered "Yes," and to the second, "No, except as to the interest of the Tuckaseigee Mining Company, under the decree aforesaid."

There was judgment on the verdict merely that plaintiff was the owner of the land under the deed of trust and that he recover costs. This Court, observing that the verdict on the second issue, as the record then stood, had been rendered without objection, and that the same appeared to find that defendant H. B. Whilden was the owner of the equitable interest of the Tuckaseigee Mining Company, considered it well to call attention to the fact that the judgment, as formerly entered, made no reference to this verdict on the second issue. For aught that appeared, it might have been rendered by consent of parties. The opinion having

been certified down, the judge below, his Honor, E. B. Cline, at the next term of the court, being Spring Term, 1915, in deference to these intimations in the opinion, entered judgment, in effect, that plaintiff was the owner of the property under the terms of the deed of trust and that defendant H. B. Whilden is the owner of all the right, title, interest, and equities owned by and vested in the Tuckaseigee Mining Company, in the lands in controversy, and from this judgment plaintiff, having duly excepted, appealed.

It now appears on this the plaintiff's appeal that plaintiff duly excepted to the charge of the court on the second issue, directing the jury to so render their verdict if they believed the evidence, and also moved to set aside the verdict on the second issue, which was overruled, and plaintiff excepted.

Considering the case, then, on the appeal of plaintiff, we fail to see any fact in evidence or principle of law that would uphold a claim or right on the part of defendant to the equitable interest of the Tuckaseigee Mining Company. As heretofore stated, the action in which A. M. Frye undertook to recover for legal services rendered the Tuckaseigee Mining Company was one strictly *in personam*. No service of process was ever shown on the company or the trustee holding the property under a decree of the court, for the benefit of creditors first and then of the stockholders of the company, and for reasons stated in the former opinion and the petition to rehear, the attempted judgment was an absolute nullity, and no right or interest of any kind in the property was acquired by defendant under his attempted purchase at execution sale.

There is no allegation of any such interest in the pleadings, and the verdict on the second issue should, therefore, be set aside as irresponsive and irrelevant to any fact alleged or proved on the trial below, and judgment entered as it appeared on the former appeal.

Error.

Cited: Comrs. v. Scales, 171 N.C. 526 (1c); *Pinnell v. Burroughs,* 172 N.C. 186 (2e); *Graves v. Reidsville,* 182 N.C. 332 (1c); *Stevens v. Turlington,* 186 N.C. 194 (3p); *Bridger v. Mitchell,* 187 N.C. 376 (1c); *Clark v. Homes,* 189 N.C. 708 (1c); *Dunn v. Wilson,* 210 N.C. 494 (2c); *Downing v. White,* 211 N.C. 42, 43 (1cc); *Monroe v. Niven,* 221 N.C. 364 (1c); *Butler v. Winston,* 223 N.C. 424 (1c); *Powell v. Turpin,* 224 N.C. 69, 71 (2c); *Williams v. Trammell,* 230 N. C. 579 (2e).

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B. H. PERRY v. SEABOARD AIR LINE RAILWAY COMPANY ET AL.

(Filed 15 March, 1916.)

1. Carriers of Passengers — Baggage — Negligence—Evidence—Questions for Jury.

Where the complaint alleges that some clothes were stolen from a suitcase, the baggage of the plaintiff, a passenger on the defendant's train, through the latter's negligence, and the evidence tends to show that the baggage had previously been transported by another carrier, under its check, and remained in the union baggage room from 7 p.m. overnight, where several clerks and porters were employed, and then received by the defendant, and that it had been received by the former carrier with the clothes in it and from the latter carrier with the clothes missing, an issue as to defendant's negligence is raised for the jury to determine, and it is reversible error for the judge to assume in his charge that the articles were lost while in the defendant's possession.

2. Carriers of Passengers—Baggage—Gratuitous Bailment—Negligence.

At common law and under our statute, Revisal, sec. 2618, the passenger's right to a limited amount of baggage as a part of the consideration for the price of his ticket is upon the condition that the baggage accompany the passenger on the same train; and where without any default on the part of the carrier, its agent, without further charge, has the baggage forwarded on a later train, the carrier's liability is not that of an insurer, but of a gratuitous bailee, under the rule of the prudent man, and attaches only in instances of gross negligence.

3. Same—Burden of Proof—Instructions—Trials—Evidence.

Where the liability of a carrier is that of a gratuitous bailee, and it is shown that the carrier received the subject of the bailment in good condition and delivered it in bad condition, it raises a *prima facie* case of negligence sufficient to be submitted to the jury, but with the instruction that the carrier would be liable only if it failed to exercise the care of a person of ordinary prudence under the circumstances, and as such circumstances rest peculiarly within the carrier's knowledge, it is incumbent upon it to introduce evidence thereof.

APPEAL by defendant from *Lyon, J.*, and a jury, at October Term, 1915, of VANCE.

Civil action to recover damages for the loss of certain wearing apparel.

The plaintiff alleges that the defendant is liable as a carrier of baggage, and, if not, that the wearing apparel was lost by reason of the negligence of the defendant.

The defendant denies that the wearing apparel was ever delivered to it and also denies any liability to the plaintiff.

The plaintiff introduced evidence tending to prove that on 3 December, 1913, he bought a ticket of the Southern Railway Company and checked his suitcase from Goldsboro to Raleigh; that the wearing apparel was

in the suitcase at the time it was checked and delivered to the agent of the Southern Railway at Goldsboro; that the agent at (159) Goldsboro delivered it in the same condition to the baggage master of the Southern Railway train; that the baggage master delivered it in the same condition to the agent at the union depot station at Raleigh; that the plaintiff remained in Raleigh a sufficient length of time to have his suitcase rechecked to Henderson, where he intended to go; that on the night of 3 December he, the plaintiff, bought a ticket of the defendant, the Seaboard Railway, from Raleigh to Henderson, but did not have his suitcase checked; that he went to Henderson on this ticket, and on the morning of 4 December requested the agent of the defendant to have his suitcase brought from Raleigh to Henderson, which the defendant agreed to do upon learning that the plaintiff had traveled on the road of the defendant; that after the suitcase reached Raleigh it was placed in the baggage room used by the Southern Railway Company and the defendant, and in this baggage room there were two clerks and three porters; that the suitcase remained in the baggage room until the morning of 4 December, 1913, when it was carried to Henderson by the defendant in accordance with the agreement of its agent at Henderson; that it was there delivered to the plaintiff and the wearing apparel was not in it; that the wearing apparel was worth $50.

The defendant introduced evidence tending to prove that the wearing apparel was not in the suitcase at the time it was delivered to the defendant and that it was not negligent.

His Honor charged the jury, among other things, as follows:

"Now, when goods are shipped over a railroad, called common carrier, and the goods are damaged, the law presumes that the company in whose possession they were when the damage was discovered, that is, the last carrier, is to be responsible for the damage to the goods." The defendant excepted.

"Now, as I told you, the law presumes that the loss occurred by the negligence of the Seaboard, it being the company in whose possession the goods were lost." The defendant excepted.

"If you find from the evidence that the suitcase contained the two pairs of trousers, and they were lost, and that they were worth $50, and from the evidence that they were lost by the negligence of the defendant, you may answer the first issue 'Yes,' the first issue being: '1. Was the property of the plaintiff lost by the negligence of the defendant, as alleged in the complaint?' "

The defendant excepted.

There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

J. C. Kittrell for plaintiff.
Murray Allen for defendant.

(160) ALLEN, J. The cause of action of the plaintiff is founded upon the allegation that the wearing apparel, which he contends was lost by the negligence of the defendant, the Seaboard Railway, was in the suitcase of the plaintiff at the time it was delivered to the defendant, and this allegation is denied.

This raised an issue for the determination of the jury, and the evidence of the plaintiff, circumstantial in character, is not so clear as to free the question from doubt and to withdraw it from the realm of debate.

The evidence tends to prove that the suitcase was carried from Goldsboro to Raleigh in the same condition in which it was delivered to the agent at Goldsboro, but that at Raleigh it was left unlocked in a baggage room in which there were two clerks and three porters, from about 7 o'clock of the evening of 3 December until the next day, when it was delivered to the defendant, and that it was only in the possession of the defendant from one to two hours, and upon this evidence the defendant might well contend that the loss was at Raleigh and not on its train or at Henderson.

It was therefore error for his Honor to assume in his charge that this fact was established, and to tell the jury that the loss occurred while the suitcase was in the possession of the defendant, which he did in the part of the charge excepted to when he said: "Now, as I told you, the law presumes that the loss occurred by the negligence of the Seaboard, it being the company in whose possession the goods were lost."

This entitles the defendant to a new trial; but as the question will necessarily be raised again, it is proper to consider the exception to the charge upon the burden of proof, and this cannot be done intelligently without dealing with the relation between the plaintiff and the defendant, and the degree of care imposed upon the latter, assuming the wearing apparel to have been in the suitcase when it was delivered to the defendant.

The plaintiff contends that it was a part of the contract at the time he bought his ticket at Raleigh for Henderson that the defendant would carry his baggage, and that the transportation of the baggage on the next day was in the performance of this contract, and that, therefore, the defendant is liable as a common carrier of baggage and is an insurer.

The position of the defendant, on the other hand, is that while the contract was to carry the baggage of the plaintiff, it was limited to the train upon which he traveled, and as the baggage did not go forward until the next day, and then for the accommodation of the plaintiff, that

its liability is that of a bailee without reward, and that there is no presumption of negligence upon proof of loss.

If the position of the plaintiff is sustained he is entitled to recover upon proof of delivery to the defendant and of a failure to deliver, and without proof of negligence, because a common carrier of goods and baggage is an insurer, and is liable for all injuries to and (161) loss of property being transported, unless the injury or loss is caused by the act of God, the public enemy, the negligence of the shipper, or by the inherent qualities of the goods, and the burden is on the carrier to bring itself within one of these exceptions. *Harden v. R. R.*, 157 N. C., 249.

The correctness of the position depends upon the contract between the plaintiff and the defendant at the time he bought his ticket, and the authorities are practically unanimous that, while at common law and under our statute (Rev., sec. 2618) the passenger has the right to have baggage to a limited amount transported free of charge as a part of the consideration for the price of his ticket, the baggage must accompany the passenger on the same train, unless prevented by the default or negligence of the carrier.

If the passenger has checked his baggage in time to be transported with him, and this is not done, or if baggage is checked through over different lines and the connection is so close at some point that there is not time to transfer the baggage to the train taken by the passenger, or if for any cause within the control and supervision of the carrier the baggage is carried on another train, it retains its character as baggage and the carrier is liable as an insurer for loss or injury to it; but in the absence of one or the other of these conditions the carrier is relieved from liability as an insurer if the baggage is carried without additional compensation on another train at the request of the passenger.

If carried on another train for extra compensation it is liable as a carrier of freight.

The authorities declaring this to be the law are collected in the note to *Conheim v. R. R.*, 15 A. and E. Anno. Cases, 391, where the editor says: "The rule generally recognized is that a passenger who brings his baggage to the station within a reasonably sufficient time before the departure of the train he intends to take to permit of the baggage being checked and placed on board has the right to have it carried on the train he himself takes. *Wald v. Pittsburg, etc., R. Co.*, 162 Ill., 545, 44 N. E., 888, 35 L. R. A., 356, 53 Am. St. Rep., 332; *Toledo, etc., R. Co. v. Tapp*, 6 Ind. App., 304, 33 N. E., 462; *Felton v. Chicago G. W. R. Co.*, 86 Mo. App., 332; *Glasco v. New York Cen. R. Co.*, 36 Barb. (N. Y.), 557; *Fairfax v. New York Cen., etc. R. Co.*, 73 N. Y., 167, 29 Am. Rep., 119; *Coward v. East Tennessee, etc., R. Co.*, 16 Lea (Tenn.), 225,

57 Am. Rep., 227. See, also, *Chicago, etc., R. Co. v. Addizoat,* 17 Ill. App., 632; *Runyan v. Central R. Co.,* 61 N. J. L., 537, 41 Atl., 367, 43 L. R. A., 284, 68 Am. St. Rep., 711; *Webb v. Atlantic Coast Line R. Co.,* 76 S. C., 193, 11 Anno. Cases, 834, 56 S. E., 954, 9 L. R. A. (N. S.), 1218.

(162) "'It is implied in the contract (of carriage) that the baggage and the passenger go together.' *Wilson v. Grand Trunk R. Co.,* 56 Me., 61, 96 Am. Dec., 435. 'In the case at bar, when the appellant bought his tickets for a passage upon the limited express train and applied to have his baggage checked, there was an implied undertaking on the part of appellee that his baggage should go on the same train on which he took passage; and appellee was bound to send his baggage on the same train on which he went, unless the appellant gave some direction, or did something, or omitted to do something, which authorized appellee to send his baggage by some other train.' *Wald v. Pittsburg, etc., R. Co.,* 1162 Ill., 553.

"The theory underlying the rule is, it seems, that the baggage which must be carried by the railroad company, without compensation beyond the passenger's fare, is such as is required for the necessity, convenience, or pleasure of the passenger, and consequently must accompany his person. See *Wilson v. Grand Trunk R. Co.,* 56 Me., 60, 96 Am. Dec., 435; *Runyan v. Central R. Co.,* 61 N. J. L., 541, 41 Atl., 367, 43 L. R. A., 284, 68 Am. St. Rep., 711."

See, to the same effect, *Wood v. R. R.,* (Me.) 99 A. D., 341, and extensive notes; *Beers v. R. R.,* 67 Conn., 417; *Marshall v. R. R.,* 126 Mich., 45; *Gaffam v. R. R.,* 67 Me., 234; 3 Hutchison on Carriers, sec. 1274; 4 Elliott on Railroads, sec. 1656. Hutchison says: "The owner of the property must, of course, stand in the relation of passenger to the carrier in order to fix upon him liability as a carrier of baggage. The carriage is *ex vi termini* incidental to the carriage of the owner as a passenger. If, therefore, that which would have been properly baggage had it been accompanied by the owner as a passenger should, by accident or mistake, be accepted by the carrier for transportation without being accompanied by the owner, and when he is not or does not become a passenger, the carrier would not have it in his custody in the character of baggage, and would not be respsonsible for it as such." And Elliott: "In the absence of anything to the contrary, the rule is that the implied contract to carry a passenger's baggage which arises from the purchase of a ticket is that the passenger and his baggage shall be transported on the same train. The purchase of a ticket usually entitles a passenger only to transportation for himself and his baggage on the same train, and nothing more."

This being the law, and the failure of the defendant to carry the suitcase on the same train with the plaintiff being due to his neglect in not having it checked when he had ample time to do so, and not to any omission of duty by the defendant, the contract between the plaintiff and the defendant was at an end when the plaintiff reached Henderson; and as the defendant transported the suitcase on the next day without compensation, its liability must be referred to the law of bailment.

This subject is fully discussed in the learned opinion of *Justice* (163) *Walker* in *Hanes v. Shapiro,* 168 N. C., 28, where, after classifying bailments into those (1) for the bailor's sole benefit, (2) for the bailee's sole benefit, (3) for the mutual benefit of the bailor and the bailee, he quotes *Lord Holt* in the leading case of *Coggs v. Bernard* as to the diligence required in each class, that "In bailments for the sole benefit of the bailor, the bailee will be liable only for gross negligence; in bailments for the mutual benefit of both parties, he will be liable for ordinary negligence; in bailments for the exclusive benefit of the bailee he will be liable even for slight negligence"; and he adds, with reference to the terms "slight negligence," "gross negligence," "ordinary care": "Nevertheless, the terms 'slight negligence,' 'gross negligence,' and 'ordinary negligence' are convenient terms to indicate the degree of care required; but in the last analysis the care required by the law is that of the man of ordinary prudence. This is the safest and best rule, and rids us of the technical and useless distinctions in regard to the subject."

Tested by this rule, the liability of the defendant is that of a bailee for the sole benefit of the bailor, a gratuitous bailee, and only answerable for gross negligence, which is the failure to exercise the care of a person of ordinary prudence undertaking to carry the goods of another without compensation.

If so, what must the plaintiff prove, in the first instance? Can he rest his case upon proof of delivery to the carrier, and that the carrier failed to deliver, or must he go further and offer affirmative evidence of some negligent act of the carrier?

If the first is the correct rule, it imposes no hardship on the carrier, because it is only called upon to explain its own conduct, and it has the evidence under its control, while the latter would in most cases be a denial to the owner of the opportunity to maintain his action, as he would have no means of showing the acts and care of the carrier during transportation.

The weight of modern authority is in favor of the position that proof of delivery to the carrier and of its failure to deliver is evidence of negligence sufficient to carry the case to the jury and to support a verdict, but that the jury ought to be instructed that the carrier is not liable if upon the whole evidence they do not find that it did not exercise the care of a

person of ordinary prudence under the circumstances. *Bennett v. O'Brien,* 37 Ill., 250; *R. R. v. Hughes,* 94 Miss., 248; *Higmon v. Cannady,* 118 Ala., 267; *Hawkins v. Haynes,* 71 Ga., 43; *Sheldon v. Robinson,* 26 A. D., 726; *Pratt v. Waddington* (23 Ont. L. R.); 21 A. and E. Anno. Cases, 841, and extended note.

We quote from the note as follows: "The Mississippi Court said in *Yazoo, etc., R. Co., v. Hughes,* 94 Miss., 242, 47 So., 663: 'It appears that the ancient rule was that in all cases where a bailee was
(164) sought to be held, no presumption of negligence arises on account of the loss of the goods, and the burden of proof is always on the plaintiff to establish that negligence was attributable to the bailee. But by the weight of modern authority this doctrine is substantially modified. It may now be said to be established that when a bailor shows that goods are delivered to his bailee in good condition, and are lost or destroyed or returned in a damaged condition, this fact creates a *prima facie* presumption of negligence; and it thereupon devolves upon the bailee to absolve himself from negligence.' The rule is founded in necessity, and upon the consideration that a person who, from his situation, has peculiar if not exclusive knowledge of the facts, if they exist, is best able to prove them. *Hackney v. Perry,* 152 Ala., 626. Of course, the bailor or depositor must prove the bailment and a failure or refusal to return the property on demand. If a failure or refusal to return the property on demand is shown, it becomes incumbent upon the bailee or depositary to show satisfactory explanatory circumstances or facts in defense. *Bates v. The Bank,* 118 Idaho, 435; *Vogelsang v. Fredkyn,* 153 Ill. App., 356; *Sanford v. Kimball,* 106 Me., 355."

This is the conclusion reached in *Hanes v. Shapiro,* 168 N. C., 31, where the Court says: "As has been seen, the obligation to redeliver or deliver over the property at the termination of the bailment on demand is an essential part of every bailment contract. If the bailee fails to do so, he is liable, unless he can show that his inability arises without fault on his part. There is considerable confusion among the decisions in regard to the burden of proof in cases where a bailee is sued for a loss or injury. A line of decisions hold that in cases founded on negligence the burden of proving it affirmatively rests on the plaintiff throughout, and that when a bailee is sued for a negligent loss or injury, mere proof of the loss or injury does not alone make a *prima facie* case. But the better opinion, supported by the weight of authority, holds that while the burden of proving negligence rests upon the plaintiff, and does not shift throughout the trial, the burden of proceeding does shift, and that where the plaintiff has shown that the plaintiff has received the property in good condition, and fails to return it, or returns it injured, he has made out a *prima facie* case of negligence."

Note that the language is that this rule prevails in "every bailment." Expressions in *Brick v. R. R.*, 145 N. C., 203, and in *Kindley v. R. R.*, 151 N. C., 207, apparently in conflict with this view, are based on the facts of those cases which are unusual and extraordinary.

The burden of proof was not involved in either case. The *Brick case* was determined upon the ground that the facts developed were a fraud on the carrier, and in the *Kindley case*, all of the evidence being in, the court held there was no evidence of negligence.

We therefore conclude that his Honor was in error in dealing (165) with the liability of the defendant as a carrier of baggage as such, but that there was evidence for the consideration of the jury.

New trial.

Cited: Trustees v. Banking Co., 182 N.C. 303 (2c); *Troxler v. Bevill*, 215 N.C. 643, 644 (1p); *Merchant v. Lassiter*, 224 N.C. 346 (3c); *Cigar Co. v. Garner*, 229 N.C. 174 (3c).

THOMAS D. WARREN AND THE PEOPLES BANK OF NEW BERN v. C. E. HERRINGTON, BESSIE G. HERRINGTON, AND A. O. NEWBERRY.

(Filed 15 March, 1916.)

1. Venue—Collateral Notes—Mortgages on Lands—Removal of Causes.

Where an action is brought upon a note to obtain a personal judgment against the maker and for the sale of the collateral hypothecated, and it appears that among the collateral is a note secured by a mortgage on lands situated in a different county from that of the venue, but no relief by foreclosure of the mortgage is sought, the sale of the collateral does not affect any interest in the land which would require that the action be brought in the county where the land is situated, and a motion to remove the cause on that ground is properly denied.

2. Judgments—Estoppel—Venue—Collateral Notes—Mortgages on Lands—Foreclosure.

Where under a decree of court a collateral note secured by a mortgage on lands is sold, the lands situated in a different county from that of the venue of the action, the defendant will be precluded from setting up defenses to the note, such as payment and the like, but not from pleading, in the suit to foreclose the mortgage, any proper defense peculiar to the mortgage itself, such as a denial of its validity, fraud in its execution, or lack of privy examination of the wife, etc.

APPEAL by defendant from *Bond, J.*, at November Term, 1915, of CRAVEN.

This is a motion by defendants C. E. and Bessie G. Herrington to remove this cause to Carteret County. The motion was denied, and said defendants appealed.

Guion & Guion for plaintiffs.

C. R. Wheatley, Abernethy & Davis for defendants.

BROWN, J. The basis of the motion is that this is substantially an action for the foreclosure of a mortgage of real property and that the lands described in the mortgage are situated in Carteret County. It is admitted that if it is not an action to foreclose a mortgage the action is properly brought in Craven County, the residence of plaintiffs.

The facts are that the defendant A. O. Newberry, being indebted to the plaintiff Peoples Bank of New Bern, executed his promissory
(166) note with coplaintiff, T. D. Warren, as surety thereon, and as collateral security to this note pledged and deposited certain chattel and real estate mortgages and notes, the collateral note providing that in default in the payment of the principal note the bank might proceed to sell at public or private sale the collaterals hypothecated. Among the collaterals are certain notes executed by the defendants Herrington and wife jointly, secured by a mortgage executed by them on lands in Carteret County. There are a number of chattel mortgages and other real estate mortgages assigned to the plaintiff bank as collateral security for the Newberry note that are listed in the exhibits attached to the complaint.

The paper-writing, signed by Newberry, assigning these several notes and mortgages as collateral security to Newberry's note, is called, in bank parlance, a "collateral note," and contains a power of sale authorizing the bank, its president or cashier, to sell the collateral notes and mortgages at public or private sale and assign the same to the purchasers.

Instead of selling the collateral under the power of sale, the plaintiff bank seeks to have all the collateral, including the notes and mortgage of Herrington and wife, sold under judicial decree by a commissioner and the proceeds applied to payment of Newberry's note. Plaintiff does not ask to foreclose the Herrington mortgage. Whoever purchases the Herrington debt can do that by proceedings in foreclosure in Carteret County. The fact that in the complaint the bank asks for a personal judgment against Herrington and wife, the joint and several obligors on the note, does not convert this into an action to foreclose the mortgage securing such note.

At common law, and in this State prior to 1868, a bill to foreclose a mortgage must filed in a court of equity, but the owner of the note

secured could proceed in a court of law to obtain a personal judgment on the note. It is true, the plaintiff could not sell the mortgaged property under such execution. That could only be done by foreclosure proceedings in equity; but he could sell any other property of the debtor under his execution.

In *Connor v. Dillard,* 129 N. C., 50, relied upon by defendants, the action was to subject a certain tract of land in Nash County under a judgment lien to the payment of a note. The Court held that it was substantially an action to foreclose a mortgage. But *Justice Clark* said expressly that "If the action had been for a mere personal judgment, though on a mortgage note, it could have been brought where the plaintiff resides, and docketing the judgment would not convey to plaintiff any estate in the debtor's land."

And in *Council v. Bailey,* 154 N. C., 59, *Justice Walker* says: "It is true, a mortgagee may sue for his debt without asking for a foreclosure, and collect his money by execution upon his judgment."

The exact point is decided adversely to defendant in *Max v.* (167) *Harris,* 125 N. C., 345: "Where an agent for sale of goods gives a note and mortgage to secure his contract, and is sued for a breach thereof, but no remedy is asked upon the mortgage and none is given, the action is properly brought in the county where the plaintiff resides, although the land is in another county, where the defendant resides."

The Court says further: "That the removal was properly refused, as we do not see how the present action affects in any way the land in Orange County. It does not ask a foreclosure." The case of *Council v. Bailey,* 154 N. C., 54, does not in the least militate against what we have here said. That was an action for specific performance, and it was held that "When it appears from the complaint in an action to enforce specific performance by the vendee of a contract to convey lands that a court of equity would decree a vendor's lien on the land and order it sold for the payment of the purchase price, if the alleged facts were established, the suit partakes in substance of the nature of one for the foreclosure of a mortgage, and is removable to the county in which the land is situated. Revisal, sec. 419."

In that case *Mr. Justice Walker* holds that "In a suit for specific performance brought by the vendor the measure of the kind of relief a court of equity will grant is not necessarily determined or controlled by the relief demanded in the complaint, *but by the facts set out in the pleadings.*" To the same effect is *Baber v. Hanie,* 163 N. C., 588.

In the case at bar the plaintiff not only does not seek to foreclose the defendant's mortgage, but does not set out in the complaint any facts upon which a decree of foreclosure could be based.

It is true, as contended, that the defendants Herrington and wife will be precluded by a judgment in this action upon the note from setting up any further defenses to the note, such as payment and the like. They have opportunity and must do that now or ever after hold their peace; but they would not be estopped from pleading in a suit to foreclose the mortgage any proper defense peculiar to the mortgage itself, such as a denial of its validity, fraud in its execution, or lack of privy examination of the wife, etc.

The motion to remove was properly denied.

Affirmed.

Cited: Jones v. R. R., 193 N.C. 595 (1c); *Mortgage Co. v. Long*, 205 N.C. 535 (1c).

(168)

J. I. DEAVER v. ENTERPRISE LUMBER COMPANY.

(Filed 15 March, 1916.)

Deeds and Conveyances—Timber—Remaining Interests—Description.

One having acquired one-third of the standing timber upon lands to be cut, etc., in ten years, afterwards acquired a deed from the then owner of the entire tract of land, in which the timber conveyed was described as "all the interest of the party of the first part in said timber, one-third of said timber having been conveyed," etc., for a period of twenty years. *Held*, the grantee acquired full title of his grantor in all of the timber for the stated period of twenty years.

APPEAL by defendant from *Allen, J.*, at January Term, 1916, of DUPLIN.

Gavin & Wallace for plaintiff.

Stevens & Beasley for defendant.

CLARK, C. J. The following are the agreed state of facts: Isaac Kornegay, Zilphia A. Kornegay, and Mary E. Kornegay were owners in fee and tenants in common of the land described in the complaint. On 18 March, 1892, Isaac Kornegay executed a conveyance of the timber on said land to S. Q. Collins for the period of twenty years, and by mesne conveyances the interest of said Collins passed to the Cape Fear Lumber Company, who owned the same on 31 May, 1902, and until after 14 October, 1908.

On 31 May, 1902, John H. Westbrook, who had become the owner by mesne conveyances from the said Isaac, Zilphia, and Mary E. Kornegay

of the lands described in the complaint under a deed "excepting one-third interest in the timber sold by Isaac Kornegay to S. Q. Collins," conveyed to the Cape Fear Lumber Company "all the timber of every description of and above the size of 12 inches in diameter at the base, when, cut, now standing or growing or which may be lying, standing, or growing during the ensuing term of twenty years upon the following described tract of land" (here follows the description), adding at the end thereof: "The said lands are known as the Isaac Kornegay lands, and the timber herein conveyed is *all the interest of the party of the first part in said timber,* one-third of said timber having already been conveyed to S. Q. Collins by Isaac Kornegay and now owned by the Cape Fear Lumber Company." Then followed a general warranty. This was recorded 6 June, 1902.

On 14 October, 1908, the said Westbrook executed to the plaintiff J. I. Deaver a deed in fee for the land described in the complaint. Thereafter the Cape Fear Lumber Company conveyed all its interest in the timber on said lands to the Enterprise Lumber Company, (169) who on 1 May, 1913, entered on said tract and cut and removed all the timber thereon above the prescribed size.

The plaintiff contends that he is entitled to one-third in value ($300) of the said timber removed by the said defendant, which it is agreed was worth $900.

The decision in this case depends upon the construction of the above timber deed executed on 31 May, 1902, by John H. Westbrook to the Cape Fear Lumber Company, in which he conveyed the timber on said land for the period of twenty years, with the privilege to cut and remove the same, with the following description: "The timber herein conveyed is *all the interest of the party of the first part* in said timber, one-third of said timber having already been conveyed to S. Q. Collins by Isaac Kornegay and now owned by the Cape Fear Lumber Company."

It is apparent from this that Westbrook conveyed all his interest in said timber, subject only to what had already been conveyed by Isaac Kornegay to Collins, and which was then already owned by Cape Fear Lumber Company. What was the interest of Westbrook at that time? He had title in fee to all the timber, subject only to aforesaid conveyance of one-third, which would expire on 18 March, 1912. He conveyed "all his interest" for twenty years and put the title thereto in the Cape Fear Lumber Company as absolutely as he owned it himself. *Murphy v. Murphy,* 132 N. C., 360. He conveyed to the Cape Fear Lumber Company all the timber "now standing or growing, or which may be lying, standing, or growing *during the ensuing twenty years*" on said tract, except the interest therein which the grantee had already acquired

in one-third of the timber, which would expire in less than ten years from that date. That is to say, the grantor owned the fee-simple interest in the timber, subject to the previous conveyance of one-third thereof for the unexpired ten years. As he conveyed "all his interest" to the Cape Fear Lumber Company by the conveyance, the latter acquired the absolute interest for twenty years in two-thirds and the interest in the other third after the expiration of the one-third interest on 18 March, 1912. It is not reasonable to suppose that the grantee, the Cape Fear Lumber Company, which already owned one-third of the timber under a lease which would expire in less than ten years, took a conveyance of the other two-thirds interest for twenty years and left the reversion in this one-third after the expiration of the ten years lease (which the grantee already held) untouched. The grantor described his interest in the timber as entire except as to said unexpired ten years lease, and conveyed "all *his interest*" for twenty years.

The Cape Fear Lumber Company having conveyed to the defendant, it was within its right in cutting the timber after 18 March, 1912,
(170) by virtue of the aforesaid conveyance of Westbrook in March, 1902, of "all his interest" in said timber.

Upon the facts agreed, the judgment should have been entered in favor of the defendant.

Reversed.

FRANK J. FAISON, EXECUTOR, ET ALS. v. F. F. MIDDLETON ET ALS.

(Filed 15 March, 1916.)

1. Wills—Residuary Clause—Interpretation.

No particular mode of expression is necessary to constitute a residuary clause in a will, and while the words "rest," "residue," or "remainder" are commonly used for the purpose, naturally placed at the end of the dispositive portion of the will, all that is required is an adequate designation of what has not been otherwise disposed of; and the fact that a provision so operating is not spoken of in the will as the residuary clause is immaterial.

2. Same—Intent.

A residuary clause in a will should be construed so as to prevent an intestacy as to any part of the testator's estate, unless there is an apparent intent to the contrary, plainly and unequivocally expressed in the writing.

3. Wills—Residuary Clause—Property Devised—Realty—Statutes.

General words in a residuary clause of a will, "all of the residue," etc., embrace every species of property, whether real or personal, owned by the testator at his death, unless restricted by the context. Revisal, sec. 3142.

4. Wills—Residuary Clause—Devise in Blank—Interpretation.

A devise of land "to my.....," without naming the devisee, followed by a residuary clause of the will, "that all of the residue of my estate be sold, and if there should be any surplus over the payment of debts and expenses, that such surplus be equally divided and paid over" to certain named persons: *Held*, the failure to name the devisee brings the devise within the terms of the statute as to void devises, or those incapable of taking effect, and the property devised will go to the residuary legatees, and not to the heirs at law.

APPEAL by defendant from *Connor, J.*, at September Term, 1915, of SAMPSON.

The suit was brought in order that the executor of L. P. Faison may be advised as to how to execute the trusts declared in his will, which is as follows:

I, L. P. Faison, of the aforesaid county and State, being of sound mind, but considering the uncertainty of my earthly existence, do make and declare this my last will and testament.

1. My executor, hereinafter named, shall give my body a (171) decent burial, suitable to the wishes of my friends and relatives, and pay all funeral expenses, together with my just debts, out of the first money which may come into his hands belonging to my estate.

2. Give and devise to my..... the tract of land on which I now reside, containing 648 acres, for his natural life, and after his death to his heirs.

3. My will and desire is that all of the residue of my estate shall be sold and the debts owing to me collected, and if there should be any surplus over and above the payment of debts and expenses, that such surplus be equally divided and paid over to my nephew L. P. Faison, Mary B. Pigford, and Bettie Bauman, Mary Haywood Middleton, Willie A. Middleton, Jennie Middleton.

4. I hereby constitute and appoint brother F. J. Faison my lawful executor, to all intents and purposes, to execute this my last will and testament, according to the true intent and meaning of the same, and every part and clause thereof, hereby revoking and declaring utterly void all other wills and testaments by me heretofore made.

In witness whereof I, the said L. P. Faison, do hereunto set my hand and seal this day. L. P. FAISON. [SEAL]

The principal question propounded to the court is whether the tract of land containing 648 acres, and mentioned in the second section of the will, goes to the heirs or next of kin, as undisposed of property, or is included in the residuary clause, there being no devisee named in said second section. The court was of opinion that it was embraced by the

residuary clause, and adjudged that it be sold by the executor and the proceeds applied and the surplus thereof divided as directed in the third section of the will. Defendants appealed.

Grady & Graham and H. E. Faison for plaintiff.
Butler & Herring for defendant.

WALKER, J., after stating the case: The contention of the plaintiffs is that the 648 acres of land described in the second section of the will falls into the residue, which in law embraces all property, both real and personal, not otherwise disposed of, while the defendants say that the testator died intestate as to the said land, and it, therefore, descends to them as his heirs. We are of the opinion that the ruling of *Judge Connor* was the correct one. A few general principles, gathered from the text-writers and decisions upon the scope and effect of residuary clauses will throw much light upon the question presented to us and aid in our investigation of it.

"Residue" meaning that which remains, no particular mode of expression is necessary to constitute a residuary clause. The words
(172) "rest," "residue," or "remainder" are commonly used in the residuary clause, whose natural position is at the end of the disposing portion of the will; but all that is necessary is an adequate designation of what has not otherwise been disposed of, and the fact that a provision so operating is not called the residuary clause is immaterial. It is a general rule always to construe a residuary clause so as to prevent an intestacy as regards any part of the testator's estate, unless there is an apparent intention to the contrary. Consequently, where the will contains a general residuary clause, in order to exclude a particular thing belonging to the testator, and not otherwise disposed of, a plain and unequivocal intention on the part of the testator to exclude that property from the operation of the clause must be manifested; an ambiguous residuary clause being construed broadly rather than narrowly. But where it is manifest, from the expressed words of the will, that the gift of the residuum is confined to that of a particular fund or description of property, or to some certain residuum, the residuary legatees will be restricted to what is thus particularly given. General words in a residuary clause carry every estate or interest of the testator which is not expressly or by necessary implication excluded from its operation. A general residuary clause will cover everything which is not otherwise well disposed of in other parts of the will. It includes property excepted from other gifts, but not property otherwise disposed of by will. General words in a residuary clause, such as "all the rest, residue, and remainder" of testator's estate, will embrace every species of property,

whether real or personal, unless restricted by the context. Land can be passed by the residuary clause without a specific description. While prior to modern legislation the operation of a residuary clause upon realty differed materially from its operation on personalty, owing to the testator's inability to devise subsequently acquired realty, and to the rule that the heirs should be favored at the expense of a devisee, which led to intestacy in the case of lapsed devises, under the present statutes the realty owned by the testator at the time of his death, and no otherwise disposed of, passes under a general residuary clause whose language is broad enough to include real estate. A general residuary bequest carries lapsed and void legacies, and property which is the subject of a devise which fails by reason of a misdescription. 40 Cyc., 1563 to 1570; Gardner on Wills, 418. It is provided by statute that "Unless a contrary intent shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will." Acts of 1844, ch. 88, sec. 4; Revisal, sec. 3142. If we regard item 2 as no devise at all, because no devisee is named therein, or as a (173) devise which has failed because incapable of taking effect, we think the judgment of the court was correct.

If the tract of 648 acres was not devised, it constituted a part of the testator's estate at his death, when his will took effect; and if it was devised, and the devise is incapable of taking effect, then it goes to the plaintiffs as a part of the residue under and by force of the statute. What the construction of this will would be if it were not for the above enactment we need not say, but it is clear, we think, that the statute gives the land in question to the plaintiffs, and similar statutes have been so construed in other States. "A general residuary clause carries property a devise of which has failed by reason of misdescription." *Eckford v. Eckford,* 53 N. W. (Iowa), 345. "Where a testatrix, by mistake, recited that she had settled a particular property upon a certain person, which was not the fact, the property being still at her disposal, and the will contained a residuary bequest, the property mentioned as having been settled passes to the residuary legatee." Gardner on Wills, 418; *In re Bagot,* L. R. 3, Ch. Div. (1893), 348. It was said in the case last cited: "One must bear this in mind, that there is a great difference between the view from which one approaches any specific gift and the view from which one approaches a residuary gift for the purposes of construction. In order to ascertain what is given, or whether any particular thing is well given, by a specific gift, you must look to see whether that

particular item is included. The question is whether it is included or not; but once given a residuary gift large enough in its language to comprehend residue, the question is, not what is included, but what is excluded; and you must find words sufficiently large, sufficiently definite, sufficiently distinct, to enable you to say that some item is excluded, so that, to use the language of one of the authorities, what hitherto has purported to be the residuary gift is reduced to the level of a specific gift, and ceases to be a residuary gift." The following expression, having the same force and effect as that quoted, was used in *Hosea v. Skinner,* 67 N. Y. Suppl. at p. 529: "The law does not favor a condition of intestacy, and the courts are, therefore, slow to adopt a construction which would lead to any such result in whole or in part. In this case the residuary clause is as broad and sweeping as any such provision well could be, and, under familiar principles, embraces all personal property of which the testator was possessed at the time of his death that had not been elsewhere in his will effectively disposed of." "We should, if possible, give to the language of the testator a construction which will render the instrument operative rather than invalid, and an interpretation that will produce intestacy as to any part of the estate is to be avoided, if possible." *Meeks v. Meeks,* 161 N. Y. at p. 70. "A general residuary clause includes in its gift any property or interest in the will which, for any reason, eventually falls into the general
(174) residue. It will include legacies which were originally void, either because the disposition was illegal or because for any other reason it was impossible that it should take effect; and it includes such legacies as may lapse by events subsequent to the making of the will. It operates to transfer to the residuary legatee such portion of his property as the testator has not perfectly disposed of. No one supposes that he has failed in his intention to dispose of all of his property by his will, and the courts should endeavor to make out such an intention and to uphold the testamentary plan, so that the testator may not, as to some of his estate, have died intestate. We think, in the present case, that the testatrix has expressed herself with absolute clearness in making a general residuary disposition of her property, and that it carries with it everything of which she died possessed and which was not otherwise effectually disposed of." *Riker v. Cornwell,* 113 N. Y. at p. 124. It was said in *Floyd v. Carow,* 88 N. Y. at p. 568, that "a general residuary devise carries every real interest, whether known or unknown, immediate or remote, unless it is manifestly excluded. The intention to include is presumed, and an intention to exclude must appear from other parts of the will, or the residuary devisee will take." Gardner on Wills, p. 418, states the same rule.

We must construe this will not by the intention which existed in the mind of the testator, but according to that which is expressed in the will. We should eschew mere conjecture and gather the meaning only from the words. *Smith v. Bell,* 6 Peters (U. S.), 74. The language of this will clearly indicates a purpose to dispose of all the testator's property. The statute of 1844 was enacted for the very reason that under the former rule such an intention would, perhaps, be disappointed, and, therefore, it was broadly conceived and comprehensively worded, and it was intended that the "residue" should include all the estate of the testator which he owned at his death, when the will took effect, including any devise which had lapsed, become void, or otherwise incapable of taking effect. "In order that a beneficiary may take under a will, he must be designated therein, either by name or by description, with such certainty that he can be readily identified, and distinguished from every other person; otherwise the devise or bequest is void for uncertainty." 40 Cyc., 1445. If this be so, then the failure to name a devisee would bring this case fairly within the terms of the statute as to void devises or those incapable of taking effect. The testator doubtless intended to insert the name of a devisee; but having failed to do so, the devise failed or became void and of no effect. *In the matter of Miller,* 161 N. Y., 71, 77; Gardner on Wills, p. 419. The object of the statute and the change from the old law is well stated in Schouler on Wills, sec. 521: "As for a residuary or general devise of real estate, the rule has not corresponded in construction to that of the residuary bequest. In the first place, the old law permitting a testator to devise only the real estate to which he was actually entitled when (175) the will was made, and none acquired subsequently, it followed that the devise, however general in terms, was in effect specific; or rather it disposed specifically of what was not already expressed to be given by the will. On general principle, the heir at law was favored as much as possible, even to the detriment of a residuary devisee; the heir and not the residuary legatee took the advantage; and, in fact, whether a devise lapsed or was void *ab initio,* the residuary devise did not absorb it. This rule has produced some refinements of construction which are no longer of much consequence; for modern legislation both in England and America puts personal and real estate on substantially the same footing in this respect, treating both lapsed and void devises as accruing *prima facie* to the residuary fund; so that consequently the residuary devisee or legatee shall take the essential benefit unless the will discloses an intent to the contrary. Moreover, in England and our several States after-acquired real estate may pass by a will, and the instrument may speak with reference to all property, real or personal, as of the date when it comes into operation, or, in other words, when the testator dies.

Under the statute policy, therefore, which applies to wills made within the last half-century or more, the analogies of legacies and devises fairly harmonize in construction so far as residuary gifts are concerned. The intention to carry lapsed and void devises, as well as estate undisposed of, to the residuary devisee is not to be defeated in construction by expressions like "all other land" or "all land not hereinbefore devised."

The case of *Lea v. Brown,* 56 N. C., 141, cited by defendant, is apparently against the view we have taken, but it was criticised, if not overruled, in *Saunders v. Saunders,* 108 N. C., 327, for the reason that the learned *Chief Justice* had evidently overlooked the statute (Laws 1844, ch. 88; Rev. Code, ch. 119, sec. 8, Revisal, 3142), or because the residuary clause itself may have been so worded as to exclude the idea that the testator intended that it should include the particular property. Nor does the case of *Holton v. Jones,* 133 N. C., 399, apply, as there a contrary intention was clearly expressed in the will.

Our opinion is that the case is governed by the terms of the statute, and the conclusion of the court is therefore sustained.

Affirmed.

Cited: Ford v. McBrayer, 171 N.C. 425 (4c); *Baker v. Edge,* 174 N.C. 104 (4c); *Crouse v. Barham,* 174 N.C. 462 (2c); *Van Winkle v. Missionary Union,* 192 N.C. 134 (1c); *Tate v. Amos,* 197 N.C. 162 (2c); *Stevenson v. Trust Co.,* 202 N.C. 96 (1c); *Case v. Biberstein,* 207 N.C. 515 (3c); *Trust Co. v. Cowan,* 208 N.C. 238 (4c); *Rigsbee v. Rigsbee,* 215 N.C. 759 (2d); *Walsh v. Friedman,* 219 N.C. 158 (1c); *Ferguson v. Ferguson,* 225 N.C. 378, 379 (3c); *Cannon v. Cannon,* 225 N.C. 622 (j); *Jones v. Jones,* 227 N.C. 430 (3c); *Trust Co. v. Shelton,* 229 N.C. 155 (4c); *St. Mary's School v. Winston,* 230 N.C. 329 (3d).

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NORFOLK AND SOUTHERN RAILROAD COMPANY v. S. L. DILL, JR.

(Filed 15 March, 1916.)

1. Limitations of Actions—Pleadings—Amendments—Court's Discretion.

It is within the reasonable discretion of the trial judge to allow amendments to pleadings when their allegations are germane to the original action, involving substantially the same transaction and presenting no real departure from the demand as originally stated, and when allowed it shall have reference to the original institution of the action.

2. Same—Magistrates' Courts—Appeal—Carriers of Goods—Counterclaim.

Where a carrier sues to recover its freight charges on a car-load of flour, before a justice of the peace, it is within the discretionary power of the Superior Court judge, on appeal, to permit the defendant to amend so as to allege damages, by way of counterclaim or offset, to the same shipment of flour, arising from the negligence of the carrier; and when allowed it will shut off the plaintiff's plea of the statute of limitations when the suit, as originally constituted, had been brought in the time specified.

CIVIL ACTION tried on appeal from a justice's court, before *Bond, J.*, and a jury, at October Term, 1915, of CRAVEN.

The action to recover an amount claimed for freight on a car-load of flour to the amount of $115.50, and said to be due 22 December, 1910, was instituted before a justice's court in said county on 18 July, 1913, and on general denial of liability the cause was tried and judgment given for plaintiff. On appeal to the Superior Court the cause came on for trial, as stated, before his Honor, W. M. Bond, judge, and a jury, at October Term, 1915, and, on motion, defendant was allowed to amend his pleadings so as to set up in defense of the action that the flour was wrongfully injured by plaintiff, and the injury thereto equaled or exceeded the amount of the freight charges sued on, to which order plaintiff duly excepted.

Plaintiff then moved that it be allowed to answer said plea and set up the statute of limitations thereto. Motion denied, and plaintiff duly excepted. Plaintiff then entered a general denial to the counterclaims, reserving the exceptions entered.

The jury rendered the following verdict:

1. Did the Norfolk Southern Railroad Company haul the flour in question to New Bern, and, by agreement with defendant Dill, place the car of flour on the track of the Atlantic Coast Line? Answer: "Yes."

2. What was the usual and lawful amount of freight for hauling said flour to New Bern? Answer: "$115.50."

3. Was said flour damaged by the negligence of the Norfolk Southern Railroad Company or prior transportation company in hauling the flour; and, if so, in what sum? Answer: "Yes; $130.25."

4. Is defendant S. L. Dill, Jr., indebted to the Norfolk (177) Southern Railroad, plaintiff, over and above defendant's counterclaim; and, if so, in what sum? Answer: "No."

Judgment on the verdict that defendant go without day, and plaintiff excepted and appealed.

L. J. Moore for plaintiff.

No counsel for defendant.

HOKE, J. In *Lefler Bros. v. Lane Co.*, 170 N. C., 181, speaking to the power of amendment now vested in the Court, and its proper exercise, the Court said: "Under the statutes regulating our present system of procedure, Revisal 1905, sec. 507 *et seq.*, and numerous decisions construing the same, the power of amendment has been very broadly conferred and may and ordinarily should be exercised in "furtherance of justice," unless the effect is to add a new cause of action or change the subject-matter thereof, and our cases on the subject hold that where the amendment is germane to the original action, involving substantially the same transaction and presenting no real departure from the demand as originally stated, it shall, when allowed, have reference by relation to the original institution of the suit," citing, among other cases, *Renn v. R. R.*, 170 N. C., 128; *Joyner v. Earley*, 139 N. C., 49; *Lassiter v. R. R.*, 136 N. C., 89; *Nims v. Blythe*, 127 N. C., 325; *Parker v. Harden*, 122 N. C., 111; *King v. Dudley*, 113 N. C., 167; *Aaron v. Smith*, 96 N. C., 389; *Ely v. Early*, 94 N. C., 1. In application of this wholesome principle, it has been expressly held in *Thomas v. Simpson*, 80 N. C., 4, and in other cases: "That it is competent for the Superior Court, on the trial of an appeal from a justice of the peace, to allow a defendant to set up a counterclaim not made on the trial before the justice." The Court was, therefore, well within its powers in allowing the defendant to set up his claim for damages by way of defense, a course open to defendant in such cases, *Cheese Co. v. Pipkin*, 155 N. C., 394; *Hurst v. Everett*, 91 N. C., 399; and it might have gone further and allowed the plea by way of counterclaim.

It is urged for defendant that while the power of amendment has been liberally conferred under our present system, its proper exercise does not extend to allowing an amendment to the pleadings so as to introduce substantially a new cause of action or change the subject-matter of that first instituted, and, further, it is held that when an amendment of this character has been made without objection, it is reversible error not to allow the adverse party to enter thereto all the defenses and pleas available to him under the law. These positions were recognized as sound in *Lefler Bros. v. Lane Co., supra,* and the authorities cited, and have been directly approved in *Gillam v. Ins. Co.*, 121 N. C., (178) 369, and *Gill v. Young*, 88 N. C., 58, and many other cases; but the present appeal does not come within any such principle. This was a suit for freight charges for $115.50, and the counterclaim, allowed only by way of defense, was for negligent breach of this very contract of carriage in putting the freight, a lot of flour, in a leaky car and by reason of which it was greatly damaged. There was ample evidence of the validity of the claim, and the very long delay in suing for the freight charge, nearly three years, would seem to lend it support. It was not,

therefore, a distinct cause of action nor did it change the subject-matter, but grew out of the very transaction presented and involved in the original demand, and, as heretofore stated, it was in the power of the court to allow it, whether stated in contract or tort, *Reynolds v. R. R.*, 136 N. C., 345, and by way of defense or counterclaim, and when allowed, in either aspect, it would be to shut off the plea of the statute of limitations or refer the determination of that question to the time when the suit was first commenced. *Lefler v. Lane, supra; Ely v. Early*, 94 N. C., 1-7; *Bremble v. Brown*, 71 N. C., 513; *R. R. v. Parks*, 86 Tenn., 554; 25 Cyc., p. 312.

We find, therefore, no reversible error in his Honor's rulings, and the judgment on the verdict is affirmed.

No error.

Cited: Capps v. R. R., 183 N.C. 187 (2e); *Dorsey v. Corbett*, 190 N.C. 785 (1c); *Goins v. Sargent*, 196 N.C. 481 (1c); *Cotton Growers Asso. v. Tillery*, 201 N.C. 533 (2e); *Nassaney v. Culler*, 224 N.C. 327 (2e); *Webb v. Eggleston*, 228 N. C. 580 (2jp).

JOHN TOOMEY ET AL. v. GOLDSBORO LUMBER COMPANY.

(Filed 15 March, 1916.)

1. Statutes—Interpretation—Intent—Amendatory Acts.

Where a statute refers to a prior legislative enactment, and in the caption and body of the act purports to be amendatory, substituting and amending different sections, the legislative intent cannot be construed to repeal the former act.

2. Same—Drainage Districts—Reference to Sections—Mistakes.

The legislative intent as gathered from chapter 238, Laws 1915, being to amend chapter 442, Laws 1909, relating to the establishment of drainage districts, it is held that section 2 of the later act, repealing, as printed, section 2 of the former one, should, by correct interpretation, refer to section 11, upon the same subject-matter, *i.e.*, the assessment of damages, and not to section 2 as printed, which sets out in detail the requirements of the petition, the method of obtaining jurisdiction of the parties, and provides for the appointment of viewers and of a drainage engineer, evidently Roman numerals in the later act being mistaken for the figure 11. Hence, the two acts should be construed together, so as not to repeal chapter 442, Laws 1909.

APPEAL by plaintiffs from *Whedbee, J.*, at February Term, (179) 1916, of CRAVEN.

Civil action, tried on demurrer.

This is a proceeding under the Drainage Act of 1909, ch. 442, Laws 1909.

The defendants demurred to the petition which was filed in accordance with section 2 of the act of 1909, upon the ground that section 2 was repealed by chapter 238, Laws 1915, and that this rendered the act of 1909 inoperative.

The Drainage Act of 1909 consists of forty sections. The first section confers jurisdiction on Clerks of the Superior Court to establish drainage districts, and the second sets out in detail the requirements of the petition, the method obtaining jurisdiction of the parties, and provides for the appointment of viewers and of a drainage engineer. The third section prescribes the duties of the viewers, and this and the succeeding sections state the successive steps in the proceeding, section 11 being as follows: "It shall be the further duty of the engineer and viewers to assess the damages claimed by any one that is justly right and due to them for land taken or for inconvenience imposed because of the construction of the improvement, or for any other legal damages sustained. Such damage shall be considered separate and apart from any benefit the land would receive because of the proposed work, and shall be paid by the board of drainage commissioners when funds shall come into their hands."

The act of 1915, ch. 238, is entitled "An act to amend chapter 442 of the Public Laws of 1909," and the material parts of it are as follows:

"SECTION 1. That section 2 of chapter 442 of the Public Laws of 1909 be and the same is hereby stricken out and the following substituted and enacted in lieu thereof: 'It shall be the further duty of the engineer and viewers to assess the damages claimed by the owners of any land located in such a proposed drainage district, and to embrace in such assessment the value of any land actually taken and the injury done to any land not taken, including damage done to the growing crops and timber located thereon, as well as inconveniences suffered by such landowners on account of such proposed drainage or other improvements. Such damages, when assessed and ascertained, shall be considered separate and apart from any benefits such land might receive because of the proposed improvements, and shall be included in the total cost of such improvements, and collected in the manner provided for the collection of other moneys to defray the costs of said improvements under the provisions of this act, and when so collected shall be paid by the board of drainage commissioners to the person or persons entitled thereto.'

(180) "SECTION 2. That section 16 of said act be amended as follows: By inserting between the words 'assessed' and 'is,' in line

eight of said section, the words 'in the manner provided in section 11 hereof,' and between the words 'assessed' and 'is,' in line eleven of said section, the words 'in the manner hereinbefore provided.'"

Judgment was entered sustaining the demurrer, and the plaintiffs appealed.

Guion & Guion for plaintiffs.

D. E. Henderson, T. D. Warren, and A. D. Ward for defendants.

ALLEN, J. It is clear that the General Assembly did not intend to repeal the Drainage Law of 1909 by the act of 1915.

In the first place, the act of 1915 purports in the title and in the body of the act to amend and not to repeal, and if the purpose had been to destroy, it would have repealed the act of 1909 instead of striking out a section of it.

Again, in the first section of the act of 1915 a new section is *substituted* for a section of the act of 1909, and in the second section there is an amendment to section 16 of the original act.

Why call the act amendatory and why substitute a section in the place of one in the act of 1909 and amend another, if the later act renders the first inoperative and void?

What, then, is the effect of the act of 1915?

If we follow the letter of the statute and substitute section 1 for section 2 of the act of 1909, it will be found that the subject-matter of the act of 1915 has no relation to that of section 2 of the act of 1909, and the later act will be made inharmonious and absurd, and it will have the further effect of incorporating as section 2 of the act of 1909 what is already in section 11 of the act in a modified form.

If, therefore, the two acts are considered together and due consideration is given to the intent of the General Assembly to amend and not to repeal, it is manifest that "section 2" referred to in the first section of the act of 1915 was intended to be "section 11," the mistake doubtless occurring in printing, the figure 11 being taken for the Roman numeral II.

If so, have we the authority to give effect to the purpose and intent of the General Assembly, notwithstanding the mistake? Both reason and authority answer the question in the affirmative.

"It is an ancient maxim of the law, applicable to all written instruments alike, that *falsa demonstratio non nocet cum de corpora constat.* Accordingly, in the case of a statute the Court will inspect the whole act; if the true intention of the Legislature can be reached, the false description will be rejected as surplusage or words substituted in the place of those wrongly used which will give effect to the law. For

(181) example, a word in a statute defining the boundaries of a county may be made 'north' instead of 'south' if it is clear that north was really intended. On the same principle a mistake in the date of the passage, or the title of an act of the Legislature, referred to by a subsequent amendatory act, will not prevent the operative effect of amendatory acts, provided the latter so particularly refers to the subject-matter of the former as clearly to indicate the act intended to be amended; and if a later statute especially refers to a designated section of an earlier act, to which it can have no application, but there is another section of the prior act to which, and to which alone, in view of the subject-matter, the latter act can properly refer, it will be read according to the manifest purpose of the Legislature, and the misdescription will not vitiate." Black Interp. Laws, sec. 38.

"Legislative enactments are not to be defeated on account of mistakes or omissions, any more than other writings, provided the intention of the Legislature can be collected from the whole statute. If the mistake renders the intention doubtful, we may look to the title and preamble as well as the body or purview of the act for assistance in arriving at it, and not until all these fail can the act be held inoperative." *Nazro v. Ins. Co.*, 14 Wisc., 298.

"If a section in an amendatory act refers to a section of the act amended by number, and the section referred to does not express the legislative intent, but another section is found which does express that intent, the reference will be treated as being made to the latter section." *People v. King,* 28 Cal., 266.

In *Palms v. Shawano,* 61 Wisc., 217, the word "south" used in the legislative act defining the boundaries of a county was read "north"; in *Stoneman v. Whaley,* 9 Iowa, 390, a subsequent act purported to repeal the sixteenth section of another act, and it was held that the repealing act referred to the sixth section; and in a case from 3 Utah, 334, a subsequent act referred to section 152 of a prior act, and it was construed to mean section 151.

The question was fully considered by this Court in *Fortune v. Comrs.,* 140 N. C., 328, and the Court there says. "A misdescription or misnomer in a statute will not vitiate the enactment or render it inoperative, provided the means of identifying the person or thing intended, apart from the erroneous description, are clear, certain, and convincing.' Black Interp. of Laws, sec. 558. Under this rule we may call to our aid anything in the act itself, or even in the alleged erroneous description, which sufficiently points to something else as furnshing certain evidence of what was meant, though the reference to the extraneous matter may not in itself be full and accurate. The rule, even when literally or strictly construed, does not require that the erroneous description

shall be altogether rejected in making the search for the true meaning; but it may be used in connection with anything outside (182) of the statute to which it refers and which itself, when examined, makes the meaning clear. The erroneous description may in this way be helped out by extraneous evidence. Black, *supra,* sec. 38. But ours is not so much an erroneous as an inaccurate description, and the question is whether its words are adequate to express with sufficient certainty the intention of the Legislature. It has been held that if a later act expressly refers to a designated section of an earlier one, to which it can have no application, but there is another section of the prior act to which, and to which alone, in view of the subject-matter, the later act can properly refer, it will be read according to the manifest purpose of the Legislature, and the misdescription will not prevent the reasonable construction that the Legislature intended to refer to the latter section. *School Directors v. School Directors,* 73 Ill., 249; *Plank Road Co. v. Reynolds,* 3 Wisc., 258; Black, *supra,* sec. 38."

This case has been approved in *Comrs. v. Stedman,* 141 N. C., 451; *S. v. Lewis,* 142 N. C., 651; *McLeod v. Comrs.,* 148 N. C., 86; *Pullen v. Comrs.,* 152 N. C., 558; *Murphy v. Webb,* 156 N. C., 407, and in the last case the language which we have cited from *Fortune v. Comrs.,* is quoted and approved.

We are, therefore, of opinion that the two acts can stand together, and that section 2, referred to in the act of 1915, means section 11 of the act of 1909.

Reversed.

Cited: S. v. Maslin, 195 N.C. 539 (1c); *S. v. Sizemore,* 199 N.C. 690 (1c).

ELM CITY LUMBER COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 15 March, 1916.)

Carriers of Goods—Bills of Lading—Inspection—Rejection of Shipment—Damages.

Where a bill of lading for a car-load shipment of hay contains a clause prohibiting its inspection unless provided for by law or permission is indorsed on the bill of lading, and there is evidence that the consignee inspected the hay and rejected it for inferiority to that purchased, without evidence that the carrier knew of or permitted the inspection: *Held,* a verdict denying recovery against the carrier will not be disturbed on appeal. In this case *semble,* a circular-letter from the consignor author-

izing inspection was sufficient to permit the consignees to do so, and relieve the carrier from liability.

APPEAL by plaintiff from *Bond, J.*, at October Term, 1915, of CRAVEN.

(183) Civil action tried upon these issues:

1. Did the defendant railroad wrongfully allow inspection of the car of hay at Bennettsville, S. C., by consignee MacLean & Croom? Answer: "No."

2. Did defendant wrongfully allow inspection of the car of hay at Robersonville, N. C., by consignee R. L. Smith & Co.? Answer: "No."

3. Would MacLean & Croom, consignees, have paid the draft and taken the hay shipped to them at Bennettsville, S. C., without inspection? Answer: "No."

4. Would R. L. Smith & Co., consignees, have paid the draft and taken the hay consigned to them at Robersonville, N. C., without inspection? Answer: "No."

5. What damage, if anything, is plaintiff entitled to recover of the defendant? Answer: "Nothing."

From the judgment rendered, plaintiff appealed.

E. M. Green, R. A. Nunn for plaintiff.

Moore & Dunn for defendant.

BROWN, J. The plaintiffs shipped two car-loads of hay by defendant, one to MacLean & Croom, Bennettsville, S. C., and the other to R. L. Smith & Co., Robersonville, N. C., under bills of lading containing this clause: "Inspection of property covered by the bill of lading will not be permitted unless provided by law or unless permission is indorsed on the original bill of lading or given in writing by the shipper."

The plaintiff sues to recover damages for a breach of this stipulation by defendant.

1. As to the shipment to Bennettsville. The court might well have instructed the jury upon plaintiff's evidence to answer the issues as they did, as no evidence was offered by defendant. The plaintiff introduced J. A. MacLean, of the firm of MacLean & Croom, who testified that he inspected the hay, and that it was not timothy hay, the kind contracted for, but orchard grass; that he inspected it by authority of plaintiff, who sent witness a circular-letter dated 9 February, making a price on hay with leave for inspection. This letter is in evidence and contains the words: "We guarantee our grade and weight, and bill all cars inspection permitted."

2. As to the Robersonville shipment. A. S. Robinson testified for plaintiff that the shipment of hay to R. L. Smith was for their joint

account; that the contract called for No. 1 timothy hay; that he inspected this hay without authority of the defendant, but at Smith's request; that it was not timothy hay, but prairie grass. There is no evidence whatever that defendant's agent authorized Robinson to enter the car and make inspection, or that defendant was (184) guilty of any negligence in failing to prevent it.

The general circular-letter in evidence and issued by plaintiff to all its customers might well permit inspection at Robersonville, as well as at Bennettsville; but it is not necessary to rest the case on that ground.

No error.

WARREN COUNTY CO-OPERATIVE ASSOCIATION COMPANY v. W. B. BOYD.

(Filed 15 March, 1916.)

1. Corporations — Subscriptions—Special Terms—Conditions Precedent—Liability of Subscriber.

One who before the enactment of Laws of 1915 gives his subscription note to a corporation for shares to be issued, conditioned that the proposed corporation should do business according to a certain system, the Rochdale system in this case, subscribes thereto on special terms, sometimes called conditions subsequent, and where the corporation has been duly organized, the character of the subscription does not affect the subscriber's liability to take or pay for his shares, but gives him in certain instances a right of action against the corporation for damages upon its failure to perform the conditions. *Semble*, chapters 144 and 115, Laws 1915, do not change the application of this principle.

2. Same—Other Stockholders.

In order for the conditions of a subscription upon special terms to the stock of a corporation to be enforcible, they must not be in contravention of public policy or the provisions of the general law or of the special charter, or in fraud of creditors or the just legal rights of the other stockholders.

3. Same—Equal Burdens.

Where one has subscribed in special terms, or upon conditions subsequent contained in his subscription note, to the stock of a corporation prior to 1915, and it appears that this was unknown to the other subscribers to the stock, who regularly subscribed without such condition, and that the corporation had been organized and the business conducted for which it had been formed upon the plan specified in the note, but subsequently changed to meet business contingencies, and was operating at a loss, though at present its assets exceeded its liabilities: *Held*, such subscriber may not avoid paying for his stock on the ground that the condition of his subscription had not been complied with, as against the

rights of the other subscribers who had paid in full, for such would enhance their burdens in violation of the equality of obligation which should prevail amongst those who embark in a common enterprise. *Semble*, chapters 144 and 115, Laws 1915, do not change the application of this principle.

4. Corporations—Subscribers—Release.

Where a corporation has been formed and the obligation of a subscriber to its stock has become absolute, the refusal of its management to presently accept his tender of payment for the shares for which he has subscribed does not release him from his obligation to take and pay for them.

(185) CIVIL ACTION heard on appeal from recorder's court of WARREN, before *Stacy, J.*, at January Term, 1916, of the Superior Court of said county.

A jury trial was waived, and the material facts as found by the court, and his Honor's judgment thereon, are as follows:

1. That the plaintiff is a corporation duly created, organized, and existing under and by virtue of the laws of the State of North Carolina; and under its charter was authorized to begin business when $200 of its capital stock was subscribed and paid in.

2. That the said corporation was duly organized and began business on or about 4 April, 1914, the requisite number of shares of stock for its organization having been subscribed at that time.

3. That on 16 May, 1914, sixty-one shares of stock of the par value of $25 per share of said corporation had been issued and paid for by the different subscribers, and that the total issue of stock at the present time amounts to sixty-eight shares, representing a paid-in capital of $1,700.

4. That prior to the organization of the said corporation, the defendant subscribed to one share of stock in the said company, and executed and delivered to plaintiff his sealed promissory note in words and figures as follows, to wit:

$25.00 WARRENTON, N. C., 16 March, 1914.

On demand after date (without grace), I promise to pay to the order of Warren County Coöperative Association Company $25, with interest at the rate of 6 per cent per annum after maturity, for one share of stock in the above named association. It is agreed by the acceptance of this note that this subscription is to be used to do business on the "Rochdale" system, and for this purpose only; otherwise, this note is to be null and void, and if already paid, the amount above subscribed shall be returned to W. B. Boyd in case the company shall fail to raise the

amount necessary to do business on this plan on or before 16 May, 1914.

No..... Due....., 191.....

(Signed) W. B. BOYD. [SEAL]

Witness:

(Signed) J. F. HUNTER.

5. That the officers and agents of the said corporation conducted the business of the concern in a manner which they *bona fide* believed to be the "Rochdale" system, though the secretary and treasurer (186) admitted that he did not know what the "Rochdale" system was, except what he had been told, which information was at variance with the definition contained in the Encyclopedia Brittanica, offered in evidence by defendant without objection.

6. That the defendant was present at a meeting of citizens when the organization and chartering of the company was proposed; subscribed to one share of stock, and was selected by those present to act as one of the directors. The defendant subsequently declined this office, and another was chosen in his stead.

7. That several weeks after the organization of the plaintiff company the defendant called upon the manager, W. A. Connell, who was also secretary and treasurer of the plaintiff company, and offered to pay his note upon delivery of the stock for which he had subscribed. The said officer did not accept payment from the defendant, and declined to deliver his stock, on the grounds that according to the by-laws of the company the stock was to be issued to members of the Warren County Farmers' Union and nonmembers of said union in the ratio of 6 to 4, and that no further stock could be issued to nonunion men until other union members took their stock, so as to keep the said proportion constant. That several months thereafter several union men paid their subscriptions, and demand was then made upon the defendant for the payment of his note—at which time, however, it was a foregone conclusion that the company was destined to be a financial failure.

8. That the officers and manager of the plaintiff company understood and believed that the "Rochdale" system required their keeping an account and list of all customers and the amount of their purchases; that after the business had been run for some time the directors instructed the manager to meet competition; after which time the manager, seeing that there would be no profits, but that the company would sustain a loss, failed to keep a correct list of all said customers, though a record of each member's purchases had been kept up to that time. No demand was made upon the defendant for payment of his note until after this change in the method of keeping said accounts by plaintiff's business manager.

9. That the assets of the plaintiff company now on hand consist of machinery, wagons, buggies, harness, etc., and notes taken for goods sold, totaling $1,703.67; and that the liabilities of said company (exclusive of shares of stock issued) amount to $1,450, which, with outstanding stock, makes a total of $3,150.

10. That twenty-five shares of stock have been subscribed by different persons, of which class the defendant is one, and which have not been paid, demand having been made therefor and payment refused.

(187) 11. That no creditor or creditors of the plaintiff company are parties to this suit, but the same is brought to enable plaintiff to pay its debts.

Upon the foregoing facts the court being of opinion that the officers and directors of the plaintiff company had contracted debts upon the strength of the stock subscribed by the defendant and other parties, and that the assets of the plaintiff company are insufficient to pay its liabilities, including the amount represented by stock issued, considers the defendant's promissory note a binding obligation and that he is entitled to his stock certificate upon payment of same.

It is now, therefore, ordered, adjudged, and decreed that the plaintiff recover of the defendant the sum of $25, together with the cost of this action, to be taxed by the clerk.

To said findings and judgment defendant excepted and appealed.

B. B. Williams for plaintiff.

Tasker Polk and T. T. Hicks for defendant.

HOKE, J. The facts showing that the defendant subscribed for one share of stock, in pursuance of a plan and purpose to form a corporation, which was afterwards carried out, the company being thereafter regularly organized and doing business, he thereby became a subscriber, and, taken in connection with the note given in evidence of his obligation, this was what is known as a subscription on special terms, sometimes said to be on condition subsequent, defined by Beach on Corporations and other writers as one "which does not affect the subscriber's liability to take and pay for his shares, but which gives him a right of action against the corporation upon its failure to perform," etc. 1 Purdey's Beach on Corporations, sec. 233.

It is well understood that a subscription of this kind may be made, and that the conditions will, to a certain extent, be enforced; the limitation being that these may not be in contravention of public policy or the provisions of general law or of the special charter, and are not in fraud of creditors or the just legal rights of the other stockholders. Clark and Marshall on Corporations, p. 1447; 1 Thompson on Cor-

porations, sec. 625; 1 Cook on Corporations, sec. 83; Clark on Corporations, page 302, and sec. 170, etc. In Clark and Marshall it is said: "In general, a subscription upon special terms is an absolute and unconditional subscription which makes the subscriber a stockholder and renders him liable as such, and for the amount of the subscription as soon as it is accepted, but contains special terms and stipulations. Such a subscription is valid, provided the special terms or stipulations are not such as to constitute a fraud upon the other subscribers or stockholders or upon the creditors of the corporation, and provided they are not beyond the powers conferred upon the corporation by its charter, nor contrary to law."

In Clark on Corporations, *supra,* the same position is stated (188) thus:

"Subscriptions upon special terms are valid except—

"*a.* Where the stipulations are *ultra vires,* or inconsistent with the charter or articles of incorporation.

"*b.* Where they operate as a fraud upon the other shareholders by subjecting the subscriber to lighter burdens or giving him greater rights and privileges.

"*c.* Where they operate as a fraud upon the creditors of the corporation who contract with it on the faith of the capital stock being fully paid."

On the record there is no definite finding as to the meaning of the condition appearing on the face of defendant's note, "that the subscription is to be used to do business on the Rochdale system, and for this purpose only," nor whether such system was pursued in this instance by the management for a whole or part of the time. From an examination of the Encyclopedia Britannica, put in evidence apparently without objection, the name was taken from the city of Rochdale, Lancaster, England, said to be the birthplace of the coöperative movement as a system for conducting business and now used as a general term appropriate to any kind of business, store, or other where the coöperative method is pursued." But there are no facts in evidence tending to show, nor is there anything in the term *ex vi termini* to import that the condition appearing in this note is in violation of the charter or other law or public policy of the State. Nor are the rights of creditors directly involved, the findings of the court being to the effect that none of them are parties, and the objective property of the company amounting to $1,703.67 and the debts only to $1,450, and under the law controlling in subscriptions of this character, the question presented is whether the stipulation or condition appearing on the face of defendant's note is void as being in fraud of the rights of the other subscribers or stockholders.

Recurring to the findings of fact more directly relevant to this question, it appears that there are sixty-eight subscribers who have paid in full, amounting to $1,700, and twenty-five, including the defendant, who have as yet paid nothing; that the company having duly organized, undertook to carry on its specified business for some months on the Rochdale plan, as the management understood it, but later it was so far changed as to meet competition by usual methods; that the business has been conducted at a substantial loss, and an entire sacrifice of the paid-up stock is threatened.

Under these circumstances, defendant, being called on to pay, resists recovery by reason of an alleged violation of a condition subsequent attached to his subscription. So far as the facts now disclose, such a provision was personal to him and, although appearing on the face
(189) of the note, given in evidence of his obligations, was unknown to the other stockholders and unassented to by them, and, in our opinion, on the facts as presented in the findings of the court, to uphold defendant's position would be to wrongfully enhance the burden of those stockholders who have paid in full and in violation of that quality of obligation which should prevail amongst subscribers who embark in a common enterprise and on a principle of equal and proportionate responsibility.

As said by *Associate Justice Brown* in *Farrish v. Cotton Mills,* 157 N. C., 190: "It is elementary that a corporation, as a rule, must treat all shareholders of the same class alike." In *Meholin v. Carson,* 17 Idaho, 742, it is held, among other things, that a corporation has no authority to accept subscription to capital stock upon special terms when the terms are such as to constitute a fraud upon the other subscribers or upon persons who become creditors of the corporation. And in 2 Clark and Marshall on Private Corporations, p. 1452, sec. 467c, it is said: "A corporation has no authority to accept subscriptions upon special terms when the terms are such as to constitute a fraud upon the other subscribers or upon persons who may become creditors of the corporation in reliance upon a *bona fide* regular subscription of the authorized capital stock. In such a case, however, the subscription is not void. The fraudulent and unauthorized stipulations are void, and the subscriber is liable for his subscription as if no such stipulations had been inserted." And this same general principle is recognized and approved in many authoritative cases and text-books of established repute. *Upton, assignee, v. Tubelock,* 91 U. S., 45, and *Webster v. Upton,* same volume, p. 65; *Morrow v. Iron and Steel Co.,* 87 Tenn., 262; *Bank v. Moody* (Ark.), 161 S. W., 134; *Melvin v. Ins. Co.,* 80 Ill., 446; *Johnston v. R. R.,* 81 Ga., 725. Apart from this, where, as in this case, the stipulation relied upon, even where valid, is in the nature of a condition subsequent, it is considered as collateral to the principal

obligation, and the remedy of the subscriber in case of breach is by an action to recover damages. 8 Thompson on Corporations, White's Supp., sec. 625, citing, among other cases, *The Gould, etc., Valve Co.*, 140 Iowa, 744; Purdey's Beach, sec. 237.

On reference to his Honor's findings, it does not appear that defendant has suffered any damages by the observance or failure to observe the condition, or that any such damages are alleged or claimed by him. It is insisted further for defendant that "at some time after the company was formed and doing business he had offered to pay his subscription, and the offer was refused, thereby releasing him from his position and obligation as subscriber." There is authority for the position that when a position of a defendant is in the tentative, constituting a mere offer to subscribe, a refusal by the corporation may have the effect of releasing him, 10 Cyc., p. 456; but where, as in this case, the subscription has been made and the obligation of the party has (190) become absolute, a mere refusal by the corporation does not release. As against creditors or other stockholders who have not been consulted or do not assent, the management could not, without consideration, surrender or cancel the obligation by direct action, and are clearly without authority to discharge a subscriber by a mere refusal to presently accept his tender of payment. *Boushall v. Myatt,* 167 N. C., 328; *Bank v. Moody, supra;* 8 Thompson, White's Supp., sec. 494; 1 Cook on Corporations, sec. 170.

On this question, in *Bank v. Moody, McCullough, C. J.,* delivering the opinion, said: "It appears, however, that defendant Vaughn and several other stockholders never paid any part of their subscriptions to the capital stock, but gave notes therefor which were afterwards canceled by the directors. The corporation, acting through its directors, had no right to cancel the notes for the stock subscriptions as against creditors *nor* as against other stockholders who had paid their subscriptions. Those who had paid were, to the extent of their payments on stock, creditors of the corporation, and are entitled to have the liability against other stockholders enforced."

The present corporation was organized in 1914, presumably under the general law (the charter does not appear in the record), and before the enactment of the statutes more directly applicable to enterprises of this character. Laws of 1915, ch. 144, and ch. 115. As now advised, we are not aware that these later statutes would interfere with or affect the positions recognized and upheld in this opinion, but we deem it well to note that the provisions of these later statutes, not being applicable to the present case, have been in no wise considered.

For the reasons heretofore given, we are of opinion that there was no error in his Honor's judgment, and the same is

Affirmed.

Cited: Hotel Co. v. Latta, 186 N.C. 713 (1c); *Fuller v. Service Co.,* 190 N.C. 658 (3c).

A. E. MYERS & CO. v. NORFOLK SOUTHERN RAILROAD COMPANY AND J. I. SMITH.

(Filed 15 March, 1916.)

1. Carriers of Goods—Title of Goods—Conditions—Constructive Title—Consignor.

Where a shipment of a car of goods is upon condition that the consignee pay cash for them or wire payment of a draft for the purchase price, which has not been done, the title does not vest in the consignee, and the delivery to the carrier is not a constructive delivery to him. Hence, where the carrier under such circumstances, agrees with the consignor in writing, upon the original bill of lading, to change the destination of the shipment and the consignee, and the goods are not delivered accordingly, the consignor may maintain his action against the carrier for damages for their loss.

2. Same—Reconsignment—Contract—Consignee's Consent.

Where the nonperformance by a consignee of certain conditions prevents the title to a shipment of goods by a common carrier vesting in him, the consent of the consignee to a reconsignment is not necessary for the consignor to maintain an action against the carrier for the loss of the goods under the second contract of carriage.

3. Carriers of Goods—Connecting Lines—Initial Carrier—Carmack Amendment.

Where a carrier issuing the bill of lading for a shipment of goods over its own and other independent roads agrees in writing before delivery, upon the original bill of lading, to a reconsignment of the goods, it is the initial carrier within the meaning of the Carmack Amendment.

(191) APPEAL by plaintiffs from *Bond, J.,* at November Term, 1915, of CRAVEN.

This is a civil action to recover damages for the loss of 181 barrels of Irish potatoes.

The plaintiff offered evidence tending to prove that on 17 June, 1913, J. I. Smith delivered to the defendant at Oriental, N. C., 181 barrels of Irish potatoes, of the value of $271.50, to be shipped on open bill of lading to the Union Town Produce Company at Union Town, Pa.; that the agreement with the produce company was that it was to pay cash for the potatoes and that it would wire a bank at New Bern to honor the draft of Smith for the same; that on 18 June, 1913, the said Smith learned that the said produce company had failed to wire

a bank at New Bern to pay his draft, and that the said produce company was not going to take the potatoes; that the said Smith, then applied to the defendant to reconsign said potatoes to the plaintiffs in this action; that the defendant, after making some inquiry, told the said Smith that it had found the car in which the potatoes were shipped and could reship the same; that the defendant then wrote on the original bill of lading the following:

This shipment reconsigned to A. E. Myers & Co., New York, this 18 June, 1913, authority J. I. Smith, he furnishing indemnity bond, which is forwarded to J. E. Boswell, Agent, Oriental, N. C., for his file.

E. W. WARREN, *Agent,*
New Bern, N. C.
J. E. BOSWELL, *Agent.*

That the plaintiffs, upon being notified of the consignment of the potatoes to them, paid for the same; that said potatoes have never been delivered to the plaintiffs.

The defendant offered evidence tending to prove that the (192) potatoes had already been delivered to a connecting carrier on 18 June, 1913, at the time the said Smith applied for a reconsignment of the potatoes to the plaintiffs; that it used due diligence to have them delivered to the plaintiffs, but that it failed to do so.

The produce company has never paid anything for the potatoes.

At the conclusion of the evidence his Honor stated that he would charge the jury that if they found the facts to be as shown by the evidence, it would be their duty to say that the defendant was not indebted to the plaintiffs, and the plaintiffs thereupon submitted to judgment of nonsuit and appealed.

T. D. Warren for plaintiff.
Moore & Dunn for defendant.

ALLEN, J. The ruling of his Honor is predicated upon the idea that the plaintiffs are not entitled to recover if their evidence is accepted by the jury, and we must, therefore, assume, for the purposes of this appeal, that all inferences that may be reasonably drawn from the evidence are established.

The contention of the defendant is that if this is done the evidence shows a shipment on an open bill of lading to the produce company; that this vested the title to the potatoes in that company, and that the consignor, Smith, had no authority to reconsign the shipment, and that no title to the potatoes ever vested in the plaintiffs.

This position would be unanswerable but for the fact that the consignor, Smith, was the owner of the goods at the time of the reconsignment to the plaintiffs, if the evidence is believed, and the further fact that the defendant consented to the reconsignment, and in effect issued a new bill of lading consigning the shipment to the plaintiffs.

When a sale of goods is made for cash or upon condition that a certain act will be performed by the vendee, and the cash is not paid nor the conditions performed, the title to the goods remains in the vendor, and he may maintain an action for their recovery even after the delivery to the vendee. *Smith v. Young,* 109 N. C., 224; *Millhiser v. Erdmann,* 103 N. C., 33.

If so, and the evidence of the consignor, Smith, is true, he was the owner of the potatoes at the time of the reconsignment to the plaintiffs, as he testifies that the sale was for cash and that the produce company had agreed to wire a bank in New Bern to pay his draft for the purchase price; and that the produce company had failed to pay the cash or to wire authorizing the bank to pay his draft.

There is also evidence that at the time of the reconsignment the potatoes were in the possession of or under the control of the defendant, as the consignor thestifies that he called at the office of the superin-
(193) tendent of the defendant on 18 June, 1913, while the potatoes were in transit, and asked to have them reshipped to the plaintiffs at New York, and he was told to come back later and they would let him know if they could get in touch with the potatoes; that he went back, and was told they had found the car and could have it reshipped, and that thereafter, on the same day, the original bill of lading was indorsed by the defendant consigning the shipment to the plaintiffs.

We have, then, on the plaintiffs' evidence the case of the title to a consignment of goods revesting in the consignor after delivery to the carrier by reason of the failure of the consignee to perform the conditions annexed to the vesting of the title in him, and a new contract of shipment executed by the defendant while the goods were in its possession or under its control, consigning the goods to the plaintiffs. Is this new contract valid and binding on the defendant?

The position of the defendant is that it is not, because not assented to by the original consignee; but the authorities are otherwise.

The principle is stated in 2 Hutchison on Carriers, sec. 660, to be that "So long as the goods remain the property of the bailor he may countermand any directions he may have given as to their consignment, and may at any time during the transit require of the carrier their redelivery to himself"; and in 1 Moore on Carriers, p. 213: "Where a common carrier receives goods for transportation and delivery to the consignee without any qualification or restriction, the consignor parts

with the goods and all control over them, and the delivery to the carrier is a delivery to the consignee's agent, and the consignor cannot by a subsequent direction to the carrier prevent their delivery to the consignee, unless such facts are shown as will justify the stoppage of the goods *in transitu;* and where by subsequent direction of the consignor the carrier delivers the goods to another person, it is liable for conversion. But where the delivery to the carrier is qualified, restricted, or conditional, as, for example, where the carrier is notified by the shipper after delivery to it of the goods, not to deliver them to the consignee until he presents the bill of lading and a draft drawn upon him, the delivery to the carrier is not a delivery to the consignee, and the consignee, on refusal to comply with the conditions, acquires no right or title to the property, and a delivery by the carrier to the consignee under such circumstances renders the carrier liable to the consignor. The consignor under such circumstances may change the consignee while the goods are in transit, and has the same right to change their destination after the goods have passed into the hands of a connecting carrier by taking a new bill of lading."

The Supreme Court of Kentucky also announces the same rule in *R. R. v. Hartwell,* 99 Ky., 438, as follows: "The shipper of goods may, even after the delivery to the carrier and after the bill of (194) lading has been signed and delivered, after the destination and direct their delivery to another consignee, unless the bill of lading has been forwarded to the consignee or some one for his use"; and the Supreme Court of Illinois, in *Lewis v. R. R.,* 40 Ill., 281, which was afterwards approved in *Strahon v. R. R.,* 43 Ill., 424, "The principle may be broadly stated that a consignor of goods has the right to direct a change in their destination, and that the carrier is bound to obey such directions."

The question has not been directly presented to this Court before this, but it was considered in *Development Co. v. R. R.,* 147 N. C., 506, where the Court quotes and approves the following excerpt from Hutchison on Carriers, sec. 193: "When there has been no agreement to ship the goods which will make the delivery of them to the carrier a delivery to the consignee and vest the property in him, the shipper may, even after the delivery to the carrier and after the bill of lading has been signed and delivered or after the goods have passed from the possession of the initial carrier into that of a succeeding one, alter their destination and direct their delivery to another consignee, unless the bill of lading has been forwarded to the consignee first named or to some one for his use."

The defendant also contends that it is not an initial carrier within the meaning of the Carmack amendment; but it appears that the ship-

ment originated upon the line of the defendant, and that the only contract of carriage in existence was made by the defendant, and this constitutes it an initial carrier.

We are, therefore, of opinion that his Honor was in error in holding that the plaintiff could not recover in any view of the evidence, which is the effect of his ruling.

Error.

Cited: Hall v. R. R., 173 N.C. 109 (1c); *McCotter v. R. R.*, 178 N.C. 162 (1c); *Trading Co. v. R. R.*, 178 N.C. 182 (3c); *Lumber Co. v. R. R.*, 179 N.C. 362 (3c); *Collins v. R. R.*, 187 N.C. 145 (1c).

A. J. JOHNSON ET ALS. v. J. B. ROBERSON ET ALS.

(Filed 22 March, 1916.)

1. Appeal and Error—Timber—Interlocutory Orders—Final Judgment.

An interlocutory order is provisional or preliminary only, and not determinative of the issues joined in the suit; and where it appears in a suit to restrain the cutting of certain timber and to subject it to sale for the satisfaction of plaintiff's judgments, that the determinative issues have been answered by the jury in plaintiff's favor, a decree accordingly entered, and a commissioner appointed to sell the timber and give effect to the decree, the judgment is not interlocutory; and when an appeal therefrom has been lost, the matter will not be afterwards reviewed on an appeal from an order confirming the sale.

2. Appeal and Error—Broadside Exceptions—Refusal.

An exception to the order of the court for that his Honor overruled the appellant's several exceptions to the report of the referee is too general, and will not be considered on appeal.

(195) APPEAL by defendants from *Connor, J.*, at October Term, 1915, of SAMPSON.

Motion in the cause to confirm report of sale of certain standing timber made by a commissioner. From an order confirming the sale, the defendants appealed.

H. E. Faison and Isaac C. Wright for plaintiffs.

John D. Kerr, Butler & Herring for defendants.

BROWN, J. It appears from the record that this is an action to restrain defendants from cutting certain timber and to subject it to sale for the satisfaction of certain judgments held by plaintiffs against defendants.

The issues were tried at September Term, 1915, *Daniels, J.*, presiding. From the judgment then rendered, defendants appealed. The appeal was dismissed by the Supreme Court. Defendants then moved in said Court for a *certiorari* to bring the record up, which was denied. Defendants again moved upon affidavits to reinstate the appeal, which motion was denied.

The commissioner made sale of the timber according to the decree signed by *Daniels, J.*, and reported to October Term, 1915. Upon the hearing of a motion to confirm the report of sale a decree was entered confirming the same, and defendants appealed.

The defendants contend that the decree entered by *Daniels, J.*, at September Term, 1914, was interlocutory only, and that, notwithstanding they appealed from it and their appeal was dismissed, they have the right to review on the present appeal all the proceedings and rulings on that trial. Twelve issues were then passed on by the jury, the necessary facts found, and a final decree entered declaring the rights and liabilities of the parties, ordering the timber to be sold, and decreeing that the proceeds be applied to the satisfaction of the judgments. A commissioner was appointed to sell the timber and give effect to the decree.

That such a complete adjudication of the rights of the parties to the action can be called interlocutory is a proposition wholly untenable. If that decree is interlocutory, then the successor of Judge Daniels could set it aside, and the labors of judge and jury would have been in vain.

An interlocutory order or decree is provisional or preliminary only. It does not determine the issues joined in the suit, but merely directs some further proceedings preparatory to the final decree. (196) 1 Barb. Ch. Pr., 326, 327; 1 Black Judgments, 21.

In the decree rendered by *Daniels, J.*, an ascertained indebtedness is declared, judgment entered, and a foreclosure by sale adjudged. "Such judgment is final as to the amount of indebtedness so adjudicated, and it is also final for purposes of appeal as to all debated and litigated questions between the parties preceding such decree." *Hoke, J.*, in *Williams v. McFadyen*, 145 N. C., 157.

The appointment of a comissioner to sell the timber was auxiliary and necessary to give effect to the decree. The judgment of September Term, 1914, completed the main purpose of the action and settled and determined the rights of the parties. The proceedings on that trial cannot now be reviewed. The defendants properly appealed at the term the judgment was rendered, but lost their right to have this Court review them, and cannot now be heard.

The defendants assign error "for that his Honor, *Judge Connor*, overruled the exceptions of the defendants Dickerson and Roberson to

the report of the commissioner," etc. There are ten of these exceptions altogether, and, as we have repeatedly held, such assignments of error are too general to comply with the rule of this Court. Such broadside assignments will not be considered. *Sturtevant v. Cotton Mills, ante,* 119.

However, we have looked into the report and decree of confirmation of sale, and think that the matters excepted to were within the sound discretion of the court.

Affirmed.

Cited: Pendleton v. Williams, 175 N.C. 254 (1c); *Boseman v. McGill,* 184 N.C. 218 (1c); *Veazey v. Durham,* 231 N.C. 362 (1c).

W. G. BRAMHAM v. CITY OF DURHAM.

(Filed 22 March, 1916.)

1. Statutes—Repugnant Clauses—Interpretation.

Where there are two acts of the Legislature applicable to the same subject, passed at different times of the same session, their provisions are to be reconciled in their interpretation, if this can be done by fair and reasonable intendment; but to the extent they are necessarily repugnant the latter shall prevail.

2. Same—Special Statutes.

Where there is a statute of general application throughout the State, and a statute special to a given locality, passed on the same subject, and the two are necessarily inconsistent, the special statute will prevail, it being usually regarded as an exception to the general one, and passed with reference to the conditions existing in the restricted territory.

3. Same — Municipal Corporations — Bond Issues—Necessaries—Vote of People.

By chapter 56, Public Laws 1915, ratified 27 February, 1915, the Legislature established a scheme, applicable to all the municipalities in the State, for local improvement therein, including streets and sidewalks, and authorizing the municipal authorities, under certain conditions, to issue bonds to a proportionate extent for payment of principal and interest without requirement that such issuance be submitted to the vote of the people. Thereafter, by special act, a bond issue was authorized by special legislative enactment, for the city of Durham, for such purposes, requiring that they first be passed favorably upon by the electors of the town. *Held,* the local law controlled, and a bond issue without the required approval is a nullity, the local act, to the extent stated, being considered as repealing the general law.

4. Municipal Corporations—Cities and Towns—Bond Issues—Necessaries —Vote of People—Legislative Control—Constitutional Law.

The building and repairing of streets and sidewalks are a necessary municipal expense, and the question of issuing bonds therefor by the town is not ordinarily required to be submitted to the voters of the town; but where by the town charter or other special legislation, or both, this is required, it is necessary to the validity of the bonds so issued that the requirement be first observed, the matter being within the exclusive legislative control. Constitution, Art. VIII, sec. 4.

APPEAL by defendant from *Devin, J.*, at January Civil Term, (197) 1916, of DURHAM.

Civil action heard on case agreed.

The action was instituted by plaintiff, a citizen and taxpayer of the city of Durham, to restrain the issuance of coupon bonds of the city for the purpose of construction and repair of streets and sidewalks of Dillard Street in said city, and without the approval of a majority of the qualified voters of the city cast at election held for the purpose. On the question presented, there was judgment for plaintiff, and defendant excepted.

Sykes & Sheppard and S. C. Chambers for plaintiff.

J. L. Morehead for defendant.

HOKE, J. From the facts agreed upon, it appeared that the General Assembly of 1915 enacted a statute, applicable in express terms to all municipalities of the State, establishing a scheme for local improvements therein, including streets and sidewalks, the same to be originated by petition, etc., and authorizing the municipal authorities, under certain conditions, to issue bonds in payment of the city's proportion of the improvement, termed "local improvement bonds," and provide for payment of principal and interest by taxation on all the taxable property of the municipality. Public Laws 1915, ch. 56, ratified 27 February, 1915.

At the same session there was enacted a statute in reference to (198) the city of Durham providing for the construction and repair of the streets and sidewalks of the city and authorizing the issuance of coupon bonds of the city to be designated as "street and sidewalk bonds" in amount not to exceed $300,000, to raise funds for this purpose, same to be paid by taxation, etc. The act also requires that its provisions should be submitted for approval to the qualified voters of the city and makes full provision for holding an election on the question. This statute, Private Laws 1915, ch. 331, was ratified 8 March, 1915, and contains a section repealing all laws and parts of laws inconsistent

therewith. The proposition is to issue bonds by virtue of powers claimed under chapter 56 and without submitting the question to the qualified voters of the city. It is a well recognized principle of statutory construction that when there are two acts of the Legislature applicable to the same subject, their provisions are to be reconciled if this can be done by fair and reasonable intendment; but, to the extent that they are necessarily repugnant, the later shall prevail. The position is stated in substantially these terms by *Associate Justice Field* in *U. S. v. Tynen,* 78 U. S., 92, as follows: "Where there are two acts on the same subject, the rule is to give effect to both, if possible; but if the two are repugnant in any of their provisions, the latter act, and without any repealing clause, operates to the extent of the repugnancy as a repeal of the first"; and in Sedgwick on Statutory Construction, p. 125, quoting from *Ely v. Bliss,* 5 Beavan, it is said: "If two inconsistent acts be passed at different times, the last is to be obeyed, and if obedience cannot be observed without derogation from the first, it is the first that must give way."

Again, it is established that where a general and a special statute are passed on the same subject, and the two are necessarily inconsistent, it is the special statute that will prevail, this last being regarded usually as in the nature of an exception to the former. *Cecil v. High Point,* 165 N. C., pp. 431-435; *Comrs. v. Aldermen,* 158 N. C., pp. 197-198; *Dahnke v. The People,* 168 Ill., 102; *Stockett v. Bird,* 18 Md., 484, a position that obtains though the special law precedes the general, unless the provisions of the general statute necessarily excludes such a construction. *Rodgers v. U. S.,* 185 U. S. 83; Black on Interpretation of Laws, p. 117.

In the citation to Black, *supra,* it is said in illustration that "A local statute enacted for a particular municipality for reasons satisfactory to the Legislature is intended to be exceptional and for the benefit of such municipality. It has been said that it is against reason to suppose that the Legislature, in framing a general system for the State, intended to repeal a special act which local circumstances made necessary."

(199) In the light of these principles, we do not hesitate to hold that the special act, ch. 331, Private Laws 1915, ratified 8 March, making provision for the construction and repair of streets and sidewalks in the city of Durham, providing for a bond issue for the purpose, and requiring that the proposition should be submitted to a popular vote for approval, is the law on the subject in that locality, and the provisions of the general statute passed by the same Legislature on 27 February previous, and providing for a bond issue for the same purpose without a popular vote, are to that extent repealed. This being by correct interpretation the state of the law controlling the subject, the pro-

posed bond issue cannot be lawfully made unless approved by popular vote pursuant to the provisions of the special statute, for, although the building and repair of streets and sidewalks are considered with us a necessary municipal expense, and so not subject to the constitutional restrictions as to incurring municipal indebtedness, *Hargrave v. Comrs.*, 168 N. C., 626, it has been held with equal emphasis that statutory restrictions on the subject must be observed, and that unless the requirements of the statute applicable are complied with, the municipal authorities are without power in the premises. *Murphy v. Webb,* 156 N. C., 402; *Comrs. v. Webb,* 148 N. C., pp. 120 and 123; *Robinson v. Goldsboro,* 135 N. C., 382; *Wadsworth v. Concord,* 133 N. C., 587.

Speaking to the question in *Comrs. v. Webb, supra,* the Court said: "While there is no constitutional inhibition, however, on the issuance of these bonds, the authorities with us are to the effect that when the charter of a municipality, or general or special legislation applicable to the question, requires or provides that a proposition to incur an indebtedness or issue bonds for a given purpose shall be submitted to the voters of the town for their approval, this will amount to a statutory restriction, and such indebtedness shall not be incurred unless the measure has been sanctioned and approved by the voters according to the provisions of the statute; and this though such indebtedness is properly classed as a necessary expense." We are confirmed in our construction of these statutes by the fact that not only the special statute, but the charter of the city of Durham, Private Laws 1899, sec. 34, required that any bonded indebtedness of this character should be first approved by a popular vote, and, in addition, that the framers of our Constitution have considered this matter of the first importance, and Article VIII, sec. 4, contains impressive admonition that it is the duty of the Legislature to provide for the organization of cities, towns, etc., and to restrict their powers of taxation, assessment, borrowing money, contracting debts, and loaning credits so as to prevent abuses in assessments and the contracting of debts.

There is no error, and the judgment of his Honor is

Affirmed.

Cited: Power Co. v. Power Co., 171 N.C. 256 (2c); *Swindell v. Belhaven,* 173 N.C. 4 (2d); *Swindell v. Belhaven,* 173 N.C. 5 (1e); Swindell *v. Belhaven,* 173 N.C. 6 (1c); *Rankin v. Gaston County,* 173 N.C. 684 (2c); *Kornegay v. Goldsboro,* 180 N.C. 451 (2c); *Young v. Davis,* 182 N.C. 203, 204 (2c); *Kinston v. R. R.,* 183 N.C. 20 (3d); *Wilson v. Comrs.,* 183 N.C. 640 (2c); *Armstrong v. Comrs.,* 185 N.C. 408 (1c); *Comrs. v. Comrs.,* 186 N.C. 204 (1c); *Felmet v. Comrs.,* 186 N.C. 252 (2c); *Blair v. Comrs. of New Hanover,* 187 N.C. 490 (2d); *Road Com.*

v. Comrs., 188 N.C. 365 (3d); *Litchfield v. Roper*, 192 N.C. 206 (1c); *Flowers v. Charlotte*, 195 N.C. 602 (3c); *Martin v. Sanatorium*, 200 N.C. 225 (1c); *Hammond v. Charlotte*, 205 N.C. 472 (2c); *Rogers v. Davis*, 212 N.C. 36 (2c); *Guilford County v. Estates Administration*, 212 N.C. 655 (1c); *Fletcher v. Comrs. of Buncombe*, 218 N.C. 7 (2c); *Cox v. Brown*, 218 N.C. 355 (1c); *S. v. Calcutt*, 219 N.C. 556 (2c); *Charlotte v. Kavanaugh*, 221 N.C. 263 (2c); *Power Co. v. Bowles*, 229 N.C. 150 (2c).

(200)

R. P. ROBINSON ET AL. v. JOHN R. DAUGHTRY.

(Filed 22 March, 1916.)

1. Partnership—Deeds and Conveyances—Realty—Tenants in Common.

A conveyance of land to a partnership is valid and vests the full equitable title in the members of the firm as tenants in common.

2. Partnership—Deeds and Conveyances—Realty—Principal and Agent—Parol Evidence—Contract to Convey.

An agency of partnership does not extend to a valid conveyance of its real property by one of the partners so as to pass the absolute title; but the agency may be shown by parol to be embraced within the scope of the partnership authority, and then the deed will be operative as a contract to convey the land, which does not require a seal, and, as such, is enforcible.

3. Same—Nature of Partnership—Agency, Express or Implied.

It was shown to be within the scope of a certain partnership to sell patent rights that the partnership would receive in payment certain articles of personal property and real estate as well; and it appeared that certain real estate was thus conveyed to the firm, and reconveyed to a third person by a fee-simple deed executed by only one of them. *Held*, the authority of the partners to make the conveyance could be either express or implied from the nature of the business, and his conveyance operated as a valid contract to convey the lands, binding upon the individual member of the firm.

4. Appeal and Error—Premature Appeal—Supreme Court—Merits.

Upon the record in this cause, *quere* as to whether the plaintiff had taken a voluntary nonsuit and had the right to appeal; but the Court passed upon the merits of the questions raised, to save trouble and expense to the parties.

APPEAL by plaintiffs from *Connor, J.*, at October Term, 1915, of SAMPSON.

This is a civil action by R. P. Robinson, one of the plaintiffs, to recover a one-half undivided interest in a tract of land in Sampson

County, and by R. H. Stowe, another plaintiff, to recover a one-fourth interest in said land.

R. P. Robinson, R. H. Stowe, and T. L. Lowe were partners doing business under the firm name of R. P. Robinson & Co., and the business of the copartnership was selling patent rights to deal in washing compounds.

Evidence was introduced tending to prove that the partnership took horses, mules, buggies, carts, and land in exchange for the patent rights, which were converted into money; that T. L. Lowe had charge of the business in Sampson County, and that it was within the scope of the business to take land and convert it into cash in exchange for patent rights.

On 27 September, 1900, the partnership sold to W. A. Hobbs, (201) in Sampson County, the right to sell the washing compound in the State of Arkansas, and in payment therefor the said Hobbs and wife conveyed to R. P. Robinson & Co., the partnership being alone named as grantee, the land described in the complaint.

On 17 October, 1900, the said T. L. Lowe, acting for the partnership, sold said land to the defendant, and executed to him a deed therefor, in which R. P. Robinson & Co. alone is the grantor, and which is signed "R. P. Robinson & Co. (Seal)."

The plaintiffs contend that the deed to Robinson & Co. vested the title to the land in the members of the partnership as tenants in common; that the deed executed by Lowe to the defendant only operated to convey his interest in the land, and that therefore they are entitled to recover their interests therein.

The defendant contends that the deed executed by Lowe conveyed the interest of all the partners, and, if not, that it is valid as a contract to convey, of which specific performance will be enforced.

The following statement appears in the case on appeal:

At the close of plaintiff's evidence, defendant moved for judgment of nonsuit. The motion was overruled.

During the discussion by counsel upon this motion, the court asked counsel for plaintiff what their views were upon the proposition that the paper-writing offered in evidence as a deed from R. P. Robinson & Co. to defendant, if not good as a deed, was good as a contract to convey, provided the jury should find that it was executed by Lowe and that Lowe was a partner, intimating, in the absence of the jury, that in his opinion it was good as such contract. Counsel retired, and, after a conference, returned into the courtroom and announced that upon the court's intimation they would take a nonsuit. The court further stated that in his opinion the paper-writing was good as color

of title. Upon the intimation of the court the plaintiff thereupon took a nonsuit and appealed to the Supreme Court.

The judgment of nonsuit states:

At the close of plaintiffs' evidence defendant moved for judgment of nonsuit under the Hinsdale Act. His Honor overruled the motion, and defendant excepted. His Honor intimated that if the jury should find that T. L. Lowe had authority to sell said land and convert same into cash, that he would hold that the deed to defendant was a contract to convey; and thereupon the plaintiffs submitted to a nonsuit and gave notice of appeal.

Grady & Graham for plaintiffs.

I. C. Wright and H. E. Faison for defendant.

(202) ALLEN, J. The deed executed to R. P. Robinson & Co. is valid, and it operated to vest the full equitable title to the land described therein in the members of the partnership as tenants in common, *Walker v. Miller,* 139 N. C., 448, also reported in 4 A. and E. Anno. Cases, 601, where there is an extensive note.

If, then, the title to the land was vested in the members of the firm by the deed executed to R. P. Robinson & Co., has it been divested by the subsequent deed executed by Lowe, one of the partners, and what is the legal effect of the latter instrument?

"A contract of partnership is a contract of agency, and it differs from a pure agency only in this, that in a pure agency the agent binds his principal only; in a partnership all the principals or partners are bound, which, of course, includes the actor. On this principle is bottomed the powers of one partner to bind the partnership when he acts within the scope of his powers." *Person v. Carter,* 7 N. C., 324.

Ordinarily this authority of one partner to bind the others on the ground of agency does not extend to the conveyance of real property, and deeds conveying such property must be executed by all the partners, 30 Cyc., 494; *Thompson v. Bowman,* 73 U. S., 316; but it is also true that an instrument in form a deed, which has been defectively executed by an agent having authority, may operate as a contract to convey, *Rogerson v. Leggett,* 145 N. C., 10, and that no seal is necessary in a contract to convey land, *Mitchell v. Bridger,* 113 N. C., 71, and that the authority to make the contract may be shown by parol, *Hargrove v. Adcock,* 111 N. C., 171; *Wellman v. Horn,* 157 N. C., 170.

Applying these principles to the facts, it follows that the paper-writing executed by the partner, Lowe, in the name of the partnership is valid as a contract to convey, provided there is evidence of authority in Lowe to make the contract.

This authority may be express, or implied from the nature of the business conducted by the partnership, and the plaintiff Stowe testified that Lowe had charge of the business of the partnership in Sampson County, and the plaintiff Robinson that it was entirely in the scope of the business to take land and convert it into cash in exchange for patent rights; and when the character of the business is considered, this furnishes evidence of authority in Lowe to make a valid contract of sale binding on all the partners.

The author says in Gilmore on Partnerships, 292: "In so-called real estate partnerships where land is the commodity dealt in, it would seem that there should be an implied power in each partner to sell it. A distinction should be drawn between the actual conveyance of firm realty and a contract to convey. It might very well be that a partner has power to bind the firm by an agreement to convey partnership land, but has not the power to execute the formal convey- (203) ance"; and Bates on Part., sec. 299, is to the same effect.

The Court states the same principle in *Thompson v. Bowman,* 73 U. S., 316, as follows: "There is no doubt that a copartnership may exist in the purchase and sale of real property equally as in any other business. Nor is there any doubt that each member of such copartnership possesses full authority to contract for the sale or other disposition of the entire property; though for technical reasons the legal title vested in all the copartners can only be transferred by their joint act"; and in *Chester v. Dickerson,* 54 N. Y., 1: "One partner cannot convey the whole title to real estate unless the whole title is vested in him. *Van Brunt v. Applegate,* 44 N. Y., 544. But he can enter into an executory contract to convey, which a court of equity will enforce. While a contract for the conveyance of land must be in writing, yet an agent to execute the contract may by appointed by parol. Willard on Real Estate, 376. And hence, when the partnership business is to deal in real estate, one partner has ample power, as general agent of the firm, to enter into an executory contract for the sale of real estate"; and in *Rovelsky v. Brown,* 92 Ala., 522: "If the several partners in a firm engaged in business of buying and selling real estate cannot bind the firm by purchases or sales of such property made in the regular course of business, then they are not capable of exercising the essential rights and powers of general partners, and their association is not really a partnership at all, but a several agency."

We are, therefore, of opinion that there is no error in the intimation of opinion by his Honor.

It is not clear that the plaintiffs had the right to appeal, as at least in some aspects of the record the rulings in the Superior Court left open essential matters of fact, *Midgett v. Mfg. Co.,* 140 N. C., 361; *Merrick*

v. Bedford, 141 N. C., 505; *Blount v. Blount,* 158 N. C., 313. But we have concluded to pass on the questions raised on their merits, and thus save the parties from the expense and trouble of another appeal.

Affirmed.

Cited: McKinney v. Patterson, 174 N.C. 490 (4c); *Bailey v. Barnes,* 188 N.C. 379 (4e); *Willis v. Anderson,* 188 N.C. 483 (3c); *Brinson v. Morris,* 192 N.C. 215 (1p); *Ramsey v. Davis,* 193 N.C. 397 (2d); *Leftwich v. Franks,* 198 N.C. 292 (2p); *Chandler v. Cameron,* 227 N.C. 236 (2c); *Lodge v. Benevolent Asso.,* 231 N. C. 526 (1c).

J. W. HUFF v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 22 March, 1916.)

1. Carriers of Passengers—Separate Accommodations—Race Division—Statutes—Commerce—Constitutional Law.

Revisal, sec. 2619, requiring separate accommodations for the white and colored races, expressly excludes from its operation, among other things, officers or guards transporting prisoners and prisoners being transported; and where a white sheriff carrying as a prisoner a colored man on the train brings his action upon the sole ground that he was required to ride in the coach provided for colored people, the construction of the statute in its relation to the Federal laws, or those regarding interstate commerce, does not arise.

2. Same—Equal Accommodations—Rules and Regulations—Conductors—Sheriffs.

Irrespective of statute, a common carrier of passengers may make and enforce reasonable regulations for governance and well ordering of its trains, and the power extends to a separation of the races on account of color, when equal accommodations are provided for all persons paying the same rate of fare; and upon occasion, the conductor of the train may reasonably act without such rules when the exigency of any particular instance requires it, having due regard for the rights of the passenger more directly concerned and also for the comfort and convenience of the other passengers. Hence, where the conductor of the train requires a white sheriff to go into the coach provided for colored people with a colored prisoner in his custody, traveling with him on the train, without any evidence that he did so in a harsh or abusive manner, or that the accommodations furnished were unequal to those of the other coach, damages sought by the sheriff in his action on that ground alone will be denied as a matter of law.

(204) APPEAL by plaintiff from *Bond, J.,* at October Term, 1915, of CRAVEN.

Civil action to recover damages for alleged wrongful conduct of defendant and its employees in compelling plaintiff, a white man, to ride in the coach set apart for colored passengers.

Among other things, the evidence tended to show that on 11 July, 1913, plaintiff, a white man and deputy sheriff of Craven County, having in charge a colored prisoner, handcuffed, bought tickets for himself and prisoner at Norfolk, Va., to New Bern, N. C., boarded defendant's train running between the two places and started into the car assigned for white passengers; that he was directed by the conductor not to take the prisoner into the car assigned for the use of the white passengers.

The plaintiff, testifying in his own behalf, said "the conductor forced him to ride in the car for colored people"; but when asked what he meant by the use of that expression, and to state just what occurred, the witness said: "When I started into the white passenger coach with the prisoner the conductor said: 'Hold on there; you can't ride in here. You will have to go into the colored car'; that the conductor acted very forcibly, and, by saying that, I mean only to say that he kept me from going into the white car by telling me to go into the colored car."

The evidence tended further to show that when the train neared Plymouth the prisoner jumped from the car and made a temporary escape; that the train was immediately stopped at the plaintiff's request, plaintiff alighting, found and recaptured his prisoner and took him to New Bern on a later train. There is no testimony (205) or claim, however, that having the prisoner in the colored car was in any way the cause of his escape, nor is the suit brought for that reason, which is, as stated, for wrongfully refusing to allow plaintiff to enter the car for white passengers with his prisoner and claimed to be in violation of section 2619, requiring carriers to provide separate accommodation for the different races.

At the close of the evidence, on motion, there was judgment of nonsuit and plaintiff excepted and appealed.

Ernest M. Green for plaintiff.

Moore & Dunn for defendant.

HOKE, J. While there is learned and forcible decision to the contrary, *Smith v. Tenn.*, 100 Tenn., 494, it seems to be the trend of opinion and the decided intimation of the Supreme Court of the United States on the subject that State legislation of this character may not extend to a case of interstate traffic. *Chesapeake and Ohio R. R. v. Ky.*, 179 U. S., 388; *Plessy v. Ferguson*, 163 U. S., 537; *Hall v. McCuir*, 95 U. S., 485; *Anderson v. Louisville and Nashville R. R.*, 62 Fed., 46; *State ex rel. Abbot v. Hicks*, 44 La. Criminal.

We are not called on, however, to decide this question on the present appeal nor to construe our statute in direct reference to it, for the reason that the law itself, Revisal, sec. 2619, after requiring all railroad and steamboat companies engaged as common carriers in the transportation of passengers for hire to provide separate and equal accommodations for white and colored passengers, contains provisos as follows: *"Provided,* that this shall not apply to relief trains in cases of accident, to Pullman and sleeping cars or through or express trains that do not stop at all stations, to negro servants attendant on their employers, to officers or guards transporting prisoners, nor to prisoners so transported."

By the express terms of the statute, therefore, the present case is excluded from its operation, and must be determined as unaffectd by direct statutory regulation. Considered, then, in that aspect, it is established by numerous decisions of our State courts that, in the absence of any statute, a common carrier may make and enforce reasonable regulations for the governance and well ordering of their trains, and the power extends to a separation of the races on account of color, the carrier providing equal accommodations for all persons paying the same rate of fare.

In an able, well reasoned case from Pennsylvania, the principle and the basic reasons for it are stated by *Justice Agnew,* in part, as follows:

"The right of the carrier to separate his passengers is founded upon two grounds: his right of private property in the means of con-
(206) veyance and the public interest. The private means he uses belong wholly to himself, and imply the right of control for the protection of his own interest, as well as the performance of his public duty. He may use his property, therefore, in a reasonable manner. It is not an unreasonable regulation to seat passengers so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or well-known customary repugnancies which are likely to breed disturbances by a promiscuous sitting. This is a proper use of the right of private property, because it tends to protect the interests of the carrier as well as the interests of those he carries. If the ground of regulation be reasonable, courts of justice cannot interfere with his rights of property. The right of the passenger is only that of being carried safely, and with a due regard to his personal comfort and convenience, which are promoted by a sound and well regulated separation of passengers. An analogy and illustration are found in the case of an innkeeper, who, if he have room, is bound to entertain proper guests; and so a carrier is bound to receive passengers. But a guest at an inn cannot select his room or his bed at pleasure; nor can a voyager take possession of a cabin or a berth at will or refuse to obey the reasonable

orders of the captain of a vessel. But, on the other hand, who would maintain that it is a reasonable regulation, either of an inn or of a vessel to compel the passengers, black and white, to room and bed together? If a right of private property confers no right of control, who shall decide a contest between passengers for seats or berths? Courts of justice may interpose to compel those who perform a business concerning the public, by the use of private means, to fulfill their duty to the public—but not a whit beyond." *Westchester, etc., Ry. v. Miles,* 55 Pa. St., 209.

The position so stated has been approved and applied in many well considered cases on the subject, as in *Commonwealth v. Power Co.,* 48 Mass., 596; *Bass v. R. R.,* 36 Wisc., 495; *Bowie v. Birmingham Ry.,* 125 Ala., 397; *Vedder v. Fellows,* 20 N. Y., 126; *Brown v. Memphis R. R.,* 7 Fed., 51; and has been fully recognized in our own State in *Britton v. R. R.,* 88 N. C., 536. And where the right to exercise such power on the part of the carrier and to make general rules on the subject would clearly exist, in the presence of emergencies or exceptional conditions not covered by any rule, the conductor in control of a train and charged with the duty of looking after the comfort and convenience of his passengers must be allowed reasonable authority for the well ordering of his train. It is better always to have established rules, because, made with greater deliberation, they may the better serve to inform the passenger of his rights in advance and thus have a tendency to prevent altercations and avoid unseemly friction; but it is impossible to frame rules that are efficient and applicable to every case that may arise in the progress of a train. The con- (207) ductor, as the representative of the company on the ground, must, of necessity, be allowed to deal with such conditions. It is a power to be exercised always with sound judgment, with due regard to the rights of the passengers more directly affected, and under a sense of obligation to preserve order and "proper decorum." As said in one of the cases above cited, *Bass v. R. R.*: "The regulations must be reasonable and reasonably enforced," a statement of the principle recognized with us in *Mason v. Ry.,* 159 N. C., 183.

Speaking to the position and powers of a conductor, in Baldwin on American Railroad Law, the author has said: "He holds, however, somewhat an analogous position to that of shipmaster. The owners of a railroad have put him in charge of the persons and property on board its cars. In case of emergency, when prompt action, if any, must be taken to protect the interests confided to his care, his ordinary powers may become greatly enlarged. A conductor, in the usual execution of his office, is more a servant than an agent; in emergencies, he may become more an agent than a servant. His ordinary powers as a

servant are so large as frequently to subject the company to liability for his wrongful acts. From the necessity of the case, he represents the corporation in the control of the engine and cars, the regulation of the conduct of his passengers as well as the subordinate servants of the corporation and the collection of fares."

On careful consideration of these general principles, we are unable to see that the rights of the plaintiff in the cause have been violated by defendant company or its employees. Under his contract of carriage he was entitled to be transported to his destination and afforded sufficient and equal accommodation during his journey; but he had no right to roam at will over the train or to take his seat with his handcuffed colored prisoner in the car set apart for white persons, regardless of the comfort and convenience of the other passengers and contrary to the directions of the conductor given in the reasonable exercise of his authority. In *Hall v. McCuir, supra,* a suit by a colored woman against the owner of a steamboat for refusing her accommodations on account of her color in the cabin specifically set apart for white persons, *Associate Judge Clifford,* on this subject, in his concurring opinion, said: "Where the passenger embarks without making any special contract, and without knowledge as to what accommodations will be afforded, the law implies a contract which obliges the carrier to furnish suitable accommodations, according to the room at his disposal; but the passenger in such a case is not entitled to any particular apartments or special accommodations. Substantial equality of right is the law of the State and of the United States; but equality does not mean identity, as, in the nature of things, identity in the accommoda-
(208) tion afforded to passengers, whether colored or white, is impossible unless our commercial marine shall undergo an entire change. Adult male passengers are never allowed a passage in the ladies' cabin, nor can all be accommodated, if the company is large, in the staterooms. Passengers are entitled to proper diet and lodging; but the laws of the United States do not require the master of a steamer to put persons in the same apartment who would be repulsive or disagreeable to each other.

"Steamers carrying passengers as a material part of their employment are common carriers, and as such enjoy the rights and are subject to the duties and obligations of such carriers; but there was and is not any law of Congress which forbids such a carrier from providing separate apartments for its passengers. What the passenger has a right to require is such accommodation as he has contracted for, or, in the absence of any special contract, such suitable accommodations as the room and means at the disposal of the carrier enable him to supply; and in locating his passengers in apartments and at their meals

it is not only the right of the master, but his duty, to exercise such reasonable discretion and control as will promote, as far as practicable, the comfort and convenience of his whole company."

In the absence of statutory or general regulations by the company, the question, under the facts and circumstances of each case, must be made to depend on "whether the action complained of was in the reasonable exercise of authority possessed by the conductor for the governance and well ordering of his train, and whether such authority was enforced in a reasonable manner." Where the question permits of debate among men of fair minds, such a question in this jurisdiction must be referred to the jury; but where the case is perfectly clear, it must then be determined as a question of law. *Holden v. Royall,* 169 N. C., 676; *Claus v. Lee,* 140 N. C., 552.

In this instance there is no evidence that the directions of the conductor were given in a rude or offensive manner, and, so far as appears, they were obeyed without present protest. There is no claim or suggestion that plaintiff and his prisoner were not provided physically with the equal and sufficient accommodations contemplated by his contract, nor is there suggestion that the escape of the prisoner was in any wise due to his being placed in the car assigned to colored people or that such an escape was thereby in any way threatened, and, under all the facts and circumstances of this case, we concur in his Honor's view, that no actionable wrong was done the plaintiff, and the judgment of nonsuit is

Affirmed.

Cited: Berry v. R. R., 186 N.C. 426 (2c).

(209)

ELWOOD H. LEE v. F. T. THORNTON ET AL.

(Filed 22 March, 1916.)

1. Actions—Parties—Causes—Statutes—Motions—Pleadings.

Objection for misjoinder of causes of action should be made upon motion to divide them, Revisal, sec. 476; objection to the complaint for multifarious, irrelevant, and redundant allegations, upon motion, made before answer or demurrer or time allowed to plead, to make it more definite and certain. Revisal, sec. 474.

2. Actions—Joinder—"Multifariousness."

"Multifariousness" in equity pleading formerly referred to the fault of improper joining in one bill distinct and independent matters and thereby confounding them, which fault is now recognized in Revisal, secs. 474,

476, relating to the improper joinder of parties and causes of action, and the statement of irrelevant matter.

3. Same—Cause of Action—Construction.

A complaint in an action which is not so prolix as to mislead or confuse the defendants or to conceal or obscure, by its elaboration or redundant words, the real cause of action, is sufficient; and if the matters alleged arise out of one and the same transaction, or series of transactions, forming one course of dealings, all tending to one end, narrating the transaction as a whole, the cause stated is not objectionable as multifarious.

4. Same—Deeds and Conveyances—Mental Capacity—Parties—Fraud.

Where the complaint in an action to set aside certain conveyances of land to different persons for fraud and undue influence upon grantor, and for his lack of mental capacity to execute them, alleges, in substance, that the grantor executed the deeds when totally deficient in mental capacity, and that he was fraudulently imposed upon and unduly influenced by the defendants, who had conspired together against him to take an unfair and unjust advantage of his mental and physical condition, and that the defendant grantee knew of such facts and participated in the fraud when he took the deed, it states with sufficient clearness a good cause of action, though the pleadings may have set forth the matter with some prolixity and unnecessary detail.

CIVIL ACTION heard by *Peebles, J.*, on demurrer to the complaint, at October Term, 1915, of WAKE.

Plaintiff alleged that his father, James Lee, on 19 November, 1913, and prior to that time, was the owner, as tenant in common, of a one-third divided interest in a parcel of land situated in House's Creek Township and containing about 3 acres. That the defendants combined and conspired to defraud James Lee out of his interest in said land. That Ella Lee was his wife, and Dr. F. J. Thornton his physician, and as such had influence and control over him. That he was greatly enfeebled in mind and body from July, 1913, to 19 November, 1913, when the first deed was made, not having mind enough to make a deed and being easily controlled by them. That by the use of
(210) said influence, and taking advantage of his mental and physical condition, they procured him to sign a deed to the defendants J. W. I. Mason and wife for a part of said land in consideration of $150, which was much less than its real value. That a large part of said sum was converted by Ella Lee and Dr. Thornton to their own use, James Lee deriving very little benefit from it. It is further alleged that, afterwards, by the fraudulent use of their control and influence over James Lee, who was devoid of mental capacity to make it, they obtained from him a deed to Dr. Thornton for another part of the land for $200 and other considerations which Thornton never paid, but kept and used for

the joint benefit of himself and Ella Lee. That in furtherance of their concerted scheme to fraudulently deprive James Lee of his land for their own benefit, they procured what purported to be a deed from him to the plaintiff Elwood Lee, who was his son and, prospectively, his only heir, with the intent to embarrass and handicap him in any attack he might make on the other deeds and thereby compel him to submit to the loss of his heritage, and that they took advantage of plaintiff's youth and inexperience and his ignorance of the real facts and circumstances to consummate their fraudulent purpose, the deed having been acknowledged, if acknowledged at all, and recorded without his seeing it or knowing what had taken place. In the original complaint and the amendments thereto it is charged that Ella Lee, Dr. Thornton, and J. W. I. Mason conspired to cheat and defraud James Lee. It is then alleged that James Lee is dead and plaintiff is his only heir at law. The prayer is that the deeds be canceled as fraudulent and void.

Defendants filed separate demurrers, substantially if not literally alike, the following being the grounds of demurrer:

"1. The said complaint does not state facts sufficient to constitute a cause of action.

"2. For that it appears from the said complaint that there is a misjoinder of parties defendant.

"3. For that it appears from said complaint that there is a misjoinder of causes of action therein.

"4. For that said complaint is scandalous and impertinent.

"5. For that in attempting to set up fraud against the defendants, the plaintiff alleges the facts upon which he attempts to rely on 'information and belief' only.

"6. For that said complaint is redundant, multifarious, and argumentative; and is not a clear and concise statement of the facts necessary to entitle the plaintiff to the relief demanded in the complaint, as required by law."

At September term the demurrers were overruled, "but the court of its own motion required the plaintiff to amend his complaint so as to allege more specifically title and ownership," and defendants (211) were allowed until the end of the next term of the court to answer.

Plaintiff amended the complaint in accordance with the order of the court, and defendants then severally demurred as follows:

"1. For that it appears from said complaint that there is a misjoinder of causes of action, it appearing therefrom that the complaint attempts to set aside two deeds which were given at different times to different parties and under different circumstances, and that the several defendants have no interest whatsoever in the deeds which were executed to the other defendants.

"2. For that there is a misjoinder of parties defendant because it appears therefrom that there is no privity or connection between the several defendants as to the various transactions alleged in said complaint.

"3. For that said complaint does not comply with the requirements of the law because of the fact that it is not a plain and concise statement of the facts constituting a cause of action, but contains irrelevant, redundant, mutifarious, scandalous, and unnecessary matter, and repetition.

"4. For that said complaint is so drawn and the allegations, as to the circumstances surrounding the various transactions named therein, are so inartfully alleged that it is impossible for either of the defendants to prepare an intelligent answer thereto."

These demurrers were sustained and plaintiff ordered to file a new complaint, and defendants permitted to answer or demur thereto. Plaintiff excepted and appealed.

Peele & Maynard and Laughlin McNeill for plaintiff.

Douglass & Douglass and Armistead Jones & Son for defendants.

WALKER, J., after stating the case: It would seem to be plain that the court did not sustain the demurrers upon the ground that there was a misjoinder of causes of action, because it made no order for a division of them under Revisal, sec. 476; and it is equally plain that it was not done for the reason that there was a misjoinder of parties for the judgment would not remove that objection, if it was well taken. The judgment must have been based upon the last two defects assigned in the demurrer, which, by reference to the statute, Revisal, sec. 474, would not seem to be proper grounds of demurrer, *Thames v. Jones,* 97 N. C., 121, but of a motion to make the complaint more definite and certain, so that the precise nature of the cause of action may clearly appear.

Revisal, sec. 474, provides as follows: "The defendant may demur to the complaint when it shall appear upon the face thereof either (1) that the court has no jurisdiction of the person of the defendant (212) or of the subject of the action; or (2) that the plaintiff has not legal capacity to sue; or (3) that there is another action pending between the same parties for the same cause; or (4) that there is a defect of parties plaintiff or defendant; or (5) that several causes of action have been improperly united; or (6) that the complaint does not state facts sufficient to constitute a cause of action."

Section 496 provides as follows: "If irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of any

person aggrieved thereby; but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment." "A motion to strike out alleged improper matter from a complaint will not be considered after an answer or demurrer is filed, or after an order for time to plead." *Best v. Clyde,* 86 N. C., 4.

The first demurrers were directed against the cause of action, but this ground was abandoned in the second group, and, we think, properly so. It appears that the court overruled the first demurrers and ordered an amendment of the complaint of its own motion so as to show more specifically plaintiff's title and ownership of the land. Plaintiff contends that this was *res judicata* as to all the other grounds of demurrer; but we need not decide this question, nor the one as to whether the last two grounds of objection can properly be taken by such a pleading, for we are of the opinion that the court should have overruled the present demurrers. Why the first demurrers were overruled and the last sustained does not clearly appear. As we have said, it would seem from the order made by the court that its ruling was based upon the last two grounds of demurrer, and this is indicated by the fact that there was no order as to the separation of causes of action or of the parties, and there was nothing left of the demurrers except the objection that the complaint was uncertain, redundant, and not clear and concise in its allegations as required by the statute. It is alleged in the third ground of demurrer that the complaint is "multifarious," which, in equity pleading, formerly referred to the fault of improperly joining in one bill distinct and independent matters, and thereby confounding them, as, for example, the uniting in one bill of several matters of complaint, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill, Story Eq. Pl. (10 Ed.), sec. 271; but we recognize in this definition of the word the same fault in pleading mentioned in Revisal, secs. 474 and 496, as to the improper joinder of parties and causes of action, and the statement of irrelevant matter.

Coming down to the real question involved, the complaint states (213) a cause of action clearly enough, but not very concisely, and it may be that the pleading was properly characterized in the argument as prolix; but if that objection is now open to the defendants upon demurrer, the prolixity is not so grave in its extent as to mislead or confuse the defendants or to conceal or obscure, by too much elaboration or

redundant words, the real cause of action, and, therefore, to require further amendment of the pleading.

The decision in *Daniels v. Fowler,* 120 N. C., 14, would seem to completely answer all of the material objections of the defendants. Language could not be more apposite to this case and the precise point raised by the demurrer, and could not more effectually dispose of them, than that which is used by the present *Chief Justice* in that case, where he said: "If the grounds of the complaint 'arise out of one and the same transaction, or series of transactions, forming one course of dealing, and all tending to one end; if one connected story can be told of the whole,' it is not multifarious. *Ruffin, C. J.,* in *Bedsole v. Monroe,* 40 N. C., 313, cited and approved in *Young v. Young,* 81 N. C., 91; *King v. Farmer,* 88 N. C., 22, and in *Heggie v. Hill,* 95 N. C., 303. To the same purport is *Hamlin v. Tucker,* 72 N. C., 502. That the 'main relief may be effectual, the plaintiff may state in his bill any number of conveyances, improperly obtained from him, either at one or more times respecting different kinds of property, and ask to have them all put out of his way, or to have reconveyances; for the several conveyances do not so much constitute distinct subjects of litigation, but are rather so many barricades erected by the defendant to impede the progress of the plaintiff towards his rights.' *Bedsole v. Monroe, supra.* 'Where a general right is claimed, arising out of a series of transactions tending to one end, the plaintiff may join several causes of action against defendants who have distinct and separate interests, in order to a conclusion of the whole matter.' *Young v. Young, supra.* Under The Code, sec. 267 (1), where the causes of action all arise out of transactions connected with the same subject-matter, a cause of action in tort can be joined with one to enforce an equitable right. (*Benton v. Collins,* 118 N. C., 196); and proceedings for enforcement of legal and equitable rights can be joined. *Solomon v. Bates,* 118 N. C., 311, 316; *S. v. Smith,* 119 N. C., 856. This is an action for the conversion of the entire estate of the ancestor of the infant plaintiff and to set aside sundry transactions, conveyances, and judgments by means of which the wrong has been done, in none of which frauds the ancestor participated. The demurrer for misjoinder was therefore properly overruled." That case has repeatedly been approved. *Fisher v. Trust Co.,* 138 N. C., 224; *Quarry Co. v.* (214) *Construction Co.,* 151 N. C., 345; *Ricks v. Wilson, ibid.,* 46; *Hawk v. Lumber Co.,* 145 N. C., 48; *Ayers v. Bailey,* 162 N. C., 209. To these may be added *Glenn v. Bank,* 72 N. C., 626; *Benton v. Collins,* 118 N. C., 196; *Pretzfelder v. Ins. Co.,* 116 N. C., 491, all decided before *Daniels v. Fowler, supra,* but to the same effect.

The writer of this opinion did not concur in *Fisher v. Trust Co., supra,* but agreed to the dissenting views so ably stated by *Justice Connor;* but he recognizes that the principle of that case has since been thoroughly settled by the decisions of this Court and is now an established rule of pleading, and he has acquiesced in it for that reason.

The complaint, if reduced to its last analysis, or the ultimate and material facts, alleges that the deeds were executed when James Lee was totally deficient in mental capacity, and that he was fraudulently imposed upon and unduly influenced by defendants Ella Lee and Dr. Thornton to execute the deeds, they having conspired to take an unfair and unjust advantage of his mental and physical condition in order to procure them, and that the defendant Mason knew of these facts and participated in the fraud when he took his deed. This states with sufficient clearness a good cause of action, even though the pleader may have gone into lengthy detail. *Blackmore v. Winders,* 144 N. C., 215; *Brewer v. Wynne,* 154 N. C., 467.

Our conclusion is that the demurrers should have been overruled and the defendant required to answer to the merits.

Reversed.

Cited: Ingram v. Corbit, 177 N.C. 322 (3c); *Dixon v. Greene,* 178 N.C. 209 (4c); *Rose v. Warehouse Co.,* 182 N.C. 109 (3e); *S. v. Bank,* 193 N.C. 528 (4c); *Bank v. Angelo,* 193 N.C. 578 (3e); *Leach v. Page,* 211 N.C. 625, 626 (3c, 4c); *Cotton Mills v. Mfg. Co.,* 218 N.C. 563 (4c); *Griggs v. Griggs,* 218 N.C. 577 (3c); *Bellman v. Bissette,* 222 N.C. 74 (3c); *Pressley v. Tea Co.,* 226 N. C. 519 (3e);

CHARLES M. PFEIFER & CO. v. LOVE'S DRUG COMPANY.

(Filed 22 March, 1916.)

1. Intoxicating Liquors — Vendor and Purchaser — Action for Purchase Price—Public Policy.

A nonresident seller of intoxicating liquor who made the sale knowing that the liquor was to be received here and sold in violation of our prohibition law cannot recover the purchase price in the courts of this State.

2. Intoxicating Liquors—Revenue License—Effect.

A license from the United States Internal Revenue Department is no protection to one violating our prohibition law. It is only a receipt showing that defendant has paid the taxes to the Federal Government.

3. Intoxicating Liquors—Sheriff's License—Interpretation of Statutes.

A license from the sheriff to sell intoxicating liquors does not authorize the delivery thereof for the purpose of sale when it does not comply with the requirements of Revisal, secs. 2063, 2064, and 2066, and such license is therefore void.

4. Judgments—Subsequent Terms—Verdict—Effect—Statutes.

Where a verdict is rendered and entered on the last day of the term, it is proper for the trial judge at the next term to render judgment thereon; but while as between the parties the judgment is entered *nunc pro tunc* as of the former term, as to judgments of third parties it can be a lien only from the docketing, effective, by provision of the statute, from the first day of the term thereof.

(215) APPEAL by plaintiffs from *Peebles, J.*, at October Term, 1915, of WAKE.

W. C. Harris and W. B. Snow for plaintiffs.
Manning & Kitchin for defendants.

CLARK, C. J. This is an action by the plaintiffs, wholesale liquor dealers in Cincinnati, Ohio, to recover of defendants in Raleigh, N. C., the price of a large quantity of whiskey sold and shipped to them during 1913 and 1914. The defendants' defense is that the whiskey was sold and delivered with the knowledge that it would be resold in North Carolina in violation of the criminal law of the State.

The issues submitted were in the same language as those submitted in *Bluthenthal v. Kennedy,* 165 N. C., 372. The jury responded "Yes" to the third issue, "Did the plaintiffs sell and deliver the whiskey to the defendants knowning that the same was to be resold in North Carolina contrary to the laws of the State?" The decision in the above cited case was followed by the judge below, and is conclusive of this appeal. That case has been approved in *Fashion Co. v. Grant,* 165 N. C., 457, and *Smith v. Express Co.,* 166 N. C., 158, and cases there cited, among them a similar action to this by the same plaintiff, *Pfeifer v. Israel,* 161 N. C., 409. The statement of the law in *Smith v. Express Co.* at p. 158 is directly applicable and is controlling.

The whole matter has been so fully and so recently discussed in the cases above cited that it is unnecessary to repeat what is said therein.

It is true that the defendants have a license to sell intoxicating liquor, issued by the United States Internal Revenue Department, but that is no protection against the State law prohibiting the sale of whiskey, and amounts to no more than a receipt given the defendants that they have paid the taxes required by the Federal Government. It is also true that the defendants hold a license from the sheriff to sell intoxicating liquors,

but as fully set out in *Smith v. Express Co., supra,* the license does not authorize "the delivery of intoxicating liquors for the purposes of sale when it does not comply with the requirements of Revisal, 2063, 2064, and 2066. And such license is therefore void." That case was decided even prior to our decision in *Glenn v. Express Co.,* 170 N. C., 286, which has sustained the constitutionality of the Webb-Kenyon law.

The judge properly told the jury that if they responded "Yes" (216) to the third issue, above set out, to answer the issue as to indebtedness "No."

This was the last case tried at that term of court, and the verdict was rendered on Saturday and recorded. At the next term, which began on the following Monday, the judgment on the verdict was signed and entered *nunc pro tunc.* This was entirely regular. *Ferrell v. Hales,* 119 N. C., 199, which has been cited and approved: *Taylor v. Ervin,* 119 N. C., 274; *Knowles v. Savage,* 140 N. C., 372. As was said in *Ferrell v. Hales, supra,* "The judge could not set aside the verdict rendered at the previous term, and if he could not enter judgment upon the facts found by the jury by their recorded verdict, the matter would have been forever suspended, like Mohammed's coffin.

In Aladdin's tower
Some unfinished window unfinished must remain.

"Not so in legal proceedings, which deal with matters of fact, not fancy. The judge, at the next term, seeing the record complete up to and including the verdict, properly rendered judgment *nunc pro tunc.* This was practical common sense, and is justified by precedent. *Bright v. Sugg,* 15 N. C., 492; *Long v. Long,* 85 N. C., 415; *Smith v. State,* 1 Tex. App., 408. As to difficulties suggested, it may be observed that while the judgment as between the parties is entered as of the former term, *nunc pro tunc,* as to third parties it can only be a lien from the docketing, which by The Code, sec. 433, has effect from the first day of the term at which it was actually entered." There is no controversy here as to the priority of judgments.

No error.

Cited: McDonald v. Howe, 178 N.C. 258 (4c); *Cogburn v. Henson,* 179 N.C. 636 (4j); *LaBarbe v. Ingle,* 201 N.C. 814 (4cc); *Patterson v. R. R.,* 214 N.C. 47 (3e).

P. E. SHAW v. SOUTHERN EXPRESS COMPANY.

(Filed 22 March, 1916.)

1. Carriers of Goods—Express—Refusing to Receive—Shipment—Special Trains—Penalty Statutes.

An express company is not liable for damages, and the statutory penalties of Revisal, secs. 2631 and 2632, for refusing to receive a shipment of thirty crates of strawberries for a certain train not carrying accommodations for shipments of this character, though it had taken, on occasion, a few berries thereon for the plaintiff, when it so advertised, the shipper knew of it, and accommodations on other daily trains were specially provided.

2. Carriers of Goods—Express—Refusing to Receive—Shipment—Tender in Time—Trials—Questions of Law.

The plaintiff tendered to the defendant thirty crates of strawberries at a small station requiring only one agent to attend to the various duties of express, telegraph, and railroad agent, when the train for which the shipment was intended was seen approaching the depot, and about seven or eight minutes before its arrival there. A charge of the court that it was for the jury to determine whether, under the circumstances, the tender of the shipment for that train was in time was not open to plaintiff's objection. *Semble*, the time was insufficient as a matter of law, Revisal, sec. 2632.

(217) APPEAL by plaintiff from *Connor, J.*, at August Term, 1915, of DUPLIN.

Civil action tried upon these issues:

1. What sum, if any, is plaintiff Shaw entitled to recover of the defendant company as damages for failure to receive and forward on train No. 42 thirty crates of strawberries on 23 May, 1913? Answer: "Nothing."

2. Did defendant refuse to receive from plaintiff for shipment thirty crates of strawberries on 23 May, 1913, as alleged? Answer: "No."

3. What sum, if any, is plaintiff Shaw entitled to recover of the defendant company as damages for failure to receive and forward on train No. 42 three crates of strawberries on 28 May, 1913? Answer: "Nothing."

4. Did defendant refuse to receive from plaintiff for shipment three crates of strawberries on 28 May, 1913, as alleged? Answer: "No."

From the judgment rendered, plaintiff appealed.

Oscar B. Turner for plaintiff.

Johnson & Johnson for defendant.

BROWN, J. The plaintiff sues to recover penalty and damages for failure to receive and transport two lots of strawberries under sections 2631 and 2632 of Revisal.

The evidence in the case is conflicting, but there is evidence tending to prove that on 23 May, 1913, the plaintiff tendered to the defendant at Teachey thirty crates of strawberries to be shipped to Raleigh. These berries were tendered at 8 o'clock p. m. and forwarded on the train which passed Teachey the following day at 10 o'clock a. m. The defendant had a train which passed Teachey at 8:06 p. m. of 23 May, but the defendant's agent testified that the train had stopped at the depot and she was out on the ground to meet the train at the time the berries were offered, and had no time to bill them on that train. These berries arrived in Raleigh 15½ hours later than they would have arrived in Raleigh had they gone forward by that train. On 28 May, 1913, the plaintiff tendered to the defendant at Teachey four crates of strawberries to be shipped to Raleigh, one of which the defendant transported by the train passing Teachey at 8:06 o'clock, and the others the defendant transported on the following day by the train passing Teachey at 10 o'clock a. m.

There are only two assignments of error relied upon: (218)

1. The court instructed the jury: "If you find from the evidence that the railroad company operated a train passing Teachey at 8:06 p. m., carrying express, mail, and passengers, and not equipped for transportation of berries in as large quantities as thirty crates, and that the public knew it, I instruct you that the defendant was under no obligation to ship these thirty crates on train No. 42; and if you find from the evidence that the defendant accepted these crates of strawberries and shipped them on the first train that was properly prepared and equipped for carrying strawberries in that quantity, then the plaintiff would not be entitled to recover any damages."

There is evidence that the defendant had given a standing instruction not to receive any quantity of perishable matter for shipment on train 42; that defendant had regular express trains daily for carrying truck and an extra truck train, No. 48, during the truck season; that on these trains the defendant was prepared to receive and ship all truck tendered, but was not on 42. There is also evidence tending to prove that plaintiff knew this, and that as an accommodation to him occasionally a few berries were taken on 42 when it could be done without delay. In view of this evidence, we think the plaintiff has no just cause to complain of the charge.

2. The court further charged: "If you find that these thirty crates were tendered seven or eight minutes before the arrival of train No. 42, that is, if you find that these crates were tendered at the time the train

was seen approaching; that Teachey is a small station, and that the agent is also agent of the Western Union, and also postmistress, then I instruct you that you have a right to consider all of these facts in determining whether seven or eight minutes was sufficient time to enable an agent to make proper billing and see that they were properly marked for shipment; and in considering that you must consider the fact that it was the duty of this agent to wait on other people besides the owner of strawberries; that it was just as much her duty to see that other express was properly delivered to the express messenger, and was just as much her duty to see that the express was taken off there, as it was to wait on this plaintiff in this case; and it is for you to say, taking into consideration all of the facts which you shall find from the evidence, even in the event that you find that the company was under obligation to transport these strawberries on train No. 42, it is for you to say whether they were tendered prior to the arrival of the train a sufficient time for the agent to get them billed and off."

We think his Honor was extremely liberal to the plaintiff in leaving the question of reasonable time to the jury under the undisputed evidence that the thirty crates were tendered only seven or eight minutes before arrival of train and just as the train was seen approaching the (219) station.

His honor might well have held as matter of law that plaintiff could not recover under section 2632, for that section provides that a delay of two days at the initial point shall not be charged against the carrier as unreasonable, and shall be held to be *prima facie* reasonable. *Cox v. R. R.*, 148 N. C., 459. In that case it is held: "When it appears that the plaintiffs in an action against a carrier for failure to accept freight for shipment when tendered did not deliver the goods to the carrier because they could not be transported by a train then getting ready to leave the station, but that they carried it back and shipped it the next day, a motion as of nonsuit upon the evidence should be allowed."

No error.

Cited: Talley v. R. R., 198 N.C. 493 (2d).

J. T. MANN ET AL. v. W. H. ALLEN, SHERIFF.

(Filed 22 March, 1916.)

1. Taxation—Levy—Repealing Statutes—Interpretation of Statutes.

Interpreting statutes involving chiefly the repeal of a tax, it is *Held*, that as to taxes already levied it will be given a prospective effect only, unless the law controlling the matter forbids such construction.

2. Same—School Districts—Legislative Powers—Constitutional Law.

Where a school district has been established under the provisions of the Revisal, sec. 4115, and in the exercise of the powers therein conferred have annually levied a tax for school purposes, and, accordingly, a tax was levied for the current year, but subsequently and in pursuance of chapter 135, Laws 1911, an election was ordered on the question of revoking the special tax, which was held and carried in favor of the repeal: *Held*, the repeal of the former tax was prospective in its operation, and especially when the authorities had theretofore contracted with teachers and for other necessary expenses to carry on the school work authorized by the former act, Revisal, sec. 4115. *Quœre*, as to whether the Legislature would have the authority to repeal the exercise of the power of taxation as to creditors conferred under the former act. Constitution, Art. VII, sec. 4; Art. VIII, sec. 1.

3. Taxation—Levy—Assessment—Repealing Statutes.

While the word "levy," when used with reference to executive officers, usually means the taking of the property levied upon into the possession or control of the officer, this meaning does not apply when it is used with reference to taxation, for then it refers to the imposition of the tax by the Legislature or under proper legislative sanction, or the apportionment of such tax to the individual taxpayer, and placing the same on the official lists preparatory to its collection, which in some instances is said to be the equivalent of an assessment. And where a statute repeals a former act, and a levy of the character stated has thereunder been made, the repealing act will be construed as prospective in its operation.

CIVIL ACTION by plaintiff and others, residents and taxpayers (220) of New Hope Special School District in Franklin County, N. C., to restrain the collection of taxes levied in said district, tried before *Peebles, J.*, holding courts of the Seventh Judicial District, on 14 December, 1915. On the pleadings and the facts as therein admitted there was judgment permanently enjoining the collection of the tax, and defendants excepted and appealed.

W. M. Person for plaintiff.

Bickett, White & Malone for defendant.

HOKE, J. From a perusal of the pleadings it appears that in 1910 the New Hope Special School District in Franklin County was estab-

lished pursuant to the law controlling the question, Revisal, sec. 4115, and thereafter continued in the exercise of powers then conferred, levying an annual tax for school purposes, etc., and on the first Monday in August, 1915, this tax was levied for the current year, 1915-16; that on 7 October the tax lists were placed in the hands of defendant for collection and some of the taxes had been already collected at the time of action commenced, on 11 November; that, relying upon the usual special tax in said district, the school authorities had employed teachers for the present fiscal year and had entered into contracts looking to the maintenance of the school and which cannot be carried out without this tax in addition to the regular apportionment.

It further appears that on the first Monday in August, 1915, upon petition properly approved and indorsed, pursuant to amendment to the law, chapter 135, Laws 1911, the entire legislation appearing in Gregory's Supplement, vol. 3, pp. 655-656, an election was ordered on the question of revoking the special school tax and abolishing the district; that the election was held on 10 September, 1915, and the question was carried in favor of the repeal, and return thereof made to the next meeting of the board of commissioners on the first Monday in October, being 4 October.

In reference to the question thus presented, in a proceeding of this character, legislative in its nature and involving chiefly the repeal of a tax, it is very generally held that, as to taxes already levied, the same will be given a prospective effect only unless the law controlling the matter clearly forbids such a construction. *Clegg v. The State,* 42 Texas, 615; *Tel. Co. v. The Commonwealth,* 66 Pa. St., 70; *S. v. Savings Bank,* 68 Me., 515; *Smith v. Auditor General,* 20 Mich., 398; *Town of Belvidere v. Warren R. R. Co.,* 34 N. J., 193; *Smith v. Keely,* 64 Ore., pp. 464-473; 1 Cooley on Taxation, p. 21.

In *Clegg v. The State, supra,* it is held that the repeal of former tax laws does not relinquish the right of the State to recover taxes previously levied but not collected.

(221) In *Smith v. Keeley, supra, Moore, J.,* delivering the opinion, said: "It is the general rule that, unless reserved, the repeal of a special-tax law destroys the remedy for enforcing the collection of the tax, but when a tax system is revised and the former law repealed, the legislative intent is assumed to be of prospective force only, and hence, prior valid assessments shall not be affected by such repeal." And the principle is stated in substantially similar terms by Judge Cooley in his work on Taxation, as follows: "The repeal of a tax law puts an end to all right to proceed to a levy of taxes under it, even in cases already commenced, and statutory remedies for the enforcement of a tax are gone when a statute is repealed without an express saving; but in gen-

eral, when a tax system is revised with the repeal of a former law, it is safe to assume that the legislative intent is that the new enactment is of prospective force only, and shall not disturb existent valid assessments."

This position was fully approved and applied with us in the recent case of Marsh v. Early, 169 N. C., 465. In that case a portion of territory contiguous to the town of Aulander had by legislative enactment and vote been added to the Aulander School District, and, a debt having been contracted, taxes were levied for the current year to pay the interest. Pending collection, the Legislature repealed the statute by which the adjacent territory had been added, and it was held, the present *Chief Justice* delivering the opinion, that, as to the taxes already levied, the repealing statute should operate prospectively and taxes could be collected.

We regard this case, and the principle upon which it rests, as decisive of the one before us, and are of opinion that, on the facts as appearing and admitted in the pleadings, the restraining order should have been dissolved. We are confirmed in this view by reason of the fact also appearing in the record, that the school authorities, pursuant to the duties incumbent upon them, have employed teachers and assumed obligations for the current year, and that these cannot be met without the collection of this additional tax. They had no right to fail in their present duties because the election might result in the abolition of the district. They were compelled to their proper performance under the law as it existed, and, this being true, there is doubt if the Legislature could, directly or indirectly, repeal the law establishing the district so as to deprive creditors of all remedy for their claims. True that, under our Constitution, the right reserved to the General Assembly to repeal or modify acts of incorporation, municipal or other, is very broadly conferred, Article VII, sec. 14; Article VIII, sec. 1; but, as to creditors, the power is not unlimited, and it may be that, under the principles recognized by this Court in *Broadfoot v. Fayetteville,* 124 N. C., 478, the collection of this tax could, in any event, be enforced to the extent required to meet obligations lawfully incurred.

While it is not necessary to decide this question, the facts re- (222) ferred to are proper to be considered in support of the construction that the statute and the proceedings under it are and are intended to be prospective only, for, in cases of doubt, the courts should always incline to the interpretation that will assuredly uphold the law. Black Interpretation of Laws, p. 93. It is earnestly insisted for the plaintiffs that, on the present record, there had been no levy of these taxes within the meaning of cases referred to and on which our decisions have been made to rest. It is true that, when referring to the action of executive officers, the term "levy" is usually properly held to mean the taking of

property into the possession or control of the officer, *Perry v. Hardison,* 99 N. C., 21; *Cary v. German,* 84 Wisc., 80; but when used in reference to taxation it more generally refers to the imposition of the tax by the Legislature or under proper legislative sanction or to the apportionment of such tax to the individual taxpayer and placing the same on the official lists preparatory to their collection, and in some instances is said to be the equivalent of "assessment." *S. v. Lakeside Land Co.,* 71 Minn., 283; *Moore v. Forth,* 32 Miss., 469; 27 A. and E. (2 Ed.), p. 729.

In Cooley on Taxation, p. 22, *supra,* the author, as heretofore quoted, in stating the principle, said that, "On repeal of a former law, the new enactment shall be propsective only, and shall not disturb *valid assessments.*"

On the record, we are of opinion, as stated, and so hold, that the abolition of the district should be properly considered as prospective in its operation, and that the collection of the current tax laid and already assessed should be enforced under the provisions of existent law.

There is error, and the judgment is

Reversed.

Cited: Waddill v. Masten, 172 N.C. 584, 585 (1c); *Galloway v. Board of Education,* 184 N.C. 247 (3c); *Comrs. v. Blue,* 190 N.C. 643 (1c); *Ashley v. Brown,* 198 N.C. 372 (1c); *In re Phipps,* 202 N.C. 645 (3c); *Bank v. Bryson City,* 213 N.C. 171 (2p).

W. D. STARLING, ADMINISTRATOR, v. SELMA COTTON MILLS.

(Filed 22 March, 1916.)

1. Negligence — Trials—Evidence—Instructions—Dangerous Conditions—Licenses.

A cotton mill company did not keep the fence around its reservoir in repair, where the children of its employees were permitted to have their playground, and a 5-year-old child of an employee, the plaintiff's intestate, got through a hole in the fence and was drowned: *Held,* it was reversible error for the judge to charge the jury that the only negligence imputable to the defendant was in permitting the particular hole to be there, for if the whole fence was dilapidated and insecure at this dangerous location, it would be evidence of defendant's negligence in not repairing it.

2. Negligence—Trials—Instructions—Expression of Opinion.

Where the trial judge read his notes of the evidence to the jury and instructed them if they found the facts as thus shown it would narrow

the inquiry of negligence down to a certain phase, a position taken by him all through the charge, it is held as reversible error, as unduly emphasizing the view the court had taken of the evidence.

3. Same—Licensee—Rule of Prudent Man.

Where a cotton mill company authorized its employees to have a playground at a place rendered dangerous through its own negligence, which caused the death of plaintiff's intestate, a 5-year-old child of an employee, it is reversible error for the trial judge to lay down the rule of the prudent man as a measure of the defendant's responsibility in safeguarding the children of others against being injured by the dangerous condition existing on its own land.

4. Trials—Instructions—Evidence—Restrictions.

It is error for the trial judge to single out the deposition of a particular witness and remind the jury that he was the only eye-witness to the occurrence, and if his testimony was believed, it would restrict them in their inquiry.

5. Corporations — Instructions—Prejudice—Expression of Opinion—Statutes.

In this action to recover damages from a corporation for its alleged negligence in inflicting a personal injury, the judge, in his charge, recited the benefits conferred by corporations upon the citizens, without mentioning the benefits they receive in return, or stressing the duty of the corporations to avoid negligence which might cause death or injury, and intimated that he would not permit a verdict rendered upon "guesswork, conjecture, sympathy, pity, or prejudice," etc. *Held*, the charge was an expression of opinion by the judge upon the evidence forbidden by the statute, Revisal, sec. 535.

APPEAL by plaintiff from *Bond, J.*, at April Term, 1915, of (223) JOHNSTON.

Douglass & Douglass and Armistead Jones & Son for plaintiff.

F. H. Brooks for defendant.

CLARK, C. J. This is an action against the defendant to recover damages for the negligent drowning of the infant intestate of the plaintiff in a reservoir on the premises of the defendant. This case was before the Court, 168 N. C., 229. There are numerous exceptions, but it is not necessary to discuss all of them.

There was evidence that the children of the operatives, among whom was this child, were in the habit of using the ground around the reservoir, which was in a few feet of the mill, as a playground; and that the plaintiff's intestate, a child 5 years old, was drowned in the reservoir, was not denied.

The plaintiff excepted to the following charge: "If it is a fact, I mean if the jury find that to be a fact, that the little boy was
(224) drowned by going through a hole in the fence, then the height of the fence was immaterial, because he did not go over it, he didn't fall over it; and the condition of every other part is immaterial, and it would narrow itself down to the question whether or not there was negligence imputable to the management of the company by the existence of the hole that the little fellow went through in the fence, if that is the way his death was caused. Because if there had been no other fence there at all, and he had still gone through the hole in one panel that was there, the only phase of negligence would have been whether or not the existence of the hole in the fence was a negligent failure of duty, because it makes no difference how much negligence a person is guilty of, unless that particular negligence is the cause of an injury there has been no actionable negligence." The plaintiff has cause to complain of this instruction.

Aside from the instruction being somewhat argumentative, the condition of other parts of the fence was evidence of negligence to be considered by the jury upon the issue of negligence in this case, for it tended to show that the fence was not kept in proper repair, and that the company had notice of that fact. Indeed, this Court held in this case, 168 N. C., at p. 231, that "it was culpable negligence" for the defendant not to guard the reservoir by a secure fence, when its officers knew that the children of the employees were habitually using that spot for their playground.

The jury might have been warranted in finding that, although this little boy went through a particular hole or other dilapidation in the fence, the fence was not of sufficient height and was built in an imperfect manner and withal was so dilapidated at other places that the child could have gotten into this pool of water although this particular hole had not existed for a sufficient length of time for the defendant to have actually observed it. There was evidence that the entire fence was improperly constructed and other parts thereof were so dilapidated that a reasonable inspection, or any inspection whatever, would have disclosed to the company the condition of the fence at this particular point. The plaintiff alleged in his complaint that the fence was improperly constructed and was of insufficient height and was not a sufficient protection to children playing around the reservoir as they were accustomed to do. Moreover, the plaintiff contended that the fence was old, worn and dilapidated, with several holes therein of sufficient size for children to pass through. The defendant contended that the fence was properly built and in good repair, and if there was a hole in the fence it was of recent date, and that it had no notice thereof. The charge complained

of deprived the plaintiff of his right to have the jury consider that the fence was throughout in such a dilapidated condition that the defendant should not have failed to take notice thereof, and that it was incumbent upon it to closely examine the fence, not only in respect (225) to other places, but throughout, and that if it had done so it could not have failed, without negligence, to close the very hole through which the boy is claimed by the defendant to have gone and fallen into the reservoir. The charge of the court that though there was a dilapidated and dangerous fence around this dangerous reservoir at the children's playground, yet if the child went through a particular hole, in a particular panel, which was a recent dilapidation, that the jury should find that the defendant was not liable unless it was shown to their satisfaction that the child went through the fence at some other point, was equivalent to telling the jury that it was not the duty of the defendant to keep a good and sufficient fence around said reservoir. If the whole fence was dilapidated and insecure at this dangerous spot, the defendant was guilty of negligence in not repairing it, and in doing so would have repaired this particular hole.

It is not a conclusive defense that there was evidence that the defendant had one particular panel of fence in good repair until just before the accident, and that there was evidence that the child was drowned by going through a dilapidation that had recently occurred in that panel.

It was also error for the court to charge the jury: "I have read to you my notes of the evidence in this case. The direct evidence, if you believe it, and find the facts as shown by it, would narrow the case down to what is the negligence complained of." This charge thrust upon the jury the judge's view of the evidence, and unduly emphasized the position taken by him all through the charge, that in order for the plaintiff to recover it was incumbent upon him to prove that the little child was not drowned in the exact manner and at the exact point detailed by one single witness.

Further, the following part of the charge was prejudicial to the plaintiff: "The law doesn't require a man to be all-wise; it requires him to do only what a prudent man in the exercise of that degree of caution and care commensurate with the existing dangers would do in safeguarding the children of others against being injured by any dangerous reservoir, or other structure which might be on the land of such supposed person." This in effect was an instruction to the jury that the only duty which the defendant owed to the plaintiff's intestate in this case was such duty as any man would owe the children of others in safeguarding them against being injured by any reservoir or other structure which might be on his land, whether he be a trespasser or not (which the child was not), and ignored the testimony in this case that

an officer in the employ of the defendant saw this boy playing at a point near to this dangerous reservoir a short time before he was drowned, and gave him permission to play there, and further (226) ignored the testimony that the children of the employees of the mill constantly and frequently played around and about said reservoir with the knowledge and permission of the defendant.

The judge also charged the jury that a deposition had been read "of the little boy who was with this little boy, and, as I recall, that is the only eye-witness of the occurrence, and that boy says that this little boy went through a hole in one panel of the fence, and if the jury finds that was so, gentlemen, it brings it square down to the question, Was it negligence on the part of this defendant for that particular hole to be in that fence? and would render the condition and height of the fence elsewhere immaterial. Because nothing else, if that were so, caused the death, if it was caused at all by their negligence, except this hole in the fence."

There is the additional objection to this charge, besides what is said above, that it was error for the judge to single out and emphasize the testimony of this one witness to the exclusion of the other possibilities or probabilities as to the place where the boy went through the fence and was drowned. It might be that the little boy whose deposition was read was mistaken as to the identity of the hole. But it impressed upon the jury the strong probability, as the judge thought, that this testimony was correct because this little witness was "the only eye-witness" to the tragedy. There are repeated decisions that it is error thus to single out and stress the testimony of one witness, and this must especially be so when the circumstance is emphasized by the judge that he was "the only eye-witness."

There are other exceptions to the charge, but in view of what we have said above it is not necessary to consider them. We cannot be inadvertent, however, to the exception that the judge violated the act of 1796, now Revisal, 535, which forbids the intimation of any opinion by the judge upon the facts, however inadvertently it may be done.

The judge in this case told the jury: "Whether it is a railroad, cotton mill, or any other sort of a corporation, it is entitled to an absolutely fair and impartial hearing and consideration when it brings a suit, or is sued in a court of justice." This was proper if there was cause to apprehend that the jury might be biased, and we are not disposed to interfere with the judge's discretion in saying this much; but he added: "Our own State is greatly indebted for its development to corporations and investment of capital by people who do not live in the State. We have great railroad facilities in this State that with rare exceptions were built by the capital of people who never lived here.

Not for the purpose of getting you to be prejudiced in their favor, but to wipe away all possible prejudice, if any should exist against them, it is fair for us to consider as an example, for instance, how your county or our State would be today if we had no railroads in it, and no corporations, except those capitalized by residents of the State." (227) The plaintiff excepted to these remarks. It may well be that the statement of fact that with rare exceptions our railroads were built by the capital of people who never lived here cannot be sustained in view of the historical fact that they were largely built by State and county bonds and local subscriptions, and that only of more recent years has their ownership passed into the hands of nonresidents by methods, whatever they were, that do not require any special sense of obligation, at the expense of the plaintiff. But the plaintiff's exception does not rest upon the statement of fact, but to the indication by the judge that he feared that the jury would not give the defendant justice, because it was a corporation, and to that extent intimated that the plaintiff ought not to recover judgment against the defendant, especially in view of the fact that he did not give the other side of the proposition as to what those who are not corporations have done for the State, and the right of the public to be protected against negligence of corporations when they inflict the loss of life or limb, and especially in view of the further statement by the judge further on in his charge, reiterating his views: "I am determined that no verdict, as far as I can prevent, shall be based upon guesswork, conjecture, or sympathy, or pity, or prejudice. I want the jury to find the facts according to the evidence in the case, and whatever they find will settle the legal rights of the parties. The question isn't whether the little boy was drowned. That is not disputed. The question is, Was his death caused by the negligence of the defendant? I read to you what negligence is. I have read to you my notes of the evidence in this case. The direct evidence, if you believe it, and find the facts to be as shown by it, will narrow the case down to, What is the negligence complained of?" The plaintiff again excepted.

The learned judge was doubtless without any intention to throw the weigh of his great office and his personal opinion into the scales. But in this charge he plainly intimated that he feared that the jury would be biased against the defendant because it was a corporation; he recited the great and indispensable obligations under which the public rested to corporations. He did not stress, on the other hand, the duty of corporations to avoid negligence which might cause death or injury to the citizens nor the great indebtedness of corporations to the people to whom they owe their charters and carefulness in operation; and he further intimated that he would not permit a verdict to be brought about by guesswork, conjecture, or sympathy, or pity, or prejudice." There

is nothing to indicate that the jury would be governed by these motives—all of them motives which, if they existed, would operate only against the defendant, not against the plaintiff. The expression of the judge of his intention to prevent a verdict by those motives was, therefore, an expression of his intention to protect the defendant. The jury might
(228) well have taken it that the judge did not think that a verdict could be brought in against the defendant unless the jury were moved by such motives, and that if it was, he would set it aside.

Taken in connection with the whole charge, it certainly could, not unreasonably, have been so understood by the jury. The judge was doubtless inadvertent that his remarks could create that impression on the jury. He was so intent that a verdict should not be rendered by prejudice against a corporation, or by sympathy or pity for the plaintiff, that he failed to give the other side of the proposition, and unduly emphasized his fears. In "avoiding Scylla, he fell into Charybdis." The necessity of judges, in obedience to the statute, avoiding any expression, however inadvertent or well intentioned, which may be reasonably construed by a jury, quick to perceive the judge's point of view, as more favorable to one side than the other, has never been better expressed than by *Mr. Justice Walker* in *Withers v. Lane,* 144 N. C., 187. The whole opinion may be read with benefit by all who are called upon to preside at the trial of fact by a jury. He quotes, among others, from *Chief Justice Taylor* in *Reel v. Reel,* 9 N. C., 63, as follows: "Upon considering the whole of the charge, it appears to us that its general tendency is to preclude that full and free inquiry into the truth of the facts which is contemplated by the law, with the purest intentions, however, on the part of the worthy judge, who, receiving a strong impression from the testimony adduced, was willing that what he believed to be the very justice of the case should be administered. We are not unaware of the difficulty of concealing all indications of the conviction wrought on the mind by evidence throughout a long and complicated cause; but the law has spoken, and we have only to obey."

Mr. Justice Walker, after quoting the above, and other similar statements from the opinions of this Court, most appropriately continues in his own language as follows: "What these eminent jurists have so well said about the duty of the trial judge under our statute, and the consequence of a violation of it, will, if it is properly heeded, conduce to the more perfect and satisfactory trial of causes. The judge should be the embodiment of even and exact justice. He should at all times be on the alert lest in an unguarded moment something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the 'cold neutral-

ity of the impartial judge,' and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged." That case has been repeatedly cited since with approval, as it deserved to be, see Anno. Ed.

We feel entirely assured that the learned judge below did not intend to infringe this statute, any more than he intentionally fell into the other errors which we have found in the charge. He was as (229) inadvertent to the one as to the other; but in the discharge of our duty, as we see it, we must declare that the plaintiff is entitled to a New trial.

Cited: Comer v. Winston-Salem, 178 N.C. 385 (1c); *Hoggard v. R. R.,* 194 N.C. 260 (c); *Brown v. Telegraph Co.,* 198 N.C. 773 (5e); *S. v. Rhinehart,* 209 N.C. 154 (5c); *Hedgepath v. Durham,* 223 N.C. 824 (1d); *Barlow v. Gurney,* 224 N.C. 224 (1c).

W. L. F. COREY AND WIFE v. S. T. HOOKER AND Z. V. HOOKER.

(Filed 22 March, 1916.)

1. Injunction—Mortgages—Foreclosure—Nonsuit—New Action.

Where a mortgagee brings suit to foreclose his mortgage he has the right to take a voluntary nonsuit; and where this is done without exception, and the defendant in that suit brings suit to obtain a perpetual injunction against the foreclosure for alleged usury, and foreclosure is not asked by the defendant in the present suit, the defendant may not be regarded as seeking the aid of the court by legal proceedings to foreclose and have their rights adjusted, as in continuation of the former action.

2. Usury—Contracts—Equity—Payment—Notes.

It is necessary, to maintain an action for the penalty of taking usury for a loan, that the usurious interest should have been paid in money or money's worth by the plaintiff, who sues in equity, and the mere giving a note for the usurious amount is insufficient.

3. Usury—Equity—Injunction—Payment of Legal Interest.

A suit to perpetually enjoin the foreclosure of a mortgage is one seeking the aid of a court of equity, requiring that the plaintiff return the money actually received, with interest; and where the defendant waives the usurious part of the contract the plaintiff may not maintain the position that the defendant is not entitled to his legal rate of interest, and the relief he thus seeks will be denied.

4. Usury — Equity — Injunction—Taxation—Solvent Credits—Listing for Taxes—Tender of Payment.

In this action to perpetually enjoin the foreclosure of a mortgage alleged to have been made upon an usurious contract the defendant does not seek to recover anything "by action at law or suit in equity," and the plaintiff's position that defendants may not exercise their power of sale for failure to list the note for taxation is untenable, especially when the defendant exercised his right to pay the amount of taxes into court.

5. Taxation—Solvent Credits—Indebtedness.

Held, in this case, that sustaining the defendant's exceptions was tantamount to findings in the lower court that the defendant's personal indebtedness exceeded the amount of the taxes on a note secured by mortgage, and the plaintiff's position that he cannot collect the note for failure to list it or foreclose the mortgage cannot be maintained.

WALKER, J., dissenting.

CLARK, C. J., concurring in the dissenting opinion.

(230) APPEAL by plaintiffs from *Bond, J.*, at September Term, 1915, of PITT.

Civil action upon exceptions to report of referee. The court overruled all plaintiffs' exceptions and sustained defendants' exceptions, and made findings of fact and law and rendered judgment accordingly. The plaintiffs appealed.

W. F. Evans, L. I. Moore, L. G. Cooper, Harry Skinner for plaintiffs.
Harding & Pierce for defendants.

BROWN, J. In this action plaintiffs seek to perpetually restrain the defendants from foreclosing certain mortgages under powers of sale therein contained, executed to Z. V. Hooker and F. C. Harding and assigned by them to S. T. Hooker. An injunction to the hearing was granted, a reference had, and the case is now presented upon the facts and conclusions of law embodied in the final decree.

The admitted facts are that S. T. Hooker loaned to plaintiffs $12,000 in actual cash and received from plaintiffs their notes and mortgages in amount in excess of that sum made to Z. V. Hooker and F. C. Harding, which were assigned by them to S. T. Hooker; that the excess over the $12,000 represents "bonus" added in the notes. The court finds that S. T. Hooker, before advertising the property for sale, voluntarily remitted to plaintiffs all over the $12,000 in actual cash loaned plaintiffs and legal interest thereon, and that the defendants have never collected anything whatsoever on either of said notes nor received any money or other thing of value on any one of them.

It is contended by the plaintiffs:

1. That Z. V. Hooker in September, 1914, commenced an action against plaintiffs to foreclose these mortgages; that pending the trial at April Term, 1915, Z. V. Hooker submitted to a voluntary nonsuit, and that the effort of defendants to foreclose under the powers of sale is but a continuation of that action, and, therefore, the defendants Hooker in this action should be treated as if they were seeking the aid of the court by legal proceedings to foreclose and have their rights and equities adjusted accordingly.

We are unable to see the force of this contention. Z. V. Hooker had the legal right to submit to the nonsuit, and that terminated that action, especially as Corey and wife, the defendants in it, took no exception. The right of a plaintiff to submit to a nonsuit before verdict is well settled. *Oil Co. v. Shore, ante,* 51. In the case at bar the defendants ask no aid from the court and do not seek to foreclose the mortgages by legal process.

2. The plaintiffs contend that under the facts of this case they are entitled to recover by way of penalty $8,650, being "twice the amount of such interest paid," and to have the said sum credited on the principal of the notes. This contention is without merit. It is (231) found as fact, and not denied, that the plaintiffs have received in actual cash $12,000 and have never paid a penny in money or money's worth as interest or bonus. In *Rushing v. Bivens,* 132 N. C., 273, it is held that usury must be actually paid in money or money's worth before an action can be maintained therefor, and that giving a note for the usury does not amount to payment. In the opinion *Judge Connor* says: "We think before the plaintiff can maintain the action he must pay the usury in money or in money's worth; he has done neither; he has paid nothing. It is well settled that the penalty is not incurred by the charge of usurious interest; it is by the taking the usury that the party incurs the penalty. No action lies therefor until it is paid." To the same effect is *Riley v. Sears,* 154 N. C., 521; *Pritchard v. Meekins,* 98 N. C., 244.

It would be most extraordinary if plaintiffs, without having paid defendants one penny in money or its equivalent, could recover of them a penalty of $8,650 and have that sum credited upon the principal of their indebtedness.

3. Failing in that, plaintiffs contend that they are entitled to a perpetual injunction against foreclosure under the power of sale and to a cancellation of the notes and mortgages upon repayment of the principal sum of $12,000, without interest. The plaintiffs are borrowers, asking equitable relief. Such relief will be granted only upon condition of their doing equity by returning the money actually received, with legal inter-

est. It has been repeatedly held by this Court that when a mortgagor brings an action to restrain the mortgagee from selling mortgaged property on the ground that the debt secured is usurious, an injunction will be refused if the mortgagee waives the usurious parts of the contract. Where the debtor comes into a court of equity and asks relief against a usurious contract he must pay the defendant the money justly due him, with legal interest thereon. *Manning v. Elliott,* 92 N. C., 48; *Purnell v. Vaughan,* 82 N. C., 134; *Ballinger v. Edwards,* 39 N. C., 449; *Beard v. Bingham,* 76 N. C., 285; *Simonton v. Lanier,* 71 N. C., 498; *Cook v. Patterson,* 103 N. C., 127; *Churchill v. Turnage,* 122 N. C., 426; *Owens v. Wright,* 161 N. C., 127.

This equitable and just rule prevails in practically all the States of this Union as well as in England. 39 Cyc., 1010. The fact that the statute declares all interest forfeited does not affect the operation of the rule. *Carver v. Brady,* 104 N. C., 219; *Cushman v. Sutphen,* 42 Ill., 255.

In reaching our conclusion we have followed the unbroken line of precedents in this Court for half a century, as well as the overwhelming weight of authority in this country as well as in England.

The Alabama court has gone so far as to hold that a statute providing that usurious contracts cannot be enforced either at law or in
(232) equity, except as to the principal sum due, does not prohibit a court of equity in a suit by a borrower for relief against a usurious contract from granting such relief on condition that the complainant repay borrowed money with legal interest thereon. *Lindsay v. U. S. Savings Bank,* 127 Ala., 366; 51 L. R. A., 393.

4. Finally the plaintiffs contend that the defendants should not be permitted to exercise the power of sale in the mortgages, because they have failed to list them for taxation. The statute relied on is copied and construed in *Hyatt v. Holloman,* 168 N. C., 387. The defendants are not seeking to recover anything "by action at law or suit in equity," and under the authority of that case this defense cannot avail plaintiffs. In any event, defendants would have the right to pay the taxes into court, as they have offered to do if liable therefor.

But the judge, in sustaining all of defendants' exceptions and finding the facts as contended for by them, has practically determined that the notes and mortgages are not liable for taxation, as defendants' personal indebtedness exceeded them in amount.

Upon a review of the record, the judgment of the Superior Court is Affirmed.

WALKER, J., dissenting: Were this a question of general law, not affected by any statutory enactment, it may be that I would be con-

strained by some precedents in our Reports, even if thought to be erroneous in principle, to yield my silent concurrence to the opinion of the majority. I do not consider it proper to dissent in every case where my views may not strictly coincide with those of my brethren, whose greater learning and superior acumen I freely acknowledge; but whenever I believe that a vital principle is involved, or a right which is plainly given and guaranteed by statute is destroyed or put in jeopardy, then it is very proper, if not quite obligatory, according to my sense of the duty resting upon me, that I should state the grounds of my dissent, where I differ in opinion with the Court as represented by the majority.

On a former occasion, in *Owens v. Wright,* 161 N. C., 127, I expressed my views somewhat at length on the general question as applicable to the facts of that case, and the defendant in the present litigation may have taken some courage from what was decided therein and in one or two previous cases, and have supposed that however gross the usurious nature of the transaction may be, he would, at last, have everything to gain and nothing to lose, as if he is "armed and equipped" with a deed of trust *and a power of sale,* giving him dominance and great advantage of the borrower, he will, at least, be compensated with what is miscalled "legal interest," that is, he will secure his loan with 6 per cent added to it, whether he succeeds in oppressing his helpless debtor or not. I cannot bring my mind to think that the Legislature intended any such thing, or that it was contemplated that the ancient dictum of the (233) chancellors, who were then invested with great discretionary power in molding their decrees, should abort the effort of legislation to ameliorate the condition of those whose impecunious and necessitous condition compelled them, at times, to appeal to the money lenders for assistance.

This case is a most striking illustration of the imperative necessity for construing the usury laws of our State according to their unmistakable terms, or at least in conformity with the plain intent of the Legislature in enacting them. They were passed to protect the poor and needy from the exorbitant exactions of the usurer. They are perfectly just to the latter, for they allow a fair return on his money. In order to restrain him from demanding more from a man who is bound to give, or to suffer if he refuses to do so, it was not sufficient to declare that he should forfeit only the excess of interest, but it was the opinion of the Legislature that he should be made to incur a heavy penalty if he violated the statute, to the extent of losing *all* interest and being subject, besides, to a further penalty of double the amount of the interest paid. But this beneficent purpose—and no one can reasonably doubt the justness of it—is entirely frustrated and set at naught if we, contrary to the evident intent of the statute, allow him to recover the principal and 6 per cent

additional; and it matters little, or rather not at all, what is the form of the action in which he is permitted to do so, or whether he is on the one side of the litigation or the other. The statute does not make this distinction, or any exception to its clear and positive mandate, that if he *charges* more than 6 per cent on his money loaned he shall never have any interest, or that the loan shall not bear *any* interest. This we held in *Erwin v. Bank,* 161 N. C., 42, where *Justice Allen* so well and so emphatically stated the *law* of the statute. After reviewing the authorities, he thus concludes, at page 49: "As the renewals, according to these authorities, do not change the nature of the transaction, and interest is forfeited when usury is *charged,* the debt became, *after that time,* simply a loan of money bearing no interest." (Italics used to stress important and vital words.) For this proposition he cited *Smith v. B. and L. Assn.,* 119 N. C., 255, where it was said: "Where usurious interest is charged, all interest is forfeited, and the legal effect of the contract being simply a loan without interest, all payments, however made, must be credited on the principal, and, in addition, the borrower is entitled to recover, or have credited on the debt, double the amount of payments made as interest within two years prior to action brought." Could there be a more direct and absolute adjudication upon any question than what is said in those two cases as to the "legal effect" of a note in which usurious interest is *charged?* It is stripped entirely of all interest-bearing quality, and is exactly the same as if, by its very terms, it bore no interest at all; or, in other words, as if the debtor had given
(234) his note, which is accepted by the creditor in these words: "I promise to pay you, for value received, but without interest, twelve months after this date, the sum of $10,000."

If the "legal effect" is that a usurious note bears no interest, by what reasoning or principle can the courts change this law as declared by the statute? Nothing but the dictum of the chancellors, that "he who asks equity must do equity," and that under the operation of this most excellent maxim of the law the mantle of its protection falls upon the usurer and restores to him that which the statute says he shall forfeit forever. With all due respect to them, if they would have said it in this day and time, I must think that this is a strange perversion of the maxim.

I cannot better answer this position than by using the language of the Court in *Mo. K. and T. Trust Co. v. Krumseig,* 172 Mo., 351, where it was said: "We think it a satisfactory reply to such a proposition that the complainants in the present case were not seeking equity, but to avail themselves of a substantive right under the statutory law of the State." That was a suit to enjoin defendants from enforcing a mortgage securing a debt bearing usurious interest, which is our case also. What boots it

that the plaintiff enters the court by one door and the defendant by the other? They are both in court to have their rights, not according to the mere sentiment of fancy of the judge, but according to the law as written clearly in the statute, that a note shall bear no interest where an excessive rate is charged thereon. Is not the defendant, in legal effect, demanding a recovery upon the notes when in answer to plaintiffs' bill of complaint he seeks to recover his principal, with interest? The plaintiff is trying to prevent him from violating the law to his injury, and instead of stopping him in his excessive demand, the Court restores to him what he has lost, or, more exactly, gives him a bonus or something he never had under the law, for resisting the plaintiff in the prosecution of his rightful claim to be protected against him. What more right has the Court to allow him any interest than to allow him all of it? for the law says he shall have neither the one nor the other—interest above the legal rate or interest at the legal rate.

There is also a maxim that "Equity regards the substance and not the form of a proceeding." 10 Ruling Case Law, par. 130. It looks at its real nature, and not so much at its form or the position of the parties. If defendant had been a plaintiff demanding the recovery of his debt and all interest which is charged in it, the result, it is admitted, would be a forfeiture of all interest; and, if he does so as defendant, the law is the same. It was so held in *Ervin v. Bank, supra,* quoting from *Brown v. Bank,* 169 U. S., 416, as follows: "The forfeiture declared by the statute is not waived or avoided by giving a separate note for the interest, or by giving a renewal note in which is included the (235) usurious interest. No matter how many renewals may have been made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied on, and the matter is thus brought to the attention of the court, lose the entire interest which the note carries or which has been agreed to be paid. By no other construction of that statute can effect be given to the clause forfeiting the entire interest which the note, bill, or other evidence of debt carries, or which was agreed to be paid, but which has not been actually paid."

Why should it make any difference how the statute is called to the attention of the Court?

The debtor alleges in his complaint that under the law he owes only the principal of the notes, but that the creditor has insisted, and still insists, that he must pay more than is allowed in order to prevent him from using his superior advantage, by reason of his having a power of sale (*McLeod v. Bullard,* 84 N. C., 516) and selling his home. He then appeals to the court to enforce the law and restrain its plain violation if this threat of the usurer is carried out. This right to restrain him is

now a legal right, not to be vouchsafed only at the will or discretion of a chancellor, for we have none, under our system, and have not had any since 1868. The right to an injunction accrues to a party by virtue of the statute, Revisal, sec. 806, and being a statutory remedy, he is entitled to resort to it whenever he states a case within the provision of the law, and this right cannot be curtailed by compelling him to give up some other well defined statutory right as a condition to granting him the appropriate relief. He is not now dependent upon the grace or favor of a chancellor. Speaking to this point in *Lumber Co. v. Wallace,* 93 N. C., at p. 27, and referring to the abolition of the forms of actions, *Justice Merrimon* said: "In some other respects it (our procedure) facilitates and enlarges the scope of equitable relief that may be granted. This is so especially as to relief by injunction and the appointment of receivers. The provisions of The Code, secs. 338 and 379, in express terms invest the court with very large and comprehensive powers to protect the rights and prevent the perpetration, or the continuance, of wrong in respect to the subject-matter of the action."

The plaintiff in this case is not asking for any equity, and is, therefore, not within the range of the maxim requiring one who does seek equity to do it. He is not demanding as his relief that defendant be enjoined from doing an inequitable act, but an illegal, unlawful act; that he be not allowed by force of his power of sale to do indirectly, or *in pais,* what he cannot do directly or in the court, and thereby to appropriate something that does not belong to him and that he is forbidden by positive law to take or receive. The offer he made before the
(236) sale included more than, under the statute, he was entitled to demand. The maxim had not come into play at that time, and his right to interest had already been lost; and it is to be noted that in this case and in his answer he demands payment of the amount of his note and 6 per cent interest and invokes the intervention and the process of the court to enforce his claim, and the court has actually given him a judgment in this action according to his demand for the same, declared the amount a lien on the land, and directed a sale thereof if the debt, and interest from the dates of the notes, 3 January, 1911, 17 June, 1912, and 10 January, 1913, are not paid by the plaintiff, which gives him in interest, roughly estimated, about $3,100, the principal being $12,000. Why should this difference be made between a judgment in favor of the usurer as plaintiff and the one in his favor as defendant? The result in this case makes the right of the usurer to recover interest depend not upon the statute, but upon his relative position in a lawsuit. But the authorities are not all one way upon this question. There are courts which hold that the maxim has lost its magic and its force, and must give way to the plain terms of the statute, which restrict the power of

the courts. *So. Home B. and L. Assn. v. Tony,* 78 Miss., 916; *Long v. McGregor,* 65 Miss., 70.

In *Barclift v. Fields,* 145 Ala., 264, under a statute not essentially different from ours, it was held that in a bill to redeem from a mortgage sale the debtor is entitled to relief without tendering or paying any interest, the debt being noninterest-bearing, and the form of action not being material. The Court said: "The rule that one asking equity must do equity was but the invention of that court of chancery for regulating its own procedure. 'The power of the Legislature to prohibit courts of equity from applying the maxim in cases involving usury is undoubted,' as *Justice Sharpe* declared in the prevailing opinion in *Lindsay's case;* and we do not see that the Legislature owed the mortgagee, claiming under a contract *pro tanto* illegal, any constitutional duty to preserve the rule of equity procedure for her benefit, to the end that she might realize the usurious interest, or even legal interest, by a sale of the mortgaged property under the power of sale. Redemption from a mortgage before foreclosure, upon paying the debt secured, has always been allowed by courts of equity. The valid legal debt in this case was the principal sum borrowed, and no more. At no time could the mortgagee have collected more than that sum by suit in any court against the mortgagor's will; and the remedy for the collection of the legal debt by suit is in no way altered or affected by the act of 1901. The insertion of a power of sale in the mortgage did not impart validity to the agreement to pay usurious interest; and, notwithstanding the power of sale, the contract remained legal only to the extent of the principal borrowed. The mortgagee had no vested right in the rule of equity pleading and practice, and cannot complain that (237) its abrogation by the lawmaking power has enabled the mortgagor to have relief without paying any interest. The law existing when the loan was made and the mortgage taken declared the contract could not be enforced except as to the principal, and to that extent it has been enforced. This preserves all the mortgagee's constitutional rights. The rule of equity practice was in no sense a part of her remedy. That the mortgagee was a widow who loaned money to her brother-in-law cannot alter the rules of law; and if he choose to seek redemption without paying any interest, the Court is bound to declare that the statute authorized him to pursue his course." This was approved in *First National Bank v. Clark,* 161 Ala., 497, an action to enjoin a sale under a deed of trust. In both of these cases the Court say that the former doctrine was a mere creation of chancery, and had no statutory, but merely judicial, sanction. In the *Barclift case, supra,* the Court very gracefully says, by *Weakley, C. J.,* that the law had finally been brought into harmony with the dissenting opinion of *Justice Haralson* in *Lindsay v. U. S. Savings and L.*

Assn., 127 Ala., 366, cited in the opinion of this Court. I would especially commend the opinion of *Justice Haralson* in that case to a careful perusal and grave consideration, for it contains an unanswerable argument in favor of the view taken by me. He there says that the object of the statute is to make usurious contracts void as to the interest, "when properly pleaded by the debtor, whether in a court of equity or law; for, at last, a debtor, by such defense, is doing no more than preventing the enforcement of such a contract against him. What is the difference in principle between not allowing such a contract enforced at the instance of the lender and in forbidding its enforcement at the instance of the borrower? It always did rest for enforcement, at law or in equity, when the lender was proceeding, upon the borrower, whether he objected or not; and but for this ancient rule in equity the principle would have been as applicable in chancery to the one as to the other." The object, he further says, was to destroy the inequality between the two parties in courts of equity and to give fair play to the statute, and that not to so construe it would seem to be a technical rather than a substantial view of the question, and to prevent the statute having effect agreeably to the intention." And again, returning to a general view of the statute, he says: "It is again a familiar rule that 'a construction which leaves a sentence or clause of a statute no field of operation should be avoided, if any other reasonable construction of the language can be given.' *Lehman v. Robinson,* 59 Ala., 235. The sole object of the amendment was to suppress usury, and leave no one to be victimized by it, when he seeks to avoid it, passed in the interest of public policy and for the prevention of extortion by the favored out of those not so
(238) fortunate as they." He buttresses his position with this extract from *Mo. K. Trust Co. v. Krumseig,* 172 Mo., 351, which appears to cover the case as with a blanket: "It would seem that no argument is necessary to establish the proposition that when substantial rights, resting upon a statute which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the courts, the latter must give way and adapt themselves to the forms necessary to give effect to such rights. The flexibility of chancery methods, by which it molds its decrees so as to give appropriate relief in all cases within its jurisdiction, enables it to do this without violence to principle. If one or the other must give way, good sense unhesitatingly requires that justice and positive rights, founded both on valid statutes and valid contracts, should not be sacrificed to mere questions of mode and form." *Holland v. Challon,* 110 U. S., 15.

It is said in 39 Cyc., at p. 1013, that "in a number of States the equitable rule requiring the borrower to offer payment of principal and legal interest as a condition of obtaining relief in equity against a usu-

rious contract has been abrogated either wholly or in part. Thus in some States payment, or tender of the principal without any interest, still suffices; so, by virtue of special statutory provisions in other jurisdictions, it is not necessary for the borrower to tender or pay either principal or interest." The elaborate note sustains this statement in the text. The trend, almost like a resistless tide, bears strongly towards the doctrine that executes the legislative will, rather than the will of the chancellors. The net result (in Virginia) is said to be "that a borrower who seeks relief in equity against a usurious contract need pay only the principal." 39 Cyc., note 78; *Edmunds v. Bruce,* 88 Va., 1007. It was held in *Morrison v. Miller,* 46 Iowa, 84, disapproving a former decision: "We do not think that equity requires the payment of this sum, but rather that it would be a practical nullification of the usury laws to require it." It may be that our Legislature will now amend the statute, as has been done in many of the other States, so as to declare its intention in language that cannot be misunderstood and to bring the law into greater harmony with public policy as evidenced by the usury laws. See 39 Cyc., 1013, and notes 78 and 79.

I have discussed so fully the other features of the case in my dissenting opinion in *Owens v. Wright,* 161 N. C., at p. 133, that I deem it unnecessary that I should make further reference to them here. My conclusion is that the terms of our statute are strong enough to abolish the former rule that prevailed in courts of chancery, and were intended to do so, and that we should not follow precedents based on the chancellor's discretion rather than on the mandate of the Legislature in a matter about which it had plenary authority to declare what should be the law. We have no right to add to defendant's re- (239) covery one cent beyond that which the law allows him, or to say that when the Legislature has said that he shall have the principal of the debt only, we will give that and the interest, in this case amounting to a large sum.

I will state, generally, without going into details, that there was more usury charged on this loan, perhaps, than on any heretofore brought into litigation, and that the violation of the statute was not only palpable but gross. This seems to be admitted. The plaintiff brought a suit to foreclose his mortgage, and when confronted with the danger of losing his interest, he withdrew from the court and got behind his power of sale, which he believed afforded a safe barrier against all attack that could jeopardize a fair and reasonable return for the loan. He gambled on the chance of winning all of his illegal exactions, but played a safe game and for a good stake, which he knew could not be lost. Whether the rule which the defendant now invokes will tempt others to experiment in the same way remains to be seen. It appears clearly to

me that the statute was intended to prevent any such result, and to forfeit the entire interest where there is a usurious charge, in all cases; otherwise it will be a dead letter, as usurers generally protect their loans by requiring a deposit of collaterals or by other forms of security, and as the debtor will be driven to his remedy by injunction, the lender will always get, at least, 6 per cent of his loan as compensation for it.

What would be the effect of a tender by the debtor of the principal before the sale upon his right to enjoin the sale without paying any interest is not raised in this case, and, therefore, need not be discussed. A tender would prevent the exercise of the power (27 Cyc., 1455; *Capehart v. Biggs,* 77 N. C., 261), and, in order to avail himself of it by keeping it good, it would seem that the debtor should not be required to bring into court more than the amount legally due, that being the usual requirement.

Where a statute is plainly worded, expressing clearly the intention, it is always said that there is no room for construction, and the will of the Legislature is enforced according to its plain meaning. This rule applies here, and should have its full operation. The law does not regard the parties to a usurious transaction as *in pari delicto,* but the debtor is rather considered as *in vinculis,* being under the power and control of the creditor. 39 Cyc., 1018. His position, therefore, should meet with the favor of the courts.

CLARK, C. J., concurs in dissenting opinion of MR. JUSTICE WALKER, and adds:

The object of the statute is to protect debtors from oppression by imposing the penalty of the loss of all interest when usury is charged. The statute contains no exemption, and when the creditor has exacted
(240) a mortgage or other security the debtor needs the protection of the statute more acutely than when there is no mortgage. The statute should be construed according to its intent.

If the legislative intent is to exempt from the statute a creditor who has obtained a mortgage, the General Assembly should add a provision: "But when the creditor has obtained a mortgage or other security he shall be exempted from the penalty of the forfeiture of all interest upon payment of legal interest."

If, however, the legislative intent is that there shall be no discrimination in favor of a creditor whose loan at usurious interest has been secured by mortgage or otherwise, then the General Assembly should add to the statute the following provision: "The penalty herein provided of the forfeiture of all interest when usury is charged shall apply whether the creditor has secured the debt by mortgage or not."

Two members of the Court have repeatedly held that the latter is the legislative intent of the statute, which contains no exemption in favor of mortgages, *Owen v. Wright,* 161 N. C., 133; also, *Churchill v. Turnage,* 122 N. C., 426, and other cases; while three members have held to the contrary. An act of the General Assembly should determine the true legislative intent in this regard.

Cited: Whisnant v. Price, 175 N.C. 614 (2pj); *Noland v. Osborne,* 177 N.C. 17 (3d); *Rankin v. Oates,* 183 N.C. 523 (4pj); *Adams v. Bank,* 187 N.C. 344 (3d); *Waters v. Garris,* 188 N.C. 308 (3c); *Miller v. Dunn,* 188 N.C. 401 (3c); *Wooten v. Bell,* 196 N.C. 657 (4c); *Nance v. Fertilizer Co.,* 200 N.C. 707 (4c); *Wilson v. Trust Co.,* 200 N.C. 791 (3l); *Smith v. Bryant,* 209 N.C. 215 (3c); *Buchanan v. Mortgage Co.,* 213 N.C. 249 (3c).

WILLIAM LAWRENCE v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 22 March, 1916.)

1. Telegraphs—Receiving Office—Negligence—Delivery.

Evidence that a telegraph company received a telegram for transmission to an addressee well known at its delivery point to the people of the town and defendant's agent, at which he had an established place of business, and that the message was received at this place at 8:29 a. m. and if delivered before 9 a. m. the injury complained of would have been avoided, is *Held,* under the circumstances of this case, sufficient for the determination of the jury upon the issue of defendant's actionable negligence, and to sustain a verdict for actual damages.

2. Telegraphs—Office Hours—Negligence.

A telegraph company will not be held as negligent in the transmission of a telegram when it is shown that its agent received the message about the time the office at its destination had closed, and the relay office had sent a service message back with this advice.

3. Telegraphs—Death Message—Notice—Relationship of Parties—Actual Damages—Burden of Proof.

Where the sendee of a telegram announcing a death sues a telegraph company for its negligent failure to deliver it, and it appears that he was not in any way related to the deceased, there is no presumption that he suffered mental anguish in being prevented by the negligence of the defendant from attending the funeral, but he may show such facts and circumstances upon which the jury may award actual damages, with the burden of proof on the plaintiff.

BROWN, J., dissenting.

(241) APPEAL by defendant from *Connor, J.*, at December Term, 1915, of LENOIR.

T. C. Wooten for plaintiff.
Moore & Dunn for defendant.

CLARK, C. J. This action is brought to recover damages for negligent delay in delivering a telegram sent from Scotland Neck 14 December, 1914, announcing the death of Mr. Noah Biggs, and stating that the funeral would take place the next day at 3 p. m.

The complaint alleges that if the telegram had been delivered to the plaintiff that night he could have left Kinston next morning at 7:10 a. m. and would have reached Scotland Neck in time for the funeral. The uncontradicted evidence shows that a list of some sixty names, to whom telegrams of the same nature were sent, were filed in the office at Scotland Neck between 7:30 and 8 p. m., and that two of these messages were delivered that night to other parties in Kinston. It was further in evidence, however, that two other messages, among them that to the plaintiff, were not among these sixty which were first filed, but that these two belated messages were filed in the office at Scotland Neck "about 9 o'clock." It was shown that the hours of the defendant's office in Kinston were from 8 o'clock a. m. to 9 p.m., and that the Kinston office had been closed before this message could be received from Scotland Neck. There is no direct wire between the two points, messages being relayed at Norfolk. There is no evidence that this was unreasonable.

The court instructed the jury: "If you believe all the evidence in this case you will find that the agent at Scotland Neck was not instructed by the sender of this telegram to the plaintiff Lawrence until about 9 o'clock, and that at that time the office of the defendant at Kinston was closed. . . . So, gentlemen of the jury, the only question left for you to consider on this first issue is, whether there was negligence on the part of the company in delivering this message to the plaintiff Lawrence after it was received in Kinston on Tuesday morning." If there was error in this, the defendant cannot complain, and the plaintiff is not appealing.

Upon this issue the evidence of the plaintiff himself was that the train had left for Scotland Neck at 7:10 a. m.; that it was 90 miles
(242) over dirt road, and that he could not have reached there by automobile in less than six hours in the condition the roads were at that time, in December, and that after he received the message, which was at 10 a. m., he "tried to find an automobile." "There was but one automobile that I knew of that would go under the circumstances, and he was out of town. He came back to town at 11 o'clock a. m. . . ."

He says further: "I could have reached Scotland Neck by automobile by 3 o'clock if the telegram had been delivered at 9 o'clock. The driver told me so."

It was in evidence by the operator at Scotland Neck that the message was received there at 8:52 p. m. (their usual closing hour being 8 p. m.), and that his office received reply from Norfolk, to which it was sent in regular course to be relayed to Kinston, that the message to Lawrence could not be delivered, as the Kinston office had closed, and it would have to lie over till the next morning. The telegram was in evidence, and on its face bore a notation that it was received at Kinston at 8:29 a. m. There is still left open the allegation of negligence in that the message having been sent to Norfolk the night before, and its urgency being shown on its face, that it should have been delivered to the office in Kinston immediately after 8 o'clock or at any rate earlier than 8:29, and further, that even if received at 8:29, with proper diligence, in a town of the size of Kinston, the telegram, which on its face showed that it had been received at Scotland Neck the night before, should have been delivered before 9 a. m. The plaintiff testifies that if he had received it by that time he could have reached Scotland Neck before 3 p. m. by automobile.

Whether this delay was negligence or not, under all the attendant circumstances, was purely an issue of fact for determination by the jury, and is not an issue of law which this Court can review. The jury have found upon evidence sufficient to be submitted to them that there was negligence in this respect, and the motion for a nonsuit was properly denied.

It was in evidence that the plaintiff had lived in Kinston sixteen years; that he had an established place of business on a public street in the town of Kinston where he had been a resident for more than sixteen years, and was well known to the local manager of the telegraph company as a barber in a public barber shop in the town. It was not error for the judge to charge that "If the telegram was not actually delivered to the plaintiff until 10 o'clock, that is, until an hour and a half after time at which the defendant says that the telegram arrived at its office in Kinston, that this was evidence of negligence to be considered by the jury." It is true that the defendant says that it had enough messenger boys to handle its ordinary business, but that they all happened to be out at the time this message was received. This was a matter of de-
fense for the jury to consider, whether in fact there was a suffi- (243)
cient number of messengers or not and whether their absence justified the failure to get an additional messenger on this occasion and the delay of an hour and a half, if the plaintiff's testimony is to be believed, in the delivery of this telegram.

We need not consider the second exception, for the exclusion of the affidavit of Rev. Mr. McFarland that he delivered the message to the office in Scotland Neck "about 9 p. m.," for the judge instructed the jury that upon the evidence there was no negligence in failing to deliver the message that night.

The only other exception that we need consider is to the following part of the charge of the court: "In this case, there is nothing in the evidence which would justify the jury in presuming that there was any injury received by this plaintiff. The burden would be upon him to satisfy you that the relations between him and Mr. Biggs were such that he suffered an injury by his failure to get to Mr. Biggs' funeral. If this evidence satisfies you by its greater weight that the relations between these men were such that by reason of his inability to get to the funeral the plaintiff did suffer mental anguish of mind, then it is for you, gentlemen of the jury, to say upon all the evidence what sum would compensate him for this injury."

The defendant was put on notice by the receipt of more than sixty telegrams announcing the death of Mr. Biggs and the hour of his funeral that he had many friends who would probably wish to attend and pay this last sad tribute of respect to his memory. It is true, the plaintiff was a colored man; but the testimony is that he had been Mr. Biggs' driver for eight years, and then for many years sexton of the church in Scotland Neck of which Mr. Biggs was an active and prominent member; that whenever Mr. Biggs came to Kinston he almost always came to see him. It was also in evidence that when the family of Mr. Biggs made up the list of those whom they wished notified and given an opportunity to attend the funeral, and it was found that the name of the plaintiff and the name of Mr. Archibald Johnson, editor of *Charity and Children,* had been omitted, these names were at once added. There was also evidence, from others than the plaintiff, that he was held in high estimation by Mr. Biggs, who often spoke of him "in very high and complimentary terms and evidently thought a great deal of him. The plaintiff is held in high estimation in Scotland Neck."

The plaintiff himself testified that he had been requested by Mr. Biggs to act as pall-bearer, and that he was much grieved that he was unable to do so, because Mr. Biggs had expressed that wish, and "I wanted to fulfill his request. He had been a friend to me and I had learned to love him; he had been one of my best white friends, and had al-
(244) ways been. I have never gotten over it. It was always grievous to my very mind and soul because I did not get there, and there is never a day passing but it has been on my mind."

It is true that the deceased was a white man and that the plaintiff is a colored man; but according to the uncontradicted evidence the plaintiff

was held in high estimation by the public; he was a warm personal friend and evidently an admirer of Mr. Biggs, and had been told by him that he desired him to act as pall-bearer at his funeral. It was also in evidence that when in the list of more than sixty names to whom similar telegrams had been sent it was discovered that the name of the plaintiff and of Mr. Arch. Johnson, editor of *Charity and Children*, had been omitted, the family had messages for those two phoned down to the operator at Scotland Neck. It is by no means impossible, indeed, it is a matter of common knowledge, that the most kindly and cordial relations frequently exist between men of the two races who have received mutual assistance from each other or been engaged in the same calling, as here the driver of Mr. Biggs and the sexton of the church in which he was a leading member. There is no rule of law that the jury must disbelieve the statement of the plaintiff that he was much grieved at not being able to attend Mr. Biggs' funeral, and that the disappointment was a great one to him of losing the satisfaction and the honor of being a pall-bearer at the funeral of his former employer, whom he highly honored and loved. It is to the credit of human nature that such kindly relations can exist and often do exist between men of the two races, and a jury of Lenoir County, composed entirely of white men, have found as a fact that those relations did exist between the plaintiff and Mr. Biggs and that it was a grievous disappointment to the plaintiff that he should not have been able to comply with his own wish, in fulfillment of Mr. Biggs' request, to be a pall-bearer at his funeral.

When there is negligence in the delivery of a telegram concerning a pecuniary transaction, it is comparatively easy, ordinarily, to calculate the damage sustained. But there is no less a wrong calling for compensation in the delay or nondelivery of a message of this kind. It is true that there is no blood relationship between the plaintiff and the deceased. The only relation is that of mutual esteem. Nearness in blood is only material when the presumption of anguish is relied on. When there is close blood relationship such presumption arises without additional proof. When there is not close relationship of blood, or no relation of that kind, then mental anguish must be shown and that the negligence of the defendant was the proximate cause thereof. *Hunter v. Tel. Co.*, 135 N. C., 458, especially the concurring opinion of *Walker, J.*, at pp. 468-472.

In *Harrison v. Tel. Co.*, 143 N. C., 150, the Court sustained a claim of damage from mental anguish for delay in the delivery of a telegram which if promptly delivered would have enabled the (245) plaintiff to attend the funeral of a stepson. *Brown, J.*, said: "There is no presumption of mental anguish growing out of the relation of stepmother and son; but under our decisions it is a fact the plaintiff

may prove, if she can, to the satisfaction of the jury, for the state of the mind is as much susceptible to proof as the condition of the stomach."

In *Bright v. Tel. Co.*, 132 N. C., 322, this Court said: "The law does not regard so much the technical relation between the parties or the legal status in respect to each other as it does the actual relation that does exist and the state of feeling between them. It does not raise any presumption of mental anguish when there is no relation by blood, but if mental suffering does actually result upon the failure to deliver a message when there is only affinity between the parties, it may be shown and damages recovered." This case is cited as authority in *Harrison v. Tel. Co.*, 136 N. C., 381, which also cites *Cashion v. Tel. Co.*, 123 N. C., 267, which said: "We do not mean to say that damage for mental anguish may not be recovered for the absence of a mere friend, if it actually result; but it is not presumed." To the same purport are all our authorities.

No error.

BROWN, J., dissenting: It is admitted in the opinion of the Court that there is no evidence of negligence upon the part of the defendant in failing to deliver the message the night it was filed at Scotland Neck, as it was not filed until about the closing hour of the Kinston office.

I am of opinion that there is no evidence of negligence in the delivery next morning. The message was received at Kinston at 8:29 a. m. and delivered, according to plaintiff's evidence, at 10 a. m. The testimony tends to prove that the messenger boy searched for plaintiff an hour and a half before finding him; that he went to his home and to his barber shop, and did not find him at either place; that he continued the search, and found plaintiff at Mrs. Harvey's at 9:35 a. m. The plaintiff admits he was at Mrs. Harvey's doing some work, and that the message was delivered to him there about 10 a. m. Taking all the evidence into consideration, there is no evidence of unreasonable delay in delivering the message after it was received at the Kinston office.

Again, it is admitted that plaintiff could not have reached Scotland Neck by train, as the only train left at 7:10 a. m., and the message was not received at the Kinston office until 8:29. In fact, the Kinston office did not open until after the train had left. Plaintiff swears it is 90 miles from Kinston to Scotland Neck, and that it requires six hours to make the trip by automobile. Plaintiff further says: "I tried to find an automobile. There was not but one automobile that I knew of that would go under the circumstances, and he was out of town.
(246) He came back in town about 11 o'clock. I asked him if he would carry me to Scotland Neck. I asked him what it would cost. He

says: '$20.' I says: 'If you will guarantee to get me there by 3 o'clock, I will pay it.' " The auto man told him it was too late.

This evidence is conclusive that had the message been delivered by 9 a. m. the plaintiff could not have made the trip by auto. Furthermore, I am of opinion that damages for mental anguish are not properly recoverable upon the facts of this case. The rule that plaintiff can recover only such special damages as may be said to have been within the *contemplation* of both parties applies to damages for mental anguish as well as for actual pecuniary loss. 37 Cyc., p. 1781. In support of the text are cited cases from all the so-called "mental anguish" courts, including this Court: *Williams v. Tel. Co.,* 136 N. C., 82; *Bowers v. Tel. Co.,* 135 N. C., 504; *Sparkman,* 130 N. C., 447; *Darlington,* 127 N. C., 448; *Kennon,* 126 N. C., 232.

In all these courts, in order to prevent intolerable litigation, this rule and limitation has so far been adhered to in applying the doctrine. Many of these courts in recent cases have expressed a disinclination to extend the doctrine beyond the limitations established by the earlier decisions, requiring that the damages recoverable shall not only be the proximate result of the negligence complained of, but shall have been reasonably within the contemplation of the parties. 37 Cyc., 1779, and cases cited in note.

The doctrine of mental anguish was first promulgated in Texas in 1881, and has now become firmly established there, and yet that Court holds that the addressee cannot recover for mental anguish caused by delay in delivery of a telegram announcing the death of a brother-in-law unless the company was put upon notice that a failure to deliver would cause such anguish. *Tel. Co. v. McMillan,* 30 S. W., 298.

The same Court holds that a telegraph company through whose failure to deliver a message plaintiff was prevented from visiting his dying stepfather is not responsible for mental suffering unless the circumstances were such as to give the company notice that tender and affectionate relations existed between the parties. *Tel. Co. v. Garrett,* 34 Tex., 649; *Tel. Co. v. Coffin,* 30 S. W., 897.

I think the consensus of judicial opinion in the "mental anguish States" is that the telegraph company is charged with notice of the relationship which actually exists between the parties named, whether disclosed by the terms of the message or not; but where no blood relationship existed and mental anguish damages are claimed upon the ground of the existence of tender and affectionate relations, the company must be fixed with knowledge of the existence of such relations.

The defendant not only moved to nonsuit, but asked the court (247) to charge: "If the jury should find from the evidence that at the time of the transmission of the message the defendant had no notice

that the failure on its part to transmit would cause mental anguish to the plaintiff, then the plaintiff would not be entitled to recover."

I think the court erred in denying the motion and the prayer for instruction. There was no blood relationship, for plaintiff is a negro and the deceased was a white man. There is nothing in the evidence tending to fix the company with any knowledge that tender and affectionate relations existed between them. Certainly it does not appear on the face of the message, and there are no circumstances in evidence tending to fix defendant with such knowledge.

Sixty similar telegrams were sent announcing Mr. Biggs' death. The one to plaintiff contains nothing except a mere announcement of the death and time of funeral. There was no invitation to be a pall-bearer, as claimed by the plaintiff. The deceased was a white man of much prominence in the business and religious circles of the State. The plaintiff is a negro barber of Kinston and had been residing there for sixteen years. It is true, the plaintiff testifies that the fact that he did not get to the funeral as a pall-bearer was "very grievous to my very mind and soul." It is a wonder that he has survived the terrible shock to his sensitive heart. Yet upon cross-examination he admits that he worked for Mr. Biggs when he was a boy, and not since, and was sexton of the Baptist Church, but has not resided near Mr. Biggs for a great many years. He admits that Mr. Biggs came to Kinston on a visit and did not go near plaintiff, and that he did not go to see Mr. Biggs.

The whole evidence shows that plaintiff's agony is of that kind that can only be assuaged by a financial solatium. It has no real substantial foundation in fact, and is manifestly manufactured for the occasion.

It is such cases as this that bring the doctrine of mental anguish into such disrepute that it has been repudiated by the Supreme Court of the United States as well as by most of the State courts, including some of the ablest in the land. 37 Cyc., 1775, and notes. I realize that this Court has gone farther than the courts of the other mental anguish States in permitting the recovery of such damages in cases of distant relationship, but it has not up to this time gone so far as to permit a recovery in a case such as this. I think it time to call a halt and to observe those rules and limitations laid down in its earlier decisions and still applied in other jurisdictions.

Cited: Gibbs v. Telegraph Co., 196 N.C. 522 (3e).

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CAROLINA-TENNESSEE POWER COMPANY v. HIAWASSEE RIVER POWER COMPANY.

(Filed 29 March, 1916.)

1. Statutes—Repealing Acts—Special Acts.

Where a later special law, local or restricted in its operation, is positively repugnant to a former law of general application to the subject-matter, and not merely affirmative, cumulative, or auxiliary, it repeals the older law by implication to the extent of such repugnancy. Revisal sec. 1129.

2. Same—Water-powers.

The provisions of Revisal, 1573, amended by Public Laws 1907, that electric companies shall not have power of condemnation to interfere with any mill or power plant actually in process of construction or in operation, and that water-powers, developed or undeveloped, with the necessary land adjacent thereto for their development, shall not be taken, with repeal of laws in conflict therewith, must give way to a charter since granted by the Legislature to a *quasi*-public corporation, which repeals these provisions by necessary implication, especially as to such lands lying dormant.

3. Corporations, Quasi-public—Private Powers—Violation—Quo Warranto.

Where a charter is granted a corporation, conferring *quasi*-public as well as private powers, the corporation may proceed to condemn lands when so empowered, in pursuance of its business of a *quasi*-public nature, and this will not be denied it because it was authorized to conduct a business of a private character; and where the corporation seeks to exercise its powers of a private nature conferred on it, in an unconstitutional or unwarranted manner, the State may restrain it by *quo warranto* or other proper proceedings.

4. Injunction, Perpetual—Final Hearing—Questions for Jury—Findings by Court—Appeal and Error.

At the final hearing of a suit to obtain a perpetual injunction the jury alone are to pass upon the issues of fact presented by the pleadings and evidence; and where the trial judge makes additional findings to those contained in or embraced by the issues answered by the jury, they will be disregarded on appeal, and a clause in the judgment reserving to the appellant the right to have recalled or reviewed the judgment for perpetual injunction did not cure the error.

5. Issues—Form—Appeal and Error.

Issues which submit to the jury all the essential matters or determinative facts in the controversy are held sufficient, the form of the issues being of little or no consequence, as they afford each party a fair chance to present his contention in the case, so far as it is pertinent.

6. Water and Water-courses—Water-power—Acquisition—Corporations—Condemnation.

In this action to adjust conflicting claims and water rights and easements between two *quasi*-public corporations for the development of water-power it is *Held*, that an issue as to whether the plaintiff acquired the rights and easements before the bringing of the action is insufficient, as too indefinite.

7. Corporations — Water-power—Charter Provisions—Compliance—Maps Issues.

The charter of the plaintiff, a *quasi*-public corporation for the development of water-powers, provided, among other things, that the corporation was empowered to take possession of lands and prosecute the work when the location of the site shall have been determined and a survey of the same deposited in the office of the clerk of the Superior Court. *Held*, an issue should have been submitted to the jury as to whether the survey had been filed, and, if so, as to the time of its having been filed.

8. Corporations—Water-powers—Prior Acquisition—Corporate Use.

The plaintiff and defendant, two *quasi*-public corporations for the development of water-powers, claimed, upon the pleadings and conflicting evidence, a priority of right in the *locus in quo*. *Held*, that the right belongs to the company which first defines and marks its route and adopts the same by authoritative corporate action (*Street Ry. v. R. R.*, 142 N. C., 423); and under the circumstances of this case the question depended upon the facts found by the jury, their legal sufficiency to be determined by the court.

9. Appeal and Error—Both Sides Appeal—Decision.

Where both parties to an action appeal to the Supreme Court, and the decision in one appeal makes the other appeal unnecessary, the latter will be dismissed.

(249) APPEAL by defendant from *Cline, J.*, at March-April Term, 1915, of CHEROKEE.

Civil action. The plaintiff was incorporated by a special act of the General Assembly, ratified on 16 February, 1909, it being Private Laws 1909, ch. 76, and was organized on 25 May, 1909. It was given by its charter numerous and comprehensive powers and capacities, and, among others, the right "to carry on any and all business in any wise appertaining or connected with the manufacturing and generating, distributing and furnishing of electricity, compressed air, gas, or steam, for light, heat, and power purposes, including the transacting and conducting of any and all business in which electricity, compressed air, gas, or steam is now or may be hereafter utilized, and all matters incidental or necessary to the distribution of light, heat, and power; to manufacture and repair, sell and deal in any and all necessary appliances and machinery used or which may be acquired or deemed advisable for or in connection

with the utilizing of electricity, compressed air, gas, or steam, or in any wise appertaining thereto or connected therewith; to purchase, acquire, own, use, lease, let, and furnish any and all kinds of machinery, apparatus and appliances; to purchase, acquire, own, hold, improve, let, lease, operate, and maintain water rights and privileges and water-powers; to construct, acquire, build and operate, maintain and (250) lease dams, canals, ditches, flumes and pipe lines for the conducting of water and creating power; to acquire by purchase, condemnation, or other proper methods the right to use, employ, and divert the water flowing and running in any stream or water-course, not navigable, in North Carolina, which may be necessary to the exercise of any of the powers of a public or *quasi*-public character herein granted to the said corporation; and whenever it shall be necessary to divert the water from any such stream or water-course to be used for any of the purposes herein provided, the said corporation shall have the right to have the value of the said water so to be diverted, and the land so to be used over which it shall be banked, ponded, or conducted, condemned, and the value thereof assessed in the manner hereinafter provided for the condemnation and valuation of land and other property; to do all and everything necessary, suitable, or proper for the accomplishment of any of the purposes or attainment of any one or more of the objects herein enumerated, or which shall at any time appear conducive to or expedient for the protection or benefit of the corporation, either as holder of or interested in any property; and in general to carry on any business, whether manufacturing, mining, or otherwise."

It is further provided in section 8 of the charter as follows:

"It shall be lawful for the president and directors, their agents, superintendents, engineers, and others in their employ, to enter at all times upon all lands or water for the purpose of exploring or surveying the lands and water required by said company for the location of any of its works, or for the conducting of the business, or any part of said business, hereinafter authorized in paragraphs *a, b, c,* and *d,* of section 5, and of locating said works, doing no unnecessary damage to private property; and when the location of said works shall have been determined and a survey of the same deposited in the office of the clerk of the Superior Court of the county in which the said land lies, then it shall be lawful for the said company, by its officers, agents, engineers, superintendents, contractors, and others in its employ, to enter upon, take possession of, have, hold, use and excavate and fill in such lands, and to erect all the necessary and suitable structures for the erection, completion, repairing, and operating of said works, subject to such compensation as is hereinafter provided: *Provided, however,* that said company shall not enter upon or break ground upon the premises, except for the purposes of

surveying, without the consent of the owner until such owner's damages are agreed upon between such owner and said company, or ascertained by the method hereinafter provided, and such damage has been paid to such owner; and *Provided further,* that such locating of its works and filing its surveys in the office of the clerk of the Superior Court
(251) shall not preclude said company from making, from time to time, other location of works and filing surveys of the same as its business and its development require; and whenever any land for the location of a dam or dams, lake or lakes, or a canal or canals, or for ponding water, or any other lands or rights of way may be required by said company for the purpose of constructing and operating its railroads, or railways, street railways, or motor lines, telegraph or telephone lines, or other works, or for the conducting of the business herein authorized, or any part of said business, and the said company cannot agree with the owner thereof for the purchase of the same, the same may be condemned and taken and appropriated by said company at a valuation of three commissioners, or a majority of them, to be appointed by the clerk of the Superior Court of the county in which the land to be condemned lies, or the clerk of the adjoining county if the land lies in more than one county."

The court submitted two issues to the jury which, with the answers thereto, are as follows:

1. Did the plaintiff, prior to 21 August, 1914, survey, stake out, and adopt the locations for its dams, reservoirs, and public works on the Hiawassee River, as alleged in the complaint and as indicated on the map offered in evidence? Answer: "Yes."

2. If so, were the plaintiffs' said locations lying on 21 August, 1914, in a state of abandonment? Answer: "No; they did not."

The court then proceeded to find in detail certain facts, and in order to get a fair and full understanding of the case, as now presented, they are here set forth:

"In this case the court, deeming it necessary and proper that the facts should be found by the court upon the evidence, in addition to the findings of the jury, by reason of the nature of the case and the relief sought herein, after due consideration of the whole evidence, finds the following facts: That the plaintiff, the Carolina-Tennessee Power Company, was chartered by an act of the General Assembly of North Carolina, being chapter 76, Private Laws 1909; that subsequently, to wit, on 25 May, 1909, a meeting was held at Murphy, North Carolina, at which the charter was accepted, the company organized thereunder, by-laws duly adopted for the government of the corporation, and officers and directors elected, and the meeting of its directors was held on 28 May, 1909. That some time in July, 1909, a contract was entered into with the

Ambursend Hydraulic Company of Boston, Mass., looking to and providing for a survey of the water-power and lands adjacent to the streams at the point on the Hiawassee River in Cherokee County which is mentioned in the complaint. That about that time, or perhaps before, this company sent T. H. Verdell, an expert civil engineer of the State of Georgia, who went upon the ground in the spring of 1909, made surveys of the lands from about the State line between North Carolina and Tennessee upon the Hiawassee River to and about a half- (252) mile up the Notla River, where he based his surveys and ran his contour lines upon a proposed dam erection near the State line, 150 feet high, and the second dam development near the mouth of Beaverdam Creek on said river a height of 150 feet, the surveys altogether including an actual distance, following the river, of about 26½ miles. That he laid out the contour lines, taking all the necessary measurements to the two dams, 150 feet each in height, located the lines upon the ground, clearing out the undergrowth at some places, where necessary, and by setting stakes from point to point along these lines of a reasonably permanent character, with the numbers and markings thereon to indicate their purpose; and the court finds as a fact, as found by the jury, that the plaintiff, for which this and subsequent work was done, did survey and stake out locations for its dams, reservoirs, and public works on the river, as alleged. It finds that Mr. Verdell made reports of the two basins, called the upper and lower, and filed the same with his maps, the last one being sent in about 18 September, 1909; same was received by the plaintiff, and copies of his maps made, and same were subsequently used for the further purposes of the company in the prosecution of this proposed development.

"That plaintiff, and those under contract with it, procured William H. Burr, expert civil engineer of high reputation, to come upon the ground about July, 1910, for an examination of the proposed properties and a checking up of the work of Mr. Verdell, and a report thereon, and that he filed a favorable report of the properties of the proposed development on 10 August, 1910, covering the same ground from the State line to the mouth of and up to Notla River. That the plaintiff took title to some of the land lying upon this stream, and contracts for other land, during the year 1910, took options in 1911, and made payments in 1912; that Mr. Elton F. Smith, for plaintiff, was upon the ground in 1910 and until he died in March, 1911, and Mr. George E. Smith, as its agent, was upon the ground in the same year. In 1912 plaintiff started condemnation proceedings, and made other payments upon its contract later on, the total expenditures made by and in behalf of the plaintiff in this and other prospects amounting approximately to $92,000.

"That with the aforesaid maps and other maps which were made, in connection with the minutes of the meetings of the stockholders and directors, the plaintiff did adopt the locations mentioned in the complaint, and in the answer to the first issue by the jury, in the same manner as found by the jury.

"That Mr. Ketcham and others who had the enterprise in charge in 1910, '11, and '12 were unable properly to finance the undertaking so as to bring about the development, and that Mr. Ketcham sought
(253) and found, in 1912, Mr. W. V. N. Powelson, who in 1913, about June, made, himself, some examination of the dam sites and other properties, he being an expert hydraulic and electrical engineer of well known reputation. That in that year he sent others of his own surveyors upon the land to check up the markings and the location of Mr. Verdell, who reported that they found them to be correct, and that in the year 1913 Mr. Powelson, with other associates, acquired all of these outstanding stocks and bonds of the company, and he is now its president. That he made payments upon the contracts of the plaintiff and acquired some of the property in fee for it, the plaintiff, as late as 16 July, 1914, and for the price of $15,000, took a deed for a large tract of land which would be covered by back water.

"The court further finds that Mr. Edmund B. Norvell of Murphy has been active from time to time and from year to year in looking up the titles of so-called landowners along the stream with whom contracts had been made or options taken. That he passed some of them as good and some of them he held up the payments on as not being sufficient upon which to base a deed in fee.

"As to the filing or depositing of the maps in the clerk's office as claimed by the plaintiff, there is some difference in the recollection of the witness as to what actually happened, but on it all the court finds that the two maps offered in evidence showing the contour lines, and giving other information about this property, were deposited for the purpose of filing, and so filed in the clerk's office by Mr. George E. Smith in the presence of Mr. Norvell on 21 June, 1911; that they were taken out again by Mr. Norvell on 28 June, returned by Mr. Smith to the office about a week later, and subsequently taken out again by Mr. Norvell, who retained them in his office for use, in reference there, until July, 1914.

"This action was begun on 21 August, 1914, and on 13 July, 1914, the defendant company filed in the office of the Secretary of State its articles of incorporation upon which a charter was issued, and so certified and sent to this county by the Secretary of State on 15 July, 1914, and the same was recorded in the office of the Superior Court of this county on 16 July, 1914. That immediately thereupon the defendant

instituted certain condemnation proceedings against certain claimants to or owners of the land along this river, and in the scope of the locations of the plaintiff, declaring itself to be a public or *quasi*-public organization chartered for the purpose of producing electric power to be sold to the public; and that it also acquired some lands upon the stream subsequently. At the time this litigation started the plaintiff owned something like 26½ miles of the water front in fee, counting it on both banks, and had under contract something like 11.96 miles, some 8 miles under proceedings for condemnation. That at the same time the defendant owned some 4 miles in fee, counting both sides of the stream, and had about 10 and a fraction miles under contract upon which substantial payments had been made and were being made; also, (254) about 11 miles under condemnation proceedings for which action had been begun. Of this last item, some 5 miles was the river front of what is known as the Fowler land, for which the plaintiff acquired a deed in fee on 16 July, 1914, the day subsequent to the one on which condemnation proceedings were begun, and 2 miles of the frontage of what is known as the Green land, to which the plaintiff had a title in fee at the time the defendant's proceedings for condemnation were begun.

"The court, therefore, finds as a fact that at no time since the incorporation and organization of the plaintiff up to the time of the bringing of this suit has the plaintiff abandoned its locations, this being the same finding as found by the jury under issue No. 2, treating it as a question of fact, if it is such."

Upon the verdict of the jury and the foregoing findings of fact the court granted an injunction substantially as requested in the prayer of the complaint, which is as follows:

"Defendant is enjoined from: (1) Purchasing or otherwise acquiring any other lands upon or along the banks of the Hiawassee River which are necessary for the works of the plaintiff as shown by marks upon the ground or the survey thereof deposited in the office of the clerk of the Superior Court of Cherokee County; (2) Prosecuting any actions heretofore commenced for the condemnation of any such lands, or commencing hereafter any actions for the condemnation of any thereof; (3) Entering upon or constructing or placing any dams, reservoirs, powerhouses, or other structures or machinery upon any such lands; and (4) Doing or committing acts or things which would interfere with the rights of the plaintiff, or the prosecution or completion of its plans and purposes as herein set forth, or which would annoy, delay or harass the plaintiff in carrying out such plans and purposes."

The court then added this clause: "In view of the fact that the plaintiff has not prosecuted its purposes and plans other than as hereinbefore set out in the findings of fact, that is to say, has neither built

nor begun any dam or other structures upon the lands in question, the court is of the opinion that the injunction ought not to be continued in perpetuity unless by its operations, activities, and conduct subsequently the plaintiff or its successors can demonstrate the fact both of their willingness and ability to develop the water-powers according to their plans and purposes, and that if within a reasonable time, to wit, in two years or thereabouts, the defendant can show that the plaintiff is not carrying forward these plans in a substantial way and not actually engaged on the work, it ought to be permitted to move in this case, or take other steps as it may be advised, for a review and recall of this order of perpetual injunction."

(255) Defendant, having duly reserved its exceptions, appealed to this Court.

Martin, Rollins & Wright for plaintiff.

Zebulon Weaver, J. N. Moody, Alley & Leatherwood, Dillard & Hill, and E. R. Black for defendant.

WALKER, J., after stating the case: The defendant has raised several objections to granting relief in this action by injunction, as there has been no violation of or obstruction to plaintiff's rights. It is especially urged that by Revisal, sec. 1573, as amended by Public Laws 1907, sec. 74, it is provided, with reference to the power of condemnation by electric companies, that the power given by this section (1573) shall not be used to interfere with any mill or power plant actually in process of construction or in operation; and further, that water-powers, developed or undeveloped, with the necessary land adjacent thereto for their development, shall not be taken, and futher, "That provisions in any special charters heretofore granted, in respect to the exercise of the right of eminent domain, which are in conflict herewith, are hereby repealed." This statute was further amended by Public Laws 1907, ch. 302.

But after these acts were passed, the legislative charter of the plaintiff was granted, which, if not expressly, then by necessary intendment, gives the power to condemn water-powers, especially those lying dormant; and where two statutes conflict, the later repeals the earlier one (*leges posteriores priores abrogant*). 1 Cook on Corporations (7 Ed.), sec. 2; Clark and Marshall on Private Corporations (Ed. of 1903), sec. 127b, at p. 383, and Ed. of 1901, pp. 107 and 174; Lewis's Sutherland on Statutory Constr., sec. 275; *Wood v. Wellington*, 30 N. Y., 218.

It was insisted upon the argument that there should be express words of repeal in this act to suspend the operation of the general law, and that none such are found therein. But this is not necessary. Where a later

special law, local or restricted in its operation, is positively repugnant to the former law, and not merely affirmative, cumulative, or auxiliary, it repeals the older law by implication *pro tanto,* to the extent of such repugnancy within the limits to which the latter applies. *McGavick v. State,* 30 N. J. L., 510; *Township of Harrison v. Supervisors,* 117 Mich., 215; *R. R. v. Ely,* 95 N. C., 77. "The well settled rule of construction, where contradictory laws come in question, is that the law general must yield to the law special." Noy's Maxims, 19. *S. v. Clark,* 25 N. J. L., 54. It was held in the following cases that the general law does not apply to a corporation organized under a special charter so far as the provisions of the latter conflict with the former: *Clarkson* (256) *v. H. R. Railroad Co.,* 49 N. Y., 455; *Le Feore v. Le Feore,* 59 N. Y., 434; *Hollis v. Drew, etc., Seminary,* 95 N. Y., 166, 173; and our cases virtually hold the same. *Holloway v. R. R.,* 85 N. C., 452, 455; *R. R. v. Ely, supra; S. v. Perkins,* 141 N. C., 797. The subject is considered by the *Chief Justice* in the recent case of *R. R. v. Ferguson,* 169 N. C., 70, where the same principle as herein stated was approved. *Justice Hoke,* in *Bramham v. City of Durham, ante,* 196, goes fully into a discussion of the question as to conflicts between the general law and special charters, holding that where there is repugnance the provisions of the special charter will prevail.

The Code, sec. 701, was amended and became section 2566 of the Revisal, being confined in its operation to railroads. This was done in 1905, before the plaintiff received its charter in 1909. The Revisal of 1905, sec. 1129, recognizes the rule of construction we have stated above, as to the operative force of a special charter.

Power Co. v. Whitney, 150 N. C., 31, does not apply. It presented a very different question. There the plaintiff's charter gave it a certain right of condemnation. This was expressly amended and limited by the general law at the same session, and afterwards its charter was reënacted, "as amended." It was properly held that the charter of plaintiff was subject to the provisions of the general law. *R. R. v. R. R.,* 106 N. C., 16, was also a different kind of case. It was held there that the general law and the special reference to the North Carolina Railroad Company's charter were *in pari materia,* and both could have operation. Besides, the statutes have been amended since then, as we have shown above, and section 1159 of the Revisal allows full effect to the special charter.

We cannot agree to the defendant's construction of the plaintiff's charter, as we think it has a broader sweep than is there attributed to it. It is further contended by defendant that plaintiff could not condemn property for public purposes, because it was authorized to engage in private business; but we have held that position to be untenable, in

Land Co. v. Traction Co., 162 N. C., 314. It was there said by the *Chief Justice:* "The plaintiff contends that the Piedmont Traction Company cannot exercise the power of eminent domain, because under its charter it is authorized to engage in private business in addition to its authority to operate a street railway, which is a *quasi*-public business. We think the law is clearly stated thus in 15 Cyc., 579. The fact that the charter powers of the corporation, to which the power of eminent domain has been delegated, embrace both private purposes and public uses does not deprive it of the right of eminent domain in the promotion of the public uses." *McIntosh v. Superior Court,* 56 Wash., 214; *Power Co. v. Webb,* 123 Tenn., 596. The company may purchase property for those
(257) uses which are not public, and not resort to condemnation. If it attempts to exceed those powers and franchises bestowed by its charter, or to exercise them in an unconstitutional or unwarranted manner, the State may restrain it by *quo warranto* or other proper proceeding. What should be the form of it, and how and by whom it may be invoked, matters not, as the remedy in some form is ample to prevent any excessive or illegal use of its chartered powers. *Land Co. v. Traction Co., supra.* It will be time enough for the defendant to complain when its legitimate interests are about to be invaded. The plaintiff has not sought, as yet, to condemn or appropriate any property for private uses.

But we think the court erred in finding any facts additional to those found by the jury in their verdict. This is not a proceeding to condemn land, as contended by the plaintiff, but a civil action to enjoin the defendant from interfering with plaintiff's previously acquired right and interest in certain water-powers and lands and easements appurtenant thereto, and was tried upon issues and oral testimony, before a jury. It was not a case in which the presiding judge could pass upon the evidence and find the facts or any material part of them. The whole matter was submitted to a jury, and it was their province to pass upon all the essential issues, and to find the ultimate facts upon which the right of the respective parties depended. We know of no precedent for trying a case like this at the *final* hearing otherwise than by a jury, upon issues submitted to them, where the evidence is oral, unless the parties waive such a trial under the statute, and agree that the judge may find the facts. This Court said, by *Justice Hoke,* in *Harvey v. R. R.,* 153 N. C., at p. 574: "Ever since the amendment to the Constitution conferring jurisdiction over 'issues of fact and questions of fact to the same extent as exercised prior to the Constitution of 1868,' the construction of the amendment, in several well considered cases, has been that it does not embrace or apply to common-law actions such as this, but only to suits which were exclusively cognizable in a court of equity, and to them only

when the entire proof is written or documentary, and in all respects the same as it was when the court below passed upon it. *Runnion v. Ramsay,* 93 N. C., 411; *Worthy v. Shields,* 90 N. C., 92; *State and City of Greensboro v. Scott,* 84 N. C., 184; *Foushee v. Pettyshall,* 67 N. C., 453."

It was not regular procedure, or according to the course and practice of the court, that the facts should be found by a divided tribunal, that is, court and jury. We, therefore, must hold that the facts as found by the judge cannot be considered here. This was not the hearing of a motion for the continuance of a preliminary injunction to the final hearing, but the final hearing itself, and the judgment was necessarily one for a perpetual injunction, and the insertion of the clause reserving to the defendant the right to have reviewed or recalled "this perpetual injunction," as it is called in the judgment, by motion or other- (258) wise, did not change its character in this respect. It still remains a final judgment and a perpetual injunction. In other words, the court at the final hearing granted the relief prayed for in the complaint.

The defendant tendered certain issues, seven in number, which the court refused to submit, and in doing so there was no error, as a comparison of these issues with those submitted by the court will show that the latter substantially embrace every question or matter which is covered by the former, with one exception hereinafter mentioned. The first of defendant's issues, leaving out the date, is the same as the first of those submitted by the court, and the third, fourth, fifth, and sixth of the defendant's issues practically contain no matter which is not presented by those of the court, but are rather special inquiries as to evidentiary facts bearing upon them. The seventh of defendant's issues is fully covered by the two issues submitted to the jury. The second issue of defendant will hereinafter be considered.

Issues are sufficient when they submit to the jury proper inquiries as to all the essential matters or the determinative facts of the controversy. *Zollicoffer v. Zollicoffer,* 168 N. C., 326; *Hatcher v. Dabbs,* 133 N. C., 239. The form of the issues is of little or no consequence, if those which are submitted to the jury afford each party a fair chance to present his contention in the case, so far as it is pertinent to the controversy. *Carr v. Alexander,* 169 N. C., 665. Issues should be framed upon the pleadings and not upon the evidence. *Goins v. Indian Training School,* 169 N. C., 736.

The first issue, though, was not definite enough in respect to the time when the plaintiff surveyed, staked out, and adopted the locations for the sites of its dams, reservoirs, and public works on the Hiawassee River. This is a case of conflicting claims to these water rights and easements, and it was not sufficient to inquire if they had been acquired by the

plaintiff prior to the bringing of this action. We are not required or permitted to examine the evidence to ascertain what the fact is, but it must appear in the issue itself as one which was found by the jury upon the evidence. The judgment is not based upon the evidence, but upon the findings of the jury from the evidence.

Besides, we think there should be an issue as to whether a map of plaintiff's location was filed in the office of the clerk of the Superior Court, and, if so, when was it done? This matter should not be left open for dispute between the parties hereafter, but should be settled by a special finding of the jury in regard to it. Important rights depend upon it, and it becomes one of the vital questions of the case. It bears, as evidence, upon other questions, it is true, but has substantial weight and influence itself as a separate and independent fact. The defendant is here claiming the ownership of some of the properties to be (259) affected by plaintiff's location, or an interest or right therein superior to the claim of the plaintiff, and while the payment of damages to the landowner may not be essential to the acquisition of a prior right or preferred location, between two rival claimants, the filing of the map is an act required to be performed by the claimant in connection with the location of his works and as a condition of his right to proceed further. If it is not required to be done for the purpose of determining the location and extent of plaintiff's claim, it is so intimately connected with it and is regarded as of such importance in the general scheme of appropriation as to call for a separate consideration and finding by the jury.

The general questions involved in this case were so thoroughly examined and considered in the carefully prepared opinion delivered by *Justice Hoke* for this Court in *Street Ry. v. R. R.*, 142 N. C., 423, that little, if anything, need be said here upon the subject. It was there held that, in the absence of statutory regulations to the contrary, the prior right belongs to that company "which first defines and marks its route and adopts the same for its permanent location by authoritative corporate action," citing pertinent authorities, and among them Lewis on Eminent Domain, sec. 305, where it is said: "Where the conflict arises out of rival locations over the same property by companies acting under general powers, that one is entitled to priority which is first in making a completed location over the property, and the relative dates of their organization or charters are immaterial." And again, in the same section: "The making of a preliminary survey by an engineer of a railroad company, never reported to the company or acted upon, will not prevent another company from locating on the same line." It appears, therefore, that what is a proper location, and what is authoritative corporate action in respect to it, so as to confer a prior or preferential right

of occupancy or condemnation, are questions depending very much upon the facts as disclosed by the evidence, under instructions by the court as to their legal sufficiency for the purpose of vesting the prior right in either one or the other of the competitors for it.

There are other exceptions, but not of sufficient importance to require any separate discussion of them. For the reasons stated, there was error committed at the trial, in the respects indicated, and for which a new trial is ordered.

New trial.

PLAINTIFF'S APPEAL.

WALKER, J. The decision in the defendant's appeal disposes also of the question in this appeal. As we have held that there should be a new trial, and as the judgment in favor of plaintiff has been set aside, there can be no amendment of it. The result in the other appeal really makes this appeal unnecessary, and it is dismissed accordingly.

Appeal dismissed.

Cited: Aiken v. Ins. Co., 173 N.C. 409 (5c); *Potato Co. v. Jeanette*, 174 N.C. 240 (5c); *Power Co. v. Power Co.*, 175 N.C. 670, S. c.; *Kornegay v. Goldsboro*, 180 N.C. 452, 454 (1c); *Retreat Asso. v. Development Co.*, 183 N.C. 44 (3c); *Mann v. Archbell*, 186 N.C. 74 (5c); *Power Co. v. Power Co.*, 186 N.C. 180, 184, S. c.; *Erskine v. Motor Co.*, 187 N.C. 832 (5c); *Power Co. v. Power Co.*, 188 N.C. 129, 131, S. c.; *Sams v. Cochran*, 188 N.C. 734 (5c); *Sugg v. Engine Co.*, 193 N.C. 816 (5c); *Power Co. v. Taylor*, 195 N.C. 56 (5c); *Bank v. Bank*, 197 N.C. 532 (5c); *Wallace v. Bellamy*, 199 N.C. 764 (5c); *McGuinn v. High Point*, 217 N.C. 456 (4c); *Yadkin County v. High Point*, 217 N.C. 467 (8c).

(260)

STATE EX REL. L. H. SMITH v. J. D. Lee.

(Filed 29 March, 1916.)

1. Elections—Public Office—Title—Burden of Proof.

In an action to try title to a local public office, in this case that of mayor of a town, the burden of proof is on the relator, and failing in this, he may not recover the office.

2. Elections—Public Office—Pleadings—Votes Cast—Evidence.

Where the title to a public office is in controversy, and the answer denies that the plaintiff was elected thereto, but admits that the judges of election counted the same number of ballots for the two candidates, it

is competent for the parties to offer evidence of the legality of the votes counted.

3. Elections—Public Office—New and Old Registration—Evidence—Trials —Nonsuit.

Where the relator's title to office depends upon either the validity of a new registration or election according to the old registration book, and it appears that in either view he has failed to show that he received a majority of the votes cast at the election, he may not recover the office.

APPEAL by defendant from *Peebles, J.*, at September Term, 1915, of WAKE.

This is an action to try the title to the office of mayor of Fuquay Springs.

The plaintiff alleges: "Upon 8 May, 1915, in an election held pursuant to law, the plaintiff's relator, to wit, L. H. Smith, was duly elected to the office of mayor of the town of Fuquay Springs, Wake County, having received in said election a majority of one vote of the votes cast for mayor in said election, said office being a public office."

The defendant in his answer admits that an election was held at the time and place alleged in the complaint, but denies "that the plaintiff's relator, L. H. Smith, was duly elected to the office of mayor of the said town of Fuquay Springs, or that he received in said election a majority of one vote of the votes cast for said mayor in such election, or that he received any majority whatsoever, as will fully appear in the further defense hereinafter set forth in this answer."

The plaintiff further alleges that 45 ballots cast in said election were counted by the judges of election for the relator, Smith, and that 45 ballots were counted for his opponent, and that the judges of election failed to count the ballot of J. A. Powell, who voted for the relator, Smith.

The defendant admitted that the number of ballots counted were as alleged by the plaintiff, and further alleged that the said Powell was not a qualified voter.

(261) The defendant also alleged in the amendment to the answer that the election was void upon the ground that there was no registration of voters.

Evidence was offered that the old registration books of the town of Fuquay had been lost or destroyed; that a new registration had been ordered, but that no legal notice of the registration had been given; that there were about 100 voters in Fuquay and that 90 or 91 of these voted.

There was a conflict of evidence as to whether the order for a new registration was generally known, and some evidence offered upon this question was excluded by the court.

Of the 45 ballots counted for the relator, one was the vote of F. W. Kurfees and another of A. J. Fletcher, neither of whom was registered on the old registration books, but who were registered on the new registration book.

J. A. Powell, who voted for the relator, but whose vote was not counted, was registered on the old registration books and not on the new registration book.

At the conclusion of the whole evidence the defendant moved for judgment of nonsuit, which was denied, and he excepted.

Jones & Bailey and A. J. Fletcher for plaintiff.
Douglass & Douglass and R. N. Simms for defendant.

ALLEN, J. The contention of the plaintiff is that the election could not be held under the new registration because of the failure to give legal notice of the registration, and that the right of the voters to vote must be determined by the old registration books, while the contention of the defendant is that no legal election was held, and that if this position cannot be maintained, that the election was held upon the new registration.

It would seem to be clear from the record that if the right of the plaintiff to recover is tested by either the old or the new registration, he cannot recover.

The burden is on the plaintiff to prove that he was duly elected, as this is alleged in the complaint and is denied in the answer.

The answer does not admit that 45 legal votes were cast for the relator, thereby leaving open only the question of the right of A. J. Powell to vote.

On the contrary, there is not only a denial that the plaintiff was elected, but also an allegation that the whole election was void, and the admission of the defendant is only that the judges of election counted 45 ballots for the relator and 45 ballots for his opponent.

It was therefore competent for the parties to offer evidence as to the tiff has failed to prove his title to the office by the old or the (262) legality of the votes counted, and if this is considered, the plain- new registration.

If the old registration alone is considered, there must be deducted from the 45 votes counted for the relator the votes of Kurfees and Fletcher, who were not registered on the old registration books, which would leave his vote 43, and if the vote of Powell is added, he would have only 44 votes and his opponent 45.

If his title is tried by the new registration he is not entitled to recover unless the vote of Powell can be added to the votes counted for him, and Powell was not registered on the new registration book.

We are therefore of opinion that in any view of the evidence the plaintiff has failed to make out his title to the office, and that the judgment of nonsuit ought to have been allowed.

This renders it unnecessary to consider the other questions presented by the appeal.

Reversed.

Cited: Cohoon v. Swain, 216 N.C. 321 (2d).

CAROLINA TIMBER COMPANY v. R. A. WELLS AND C. B. PAGE.

(Filed 29 March, 1916.)

1. Deeds and Conveyances—Timber—Defeasible Title.

The laws of devolution and transfer applicable to realty apply to timber standing and growing thereon, and conveyances of such timber, as ordinarily drawn, convey an estate of absolute ownership in fee, defeasible as to all timber not cut and removed within the specified period.

2. Same—Extension Period—Options—Title Reversion.

A stipulation in a deed conveying timber standing and growing upon lands, that at the expiration of the period in which the timber shall be cut and removed the grantee shall acquire a further period for the purpose upon paying a stipulated or ascertainable price, is in the nature of an option; and contracts of this character do not of themselves create any interest in the property, but only amount to an offer to create or convey such an interest when the conditions are performed, and working a forfeiture when not complied with.

3. Same—Original Owner of Lands—Subsequent Grantee.

Where the owner of lands conveys the timber standing and growing thereon, with provision that the time for cutting and removing it will be extended upon payment of a certain sum, and the grantee of the timber avails himself of this right in accordance with his deed, but after the grantor has conveyed the land itself to another, the grantee of the land is entitled to the sum of money paid by the grantee of the timber for the extension of the period of time given for cutting and removing it.

4. Deeds and Conveyances—Timber—Extension—Title—Leases—Statutes.

An option or privilege in a timber deed for an extension of the time for cutting and removing it is a contract attendant upon the title.

5. Deeds and Conveyances—Timber—Extension Period—Consideration—Equitable Remedies—Jurisdiction.

Where the grantee of timber, in the exercise of his option, under his deed, pays the agreed sum for an extension period for cutting and removing the timber, but after the owner of the lands had conveyed the

same to another, and the controversy is to ascertain whether the original owner of the lands or his grantee thereof is entitled to receive the sum so paid, the action is in the nature of a bill of interpleader to determine the rights of two adverse claimants to a fund, enforcible in equity, and properly brought in the Superior Court.

6. Deeds and Conveyances—Timber—Extension Period—Options—Title—Devolution and Transfer—Executors and Administrators.

An option to extend the period of time for cutting timber takes effect only when its terms are complied with by the optionee; and where such is done after the death of the grantor, the price so paid goes to the heirs at law, the then owners of the title, and not to the personal representatives of the deceased owner, though in his deed it was provided that the price be paid to himself or his personal representative. It would be otherwise had he conveyed the timber for the additional period.

(NOTE.—*Timber Co. v. Bryan.* See case next following.)

CONTROVERSY submitted without action upon case agreed, and (263) heard in DUPLIN Superior Court on 26 February, 1916, before *Bond, J.*, holding the courts of the Sixth Judicial District. From the facts agreed upon, it appears that on 25 April, 1906, R. A. Wells, then owning a tract of land, for valuable consideration in hand paid, to wit, $450, conveyed to the Cumberland Lumber Company the timber on said land of specified dimensions, with the right to cut and remove the same at any time within ten years from the date of the conveyance. The instrument contained also the stipulation that the grantee, his assigns and successors, should have additional time to cut and remove, etc., not exceeding five years, paying therefor annually, within ninety days from 25 April, 1916, of the years following and respectively, to R. A. Wells or his personal representatives a sum equal to the interest on the purchase price; that on 26 March, 1907, said R. A. Wells sold and conveyed said land in fee simple to his codefendant, C. B. Page, who now holds same under said deed; that the title, rights and interests of the Cumberland Lumber Company under said conveyance have been acquired and are now owned by plaintiff; that the timber on said land has never been cut, and plaintiff, the Carolina Timber Company, has determined to ask for an extension of time for one year from 25 April within which to cut and remove the timber, and has so notified both R. A. Wells and C. B. Page of its purpose, and within this specified time has tendered the amount due as per contract; that the (264) entire amount of $27 is claimed by each of the defendants, and they have so notified plaintiff.

Upon these facts the court being of opinion that the entire amount was due and owing to C. B. Page, so entered its judgment, and defendant R. A. Wells excepted and appealed.

Stevens & Beasley for plaintiff.
H. D. Williams for defendant.

HOKE, J., after stating the case: Our decisions hold that standing timber is realty, subject to the laws of devolution and transfer applicable to that kind of property, and that timber deeds of this character, as ordinarily drawn, convey an estate of absolute ownership, defeasible as to all timber not cut and removed within the specified period. *Williams v. Parsons,* 167 N. C., 529; *Midyette v. Grubbs,* 145 N. C., 85; *Lumber Co. v. Corey,* 140 N. C., 467.

The cases on the subject are to the effect, further, that a stipulation of the kind now presented, providing for an extension of the time within which the timber must be cut, is in the nature of an option, and it is held by the great weight of authority that contracts of this character do not of themselves create any interest in the property, but only amount to an offer to create or convey such an interest when the conditions are performed and working a forfeiture when not strictly complied with. *Waterman v. Banks,* 144 U. S., 394; *Hacher v. Weston,* 197 Mass., 143; *Gaston v. School District,* 94 Mich., 502; *Newton v. Newton,* 11 R. I., 390; *Bostwick v. Hess,* 80 Ill., 138.

Our own decisions are in general approval of these principles: *Ward v. Albertson,* 165 N. C., 218; *Winders v. Kenan,* 161 N. C., 628; *Bateman v. Lumber Co.,* 154 N. C., 248; *Hornthal v. Howcott,* 154 N. C., 228; and from this it follows that where the time first provided in one of these timber deeds and paid for has passed, and it becomes necessary for the grantee to hold by reason of the performance of the stipulation for an extension, that the estate or interest arises at the time the conditions are complied with, and, in the absence of any provision in his deed to the contrary, the price paid belongs to him who then has the title and from whose ownership the interest is then created. The option or privilege obtained, to the extent of the right conferred, is a contract attendant upon the title, and, as stated, unless otherwise specified in the deed conveying the title, the price for the interest arising on proper performance of the conditions will inure to the owner. It is from his estate that the interest passes, and he must receive the purchase price.

It was urged on the argument that the judgment could be upheld on the principle that gives the owner of the reversion the right to
(265) receive the rental accruing after title descended, both under the principles of the common law and of our statute applicable to the question. *Holly v. Holly,* 94 N. C., 670; *Rogers v. McKenzie,* 65 N. C., 218; Revisal 1905, sec. 1989. Neither the decisions nor the statute are directly authoritative, for the reason that we have held that the

interest here conveyed is not a leasehold interest, but an estate in fee. There is, therefore, an absence of the tenure required to constitute rent. *Hawkins v. Lumber Co.*, 139 N. C., 160; *Bunch v. Lumber Co.*, 134 N. C., 116.

The position, however, affords a strong analogy in support of our construction of the contract and its effect upon the rights of the parties. It is suggested that the actual amount in controversy being only $27, the Superior Court is without original jurisdiction to determine it. The controversy, however, involves an action in the nature of a bill of interpleader to determine the rights of two adverse claimants to a fund, and being an exercise of the powers of the court enforcible by bill in equity under the old system, the Superior Court properly assumed jurisdiction to hear and determine the matter. *Fidelity Co. v. Jordan*, 134 N. C., 236; *Berry v. Henderson*, 102 N. C., 525; *Fisher v. Webb*, 84 N. C., 44. There is no error, and the judgment of the court below is

Affirmed.

Cited: Lumber Co. v. Comrs., 173 N.C. 121 (1j); *Mizell v. Lumber Co.*, 174 N.C. 71 (2cc, 6cc); *Jerome v. Setzer*, 175 N.C. 395 (2c); *Ricks v. McPherson*, 178 N.C. 159 (3d); *Morton v. Lumber Co.*, 178 N.C. 166 (1c, 2c); *Hudson v. Cozart*, 179 N.C. 250 (2c); *Lumber Co. v. Valentine*, 179 N.C. 425 (1c, 6c); *Dill v. Reynolds*, 186 N.C. 296 (3p); *Bennett v. Lumber Co.*, 191 N.C. 427 (3cc); *Mote v. Lumber Co.*, 192 N.C. 463 (1c, 2c); *Bank v. Lumber Co.*, 193 N.C. 759 (3c); *Trust Co. v. Frazelle*, 226 N.C. 728 (6c).

CAROLINA TIMBER COMPANY v. G. D. BRYAN, ADMINISTRATOR, ET ALS.

(Filed 29 March, 1916.)

For digest, see next preceding case.

CIVIL ACTION, heard on case agreed before *Connor, J.*, December, 1915, of SAMPSON.

The case presented was a contest between the administrator and the heirs at law of J. S. Johnston, the latter being represented by J. B. Highsmith, guardian, as to the right to $36.60, tendered in accordance with the provision of a timber deed to secure an extension of time, etc.

There was judgment in favor of the personal representative, and the guardian excepted and appealed.

Stevens & Beasley for plaintiff.
H. D. Williams for defendant.

HOKE, J. The relevant facts in this case are similar to those presented in *Lumber Co. v. Wells and Page,* just decided, except that here the grantor died and the time originally provided for removing the timber and for which he had been paid having expired, the (266) grantees tendered the money due for an extension, and same is claimed by the administrator and the heirs at law.

In accordance with our decision in the case of *Lumber Co. v. Wells,* we must hold that the right to this fund is in the heirs. The title having descended to them, it is from their estate that the interest arises, and they are entitled to receive the purchase price. We are not inadvertent to the language of the stipulation, that the price for an extension is to be paid to J. S. Johnston and his personal representative, or to the argument advanced that Johnston being the absolute and entire owner, at the date of the original deed, he could make such contract as to the payment of the purchase money for the interest conveyed as he saw proper. Assuredly he could, and if he had conveyed the timber for the additional period, the stipulation would hold, in strictness, as written; but, as we have endeavored to show, this provision in the deed for an extension of the time was an option, an offer to confer the right which matured only at the time the conditions were complied with. The property was then owned by the heirs, and the price to be paid for the interest then arising out of their ownership must, in our opinion, inure to them.

True, J. S. Johnston might have sold to the grantee for this additional five years, and the purchase price would have gone as he contracted; but, as stated, he only conferred upon the grantee the right to buy, and this being exercised after the land descended upon the heirs, the price must be paid to them.

There is error.

Cited: Mizell v. Lumber Co., 174 N.C. 71 (cc); *Morton v. Lumber Co.,* 178 N.C. 166 (c); *Lumber Co. v. Valentine,* 179 N.C. 425 (c); *Dill v. Reynolds,* 186 N.C. 296 (p); *Bennett v. Lumber Co.,* 191 N.C. 427 (cc); *Bank v. Lumber Co.,* 193 N.C. 759 (c); *Trust Co. v. Frazelle,* 226 N.C. 728 (c).

E. M. BROWN & CO. v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 29 March, 1916.)

1. Railroads — Crossings — Negligence — Look and Listen — Track—Improper Construction.

Where there is evidence that one driving an automobile approached a public crossing of a railroad, where the view of an approaching train was obstructed, with due regard to his safety, looking and listening for the train, which came without signal or warning, and which he could not see before going upon the track; that he was prevented from crossing by a vehicle approaching from the opposite direction, and in endeavoring to back his machine out of danger his engine stopped, and because the track was not properly filled, the rails standing above the level of the ground, his machine could not be made to move, and was struck by the locomotive, causing him to be injured while endeavoring to jump out; that the engineer should, by the exercise of proper care, have seen plaintiff's danger in time to have avoided the injury: *Held*, sufficient upon the question of defendant's actionable negligence to take the case to the jury.

2. Same—Sudden Peril—Contributory Negligence—Rule of Prudent Man.

Under the circumstances of this case, it is held that the condition of the defendant railroad company's track at a crossing where its locomotive had a collision with plaintiff's automobile, causing the injury complained of, was evidence of defendant's negligence in not properly filling between the rails, leaving for the determination of the jury whether the plaintiff acted as a man of ordinary prudence and presence of mind would have done when confronted suddenly by the same grave peril, though the care required of him in approaching the track was increased in proportion to the danger in attempting to cross the same where the view was obstructed.

APPEAL by defendant from *Daniels, J.*, at November Term, (267) 1915, of COLUMBUS.

The defendant, in its brief, states with sufficient accuracy the respective contentions of the parties, and we adopt its statement as containing the material facts.

This was an action brought by the plaintiff against the defendant to recover damages for personal injuries received by him and damage to his automobile claimed to have been caused by the negligence of the defendant while plaintiff in his automobile was attempting to cross the tracks of the defendant in the town of Cerro Gordo. Plaintiff alleged that on 18 December, 1914, while going over a public crossing in the town of Cerro Gordo, a few feet west of the defendant's station, he was struck by a train of the defendant which was negligently approaching the crossing without giving any signal by bell, whistle, or otherwise. He alleges that the crossing was negligently constructed and defective, in that there was no material between the rails on the track and each

side of the rails of the track to serve as a support for the wheels of vehicles using the same in crossing, and which would have held them up near the level of the top of the rails and made the crossing safe for public use by providing for vehicles attempting to use the same to pass without unusual jars, and without stalling on the track and crossing, and was too narrow to permit vehicles to pass each other over the same, and that he drove his automobile in a careful and safe manner towards the crossing, making careful observation for approaching trains, having due regard to his safety and the safety of other persons who might be using the crossing, and when he reached a point between the rails of the defendant's main line of track, he observed approaching from the north a vehicle, which he had been prevented from seeing before he got to the track by the cars of the defendant which had been negligently left on the side-track, and that in order to prevent a collision with the vehicle he was compelled to stop his car at said point on the track, when he observed approaching from the west an engine and cars which had failed to give any signal, and he immediately signaled to the engineer in charge of the train to stop, and attempted to back his automobile
(268) off of the track, which he failed to do by reason of the negligent construction of the crossing. He further alleges that his engine stalled and stopped, and the defendant's engineer failed and refused to stop the train or to give any attention to his signals of distress, and negligently struck him and his car, and injured him. All of which the defendant denies.

The second cause of action is upon the same statement of facts, except that it alleges damages to the machine.

The defendant alleges that the plaintiff was guilty of negligence, in that he negligently ran his automobile on the track immediately in front of the defendant's train while it was moving forward along the track, when the train was too close to stop before striking the machine, and that he negligently failed to stop and look and listen for the train before going on the track, and that he could have prevented the injury, as he could have seen and heard the train in time to have stopped his machine and avoided the injury.

The jury returned a verdict for the plaintiff, finding that there was negligence on the part of the defendant and none by the plaintiff, and assessed damages for the personal injuries at $1,600 and for injury to the automobile at $400. Judgment was entered thereon, and defendant appealed.

Irvin B. Tucker and H. L. Lyon for plaintiff.

Davis & Davis, Schulken, Toon & Schulken for defendant.

WALKER, J., after stating the case: A careful analysis of the record convinces us that there has been no error committed in this case. On 18 December, 1914, plaintiff attempted to cross defendant's track, on a public highway intersected by it, in his automobile. He testified that he both looked and listened for approaching trains, but that his view was obstructed by cars of the defendant negligently left on a parallel track and by other hindrances, and that he looked as best he could, and also listened for the noise of the train and signals for the crossing, but heard none. That he went upon the track, believing it to be safe to do so, and being induced to do so by the defendant's failure to give proper warning of the approach of one of its trains, and that he would have crossed safely had it not been for the approach of another person in a vehicle from the other side of the track, which prevented his going on, as he had intended to do. He then backed over the track in the direction from which he had come, but that the crossing was in such bad condition as to cause his automobile to stall on the track, and the train, which was coming towards him at the time, and in full view of his perilous position, ran into him and damaged him and his automobile. He further testified that the engineer could have seen that he was in trouble with his car on the track and in danger of a collision (269) if he did not stop his train, which he had full time and opportunity to do before reaching the place on the track where the plaintiff had stopped, and that he signaled the engineer to stop.

There was other evidence tending to show that defendant's servants were negligent and that plaintiff was free from fault.

The court submitted the case to the jury under a charge, which was exceptionally clear in its statement of the law as applicable to the facts and which covered completely every phase of the case. It certainly was not unfavorable to the defendant, and was entirely free from any error.

The jury, under the evidence and the charge, considered in connection with the verdict, must have found that defendant so obstructed the view of its track from the road that plaintiff could not see or hear approaching trains, although he looked and listened for them, and that defendant also failed to exercise care in giving proper signals from its train of its approach to the crossing, and that this proximately caused the collision and consequent injury, or that after plaintiff had stalled on the crossing he was seen by the engineer in time for him to have prevented the injury by stopping his train, or that both acts of negligence combined to produce the injury. On these questions the court charged the jury according to the approved precedents in this Court.

We held in *Shepard v. R. R.*, 166 N. C., 539, following two of the rules laid down in *Cooper v. R. R.*, 140 N. C., 209, and *Johnson v. R. R.*, 163 N. C., 431, as follows: "Where the view is unobstructed, a

traveler who attempts to cross a railroad track under ordinary and usual conditions without first looking, when by doing so he could note the approach of a train in time to save himself by reasonable effort, is guilty of contributory negligence.

"Where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing, and if he does listen and is induced to enter on a public crossing because of the negligent failure of the company to give the ordinary signals, this will usually be attributed to the failure of the company to warn the traveler of the danger, and not imputed to him for contributory negligence."

The court substantially instructed the jury in accordance with those rules, and if the jury found that there was negligence in the respect indicated in the latter of those two rules, and that it was the proximate cause of the injury, we can see no fault in that part of the charge. *Shepard's case* was again before the Court, and is reported in 169 N. C., 239, where the former decision was approved, and where it was further held that if plaintiff (in that case) was running his automobile at a rate of speed prohibited by the statute (Laws 1913, ch. 107), he was not, as a matter of law, debarred of a recovery, as the question of proximate cause was involved and was for the jury to determine. We have
(270) referred to that case especially because the plaintiff therein was in an automobile at the time he approached the crossing, and defendant in this case cites *N. Y. C. and A. R. R. v. Maidment,* 21 L. R. A. (N. S.), as perhaps a rule especially applicable to the automobile driver in regard to the duty of looking and listening, and controlling the speed of his car, somewhat different from that which is the standard in other cases. Without deciding whether there should be a difference between the driver of an automobile and the driver of an ordinary vehicle drawn by a horse or other animal likely to be frightened by a train, in respect of the care to be exercised by each of them, as stated in that case, we think the duty of the plaintiff in approaching the defendant's track with his care was carefully and properly explained to the jury, in the charge of the court, according to the principle as declared in *Shepard v. R. R.,* 166 N. C. 539. In that case, at p. 545, the Court said: "It is also established by the weight of authority that it is not always imperative on a traveler to come to a complete stop before entering on a railroad crossing; but 'whether he must stop, in addition to looking and listening, depends upon the facts and circumstances of each particular case, and so is usually a question for the jury.' *Alexander v. R. R.,* 112 N. C., 720; *Judson v. R. R.,* 158 N. Y., 597; *Malott v. Hawkins,* 159 Ind., pp. 127-134; 3 Elliott on Railroads (2 Ed.), sec. 1095, Note 147; 33 Cyc., pp. 1010, 1020. In *Alexander's case* it was held, among other things: 'Where in an action for damages for an in-

jury received at a railroad crossing plaintiff testified that she "held up very slow," as she was driving across, and, hearing no bell, which she had heard the day before while at the crossing, notwithstanding the noise of the factories on each side of the street, concluded that no engine was approaching, and drove on: *Held,* that it was not necessary for her to get out of her buggy and go beyond the cars to look up and down the track, or to stop and listen for an approaching engine when no signal was given of its approach.' In *Judson's case, supra:* 'A person approaching a railroad crossing is not required, as a matter of law, to stop before attempting to cross, but his omission to do so is a fact for the consideration of the jury.' In *Malott's case,* 159 Ind., *supra, Gallett, J.,* delivering the opinion, said: 'Exceptional circumstances may also require him to stop, although this proposition generally presents itself as a mixed question of law and fact.'" That case was approved in *Hunt v. R. R.,* 170 N. C., 442.

In respect to the condition of the crossing, it is our view that the same question is not presented in this case as in *Hunt's case, supra.* It was material to inquire whether the track was properly filled between the rails, as it seems that the reversal of the engine and the condition of the crossing caused the car to stop, according to plaintiff's testimony. If without fault he went upon the track and was then confronted suddenly by a grave peril, and exercised such care as a man of (271) ordinary prudence and presence of mind would have used under the same circumstances, negligence will not be imputed to him, and the court so charged the jury. Not having brought the danger upon himself, or, if he did, the defendant having a fair opportunity to prevent the injury, he was not required to act wisely or discreetly, but only with such care and judgment as would be expected of a man of ordinary prudence in a like situation. He testified that he could not go forward safely, as another vehicle was in his way, and he backed, hoping to clear the track in another direction, but failed to do so, owing to the stoppage of his car. There was no dirt between the rails, and the front wheels struck the rail and stopped the engine. He then called to the engineer and attempted to jump over the back seat of the car, when he was stricken by the engine. Whether he acted with ordinary prudence under the circumstances was a question for the jury, it not being so clear that he did not as to make it a question of law. "The well settled rule that where one is placed in imminent danger he is not required to act with the same degree of care as if he had time for deliberation has been applied in the case of an accident to an automobile at a railroad crossing." 2 Ruling Case Law, p. 1207, sec. 42.

The plaintiff stated that he could not see the train until he got upon the track, as his view was obstructed by the defendant's car on another

track, and there was evidence that no signal of the approaching train was given, so that he could not either hear or see, and he could have crossed safely had it not been for the other vehicle which was coming over the crossing in the opposite direction, and, in backing to avoid a collision with it, he was caught on the track and could not move his car, as its engine had stopped; and there was further evidence that he did the best that he could, in the presence of the impending danger, with his way blocked, his engine stopped, and a train approaching on the same track. It is true that where the view of the track from a railroad crossing is obstructed the degree of care required of a traveler as well as of the railroad company is correspondingly increased and should be in proportion to the danger, *R. R. v. Grubbs,* 113 Va., 214; but whether the proper degree of care was exercised at the time of crossing the track or attempting to do so, and whether the traveler and the company continued in the exercise of the requisite degree of care, are questions for the jury, and the judge so treated them in this case, making proper allowance for plaintiff's alarm or fright when confronted by a grave peril.

The case was tried according to the rules approved by this Court and applicable to every phase of it as disclosed by the testimony.

No error.

Cited: Dail v. R. R., 176 N.C. 112 (2c); *Perry v. R. R.,* 180 N.C. 296, 297 (2c); *Perry v. R. R.,* 180 N.C. 311 (j); *Finch v. R. R.,* 195 N.C. 198 (1cc, 2cc).

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R. G. WINN v. C. W. FINCH & SON.

(Filed 29 March, 1916.)

1. Vendor and Purchaser—Contracts—Warranty—Reassurance—Verdict.

Where the seller warrants a horse to be gentle, and the purchaser carries it back to his stables after seeing the horse frightened by an automobile, which had caused injury, and the seller assures him that the horse was as represented, and only "feeling good" at the time he was so frightened, but offers to take him back and surrender the note for the purchase price he had received, which offer the buyer declines to accept, and keeps the horse, though convinced that he was not gentle as warranted, and the jury, under proper instructions from the court, find upon the issue, that there had been a breach of the warranty, it is equivalent to a finding, that the seller renewed his original assurances, upon which the buyer, in the exercise of ordinary care and prudence, relied.

2. Trials—Evidence—Nonsuit—Appeal and Error.

In this action for damages for a breach of warranty of a horse, brought by the purchaser, it is held that the evidence was sufficient to take the case to the jury, and the defendant's motion to nonsuit was properly denied. *Hodges v. Smith*, 158 N. C., 256, cited and applied.

3. Vendor and Purchaser—Contracts—Warranty—Breach—Damages.

Upon the breach of warranty of a horse, the purchaser is not bound to accept the seller's offer to rescind the contract, but may keep the horse and maintain an action for damages for the breach.

4. Vendor and Purchaser — Contracts — Warranty—Breach—Measure of Damages.

The measure of damages for a breach of warranty in the sale of a horse is the difference between its actual value and what the value would have been had the animal been as warranted, and damages for a personal injury caused by the horse not being gentle as warranted was properly excluded in this case.

5. Judgments—Verdicts—Vendor and Purchaser—Contracts—Warranty—Breach—Damages.

Where the verdict of the jury upon the issues has established the breach of warranty sued on, and has assessed the amount of the plaintiff's damages, the judgment rendered must be in accordance therewith; and a judgment which requires the defendant to give up a note he has received for the purchase price, and the plaintiff to give up his possession of the horse to defendant, is erroneous.

APPEAL from *Peebles, J.*, at August Term, 1915, of FRANKLIN.

Plaintiff brought this action to recover damages for a breach of warranty in the sale of a horse. He alleged that defendants, who dealt in live stock at Henderson, N. C., had tried to sell him a horse, but they had no horse that suited him, and promised to let him know when they got one of the kind he wanted. In March, 1914, Mr. Finch told him that he had the very horse he wanted and that he would suit exactly. Plaintiff had stated to him that he wished to buy a (273) horse that was perfectly gentle and sound and so gentle that his children could drive him anywhere, and also suitable for other purposes. Finch said that plaintiff's little boy could drive the horse. After looking at the mare defendants showed him, plaintiff bought her at $125 and gave his note for the price. He found out after driving her that she was always frightened by automobiles, not only while they passed by, but after they had passed her, and she would try to move every time she met one. In May, 1914, when plaintiff, with his son and daughter, was driving her to a buggy from Henderson the mare was frightened at an automobile and ran away, injuring plaintiff and his daughter severely, but not dangerously. When plaintiff first complained about the mare, Mr. Finch told him that he knew she was perfectly gentle, but if

he did not want her, they would exchange for any other horse in the stable. Plaintiff looked at the horses, but could not find one that suited him, and late in the evening of the same day Mr. Finch said to plaintiff that while he knew the mare was gentle, "and was just feeling good" when she passed the automobiles, he could leave her there and get his note, and plaintiff replied that he would take the mare home, and did so. It was after this occurred that he drove her to a buggy, and she ran away and injured plaintiff and his daughter. After the runaway happened he carried the mare back to Mr. Finch and asked him to take her back and give up his note, which Finch refused to do. Plaintiff also testified that the mare was wind-broken. He stated that he relied on the representations of Mr. Finch as to the mare's gentleness and soundness, both when he first bought her and at the time he took her back, and was assured by Mr. Finch as to her good qualities, and that he took her back the second time because he had relied on the first and second assurances that the mare was gentle and sound.

There were some variations from the above statements of the plaintiff in the cross-examination, but nothing that materially changed the substance of them, but only tended to weaken their force. There was evidence in corroboration of plaintiff and other evidence tending to contradict him.

The court submitted to the jury three issues, which, with the answers thereto, are as follows:

1. Did defendant warrant the mare to be gentle and sound on 18 March, 1914? Answer: "Yes."

2. If so, was the said warranty false? Answer: "Yes."

3. What damage is plaintiff entitled to recover, if any? Answer: "$125."

The judge charged the jury upon the third issue as follows: "If you answer the first and second issues 'Yes,' then you come to the
(274) question of damages. The court charges you that the measure of damages in the case of false warranty is the difference between the value of the horse as she was and what she would have been worth if she had been as she was warranted to be." He excluded all damages for injuries to plaintiff and his daughter.

Upon the verdict, the court rendered the following judgment: "This cause being heard at this term before Hon. R. B. Peebles, judge, and a jury, and the jury having found the issues in favor of plaintiff and assessed his damages at $125, and it appearing to the court by the admissions of the parties that plaintiff has never paid defendant for the mare, and that he now has the mare, and that defendant has plaintiff's note, the court doth adjudge that defendant do surrender to plaintiff the note for the mare, and that such surrender forthwith shall satisfy

and extinguish the damages established in plaintiff's favor by the verdict, and that defendant do pay the costs of the action. It is further adjudged that plaintiff do forthwith surrender to defendant the mare in question."

Plaintiff excepted, and moved for judgment, according to the verdict, for $125, with interest and costs; and to the refusal of this motion, he again excepted and appealed.

Defendant also excepted because the court refused to nonsuit, and appealed.

W. H. Yarborough and T. M. Pittman for plaintiff.
T. T. Hicks for defendants.

DEFENDANTS' APPEAL.

WALKER, J., after stating the case: The court held, and so charged the jury, that there was no evidence of unsoundness, and confined the inquiry to the ungentleness of the mare. Defendants contend that after plaintiff had time to ascertain the qualities of the mare, and that she was frightened by automobiles, he brought her to defendants' stables and they offered to take her back and surrender the note given for her price, and plaintiff rejected the offer and took the mare to his home. Plaintiff replies that he was not bound to rescind the contract at that time, as there already had been a breach of the contract, and he had an election to rescind or not, and, besides, that he acted upon defendants' original warranty and further asurance given, when he returned to the stable with the mare, that defendants knew the mare was gentle and sound. It is true that this was denied by the defendants, but the court left this controversy to the jury under an instruction which was perfectly fair to defendants and stated the rule of law correctly. The jury evidently found, under the evidence and the charge, that the defendants renewed their original assurances of soundness and gentleness, and the plaintiff, in the exercise of ordinary care, re- (275) lied upon it, and governed himself accordingly; that he did what a man of ordinary prudence would have done in the same circumstances. But the motion of defendants to nonsuit only raises the question whether the plaintiff's evidence, in any reasonable view of it, sustained his cause of action, and we think that it did, and that the court properly submitted the issue to the jury.

This case is somewhat like *Hodges v. Smith,* 158 N. C., 256, where it is said, at pp. 262, 263, after citing numerous cases: "Applying the principle as thus gathered from the authorities, the court erred in not submitting the case to the jury to find the facts and to pass upon the question of warranty. The language of the parties, as used at the time

of the transaction, is quite as strong to show a warranty as any to be found in the cases we have cited. The defendant was a dealer in horses, and by the testimony as we now have it he, at least, affirmed that the horse he sold to the plaintiff was of the description he wanted—kind and gentle in harness, and so well broken that even a lady could drive him with safety. The plaintiff says that he relied upon that representation, and bought the horse believing it to be true, and being induced thereby to buy. The jury must decide whether it was intended and accepted as a warranty, and also, upon the evidence, whether there has been a breach thereof, there being evidence of a breach for them to consider." Tiffany on Sales, 162; *Wrenn v. Morgan,* 148 N. C., 101; *Harris v. Cannady,* 149 N. C., 81.

The buyer of a horse warranted to be gentle and kind in harness is not bound to accept an offer of the seller to rescind the contract, if the warranty has been breached, but may keep the animal and rely on his action for the breach and recover his damages. *Kester v. Miller,* 119 N. C., 475; *Robinson v. Huffstetler,* 165 N. C., 459; *Alpha Mills v. Engine Co.,* 116 N. C., 797; *Lewis v. Rountree,* 78 N. C., 323; *Cox v. Long,* 69 N. C., 7; *Cable Co. v. Macon,* 153 N. C., 150; 35 Cyc., 434. It is said in *Cox v. Long, supra:* "Where an article is warranted, and the warranty is not complied with, the vendee has three courses, any one of which he may pursue: (1) He may refuse to receive the article at all; (2) he may receive it and bring a cross-action for a breach of the warranty; or (3) he may, without bringing a cross-action, use the breach of warranty in reduction of the damages in an action brought by the vendor for the price." In this respect we find no error, as the plaintiff had the right to sue upon the warranty, notwithstanding what occurred between him and Mr. Finch at the stable when he came back with the mare and complained of her ungentleness. The motion to nonsuit was, therefore,

properly denied, there being some evidence of a breach of the
(276) warranty.

The court applied the correct rule as to the measure of damages. *Parker v. Fenwick,* 138 N. C., 209; *Spiers v. Halsted,* 74 N. C., 620; *Mfg. Co. v. Gray,* 126 N. C., 108; *Marsh v. McPherson,* 105 U. S., 709; *Cable Co. v. Macon, supra; Robertson v. Halton,* 156 N. C., 215; *Guano Co. v. Live-stock Co.,* 168 N. C., 442-450. "The general rule as to the measure of damages on a breach of warranty is that the buyer is entitled to recover the difference between the actual value of the goods and what the value would have been if the goods had been as warranted, and in the application of the rule it is held that the fact that the goods were actually worth the price paid for them is immaterial. . . . It is true that in some cases the rule has been stated that the measure of damages is the difference between the purchase price

and the actual value of the goods, but in nearly all of these cases the theory undoubtedly is that, in accordance with the general rule, if there is no other evidence of the actual value of the goods, the purchase price will be regarded as the actual value." 35 Cyc., 468.

It follows there was no error in defendant's appeal.

No error.

PLAINTIFF'S APPEAL.

If, as we have shown in the defendant's appeal, the plaintiff was not bound to rescind the contract and give up the mare upon a surrender of the note, the court had no power to rescind it without his consent. He had obtained a verdict for the damages resulting from the breach of warranty, and the action sounded only in damages. The court should have set aside the verdict, if deemed to be against the weight of the evidence, or if it considered the damages as excessive. This was a matter lying within its discretion. But it did not do this, but entered a judgment which was not germane to the cause of action or to the verdict, but quite different, in its nature, from both of them. If the verdict was allowed to stand, the plaintiff was entitled in law, and as matter of right, to a judgment for the amount of damages assessed by the jury and to his costs; and, therefore, the judgment rendered by the court will be set aside and a judgment entered as above indicated.

If the parties hereafter agree that the contract may be rescinded, or that the amount recovered may be credited on the note, or if they agree upon any other terms of settlement, judgment may be entered accordingly; but otherwise, or without their consent, no judgment other than one upon the verdict, and for costs to the plaintiff, can be given.

It may be that the amount of damages indicates that the jury were endeavoring to adjust the controversy on equitable terms, amounting to a rescission, believing that the recovery would offset the note and that the horse would be given up to the defendants. But we cannot act upon this supposition, as it was not the question submitted to the jury. We must regard the verdict as strictly responsive to the issue, and (277) only as assessing plaintiff's damages. It is a cardinal rule that the judgment must follow the verdict, and if the jury have given a specified sum in an action for damages, the Court cannot increase or decrease the amount, nor can it change the substance of the verdict; the remedy for any error committed by the jury being a new trial. Black on Judgments (2 Ed.), sec. 142. It follows, therefore, that the judge erred in reforming the verdict or in giving a judgment contrary to its findings.

Since this opinion was prepared, the parties have agreed that the amount of the recovery may be credited on the note, and this will be done

in the court below and provided for in the judgment, the costs to be paid by the defendant. There was error in this appeal.

Error.

Cited: Durham v. Davis, 171 N.C. 308 (5c); *Sitterson v. Sitterson,* 191 N.C. 321 (5d); *Carroll v. Alston,* 214 N.C. 850 (5cc); *Troitino v. Goodman,* 225 N.C. 413 (4c).

RALEIGH, CHARLOTTE AND SOUTHERN RAILWAY COMPANY v. W. H. McGUIRE.

(Filed 29 March, 1916.)

1. Appeal and Error—Railroads—Rights of Way—Easements—Reverter.

The question of whether the plaintiff railroad company had abandoned its right of way over the defendant's lands, so that, under the terms of its deed, it had reverted to the grantor thereof, cannot be raised for the first time in the Supreme Court on appeal; and in this case only by requested instruction that there was no sufficient evidence of abandonment, the burden of proof being on the defendant.

2. Railroads — Deeds and Conveyances — Rights of Way — Easements—Abandonment—Unequivocal Acts—Intent.

An abandonment by a railroad company of its right of way acquired by deed with provision that it would revert to the grantor, includes the intention to abandon in concurrence with the external acts by which such intention is carried into effect amounting to a relinquishment of the property, which must be positive, unequivocal, and inconsistent with the claim of title.

3. Railroads — Deeds and Conveyances — Rights of Way — Easements—Abandonment—Spur or Side Tracks.

Where a railroad company acquires a right of way over the lands of the owner by deed with provision that it would revert to the owner for nonuser for a stated period, and constructs and operates its main line thereon for a while, and then changes its main line of road to cross other lands, but continues to use the *locus in quo* for spur and side tracks in connection with its freight or other railroad business, the relocation of its main line, as stated, is not an act of abandonment which will forfeit the company's easement under its deed.

4. Same—Permissive User—Leases.

Permissive user or occupancy of a portion of a railroad company's right of way, not then used by the company for railroad purposes, or such portion leased by the company to its patrons in furtherance of its business, does not affect the company's title once acquired, and cannot be construed as an act of abandonment by the company under its deed providing that the title thereto will revert to the grantor in event of abandonment for a specified period.

5. Appeal and Error—Railroads—Rights of Way—Easements—Abandonment—Deeds and Conveyances—Grantor's Intent.

In an action by a railroad company to restrain the defendant from hindering and molesting the plaintiff's servants in discharging its duty in the prosecution of its business as a common carrier, where the rights of the parties are made to depend upon whether the plaintiff had abandoned its right of way under the provisions of its deed thereto, it is reversible error for the trial judge to make the decision upon the issue of abandonment depend upon the intention and conduct of the plaintiff's grantor.

6. Instructions — Railroads — Easements — Rights of Way—Appeal and Error.

Where a railroad company seeks to enjoin the interference of the defendant with the conduct of its business, raising the question of plaintiff's abandonment of its right of way under the terms of its deed, it is reversible error for the trial judge to instruct the jury that the company could have acquired but one right of way under its deed, and that the law presumed that it acted thereunder, there being no evidence to the contrary, when such instruction leaves out of consideration the evidence that while the plaintiff had changed its main line of road, it was still using the *locus in quo* for its legitimate railroad purposes, and had a right to acquire other lands for the purpose of its main line.

HOKE, J., concurs in the result.

APPEAL by plaintiffs from *Peebles, J.*, at October Term, 1915, (278) of WAKE.

Civil action, tried upon these issues:

1. Did plaintiffs or their predecessor abandon the land in controversy, as alleged in answer of defendant? Answer: "Yes."

2. What damage, if any, has defendant sustained by wrongful acts of plaintiffs, as alleged in answer of defendant? Answer: "$40."

3. Are the plaintiffs the owners of a right of way extending 50 feet on each side of the center line of the railroad track in controversy, as alleged in the complaint? Answer: "No."

4. Did the defendant wrongfully interfere with the plaintiffs' use of said right of way, as alleged in the complaint? Answer: "No."

5. What damages are the plaintiffs entitled to recover of the defendant? Answer: "Nothing."

From the judgment rendered, plaintiffs appealed.

R. N. Simms for plaintiff.

H. E. Norris, Manning & Kitchin for defendant.

BROWN, J. The purpose of this action is to restrain defendant (279) from constructing and maintaining a fence upon plaintiff's right

of way and from otherwise molesting and hindering plaintiffs' servants in using said right of way, delivering freight thereon, and othewise discharging duties incumbent upon plaintiff as a common carrier.

The defendant denies many of the allegations of the complaint, but sets up a claim to a part of the right of way, being the part in controversy, and avers that the plaintiff and its predecessors "permanently abandoned the first location made by said Raleigh and Cape Fear Railroad Company (plaintiffs' predecessor in title) on and over said land of B. H. Fuquay, a part of which the said B. H. Fuquay sold and conveyed to this defendant."

The plaintiff claims title to its right of way under a deed from B. H. Fuquay dated 10 October, 1898, containing this clause: *"Provided, however,* that in case of a permanent abandonment of the said right of way or easement by said party of the second part, its heirs or assigns, or in case said right of way or easement is not located and used for the purposes aforesaid within five years from the date of this conveyance, then said right of way or easement and the land hereby granted is to revert to the said party of the first part, their heirs and assigns."

Plaintiff located its right of way within the time required, constructed a track thereon, and claims to have used this track for railroad purposes ever since. The defendant claims the *locus in quo* by a deed from B. H. Fuquay dated 24 December, 1913, and seeks to hold the same as the grantee of Fuquay under the abandonment clause in plaintiffs' deed. The evidence, as stated in the case on appeal, tends to prove that plaintiffs' predecessor constructed its main line on this right of way and used it continuously up to 1902 or 1903, when the railroad company extended its line southwardly, and for this purpose, deflected at a point some 300 or 400 feet north of the lot in controversy, and took a new route to the westward at that point, and thence to the new Fuquay Springs station, and on to Lillington and Fayetteville, but that it continuously maintained and used the old track upon the lot in controversy on its right of way thereafter and until the present time as a spur track for the purposes above mentioned of handling cars and receiving and delivering freight.

The plaintiffs also offered evidence tending to show that when the new road above mentioned was built it did not encroach upon any land of said B. H. Fuquay other than that which was already included in the 50-foot strip extending on each side of the old main-line track, which had been built, as above mentioned, in 1898 or 1899.

The plaintiffs' testimony tended to show that as long as the railroad was upon any land owned by B. H. Fuquay the new track was
(280) within 50 feet of the center line of the old track, and when it got farther away from the old track than that distance it was upon lands of persons other than the said B. H. Fuquay.

The defendant offered evidence tending to show that when the railroad ran its new route, about 1903, a portion of its new track ran across a portion of B. H. Fuquay's land for a distance of something like 100 feet, and that thereafter the track on the land in controversy was mainly used for handling cars for shipment to or from the lumber plant of J. A. Sexton or the defendant's stave factory, located on the lot in controversy, and that the said B. H. Fuquay executed to the defendant the lease and deed mentioned in the pleadings.

There was no evidence that the railroad company has ever been hindered in using the railroad track upon the lot in question for any purpose until the defendant did so by building the fence, as alleged in complaint in 1913, and the evidence of both parties shows that from 1898 or 1899 until 1913 trains and cars had been during all of that time operated upon the tracks on the land in controversy.

There was evidence tending to show that during the year 1913 Tilley, Beck & Co., a corporation, had, without objection on the part of the plaintiffs' built a warehouse upon the lot in controversy, and on the east side of the track, for the purpose of receiving freight from the plaintiffs and delivering freight to them, and for no other purpose, and that the said warehouse had been so used for the purpose of expediting the business of the said Tilley, Beck & Co. with the plaintiffs in the handling of freight which had been or was to be shipped over the plaintiff's line of railroad, and that this caused no inconvenience to the plaintiff.

There was evidence tending to show that Dr. J. A. Sexton built a planing mill on the south end of the lot in controversy about 1900, and operated the same four or five years, shipping lumber in and out over the said track.

There was also evidence that several years before the commencement of this action the defendant had for a short while operated a stave mill on a portion of this lot in controversy, and had shipped freight in and out over the said track.

The plaintiffs offered the testimony of the president and general manager, Mr. John A. Mills, and his assistant, Mr. F. T. Ricks, who occupied said offices continuously from 10 October, 1898, until 1912, and also the testimony of a number of residents of Fuquay Springs, and in the vicinity of the land in controversy, tending to show an uninterrupted use by the railroads of the track upon the lot in controversy, continuously from its first construction in 1898 or 1899 to the time of the commencement of this action, and the maintenance of the track upon said land, and the reception and delivery of freight (281) from and to the public generally.

The above extracts, taken *verbatim* from the case on appeal, clearly explain the controversy. Whether there is any sufficient evidence of an

abandonment by plaintiff of its right of way, embracing the lot in controversy, is a matter not presented by the record, and it cannot be raised for the first time in the Supreme Court. In this case it can only be raised by a prayer that the jury be instructed that there is no sufficient evidence of abandonment and that the first issue be answered "No," the burden of proof being upon the defendant to establish such abandonment.

This brings us to consider the essential elements of an abandonment. It includes both the intention to abandon and the external act by which such intention is carried into effect. There must be a concurrence of the intention with the actual relinquishment of the property. It is well settled that to constitute an abandonment or renunciation of a claim to property there must be acts and conduct positive, unequivocal, and inconsistent with the claim of title. Mere lapse of time or other delay in asserting the claim, unaccompanied by acts clearly inconsistent with the right, do not amount to a waiver or abandonment. 1 Cyc., 3; *Banks v. Banks,* 77 N. C., 186; *Faw v. Whittington,* 72 N. C., 321; *Miller v. Pierce,* 104 N. C., 391; *Boone v. Drake,* 109 N. C., 82.

The defendant contended that the plaintiff changed its main line and diverted it from the old right of way and relocated it by acquiring another right of way, and that it has entirely ceased to use the old right of way for all railroad purposes, thereby manifesting by its acts an unequivocal purpose to abandon it, and that therefore defendant, as Fuquay's grantee under the deed of 24 December, 1912, has the right to enter.

If the facts are found in accordance with this contention, the plaintiff would not be entitled to the relief asked. The plaintiff admits that the main line has been diverted from its former course and rebuilt on other land acquired from other parties, as the exigencies of its passenger traffic demanded it, but it avers that the old right of way covering the land in controversy has not been abandoned, that it has been continuously occupied up to the present as a spur track and such spur track is used daily by freight trains and cars in the handling and delivery of freight.

If these facts be true, there would be no abandonment, and plaintiff would be entitled to the relief asked. It is well settled that a railroad company does not abandon the land on which it has constructed its tracks so as to entitle the owner to revoke its license by ceasing to operate freight or passenger trains over it, where it continues to
(282) use it for purposes incident to and connected with its business in operating the road. 33 Cyc., p. 223, and cases cited in notes; *Ft. Worth, etc., R. R. Co. v. Sweat,* 20 Tex. C. App., 543.

It is immaterial whether plaintiff acquired the land for its present main-line track from Fuquay or from other persons. It had a right to

do so, and to divert its main line if thereby it increased its facilities to serve the public. It did not thereby forfeit and abandon that portion of its old right of way if it continued to occupy it with its track and to use such track for railroad purposes.

The fact that Tilley, Beck & Co., Sexton, this defendant, and others had been permitted to use and occupy a portion of the right of way does not constitute an abandonment.

The title of the railroad to the right of way once acquired cannot be lost by occupancy as to any part of it by the lapse of time or by the occupation of its patrons. "A permissive use of a right of way by another, when no present inconvenience results to the company, is not a surrender of rights of property, and, indeed, to expel an occupant under such circumstances would be a needless and uncalled for injury." *R. R. v. McCaskill,* 94 N. C., 746.

In 33 Cyc., p. 191, note 30, citing *Ill. Central R. R. Co. v. Wathan,* 17 Ill. App., 582, it is held that a railroad company may permit its customers to erect elevators, corn cribs, etc., which facilitate its business.

In 33 Cyc., p. 393, note 23, citing *Michigan Central R. R. Co. v. Bullard,* 120 Mich., 416, it is held that a railroad may lease a portion of its right of way to a manufacturing company with a view of facilitating the securing of freight therefrom; *Gilliland v. Chicago, etc., R. R. Co.,* 19 Miss. App., 411, holding that a railroad company may lease a portion of its land for the erection of a grain elevator.

Same note cites *Roby v. N. Y. C. R. R. Co.,* 142 N. Y., 176, holding that a railroad company may lease a portion of its right of way for a coal yard and trestle, for the purpose of handling and receiving coal transported over the railroad company.

These propositions of law herein laid down were all presented by appropriate prayers for instruction, which the court failed to give.

Again, the learned judge inadvertently made the decision upon the issue of abandonment depend upon the conduct and intention of Fuquay, the grantor in the deed. This was clearly an error, and worked injustice to plaintiff. The issue should be determined by the acts of the railroad company, accompanied by its manifested intention to abandon.

The judge further instructed the jury that the Fuquay "deed did not allow but one right of way over Fuquay's land, and the railroad could not acquire a right of way except under that deed, and the law presumes that the railroad company acted under that deed, and (283) there is no evidence to the contrary."

That instruction is manifestly erroneous. Under the deed of 1898 the railroad company acquired only one right of way over Fuquay's land of a certain width, but, if its necessities or interests demanded it,

had a right to acquire other land by purchase from Fuquay or any one else, and to construct its main track on it. It had a right to retain and use its old right of way and track for a spur track, siding, or any other legitimate railroad purpose, and also to construct additional side-tracks on it if its increased business required it.

For the errors pointed out, there must be a

New trial.

HOKE, J., concurs in the result.

Cited: Power Co. v. Power Co., 175 N.C. 679 (2c); *Mann v. Board of Optometry Examiners*, 206 N.C. 855 (4c); *Furniture Co. v. Cole*, 207 N.C. 846 (2c); *Miller v. Teer*, 220 N.C. 612 (4c); *Bell v. Brown*, 227 N.C. 323 (4c).

CHARLES LASSITER v. SEABOARD AIR LINE RAILWAY.

(Filed 29 March, 1916.)

1. Railroads — Master and Servant — Negligence—Proximate Cause—Instructions—Appeal and Error.

The plaintiff, an employee of the defendant railroad company, was engaged at night in shoveling coal from one part of the tender of a locomotive to another, which was standing still, with evidence tending to show that he was injured while on the step, in leaving the cab, by a jar caused by another locomotive striking the one he was on, which approached without warning. *Held*, the jury might have inferred that the engines were being coupled for the purpose of moving the one he was on, and the question of negligence would then depend upon whether there was a jarring of unusual violence in such instances; or whether the train approached without warning; and while the fact that the jarring caused the plaintiff's injury would be some evidence of defendant's actionable negligence, it would be insufficient to establish as a matter of law; and, further, an instruction to that effect would be reversible error, in leaving out the element of proximate cause.

2. Courts—Instructions—Expression of Opinion—Corroboration.

Under the definition of the verb, to corroborate signifies, (1) to make strong or to give additional strength to; to strengthen; (2) to make more certain; to confirm, etc. Therefore, when the testimony of one witness tends to corroborate another on the trial of a cause, it is reversible error for the judge to instruct the jury that it corroborated his evidence, for it is for the jury to say whether or not it had done so.

APPEAL by defendant from *Peebles, J.*, at October Term, 1915, of WAKE.

Civil action brought to recover damages for personal injuries (284) alleged to have been caused by negligence of the defendant. The particular nature of the cause of action will appear from a recital of material parts of the testimony.

Charles Lassiter, the plaintiff, in his own behalf, testified: "I have lived in Raleigh about fifteen years, and worked most of that time in the city cemetery. I worked for the defendant for six nights in March of last year. I got hurt on the 23d of March, in the night. I hadn't worked any for the railroad before. They put me to shoveling coal at the coal pit. Leo Black was working with me. The man that worked on the h'ister sent me and Leo Black down to the engine to cut down the coal off the engine, and the engine was headed north, and we went down and cut the coal off the engine, and when we came out I got struck on the steps on the left side. We shoveled the coal from the back side of the tender to the front side of the tender. As near as I could guess, it was between midnight and day. I did not have any torch at all; Leo had one, but his went out. When we shoveled the coal from the back end of the tender to the front end, we shoveled it all on the tender; then we came back to the coal pit. That night, after shoveling the coal down, I started out of the tender. I started through the cab and down the steps on the left side. I was on the step. I had a jar from the engine when I was coming down the step. Well, it was a jar from another engine. It ran into us. It gave the engine a jar from back side of the tender; on back side at tender. The engine was headed north, and the tender was on the back side. I got hit on the left side by the jar from the steps when I was coming out and it ran in. It hurt me from my knee on up to my side. My knee struck against the steps. I didn't do nothing, but hollered and got down the best I could. Held on to the steps until I got so I could get down. When I started to go down and when this happened my engine had been standing still. I was not able to get out of bed the next day. I was disabled to work any at all for about four months. (Describes his injuries.) Nobody was in the engine with me and Leo Black. I did not know the other engine was going to strike the tender. It was dark and we could not see. No bell was rung and no alarm given at all. I am about 43 years old. I had never worked for the railroad before that time. This is down below the sand house on the Seaboard track. The man that runs the h'ister was the man we worked under. Of course, Mr. Pusey was the main boss man, but he put us under that man. He was the overseer over us, and we worked under his orders."

Leo Black, witness for plaintiff, testified: "I was working for the Seaboard at the time Charlie Lassiter got hurt. I and Charlie went down on the engine to work. It was a freight engine. We were

(285) ordered by the boss, but his name I do not know, and I and Charlie went down there, and I had a torch. We got up on the engine and cut the coal from the back to the front, and after we cut it, I went to pick up the torch and it went out, and we came through the cab, coming out on the left side—on the west—and the torch was out, and I came down first, and Charlie came down behind me, and after I got on the ground some one coupled up to the tender behind, and I could not see any light of the engine, and after he coupled up, Charlie hollered, and I walked on a step or two, and Charlie came up and said he got hurt, and I said where, and he said on his knee, and he went over to where James Gunter and Dave Haywood were. They were working on the ashpan, and he came up to the fire where we all sit, and he kept complaining, and on in the night he said his knee was swollen, and I never saw him any more until about morning; that's about time for us all to knock off, and he was still complaining with his knee, and the next night the boys came back to work, and they said he wasn't able to come back to work. I did not see him any more after he got hurt; he was hurt at the sand track. That was the usual place used to come down—where he got hurt. I didn't hear any signal before the engine struck the tender."

Q. "You say there was a blow when the engine struck the tender?" A. "Well, they coupled up behind, and it made a jar. It was only a jar; all I know, from coupling; just a jar. Of course, it was a hard blow. I don't know whether the engine that came up behind the tender was coupling or not. That's what I supposed. I didn't go around there to look to see whether they were coupled. I don't know who was on the engine. The hostler had been on the engine; I and he was; but he got off. The other engine was brought out there to be worked, I suppose, to go out on the road. They were both headed north. I never saw any one at the time but Charlie Lassiter. The engine that we were on was standing still, and the other came up behind it, and came up against it."

There was some evidence as to the nature and extent of plaintiff's injury, and as to damages, but it is not necessary to be stated.

Defendant requested the court to charge the jury as follows: "If the jury should find that the jar of the engine on which the plaintiff was employed was caused by coupling another engine to this engine, and that this coupling was made in the usual and proper manner, you will answer the first issue 'No.'" This prayer was refused, and defendant excepted.

The judge charged the jury as follows: "The plaintiff goes upon the stand and he says he was shoveling coal from one end of the tender to the end next to the engine, and there was nobody on the engine except another colored man named Leo Black, and when they had finished

shoveling the coal, and Leo had gotten down on the ground, that he went to get off the car; off the tender; and another engine (286) came up behind and butted against the tender and threw him against the steps of the car and injured him. And Leo Black goes upon the stand and corroborates him. The burden is upon the plaintiff as to that issue, and if you are satisfied by the greater weight of the evidence that those are the facts in the case, you will answer the first issue 'Yes.' But Mr. Kaylor is put upon the stand, and he says the defendant the next day, or day after, or two or three days after, when he came for his pay, said that the plaintiff said he went to get off moving engine and got hurt in that way. If he said that, and you find that to be a fact, you will answer the first issue 'No,' for if he undertook to get off an engine when it was moving, his own negligence was the proximate cause of the injury, and not the negligence of the railroad company." He also instructed the jury as to the measure of damages if the jury answered the first issue affirmatively.

There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

R. N. Simms for plaintiff.
Murray Allen for defendant.

WALKER, J., after stating the case: We do not think that the charge was a sufficient explanation of the law arising upon the evidence, as required by statute, Revisal, sec. 535. There was no statement to the jury as to what would constitute negligence under the circumstances or as to what in law would be considered as the proximate cause of an injury. The jury were told only that if the one engine "butted" against the other and injured the plaintiff, they would answer the first issue "Yes," that is, that there was not only negligence, but that it was the proximate cause of the injury, for both questions were involved in the issue. *Fry v. R. R.*, 159 N. C., 357; *McNeill v. R. R.*, 167 N. C., 390; *Treadwell v. R. R.*, 169 N. C., at 701. It is possible that an engine, while a coupling is being made, might butt against the other engine without it being the result of a negligent act on the part of those having control of the moving engine. A coupling produces more or less of a jar, and the engine on which the plaintiff had been shoveling the coal might have been shaken or jarred considerably without there being anything more than the making of an ordinary coupling, in a careful and proper manner. It was for the jury to say whether there was negligence or not. There was evidence of an admission by plaintiff that he was hurt by falling from a moving engine. This he denied, but the conflict in this respect was for the jury to settle. The jury might have inferred

that the engine had come up the track for the purpose of being coupled to the other engine which was to be moved to some other place, and that it was not merely a careless and unnecessary butting of the engine
(287) against the other for no purpose whatever. If the jury had found that one of the engines had butted against the tender of the other, this would be some evidence on the question of negligence, but was not necessarily negligence by itself, so as to justify a charge to that effect. It would depend upon the degree of violence with which it was done and upon other circumstances. The jury should have been instructed to find whether there was a violent jar, without any warning to plaintiff, and whether the injury was caused as he testified, his credibility being a question for the jury to consider. There was evidence of negligence, but it was not properly submitted to the jury. They should have been so instructed that they could have found whether or not the jar, under the circumstances, was caused by a negligent act, and not restricted to a single fact, which standing alone, did not amount to negligence.

We cannot approve an instruction, "that one witness corroborates another," as this is a question of fact to be decided by the jury. We said in *Withers v. Lane,* 144 N. C., at page 189: "Whether the plaintiff had in fact been contradicted or not was a question for the jury to decide, and not for the court, which might very properly have called attention to the apparent conflict in the testimony, and have explained to the jury the nature of the different kinds of evidence, and it may have been within the judge's province to have stated what the evidence on either side tended to prove, but he could not tell the jury what it actually did prove." The principle is the same in both cases. An intimation that one witness corroborates another is as harmful in its effect upon the jury as one that he contradicts another. One is practically the converse of the other. The approved definition of the verb "corroborate" is "(1) To make strong or to give additional strength to; to strengthen. (2) To make more certain; to confirm; to strengthen." Under any of these definition, whether we accept the primary or the secondary meaning, the instruction, in effect, told the jury that Leo Black's testimony strengthened or rendered more certain that of the plaintiff, whereas it is the province of the jury to judge of the weight of testimony and as to the effect of the testimony of one witness upon that of another. The reference to the testimony of Leo Black, in connection with the other instruction, rendered the latter more harmful. The tendency of certain testimony to corroborate a witness, and the fact of corroboration, are considered, in law, as two different things. It is for the jury and not for the judge to say how the testimony of a witness is affected by other testimony. *Swan v. Carawan,* 168 N. C., 472. The credibility of witnesses,

the weight and sufficiency of testimony, are matters peculiarly within the province of the jury to consider and pass upon.

We are of the opinion that the charge in the respects indicated was not an adequate one, and that the judge inadvertently expressed an opinion upon the weight of the testimony. There are other (288) questions, but they need not be considered, except the motion to nonsuit, which was properly overruled.

New trial.

Cited: Corporation Com. v. Trust Co., 193 N.C. 700 (1c); *Beck v. Hooks,* 218 N.C. 114 (2j).

ROBERT GADSDEN v. GEORGE H. CRAFTS ET AL.

(Filed 5 April, 1916.)

Contracts—Indemnity—Contractor—Liens—Negligence—Torts—Nonsuit.

An employee of a contractor to build a bridge for a railroad company sued the contractor, the railroad company, and the bonding company for the alleged negligence of the contractor and railroad company in causing a personal injury; and it appearing from the bond set out in the pleadings that it was solely to indemnify the railroad company against liens for labor and material, etc., used in the construction of the bridge, it is *Held,* that no liability could accrue to the railroad company arising out of the tort alleged, and that the motion of the bonding company to nonsuit should not only have been granted as to the plaintiff, but also as to the cross-bill filed by the railroad company, the codefendant.

APPEAL by Bonding and Insurance Company, one of defendants, from *Peebles, J.,* at February Term, 1916, of NEW HANOVER.

Herbert McClammy for Bonding Company.

Davis & Davis for A. C. L. R. R., defendant, appellee.

John D. Bellamy & Son for S. A. L. R. R., defendant, appellee.

CLARK, C. J. The complaint alleged that the plaintiff, an employee, had been injured by the negligence of the defendants, George H. Crafts & Co., contractors, and of the defendants Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Company, and in paragraph 9 alleged that the other defendant, the Massachusetts Bonding and Insurance Company, had issued a policy of insurance to the other defendants, or some of them, to secure them against loss or damage sustained

by them from liability to their employees, and charging that, therefore, said defendant the Bonding and Insurance Company was also liable. The latter company demurred to the complaint, and the court sustained the demurrer. The Bonding Company then asked the court to enter judgment dismissing it, which the court declined to do because it had not demurred to the cross-bill filed by the two railroad companies which averred the liability of the Bonding Company to them by reason of it being surety on the indemnity bond executed to them by the contractor.

The Bonding Company then demurred to the cross-bill, and the court sustained the demurrer. The defendant railroad companies were (289) then granted leave to amend their answer, and alleged that George H. Crafts & Co. were hopelessly insolvent. Thereupon the court overruled the demurrer to the cross-bill, and the Bonding Company excepted and appealed.

In this ruling there was error. The defendant Bonding Company was brought into court by the plaintiff and its demurrer sustained. There was no cause of action set out in the complaint against the Bonding Company, and no right of action could accrue against it in favor of the other two defendants, the railroad companies.

It is unnecessary to consider the legal proposition urged by the counsel for the railroad companies, for a reference to the bond set out in the pleadings executed by the Bonding Company shows on its face that it did not cover the cause of action alleged in the complaint. That cause of action, according to the complaint, was that George H. Crafts & Co., in building a railroad bridge for the two defendant companies was negligent, so that the plaintiff sustained the personal injuries alleged. The bond given to said railroad companies by George H. Crafts and the defendant Bonding Company recited as follows: that the said Crafts & Co. had "assumed obligations to the Seaboard Air Line Railway Company and the Atlantic Coast Line Railroad Company with respect to the construction and completion for account of said companies at Fourth Street, Wilmington, N. C., located substantially as shown on the blue-prints, and as expressed in the covenants of the contractor in said agreement contained, to which reference is hereby made for greater certainty as to the terms thereof"; and further, that "should the contractor well and truly comply with each and every of the covenants of the contractor in said agreement contained, and indemnify and save harmless the Seaboard Air Line Railway Company and the Atlantic Coast Line Railroad Company *against any and all labor, material, or other liens* placed upon said work by reason of any act, default, or omission of the contractor, or any agents, servants, or employees of the contractor, or otherwise on account of contractor, and should further indemnify and save harmless the Seaboard Air Line Railway Company

and the Atlantic Coast Line Railroad Company, as their respective interests may appear, in all other respects in said agreement provided for," then the obligation to be void; otherwise, to remain in full force and effect.

It will be seen that the contract of the Bonding Company could not be construed as embracing liability for personal injuries sustained by any employee by reason of the negligence of said contractor. Such liability is not "nominated in the bond," and does not come within the scope of the obligation of the Bonding Company, which covers matters affecting only the proper and faithful execution of the work, and against liens, and does not embrace liability for torts. The cross- (290) bill avers that the injury to plaintiff was caused by the negligence of the contractor in permitting the chute to become choked with cement. But this, if true, would only make the bond liable for loss of time or inferior work, and not for the tort causing injury to an employee.

The demurrer to the cross-bill filed by the railroad companies should have been sustained and the action dismissed as to said Bonding Company.

Reversed.

Cited: R. R. v. Drafts, 187 N.C. 564 (5c).

POWELL & POWELL, INC., ETC., ET AL. v. WAKE WATER COMPANY ET AL.

(Filed 5 April, 1916.)

Insurance, Fire—Cities and Towns—Water Companies—Equity—Subrogation—Contracts.

Where a citizen of a town has brought suit against the receiver of a water company for the alleged negligent failure of the water company to supply water under its contract with the city, by reason of which the plaintiff sustained loss by fire, and the plaintiff has collected moneys due under his policies with certain insurance companies on the same building insufficient to pay the damages he has sustained, and it appears that the receiver has sufficient funds: *Held,* the insurance companies are subrogated to the rights of the insured, and in this case the order of the Superior Court is sustained, that the insurance companies have made out a *prima facie* case against the receiver of the insolvent water company, and that they be permitted to sue him, MR. JUSTICE ALLEN writing the opinion of the Court, MR. CHIEF JUSTICE CLARK concurring; MESSRS. JUSTICES BROWN and HOKE not sitting, and MR. JUSTICE WALKER dissenting upon the grounds stated in his dissenting opinion in *Morton v. Power and Light Co.,* 168 N. C., 582.

APPEAL by defendant from *Peebles, J.*, at December Term, 1915, of WAKE.

This is an appeal from an order allowing certain insurance companies to institute an action against the receiver of the Wake Water Company that was under contract, at the time of the injuries complained of, to furnish the city of Raleigh and its inhabitants with water and to perform other obligations.

It is alleged in the petition that the property of the News and Observer Company was destroyed by fire on account of the negligence of the water company; that at the time of the loss the property was insured in the companies of the petitioners; that the amount of the insurance has been paid to the publishing company, and that the receiver has settled the claim of the publishing company in excess of the

(291) insurance.

The receiver denies negligence, but contends that if this is established there is no right of action in the insurance companies, for the following reasons:

1. That under the contract between said Wake Water Company and the city of Raleigh, a copy of which is attached to said order, it is provided as follows:

The said water company "shall hold the said city harmless from any and all damages arising from negligence or mismanagement of said water company, or its employees in constructing, extending, or operating said works."

That this contract in effect provides that the water company will indemnify and hold harmless the city, and that by its terms the water company was dealing exclusively with the city and was accountable only to it, and that the city only must sue for its breach. Therefore, there was no cause of action in the News and Observer Publishing Company, and consequently none in the petitioning insurance companies, who claim under the News and Observer Publishing Company.

2. That if there was any cause of action in the News and Observer Company for the alleged breach of said contract, the entire and sole cause of action was in said publishing company, and the right of recovery for the entire damage caused by the water company was in the News and Observer Publishing Company, and the fact that the News and Observer Publishing Company had insurance covering a part of its alleged loss and had collected said insurance was not a defense available to the water company when sued by the publishing company, but the News and Observer Publishing Company held any amount collected from the Wake Water Company as trustee for the insurance companies after it was fully compensated; therefore, the compromise approved by court of the suit brought by the News and Observer Publishing Com-

pany, "the *dominus litis*," and the release executed by the publishing company, in the absence of any allegation or suggestion of fraud, was a bar to the prosecution of any suit by the insurance companies, the said release by the News and Observer Publishing Company being as follows:

$12,500. RALEIGH, N. C., 15 December, 1914.

Received of William B. Grimes, receiver of Wake Water Company, the sum of $12,500 in full settlement, satisfaction, and discharge of all claims and demands of the News and Observer Publishing Company against W. B. Grimes, John A. Mills, and Fred C. Boyce, Jr., receivers of Wake Water Company, and the Wake Water Company, or any of them, and of the order of Wake Superior Court, directing the payment of said sum to said publishing company and of all things required of W. B. Grimes, John A. Mills, and Fred C. Boyce, Jr., receivers of Wake Water Company, and the Wake Water Company, or any of (292) them, pursuant to the paper-writing of compromise, release, and indemnity dated 9 December, 1914, and signed by said News and Observer Publishing Company.

THE NEWS AND OBSERVER PUBLISHING COMPANY,
By W. H. BAGLEY, *Business Manager.*
JONES & BAILEY,
Attorneys for the News and Observer Publishing Company.

3. That the said insurance companies knew at the time they made payment of the loss under their policies, to wit, on 12 September, 1913, that said water company was in the hands of a receiver, and that the News and Observer Publishing Company had brought suit against the receiver of the Wake Water Company for the damages by reason of the alleged negligent failure to furnish water and pressure, and none of said petitioning insurance companies applied to be made parties, and said suit was not compromised until December, 1914, and none of said insurance companies asked leave to sue until January, 1915, or filed with said receiver any claim until 23 November, 1915, after said compromise and settlement had been carried out and the $12,500 paid under the order of the court by its receiver, though said insurance companies knew on 27 May, 1913, that the water company was in the hands of a receiver, and the time for filing claims expired 15 July, 1913, and under the facts as found by the court the said insurance companies have no right of action against the water company or its receiver, and said insurance companies have been negligent in asserting their pretended claims.

4. That the loss by said fire to the property covered by all insurance policies was appraised and adjusted by said insurance companies in

May, 1913, at $41,265.50, and the total insurance in force and paid was $26,901.24, which, added to the $12,500 collected from the water company by the compromise approved by the court, amounts to $39,401.24, which is about $2,000 less than the loss to the property covered by all insurance, and the News and Observer Publishing Company alleges its total damage was $110,951.48. The insurer has no right of subrogation until the insured is fully indemnified. The News and Observer Publishing Company was asserting a $100,000 claim against the water company; the water company and its receivers were denying any liability. The News and Observer Publishing Company was afraid it would get nothing; the water company was afraid it would have to pay the full $75,000 for which the News and Observer was authorized to bring suit; the suit was pending a year and a half, and each side, acting for what it considered its best interest, compromised for $12,500, which was approved by the court. The water company insists that it compromised with "the lord of the litigation," and it compromised all matters growing out of the fire, and that under the facts it should not be sub-
(293) ject to the cost and expense of another suit. If this course is permitted, the other companies who paid the additional $12,000 of insurance not embraced by this order may later separately and jointly apply for leave to sue, and the water company will be subjected to the cost and expense of three or more suits for one alleged tort—which is against the settled principle of the law, "that a defendant shall not be subjected to two actions by different parties for the same wrong."

5. That the insurance companies ought not to sue, for that it was found as a fact that they had not paid the full value of the loss to the property insured, and until the total loss is paid, the right of action is in the insured and the right of the insurer must be worked out through the insured and the insurer can and must take timely action to protect its rights.

6. That neither said publishing company nor any of said insurance companies were parties or privies to said contract between said water company and said city of Raleigh, and hence none of them have any right to sue said water company or its receiver.

The following order was made upon the petition to sue, in which appears the findings of fact of his Honor:

Upon consideration of the petition of the Orient Fire Insurance Company of Hartford, Conn., the Virginia Fire and Marine Insurance Company, Springfield Fire and Marine Insurance Company, the Hartford Insurance Company, New York Underwriters Agency, British-American Assurance Company, the Dixie Fire Insurance Company, the Sun Insurance Company, Niagara Insurance Company, Fire Association of Philadelphia, Pennsylvania Fire Insurance Company, for leave to sue

the receiver of the Wake Water Company heretofore appointed by order of this court, it is considered and ordered, after considering the petition, the answer filed, and the argument of counsel, that the said petitioners have leave of the court to sue the receiver of the Wake Water Company and to bring one independent action against said receiver, joining in one action their demands and causes of action against the said receiver.

It is further ordered that the said petitioners give bond in the sum of $1,000 to secure the costs to be incurred by the receiver in the defense of said action, with surety approved by the clerk of this court, if it shall be finally adjudged that the said petitioners are required to pay said costs.

The said court, being requested by attorneys for receiver of Wake Water Company to find the facts, does find the following facts:

That W. B. Grimes was appointed receiver of the defendant Wake Water Company on 29 August, 1912, and at once qualified and entered upon the discharge of his duties as such receiver.

That pursuant to order of court in said action, a notice was (294) published in the *Baltimore Sun* and in the *Raleigh Evening Times* for twenty days commencing 30 May, 1913, notifying all parties having claims against the said water company or the receiver thereof to file the same with said receiver on or before 15 July, 1913, and further giving notice that all parties who failed to so file their claims would be barred from participating in the distribution of the assets of said water company, a copy of which notice is attached to the amended answer to the petition herein.

That the petitioners above named had issued policies of fire insurance upon the property of the News and Observer Publishing Company, situated in the city of Raleigh, N. C., which property was destroyed or damaged by fire on 24 April, 1913, and that the petitioners paid to the said News and Observer Publishing Company several amounts aggregating $4,995.50, and that the said petitioners filed with the receiver an itemized statement of said amounts on 23 November, 1915.

That heretofore, to wit, in July, 1913, the News and Observer Publishing Company brought suit, by leave of this court granted, against the receiver of the Wake Water Company, and in the complaint filed 21 November, 1913, in said action it was alleged that the News and Observer Publishing Company carried insurance upon the property damaged and destroyed by fire to the amount of $26,901.24, and the defendants in said action in answer filed admitted the fact of insurance, but denied upon information and belief the amount thereof.

That the said publishing company alleged in its complaint the value of the property destroyed to be $110,951.48, and prayed judgment for the difference, $89,050.24, a copy of which said complaint is attached

to said amended answer. That thereafter in said action the plaintiffs and the defendants comprised the matters involved in said litigation, and a judgment was entered at the December Term, 1914, of this court dismissing the action brought by the plaintiff and adjudging that each party pay its costs, the matters and things having been settled by agreement; and in this action as above entitled an order was made approving the settlement between the News and Observer Publishing Company and the receivers of the Wake Water Company and the payment of $12,500 by the said receiver to the said News and Observer Publishing Company in settlement of the demands of the said News and Observer Publishing Company, a copy of which release is attached to said amended answer; but that previous thereto, to wit, in September, 1913, the petitioners received from the said News and Observer Publishing Company a subrogation contract in the form a copy of which is attached.

That none of said insurance companies applied to be made parties to the suit brought by said publishing company.

(295) That the loss by said fire to the property covered by all insurance policies was appraised and adjusted by said insurance companies on 27 May, 1913, at $41,265.50, and that settlement subsequently made by said insurance companies was made upon that appraisement and adjustment.

That said insurance companies at the time of such appraisement and adjustment knew that said water company was in the hands of a receiver, and at the time of the payment by them of the loss under their policies on 12 September, 1913, knew that said water company was in the hands of a receiver, and that said publishing company had brought suit against the receiver of said water company for damages by reason of alleged negligent failure to furnish water and pressure to extinguish said fire.

That the contract between the Wake Water Company and the city of Raleigh was made in 1906, a copy of which is attached hereto, and that the first five of said petitioners filed a petition in this action to be allowed to sue the receiver in January, 1915, and the same had been continued from time to time to this term of court, and the rest of said petitioners filed petition for leave to sue on 23 November, 1915.

Upon the foregoing facts the court finds that the petitioners have a *prima facie* cause of action and right of action against the receiver. And it is further found as a fact by the court that the receivers of the Wake Water Company have not yet distributed all the funds in their hands arising from the sale of the property of the said Wake Water Company, but they now have in hand sufficient funds to meet the demands of the petitioners.

This order is made without prejudice to any defense which the Wake Water Company or the receiver thereof or any of the defendants herein may see fit to interpose to any of said proposed suits.

R. B. PEEBLES,
Judge Presiding.

The receiver excepted and appealed.

Manning & Kitchin for plaintiffs.
Ernest Haywood and Winston & Biggs for defendants.

ALLEN, J. The provisions in the contract between the city of Raleigh and Wake Water Company upon which the receiver relies to take this case out of the principle adopted in *Gorrell v. Water Co.*, 124 N. C., 328, are in substance the same as those in the contracts considered in *Jones v. Water Co.*, 135 N. C., 553, and *Morton v. Water Co.*, 168 N. C., 582, and we therefore hold, following these authorities, that the News and Observer Publishing Company had a right of action against the defendants as receivers of the Wake Water Company upon the allegations of negligence contained in the petition.

If so, have the petitioners, the insurance companies, who have (296) paid the loss in part, any interest in this right of action which can be maintained in their own name?

When property, upon which there is insurance, is destroyed or damaged by the wrongful act of another, the liability of the wrong-doer is primary and that of the insurer secondary, not in order of time, but in order of ultimate liability; the right of action is for one indivisible wrong, and this abides in the insured, through whom the insurer must work out his rights upon payment of the insurance, the insurer being subrogated to the rights of the insured upon payment being made. *Hall v. R. R.*, 80 U. S., 367; *R. R. v. Jurey*, 111 U. S., 595; *Phœnix Ins. Co.*, 117 U. S., 321; *R. R. v. Ins. Co.*, 139 U. S., 235.

"The right (of subrogation) arises not out of the contract between the insured and the insurer, but has its origin in general principles of equity" (14 Mod. Am. L., 159), and in this respect the standard form of policy, which has been adopted by legislative enactment (Rev., sec. 4760), in making provision for subrogation, is but declaratory of principles already existing.

The great weight of authority is in favor of the position of the receiver, that when the loss exceeds the insurance, as the cause of action is indivisible and the right of the insurer is not because of any interest in the property destroyed or damaged, and is enforced upon the equitable principle of subrogation, the action must be brought by and in the name of the owner of the property, and that he is entitled to

recover the entire damages, without diminution on account of the insurance, and that he holds the recovery first to make good his own loss, and then in trust for the insurer; but if the insurance paid equals or exceeds the loss or damage, as the insured in that event has no further beneficial interest, the insurer is entitled to be subrogated to the entire cause of action of the insured, and the action may be maintained in the name of the insurer or of the insured to the use of the insurer. *Ins. Co. v. Oil Co.*, 59 Fed., 987; *R. R. v. Pullman Co.*, 139 U. S., 87; *Ex Parte Ins. Co.*, 86 S. C., 54; *Ins. Co. v. Frost*, 37 Ill., 335; *Ins. Co. v. R. R.*, 25 Conn., 277; *Ins. Co. v. Lainsburg*, 3 Doug., 245; *Ins. Co. v. Mosher*, 39 Me., 256; *Ins. Co. v. R. R.*, 41 S. C., 412; *Ins. Co. v. L. Co.*, 93 Mich., 139; *Ætna Ins. Co. v. Hannibal*, 3 Dill., 1; *Hart v. R. R.*, 54 Mass., 108; *Swarthout v. R. R.*, 49 Wis., 629; *R. R. v. Loker*, 68 Kan., 244; *Ins. Co. v. R. R.*, 20 Ore., 269; *Rankin Co. v. R. R.*, 82 Vt., 390; *R. R. v. Shutt*, 24 Okla., 102; *R. R. v. Blount*, 165 Fed., 261; *Tel. Co. v. Watts*, 66 Fed., 460; *Hampton v. Power Co.*, 124 La. Ann., 570; 19 Cyc., 893 and notes.

The case from Kansas is also reported in 1 A. and E. Anno. Cases, 883, and the case from Vermont in 18 A. and E. Anno. Cases, 708, where there are full notes collecting the authorities.

(297) The controlling principles and the conclusions reached by the courts are stated accurately in the first case cited from the Circuit Court of Appeals as follows:

"When an insurance company pays to the insured the amount of a loss of the property insured, it is subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. This right of the insurer against such other person is derived from the assured alone, and can be enforced in his right only. At common law it must be asserted in the name of the assured. In a court of equity or of admiralty, or under the modern codes of practice, it may be asserted by the insurance company in its own name, when it has paid the insured the full value of the property destroyed. *St. Louis, I. M. and S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S., 223, 235, 11 Sup. Ct., 554, and cases cited; *Marine Ins., Co. v. St. Louis, I. M. and S. Ry. Co.*, 41 Fed., 643. But the rule seems to be well settled that when the value of the property exceeds the insurance money paid, the suit must be brought in the name of the assured. *Ætna Ins. Co. v. Hannibal and St. J. R.. Co.*, 3 Dill., 1, Fed. Cas., No. 96; *Assur. Co. v. Sainsbury*, 3 Doug., 245; *Ins. Co. v. Bosher*, 39 Me., 253; *Hart v. R. R. Corp.*, 13 Metc. (Mass.), 99; *Connecticut, etc., Ins. Co. v. New York, etc., R. Co.*, 25 Conn., 2, 65, 278; *Insurance Co. v. Frost*, 37 Ill., 333; Fland Ins., pp. 360, 481, 591; *Marine Ins. Co. v. St. Louis, I. M. and S. Ry. Co., supra.* In such an action the assured may re-

cover the full value of the property from the wrong-doer; but as to the amount paid him by the insurance company he becomes a trustee, and the defendant will not be permitted to plead a release of the cause of action from the assured or to set up as defense the insurance company's payment of its part of the loss. *Hart v. R. R. Corp., supra; Hall v. R. R. Co.,* 13 Wall., 367. In support of this rule it is commonly said that the wrongful act is single and indivisible and can give rise to but one liability. "If," says *Judge Dillon* in *Ætna Ins. Co. v. Hannibal and St. J. R. Co., supra,* "one insurer may sue, then, if there are a dozen, each may sue; and if the aggregate amount of all the policies falls short of the actual loss, the owner could sue for the balance. This is not permitted, and so it was held nearly a hundred years ago, in a case whose authority has been recognized ever since both in Great Britain and in this country."

The cases of *Ins. Co. v. R. R.,* 132 N. C., 75, and *Cunningham v. R. R.,* 139 N. C., 427, belong to this latter class, as in each the insurance was equal to or exceeded the loss.

It is also generally held that there is no right to subrogation until the insurance is paid, and that when the right once attaches it cannot be destroyed or extinguished by a release or discharge executed by the insured. *Ins. Co. v. Oil Co.,* 59 Fed., 987; *Hart v. R. R.,* 54 Mass., 100; *Ins. Co. v. R. R.,* 73 N. Y., 405; *Swarthout v. R. R.,* (298) 49 Wis., 628; *Ins. Co. v. Hutchinson,* 21 N. J. Eq., *R. R. v. Ins. Co.,* 59 Kan., 435.

"After the loss has been paid by the company, the wrong-doer, having knowledge of the fact, cannot make settlement with the insured for the loss, his liability being to the company to the extent of the insurance paid." 19 Cyc., 895, and cases in note.

"In regard to the right of the insurance company to sue in the name of the assured, we think the cases fully affirm the position that by accepting payment of the insurers the assured do impliedly assign their right of indemnity from a party liable to the assured. It is in the nature of an equitable assignment, which authorizes the assignee to sue in the name of the assignor for his own benefit; and this is a right which a court of law will support, and will restrain and prohibit the assignor from defeating it by a release. The formal discharge, therefore, given by the nominal plaintiffs, is not a bar to the action." *Hart v. R. R.,* 54 Mass., 100.

"The courts have likewise been very firm in supporting the right of the insurance company to bring an action in the name of the assured, and will not allow the latter to defeat such action, even by a release or discharge of the person by whose act the damage was occasioned." *Swarthout v. R. R., Wis.,* 628.

"It is also settled that if the railroad company had not paid Hutchinson his damages, or had paid them to him, knowing that he had received the amount insured from the complainants, that they are liable to the complainants in a suit at law, which they have the right to bring in the name of Hutchinson, without his consent, to repay them the damages to the amount of the sum paid by them, and that a release by Hutchinson would be no defense to such suit." *Ins. Co. v. Hutchinson,* 21 N. J. E.

The case from New York is in many respects like the one before us. There the loss was greater than the insurance, and the owner settled with the wrong-doer for the difference between the value of the property and the insurance, reserving the right to the insurance, and executed a release, and it was held that the insurer could maintain his action; and the reasoning in the case from Kansas on a similar state of facts leads to the same result.

It would seem, therefore, that the following principles are established:

1. That the right of action to recover damages from the wrong-doer is in the insured, and that this right of action is one and indivisible.

2. That upon payment of the insurance the insurer is subrogated to the rights of the insured as against the wrong-doer.

(299) 3. That if the insurance is equal to or exceeds the loss, this right of subrogation extends to the whole right of action in the insured, and operates as an equitable assignment, and the action may thereafter be prosecuted in the name of the insurer.

4. That if the insurance is less than the total loss, the right of subrogation still exists; but as the right of action is indivisible, and as the insurer has only paid a part of the loss and is not entitled to an assignment of the whole cause of action, the action must be prosecuted in the name of the insured.

5. That a release by the insured does not extinguish the right of subrogation.

They also seem to establish the proposition that if the insurance is less than the loss, and the insured has settled the difference between the insurance and the total loss with the wrong-doer, leaving unsettled only the amount of damages, measured by the insurance, that the cause of action for this damage would be in the insurer, for the reason that the insured has parted with all beneficial interest in the right of action, and, while the cause of action was indivisible, it has been divided by the act of the parties.

Applying these principles, we are of the opinion that there is no error in granting the prayer of the petitioners, as it appears that the News and Observer Publishing Company alleged in its complaint

against the receiver of the Wake Water Company that the value of the property destroyed was $110,951.48, that the insurance on the same amounted to $26,901.24, and that it asked for judgment for the difference between the two amounts; and it further appears that the claim of the publishing company has been settled with knowledge of the payment of the insurance.

The receiver has the right to be relieved from a multiplicity of suits, and the petitioners or the receiver may require all insurance companies that have participated in the payment of the loss to the publishing company to be made parties to the action.

This opinion is based on the facts alleged in the petition, as the petitioners are not now required to do more than make out a *prima facie* right to sue.

We make no intimation on the issue of negligence, which the petitioners must establish, as none of the evidence bearing upon negligence is before us.

We further reserve the question of laches, and whether the right to subrogation may prevail as against the owner of bonds secured by mortgage or trust deed, until the facts are fully developed.

Affirmed.

WALKER, J., dissenting: In *Morton v. Water Co.*, 168 N. C., (300) 582, I dissented upon the ground that no recovery could be had by any one but the city with whom the contract for a supply of water was made; and for the same reasons as are fully stated in the opinion filed by me in that case, I must dissent from the judgment in this case. If I could think that there is any cause of action for the alleged wrong, it may be that I would concur in the views of the Court as stated by JUSTICE ALLEN upon the other questions involved.

BROWN and HOKE, JJ., did not sit on the hearing of this case.

Cited: Howland v. Asheville, 174 N.C. 753 (d); *Potter v. Lumber Co.*, 179 N.C. 140 (c); *Ins. Co. v. R. R.*, 179 N.C. 261 (c); *Ins. Co. v. R. R.*, 179 N.C. 292 (c); *Ins. Co. v. Lumber Co.*, 186 N.C. 270, 271 (c); *Underwood v. Dooley,* 197 N.C. 106 (c); *Wallace v. Benner,* 200 N.C. 130 (c); *Buckner v. Ins. Co.*, 209 N.C. 647 (c); *Ins. Co. v. Motor Lines,* 225 N.C. 590, 591 (c); *Fleming v. Light Co.*, 229 N.C. 405 (c).

T. N. MAULTSBY AND WIFE v. ANNA J. BRADDY ET AL.

(Filed 5 April, 1916.)

Processioning—Amendments—Title—Adverse Possession—Evidence.

Where in proceedings under the processioning act the line of one of the parties is called for in a deed under which the other claims, and on appeal in the Superior Court an amendment to the pleadings was allowed setting up title by adverse possession under color and otherwise to a certain marked line of division, the effect was to put at issue the title to the strip of land in dispute, and testimony of such possession is competent either on the direct issue as to title or on the issue as to correct location of the present dividing line.

PROCEEDINGS instituted before the clerk under the processioning act and heard on appeal before *Whedbee, J.*, and a jury, at October Term, 1915, of BLADEN.

From an examination of the record it appears that a tract of land, 337 acres, was formerly owned by G. R. Dixon, and in 1863 he conveyed 100 acres of it to defendant Anna J. Braddy, describing same by metes and bounds; that later said Dixon conveyed the remainder of the land to R. M. Devane, and he in turn conveyed to plaintiff, the description calling for the Braddy deed. On proceedings instituted before the clerk to determine the true location of the divisional line there was judgment for plaintiff, and defendant appealed. In the Superior Court defendant, by leave of court, entered a plea of "twenty years open, notorious, continuous, adverse possession of the strip of land in dispute between the parties," and also a plea of such possession for twenty-one years under color of title and up to known and visible lines and boundaries, etc., and in support of her claim testified, among other things, that soon after she bought the land, on inquiry, she
(301) was told by the surveyor that the dividing line was as she now claimed it to be, and she then put a fence on the line and kept it up for over thirty years, and had been in possession of the land, asserting ownership to the bringing of this suit, using the same in every way of which is was susceptible, etc.

On issue submitted, the following verdict was rendered:

1. What is the true dividing line between the lands of plaintiff and defendant? Answer: "We establish the line from B to C and thence the nearest course to the river."

Substantially the line as claimed by plaintiff, defendants insisting that the dotted line, E, F, G, was correct.

His Honor, among other things, charged the jury that "There is no evidence of possession on the part of either party, and you will not consider that aspect of the case."

Judgment for plaintiffs, and defendants excepted and appealed.

T. Bayard Clark for plaintiffs.
H. L. Lyon and George H. Braddy for defendants.

HOKE, J., after stating the case: The effect of defendant's plea, in our opinion, was to put in issue the title to the strip of land in dispute between the parties, and, in such case, the Court has recently held that a judgment will operate as an estoppel both on the title and as to the correct location of the line. This being true, we are of opinion that the defendant was entitled to have her testimony, tending to show actual adverse and continuous occupation for thirty years and over, considered by the jury, either on a direct issue as to title or on the issue as to the correct location of the present divisional line. See *Whitaker v. Garren,* 167 N. C., 658; *Woody v. Fountain,* 143 N. C., 66.

For the error indicated, defendant is entitled to a new trial, and it is so ordered.

New trial.

Cited: Hilliard v. Abernethy, 171 N.C. 646 (c); *Nash v. Shute,* 182 N.C. 531 (d).

O. C. FAULK ET AL. V. FRATERNAL MYSTIC CIRCLE ET AL.

(Filed 5 April, 1916.)

1. Insurance—Fraternal Orders—Suits Within Year—Valid Provisions—Statutes.

Provisions of the constitution and by-laws of a fraternal order of insurance, that suits shall not be brought or maintained for any cause or claim arising out of the benefit certificate of a member unless within one year from the time the right of action accrues, are valid, and not contrary to Revisal, sec. 4809.

2. Same—Amendments—Policy Contracts.

Where a certificate of membership in one insurance order is taken over and continued by another such order, with provision as to each that the holder shall be bound by any changes in the constitution and by-laws, and thereafter the order taking over the certificate amends its constitution and by-laws at a representative meeting so as to bar a suit or action unless brought within a year from the time the cause of action accrued, the amendment is valid and binding upon the holder of the certificate, though no such provision existed at the time he became a member of either order.

(302) APPEAL by both parties from *Whedbee, J.*, at December Term, 1915, of ROBESON.

McLean & McKinnon for plaintiff.

A. C. Davis and McLean, Varser & McLean for defendant.

CLARK, C. J. The plaintiff held a benefit certificate from the defendant "Mystic Circle." The only question presented by the plaintiff's appeal is the validity of section 5 in the constitution and by-laws of the defendant company: "No action at law or in equity, in any court, shall be brought or maintained on any cause of claim arising out of the membership or benefit certificate unless such action is brought within one year from the time when such right of action accrues." It was admitted that this provision was in force for more than one year prior to the beginning of this action, and that the plaintiff's cause of action, if he has any, accrued more than twelve months prior to the beginning of this action.

In *Heilig v. Ins. Co.*, 152 N. C., 358, this provision was held valid, the Court holding that a stipulation in insurance policies limiting the time in which actions to recover for loss covered by the policy can be begun is not contrary to Revisal, 4809, if the time limited is not less than one year, as provided in that section. That decision cites many cases in this Court upholding such stipulation. Among our own authorities to this effect, as cited in the above case, are *Modlin v. Ins. Co.*, 151 N. C., 35; *Parker v. Ins. Co.*, 143 N. C., 339; *Gerringer v. Ins. Co.*, 133 N. C., 407; *Lowe v. Accident Assn.*, 115 N. C., 18; *Muse v. Assurance Co.*, 108 N. C., 240. In Vance on Insurance, sec. 191, are citations in the Notes to a large number of cases in other States to the same effect.

The cases cited by the defendant do not contravene this ruling. *Bragaw v. Lodge*, 128 N. C., 354, presented an entirely different proposition. In *Makeley v. Legion of Honor*, 133 N. C., 367, the defendant attempted to reduce the amount of indemnity, and *Johnson v. Reformers*, 135 N. C., 385, was to the same purport.

The plaintiff contends that the provision limiting the time to one year within which the action can be brought is invalid because it was
(303) not in the constitution and by-laws of the American Guild when he took out his benefit certificate in 1897, and that it was not in the constitution and by-laws of the Mystic Circle, 27 May, 1907, when he accepted this benefit certificate from it in lieu of the certificate of the American Guild. But in the constitution and by-laws of both of these companies at the time the plaintiff accepted the certificates, respectively, from them, was a provision that the holder of certificates should be bound by the provisions of the constitution and by-laws at

the time of the issuance of the certificates, or that might thereafter be enacted by them, and that these should constitute part of the contract between the plaintiff and such companies, respectively, thereby expressly incorporating all provisions of the constitution and by-laws enacted at any time during the life of any of the certificates which are thereby made a part of such certificates.

It appears from the evidence and the constitution and by-laws set up in this case that this amendment was enacted by a representative body called the "Supreme Ruling," composed of representatives from each State jurisdiction, and each State jurisdiction was composed of representatives from each local lodge, and that the local lodge members participated in the election of these representatives. Such provision was, therefore, binding upon the plaintiff, being within the stipulation, unless it was clearly shown to be unreasonable, and that could not be done, since it is in conformity with the limitation authorized by Revisal, 4809.

DEFENDANT'S APPEAL.

This action was for the recovery of the premiums paid by the plaintiff on the certificate issued to him by the defendant, claiming that the defendant had wrongfully refused to accept further premiums from the plaintiff and had illegally discontinued the policy of insurance. The court directed a verdict in favor of the plaintiff upon the evidence, subject to above ruling in plaintiff's appeal, and the defendant appealed.

In view of the decision on the plaintiff's appeal, sustaining the judgment against the plaintiff it is unnecessary to consider this appeal.

Defendant's appeal dismissed.

In the plaintiff's appeal, no error.

Cited: Tatham v. Ins. Co., 181 N.C. 434 (1c); *Beard v. Sovereign Lodge*, 184 N.C. 157 (1c); *Spearman v. Burial Assn.*, 225 N.C. 187 (2c).

W. M. OLIPHANT v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 5 April, 1916.)

1. Jurors—Employees—Qualification.

An employee in the legal department of a corporation, a party to the suit, is not qualified to sit as a juror upon the trial.

2. Jurors — Peremptory Challenges — Qualifications—Prejudicial Error—Appeal and Error.

Where a party to the litigation has exhausted his last peremptory challenge to a juror under the erroneous ruling of the court that the juror

was qualified, and then attempts to challenge peremptorily another juror, which is forbidden by the court upon the ground that he had already exhausted his peremptory challenges, it constitutes reversible and not harmless error.

3. Jurors—Peremptory Challenges—Reasons—Prejudicial Error—Appeal and Error.

A party litigant exercises his right to the peremptory challenges to the jury given him, without being required to state his reason; and where he has been denied this right to his prejudice by the erroneous ruling of the court as to the qualification of a juror, it cannot be maintained by the adversary party that his object was only to test the correctness of the ruling.

(304) APPEAL by plaintiff from *Peebles, J.*, and a jury, at February Term, 1916, of NEW HANOVER.

Civil action for damages for personal injuries, alleged to have been caused by the negligence of the defendant.

The jury answered the issue as to negligence "No." Plaintiff appealed.

A. G. Ricaud, L. C. Grant, W. F. Jones for plaintiff.

Davis & Davis for defendant.

BROWN, J. During the selection of the jury one Darden was challenged by plaintiff for cause. Upon examination he stated he was an employee of defendant, being a clerk in its legal department. The court overruled the challenge. Plaintiff excepted and challenged the juror peremptorily. This exhausted the plaintiff's four peremptory challenges. Plaintiff afterwards challenged juror Clayton and the court overruled the challenge, holding that the plaintiff's peremptory challenges were exhausted when Darden was stood aside. Plaintiff excepted.

There was error in not sustaining the challenge for cause to juror Darden. This Court has repeatedly held that an employee of a defendant is not a competent and qualified juror. *Blevins v. Cotton Mills,* 150 N. C., 493; *Featherstone v. Cotton Mills,* 159 N. C., 429; *Walters v. Lumber Co.,* 165 N. C., 388; *Starr v. Oil Co.,* 165 N. C., 587; *Norris v. Mills,* 154 N. C., 474.

If the plaintiff had not attempted to challenge peremptorily after Darden had been stood aside by a peremptory challenge, he could not review the ruling of the judge upon the cause assigned, for the error would have been harmless. *S. v. Cockman,* 60 N. C., 485.

But inasmuch as he afterwards challenged Clayton peremptorily, and the court erroneously held that his peremptory challenges had (305) been exhausted with Darden, the ruling was not harmless, for it

deprived plaintiff of one peremptory challenge. But it is contended that plaintiff challenged Clayton without any real objection to the juror, solely to give him the right to review the ruling of the court in respect to Darden's eligibility. A party's reason for challenging a juror peremptorily cannot be inquired into. The law gives the litigant the right to object to a number of jurors without assigning cause. *Dupree v. Ins. Co.*, 92 N. C., 419.

The rule is well stated in *Dunn v. R. R.*, 131 N. C., 448, as follows: "It is true, a party's right is not to select but to reject a juror, and, therefore, no exception will lie to the rejection of a juror by the other side unless it is prejudicial to himself. But that appears here, for the defendant, having exhausted his peremptory challenges in perusing the jury, when the peremptory challenge of the plaintiff was thereafter allowed the defendant was deprived of the right to challenge peremptorily the new juror put in his place. The defendant was not improvident in having exhausted its peremptory challenges in the perusal of the panel. It was not necessary for the defendant to show grounds of a challenge for cause to the new juror. It is enough that he could not challenge him peremptorily."

Besides, the plaintiff may have desired to use the peremptory challenge on some juror following Clayton. After his Honor's ruling that all his peremptory challenges were exhausted, plaintiff was not called upon to attempt to challenge. After challenging Clayton peremptorily and noting his exception, he properly observed the judge's ruling.

New trial.

Cited: Carter v. King, 174 N.C. 550 (2c); *S. v. Levy,* 187 N.C. 586 (1c); *S. v. Levy,* 187 N.C. 587 (2c); *Peanut Growers Exchange v. Bobbitt,* 188 N.C. 336 (1c); *S. v. Bost,* 189 N.C. 643 (2c); *Fulcher v. Lumber Co.,* 191 N.C. 410 (1c); *S. v. Avant,* 202 N.C. 684 (2cc); *S. v. Koritz,* 227 N.C. 555 (2c).

THE CITY OF DURHAM v. MRS. LELIA G. DAVIS.

(Filed 5 April, 1916.)

1. Costs—Attorney and Client—Attorney's Fees—Condemnation—Statutes—Appeal and Error.

The losing party in an action may not be taxed with attorney's fees of the successful party (Revisal, sec. 2587) unless authorized by section 2592 of the Revisal, which applies when attorneys are appointed by the court to appear for and protect the right of any party in interest who is unknown or whose residence is not known and who has not appeared by attorney

or agent. Hence, in condemnation proceedings of land, brought by a city, it is reversible error for the court to allow, as a part of the costs, attorney's fees to the owner of the land, the successful party, who has appeared by an attorney retained by him.

2. Judgments—Verdict—Interest—Appeal and Error.

The judgment in an action must correspond with the verdict, and where in condemnation proceedings tried in the Superior Court on appeal the jury have in their verdict ascertained the damages to the owner of the land, the verdict will be presumed to include the element of interest, nothing else appearing, and it is reversible error for the trial judge to allow interest from the time the damages were determined upon by the appraisers and render judgment accordingly. Revisal, sec. 1954, providing for the payment of interest on moneys due by contract, etc., has no application.

3. Costs — Condemnation—Superior Court—Trials—Appeal and Error—Statutes.

On appeal by both parties in proceedings to condemn land, to the Superior Court in term, the trial is *de novo;* and where the defendant has substantially recovered damages for the taking of his land, the costs are taxable against the plaintiff, though the recovery is in a smaller sum than the amount theretofore awarded by the appraisers or viewers. Private Laws 1899, sec. 61, and Revisal, sec. 1905, applying to plaintiff's appeal from a justice of the peace, have no application. *Semble,* if the exercise of the judge's discretion was necessary, Revisal, sec. 1279, the result is the same in this case.

(306) SPECIAL PROCEEDING tried before *Allen, J.,* and a jury, at September Term, 1915, of DURHAM.

This was a proceeding commenced before the clerk of the Superior Court of Durham County on 18 February, 1913, by the plaintiff against the defendants for the condemnation of certain property described in the petition for the purpose of widening the streets at the place known as Five Points and fully described in the petition.

After the pleadings were filed, commissioners were appointed by the court to appraise the value of the lands described in the petition. The appraisers in due time made their report to the court, assessing the damages at $2,750. To this report both the plaintiff and the defendants excepted, the former upon the ground that the assessment was excessive, and the latter upon the ground that it was inadequate. The exceptions were heard by the clerk of the Superior Court, who made an order confirming and approving the report of the commissioners. From the order so entered by the clerk both the plaintiff and the defendants appealed to the Superior Court. Both demanded a jury trial.

The court submitted the following issue: "What damages is defendant, Mrs. L. G. Davis, entitled to recover of the plaintiff, the city

of Durham, for the condemnation of her property by the said city, situated at Five Points on West Main Street?"

Evidence was offered by the parties, and the jury, under the same and the charge of the court, returned a verdict in favor of the defendant, Mrs. Lelia G. Davis, as follows: "What damages is the defendant, Mrs. Lelia G. Davis, entitled to recover of the plaintiff, the city of Durham, for the condemnation of her property (307) by the said city of Durham situated at Five Points on West Main Street? Answer: 'Two thousand dollars ($2,000).'" The court, thereupon, and at the request of Mrs. Davis, entered a judgment in her favor for $2,000 with interest on the same from 19 April, 1913, that being the date on which the appraisers filed their report in the clerk's office, and also included in the judgment an allowance of $250 as counsel fees, and the costs of the proceeding, the counsel fees being designated as a part of the costs and to be taxed as such. It was further adjudged that upon the payment of said amounts the property described in the pleadings be condemned to the use of the city of Durham and the public for street purposes.

The defendant, Mrs. Lelia G. Davis, did not appeal, but the plaintiff, city of Durham, excepted to the judgment upon these grounds: (1) That the court allowed interest on the $2,000 assessed as damages by the jury. (2) That the court allowed counsel fees. (3) That the court taxed plaintiff with the costs. And upon these exceptions, an appeal was taken from the judgment to this Court.

J. L. Morehead and V. S. Bryant for plaintiff.

Manning, Everett & Kitchin for defendant.

WALKER, J., after stating the case: There are three questions presented in this appeal, as above stated.

First. The general rule in this Court has been that counsel fees are not allowed in civil actions or like proceedings to either party. There are exceptions, but this case does not fall within any of them. *Patterson v. Miller,* 72 N. C., 516; *Mordecai v. Devereux,* 74 N. C., 673; *Gay v. Davis,* 107 N. C., 269. Counsel for defendant referred us to Revisal, secs. 2587 and 2592. We are clearly of the opinion that the counsel fees "allowed by the court" and to be included, with the costs, in the judgment are those mentioned in Revisal, sec. 2592, of the chapter on "Eminent Domain," and they are such fees as are allowed to counsel who, by the appointment of the court, "appear for and protect the rights of any party in interest who is unknown or whose residence is not known and who has not appeared by an attorney or agent." The court by that section is authorized to make an allowance for counsel fees

in such cases. The question was decided in *R. R. v. Godwin,* 110 N. C., 175, where the present *Chief Justice* said: "The reference in section 1946 of The Code (now 2587 of Revisal) to the 'costs and counsel fees allowed by the court' is to such counsel fees as the court was authorized by law to tax, to wit, in the case mentioned in section 1948 (section 2592 of Revisal 1905). In the present instance the counsel whose fees are sought to be taxed against the railroad company was not ap-
(308) pointed by the court to represent the owner of an interest in real estate, who, or whose residence, was unknown. The motion to tax an allowance in his behalf against the opposite party was, therefore, properly denied." Counsel fees were, therefore, improperly allowed by the court, as Mrs. Davis defended by her own counsel.

Second. There also was error in allowing interest on the recovery. We have decided at this term, *Winn v. Finch, ante,* 272, that the judgment must correspond with the verdict, and that the court below has no power to amend the verdict by adding to it or taking anything from it or by reducing or increasing the amount of it. Its power is exhausted when it gives judgment upon it as it was rendered by the jury. We find the same doctrine laid down with reference to a verdict in a proceeding for the condemnation of land for the uses of a railroad company. *Butte Elec. Ry. Co. v. Matthews,* 34 Mont., 487, 493. It was there said: "The contention is made that the court had no power to direct judgment for any other sum than that mentioned in the verdict, and we think this must be sustained." . . . "There is no principle of law more firmly established than that the judgment must follow and conform to the verdict or findings," citing 11 Enc. of Pl. and Pr., 905; *Frohner v. Rodgers,* 2 Mont., 179; *Kimpton v. Junilee Placer Min. Co.,* 41 Pac. Rep., 137. But this question was decided in *R. R. v. Mfg. Co.,* 166 N. C., 168, where it is said, at p. 182: "The only other exception on this appeal is that the court did not allow interest on the amount of damages from the date of the condemnation of the right of way, but only from the date of the verdict and judgment. In this there was no error. Revisal, 1954, provides that all sums of money due by contract, except on penal bonds, shall bear interest. But judgments in other cases than on contract bear interest only from the date of the judgment. At common law a judgment did not carry interest when an execution was issued upon it. The statute was passed for the purpose of amending the law in this respect. *Collais v. McLeod,* 30 N. C., 221, cited in *McNeill v. R. R.,* 138 N. C., 4. The cause of action here does not arise on contract, but is for damages on account of defendant's land taken under the right of eminent domain. These damages fall directly under Revisal, 1954, and the law gives interest only from the rendition of the judgment." The same rule was approved in *Abernathy v. R. R.,* 159

N. C., 340, as to the allowance of interest, as a matter of right, and as to the judgment bearing interest, even if rendered in an action to recover damages for a tort; but we there held that the court, when reviewing a referee's report, did not err in considering interest in the assessment of the damages or in fixing the compensation of the landowner. It is presumed that the jury considered the matter of interest in assessing the damages. There was no prayer for instructions, nor any exception to the charge in regard to it, and no appeal by the defendant.

Third. When the plaintiff excepted to the report of the com- (309) missioners or viewers and appealed to the Superior Court, the issue as to damages was tried *de novo* in that court and the defendant recovered a large sum, though she did not get all which had been allowed in the report. Counsel have cited us to the provision in the plaintiff's charter (Pr. Laws 1899, sec. 61) which reads as follows: "If any person over whose land the said street may pass, or improvement be erected, or the aldermen, be dissatisfied with the valution thus made, then, in that case, either party may have an appeal to the next Superior Court of Durham County to be held thereafter, under the same rules, regulations, and restrictions as now govern appeals from judgments of justices of the peace." And also to Revisal, sec. 1905, which provides that, "If on appeal from a justice of the peace, judgment be entered for the plaintiff, and he shall not recover on his appeal a greater sum than was recovered before the justice, besides interest accrued since the rendition of the judgment, he shall not recover the costs of the appeal, but shall be liable, at the discretion of the court, to pay the same." But it will be seen that this section refers to an appeal taken by the plaintiff or party who seeks to recover the damages—here the defendant, and she has not appealed. It may be hard measure for plaintiff, on whose appeal the damages were largely reduced, to be taxed with all the costs, but the law is so written, as upon the trial *de novo* the defendant has recovered her damages. If the case falls within Revisal, sec. 1279, the judge has exercised his discretion against the plaintiff, and the result is the same. The costs were, therefore, properly taxed.

The judgment will be amended by striking out the interest and the allowance for attorneys, and will stand only for the amount assessed by the jury, $2,000, with interest from the rendition of the judgment, and the costs.

The balance of the sum deposited in the court, after satisfying the judgment, will be paid to the plaintiff.

The costs of this Court will be equally divided between the parties and so taxed by the clerk.

Modified and affirmed.

Cited: Sitterson v. Sitterson, 191 N.C. 321 (2c); *In re Will of Howell,* 204 N.C. 438 (1c); *Supply Co. v. Horton,* 220 N.C. 376 (2c); *Yancey v. Highway Com.,* 221 N.C. 188 (2c); *Yancey v. Highway Com.,* 222 N.C. 109 (2c); *Hutchins v. Davis,* 230 N.C. 72 (2c).

SARAH C. WITTE, ADMINISTRATRIX, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 5 April, 1916.)

1. **Railroads—Negligence—Escaping Steam—Runaway Horses—Intervening Cause—Proximate Cause—Trials—Evidence—Question for Jury.**

Evidence that the engineer on the locomotive of defendant railroad company carelessly and recklessly let off steam from the engine under a team of horses used in handling freight at its depot, and, seeing the horses frightened, did not desist, and that his conduct caused them to run away and kill the plaintiff's intestate, is sufficient upon the issue of the defendant's actionable negligence to take the case to the jury; and in this case it is held that the question of the intestate's negligence to have ventured there, being deaf, and the intervening negligence of the owner of the team in not providing a proper harness, together with the question of proximate cause, was correctly submitted to the determination of the jury.

2. **Measure of Damages—Wrongful Death—Earning Capacity—Successful Business—Evidence.**

In an action for damages for the negligent killing of the intestate by a railroad company, it is competent to show, upon the issue of the measure of damages, that the intestate had built up a successful business from a small start; and where the daughter of the intestate has testified thereto from her own knowledge, her testimony, on cross-examination, is not rendered incompetent by her giving, as sources of her knowledge, information she had obtained by conversations with her father and mother, and entries made on his bank book.

APPEAL by defendant from *Daniels, J.,* at December Term, 1915, of NEW HANOVER.

E. K. Bryan for plaintiff.
Davis & Davis for defendant A. C. L. Railroad Co.
Herbert McClammy for defendant Schloss-Bear-Davis Co.

(310) CLARK, C. J. This is an action for the wrongful killing of plaintiff's intestate, who was very deaf. He was a wholesale fruit merchant in Wilmington, and frequently went to the warehouse of the

railroad company, whose agents and employees had knowledge of his defective hearing.

The negligence alleged on the part of the railroad company was that the engineer operating a switch engine ejected steam under a team of horses backed up to the railroad warehouse when about 7 feet from the engine. When the engineer turned the steam from the steam chest under the horses they became frightened and ran away, running over the plaintiff's intestate. There was evidence that the engineer could have seen the horses long before his engine got to them, as the tracks were perfectly clear, and there was nothing to obstruct his view of the horses, and, further, that after the horses showed signs of fright the engineer made no attempt to cut off the steam. The horses and wagon belonged to the other defendant, Schloss-Bear-Davis Company.

The jury found upon the issues that the defendant railroad company was guilty of negligence; that its codefendant, the owner of the team or their driver, was not guilty of negligence, and that the plaintiff was not guilty of contributory negligence, and assessed the damages. The defendant railroad company appealed.

This case was before us at Spring Term, 1914, *Witte v. R. R.*, (311) 168 N. C., 566, where the facts are fully stated.

On this trial there are many exceptions, but we do not find it necessary to discuss them. The result depended almost entirely upon the findings of fact which the jury have made after full discussion by counsel and a clear charge by the court upon the law.

The defendant, of course, had the right to operate its trains according to its best judgment, but this must be done subordinate to the rule that their trains shall be operated with due regard to the rights of the public and without such negligence as to injure others. The railroad company is not liable if teams become frightened at the usual noises incident to the movement of trains, but it is otherwise if the steam is let off carelessly or recklessly, as is alleged in this case, under a restive team, which, as the jury found under the charge, frightened them, and the engineer, seeing this, did not desist.

In *Brendle v. R. R.*, 125 N. C., 474, the railroad company was held liable where the engineer on a passing train wantonly blew his whistle, frightening horses near the track, causing them to run away, injuring the driver. To the same effect, *Everett v. Receivers*, 121 N. C., 519; affirmed on rehearing, 122 N. C., 1010. In the present case the team and horses were on the premises of the defendant, by its invitation, to receive freight, and the plaintiff was also there on business with the railroad company.

The jury have found that the negligence of the defendant's engineer was the proximate cause of the injury. There was conflicting evidence,

doubtless strongly presented to the jury, that notwithstanding it should be found that the action of the engineer in recklessly blowing off steam caused the horses to run away, this would not have caused the injury but for the intervening negligence of the codefendant in having defective harness, and especially a defective bit, which broke and made the team unmanagable, and, further, that the plaintiff's intestate, a deaf man, was guilty of contributory negligence in being on the premises and in the pathway of the runaway team. These were matters for the jury, and they have found both contentions against the appellant.

The defendant further contends that there was error in submitting to the jury the evidence of the plaintiff as throwing some light upon the issue of damages that her intestate started in business with about $702 and when his estate was wound up it was worth $2,500, showing a net profit of $1,800 in two years. The witness testified these matters of her own knowledge. This evidence was not made incompetent from the fact that on cross-examination she gave as the sources of her knowledge conversations with her father and mother and the entry in the bank book of the deposit of said amount of $702 when her father began
(312) business That the business was profitable under her father's management was competent evidence, tending to show the value of his life. It would have been difficult for her to learn these facts except from such sources as she mentioned—the statements of her father while carrying on the business and the entries in the bank book. These matters were not put in evidence by her, but were brought out on cross-examination as testing her means of knowledge.

Upon the whole case we do not find that the defendant has been prejudiced.

No error.

Cited: Hanks v. R. R., 230 N.C. 184 (2cc).

F. H. WALTERS v. J. M. WALTERS.

(Filed 5 April, 1916.)

Judgment—Default—Excusable Neglect—Appeal and Error.

Where it appears on a motion to set aside a judgment rendered by default that the defendant immediately upon the institution of the action employed local attorneys to represent him, who diligently made inquiry and examined the court papers frequently to get the complaint to answer it, but could not find it; that the complaint had never been found, and at last they found the judgment in the court papers, and had to get the notes

of the plaintiff's stenographer in order to draft the answer, it is *Held*, that no neglect has been committed, and the action of the trial judge in setting aside the judgment was proper. As to whether a meritorious defense has been shown in this case, *quære*.

APPEAL by plaintiff from *Whedbee, J.*, at the December Term, 1915, of ROBESON.

This is an appeal from an order setting aside a judgment by default entered at September Term, 1915, of the Superior Court of Robeson County.

The summons was issued on 6 September, 1915, and served on 15 September, 1915. The complaint and a *lis pendens* were filed in the clerk's office on 7 September, 1915.

The court finds the facts to be as stated in the affidavits of R. C. Lawrence for the defendant and T. A. McNeill, Jr., for the plaintiff, and it appears therefrom that as soon as the summons was served the defendant went to Lumberton and employed the firm of McIntyre, Lawrence & Proctor to represent him in the action, and that they accepted the employment; that Mr. Lawrence went immediately to the clerk's office to get the complaint in order that he might find out the nature of the action and might prepare the answer; that he found in the clerk's office the file containing the summons, bond, and notice of *lis pendens*, but that the complaint was not in the file and could not be found; that Mr. Lawrence then informed the defendant (313) that the complaint could not be found, and that the answer could not be prepared until it could be located; that defendant could go home, and he would be notified as soon as the complaint could be found, so that he might return, and have his answer prepared; that within a few days thereafter defendant again went to Lumberton and again his counsel went to the clerk's office to get the complaint, but it could not be found; that thereafter defendant's counsel went to clerk's office several times to get the complaint, but it could not be found; that thereafter one of the defendant's counsel in making another search for the complaint found the file containing the summons, bond, notice of *lis pendens*, and a judgment by default which had been rendered at September term, but still the complaint was not in the file; that this was the first notice that the defendant or his counsel had that any default judgment had been rendered; that the original complaint had not been found, and that the defendant has filed an answer setting up a meritorious defense, which he was able to do by reason of the stenographer of the plaintiff's counsel furnishing him a copy of the complaint; that the counsel of the defendant upon filing the answer served notice of the motion to set aside the judgment; that the defendant has a meritorious defense.

His Honor set aside the judgment by default, and the plaintiff excepted and appealed.

McNeill & McNeill for plaintiff.
McIntyre, Lawrence & Proctor for defendant.

ALLEN, J. We fail to see any negligence on the part of the defendant; on the contrary, he appears to have been unusually diligent. He employed resident counsel as soon as the summons was served, and he used all reasonable means to prepare his defense.

We, therefore, conclude that there was no error in setting aside the judgment by default, as the motion was made within less than twelve months from the rendition of the judgment.

We will not pass on the question as to the regularity of the judgment at this time, but it is doubtful if any cause of action is alleged in the complaint under *Gaylord v. Gaylord,* 150 N. C., 222, holding that a parol trust cannot be engrafted in favor of the grantor upon a deed conveying the absolute title to the grantee.

Affirmed.

Cited: Walters v. Walters, 172 N.C. 330 S. c.; *Thomas v. Carteret,* 182 N.C. 380 (p); *Blue v. Wilmington,* 186 N.C. 327 (p); *Williams v. McRackan,* 186 N.C. 384 (j).

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BLUE RIDGE INTERURBAN RAILWAY COMPANY v. HENDERSONVILLE LIGHT AND POWER COMPANY ET ALS.

(Filed 22 March, 1916.)

1. Water and Water-courses—Condemnation—Statutes—Exceptions—Burden of Proof.

Water powers are subject to condemnation under our statutes, chapter 302, Laws 1907, amended by chapter 94, Laws 1913, unless the same are "used or held to be used or to be developed for use in connection with or addition to any power actually used by such persons, firms, or corporations serving the general public"; and where a *quasi*-public corporation brings action for condemnation, and the defendant resists upon the ground that the lands or power sought to be taken are protected by the statute, the burden of proof is upon the defendant to bring the lands or water power within the provisions of the statute excepting them.

2. Same—Trials—Evidence—Questions of Law—Verdict, Directing.

Where a *quasi*-public corporation, with the power of condemnation, seeks to condemn a stream of water for water power, which is jointly owned by an opposite riparian owner, and the respondent resists the

proceedings upon the sole ground that it is to be used in connection with and in addition to its electric power already developed and in use by it, the burden is upon the respondent to bring itself within the exception of the statute; and where its evidence tends solely to show that it could only do so by the use of a wing dam, this would infringe the plaintiff's right to the use of the whole bulk of the stream, undivided and indivisible, presenting insufficient evidence of his contention to be presented to the jury, and the plaintiff's right will be established as a matter of law.

ALLEN, J., concurring.

CLARK, C. J., and HOKE, J., dissenting.

PETITION to rehear. Upon the trial *Webb, J.*, submitted these issues to the jury and instructed the jury to answer issues *a* and *b* "No."

a. Are there water powers, rights, and properties on the lands of the respondents as described in the petition capable of being developed for the production of electric power for use in connection with and in addition to the electric power already developed and in use by the respondent, Hendersonville Light and Power Company? Answer: "No."

b. Are there water powers, rights, or properties on the lands of the respondents as described in the petition which are being held by the respondent, Hendersonville Light and Power Company, to be used or to be developed for use in connection with or in addition to any power now actually used by the said respondent, Hendersonville Light and Power Company? Answer: "No."

c. What compensation are defendants, or either of them, entitled to recover for the acquirement by condemnation by the petitioners of the right to divert the water in the manner set forth in (315) the petition? Answer: "Ten thousand dollars ($10,000)."

Manning & Kitchin, Smith & Shipman, Tillett & Guthrie for plaintiffs.

Staton & Rector, Michael Schenck, C. F. Toms, and J. W. Keerans for defendants.

BROWN, J. This case is reported in 169 N. C., 471. It is a condemnation proceeding brought by the plaintiff to condemn certain property called a water power belonging to the defendant. The defendant owns the land on one side of the stream and an undivided half interest in the water power. The plaintiff owns the land on the other side of the stream and a half interest in the water power. All water powers are as much subject to condemnation as any other property, unless it is established that they are "being used or held to be used or to be developed

for use in connection with or addition to any power actually used by such persons, firms, or corporations serving the general public." If this is not the correct principle to be applied to the facts in this record, the statute conferring the right to condemn water rights is a dead letter, and such rights or power cannot be condemned by the terms of the statute. If we go further, and hold that, although not so used as specified in the statute, the owner may divert the water and convert it into such a water power, there is nothing left for the statute to operate upon. There are few if any streams in North Carolina the waters of which cannot be so diverted and developed into a water power.

The effect of this proviso in the statute (1907, ch. 302, as amended ch. 94, Laws 1913, Gregory's Supp., sec. 2575d) is to place the burden of proof upon the owner of the water power sought to be condemned to introduce evidence sufficient to be submitted to a jury that will bring the property within the exception made by the above quoted proviso. If the owner fails, then the property is subject to condemnation. If the owner offers sufficient competent evidence, it is the duty of the judge to submit the proper issue to the jury. It is earnestly contended upon the rehearing that the defendant has failed to offer any sufficient evidence tending to prove that its half interest in this water power can be developed in any practicable way consistent with well established principles of law for use in connection with or addition to any power actually in use by defendant. That is the only proposition presented upon this rehearing.

In his opinion *Mr. Justice Allen* doubts if there is any evidence in the record sufficient to go to the jury tending to bring the defendant's half interest in the water power within the exception exempting it from condemnation. Further examination of the case compels the majority of the Court to the conclusion that there is no such evidence.

(316) We now conclude that all the evidence, taken in its most favorable light for defendant, discloses that the only feasible method by which the defendant can develop this water power for use is to construct a dam to the middle of the stream and divert half the water through a flume on its own side of the river. This is the only practicable method pointed out by the evidence, and to develop it in that manner would violate a well settled principle of law.

A majority of this Court held on the former hearing that "Where a stream passes between the lands of opposite riparian owners, one of such owners cannot build a dam to the middle of the stream and divert half the water through a flume, although he may return it into the stream before it leaves his land, since in such case each riparian owner is entitled to the whole bulk of the stream, undivided and indivisible." 86 S. E., 296.

That this conclusion is sustained by the overwhelming weight of authority is demonstrated in the opinion of *Mr. Justice Allen* in this case, concurred in by *Mr. Justice Walker* and the writer. For additional supporting authority, see Waters and Water-courses, Cent. Dig., sec. 72, Dec. Dig., 80. A reëxamination of the evidence shows only one plan of development proposed by defendant. Mr. Oates, the president and general manager of defendant, testified that he had made plans and calculations to develop his side of the Narrows. He further says: "Owing to my ownership only to the middle of the stream, my plan was to take out half of the water by means of a diverting dam, and convey it on the north bank to the mouth of Pulliam's Creek, utilize it through my water wheels and turn it back into the river on my own land. I had several estimates made as to the cost of that development, and have had it surveyed and worked out by several engineers. The first was Mr. Charles E. Waddell."

The witness was asked the specific question: "Tell us your plans for the development of the Narrows, and how you expect to do it, the cost of it, what profit there will be in it." To this he responded: "It simply involves the use of a diverting dam; it is merely a projecting wall built into the stream to divert half the water of Green River into a canal or race which we will use for a certain distance to a settling basin, where we can accumulate water and acquire a static head, and then convey the water by means of a steel flume to wheels in the power house situated at the mouth of Pulliam's Creek, and the power applied and transmitted."

Upon cross-examination he was asked as to the effect of taking half of the water, and he replied: "The other half will be left in the stream and he can get it if he wants it. I will give him permission to go over and get it. They could not do it without my permission and without going on my lands."

Witness Shearer, hydraulic engineer, testified for defendant: (317) "I made an examination of the stream with a view of determining whether it is practicable for the owner of the north bank to divert one-half the stream from the channel, use it for developing water power, and return to the stream on the same land. As an engineering proposition, approximately one-half the volume of the water of the stream can be diverted to the Torrence side and developed into a water power and returned. At or near the head of the Torrence tract I would begin a canal, ditch, or open earth flume around the side of the hill. Would extend the mouth of the ditch into the stream at this point and carry this water around on the Torrence property to a point probably 200 to 300 feet down stream, from a little basin, carry it from there by a pipe, flume, or other method to the power-house.

None of the witnesses examined proposed any plan of development except the plan set out in the testimony of Oates and Shearer.

After a critical examination of all the evidence, we are unable to find a single suggestion for developing and using the defendant's half of this water power except that which contemplates taking one-half the water out of the stream.

His Honor instructed the jury that the burden of proof was on defendant to show by the greater weight of evidence that this water power was capable of being developed for use in connection with the power now used by defendants, and further instructed the jury that upon all the evidence, if believed, to answer issues *a* and *b* "No." Applying the principles laid down in this opinion, we think the charge should be approved.

The issue as to damages was fairly submitted to the jury in a full and clear charge, of which the defendants have no right to complain. The petition to rehear is allowed, and upon such rehearing we find in the trial as had in the Superior Court

No error.

All the costs of this Court will be taxed against defendants.

ALLEN, J., concurring: I have carefully examined the record in this appeal several times, and I do not find a line in it which would warrant the charge that the plaintiff is a trust or that it is owned by the Southern Power Company or by the Dukes; but if these facts appeared, they would not justify us in denying to it the recognition of its property rights.

The only place where the word "Duke" appears is on page 22 of the record, where John A. Law, a witness for the plaintiff, said, on cross-examination: "I am a banker, cotton mill manufacturer, and a director in one railroad, the Piedmont and Northern. The same interests own controlling stock in that and the Southern Power Company. (318) Never heard this railroad called the Southern Power Company road; have heard it called the Duke road. I think he is president." That this refers to the Piedmont and Northern I think clearly appears from page 23 of the record, where the directors of the plaintiff company are named, among which the name of Duke does not appear, and from page 54 of the record, where W. S. Montgomery testifies that he is president of the plaintiff company.

If, however, the plaintiff is a trust, the fault is with the General Assembly of this State, which granted to it its charter and from whom it derives all of its powers. It is not claimed that these powers have been exceeded, and if this could be shown, it ought to be pointed out in order that the State may take steps to have the charter forfeited.

There is but one question in this appeal, and that is whether the defendant has offered evidence tending to prove that its water power and water right, which the plaintiff seeks to condemn, is not the subject of condemnation.

If the defendant has offered evidence tending to prove this fact, it is entitled to have it considered by a jury; but if not, it was the duty of the judge to so hold as matter of law.

The right of this plaintiff to condemn water rights and water powers is clearly recognized in an opinion by the *Chief Justice,* between the same parties, in *R. R. v. Oates and the Light and Power Co.,* 164 N. C., 172, and repeated in 169 N. C., 474, where he says: "In *R. R. v. Oates,* 164 N. C., at p. 172, the Court said, as to condemning water powers: 'The matter turns, therefore, on the question whether under the terms of ch. 94, Laws 1913, the land in question is subject to condemnation,' and the Court further held that it could not be condemned if it was 'held to be used or to be developed for the use in connection with or in addition to any power actually used.' "

This cannot mean anything except that the plaintiff can condemn the water right or water power of the defendant unless the defendant proves that the water right or water power was "held to be used or to be developed for use in connection with or in addition to any power actually used."

This is the issue between the parties, and the point of difference is whether the defendant has offered evidence that its water power was "held to be used or to be developed for use in connection with or in addition to any power actually used."

As pointed out in the opinion of *Associate Justice Brown,* where the evidence is quoted, the defendant did not claim that its water power could be so used or developed except by running a dam to the middle of the stream and by diverting one-half the stream and conducting it one-half mile through its own land before its return to the stream, and, in the opinion of the Court, this is not permissible, the Court having adopted as the correct rule determining the right in nonnavigable (319) water of opposite riparian owners the one laid down by Angell on Water-courses, sec. 100, as follows: "Whenever a water-course *divides two estates,* the riparian owner of neither can lawfully carry off any part without the consent of the other opposite; and each riparian owner is entitled, not to half or other portion of the water, but to the whole bulk of the stream, undivided and indivisible, or *per my et per tout.* To use the language of *Platt, J.,* in *Vandenburg v. Vanbergen,* in New York. . . . 'The grant of an *undivided share* in a stream would not authorize the grantee to appropriate or modify the stream to the injury of others who have a joint interest in it. The property in a stream of

water is *indivisible.* The joint proprietors must use it as an entire stream in its natural channel; a severance would destroy the rights of all. In *Blanchard v. Baker,* in Maine, the defendants, who had their dam on the side of the stream opposite to the plaintiff's dam, contended that they had a good and legal right to one-half of the water in the main stream, and to carry it off by deepening an ancient outlet or canal. . . . It was held that the defendants had not a right to one-half of the water in the main stream of the river, so as to abstract it by means of the channel in question. The Court said, in reply to the suggestion, that the owners of the dam on the eastern side of the river had a right to half the water, and *to divert to that extent:* 'It has been seen that if they had been the owners on both sides, they had no right to divert the water without again returning it to its original channel. Besides, it was impossible, in the nature of things, that they could take it from their side only; an equal portion from the plaintiff's side must have been mingled with all that was diverted.' "

The reason for permitting the plaintiff to condemn the water power or water right of the defendant, when the defendant cannot condemn the water power or water right of the plaintiff, is that the General Assembly has conferred this power upon the plaintiff and those doing a like business, and has denied it to the defendant.

The *Chief Justice* said in *R. R. v. Oates,* 164 N. C., 169: "It would, therefore, seem that if a company needed a water power to produce electric power, and styled itself an electric light and power company, it could not condemn the water power of another for that purpose. Chapter 74, Laws of 1907. But if it styled itself 'a street and interurban railway company,' and should 'own land on one or both sides of a stream which can be used in developing water power," it might have condemned the additional lands 'needed to fully develop such water power.' Chapter 302, Laws 1907."

The General Assembly, and not the courts, have made this distinction between the powers and rights granted to the plaintiffs and de-
(320) fendants respectively, and as this is a question of State policy committed to the General Assembly, we must obey, not thwart, its will.

It would seem that the defendant, who is represented as a "poor man" with "one little ewe lamb" (one-half of a water power on one side of a stream, ought to be grateful that it has escaped the payment of $40,000 for another "little ewe lamb" (one-half of the stream on the opposite side) of the same size and weight and kindred, which the jury has found was only worth $10,000.

It will be remembered that Nathan was dealing in figure of speech when he was talking to David, and that David's anger was greatly

kindled against the rich man, and that Nathan said to David, "Thou art the man."

CLARK, C. J., dissenting: This is a petition to rehear the decision in this case, 169 N. C., 472. The petition does not comply with Rule 53 of this Court, for it does not "assign the alleged error of law complained of or the matter overlooked." 164 N. C., 556.

The court withdrew the case from the jury by instructing them to answer issues *a* and *b* "No," instead of leaving to them to answer upon the evidence. These issues are as follows:

"*a.* Are there water powers, rights, and properties on the land of the respondents, as described in the petition, capable of being developed for the production of electric power for use in connection with and in addition to the electric power already developed and in use by the respondent, Hendersonville Light and Power Company?" and

"*b.* Are there water powers, rights, or properties on the land of the respondents, as described in the petition, which are being held by the respondent, Hendersonville Light and Power Company, to be used and to be developed for use in connection with or in addition to any power actually used by the said respondent, Hendersonville Light and Power Company?"

Mr. Justice Hoke stated the matter clearly in his opinion in this case at the former hearing, *R. R. v. Light and Power Co.*, 169 N. C., at p. 480, as follows: "Whether they (the defendants) can carry out their purpose and utilize this power in substantial aid of the power already developed and without unwarranted interference with the rights of the plaintiff who owns along the opposite bank, is, in my opinion, a mixed question of law and fact, and, on the record, requires that the issue be submitted to the jury."

Brown, J., also said, 169 N. C., at p. 479: "I concur in the judgment of the Court submitting a proper issue to the jury to determine the fact as to whether the defendant is using or holding its water power to be used or developed for use in connection with or in addition to any power actually used by it." *Allen, J.* (with whom *Walker, J.*, concurred), said: "I do not think the defendant has any (321) property in the water in the stream, and that it is only entitled to a reasonable use of it as it passes his land, which may include the use for manufacturing purposes."

This last is all that the defendant sought, and it is for its choice to say whether it shall use it by an undershot or an overshot wheel for grinding, or conduct it through a tube to a point lower down, so that in that way its fall shall utilize the force of gravity which will be converted into electricity and carried by cables to run the street cars and

lights of the defendant, which is exactly the use to which plaintiff itself seeks to apply it.

The testimony of the witnesses R. M. Oates, W. H. Banks, J. W. Seaver, and D. R. Shearer was ample to go to the jury and, indeed, clear and explicit that the defendants could develop on their half of the stream 1,360 h.p., and that this could be done without materially interfering with the rights of the plaintiff on the opposite side of the stream. As we held before, this evidence should have gone to the jury, and in withdrawing it the judge assumed to himself the functions of the jury and denied to these defendants their constitutional rights.

This is a proceeding by the plaintiff to take from the defendants their one-half of the stream which is the boundary between the two. It is admitted that the line between them runs to the middle of the stream, the defendants owning one-half of the bed of the stream for half a mile on the south side and the plaintiff owning the other half. The plaintiff alleges that it has a right to condemn this water power of the defendants, notwithstanding a statute prohibiting the condemnation of any water power, because, as it alleges, the defendants cannot utilize it for that purpose, and, therefore, the plaintiff can take it against the will of the defendants. In *R. R. v. Oates,* 164 N. C., 169, and in *R. R. v. Light and Power Co.,* 169 N. C., 472, we held that upon the evidence this was an issue of fact which the defendants were intitled to have a jury pass upon. The plaintiff again insists for the third time that it can have the judge withdraw that issue from the jury and find as a matter of law that the defendants could not use their half of the stream to generate water power.

Laws 1907, ch. 74, contains this provision: "Water powers, developed or undeveloped, with the necessary land adjacent thereto for their development, shall not be taken" under condemnation proceedings. This act was sustained in *Power Co. v. Whitney,* 150 N. C., 34.

There are many reasons why the defendants cannot be deprived of their property in this case without violating the guaranty that property shall not be taken, as was said, 169 N. C. at p. 474, "without due process of law and only according to the law of the land. The de-
(322) fendants had the right to have the issue of fact (whether they could utilize their half of the stream) found by a jury, and only upon such finding should the court have imposed the judgment of the law."

In *Dargan v. R. R.,* 113 N. C., 596, it was said that "the right of the State to take private property rests upon the ground that there is a *public* necessity for such appropriation." It is not a public necessity that the plaintiff should take from the defendants the enjoyment of their property in this water power. When a railroad track is to be laid

out from one point to another, the construction of the railroad being a *quasi*-public matter, it is a public necessity that it shall lay out its line, with such restrictions as the statute requires, across the land of individuals, and, therefore, the right of eminent domain is conferred upon the railroad company with the correlative right that, being a public corporation, it can be regulated by the State; but it is not a public necessity that the railroad company shall take the defendant's water power, which is not needed for its right of way and is merely a facility for the subsequent operation of the road. It would be as accurate to say that the plaintiff could condemn a coal mine 100 miles *or more* off its line to generate power for its engine, or a forest anywhere to obtain wood for its engines or cross-ties for its track, as to say that it could condemn the defendant's falling water to generate electric power to move its engines.

It would be as just to say that one railroad could condemn the engines or the freight cars or the passenger cars of another company, because that would be a facility to operate its lines fully as much as to take from the defendants the water power, which the defendants purchased to aid in running their street cars in Hendersonville and to furnish light and power for the citizens of that town, for the convenience of the plaintiff in running its railroad.

But if it were conceded, as it cannot be, that it is a public necessity, from the nature of the property it is clear for many reasons that, while it would be a convenience, it is not a *necessity* at all.

1. The plaintiff and defendants might build a dam, or several dams, across the stream in its precipitous course and divide the water at the middle of the crest, as Goat Island divides Niagara Falls into the Canadian and American Falls. There is evidence, and it is also common knowledge, that this is practicable and has been done in many cases.

2. Or, the plaintiff and the defendant might coöperate by having all the water conducted into one power plant and equally divide between them the electricity created. It is common knowledge that this has been done in many cases, and it is entirely practicable. The great power plants in the State thus divide and distribute to different towns and to different individuals the power generated by them. (323) Certainly the plaintiff and defendants might divide it into two equal parts.

3. Or, the defendants might, by putting in a wing dam, use their half of the water without in any wise diminishing the capacity of the plaintiff to use the other half. There was ample evidence in this case that this could be done, and that as a matter of fact it was being done at other points in the State and all over the country. While the de-

fendants seemed to prefer this method to the other two above named, they were not restricted to this. They are entitled to use and enjoy their half interest in this water power, because it is evident that it can be utilized by them for the purpose of running their street cars and furnishing power and light.

In *Linderman v. Lindsey,* 8 Am. Decisions, 325, *Mr. Justice Sharswood* says: "When the proprietor of the two opposite banks of a stream of water are desirous of enjoying the advantage of the water for propelling machinery, a dam for that purpose cannot be built, except by mutual consent, *unless, indeed, it may be what is termed a wing dam confined to the soil of the person who erects it, on that half of the bed of the stream which belongs to him.*" This principle is also laid down by *Shaw, C. J.,* in *Elliott v. R. R.,* 57 Am. Dec., 88, quoted by *Brown, J.,* in *Harris v. R. R.,* 153 N. C., 545.

In *Charnock v. Higuerra,* 52 Am. St., 197, it was held: "Since the right to make use of the stream is common to all who own property on its shores, there would *prima facie* seem to be no cause of complaint for any use made by another unless he were actually injured by such use"; and all the authorities hold that whether the party is making a reasonable use is a question of fact. This case also is quoted by *Brown, J., Harris v. R. R.,* 153 N. C., 544.

This stream, in the half a mile that it flows between the plaintiff and defendants, has a fall of 219 feet and is capable of generating 2,700 h.p., of which the defendants are entitled to use one-half. The witnesses give many instances in which one-half of the stream is thus utilized by wing dams, some of which are set out in this case, 169 N. C. at pp. 475 and 476. Whether the defendants can utilize one-half of the water by a wing dam is a matter of fact and not of law. *Prentiss v. Geiger,* 74 N. Y., 341; *Bullard v. Mfg. Co.,* 77 N. Y., 525; Gould on Waters, sec. 220; *Dumont v. Kellogg,* 18 Am. Rep. (Mich.), 102; *Hayes v. Waldron,* 84 Am. Dec. (N. H.), 105; *Merryfield v. Worcester,* 14 Am. Rep. (Mass.), 592; *Ullrith v. Water Co.,* 4 L. R. A. (Ala.), 474. And the books are full of similar cases.

What the defendants purpose is not a division of the water, taking it out of the stream, but to utilize the force of gravity contained in the falling of one-half of this water and converting it into electricity for the operation of their street railway and furnishing power (324) and light to their customers in fulfillment of their contract. This is not a navigable stream, and, therefore, the plaintiff cannot object that this use might diminish the depth of the water on its side—if, indeed, it would have that effect.

While the defendant stressed mostly its evidence that its half of the water could be utilized by a wing dam, it did not abandon its other

rights, which have been held in many cases by the best courts. In *Roberts v. R. R.*, 74 N. H., 217, it is said: "The question, therefore, is whether they have the legal right to have the water divided and their share assigned to them in severalty; if this can be done without unreasonably interfering with plaintiff's rights. It is clear that they have such a right if the same rule applies to improved and unimproved water powers, for it is settled that the court has power to make such orders in respect to the way the several owners shall exercise their right in the common property as will be for the best interests of each of them, in so far as it can be done without any unreasonable interference with the rights of the others." In *Warren v. Mfg. Co.*, 26 L. R. A. 288 (86 Me., 32), it is said: "As between opposite riparian owners upon the same channel, the court might have jurisdiction to equalize each owner's use of the water and to mark out beforehand each owner's share, and this by any appropriate proceedings and instrumentality. . . . Opposite riparian owners upon the same channel have a common and equal right to the use of all the water flowing in that channel as it passes their opposite land. If the volume and flow of water be limited, the use by each riparian owner may be limited by judicial action, in proportion so that the enjoyment be kept equal, like the right." To same purport, *Sooville v. Kennedy*, 14 Conn., 349; *Olmstead v. Loomis*, 9 N. Y., 423; *Olney v. Fenner*, 2 R. I., 211; *Lyon v. McLaughlin*, 32 Vt., 423; and *Burnham v. Kempton*, 44 N. H., 78.

The defendants' interest in this stream is either a water power or it is not. If it is a water power, then whether they can utilize it or not is an issue of fact for the jury upon the evidence which they have offered. If it is not a water power, it is not subject to condemnation, for the plaintiff does not seek to condemn it for right of way. If the defendants' interest in this water is not a pawer [water] power, neither is the plaintiff's interest, and the statute does not authorize it to create a water power by taking the defendants' interest which is not a water power. Besides, if the plaintiff could do this, the defendants could do the same.

The plaintiff occupies a most extraordinary position. It says, in effect, to the defendants: "We will not permit dam or dams across the stream and a division of the water at the middle of the crest whereby you may enjoy your half of the water power. We will not coöperate with you in putting up a plant to generate electric power and divide the power produced. We will not permit you to put in a (325) wing dam whereby you may utilize only your half of the water without detriment to us. We will not permit you to have a jury to decide upon the evidence whether either of these three methods can be used. We have offered you $1,000 for your half interest in this stream and you

have offered us $40,000 for our half. We will not accept your offer nor put the property up to the highest bidder. And having thus prevented you from enjoying your half of this water power, we will cause the court to decree that you cannot utilize it, and, therefore, we will take your property."

It may be possible that some other plaintiff has thus boldly stated his intention to take the property of another because he has prevented that other from using it. But, if so, such case cannot be found by ordinary research. The plaintiff's attitude reminds us of the fable in Æsop. Irritated at the resistance of the owner, the plaintiff says, in effect, to the defendants: "Anyway, I need your property in my business, and I'll take it."

The defendants further contend that they are entitled to be protected in their rights under the provisions of the Federal Constitution that they shall not be deprived of their property "without due process of law, nor denied the equal protection of the law," on four grounds:

1. It is not the "law of the land" that property off the line of railway not needed for its construction can be taken to aid in its operation, such as a coal mine, or wood for fuel or for cross-ties, or water power. Such property for such purpose cannot be taken under "due process of law."

2. Neither can public property like that of the defendants, already devoted to the same public purpose, be taken under the right of eminent domain. Lewis Em. Domain, sec. 400. As well might one railroad company condemn the track, or the engines, or the cars of another. While one road can condemn a right of way across the track of another, it does not take the sole and exclusive use of the track at that point, as the plaintiff seeks in regard to the property of the defendants.

3. Both the State and Federal Constitutions guarantee the right of trial by jury as to disputed issues of fact. Putting the case most strongly for the plaintiff, whether or not the defendants can utilize their half interest in this water power is, upon the evidence, a much disputed issue of fact, and the court could not deprive them of this right under "the law of the land."

4. The public policy of the Federal and State governments, as shown by statutes and by decisions, notably in the judgments dissolving the American Tobacco Company, the Standard Oil Company, the Sugar Trust, the Hartford and New Haven Railroad Combination, and many other cases, is that such combinations are injurious to the
(326) public welfare and "contrary to the law of the land." The Department of Justice is considering instituting similar proceedings to dissolve the great water-power trusts which are taking into their control the most vital sources of heat, power, and light, the water powers

of the country. A recent publication made by authority of the United States Government, of which we take judicial notice, shows that in this State already two companies, the Southern Power Company and the Carolina Power and Light Company, own 75 per cent of the water power of this State, and that eight companies control 94 per cent of the total water power of the State, while forty-nine cities and towns altogether control only 1 per cent. If the plaintiff can through the courts wrest from the defendants the enjoyment of their half of this water power which is being used for the town of Hendersonville, then that much will be taken from the 1 per cent of water power which these forty-nine cities utilize to be added to the 94 per cent which has been gathered by the eight corporations which the Government reports, even if some of these eight are not merely *aliases* for the larger ones. It appears that both the president and secretary and treasurer of the plaintiff company are directors in the Northern and Piedmont Railroad Company, which said treasurer in his testimony states is known as "the Dukes' road." It is common knowledge that the Southern Power Company, one of the companies reported by the Government as engrossing the water power of this State, is controlled by the same interests. The defendants have the right, in this proceeding, to have a jury pass upon the question whether the plaintiff company is not potentially the property of the same financial "interests," for, if so, to grant to it the right to absorb this property and take it from the defendants is in violation of the "law of the land" which the Government is seeking to enforce against these great trusts and combinations which would take to themselves the entire water power of the State, the source of light, heat, and power of the future.

For these reasons the defendants invoke the protection of the XIV Amendment at the hands of the courts.

It would seem, therefore, that the property of the defendant is not subject to condemnation, and that the plaintiff cannot, by preventing the defendant from using it, make it subject to condemnation, and that in any aspect the defendants are entitled to a trial by jury, and to deprive them of such right is in violation of both the State and Federal Constitutions.

Joseph B. Lee, "one of the owners and directors of the plaintiff company" (as he styles himself), testified that, as such, he offered the defendants $1,000 for their one-half of this water power, which he "thought was a fair offer." But he admitted, on cross-examination, that he refused to take $40,000 for the plaintiff's half when offered by the defendants. The uncontradicted testimony is that the de- (327) fendants had $40,000 in bank to back this offer, though it was

admitted that the defendants' capital was small as compared with that of the plaintiff.

The plaintiff's evidence was that it was intended to spend $2,000,000 on the development of this water power. Under the statute a water-power plant cannot condemn another's water power, whether in use or not. This is only allowed to an interurban railroad company, and even then only if the water power sought to be condemned is "not being used, or held to be used, for development by its owner." The sum of $2,000,000 intended to be spent by the plaintiff on this plant is evidence for the jury to consider whether it is seeking *bona fide* to take the defendants' water power merely for an interurban railroad or to create a water power. Indeed, the complaint avers an intention to build a very short railroad and "to sell its surplus power." In the latter event the plaintiff cannot condemn even an unused water power.

The plaintiff says it will not sell its half of this water power, which is only a small part of its holding, for $40,000, but strangely enough, it insists that it shall be allowed to use the "strong arm" of the law to take *all* the water power of the defendants, being the other half of the stream at this point, for $10,000. Such claim is not founded in justice, without respect to persons, nor consonant to the sentiment of the ages. "Nathan said unto David, There were two men in one city, the one rich and the other poor. The rich man had exceeding many flocks and herds; but the poor man had nothing save one little ewe lamb, which he bought and nourished up; and it grew up with him and with his children; it did eat of his own meat and drank of his own cup and lay in his bosom, and was unto him as a daughter. And there came a traveler unto the rich man and he spared to take of his own herd to dress for the wayfaring man that had come unto him, but took the poor man's lamb and dressed it for the man that was come unto him." 2 Samuel xii, v. 1-4.

We know, too, the story of Naboth's Vineyard, I Kings, ch. xxi. They who have been to Potsdam near Berlin will remember that when Frederick the Great was gathering in the lands to make the famous park for his palace at Potsdam, there was a miller whose little tract was included within the bounds of the park, who refused to sell it at any price. When the great king was advised to take it anyway, though one of the most arbitrary of men, he replied: "Let the miller keep his mill, that it may be known that there is law in Prussia." The rustic mill still stands, kept in repair at public expense, and on it in gold letters there still abides this inscription: "Let the miller keep his mill, that it may be known that there is law in Prussia."

(328) HOKE, J., dissenting: When this case was formerly before the Court it was decided that the question at issue between the parties

should be referred to the jury. In a concurring opinion then filed my opinion was stated as follows:

"Our statute, in permitting water powers to be condemned for public use, withdraws from the effect of the law any water power which is being used or held to be used or to be developed for use in connection with or in addition to any power actually being used for public service, etc.

"There is evidence in the record tending to show that defendant is the riparian owner of land on one side of Green River, where there is a considerable fall in the stream, giving promise of a good water power, if properly developed. The officials of the company testified, further, that defendants purchased and now hold this property with a view to aid their power already developed and now being used under a charter for the benefit of the public; that they have great need of such undeveloped power and purpose to utilize the same as contemplated and provided by the statute.

"Whether they can carry their purpose and utilize this power in substantial aid of the power already developed, and without unwarranted interference with the rights of the plaintiffs, who own along the opposite bank is, in my opinion, a mixed question of law and fact, and, on the record, requires that the issue be submitted to the jury."

On further consideration, I am confirmed in the opinion thus expressed, that the issue should be referred to the jury, and I, therefore, dissent from the present disposition of the appeal.

MAX BANE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 12 April, 1916.)

1. Carriers of Goods—Penalty Statutes—Tender of Shipment.

In order for the daily penalty to attach to the carrier for continually refusing to accept freight for shipment under the provisions of Revisal, sec. 2631, it is necessary for actual or constructive tender thereof to be made to the carrier each day; and where cattle are the subject of shipment, evidence that the shipment had been refused and that the shipper kept the cattle near the depot and told the defendant's agent thereof, and that he would deliver them when notified that the company would receive them, is insufficient except as to the first penalty, notwithstanding the shipper would have delivered them for shipment upon being so notified. *Garrison v. R. R.*, 150 N. C., 587, where the shipment was loaded on car and the carrier refused to issue bill of lading, cited and distinguished.

2. Evidence—Photographs—Accuracy—Evidence.

Photographs of the subject of the inquiry may be introduced in evidence, when shown to be a true representation by the testimony of wit-

nesses, without the necessity of proving this fact by the photographer who took them.

3. Appeal and Error—Objections and Exceptions.

In an action to recover damages from a railroad company alleged to have been caused by the wrongful failure of the defendant to accept them for shipment, objection to the testimony of the plaintiff as to the price for which he sold them will not be sustained when it appears he had already given this testimony without objection.

4. Evidence—Testimony of Fact—Opinion—Condition of Cattle—Carriers of Goods.

Where the condition of cattle is the subject of the inquiry on the question of damages for the wrongful failure of the defendant railroad company to accept them, testimony of one who had seen the cattle, that they were in good condition, is held to be a statement of a fact, and not objectionable as a statement of the opinion of the witness.

(329) APPEAL by plaintiff from *Allen, J.*, and a jury at September Term, 1916, of DURHAM.

Civil action to recover a penalty against the defendant for refusal to receive for shipment a car-load of cattle which the plaintiff alleges he tendered to be shipped from Roseboro, N. C., in Sampson County, to Clayton, N. C., in Johnston County, and damages which the plaintiff alleges he sustained by reason of the failure to receive and transport the cattle.

The plaintiff testified that he tendered said cattle at Roseboro, N. C., for shipment to Clayton, N. C., on 14 February, 1914, and that the agent of the defendant refused to accept them, and that by reason of such failure he was forced to keep the cattle in an open lot exposed to the weather, and that they were damaged thereby.

The cattle were shipped on 18 February, 1914, to Clayton.

The defendant's witnesses testified that the cattle were not tendered for shipment to Clayton on 14 February, but, on the contrary, were tendered for shipment to Durham, N. C.; that the cattle were not accepted for shipment to Durham because Sampson County was in quarantine territory and Durham County was in open terrtitory, and that the plaintiff had not complied with certain quarantine regulations of the Department of Agriculture.

The plaintiff also offered evidence tending to prove that the defendant had no inclosure on its right of way at Roseboro where the cattle could be kept; that he drove the cattle to Roseboro on 14 February, and tendered them for shipment, and that the agent of the defendant refused to accept them; that he then placed the cattle in a lot about 200 yards from the depot and notified the agent of the defendant that they
(330) were in the lot ready for shipment at any time he would ship them,

and that one Fillyaw would be in charge of the cattle; that the said Fillyaw saw the agent of the defendant each day and made inquiry as to whether the cattle would be received for shipment.

The evidence for the defendant tended to prove that the cattle were never tendered for shipment to Clayton until 18 February, 1914, when they were received and shipped.

The plaintiff was permitted to introduce a photograph of the cattle alleged to have been taken at Roseboro on 14 February, 1914, and the defendant excepted. The photographer who made the protograph was not introduced as a witness, but one or more witnesses for the plaintiff testified that the photograph was correct.

The plaintiff contended that he was entitled to recover a penalty of $50 a day for the four days, 14, 15, 16, and 17 February. This was denied by the defendant.

His Honor charged the jury, among other things, as follows:

"It is a contention there that he must tender them each day. I do not charge you that, but charge you on that issue as follows: That the evidence in this case shows that the railroad company had no cattle pen or lot at its station at Roseboro, and if you are satisfied from the evidence that after defendant had refused to ship plaintiff's cattle, that plaintiff notified the defendant's agent that he would keep his cattle near the depot ready for shipment at any time he, the defendant's agent, would accept them, then I instruct you that the plaintiff's keeping the cattle there ready for shipment at some place near by and convenient for them to be reached and shipped, and that was done with the defendant's knowledge, or its agent's knowledge, it would be a sufficient tender of them to the railroad, and the plaintiff would not be required to demand of the railroad company to ship his cattle each day." The defendant excepted.

The jury returned the following verdict:

1. Did the defendant wrongfully refuse to accept the plaintiff's cattle for shipment, as alleged in the complaint? Answer: "Yes."

2. If so, for how many days did the defendant wrongfully refuse to accept plaintiff's cattle for shipment? Answer: "Four days."

3. What amount, if any, is the plaintiff entitled to recover of the defendant as penalties? Answer: "$200."

4. What damages, if any, is the plaintiff entitled to recover of the defendant by reason of the defendant's refusal to accept plaintiff's cattle for shipment? Answer: "$700."

Judgment was rendered upon the verdict in favor of the plaintiff, and the defendant appealed.

Brawley & Gantt and L. P. McLendon for plaintiff.
Harry Skinner, L. C. Cooper, and Fuller & Reade for defendant.

(331) ALLEN, J. The Revisal, sec. 2631, makes it the duty of transportation companies to receive all articles of the nature and kind received by such companies for transportation "whenever tendered at a regular depot, station," etc., and imposes a penalty of $50 "for each day said companies refuse to receive such shipment."

The construction placed upon the statute is "that is was intended to impose a penalty for each day upon which the freight was at the depot ready for shipment" (*Garrison v. R. R.*, 150 N. C., 587), and that before the penalty can be recovered the jury "must find that there was a tender and refusal each day." *Cotton Mills v. R. R.*, 150 N. C., 610.

It was also strongly intimated in the first of these cases that it would not always be necessary to make an actual tender of the shipment, the Court saying, in reference to a shipment of lumber: "To require the plaintiff to haul the lumber home and return it to the depot each day or to go through the empty form of making a constructive tender imposes either an unwarranted hardship or savors of trifling with a man's substantial rights;" but this was said upon facts showing that the shipment in controversy had been placed upon the car of the defendant company and was in its possession, and that it had refused to issue bill of lading and to ship.

The two decisions, when considered together, give authoritative construction that each day for which a penalty is demanded is treated as separate and distinct, upon the theory that when there has been a tender and refusal on one day the penalty of $50 is imposed, and that this closes the transaction, nothing else appearing; and that, if further penalties are demanded, the plaintiff must thereafter prove a tender and refusal.

If these principles are applied to his Honor's charge, it appears that he enlarged the liability of the defendant beyond the scope and spirit of the statute. He expressly refused to charge that there must be a tender and refusal each day, and then, assuming that a constructive tender was sufficient, he made this depend alone upon the plaintiff's readiness to ship and knowledge upon the part of the agent.

The plaintiff may have been ready and willing to ship, and the defendant's agent may have known of this fact, and still no penalty would accrue unless there was an offer or tender of the shipment either actual or constructive.

If, as his Honor stated to the jury, the cattle were in a lot near by, it was not necessary that they should be driven from the lot to the station each day, but the plaintiff or his agent ought to have offered to do

so in order to make good their tender, and this important element was omitted from his Honor's charge.

A tender imports not merely the readiness and the ability to pay or perform, but also the actual production of the thing to be paid or delivered over, and an offer of it to the person to whom the (332) tender is to be made. 38 Cyc., 132.

The relation of debtor and creditor furnishes an analogy. The debtor may be able and ready to pay, and the creditor may know this, but there is no tender unless the money is produced and offered to the creditor, or unless there is a waiver of the tender; and the debtor must seek the creditor and not the creditor the debtor.

Under his Honor's charge, and upon the plaintiff's evidence, a penalty of $50 having already accrued for failing to receive the shipment on the first day it was tendered, the duty was imposed upon the agent of the defendant of going out and hunting up the plaintiff to notify him that he would receive the shipment in order that it might be relieved of further liability for penalties; whereas the duty was upon the plaintiff of finding the agent of the defendant and offering to deliver the cattle for shipment in order that the penalty might be imposed.

The failure of his Honor to incorporate in his charge the principle that there must be an offer or tender each day, actual or constructive, prefaced by the statement to the jury that he would not charge that there must be a tender and refusal each day, was important and material in view of the conflict in the evidence, the agent of the defendant denying that there was a tender and refusal and the evidence for the plaintiff tending to prove an offer each day.

The other exception principally relied on is to the introduction of the photograph of the cattle, alleged to have been taken on 14 February, while they were at the depot of the defendant. Photographs are admissible in evidence when shown to be a true representation and to have been taken under proper safeguard (*Davis v. R. R.*, 136 N. C., 115; *Pickett v. R. R.*, 153 N. C., 148; *Lupton v. Express Co.*, 169 N. C., 673), and it is generally held that these facts may be proven by other witnesses without introducing the photographer. 17 Cyc., 415; *Carlson v. Benton*, 66 Neb., 486; 1 A. and E. Anno. Cases, 159 and note; *McKarren v. R. R.*, 194 Mass., 179; 10 A. and E. Anno. Cases, 961; *Hughes v. State*, 126 Tenn., 40; 29 A. and E. Anno. Cases, 1263.

The Court says, in the authority last cited: "The fact that the photograph was not proven by the photographer who made it was immaterial. *McGirr Sons Co. v. Babbitt*, 61 Misc., 291, 113 N. Y. S., 753; *Smith v. Central Vermont R. Co.*, 80 Vt., 208, 67 Atl., 535; *McKarren v. Boston & N. St. R. Co.*, 194 Mass., 179, 80 N. E., 477, 10 Anno. Cases, 961, and note; *Consolidated Gas, Electric Light and Power Co. v.*

State, 109 Md., 186, 72 Atl., 651; *Indiana Union Traction Co. v. Scribner,* 47 Ind. App., 621, 93 N. E., 1014. The accuracy of photographs may be proven by any one who knows the fact. *Thompson v. Galveston, H. and S. A. R. R. Co.,* 48 Tex. Civ. App., 284, 106 S. W., 910; *Consolidated Gas, Electric Light and Power Co. v. State, supra.*"

(333) There was evidence that the photograph was not a true representation of the cattle of the plaintiff, but several witnesses testified that it was correct and accurate, and this was sufficient to justify its admission in evidence.

We have examined the other exceptions, and find no error in the rulings of his Honor.

The statement on the plaintiff as to the price for which he sold the cattle, which was objected to, had already been made without objection, and there is nothing in the record to show what the answer of Dr. Smith would have been to the questions asked him, which were excluded.

The statement of the witness that the cattle were in good condition, which was objected to upon the ground that it was an expression of opinion, falls clearly within the rule in *S. v. Leak,* 156 N. C., 647, stated as follows:

"The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence. A witness may say that a man appeared intoxicated, or angry, or pleased. In one sense the statement is a conclusion or opinion of the witness, but in a legal sense, and within the meaning of the phrase, 'matter of fact,' as used in the law of evidence, it is not opinion, but is one of the class of things above mentioned, which are better regarded as matters of fact. The appearance of a man, his actions, his expressions, his conversation—a series of things—go to make up the mental picture in the mind of the witness which leads to a knowledge which is as certain, and as much a matter of fact as if he testified, from evidence presented to his eyes, to the color of a person's hair or any other physical fact of like nature. This class of evidence is treated in many of the cases as opinion admitted under exception to the general rule, and in others as matter of fact—'shorthand statement of fact' as it is called. It seems more accurate to treat it as fact, as it embraces only those impressions which are practically instantaneous, and require no conscious act of judgment in their formation. The evidence is almost universally admitted, and very properly, as it is helpful to the jury in aiding to a clearer comprehension of the facts."

For the reasons given there must be a new trial on the second and third issues.

Partial new trial.

Cited: White v. Hines, 182 N.C. 281 (2c); *Moore v. Ins. Co.,* 192 N.C. 582 (4c); *S. v. Brown,* 204 N.C. 399 (4c); *Watson v. Durham,* 207 N.C. 625 (4c); *S. v. Stanley,* 227 N.C. 656 (2c).

(334)

P. P. YARBOROUGH v. F. C. GEER COMPANY, WELLS BROTHERS, AND NATIONAL FIRE-PROOFING COMPANY.

(Filed 12 April, 1916.)

1. Master and Servant—Safe Place to Work—Tower Elevators.

An elevator 60 feet high used for the purpose of elevating and distributing concrete in the construction of a building, at the top of which a servant is required to work, requires the care and supervision of the master, under the principle that the master, in the exercise of ordinary care commensurate with the danger, should furnish his servant a safe place to do his work.

2. Same—Trials—Evidence—Negligence.

Where the evidence tends to show that a servant was required to work at the top of a 60-foot elevator used for the distribution of concrete in the erection of a building, and was injured by stepping on a loose plank, not properly nailed to the platform, and thrown to the first floor, and it appears that it had not been his duty either to aid in the construction of the platform or inspect it, and that he had gone there without knowledge of the defect, to work at the order of a vice-principal: *Held,* the servant had a right to assume that the place was safe, and the evidence is sufficient upon the issue of the master's actionable negligence.

3. Master and Servant—Dangerous Employment—Assumption of Risks—Master's Negligence.

The rule that the servant assumes the risks incident to the nature of a dangerous employment has no application to injuries directly resulting from the negligence of the master in failing in his duty to furnish him a safe place to work, or that of another to whom the master had delegated this duty.

APPEAL by defendant from *O. H. Allen, J.,* at November Term, 1915, of DURHAM.

Civil action, tried upon these issues:

1. Was the plaintiff injured by the negligence of defendant F. C. Geer Company, as alleged in the complaint? Answer: "No."

2. Was the plaintiff injured by the negligence of the defendant Wells Brothers Company, as alleged in the complaint? Answer: "No."

3. Was the plaintiff injured by the negligence of the defendant the National Fire-Proofing Company, as alleged in the complaint? Answer: "Yes."

4. If so, did plaintiff, by negligence on his part, contribute to said injury, as alleged in the answer? Answer: "No."

5. Did the plaintiff assume the risk incident to his employment, as alleged in the answer? Answer: "No."

6. What damages, if any, is the plaintiff entitled to recover? Answer: "$5,000."

(335) From the judgment rendered, the defendant the National Fire-Proofing Company, appealed.

Fuller & Reade for plaintiff.

Bryant & Brogden for defendants.

BROWN, J. In the view we take of this case, it is unnecessary to discuss the several assignments of error *seriatim*. The questions of law presented are few and simple and can be considered under the motion of nonsuit. The plaintiff was employed by the National Fire-Proofing Company, hereinafter called the defendant, in the construction of a building for the Geer Company in the city of Durham. Wells Brothers Company were the contractors to erect the building, and they sublet the concreting of the several floors of the building to the defendant the National Fire-Proofing Company.

At the time of the plaintiff's injury he was employed by this defendant and engaged in concreting the third floor. The concrete was carried by means of an elevator to the top of the building as it was being erected, and from buckets emptied into a hopper; from the hopper it passed into the chute and was conveyed to that part of the building where it was to be laid. The evidence tends to prove that this elevator was about 60 feet high and was an open latticed tower structure.

The plaintiff was sent by the defendant's superintendent, Price, to the top of the elevator tower and directed to operate the hopper. The plaintiff stood upon the platform at the top of the elevator and operated the chute and the hopper from that position. At times it became necessary to climb on top of the hopper in order to prevent its becoming choked. The plaintiff climbed on top of the hopper for the purpose of freeing it, and in getting back to his position on the platform, as he was attempting to step off of the platform, he stepped on one of its planks, which, according to the evidence, was not nailed or in any way fastened down, and as it gave way it caused the plaintiff to fall to the first floor, whereby he was seriously injured.

Plaintiff testifies: "I had nothing to do with laying those planks that were across there for me to stand on. The first time that I saw the planks or used them was when I was ordered up there to work."

In addition to excepting to his Honor's refusal to allow the motion to nonsuit, the defendant excepts to the following charge: "But I hold as applicable to this case that a structure of this kind, where a person is put to work upon it and has to ascend as high as 60 feet in the air, and do the work, that the principle of requiring the master to furnish a safe place to work—a reasonably safe place—does apply in this case, and I instruct you that that principle does apply to this case, subject, however, to the rules I shall lay down later as to contributory negligence and assumption of risk. I am holding that where a man (336) is put to work on a structure of this kind, as high as he was in the air, that the master must furnish him a reasonably safe place to work, and as to whether this was a reasonably safe place, I am leaving that for the jury to say—putting a man to work on a platform of this kind without nailing it down."

One of the elementary principles of the law of negligence now established is that the master must furnish his servant a reasonably safe place in which to do his work, consistent with the character of the work to be done. This principle is so well settled that it needs no citation of authority to support it. There are exceptions to this as well as to most other rules.

The defendant contends that this case falls within the rule announced by this Court in the case of *Bunn v. R. R.*, 169 N. C., 648; *Simpson v. R. R.*, 154 N. C., 52, and others of similar import; that is, that the duty of the master to provide for his employee a safe place to work does not usually prevail under ordinary conditions requiring no special care, preparation, or provision, where defects are readily observable and where there was no good reason to suppose that injury would result.

We agree with his Honor that a structure of the kind which the plaintiff was required to ascend and work upon, 60 feet from the first floor, is not of the kind referred to in any of the cases which have been made exceptions to the ordinary rule. This particular structure was a tower elevator in which concrete was carried up to its top and which workmen were required to ascend and use at a dangerous elevation. If such a structure as this does not require the supervision of the master to see that it is in good and proper condition, so far as circumstances will reasonably permit it to be, then we do not think any structure could require such supervision. *Barkley v. Waste Co.*, 147 N. C., 585; *Smith v. R. R.*, 170 N. C., 184.

There is no similarity whatever, in our opinion, between that class of cases represented by *Bunn v. R. R.*, 169 N. C., 648, and *Simpson v. R. R.*, 154 N. C., 52. The plaintiff took no part in the erection of this tower and was not required to inspect the condition of the platform. When he was sent on top of this structure by the superintendent, he had

the right to assume that the platform was as secure as it could reasonably be made, and he was not required to inspect it, and it seems from the evidence that he had no knowledge that the planks on this platform had not been in any way fastened down. Labatt on Master and Servant, 1904 Ed., secs. 409c, 410 a, and cases cited in Note G to section 412 on page 1150. *Cotton v. R. R.,* 149 N. C., 227; *Aiken v. Mfg. Co.,* 146 N. C., 324; *Steele v. Grant,* 166 N. C., 635; *Barkley v. Waste Co.,* 147 N. C., 585; *Standard Oil Co. v. Bowker,* 141 Ind., 12.

(337) There is abundant evidence tending to prove that the tower was erected by this defendant; that the planking of the top of the platform was left unfastened, and that it was the direct and proximate cause of the plaintiff's injury. There is no evidence, so far as we can see, that the plaintiff did anything of a negligent character which contributed to his own injury. The plaintiff in accepting this particular employment assumed all such risks as are naturally incident to it, but he did not assume those risks which arise out of the negligence of the defendant. If in the construction of this tower the defendant delegated the work to one of its servants, it is responsible for the manner in which it was discharged, and the plaintiff did not assume any risk which was the proximate result of the defendant's negligence or of those to whom the primary duty of the defendant was delegated. *Tanner v. Lumber Co.,* 140 N. C., 475; *Avery v. Lumber Co.,* 146 N. C., 592; *Smith v. R. R., supra; Aiken v. Mfg. Co.,* 146 N. C., 324; *Orr v. Telephone Co.,* 132 N. C., 691.

No error.

Cited: Howard v. Wright, 173 N.C. 341 (3cc); *Atkins v. Madry,* 174 N.C. 192 (3c); *Wallace v. Power Co.,* 176 N.C. 561 (3c); *Thompson v. Oil Co.,* 177 N.C. 283 (3c); *Fowler v. Conduit Co.,* 192 N.C. 17, 18 (2c).

CHARLES R. HELSABECK v. C. T. GRUBBS.

(Filed 12 April, 1916.)

Courts—Justices of the Peace—Appeal—Recordari—Motions to Dismiss—Statutes.

A motion to dismiss an appeal from a justice's court, made in the Superior Court several terms after the judgment has been entered, for failure to send up the transcript, should be granted under Revisal, sec. 608, notwithstanding due notice of appeal has been given, when the appellant has not paid the fees required or taken proper steps to perfect the appeal; and his motion for *recordari* should be denied.

HELSABECK *v.* GRUBBS.

APPEAL by plaintiff from *Cline, J.*, at November Term, 1915, of FORSYTH.

Ovid W. Jones, Benbow, Hall & Benbow, and W. H. Beckerdite for plaintiff.

No counsel for defendant.

CLARK, C. J. This action was begun before a justice of the peace, 24 February, 1913, for recovery of personal property. Defendant failed to appear, and at the trial judgment was entered in favor of plaintiff. On 4 March, 1913, the defendant caused notice of appeal to be served on plaintiff and the justice of the peace, but the latter did not send up the appeal, claiming that his fees had not been paid. At December Term, 1913, of the Superior Court, the seventh term of that (338) court held after the trial before the justice of the peace, the defendant, who in the meantime had made no effort to ascertain whether his appeal had been docketed, moved in the Superior Court for *recordari* and the plaintiff moved to dismiss the appeal. The latter motion was overruled. The plaintiff excepted and from the verdict and judgment at the trial appealed to this Court.

Without passing upon the exceptions for error at the trial, it is sufficient to say that the motion in the Superior Court to dismiss the appeal should have been allowed. In *Boing v. R. R.*, 88 N. C., 62, it was held that an appeal from a justice of the peace should be docketed at the first term of the Superior Court.

Many decisions have followed to the same effect. In *Peltz v. Bailey*, 157 N. C., 167, the Court held, reviewing the authorities, as follows: "Appellee has rights as well as the appellant. The failure to docket the appeal in this case at the November term was negligence on the part of the appellant, which entitled the appellee to have the appeal dismissed. This point has been so often held by this Court that it admits of mild surprise that it can be again presented. . . . The Court has sufficient employment to decide cases which are presented to us on their merits, without taking up valuable time to consider the excuses for negligence by parties who do not think enough of their appeals to attend to them in the time provided by statute." That case cites numerous others to the same effect.

Revisal, 608, requires an appeal from a justice of the peace to be "docketed at the next ensuing term of the Superior Court," which has always been held to be the first term of that court "which begins more than ten days after judgment in the magistrate's court." The statute further provides that appeals from a justice shall be triable at such first term, and the Superior Court has no more right to dispense with such

requirement than this Court has to disregard the similar provision as to docketing appeals in this Court.

The object of our statute, Revisal, 608, is to expedite the trial of appeals from justices, and for same reason, Revisal, 609, provides that such causes shall be tried upon original papers. The intention of the law is that litigation for such small matters as come up from justices of the peace shall not be made expensive by unnecessary delays.

Besides numerous cases cited in *Peltz v. Bailey,* that case itself has been cited since as conclusive authority in *Jones v. Fowler,* 161 N. C., 355. There was error in not dismissing the case below.

Reversed.

Cited: Sneeden v. Darby, 173 N.C. 275 (cc); *Teel v. Knott,* 200 N.C. 522 (cc); *S. v. Fleming,* 204 N.C. 42 (c); *Summerell v. Sales Corp.,* 218 N.C. 453 (c).

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(339)

J. M. AND W. H. ALLEN v. ROANOKE RAILROAD AND LUMBER COMPANY.

(Filed 12 April, 1916.)

1. Deeds and Conveyances—Registration—Notice.

No notice, however full and formal, as to the existence of a prior deed will of itself supply the place of registration as required by our statute.

2. Same—Adjoining Counties—Reference to Former Deeds—Trusts.

Where a deed conveys a tract of land partly situated in two adjoining counties, the registration thereof in one county has no effect beyond its own borders as against a registered conveyance of the land situated in the adjoining county derived from the same grantor, though subsequently executed; and where the later deed refers to the former one only for a better description, the rule does not obtain that such recitals create an interest or engraft a trust upon the property conveyed, and so protect such interest or estate by the registration of the later instrument; and especially when such instrument referred to is not immediately from the same grantor.

3. Reformation of Instruments — Fraud — Mutual Mistake — Inadequate Consideration—Deeds and Conveyances—Trials—Evidence.

In order to successfully invoke the equitable jurisdiction of our courts to correct a deed for mistake, it must be shown that the mistake was mutual, or the mistake of one superinduced by the fraud of the other; and the evidence in this case tending only to show that the grantor instructed his draftsman to convey the land, reserving the timber, without the knowledge of the grantee, which was not expressed in the deed, and

that the price was inadequate for both the timber and land conveyed, is held insufficient both as to the questions of mutual mistake and fraud.

4. Principal and Agent—Evidence—Declarations—Direct Testimony.

The principle that excludes declarations of an agent as to his authority to bind his principal by his acts can have no application where the agent himself testifies to the fact, as a witness in the suit.

5. Appeal and Error—Assignments of Error—Brief.

A question not presented by exceptions or assignments of error, but only discussed in appellant's brief, will not be considered on appeal.

CLARK, C. J., concurring.

APPEAL by defendant from *Peebles, J.*, at September Term, 1915, of WAKE.

Civil action. From an inspection of the record, it appears that, heretofore, in 1913, J. M. and W. H. Allen instituted an action against the lumber company to restrain cutting of timber on plaintiff's land in Franklin County and to recover damage for cutting already done; that Nannie R. Sills and her children and heirs at law, grantors in the deed conveying the land to the Allens, had instituted an action against them in the county of Nash to correct the deed, alleging that the growing timber on the land was included in the deed by mistake of (340) the parties. Both actions were removed to Wake County, and, having been consolidated by order of court, the questions were submitted to the jury on issues as follows:

1. Are J. M. and W. H. Allen the owners in fee and entitled to the possession of the lands described in the complaint and the timber growing thereon, situated in Franklin County, N. C.?

2. Are J. M. and W. H. Allen the owners in fee and entitled to the possession of that part of said lands situated in Nash County, N. C.?

3. Did the Roanoke Railroad and Lumber Company wrongfully and unlawfully cut and remove any timber from the lands situated in Franklin County, N. C., as alleged?

4. If so, what damages, if any, are J. M. and W. H. Allen entitled to recover?

On the trial, the facts in evidence tended to show that Nannie R. Sills, and her two children and heirs at law, codefendants, were the owners of a body of land, amounting to near 260 acres, lying in the counties of Franklin and Nash, about 209 acres of same being in the former county, and that in May, 1912, for $3,325, they conveyed said land to plaintiffs, and the deed therefor was registered in Franklin County on 26 June, 1912, and in Nash County on 7 August, 1912. It was admitted that the timber growing on the part of the land in Nash County had been

already cut and removed by defendant company, and that they had title to that portion of timber; that prior to the execution of the aforesaid deed, to wit, 20 September, 1905, the Sillses, owners, had conveyed the timber growing on these lands to A. G. Taylor and B. G. Alston, and the deed was recorded in Nash County 28 October, 1905, but was not registered in Franklin County till after the commencement of the action in 1913; that on 27 October, 1905, Alston and Taylor conveyed the timber to the Nash County Timber Company, and the deed was registered in Nash County 28 October, 1905, but not in Franklin County till after this action commenced. The Nash County Timber Company conveyed the timber to defendant the Roanoke Railroad and Lumber Company by deed dated 25 June, 1907, and same was registered in Nash County September, 1907, and in Franklin County 23 September, 1907. This deed does not describe the lands, but conveys "all the trees, timber, etc., which are described and conveyed in the following deeds, to which reference is made for a more definite and accurate description: first, the following deeds registered in Nash County," etc., and among the deeds recited is that from G. W. Taylor and wife *et al,* book 150, p. 307.

There were facts in evidence as to the alleged trespass and amount of damage done, and also testimony offered by defendants for the purpose of establishing the alleged mistake.

(341) At the close of the testimony the court charged the jury that if they believed the evidence they would answer the issues as to title in favor of plaintiffs, and submitted the question of damages for their decision.

Verdict for plaintiff, and defendant company excepted and appealed.

W. H. Yarborough, W. M. Person, Armistead Jones & Son, and Manning & Kitchin for plaintiff.

R. N. Simms, Small, MacLean, Bragaw & Rodman for defendant.

HOKE, J., after stating the facts: It has been repeatedly held with us that, under our registration laws, no notice, however full and formal, as to the existence of a prior deed, will of itself supply the place of registration. *Piano Co. v. Spruill,* 150 N. C., 168; *Tremaine v. Williams,* 144 N. C., 116; *Quinnerly v. Quinnerly,* 114 N. C., 145; *Todd v. Outlaw,* 79 N. C., 235. This being true, the deed to plaintiffs from Mrs. Sills and her children, the original owners, conveying the land and all that was on it of a permanent nature, including the growing timber, having been registered in Franklin County before any conveyance of the timber from these owners to defendant or to any one under whom the defendants claim, on the record as it now stands the

plaintiffs have the better title, and the position is not affected because the deeds of defendants were first registered in Nash County, where a portion of the land is situate. Our statute, Revisal, 980, establishes priority of right from registration in the "county where the land lieth," and the registration in Nash had no effect beyond the borders of that county. *King v. Portis,* 77 N. C., 25.

It is urged for defendant, the lumber company, that the plaintiffs are affected with *legal notice* of their claim, as we understand the argument, by reason of the registration in Franklin County of the deed from the Nash Timber Company to the lumber company, this deed having been registered in Franklin in 1907, and making some reference to the former deed of Alston and Taylor to said lumber company. There are decisions on the subject which hold that a deed by its recitals, etc., may so recognize and refer to the existence of a prior deed as to create an interest or engraft a trust upon the property conveyed, and so protect such interest or estate by registration of the latter instrument, an instance presented in *Hinton v. Leigh,* 102 N. C., 28, and one or two other cases in our Reports; but in the case before us the provision is not at all of that character, but only refers to the Taylor and Alston deed for a better description of the property, and did not purport to have any further effect. *Piano Co. v. Spruill, supra.* And, if it were otherwise, the reference relied upon is to a deed from Taylor and Alston, and not to any deed or conveyance from Mrs. Sills and her children.

The purpose of our registration acts is to enable creditors and purchasers for value to ascertain the true owner, and the priority of right should arise from the prior registering of the deed passing (342) the property from such owner. This, as we have seen, the plaintiffs have, and it must be held, therefore, as stated, that they hold the superior claims.

It is further insisted that his Honor, on some appropriate issue, should have submitted the question involved in the suit by Mrs. Sills and her children to correct the deed made by them to plaintiffs, on the ground of mistake; that by the terms of the agreement the timber was to have been excluded from this instrument. To correct a deed on account of mistake is a recognized subject of equitable jurisdiction, but in order to its exercise for the purpose of reforming the instrument because it does not properly express the agreement of the parties, it is established that the mistake must be mutual or it must be the mistake of one superinduced by the fraud of the other. *Sills v. Ford,* at present term; *Shook v. Love,* 170 N. C., 99; *Pelletier v. Cooper,* 158 N. C., 405; *Floars v. Ins. Co.,* 144 N. C., 232; *King v. Hobbs,* 139 N. C., 170; *Warehouse v. Ozment,* 132 N. C., 839.

In *Pelletier's case, supra,* it was held: "Equity will correct a mistake in law in the drawing of a written contract when it is made to appear that the contract, as therein expressed, does not carry out the actual agreement which both the parties had made and which it was their mutual intent to express in the writing." And in *Shook v. Love, supra, Associate Justice Brown* delivering the opinion, it was said: "The power of a court of equity to reform written instruments so as to speak the real contract of the parties will not be exercised because of the mistake of one of the parties unless brought about by the fraud of the other; but an instrument will be reformed when the mistake is by all parties or when it is the mistake of the draftsman."

Applying the principle, there is doubt if on proper consideration of the record there is sufficient evidence of mistake on the part of Mrs. Sills and her children to justify a correction of this instrument, and we find no evidence whatever of any mistake or fraud on the part of the Allens. On the contrary, the facts tend to show that, having been approached by a real estate dealer, representing Mrs. Sills, with a proposition to sell the land, they had the record examined, and, finding the title clear, they bought and took a deed for the land, and had the same properly registered, and that the timber on the portion of the land in Franklin County was one of the inducements to the purchase, and the deed and claim correctly expressed the contract which they made and intended to make. True, there is testimony on part of Mrs. Sills that the purchase price paid for the land, $3,300, was entirely inadequate, and that the timber alone was worth that amount; but there is also evidence tending to show that the land, as conveyed, brought a full price, and, in any event, there is no such discrepancy of value and price as to affect the result. Doubtless, Mrs. Sills did not intend
(343) to convey the timber, which she had already sold, and her son told the draftsman of the deed, in Greensboro, that the timber had been already sold off; but the darftsman was the agent of Mrs. Sills, and we do not find that he was instructed to leave out the timber, and accordingly, the deed conveying both land and timber, having been duly executed, was forwarded to the Allens at Louisburg, and there is nothing to show that they had any knowledge or notice that it was not drawn pursuant to the agreement between the parties as they understood it, and the case presented is only an ordinary one where a second purchaser has obtained the title by having his deed first registered pursuant to law.

Exceptions to rulings of the court on questions of evidence are without merit.

One J. A. Turner, a witness for defendants, to whom Mrs. Sills first wrote about selling her land, and who negotiated the sale to plaintiffs,

was asked on cross-examination if, in the transaction, he represented the Allens in any way, as factor or agent, and answered he did not.

It is a recognized position, not infrequently presented, that the fact of agency cannot be proved by the declarations of an alleged agent; but we fail to see why this fact cannot be shown by the sworn testimony of the witness. Unless objectionable on some other principle, such testimony would seem to be directly relevant, and the cases so hold. *Sutton v. Lyons,* 156 N. C., 3; *Machine Co. v. Seago,* 128 N. C., 160.

The right of a woman as notary public to take the verification of a pleading of the probate of a deed is not involved in this appeal. No exception or assignment of error presents the question, nor is it discussed in the briefs, and for the reason, no doubt, that the verification and probate were taken in Virginia, and the Constitution of that State provides that "Men and women 18 years of age shall be eligible to the office of notary public." Art. II, sec. 32. If this did not appear affirmatively, the presumption is that the officer of another State is acting under legal authority. *Nicholson v. Lumber Co.,* 160 N. C., 33.

We find no error in the record, and the judgment in plaintiff's favor is affirmed.

No error.

CLARK, C. J., concurring: The answer in this case was sworn to before "Alleene" C. Jones, notary public, 13 November, 1913. If the majority opinion in *S. v. Knight,* 169 N. C., 333, which set aside chapter 12, Laws 1915 (which provided that women could exercise the duties and powers of a notary public), is to be adhered to, it must be upon the ground that women are inherently incompetent, under the Constitution, to discharge that duty, and hence they must have been so at the date that this answer was filed. Consequently, the answer of the defendant not being legally verified, the allegations of the verified complaint would be taken as true, and the discussion in (344) the opinion of the rights of the parties is unnecessary.

Furthermore, the deed to the defendant Roanoke Railroad and Lumber Company, 25 June, 1907, was acknowledged before Miss Rosa T. Bilisoly, notary public. This point was made on the trial below and in this Court, and the fact that she was a woman was not denied. The acknowledgement of this deed, certified under her "hand and official seal" as notary public, is headed "North Carolina—Nash County." It is true that the clerk of the Superior Court in passing upon her certificate says: "The foregoing certificate of Rosa T. Bilisoly, notary public of Norfolk, Va., is adjudged to be correct. But the certificate made by her recites, as above, the acknowledgement as having been taken before her in Nash County.

If there is, as I believe, no inherent defect, either in fact or in law, which disables women from signing a certificate as notary public, then I acquiesce in the opinion of the Court, if a woman cannot be a notary; but the discussion in the opinion is unnecessary and *obiter*.

In *Nicholson v. Lumber Co.*, 160 N. C., 33, we held that where the probate of a deed is taken before a woman notary public in another State it will be assumed that she rightfully held the position in that State, and Virginia is one of some forty-odd States and territories in which a woman can exercise the duties of that position. Indeed, in Virginia it is held that "any man or woman 18 years of age" can be a notary public. But in this case the acknowledgement of the deed for land in this State, as already stated, purports to have been taken by Miss Bilisoly in Nash County in this State.

There is no recital by the clerk that Alleene C. Jones, before whom the verification of the answer was made, was a notary public in another State, and the verification purports to have been taken in Nash County.

Cited: Dye v. Morrison, 181 N.C. 311 (1c); *Crawford v. Willoughby,* 192 N.C. 272 (3c); *Lloyd v. Speight,* 195 N.C. 180 (3c); *McClure v. Crow,* 196 N.C. 659 (1c); *Jones v. Light Co.,* 206 N.C. 864 (4c); *Parrish v. Mfg. Co.,* 211 N.C. 11 (4c).

R. H. GRAY v. J. S. COLEMAN ET AL.

(Filed 12 April, 1916.)

1. Deeds and Conveyances—Description—Natural Objects—Ambiguity—Questions for Jury.

Ordinarily natural objects, properly identified, will control course and distance in the description of lands in a deed; but where there is ambiguity as to what is the natural object called for, so as to require parol evidence of identification, the question must be referred to the determination of the jury.

2. Deeds and Conveyances—Descriptions—Natural Objects—Private Lines.

A call in a conveyance of land to the line of another tract, when such line is fixed and established or capable of being so fixed and established by the usual rule of locating land, is to be considered a natural object within the meaning of the principle; and natural objects in strictness, such as creeks or rivers, when they have a distinct and definite identification, are given preference over a call by marked line and artificial corners, unless these last were made for the present purpose of executing a deed and contained in a survey made for that purpose.

3. Deeds and Conveyances — Descriptions — Natural Objects—Streams—Ambiguity—Evidence—Trials—Questions for Jury.

In an action of trespass, involving the true location of the divisional line between two adjoining owners of land, the question was made to depend upon the following description in a former deed in plaintiff's chain of title: "thence N. 86 E. 45 poles to a pawpaw gum on the main run of Deep Creek; thence down the run of said creek by a line of marked trees, S. 2 E. 92 poles to a white oak; thence W. 22 W. 20 poles to a pawpaw on the main run of said creek," etc. There was evidence tending to show that some distance south of the point where the description touched Deep Creek it divided into two prongs of about equal size, coming together again before reaching the southern terminus, where it is again spoken of as the main channel, and that the trees were marked on the eastern prong, with other evidence of identification, in accordance with plaintiff's contention, the *locus in quo* lying between these two prongs. *Held*, it was for the jury to determine, upon the evidence, which run of Deep Creek was designated by the parties and referred to in the deed as "down said run," etc., to a "white oak."

4. Deeds and Conveyances—Descriptions—Natural Objects—Streams—Intent—Instructions—Appeal and Error.

In this action of trespass, involving the true divisional line between two adjoining owners of land, the question was made to depend upon whether the line is with the eastern or western prong of a creek which separates along the line of description and comes together again before reaching the next call in the deed in the plaintiff's chain of title. *Held*, reversible error to the plaintiff's prejudice for the trial judge to instruct the jury that the true location of the line would depend upon "the run of the main creek as it was when this call appeared in plaintiff's original deed," for it should depend upon the intention of the parties in using the terms at the time, to be determined by the jury.

5. Deeds and Conveyances—Evidence—Declarations Against Interest.

A deed in defendant's chain of title, made in 1833, tending to show that the true divisional line in dispute between adjoining owners of land was in accordance with the plaintiff's contention, and against the interest of the grantor therein, is held to be competent evidence in plaintiff's favor under the circumstances of this case.

CIVIL ACTION of trespass on realty, involving chiefly a question (345) of boundary, tried before *Bond, J.*, at November Term, 1914, of HALIFAX.

On the trial there was proof that plaintiff owned and was in possession of a tract of land of about 225 acres, the southernmost portion of a larger tract and the eastern boundary of the deeds con- (346) veying the title, the calls directly relevant to the question presented being as follows: "Beginning at a black gum, standing in the run of Saw Scaffold Branch, thence N. 86 E. 45 poles to a pawpaw gum on the main run of Deep Creek, thence down the run of said creek by a

line of marked trees, S. 2 E. 92 poles to a white oak, thence S. 22 W. 152 poles, thence S. 34 W. 20 poles to a pawpaw on the main run of said creek in the Benjamin Dickens line," etc.

In June, 1853, Moses Smith, Sr., then owner of the entire or larger tract, conveyed the northern part of same to Moses Smith, Jr., the dividing line between them running from the white oak and called in that deed the Taylor and Lemuel Bell corner. Plaintiff, as stated, owns the southern portion of this larger tract. The facts in evidence also tended to show that, some distance south of the pawpaw gum, Deep Creek divided with two prongs, each running in a southerly direction and coming together again at or before reaching the southern boundary at Dickens' hole. The land in dispute is between these two prongs, and plaintiff claimed and offered evidence tending to show that the eastern prong was the main run of Deep Creek and was the prong designated and referred to by the parties in the various deeds and the one to be followed in running the calls, S. 2 E. and S. 22 W. and S. 34 W., etc.

There was evidence on part of plaintiff also tending to show that the white oak called for in the boundary was at or near the eastern prong, and that the line of marked trees followed the same.

There was evidence on the part of defendant tending to show that the western prong was the main run of Deep Creek and the line designated and called for in the deeds. The cutting done by defendants was on the land lying between the two runs of the creek, and the facts in evidence tended to show that if the eastern run of the creek was the correct boundary of plaintiff's deeds, there had been a wrongful trespass by defendant, and if the western was the true location, no wrong had been done.

There was verdict for defendant. Judgment. Plaintiff appealed, assigning for error certain portions of his Honor's charge and two rulings of the court on questions of evidence.

E. L. Travis and A. P. Kitchin for plaintiff.
Murray Allen and R. C. Dunn for defendant.

HOKE, J. It is an established position in our law of boundary that in case of irreconcilable repugnancy, natural objects called for and properly identified will control course and distance, and that the line of another tract, when fixed and established or capable of being (347) so fixed and established by the usual rules for locating land, is to be considered a natural object within the meaning of the principle. *Lumber Co. v. Bernhardt,* 162 N. C., 460, and authorities cited.

It is also recognized that, as a general rule, natural objects in strictness such, as a creek or river when it has distinct and definite identification, are to be given preference over a call by marked lines and artificial corners, unless these last were made with the present purpose of executing a deed conveying the land contained in the survey and the same is made accordingly. *Lynch v. Allen,* 20 N. C., 190. And the cases on this subject further hold that when there is ambiguity as to what is the natural object called for, and to such an extent parol evidence is required to identify it or to establish what is intended by the call, the question must be referred to the jury for decision, and, in some instances, the call for marked lines will be adopted as affording the safer guide to a correct location. *Lumber Co. v. Lumber Co.,* 169 N. C., 80; *Bonaparte v. Carter,* 106 N. C., 534; *Baxter v. Wilson,* 95 N. C., 137; *Gainey v. Hays,* 63 N. C., 497; *Hurley v. Morgan,* 18 N. C., 425; *Cherry v. Slade,* 7 N. C., 82. In *Gainey v. Hays, supra,* the boundary line in dispute was "the main road from Smith's ferry to Bass's ferry on the Neuse," and, there being two roads between the points designated, it was referred to the jury to determine "which of the roads was intended by the parties to the deed." And in *Cherry v. Slade, Henderson, J.,* speaking generally to the question, said: "I think a *venire facias de novo* should be awarded, because the jury, instead of finding the facts, have only found the evidence. That the line C D is Ward's line, or a line of a tract of land belonging to Ward, is matter of evidence. That it is the line of Ward called for in Hislop's patent is a question of fact for the jury to find from the evidence, and this fact may depend upon a variety of circumstances, all proper for the consideration of the jury. This error has become too common, from confounding the evidence with facts. A line, when once established to be the one called for, no matter by what evidence (if it be legal evidence), whether it be artificial or natural, will certainly control course and distance, as the more certain description. A natural boundary, such as a water-course, is distinguished from other water-courses by its name, or by its situation, or by some other mark. One of those means of identifying the water-course cannot control all the rest, if those other means are more strong and certain. A name, for instance, is the most common means of designating it; and this, in general, is sufficiently certain; but it cannot control every other description; and where there are two descriptions incompatible with each other, that which is the most certain must prevail. Cases might be put where it must be evident that the parties were mistaken in the name, and, therefore, the name must yield to some other description more consistent with (348) the apparent intent of the parties. It is true that in cases of water-courses or natural boundaries, and in some cases of artificial

boundaries which are of much notoriety, and have, therefore, obtained well known names, the other descriptions must be very strong; but if they be sufficiently so, the name must give way and be accounted for from the misapprehension or mistake of the parties."

On careful consideration of the record and the facts in evidence, we are of opinion that the plaintiff has not had the benefit of the principles upheld by these last cases, and that reversible error has been committed to his prejudice.

From these facts it appears that "the pawpaw corner," the first point the plaintiff's deed purports to touch Deep Creek, there was one main creek, running south, and some distance below that the creek divided into two prongs of about equal size and making it at least difficult to determine which of the two was the main run; that these prongs came together at or before the termination of the southerly calls of plaintiff's deed, and there again the point is designated as the main run, while the call for the corner lines, between the northern and southern terminals, is down the run of said creek, omitting the word "main" except in so far as the word "said" may be held to indicate main.

The trespass, if any, was between these two runs, and, if the eastern is the true location of the *run* referred to in these deeds, the plaintiff should recover.

There is evidence on the part of the plaintiff that the white oak at the termination of the first southern call was on the eastern run, and there was also a cypress, with evidence tending to show it was another monument, and, considering all the evidence bearing on the question, we are of opinion that a proper application of the authorities recited requires that the court should have left it to the jury to decide which run was designated by the parties and referred to in the deed as "down the said run" to a "white oak."

In two or three places in the charge of the court, and in laying down the rule to guide them to a correct conclusion, the jury were distinctly instructed that the true location of these eastern lines was "down the run of the main creek as it was when this call appeared in plaintiff's original deed in 1826." Not what the parties to the instrument intended by the call "down the said creek," but "down the main creek as it was at that date." True, we have repeatedly held that "what are the boundaries of a tract of land is a question of law," but, as shown in the cases referred to, where there is ambiguity as to the call of a natural object, the jury must decide what object the parties intended, which run they intended when they wrote, as part of the
(349) description, "down the run of said creek," and the relevant evidence as to the probable existence of corners called for, etc., should be properly weighed and considered in deciding the question.

True, at the very close of his Honor's charge he instructed the jury as follows: "If the plaintiff has satisfied you by the greater weight of the evidence that the main run of the swamp at the time it was called for in the old deed had these marked trees standing on it which are called for in his description in the complaint and in the deeds, and that was the main run of the swamp, so regarded by the parties at the time the deed was made, you would answer the first issue 'Yes.' If, on the other hand, you find that at the time that the deed was given that the marked trees called for stood in the Higgs hole run, and that that was referred to by the parties as the main run of the swamp, then it would be your duty to answer the first issue 'No,'" and this is very near in accord with the authorities; but, as stated, at least three times in the body of the charge he had instructed them that the "main run of the creek would control," necessarily giving the impression that this would be true regardless of what the parties intended, and we think the jury must have been left in uncertainty as to what was the true rule for their guidance in determining the issue.

Again, plaintiff offered to put in evidence the record of a division of the lands of Benjamin Bell, made in 1833, showing said land was divided into six portions, and offered also to prove in this connection that lot 6, afterwards known as the Taylor land, had been acquired and was held by Mrs. DeLany, under whom defendant claimed, and that same contained descriptive calls tending, in connection with other facts and papers already in evidence, to support the location of the eastern line as claimed by plaintiff, among other things, tending to show that eastern run was designated as the "main run" of the creek, and this as far back as in 1833, and calling also for a white oak, designated and claimed by plaintiff as his own corner on or near the eastern run, etc.

The record and accompanying deed were excluded by the court.

We were not favored with an oral argument for defendant, and it is sometimes difficult to apprehend the full significance of an objection in an extended trial of this kind, but, as now advised and on the record as we now understand it, we are of opinion that this record should have been received. It seems to be the admission of a former proprietor of this lot No. 6 against the interest of such proprietor and tending to establish the location of the divisional line between them as claimed by plaintiff.

Under the authorities apposite, the record was relevant to the inquiry, and should have been received, *Smith v. Moore,* 142 N. C., pp. 277-286; *Ratliff v. Ratliff,* 131 N. C., 425; *Cansler v. Fite,* 50 (350) N. C., 424; *Peace v. Jenkins,* 32 N. C., 355.

For the errors indicated, plaintiff is entitled to a new trial of the issues, and it is so ordered.

Venire de novo.

Cited: Pace v. McAden, 191 N.C. 139 (c).

SCHLOSS-BEAR-DAVIS COMPANY, INC. v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

(Filed 12 April, 1916.)

1. Commerce—Railroads—Live Stock—Damages—Bills of Lading—Written Notice—Waiver.

Our former decisions are approved, that the stipulations in live-stock bills of lading may be waived which require that written notice of claim for damages be given the carrier before removing the stock from its possession, applicable to interstate as well as intrastate commerce; and it is held that Ruling No. 456 of the Interstate Commerce Commission, as to the form of the written notice, has no application.

2. Same—Discrimination—Constitutional Law.

The principle announced in the decisions of our Supreme Court recognizing that knowledge by the carrier of the damaged condition of live stock under the ordinary bill of lading, before their removal, etc., may be regarded as a waiver of the written notice therein stipulated for, is not objectionable either as discriminatory or as affording additional opportunity for discrimination, contrary to the Federal Commerce Acts.

3. Instructions—Evidence—Trials—Appeal and Error.

Proper prayers for instruction must relate to the evidence introduced at the trial, and it is not error for the trial judge to refuse to give them, though stating correct propositions of law, when they are not supported by the evidence.

APPEAL by defendant from *Daniels, J.,* at December Term, 1915, of NEW HANOVER.

Civil action to recover damages for negligent injury to an interstate shipment of live stock over the defendant Louisville and Nashville Railroad, the initial carrier, and over the Seaboard Air Line Railway, the connecting and delivering carrier. The Louisville and Nashville Railroad, the initial carrier, is the sole defendant in this cause, the Seaboard Air Line Railway not being made a party thereto.

The live stock reached Wilmington on the night of 10 March and was unloaded by plaintiff and its employee and delivered near midnight

to plaintiff by a watchman of the delivering carrier. If stock came in after 12 o'clock at night the watchman usually delivered it. No written notice was given to the delivering carrier that there was (351) any injury at the time of delivery. Plaintiff was told by his negro hostler, Bill Schloss, in the presence of the watchman, that the stock could not be examined there, and the watchman said: "You take them to your barn, and I will come down in the morning and we will examine them over." On the next day, or on the second day, the 12th, the defendant was called up over the phone, and Meade, an agent, was requested to examine the stock, and he, going to the place of business of plaintiff on the 12th, made an examination and noted on the freight bill the following: "Examined 3-12-12. Found one gray mule, left hind hock cut; one black mule, left hind leg cut; one small bay mare, front leg cut; one black mare and one black horse sick."

The bill of lading under which the shipment was made contains the usual provision requiring written notice of claim for damages to be given before the stock is removed from the place of destination.

The defendant objected to the evidence tending to prove a written notice of the claim, and also moved for judgment of nonsuit at the conclusion of the evidence, upon the ground that as it was an interstate shipment the action could not be maintained without proof of a written notice.

The defendant requested his Honor to give the following instruction, which was refused, and the defendant excepted: "That in the shipment of live stock, if the said live stock, being loaded in a single car, were maimed, bruised, or otherwise injured by trampling upon, pawing or kicking each other, that is a damage and risk that the shipper assumes, under the bill of lading put in evidence, and the carrier, or defendant, cannot be held liable for such injury."

His Honor instructed the jury, among other things, as follows: "Where stock is delivered to a railroad company for transportation in good order and at the end of transit is found to be injured, then the burden rests upon the defendant to rebut the presumption of negligence. There is then a presumption of negligence if the stock is found to be injured at the end of transit, and the burden is upon the defendant to satisfy the jury that the injury was not caused by negligence of the company." The defendant excepted.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

J. Felton Head and Herbert McClammy for plaintiff.

John D. Bellamy & Son for defendant.

ALLEN, J. The question presented by the objection to evidence tending to prove a waiver of the written notice of the claim for damages, and by the motion for judgment of nonsuit, was fully considered at the last term in *Baldwin v. R. R.*, 170 N. C., 12, and in two other cases (352) the opinion in one of which was written by *Associate Justice Walker* and the other by *Associate Justice Hoke*, and in all the same conclusion was reached.

The Court said in the first of these cases: "Stipulations in bills of lading covering shipments of live stock, requiring written notice of the claim for damages to be given before the stock is removed from the possession of the carrier, are valid (*Selby v. R. R.*, 113 N. C., 588; *Austin v. R. R.*, 151 N. C., 137); but the requirement that the notice shall be in writing is waived upon proof of actual knowledge of the injury. *Kime v. R. R.*, 153 N. C., 398; *Kime v. R. R.*, 156 N. C., 451; *Kime v. R. R.*, 160 N. C., 464; *Wilkins v. R. R.*, 160 N. C., 58.

"These decisions, the result of mature consideration, were rendered upon interstate shipments and after the enactment of the Elkins Act of 1903, which the defendant contends changes the rule, and we are not inclined to depart from them, at least until there is an authoritative construction of the Federal act to the contrary by the Supreme Court of the United States, which would be binding on us. . . .

"The rule permitting knowledge to supply the written notice is not a discrimination between railroads, nor is it a preference in favor of a particular shipper at the expense of others.

"It is a mode of proof applicable alike to all railroads and in favor of all shippers, and it is enforced against a carrier who has had possession of the property with every opportunity to know the extent of the injury and its cause."

The ruling of the Interstate Commerce Commission, No. 456, which has been called to our attention, does not, in our opinion, purport to make any change in existing law, nor does it materially affect the principle involved. It deals only with the form of the written notice when it is given, expressing the view of the Commission that a claim or a written notice of intended claim, describing the shipment with reasonable definiteness, will be sufficient; but it does not say that there can be no waiver of such notice or claim.

The contention of the defendant that to permit a waiver of the written notice will afford additional opportunity for discrimination does not impress us as being sound, because if, by collusion between the shipper and the carrier, a false or pretended claim could be established by evidence of a waiver, and thereby a rebate in the freights could be obtained to the extent of the claim, the same result could be reached by the filing of a written notice.

The instruction requested by the defendant is in the abstract correct, but his Honor was justified in refusing it, because there was no evidence presenting the facts embodied in the instruction.

It does not appear in the record whether the stock was old or young, broken or unbroken, gentle or vicious, and if the instruction had been given it would have left the matter open to mere conjecture (353) on the part of the jury.

The instruction given to the jury to which the defendant excepted is fully supported by the authorities. *Mitchell v. R. R.*, 124 N. C., 236; *Everett v. R. R.*, 138 N. C., 68; *Peele v. R. R.*, 149 N. C., 393.

We find no error which entitles the defendant to a new trial.

No error.

Cited: Teeter v. Express Co., 172 N.C. 618 (p); *Bryan v. R. R.*, 174 N.C. 179 (1o, 2o); *Dixon v. Davis*, 184 N.C. 210 (1l, 2l); *Fuller v. R. R.*, 214 N.C. 652 (p).

J. C. SCARBOROUGH ET AL. v. AMERICAN NATIONAL INSURANCE COMPANY.

(Filed 12 April, 1916.)

1. Insurance, Life—Death by Execution—Policy—Interpretation.

Whether stated in a policy of life insurance sued on or not, the policy itself does not contemplate the risk of loss against the death of the insured administered by the law as the punishment for the commission of a capital felony, for such maturity thereof would be in consequence of an act in contravention of sound principles of public policy as well as good morals.

2. Same—Noncontestable Clause.

The noncontestable clause in a policy of life insurance refers to the contract entered upon in accordance with its terms, and where the insured has been put to death under sentence of the law the insurer may plead this in defense of payment, notwithstanding the noncontestable clause.

CIVIL ACTION to recover on a life insurance policy, tried at September Term, 1915, of DURHAM, before *O. H. Allen, J.* There was a verdict and judgment for the plaintiff. Defendant appealed.

Manning, Everett & Kitchin for plaintiff.

McLendon & Hedrick for defendant.

BROWN, J. The defendant insured the life of Willie Bell, payable to his mother, Kitty Bynum, with right to change the beneficiary. The

plaintiffs are the beneficiaries and are entitled to recover if the policy is in force. Willie Bell, the insured, was electrocuted on 8 July, 1915, in accordance with the sentence of the law, for the crime of murder. The policy contains no provision stipulating either for or against the liability of the company in the event the insured's life was taken in punishment for the violation of the laws of the State. The policy does, however, contain this provision: "This policy shall be incontestable after two years from its date of issue for the amount due, provided premiums have been duly paid, except for fraud."

(354) Upon the facts stated, the only question presented on this appeal is, Does an ordinary life insurance policy, in the absence of any provision in regard thereto, insure against death by act of the law administered as a punishment for the commission of a capital felony?

We do not think that the parties to the contract contemplated such an extraordinary risk, or that the terms of the policy include it. If such a stipulation had been inserted in the policy, it would be insurance against the commission of crime, and void as against sound principles of public policy.

This identical case, as far as our researches show, was first decided by the House of Lords in the case of *Amicable Insurance Society v. Bolland,* 2 Dow and Clark, page 1, known as the *Fauntleroy case.* It was then held by the House of Lords that though the policy did not contain an exception of the liability of the insurer, in the event the assurer came to his death by the hands of the law the exception would be implied, for the reason that an express contract for liability in such event would contravene sound principles of public policy as well as good morals.

The doctrine asserted in the *Fauntleroy case,* that death by the hands of public justice for the commission of crime avoids a contract of life insurance, is said by the Supreme Court of Alabama never to have been questioned, though the case itself may have led to the very general introduction of the exception into policies. *Knights of the Golden Rule v. Ainsworth,* 71 Ala., 447.

As is said in that case: "The extinction of life by disease or by accident, not by suicide voluntary and intentional by the assured, while in his senses, is the risk intended; and it is not intended that, without the hazard of loss, the assured may safely commit crime." Bliss on Life Ins., secs. 242, 243; Vance on Life Ins., p. 524.

This question was decided by the Supreme Court of the United States in the well known case of *McCue v. Northwestern Life Ins. Co.,* 223 U. S., 234, and in the case of *Burt v. Life Ins. Co.,* 187 U. S., 362.

In the former case it is stated: "The question was before this Court in *Burt v. Union Central Life Ins. Co.* In the policy passed on, as in

the policy in the case at bar, there was no provision excluding death by the law. It was decided, however, that such must be considered its effect, though the policy contained nothing covering such contingency. These direct questions were asked: 'Do insurance policies insure against crime? Is that a risk which enters into and becomes a part of the contract?' And, answering, after discussions, we said: 'It cannot be that one of the risks covered by a contract of insurance is the crime of the insured. There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy. Public policy forbids the insertion in a contract of a condition which would tend to induce crime, and as it forbids the introduction of such stipula- (355) tion, it also forbids the enforcement of the contract under circumstances which cannot be lawfully stipulated for.'"

In *Ritter v. Mutual Life Ins. Co.*, 169 U. S., 139, it was held that a life insurance policy taken out by the insured for the benefit of his estate was avoided when one of sound mind intentionally took his life, irrespective of the question whether there was a stipulation in the policy or not, and the conclusion was based, among other considerations, upon public policy, the Court saying: "A contract the tendency of which is to endanger the public interest or injuriously affect the public good, and which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment." *Ritter v. Mutual Life Ins. Co., supra; Sup. Com. Knights of Golden Rule v. Ainsworth, supra; Plunket v. Sup. Com. I. O. H.*, 105 Va., 643; *Hartman v. Keystone Ins. Co.*, 21 Pa. St., 466; *Hopkins v. Northwestern Life Ins. Co.*, 94 Fed., 729; *Bloom v. Franklin Ins. Co.*, 97 Ind., 478.

The incontestable clause in this policy does not prevent the defendant from setting up the defense interposed in this action.

By the use of the term "incontestable" the parties must necessarily mean that the provisions of the policy will not be contested, and not that the insurance company agrees to waive the right to defend itself against a risk which it never contracted to assume. In *Collins v. Metropolitan Life Ins. Co.*, 27 Pa. Super. Ct., 345, the Court in a case precisely like the one at bar, in construing the incontestable clause, used the following language: "By its terms it is not the claim presented by the insured, irrespective of the cause of death, which is made incontestable; it is merely the validity of the policy as an obligation binding upon the company."

The only case that at all militates against our conclusion is *Collins v. Ins. Co.*, 232 Ill.; but that decision seems to be based upon a provision of the State Constitution declaring that no conviction shall work a corruption of blood or forfeiture of estate. It is not necessary that we

should discuss that case except to say that we do not regard it as a precedent to be followed. Those cases which are based upon statutes of descent and dower and the like, such as the *Owens case,* 100 N. C., 240, have no application where the liability grows out of contract of insurance.

Upon the agreed statement of facts, the judgment of the Superior Court is reversed. Let judgment be entered in the court below in favor of the plaintiff against the defendant for the sum of $11.40, the sum tendered by the defendant and refused by the plaintiff. All the costs of this Court and the Superior Court will be taxed against the plaintiff.

Reversed.

Cited: Jolley v. Ins. Co., 199 N.C. 271, 772 (2cc); *Mills v. Ins. Co.,* 210 N.C. 442 (2cc).

(356)

COUNTY OF GUILFORD ET AL. V. W. C. PORTER ET AL.

(Filed 19 April, 1916.)

1. Deeds and Conveyances—Counties—Public Square—Reservations—Reentry—Obstructions—Easements.

A reservation in a deed of lands to a county, that they shall be used only as a part of a public square, and that the grantors, their heirs and assigns, shall have the right to enter thereon and remove buildings and obstructions placed thereon which are inconsistent with the title conveyed, is not that of an easement retained by the grantor in the lands, but only conservative of the dedication in the conveyance.

2. Appeal and Error—Superior Courts—Judgments—Second Appeal—Review—Deeds and Conveyances—Reservations.

Where the question presented on appeal is whether the judgment entered in the Superior Court is in accordance with the former decision on appeal in the same cause of action, the former decision of the Supreme Court will not be reviewed; and on this appeal the judgment of the Superior Court is affirmed, except as to paragraph 6 thereof, which is modified in accordance with the syllabus next preceding this.

APPEAL from *Cline, J.,* at January Term, 1916, of GUILFORD, by all parties except the heirs of Porter and Caldwell.

The question presented is as to whether the judgment entered in the Superior Court conforms to the decision rendered by the Supreme Court on a former appeal of the same cause of action, the judgment herein appealed from reading as follows:

Now, on considering said opinion of the Supreme Court, it is ordered, considered, and decreed by the court:

I. That the land embraced in the deed from William A. Caldwell and wife, Rachael D. Caldwell, under date of 5 February, 1873, to the board of commissioners of Guilford County, and referred to on the map hereinafter made a part of this decree as "from Caldwell," was conveyed to and is held by the county of Guilford on condition that the said lot be used by the county of Guilford as a public square and be forever kept open for that purpose, and should any building or structure of any character inconsistent with said purpose be erected thereon, the said party of the first part, his heirs or assigns (meaning W. A. Caldwell, now deceased, his heirs or assigns), may enter upon the land aforesaid and abate and remove any and all buildings or parts of buildings inconsistent with its use as aforesaid.

II. That the condition aforesaid contained in the deed from William A. Caldwell and wife, Rachael D. Caldwell, to the board of commissioners of Guilford County is valid and subsisting and enforcible against the county of Guilford by the defendants, Mary E. Caldwell, W. A. Caldwell, and Lizzie Caldwell Johnson, their heirs and assigns.

III. That the land embraced in the deed from W. Clark (358) Porter under date of 5 February, 1873, to the board of commissioners of Guilford County, and referred to on the map hereinafter made a part of this decree as "from Porter," was conveyed to and is held by the county of Guilford on condition that the said lot be used by county of Guilford as a public square and be forever kept open for that purpose; and should any building or structure of any character inconsistent with said purpose be erected thereon, the said party of the first part, his heirs or assigns (meaning W. Clark Porter, his heirs or assigns), may enter upon the land aforesaid and abate and remove any and all buildings or parts of buildings inconsistent with its use as aforesaid.

IV. That the condition aforesaid contained in the deed from W. Clark Porter to the board of commissioners of Guilford County is valid, subsisting, and enforcible against the county of Guilford by the defendants W. C. Porter, Waldo Porter, Logan Porter, and Ruth Porter Adams, their heirs and assigns.

V. That so long as the county uses these two lots as a public square the easement is intact. There is no obligation in the conveyances that these lots should be a part of the courthouse lot.

VI. That the word "assigns" as used in paragraphs I and III does not give to the defendants Barker and Sockwell any special, particular, or distinctive rights in the two lots hereinbefore mentioned because of their ownership of the two lots designated on the map and marked

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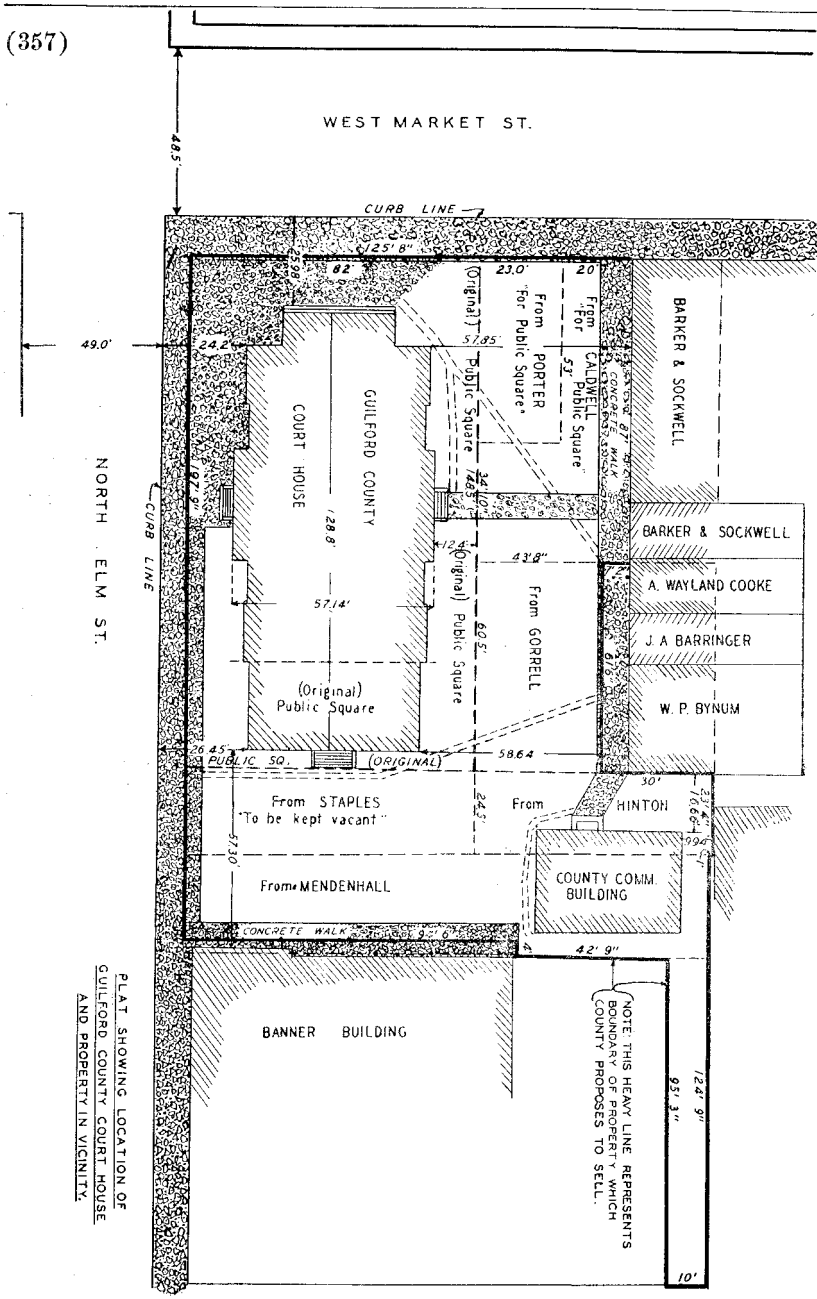

PLAT SHOWING LOCATION OF GUILFORD COUNTY COURT HOUSE AND PROPERTY IN VICINITY.

"Barker and Sockwell," such rights as they and their assigns have to perpetual enforcement of the restrictitons above set forth attaching to the lots from Caldwell and Porter, to wit, that they shall be used by the county as a public square, being such only as may exist in common with the other defendants, Barringer, Bynum, and Cooke, this being in the nature of a general right or interest, if it exists at all, and not special.

VII. That the defendants Cooke, Bynum, and Barringer are adjudged to have no separate and special rights in and to the easements in the land marked "from Caldwell" and "from Porter" by reason of their having purchased by mesne conveyances the western portion of the lot marked on the map "from Gorrell."

VIII. That the portion of the present courthouse square conveyed to the county of Guilford by Hopkins, Gorrell, Hinton, and Staples is owned by the county of Guilford in fee simple, free from any right, title, interest, or easement in the defendants or any of them.

IX. That for the purpose of preserving and making certain the terms of this decree and the rights of the parties, the map of the *locus in quo* prepared by E. W. Myers, engineer, and made a part of the printed record in this case on appeal to the Supreme Court, is hereto attached and made a part of this decree, and the clerk of this court is hereby ordered to certify this decree, with copy of the map attached, (359) to the register of deeds of Guilford County, to the end that the same may be by him recorded in the office of the register of deeds of Guilford County.

X. That defendants recover of the county of Guilford the costs in this action, excluding the costs in the Supreme Court, to be taxed by the clerk of this court.

E. B. CLINE,
Judge Presiding.

Accompanying this statement is a corrected map made since the former appeal was decided.

John N. Wilson for Guilford County.
Manly, Hendren & Womble for Porter and Caldwell heirs.
W. P. Bynum and King & Kimball for defendants.

CLARK, C. J. This is the third appeal in this case. The former appeals are reported 167 N. C., 366, and 170 N. C., 310, where the facts are fully set forth (together with the map), and they need not be repeated here. The only question presented is as to the construction of our opinion in the last named case. That decision could not be reviewed on this new appeal. Construing that decision, we are of opinion, without again giving our reasons, that the judgment entered below

should provide substantially as follows: Paragraphs I, II, III, IV, V, VII, VIII, IX, and X of the judgment sent up in the record are approved. In lieu of paragraph VI, which alone we set aside, the judgment should express the provision as follows: "The word 'assigns' as used in paragraphs I and II does not give the defendants Barker and Sockwell any rights in the two lots above mentioned, or in any other respect, because of their ownership of the two lots marked on the map 'Barker and Sockwell.'"

We are of opinion that the rights as to the two lots marked "from Caldwell" and "from Porter" which the decree recognizes as outstanding respectively in the heirs of said Porter and of said Caldwell only, are not strictly an "easement," but rather rights under a "dedication to a public use," under which there was reserved to Caldwell and to Porter, respectively, and their heirs and assigns (of such right) merely the right to enter on either of said two lots to remove therefrom any buildings placed thereon, respectively, as shall be "inconsistent with its use as a public square."

This is not the case where the owner of land lays it off into squares and streets and sells lots facing thereon. In such case, if the squares and streets have been accepted by the town, it is a dedication thereof, and the lots are sold with reference thereto, and this is a part of the contract.

Conrad v. Land Co., 126 N. C., 776; *Bailliere v. Shingle Co.*, 150 (360) N. C., 627; *Green v. Miller*, 161 N. C., 24. But here the county bought these two lots from Porter and Caldwell without any restriction, save that as to these two lots the vendors or their assigns could enter thereon and remove any buildings placed on said lots inconsistent with their use as a public square. There was no other right given to the vendors, nor any reservation in favor of the other lots held by them which have since passed to Barker and Sockwell or any one else.

Neither is such interest in Caldwell and Porter, as to the lots conveyed to the county a "reversion," for the reservation in the deed does not provide for a defeasance or forfeiture of the lots if such buildings, inconsistent with its use as a public square, are erected thereon, but merely reserves the right to the heirs of Caldwell and of Porter respectively, or their assigns, to "enter thereon and remove such buildings."

With this modification of paragraph VI, the judgment now appealed from is affirmed. The costs of this appeal will be taxed against all the defendants who are appellants.

Modified and affirmed.

Cited: Barker v. Ins. Co., 181 N.C. 268, 269, 270, *S. c.; Guilford v. Bynum*, 181 N.C. 289, 290, *S. c.*

J. W. CATES v. R. J. HALL, G. M. BROOKS, AND G. KERNODLE, COPARTNERS.

(Filed 19 April, 1916.)

1. Partnership—Torts—Individual Liability—Automobiles.

A partnership is liable for the tort of one of its members committed in the scope and course of the partnership business which proximately causes injury to another, as in this case, where the partnership owned a garage and let out automobiles for hire, to be run by the partners or chauffeurs supplied by them, and a passenger on a car is injured by the negligence of one of the partners acting as chauffeur on the occasion.

2. Automobiles — Carriers of Passengers — Negligence—Rule of Prudent Man.

Those furnishing automobiles for hire with themselves or others as chauffeurs are held to that degree of care in hauling passengers required of a common carrier, or that which is commensurate with the risks incident to the occupation, according to the rule of the prudent man.

3. Same—Gratuitous Service.

Those who engage in the occupation of transporting passengers by automobile for hire are not relieved of the duty that their chauffeur shall exercise the full care required of common carriers of passengers, because of the fact that at the time complained of the passenger who received an injury caused by the negligence of their chauffeur was being carried gratuitously, for their liability is the same as if compensation had been paid them.

4. Same—Appeal and Error.

Where one partner, in the business of transporting passengers by automobile for hire, gives, gratuitously, the use of an automobile to the city for a special occasion, and a representative of the city is injured by the negligent driving of the automobile by the other partner while riding therein, it is reversible error for the trial judge, in the suit by the insured party for damages, to make the defendant's liability depend upon an issue as to whether the plaintiff procured the use of the automobile for a valuable consideration.

5. Pleadings—Automobiles—Carriers of Passengers—Gratuitous Service—Negligence.

Where the complaint in an action to recover damages for a personal injury alleged to have been caused by the negligence of the carrier of passengers by automobiles for hire alleges that the transportation was for a valuable consideration, and, further, that the injury was received through the negligent and reckless driving of the car by a member of the firm furnishing it, the allegations are sufficiently broad to cover either aspect of the demand, and to sustain a verdict, though the services rendered at the particular time were gratuitous.

APPEAL by plaintiff from *O. H. Allen, J.*, at September Term, (361) 1915, of ALAMANCE.

CATES *v.* HALL.

Civil action instituted to recover damages for alleged negligence of defendants, a partnership, in operating an automobile whereby plaintiff, a passenger in the machine, received painful and serious injuries. On denial of liability, issues were submitted and verdict rendered thereon as follows:

1. Did the plaintiff, J. W. Cates, on 29 July, 1913, for his own use and for a valuable consideration, procure his passage in an automobile belonging to the defendants, as alleged in the complaint? Answer: "No."

2. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint? Answer: .....

3. What damage, if any, is the plaintiff entitled to recover? Answer: .....

There was judgment for defendants, and plaintiff excepted and appealed, assigning for error chiefly the ruling of his Honor that a verdict for defendant on the first issue would be decisive of plaintiff's right to recover.

J. H. Vernon, W. S. Coulter, E. S. Parker, Jr., for plaintiff.

E. S. W. Dameron, Long & Long, and J. Dolph Long for defendants.

HOKE, J. There was evidence on the part of plaintiff tending to show that, on 29 July, 1913, defendants R. J. Hall, G. M. Brooks, and G. A. Kernodle were copartners owning or operating a garage in the city of Burlington, N. C., letting out automobiles for hire to be run by the partners or drivers supplied by them, and, on said day, plaintiff (362) and another, one W. D. Foster, hired from them a machine at an agreed price and plaintiff and two or three other passengers were going out on the road towards Gibsonville to meet the Governor, who was supposed to be in the county inspecting the roads with a view of designating the apportionment of certain moneys available for good road purposes; that the car on the trip was being driven by G. A. Kernodle, one of the defendants, and not having met the Governor, for some reason, on the return trip was run by said defendant at a reckless rate of speed, and so negligently that, in the wrongful effort to pass another car in front, on a narrow piece of road, he struck the said car and then ran down an embankment into a meadow, colliding with a stump or tree, breaking several of plaintiff's ribs, and giving him other painful and serious bruises on the head and back, from which he still suffers and from which he was confined many months in a hospital and has had to procure necessary medical treatment, etc., at a cost of something like $2,000, etc.

Defendant denied that there was any contract of hiring by plaintiff or any one for him; alleged that the car had been donated to the Cham-

ber of Commerce for that day to "boost the town," etc., and that plaintiff was the representative of the body, and, as such, was in the car at the time with two others who were there on plaintiff's invitation.

There was evidence in support of defendant's position, and he testified, also, that the effort to pass the car in front was undertaken by direction of the plaintiff. This was denied by plaintiff.

On these, the facts relevant to the question as now presented, we are of opinion that it was reversible error to hold that a verdict against plaintiff on the first issue was necessarily decisive of his right to recover.

On authority apposite to certain phases of the testimony it is held that a partnership is liable for the tort of one of its members committed in the scope and course of the partnership business. *Hall v. Younts,* 87 N. C., 285; *Mode v. Penland,* 93 N. C., 292; Principles of Partnership by Parsons, sec. 139; George on Partnership, p. 242; Hale on Torts, p. 167. That defendants may be considered public carriers of passengers and held to a high degree of care in respect to their duties as such: *Shepherd v. Jacobs,* 204 Mass., 110; *Primrose v. Casualty Co.,* 232 Pa. St., 210; *Sewark v. Perkins,* 73 Kansas, 553; *Benner Livery Co. v. Busson,* 58 Ill., App., 1; 6 Cyc., pp. 364-533 and 534—a degree of care commensurate with the duties they have undertaken, and influenced and determined by reference to the hazards incident to the occupation, and the machines and methods employed in carrying it on, the recognized principle as to machines being that the more dangerous the character "the greater the degree of care and caution required in their use and operation." *Tudor v. Bowen,* 152 N. C., 441; *Marable v. R. R.,* 142 N. C., 557; *Indianapolis, etc., R. R. v. Hoest,* 93 U. S., 291; *Steamboat Co. v. King,* 57 U. S., 469; 2 Ruling Case Law, title "Automobiles," p. 1189. In *Marable's case* it was held, among other (363) things, that "a carrier is required to use that high degree of care for the safety of the passengers which a prudent person would use in view of the nature and risks of the business." And, speaking to the same position, in *Fitzgerald v. R. R.,* 141 N. C., 530, it was held: "They (the employees of the company) were, therefore, charged with a high degree of care in this respect. This statement imports no infringement on the doctirne which obtains with us that there are no degrees of care so far as *fixing responsibility for negligence* is concerned. This is true on a given state of facts, and, in the same case, the standard is always that care which a prudent man should use under like circumstances. What such reasonable care is, however, does vary in different cases and under different conditions, and the degree of care required of one whose breach of duty is likely to result in serious harm is greater than when the effect of such breach is not near so threatening."

And on the question more directly involved in the appeal the decided cases here and elsewhere are to the effect that the distinction as to the liability of carriers in cases of passengers for hire and those carried gratuitously does not prevail as in the cases of common carriers of goods, but the same degree of care is exacted in the one case as the other. *McNeill v. R. R.*, 135 N. C., 682; *Benner Livery Co. v. Busson, supra; Indianapolis Traction Co. v. Kluitschy*, 167 Ind., 598; *Lemon v. Canslor*, 68 Mo., 340; *Gillenwater v. R. R.*, 5 Ind., 339; Hale on Bailments, p. 497; 6 Cyc., 544.

In *McNeill's case* the Court cites with approval from *Lemon v. Canslor* the statement of the position as follows: "This we think was sufficient to authorize the instruction. The principle announced in it, that although plaintiff might have been a gratuitous passenger, such fact constituted no defense, is supported by all the authorities which have come under our observation. While in some of them intimations are made that in the case of a gratuitous passenger the carrier may only be liable for gross negligence, it has not been held in any of them that such fact will exempt the carrier from all liability. On the contrary, the weight of authority favors the doctrine of holding the carrier of passengers to the same degree of diligence in all cases where one has been received as a passenger, on the principle that "if a man undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, omission of that skill is imputable to him as gross negligence.' "

In *Traction Co. v. Kluitschy, supra,* it was held: "Carriers are liable to passengers for negligence resulting in damages, though the carriage is 'gratuitous,' " and, further, "When an officer of a street railway company, on behalf of such company, invited a visiting order, composed of women of whom plaintiff was one, to take a free trolley ride in
(364) one of such company's cars, the acceptance of such invitation by taking passage on the car constituted the plaintiff a passenger."

In Hale on Bailments, p. 497, the author states the position as follows: "In one respect there is a striking difference between the liability of common carriers for goods and the liability of public carriers of passengers for injuries to a passenger. As has been seen, where goods are carried gratuitously the carrier is not regarded as a common carrier, but is simply a private carrier, and liable, as a mandatory, only for gross negligence. But in respect to public carriers of passengers, public policy has imposed an entirely different rule. Even though such passengers are carried gratuitously, if they have been accepted by the carrier as passengers, all the extraordinary liabilities of the relation attach. Having admitted him to the rights of a passenger, the carrier is not permitted to deny that he owes to him the duty which, as carrying on a public employment, he owes to those who have paid him for the service."

Applying the principle, we are of opinion that, whether plaintiff hired the car from one of the partners or whether he was riding in a car which was donated by the partnership for free service and was being operated at the time by one of the partners in pursuance of this arrangement, in either event he was to be considered a passenger, and is entitled to have his rights determined in that view of the case, and, as stated, it constituted reversible error to make the question of a contract for hire conclusive on the subject. There is nothing in either *Linville v. Nissen,* 162 N. C., 95, or in *Power Co. v. Engineering Co.,* Supreme Court N. Y., 401, to which we were cited, as we understand them, that in any way militates against this view. In *Nissen's case* it was held that, on the facts as there presented, the owner of an automobile could not be properly held responsible for tort of his infant son, who had taken his father's machine out for a run without his permission and contrary to his express directions. And in the *Power case* it was held that a defendant corporation, engaged in the business of surveying land, could not be held liable for negligence in operating a car which had been taken out and used by certain officers of the corporation on a pleasure trip of their own, in no way connected with the company's business and which it had in no way authorized and sanctioned. The cases are made to rest on the position that the machines, at the time, were not being used in the owner's business or with his authority or consent, and do not apply where, according to defendant's own evidence, it was being operated at the time by one of the partners and coöwners, and under an arrangement with another of the partners that the machine was donated for free service of the town. The objection that the allegations of the defendant are not sufficient to present the case in any other aspect than that of a hiring cannot be sustained. True, the plaintiff alleges that there was a hiring, and offered evidence in support of his allegations; but the complaint, (365) after alleging that the defendants were a copartnership, owning a garage and letting their machines for hire, contains averment, in general terms, "That plaintiff, while a passenger riding in an automobile furnished by defendants and driven by G. A. Kernodle, one of the partners and owners, was injured by the negligent and reckless manner in which he operated the car." The allegations are sufficiently broad to cover either aspect of the demand, and the objection must be overruled.

Plaintiff is entitled to a new trial of the cause on issues properly determinative of his rights, and it is so ordered.

New trial.

Cited: Campbell v. Casualty Co., 212 N.C. 69 (3cc).

R. M. CARDWELL v. NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 19 April, 1916.)

1. Water and Water-courses—Surface Waters—Diverting Flow—Damages.

The upper proprietor is liable to the lower one for the damages caused to the latter's land by changing the direction of the flow of the surface water on his own premises; and where a railroad company thus causes damages to the land of the lower proprietor by changing the location of its culverts, it is liable for the consequent damages, without reference to the question of care or skill in the construction of its roadbed, side ditches, and culverts.

2. Same—Railroads—Change of Culverts—Statutes.

Where a railroad company has constructed its roads with culverts and ditches, and thereafter makes a change in the culverts so as to divert the flow of surface water, to the damage of the lands of the plaintiff, the lower proprietor, the five-year statute of limitations, Revisal, sec. 394 (2), begins to run only from the time the change was made which caused the damages complained of.

3. Same—Torts—Diminution of Damages.

Where damages sound in tort and do not arise by contract, the rule that the plaintiff is required to reasonably reduce the amount of his damages does not apply; and where a railroad company has wrongfully diverted the flow of water upon the lands of the lower proprietor, the latter is not required to go to the expense of cutting ditches on his land to carry off the water to reduce the amount of damages being caused to his lands.

APPEAL by defendant from *Cline, J.*, at November Term, 1915, of ROCKINGHAM.

J. M. Sharp and Manly, Hendren & Womble for plaintiff.

H. R. Scott and King & Kimball for defendant.

(366) CLARK, C. J. This is an action for damages to land and crops caused by the defendant collecting surface water on the upper side of its roadbed and diverting it through culverts and emptying it on the plaintiff's bottom-land. The plaintiff admits that the water from three of these culverts flows into ditches which carry it into the plaintiff's main farm ditch, and thence into the river, without damage. But he alleges that the other three culverts empty the water on the plaintiff's bottom-land, where there are no ditches, and that this diversion thus drowns out 17 out of 54 acres thereof.

There is evidence that prior to the spring of 1912 this water had done no substantial damage to the plaintiff; but that in that year the de-

fendant repaired and improved its roadbed by enlarging its ditch on the upper side of its roadbed and replacing the culverts referred to with much larger culverts, whereby much of the water which had theretofore been retained in the ditches on the upper side until it had soaked in or evaporated was turned upon the plaintiff's land to its injury, the effect of the change being to greatly increase the quantity of the water and its velocity. The contention of the plaintiff is that these three culverts were not placed at the natural drainways, but were arbitrarily located by the defendant for its own convenience, and thus the water which would have gone in another direction was diverted and turned upon the plaintiff's land. The railroad bed was built in 1889, but this change, whereby the increased flow of water was diverted and turned upon the plaintiff's land and crops, occurred in 1912.

These allegations of fact were controverted by the defendant, but upon the issues submitted to the jury they found, upon competent evidence, that the defendant wrongfully and negligently diverted this surface water from its natural course and threw it upon the plaintiff's land, causing thereby damages of $500 to his crops (which the court, with the plaintiff's consent, reduced to $250), and assessed the permanent damages at $1,275, which the court, with the plaintiff's consent, reduced to $1,000.

It is well settled in this State, as in many others, that no one has a right to collect surface water upon his own premises and to so change the grade or surface thereof as to cause surface water thereon to flow in a different direction. As it has often been expressed, the upper proprietor "may accelerate but cannot divert" the flow of surface water to the damage of his neighbor, without being responsible therefor. *Hocutt v. R. R.*, 124 N. C., 214; *Rice v. R. R.*, 130 N. C., 377; *Davis v. Smith*, 141 N. C., 108, and cases cited to above in Anno. Ed.; *Brown v. R. R.*, 165 N. C., 396; and there are many others in our Reports. Also, see 40 Cyc., 645, 646, and 647.

This is not a question as to care and skill in the construction of the defendant's roadbed, side ditches, and culverts for the proper drainage of its right of way, but whether by the location of its (367) culverts the defendant has wrongfully diverted the flow of water and thereby injured the plaintiff's lands and crops.

The principal question seems to be as to the statute of limitations. By Revisal, 394 (2), it is provided that no action shall be brought against a railroad company "for damages caused by the construction of said road or the repairs thereto unless the action shall be commenced within five years after such cause of action accrues." But this does not apply where there has been such addition to or change made in the roadway as to increase the damage inflicted by the diversion or the ponding

back of water. In such case the five years statute runs only from such increase in the obstruction or diversion, which in this case was in 1912, and the action was begun in August, 1913. *Barcliff v. R. R.*, 168 N. C., 270, and cases there cited.

The defendant further contends that though the railroad company may have diverted the natural flow of the water to the damage of the plaintiff, the lower proprietor, the defendant here could rely upon the defense that the plaintiff could have reduced his damages by cutting drainage ditches thereon. But this principle applies only in cases of breach of contract where the party who has sustained damage thereby can by proper steps reduce the damages. It does not apply to cases of tort. *Waters v. Kear*, 168 N. C., 246; *Barcliff v. R. R., supra.* The lower proprietor is not required to avoid damages to his land by digging ditches at his own expense to carry off the surface water wrongfully diverted from its natural flow by the upper proprietor to his damage. *Roberts v. Baldwin*, 155 N. C., 281. The damages awarded embrace the cost of such additional ditching made necessary by the wrongful act of the defendant. This renders it unnecessary to consider the ground of the plaintiff's appeal or the other exceptions in the defendant's appeal.

No error.

Cited: Borden v. Power Co., 174 N.C. 74 (3cc); *Yowmans v. Hendersonville*, 175 N.C. 579 (3l); *Shaw v. Greensboro*, 178 N.C. 429 (3l); *Ragan v. Thomasville*, 196 N.C. 262 (2cc); *Peacock v. Greensboro*, 196 N.C. 416 (2cc).

EFFIE GRIMES v. POLLY ANDREWS.

(Filed 19 April, 1916.)

Appeal and Error—Costs—Defense Bond—Ejectment—Statutes.

The defense bond and the sureties thereon, in an action of ejectment, Revisal, sec. 453, are liable to the amount of the bond for the costs in the Supreme Court on appeal as well as those incurred in the Superior Court.

MOTION in this cause in the Supreme Court by plaintiff for judgment against Harry Skinner and J. F. Pollard, sureties on defense bond in action of ejectment under Revisal, sec. 453, for the costs of the Supreme Court.

(368) *Julius Brown for plaintiff.*

Harry Skinner, Albion Dunn, L. G. Cooper for defendant.

BROWN, J. The condition of the defense bond in an action for the recovery of real property is "that the defendant pay to the plaintiff *all such costs* and damages as the plaintiff may recover in the action," etc. The statute requires defendant to give such bond as a condition precedent to filing an answer.

It is not questioned that the bond secures the costs of the Superior Court. We are unable to comprehend why it does not cover costs of the Supreme Court as well. The language of the statute is plain, unequivocal, comprehensive, and covers *all costs* the plaintiff may recover. There seems to be no room for construction. If the Legislature had meant otherwise, it would have said so. We think the point is settled adversely to the respondents by the decision in *Kenney v. R. R.*, 166 N. C., 566, in a well considered opinion by *Mr. Justice Walker*.

A similar ruling is made by the Supreme Court of Mississippi upon a statute like ours. *Martin v. Kelly*, 59 Miss., 664, in which the Court says: "The surety is not only liable for the costs of the court below, but of this Court, also."

In Tennessee the Supreme Court held that upon a bond "conditioned to pay *all* costs and damages," the sureties are liable for the costs of the appellate Court as well as those of the court below. *Bowman v. Harman*, 35 S. W., 1020.

To same effect is *Hendricks v. Carson*, 97 Ind., 246, wherein it is held that a bond of nonresident given in the Circuit Court to secure all costs covers costs of appellate Court. In that case the Court well says: "The case in the Supreme Court was the same 'action' that had been commenced in the Circuit Court. The law gave the defendant the right to appeal the case to the Supreme Court for final determination. The proceedings in the Supreme Court were a regular part of the legal proceedings in the action, and the costs accruing thereon in the Supreme Court were a part of the costs legitimately accruing in the action, and we think that it is within the letter and spirit of the statute to hold that the bond of a nonresident plaintiff for costs, filed in the Circuit Court, covers the costs that accrued in the Supreme Court on an appeal of that action. Were a contrary rule of construction adopted, in such cases there would be no means of securing the costs accruing in the Supreme Court." See, also, *Smith v. Lockwood*, 34 Wis., 72; *Traver v. Nichols*, 7 Wend., 434; *Dunn v. Sutliff*, 1 Mich., 24.

The respondent sureties are liable for the penalty of the bond only, $200, to be discharged upon payment of the costs of this Court as well as those recovered in Superior Court.

Let judgment be entered accordingly.

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L. W. COCHRAN v. J. B. SMITH ET AL.

(Filed 19 April, 1916.)

1. Instructions—Erroneous in Part—Construed—Bills and Notes—Fraud—Appeal and Error.

The correctness of a charge by the judge to the jury, free from objection as a whole, is not affected by the fact that a portion thereof, separately considered, is erroneous; and where there is allegation and evidence that a note sued on has been procured by fraud, and the plaintiff is the holder by indorsement, and the judge in effect charges the jury that the burden was upon the plaintiff to prove that the instrument was complete and regular upon its face; that he became the holder before maturity without notice of the infirmity, in good faith for value; that the instrument was in fact regular upon its face, etc., the instruction will not be held as erroneous because a detached portion thereof seemed to put the burden upon the defendant.

2. Instructions—Requested Prayers—Bills and Notes—Fraud—Evidence.

In an action upon a note by an indorsee, where fraud in its procurement is alleged, with evidence tending to support the allegation, it is not error for the trial judge to refuse to give special instructions correct in the abstract as to the circumstances and *bona fides* of plaintiff's purchase, the credibility of the evidence, etc., when such were substantially embodied in the general charge; and it is *Held*, the instructions asked in this case were not proper, there being no evidence that plaintiff purchased under such circumstances as would impliedly give him notice of the infirmity, it appearing from the evidence that he had no actual notice thereof.

APPEAL by defendants from *Cline, J.*, at August Term, 1915, of SURRY.

Civil action to recover the amount of a note executed for the purchase price of a stallion.

The plaintiff is the indorsee of the note, and alleges the he purchased the same for full value before maturity and without notice of any defect or infirmity in the note.

The defendants are the makers of the note, and they allege that the note was procured by fraud and that the plaintiff had notice thereof at the time of his purchase of the same.

The jury returned the following verdict:

1. Was the execution of the note sued on procured by the false and fraudulent representations of the payees in the note, as alleged in the answer? Answer: "Yes."

2. Did the plaintiff purchase the said note in good faith before maturity, for a valuable consideration, and without notice of any infirmity in the note or defect in the title of the said Bridges & Flora? Answer: "Yes."

3. In what amount, if any, are the defendants indebted to the (370) plaintiff upon the note sued on? Answer: "335.34, with interest."

Judgment was entered upon the verdict in favor of the plaintiff, and the defendants excepted and appealed and assigned the following errors, omitting those not relied on:

1. His Honor erred in instructing the jury as follows: "I instruct you as a matter of law, after an inspection of the note here, that it is regular upon its face; second, that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was a fact; third, that he took it in good faith and for value."

2. His Honor erred in instructing the jury: "That unless they find the plaintiff had notice or knowledge that there was a contest about the note when he bought it, that there would be a defense made on the note, he would be a holder in good faith."

3. His Honor erred in refusing to give defendants' prayer for instruction No. 1, as follows: "The court instructs the jury that where fraud in procuring the execution of the note sued on is alleged, and evidence offered tending to sustain it, the circumstances and *bona fides* of plaintiff's purchase are the material questions in the controversy, and both the issues and the credibility of the evidence offered tending to establish the position of either party in reference to it are for the jury."

4. His Honor erred in refusing defendants' prayer for instruction No. 4, which was as follows: "In passing upon the question of whether the plaintiff has shown that he is such a holder in due course, you may consider the circumstances under which the note was obtained by him, the knowledge, if any he had, as to what the note was given for, the circumstances and position of plaintiff when he took the note, his knowledge, if any you find he had, of the character of business conducted by Bridges & Flora, his want of acquaintance with the makers of the note, and all the surrounding facts and circumstances, as you may find from the evidence, throwing or tending to throw light upon the *bona fides* of the transaction."

W. F. Carter for plaintiff.

W. L. Reece and J. H. Folger for defendants.

ALLEN, J. We would be compelled to order a new trial for error in the instruction to the jury quoted in the first assignment of error if it stood alone, because, there being both allegation and proof of fraud in the execution of the note, the burden was then upon the plaintiff to prove that he was a purchaser for value before maturity and without

notice of any defect or infirmity in the note, and this could not be declared as matter of law.

(371) We must, however, consider and pass upon the charge as a whole, and when we do so we find that the quotation is taken from the middle of a paragraph which reads as follows:

"Now, the burden of this issue, I told you, is upon Mr. Cochran to satisfy you of that by the greater weight of the evidence. He must show you that he is what we call a holder in due course. Now, that means he must show you from the evidence that the instrument is complete and regular upon its face. I instruct you as a matter of law, after an inspection of the instrument here, that it is regular upon its face; second, that he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was a fact; that means by protest or something (this note had not been dishonored) that he became the holder of it, then before it was overdue, that is, before it came due; it came due 1 October, 1912, and he testifies that he became the holder of it 10 November, 1910, two years before it became due; third, that he took it in good faith and for value. He says that he took it in good faith for value, that is, he paid dollar for dollar for it in the trade of some young horses to Bridges & Flora; fourth, at the time it was negotiated to him he had no notice of any infirmity or defect in the title of the person negotiating it."

It is clear when the whole paragraph is read that his Honor charged the jury that the burden of the second issue was upon the plaintiff to prove, first, that the instrument was complete and regular upon its face; second, that he became the holder of it before it was due and without notice that it had been previously dishonored; third, that he took it in good faith for value; fourth, that at the time he bought it he had no notice of any infirmity or defect in the title of the person negotiating it, and that he instructed them as matter of law that the instrument was regular upon is face. That this is the meaning of the charge is shown by the instruction on this issue which he gave to the jury after their retirement, when they came back for further instruction, as follows:

"I instruct you, on the second issue, if you come to it, that the burden of this issue is upon the plaintiff, Mr. Cochran; and if he satisfies you by the greater weight of the evidence that he bought this note in good faith from those men out there at Crawfordsville, Ind., before it was due, paid value for it, and had no notice of any defect or infirmity about it, no notice of any claim that these defendants were making at the time —I say no notice at the time or prior to that time of any claim that they were making; that they intended to contest the note and refused to pay it, and set up a defense to it, or no notice of anything that would put him upon guard about it; if it was a straight, fair, open, aboveboard

transaction, he was acting in good faith, and took the note for value, before maturity, and without notice of any claim of theirs, that the note was falsely procured, and they were going to refuse to (372) pay it, then your duty would be to answer this second issue 'Yes'; otherwise, 'No.'"

We, therefore, conclude that the first assignment of error cannot be sustained.

The second assignment of error is subject to the same objection, as it does not state all that his Honor charged upon the question of notice, and in this respect the charge is free from objection.

The principles contained in the instruction prayed for in the third and fourth assignments of error are in the abstract sound, but they were substantially embodied in the charge; and if they had not been referred to, it would not constitute reversible error, because upon a careful examination of the record we find nothing tending to show bad faith on the part of the plaintiff or that he had notice of any defect in the note which he purchased.

The plaintiff was a witness in his own behalf, and testified that he had paid full value for the note, before it was due, and that he had no notice of the claims of the defendants that it had been procured by fraud; that he required the payees in the note to indorse it, and that they were at that time solvent; that he also made inquiry at the banks as to the solvency of the makers of the note; that afterwards the payees became insolvent, and for that reason he was prosecuting his action against the makers of the note, and he offered evidence that he was a man of good character.

The only circumstances which the defendants refer to in their brief tending to throw suspicion on the purchase of the note by the plaintiff is that he lived in the same town with the payees; that he was well acquainted with them; that he knew they were engaged in buying and selling horses, and that he admitted that he supposed the note was executed for the purchase of a horse; and these circumstances are not sufficient to sustain a verdict in favor of the defendants upon the second issue. There is

No error.

Cited: Williams v. Hedgepeth, 184 N.C. 117 (2cc); *Beal v. Coal Co.,* 186 N.C. 756 (1c); *Michaux v. Rubber Co.,* 190 N.C. 619 (2c).

IN RE W. L. WIGGINS

(Filed 19 April, 1916.)

Requisition — Habeas Corpus — Appearance Bond — Forfeiture — School Funds—Statutes—Constitutional Law.

Where the Governor has granted requisition for a fugitive from justice from another State, to be turned over to the agent of that State here, and the prisoner sued out the writ of *habeas corpus* before a judge of the Superior Court, and pending this proceeding he forfeits his appearance bond, payable to the State of North Carolina: *Held*, the penalty on the bond falls within the provisions of Revisal, sec. 1378, enacted in pursuance of Art. IX, sec. 5, of our Constitution, and goes to the benefit of the public school fund of the county, and not to the agent of the State whose requisition had been honored, especially when he has shown no authority from such State to collect the amount in controversy.

(373) APPEAL by J. F. Gordon, agent, etc., from order of *Cline, J.*, in proceedings held at the October Term, 1915, of FORSYTH.

This is an application by J. F. Gordon, agent for the State of Florida, to have turned over the proceeds of a forfeited appearance bond.

On 11 March, 1914, a warrant for William L. Wiggins was issued by William Martin, county judge for Orange County, State of Florida, charging the said Wiggins with embezzlement, and on 17 March, 1914, requisition was issued by the Governor of the State of Florida upon the Governor of North Carolina for the surrender of Wiggins, and appointing J. F. Gordon agent for the State of Florida to receive from the authorities of the State of North Carolina the said Wiggins, and on 19 March, 1914, the Governor of North Carolina honored said requisition. On 14 March, 1914, a warrant was issued against said Wiggins under which he was arrested.

Wiggins, on 16 March, 1914, made application to his Honor, W. A. Devin, judge presiding at the March term of the Superior Court of Forsyth County, for a writ of *habeas corpus*, and on 21 March, 1914, his Honor, W. A. Devin, entered judgment in which he ordered that the said Wiggins be delivered to J. F. Gordon, to be taken to the State of Florida. From this judgment the said Wiggins appealed to the Supreme Court and his appearance bond was fixed by Judge Devin at $300, which bond was duly executed for his appearance at the July term of the Superior Court of Forsyth County. The bond was executed with T. W. Hancock and Mary E. Hancock as sureties for said W. L. Wiggins to appear at July term of the Superior Court of Forsyth County, and was payable to the State of North Carolina; that at July term the said Wiggins failed to make his appearance, and judgment was entered February Term, 1915, against W. L. Wiggins and his sureties for the sum of $200,

the bond being reduced to that sum by the court, which amount his sureties paid upon execution issued by the clerk of the Superior Court of Forsyth County, and after deducting the cost the amount was paid to the treasurer of Forsyth County for the benefit of the public school fund.

At October Term, 1915, J. F. Gordon, agent for the State of Florida, made application before his Honor, E. B. Cline, that the $173 collected on the forfeited bond be paid him as agent of the State of Florida. His Honor declined this application and entered judgment that the money collected on this forfeited appearance bond belonged to the school fund of Forsyth County. From this judgment counsel for (374) the agent of the State of Florida appealed to the Supreme Court.

J. C. Buxton and Raymond G. Parker for J. F. Gordon, Agent.
Hastings & Whicker for School Board.

ALLEN, J. The Governor of the State of Florida made demand upon the Governor of North Carolina for the surrender of W. L. Wiggins, alleged to be a fugitive from justice.

Wiggins was arrested in Forsyth County under process duly issued, and thereafter he filed his petition before one of the judges of the Superior Court of this State asking that the writ of *habeas corpus* issue and that the lawfulness of his detention be inquired into.

The writ was issued and upon the hearing judgment was rendered denying the prayer of the petition, and Wiggins appealed to the Supreme Court. Pending his appeal he was required to enter into bond payable to the State of North Carolina and conditioned that he make his appearance at a regular term of the Superior Court of Forsyth County to abide the result of the appeal.

The appeal was dismissed, and the said Wiggins having to appear according to the conditions of his bond, a judgment of forfeiture was entered and the amount of the bond collected and the net proceeds turned over to the board of education of Forsyth County.

Thereafter J. F. Gordon, who was the agent of the State of Florida to receive the said Wiggins and carry him to Florida, made application to the Superior Court demanding that the net proceeds of said bond be paid to him as such agent, and this appeal presents the question as to his right to recover such proceeds.

The proceedings upon the writ of *habeas corpus* were, under the laws of this State, administered by our own court.

Wiggins, the fugitive from justice, was arrested by the sheriff of Forsyth County, was confined in the jail of that county; the bond for his appearance was payable to the State of North Carolina and made return-

able to a regular term of the Superior Court, and the judgment of forfeiture was declared in that court.

The facts, therefore, bring the case clearly within the provisions of section 1378 of the Revisal, enacted pursuant to Article IX, section 5, of the Constitution, which declares that "All fines, forfeitures, penalties, and amercements collected in the several counties by any court or otherwise shall be accounted for and paid to the county treasurer by the officials receiving them within sixty days after receipt thereof and shall be faithfully appropriated by the county board of education for the establishment and maintenance of free public schools."

(375) If, however, it were otherwise, the petitioner, Gordon, has shown no right or title to any part of the proceeds of the forfeited bond. The State of Florida is making no claim, and Gordon, who claims to be the agent of that State, has shown no authority except to receive the fugitive from justice and to carry him to Florida, and this would not authorize him to collect money belonging to the State of Florida. There is

No error.

Cited: Boney v. Kinston Graded Schools, 229 N.C. 140 (d).

H. F. CAUSEY v. G. M. ORTON AND CHARLES W. ORTON.

(Filed 19 April, 1916.)

Fixtures, Trade—Landlord and Tenant—Leases—Liens.

Where a written lease of lands permits the lessee to erect poultry houses and inside poultry fences thereon, and to remove the same at the expiration of the lease, the lease is not restrictive, but in recognition of the lessee's right to remove the designated improvements as trade fixtures, whether put thereon and removed by the lessee, his sub-lessee, or by one with his approval or under his direction; and an order restraining to the hearing the removal of such fixtures before the expiration of the lease is improvidently granted. *Stamps v. Cooley,* 91 N. C., 316, where a lien is given by the contract of lease, cited and distinguished.

APPEAL by defendants from *Cline, J.,* at January Term, 1916, of GUILFORD.

Brooks, Sapp & Williams for plaintiff.

R. C. Strudwick for defendants.

CLARK, C. J. This is an appeal from the continuance to the hearing of a restraining order against the removal by the tenant of certain trade fixtures placed on leased premises.

The defendant G. M. Orton was in possession under a three-year lease of the premises from the plaintiff. The said lease contained the following clause, whose construction presents the only question raised by this appeal:

"Ninth. It is agreed between the parties of the first and second parts that the party of the first part (G. M. Orton) is to have the privilege of erecting on said land poultry houses and inside poultry fences, and is further to have the privilege of removing same from said premises at the expiration of this contract."

The lessee permitted his son, C. W. Orton, to erect on the premises certain poultry houses and fences at his own expense, and prior to the expiration of the lease, in which there has been no default or arrearages of rent, said son was proceeding to remove the said fix- (376) tures placed thereon by him with his father's permission.

The tenant, either by himself or his son, could remove any fixtures placed thereon by him prior to the expiration of the lease, and, indeed, these being "trade fixtures," they could be removed at the expiration of the lease. The above provision was in no wise restrictive of this right, but was in full recognition thereof. Indeed, if these had not been "trade fixtures," it was an extension till the expiration of the lease of the privilege to remove the fixtures designated if they had not been removed prior to that time. There was no contract to restrict to such time the removal. No benefit could accrue to the lessor from such restriction, since the lessee, or his agent or a sub-lessee, certainly had the right to remove any fixtures prior to the expiration of the lease, in the absence of any lien being given thereon by the contract of lease, as in *Stamps v. Cooley,* 91 N. C., 316.

We do not deem it necessary to cite authorities. The learned judge states, in his judgment, that he continued the restraining order because, being in some doubt about the matter, he thought that as the plaintiff had given a bond to cover any damages it would be better to restrain the other party until the opinion of this Court was expressed.

Such action, however, was improvident, and the order continuing the restraint is

Reversed.

Cited: Springs v. Refining Co., 205 N.C. 447 (c); *Haywood v. Briggs,* 227 N.C. 115 (p).

MARY HOLLAND v. J. A. HARTLEY.

(Filed 19 April, 1916.)

1. Parent and Child—Emancipation—Board of Child.

In an action against the father to recover money for the board of his minor son, and the defense relied upon is that the defendant had emancipated his son, and consequently was not liable, the burden is upon the defendant to prove the fact.

2. Same—Evidence.

Evidence tending to prove that the father had agreed with his 18-year-old son that the latter should leave his father's roof, have all his own earnings, and make his own contracts, is sufficient as to the son's emancipation to defeat a recovery against the father for the son's board.

3. Statute of Frauds—Parent and Child—Promise of Father—Emancipation of Child.

Where recovery in an action for the board of a minor son depends upon the question of whether the father had emancipated him or had promised to pay for the board, and the evidence tends to show that plaintiff surrendered the clothes of the son in her possession, relying upon the promise of the father that he would see that the board was paid if she would continue the son there: *Held*, sufficient as to an original promise on the father's part, supported by a consideration, to take it out of the statute of frauds and make it binding.

4. Instructions—Erroneous in Part—Appeal and Error.

Where a charge, construed as a whole, is correct, it will not be affected by the fact that a part thereof, taken disjointedly, is erroneous.

(377) APPEAL by plaintiff from *Cline, J.*, at November Term, 1915, of FORSYTH.

Civil action, tried upon these issues:

1. Had the defendant's son, Ira Hartley, been emancipated by the defendant at the time the unpaid board bill was made? Answer: "Yes."

2. Is the defendant indebted to the plaintiff, and, if so, in what amount? Answer: "None."

From the judgment rendered, plaintiff appealed.

S. J. Bennett for plaintiff.

Walser & Walser for defendant.

BROWN, J. This action is brought to recover of the defendant a board bill for his minor son. The plaintiff rests her case upon two grounds:

First. That the son was not emancipated by the father, and, consequently, that the father is liable for the support of his minor son. His

Honor very properly placed the burden of proof upon the defendant to satisfy the jury by a preponderance of evidence that the son had been emancipated from the control of his parent. The evidence tends to prove that the child left his father's roof when he was about 18 years old, by an agreement with the defendant that the son was to have all his earnings, make his own contracts, and receive his own wages. All the evidence tends to prove that the father permitted his son to work for himself, to remain away from the parental roof, and to receive and spend the earnings of his own labor. There is no evidence in the record which tends to contradict the testimony of the father to that effect. It is well settled upon such state of facts that the father has released his parental control and is not liable for the care and maintenance of his child. *Daniel v. R. R., ante,* 23; 29 Cyc., 1626; *Lowrie v. Oxendine,* 153 N. C., 268.

In our view of the case, the judge might well have charged the jury that if they believed the evidence, in any view of it, they should answer the first issue "Yes." This renders it unnecessary to discuss the prayers for instructions upon the first issue.

Second. The plaintiff contends that there was an express (378) promise upon the part of the defendant to pay the son's board. There is evidence tending to prove that the defendant told the plaintiff that he did not want his son turned off from her house, because it would discourage him, and said to her: "Wait, and I will see that you get the money."

The plaintiff further testified that the last time the defendant came to see her "I asked him what to do about the boy, and he said he was going to take the boy home and let him rest a week, and said, 'When he comes back he will be prepared to pay you some.' The boy left with his father, went home and stayed about a week, came back and stayed two weeks with me, after that, and never did say money to me. I finally told him that I could not keep him longer, and for him not to go to his room and get his clothes. When he came to get the boy's clothes he and the boy came together, and he told me to let him have the boy's clothes and he would see that I got my money, and the boy got up his clothes and Mr. Hartley took an itemized account of the things."

The plaintiff assigns error because the court charged the jury as follows: "Now, I charge you, gentlemen, the law to be, that if he merely promised her by words of the mouth, that is, if you find that he merely promised her that he would be responsible—I am not using the language now, but I am letting you find the facts from the evidence—that he would be responsible to her for the board bill in the event his son failed to pay it, why, that would not be a binding promise upon him in this case, as the plaintiff could not hold him upon that promise. A promise

to pay the debt of another if the other fails to pay must be in writing; otherwise, it is not enforcible."

As an abstract proposition of law, this charge is substantially correct. *Peele v. Powell,* 156 N. C., 557; *Dale v. Lumber Co.,* 152 N. C., 653.

It would, however, have been error had the judge stopped with that instruction and said nothing more. His Honor further instructed the jury that if the father did emancipate the son, he would not be liable for the board bill by reason of the relationship between parent and child, and that the jury must look further and see whether he is liable upon any other ground. He further instructed the jury that the burden of proof was upon the plaintiff upon the second issue, and that if the jury was satisfied by the greater weight of evidence that after the board bill had been partly incurred the son was about to leave in obedience to the demands of the plaintiff, and that then the defendant came to the plaintiff, who had the son's clothes in her possession, and induced her by his own promise to release the clothes and to continue the son in her house, and that he would pay the bill, and that the plaintiff, relying upon such promises of the father, did as requested, the defendant would be liable for the debt. Under those circumstances the jury should answer the second issue "Yes; $125."

(379) This instruction was based upon the evidence of the plaintiff, and was given to the jury at her instance. If those facts are true, it would take the promise of the defendant out of the statute of frauds and would be an original promise on his part based upon a consideration. In so charging the jury, his Honor gave the plaintiff all that she was entitled to. The jury seems, however, to have accepted the defendant's version of the facts.

No error.

Cited: Jolley v. Telegraph Co., 204 N.C. 138 (1c, 2c); *James v. James,* 226 N.C. 402 (1c, 2c).

W. O. JACKSON ET AL. v. BOARD OF COUNTY COMMISSIONERS OF SURRY COUNTY.

(Filed 19 April, 1916.)

1. County Commissioners — Discretionary Powers—Courts—Indictment—Jurisdiction—Duress.

A request from the judge holding court in a county to the solicitor to draw an indictment against the county commissioners for failing in their

duty to provide a proper courthouse and jail cannot alone be regarded as a coercion of the commissioners in regard to their discretionary powers, or duress to invalidate bonds afterwards to be issued by them in pursuance of their resolutions to build a new courthouse and jail upon the sites of the old ones; and the bonds to be so issued will not be restrained either on that ground or the want of jurisdiction of the judge making the request.

2. County Commissioners—Discretionary Powers—Necessary Expenses—Courthouses—Jails—Courts—Indictments—Defenses.

It is within the sound discretion of the county commissioners to have the courthouse or jail of the county repaired or to erect new ones on the same sites as a necessary county expense, which will not be reviewed in the courts in the absence of *mala fides;* and should a bill of indictment be drawn by the solicitor, at the request of the judge holding the courts of the county, and a true bill be found by the grand jury thereon, it is open to the commissioners to set up any available defense they may have.

3. County Commissioners—Necessary Expenses—Courthouse—Jails—Special Taxes—Interest—Sinking Fund—Statutes.

Where the county commissioners have the authority to repair the county's jail and courthouse and to erect new ones, in its discretion, it is without authority to levy a special tax to provide for the payment of interest on the bonds issued for that purpose, or to create a sinking fund therefor, for this must be provided for by proper legislation, or paid out of the general revenues and income of the county.

ALLEN, J., dissents.

CIVIL ACTION in the Superior Court of SURRY County, heard by *Lane, J.,* at chambers, 3 January, 1916, upon application by the plaintiff for a restraining order. The court refused the motion, and the plaintiff appealed.

The board of commissioners of Surry County at their meeting (380) on 6 December, 1915, made the following order:

"Whereas, by reason of the increase and growth in the public and material interests of the county in the last ten years, by which the business of the county has been much enlarged, demanding greater facilities therefor; and whereas the apparent need of a courthouse of sufficient size and capacity to preserve the records of the county and to provide room for the same has long been felt as a great public necessity; and whereas the grand jury of the county for a number of years, scarcely without exception, had in their official report declared the present building insufficient, and recommended the building of a courthouse in some measure suitable to the demands of the county, and like recommendation has been earnestly suggested by every judge who has presided for the courts of the county; and whereas the judge holding the October Term, 1915, of court instructed the solicitor of this judicial district to

send a bill of indictment against the county commissioners at the next criminal term of the court, provided steps have not been taken for the erection of a new courthouse building suitable to the needs of the county; and whereas it is apparent to every citizen of the county that the present courthouse is utterly insufficient for the transaction of the public business; and whereas, by reason of the large growth in population and the resulting increase in crime, the county jail is found wholly insufficient and also is an old, dark, unsanitary building, without light or heat, or any provision for the health, cleanliness, and comfort of the person; and whereas there is no water, no way to clean or disinfect the present jail building; and whereas the grand jury of the county for the last ten years, scarcely without exception, have in their official reports of the present jail buildings recommended the building of a new jail in some measure suited to the needs of the county, and also to the demands of humanity, and a like recommendation has been earnestly advocated by every judge who during his lifetime has presided over the court of the county; and whereas at the October Term, 1915, of the court the judge of the court instructed the solicitor of the judicial district to draft a bill of indictment against the county commissioners charging them with neglect of official duty unless in the meantime they should actively commence the erection at the present site of a jail which will meet the requirements of the law and the needs of the citizens of the county; and whereas the board of county commissioners declared a larger and more commodious courthouse a public necessity; therefore, be it

"*Resolved,* That a new and sufficiently capacious courthouse, with necessary and modern conveniences, light, heat, and sewerage, be constructed on the site of the present building; also be it

(381) "*Resolved,* That a new and sufficiently capacious jail, with sufficient and modern conveniences, light, heat, water, and sewerage, be constructed on the site of the present jail building; also, a house suitable for the jailer, on the same lot. All of the said buildings and improvements, including improvements of public sewerage, shall cost not exceeding $80,000. That to pay for said construction the board of commissioners issue, when needed, eighty notes, $1,000 each, making a total of $80,000, due and payable in thirty years, bearing interest not to exceed 5 per cent per annum, payable semiannually; that said notes be executed by the chairman of the board of county commissioners and signed by the clerk of said board in the presence of the county treasurer and a full board or majority of same."

It is to enjoin the defendants from carrying into effect the above order that this action is brought.

R. L. Haymore for plaintiff.
W. F. Carter for defendants.

BROWN, J. It appears in the record that at October Term, 1915, his Honor, Judge Cline, presiding, declared that the present courthouse for Surry County is inadequate for public purposes, and that the county jail is far worse in all respects than the courthouse, and that the county is growing both in population and wealth and well able to bear the expense of the erection of modern and suitable buildings.

The judge then "respectfully suggests and requests that the solicitor of this judicial district prepare and send a bill of indictment to the next grand jury, charging the commissioners of this county with neglect of official duty unless in the meantime they shall have actively commenced the erection, at the present sites, of a courthouse and jail which will meet the requirements of the law and the needs of the citizens of the county."

The plaintiff seeks this injunction upon two grounds, as set out in the brief: First, that the order made by Judge Cline is void for want of power to make it; and, second, that the order made by the commissioners hereinbefore set out was made because of the coercion of Judge Cline, which destroyed the discretion of the board of county commissioners in making the order, and that it was not made of their own volition.

The first ground is untenable for the reason that if Judge Cline's order is without jurisdiction, the defendants, the board of commissioners, need not obey it; and if they should be indicted or charged with contempt in disobeying such order, its invalidity would be a matter of defense for them. But as we construe the order, it does not command the commissioners to do anything. It is simply a request to the solicitor of the district to send a bill of indictment charging the commissioners with neglect of official duty. It does not order the com- (382) missioners to do anything, and is not directed to them. If they should be indicted in accordance with the recommendation of the judge, they would have every opportunity to set up any available defense, as was done in *S. v. Leeper,* 146 N. C., 655. The fact that the judge made such a recommendation to the solicitor affords no reason why the defendant board of commissioners should be enjoined from carrying out the provisions of the order made by them at their December meeting.

As to the second ground, that the defendants should be enjoined because they are acting under duress, that is likewise untenable. In the first place, there is no evidence that the board of commissioners is acting under duress. It may be that the recommendations of the judge have influenced them to provide suitable public buildings for county purposes. Because of that it does not follow that they are coerced into doing a

thing which their sound discretion does not approve. In any event, the allegation that they are acting under duress is no ground for injunction. If the commissioners are of the opinion that the judge's recommendations are not well founded, it would be their duty to act upon their own judgment instead of following the recommendation of his Honor. The board of commissioners of the county is a body to whom the law entrusts the administration of such matters. Such board is clothed with the power to order the erection of necessary public buildings for the county. It is a matter within the sound discretion of the county authorities and their discretion will not be reviewed by the courts except when *mala fides* is shown. The building of a courthouse is a necessary county expense, and the board has full power, in their sound discretion, to repair the old one or to erect a new one, and in order to do so they may contract such debt as is necessary for the purpose. *Vaughn v. Comrs.*, 117 N. C., 429; *Brodnax v. Groom*, 64 N. C., 244; *Haskett v. Tyrrell Co.*, 152 N. C., 714. It should be borne in mind, however, by the county commissioners that while they are clothed with the necessary power to contract such indebtedness, they have no power to levy a special tax out of which to pay the interest and create a sinking fund, unless they have the special authority of the General Assembly. The interest on such bonds would have to be paid out of the general revenues and income of the county. *Comrs. of Pitt v. McDonald*, 148 N. C., 125. Under such conditions it would be well for the commissioners to consider carefully the advisability of prosecuting the work or of offering their bonds for sale until they are secured by some special legislation. There is nothing in this record that indicates that the board of commissioners are acting in bad faith, but rather they appear to be acting for what they think is for the best interests of the county. When so acting they are within their legal rights, and cannot be coerced by any findings or orders made by the judges of the Superior Courts.

(383) The complaint in this case, we think, fails to state a cause of action, and the action is, therefore, dismissed.

Affirmed.

ALLEN, J., dissents.

Cited: Keith v. Lockhart, 171 N.C. 459 (1d); *Cooper v. Comrs.*, 183 N.C. 235 (3cc); *R. R. v. Reid*, 187 N.C. 324 (3d); *Barbour v. Wake County*, 197 N.C. 317 (3d); *Castevens v. Stanly County*, 209 N.C. 81 (1c, 3c).

E. RANDOPH ET AL. v. W. C. HEATH.

(Filed 3 May, 1916.)

1. Courts—Pleadings—Amendments—Parties.

It is within the discretion of the trial judge to permit an amendment to the complaint, after service of summons, by adding other names of the defendant partnership, it appearing that the defendant had notice of the amendment.

2. Judgments—Excusable Neglect.

A motion by defendant to set aside a judgment rendered by default of an answer, for inadvertence, surprise, mistake, and excusable neglect, will be denied when it appears that the cause was regularly set on the calendar which was advertised, and the judgment rendered at a term of court held after several terms thereof had passed wherein the answer should have been filed.

3. Gaming Contracts—Cotton Futures—Statutes—Constitutional Law.

Chapter 853, Laws 1909 (Gregory's Supplement, sec. 1689), declaring contracts in cotton futures void, and that no action may be maintained upon them in the courts of this State, is in furtherance of our declared public policy, and our statute is constitutional and valid.

4. Same—Void Judgments.

A judgment rendered by default of an answer upon notes regular and valid upon their face, but growing out of transactions in cotton futures made void by our statute, which also declares that actions thereon may not be maintained in the courts of our State, will be set aside as utterly void, irrespective of whether it was obtained through excusable neglect, etc.

5. Same—Appeal and Error—Findings—Procedure—New Actions.

Upon motion to set aside a judgment regularly rendered, when it is found as a fact by the trial judge that it was obtained upon notes given in transactions relating to cotton futures, prohibited by our statute (Gregory's Supplement, sec. 1689), the Supreme Court, on appeal, will order the judgment set aside for want of power in the court to render it, and as absolutely invalid, and leave the plaintiff to establish the fact in another action, if he can, that the notes were valid and not arising from the transactions prohibited.

ALLEN, J., dissenting; BROWN, J., concurring in the dissenting opinion.

APPEAL by defendant from *Adams, J.*, at February Term, (384) 1916, of UNION.

Redwine & Sikes for plaintiffs.

Stack & Parker for defendant.

CLARK, C. J. This is an appeal from a refusal of a motion to set aside a judgment which was rendered at December Term, 1914, of Union. The motion was made on three grounds:

1. That the judgment was irregular in that the plaintiff amended the complaint before judgment, but after service of summons, by adding other names as members of the firm of E. & C. Randolph. This, however, was a matter of discretion in the trial judge. The defendant had notice of the amendment.

2. On the ground of inadvertence, surprise, mistake, and excusable neglect. The motion was properly refused on this ground. The summons was issued 3 October, 1914, and was served on the defendants 6 October. The complaint was filed on 10 October, duly verified by one of the partners of the plaintiff firm, and, besides (which was not necessary), there was indorsed on the complaint, "Answer demanded at October Term, 1914." The action was to recover judgment on two promissory notes signed by the defendant and executed to the plaintiffs, which were duly set out in the complaint. The defendant did not file an answer nor employ counsel at October term nor at December term, and at the latter term judgment by default final was rendered according to the complaint. The cause was placed on the calendar for trial at December Term, 1914, and the calendar was printed in two newspapers published in Monroe before said term, the defendant being a resident of said town.

3. The third ground of the motion to set aside the judgment is based on the finding of the judge, "I find as a fact that for a considerable time before this suit was brought the defendant had been dealing in futures in cotton in direct violation of the statutes enacted by the General Assembly of this State, and that the notes sued on were executed in evidence of his liability to the plaintiff growing out of these transactions."

The judgment should have been set aside as void, because the statute had withdrawn from the courts jurisdiction of such cause of action. The statute referred to is chapter 853, Laws 1909, which is set out as section 1689 in Gregory's Supplement, which specifies that a cause of action such as that found above by the judge to be the consideration of the notes in this case "shall be *utterly null and void;* and no action shall be maintained in any court to enforce any such contract, whether the same was made in or out of the State, or partly in and partly out of the State,

(385) and whether made with the parties thereto by themselves or by or through their agents, immediately or mediately." And it is further provided: "Nor shall the courts of this State have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such contract," *i. e.,* such judgment is void.

It will thus be seen that the court was entirely without jurisdiction to entertain an action upon this cause of action or to render any judgment thereon. And when it is brought to the attention of the court, as it was done by the defendant in this case, it was the duty of the court to strike out the judgment and dismiss the action, which it was forbidden to entertain.

If a justice of the peace should entertain an action for a matter beyond his jurisdiction, and should render judgment thereon, as, for instance, for $1,000, though there should be no appeal and though the judgment was regularly docketed in the Superior Court, upon the matter being called to the attention of the court it would be treated as a nullity.

The court had no jurisdiction to entertain this action nor to render judgment therein, and being without jurisdiction, the judgment should be struck out. Congress enacted as to the Reconstruction Acts that the court should entertain no action to construe the validity of such statutes, and the Supreme Court of the United States in *Ex parte McCardle,* 74 U. S. (7 Wallace), 506, held that the court having no jurisdiction, such action must be dismissed.

The public policy of a State is a matter for the legislative department. When a statute provides that a cause of action is immoral and contrary to the public welfare, the statute can forbid the courts to entertain jurisdiction thereof. When by inadvertence, or in ignorance of the facts, the court has taken jurisdiction and rendered judgment thereon, when this is brought to the attention of the court, and the fact is found by the judge, as in this case, the judgment should be set aside and struck from the docket. To do otherwise would be to maintain the validity of a judgment upon a cause of action that by legislation was held null and void and of which jurisdiction was denied to the court by statute.

This is not merely the case of an illegal or immoral consideration, as to which, if the court renders judgment and the defendant does not appeal, it will be presumed in favor of the regularity of judgments that on the facts it was adjudged that the consideration was not illegal or immoral, and the judgment cannot afterwards be set aside on such averment. 23 Cyc., 928. In such case the defendant waives the objection by not pleading it. But here jurisdiction is denied to the court as to this cause of action, whose nature is not denied and which is found by the court, and the defendant cannot confer jurisdiction by failing to plead it. The judgment cannot be valid when the court had no jurisdiction, and the court could not acquire jurisdiction by being (386) kept in ignorance of the facts by the silence of the plaintiffs and the absence of the defendant.

Had this defect been brought to the attention of the court it would have refused judgment and have dismissed the action in obedience to the statute. The position of the plaintiffs is no stronger by reason of the fact that the judgment was rendered by the inadvertence of the court. The defendant was not represented and the plaintiffs failed to call to the attention of the court the facts which would have shown to the court that it was without jurisdiction.

In the *McCardle case, supra,* the United States Supreme Court said: "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle." If the court had known the facts constituting the cause of action, legally it could not have rendered judgment, and if it had rendered judgment it would have been void for want of jurisdiction.

Revisal, 1689, which made such contracts "utterly null and void," was held constitutional. *S. v. McGinnis,* 138 N. C., 724; *S. v. Clayton, ib.,* 732; *Garsed v. Sternberger,* 135 N. C., 501; *Rankin v. Mitchem,* 141 N. C., 277, and in many other cases. Revisal, 3823, made parties to such contracts, either as principal or agent, directly or indirectly, indictable and punishable by fine and imprisonment. This was also held constitutional in the above cases.

The provision that a judgment for such cause of action is a nullity was held constitutional in *Mottu v. Davis,* 151 N. C., 238. Many other States have passed statutes in recognition of the same public policy, and, indeed, the Federal Government has done the same and has created a bureau and appointed officials to secure its better execution. U. S. Stat., 1914, ch. 255.

Upon the finding of facts by the judge, the judgment should have been set aside. But this would not debar the defendant from contesting before the jury in another trial the issue whether the cause of action was of this nature, *Rankin v. Mitchem,* 141 N. C., 277, since its illegality did not appear upon the face of the note sued on.

Reversed.

ALLEN, J., dissenting: One question is decided in the opinion of the majority of the Court:

(1) That a regular judgment rendered upon notes, valid on their face, may be set aside when there is no surprise or excusable neglect, upon a finding by the judge that the notes were executed to cover a liability growing out of a contract for "futures."

(387) I do not think the proposition is sound.

(1) The material parts of the statute in regard to contracts for "futures" (Greg. Suppl., 1689) are that such contracts "shall be utterly null and void"; that "no action shall be maintained in any court to enforce any such contract," "nor shall the courts of this State have any jurisdiction to entertain any suit or action brought upon ajudgment based upon any such contract."

It therefore appears that the prohibition on the courts is that they shall not entertain an action "to enforce any such contract," or one "brought upon a judgment based upon any such contract," and the subject-matter of the present appeal, the correctness of an order refusing to set aside a judgment, does not fall within either class.

The distinction between actions instituted to enforce a liability growing out of a contract for "futures" and where the question arises otherwise is recognized in *Overman v. Lanier,* 157 N. C., 548, in which the distributees attacked a payment made by the administrator upon the ground that the liability arose in a contract for futures, and the Court said of this contention: "We cannot agree with the defendants that because in their answer in this proceeding they alleged that these were gambling debts, this cast the burden of proof upon the plaintiff under Revisal, 1691. That provision applies where a party sues upon the contract and the debtor denies it and sets up the defense. But here the defendants are alleging that the payment by the plaintiff of his intestate's notes, valid on their face, is invalid because the contract was founded upon illegal consideration, and the burden was upon them to prove it."

This case is also important in that it determines that the plea that a liability, which a plaintiff is seeking to enforce, upon a contract for "futures," is a defense and must be set up in the answer, and if a defense which must be pleaded, the defendant is now precluded by the judgment from relying on it. *Caudle v. Morris,* 160 N. C., 173. "A judgment will not be opened or vacated because founded on an illegal or fraudulent consideration, if the party knew of this objection and might have set it up in defense to the action." 23 Cyc., 928.

In *Best v. Mortgage Co.,* 133 N. C., 20, this principle of the conclusiveness of the judgment as to all matters of defense was applied to the plea of usury, which is condemned by statute.

When this action was commenced the court had complete jurisdiction, as the defendant had been served and the cause of action was upon notes valid on their face and for an amount within the jurisdiction of the court. The defendant failed to answer and set up his defense and judgment was rendered against him.

This judgment is an adjudication that the notes were valid, and it shuts off all inquiry as to the consideration of the notes unless it is

(388) set aside for irregularity or excusable neglect. If not, what becomes of the well established doctrine that when the cause of action is the same, a judgment concludes not only as to those matters litigated, but also as to those which might have been litigated? *Coltrane v. Laughlin,* 157 N. C., 287; *Pinnell v. Burroughs,* 168 N. C., 318, and cases cited.

The language in the last case may well be applied to the defendant in this action: "The party is estopped for the reason, in part, that he has been delinquent, as he had his day in court and a fair opportunity to assert his right, which he deliberately failed to do, and he will not afterwards be heard to call the matter in question, for the law does not permit the same question to be again litigated under such circumstances. If it did, there never would be an end to controversy."

I do not think we can consider the finding of the judge in the absence of excusable neglect, as that inquiry is merged in the judgment.

In *Mottu v. Davis,* 151 N. C., 237, a recovery was permitted upon a judgment obtained in Virginia, which was assailed upon the ground that it was rendered upon a contract for "futures" and under the statute as it is today.

BROWN, J., concurs in this opinion.

Cited: Bank v. Felton, 188 N.C. 392 (3c, 4c); *Welles & Co. v. Satterfield,* 190 N.C. 94 (3c, 4c); *Respass v. Spinning Co.,* 191 N.C. 812 (3c, 4c); *Howard v. Howard,* 200 N.C. 580 (3d); *Cody v. Hovey,* 219 N.C. 376 (3c, 4c, 5c).

J. E. WALL, TRUSTEE, v. E. A. ROTHROCK AND S. M. PEACOCK.

(Filed 26 April, 1916.)

1. Corporations—Directors—Borrowing Money—Mortgages.

The authority of a board of directors to borrow money for the corporation's needs impliedly carries with it the power, without a vote of the stockholders, to secure the loan by mortgage on the corporate property, unless specially restrained by the charter or by-laws. *Semble,* this principle is impliedly recognized by statute, Revisal, sec. 1005.

2. Same—Loans by Directors—Indorsers—Bills and Notes.

The directors of a corporation, unless restricted by its charter or by-laws, may cause a valid mortgage on the corporate property to be executed to secure one or more of them, in lending money to or incurring a liability for the present needs of the corporation in pursuance of its authorized business.

3. Same—Fiduciaries—Insolvency—Pre-existing Debt.

The directors of a corporation occupy a fiduciary relation, and are not permitted to secure themselves against preëxisting liabilities of the corporation upon which they are already bound, or for money they may have already loaned, when the corporation is in declining circumstances and verging on insolvency.

4. Same—Issues.

In an action by a trustee in bankruptcy of an insolvent corporation to set aside a certain mortgage made by the corporation to its directors to secure their indorsements on the corporation's paper, which the indorsers have paid, proper issues should be submitted to the jury determinative of the questions of whether the mortgage was given to secure the directors on a preëxisting debt or liability, and as to whether the corporation was in failing circumstances at the time of its registration.

5. Corporations — Directors — Loans by Directors—Mortgages—Registration—Fraud on Creditors—Issues.

Where the directors of a corporation cause a mortgage on the corporate property to be given to secure the liability of some of its members for indorsing its paper used in the course of its authorized business, and it appears that the mortgage was not registered within eleven months after its execution, and there is evidence tending to show that the corporation was insolvent at the date of its registration, such indorsers are not permitted to withhold their mortgage from registration in order to give the corporation a fictitious credit to those dealing with it between the date of its execution and registration; and this question is for the determination of the jury upon a proper issue arising from the evidence, and under correct instructions thereon.

CIVIL ACTION, tried before *Cline, J.*, and a jury, at February (389) Term, 1916, of DAVIDSON, upon these issues:

1. Is the deed of mortgage mentioned in the pleadings the act and deed of the Southmont Spoke, Hub and Handle Company, now bankrupt? Answer: "Yes."

2. Was the said Southmont Spoke, Hub and Handle Company at the time of the execution of said paper-writing insolvent and unable to pay its debts? Answer: "No."

3. Was the said deed of mortgage executed with the fraudulent purpose and intent to defeat the rights of other creditors and unduly prefer the defendants? Answer: "No."

4. What amount, if any, were the defendants required to pay on account of the indebtedness secured in said mortgage and what amount, if any, is now due thereon to the defendants? Answer: "$3,350.16."

From the judgment rendered, the plaintiff appealed.

P. V. Critcher, McCreary & McCreary, Walser & Walser for plaintiffs.

Roper & Roper, J. F. Spruill, Phillips & Bower for defendants.

BROWN, J. This action is brought by plaintiff as trustee in bankruptcy of the Southmont Spoke, Hub and Handle Company to set aside a mortgage made by the bankrupt to the two defendants, one of whom, Rothrock, was president, and both of whom were directors of the said corporation. The mortgage is dated February, 1913, was recorded 15 January, 1914, and secures the defendants as indorsers of four (390) notes of same date executed by the bankrupt to the Bank of Lexington for money loaned. The plaintiffs have paid the notes and now seek to foreclose their mortgage.

Plaintiff in apt time requested the following instructions:

1. If the jury find from the evidence that the mortgage was authorized by the directors and not by the stockholders, you will answer the first issue "No."

2. If the jury believe the evidence, they will answer the third issue "Yes."

These instructions the court properly declined to give.

The first prayer raises the general question as to the right of directors ever to mortgage the corporate property without the consent of the stockholders. It is well settled that, as a general rule, the directors of a corporation, unless they are specially restrained by the charter or by-laws, have the power to borrow money with which to conduct the business and to secure payment by mortgage on the corporate property. 10 Cyc., 765.

The power to borrow money carries with it by implication the power to secure the loan by mortgage. 2 Beach on Corp., sec. 388; 1 Morawetz, sec. 346. Cook says, voy. 3, sec. 808: "It is now the established rule that the board of directors, without any action whatever by the stockholders, has the power to authorize the execution of a mortgage on the corporate property." Same author, section 712, says: "The stockholders, indeed, have very few functions. The board of directors have the widest of powers. All the various acts and contracts which a corporation may enter into are entered into by and through the board of directors. The board of directors make or authorize the making of notes, bills, mortgages, sales, deeds, liens, and contracts generally of the corporation."

Our statute, Rev. 1905, sec. 1005, appears to recognize inferentially the power of a board of directors to mortgage the corporate property.

In *Duke v. Markham,* 105 N. C., 135, it is said by the present *Chief Justice* that "a president and cashier, as such, cannot execute a mortgage of corporate property without special authority from the board of directors or the stockholders."

The other prayer was properly refused, because fraud is generally a question of fact, and, taking the evidence as a whole, the court could not as matter of law pronounce the transaction fraudulent and void.

It is true that it is held in *Edwards v. Supply Co.,* 150 N. C., 171, that a mortgage on all its property, made by a corporation under authority of its directors with a vote of the stockholders, to secure them in their *prior indorsements* of the corporation's notes negotiated for the benefit of the corporation is void; otherwise had the mortgage been authorized at the time of the indorsements and receipt of the money to aid the corporation's business.

In that case it is also held that when a mortgage has been made (391) on all its property by a corporation to its officers to secure a pre-existing debt, the company continued in possession, it is evidence sufficient to sustain a *holding* of the referee that it was void as to other creditors. In that case the property consisted of a stock of goods *continually being depleted,* and the proposition is based upon the doctrine laid down in *Cheatham v. Hawkins,* 76 N. C., 335, and *Cowan v. Phillips,* 119 N. C., 26. In those cases it is held that such facts are not absolutely fraudulent in law, but such evidence of fraud that the burden of proof rests upon the party claiming under the mortgage to disprove the fraud. Facts which will justify a jury or a referee in finding fraud do not always warrant a court in adjudging fraud as matter of law.

We think that there is no doubt that a board of directors, unless restricted by charter, may borrow money for the *present* needs of the corporation, and authorize certain directors to indorse the notes and secure them by mortgage on the corporate property, if done in good faith.

This just principle is recognized by *Chief Justice Clark* in *Edwards v. Supply Co., supra;* by *Mr. Justice Manning* in *Powell v. Lumber Co.,* 153 N. C., 56, quoting from *Edwards v. Supply Co.,* and by *Mr. Justice Hoke* in *Whitlock v. Alexander,* 160 N. C., 479.

There is nothing to hinder a director from loaning money and taking liens on the corporate property to secure him. If he can do that, he can lend his credit by indorsing its paper in order to obtain needed cash, and secure himself upon the corporation's property. Such transactions are looked upon with suspicion, and strict proof of their *bona fides* is required. *Hill v. Lumber Co.,* 113 N. C., 178; *Oil Co. v. Marbury,* 81 U. S., 587.

But the directors, occupying a fiduciary relation, are not permitted to secure themselves against preëxisting liabilities of the corporation upon which they are already bound, or for money they may have already loaned, when the corporation is in declining circumstances and verging on insolvency. They cannot be permitted to take advantage of their intimate knowledge of the corporation's affairs for their own benefit at the expense of the general creditors.

We think, however, that the plaintiff's exceptions to the issues submitted are well taken. They are not determinative of the controversy.

There is no finding of fact as to when the debts were contracted originally, whether the notes were renewal notes of other notes already indorsed by defendants or either of them, and which one.

There is no need to submit the first and second issues tendered by plaintiff, as those facts appear to be admitted. The other three issues should have been submitted; also an issue as to whether at the time of the registration of the mortgage the corporation was in failing circumstances and verging on bankruptcy. It is immaterial that the (392) corporation was solvent at date of the mortgage. The question is, What was its condition when the defendant directors put it on record and attempted to shelter themselves under its protection as against the other creditors?

The defendant Rothrock seems to stand upon a somewhat different footing, if his evidence is taken to be true. According to his version, he was elected director and president, 13 February, 1913, and that was his first connection with the corporation. He was not on any of its outstanding notes, and refused to indorse the notes until the directors executed a corporate mortgage securing him against loss. This would be a legitimate transaction, according to the authorities cited heretofore. Nevertheless, if he failed to record the mortgage in order to give the corporation a fictitious credit, he would not be permitted to set it up against those who extended credit to the company between its execution and registration, and the same rule would apply to his codefendant, even if his indorsement was an original instead of a renewed liability.

New trial.

Cited: Steel Co. v. Hardware Co., 175 N.C. 451 (3c); *Caldwell v. Robinson,* 179 N.C. 523 (2c, 3d); *Bassett v. Cooperage Co.,* 188 N.C. 513 (3c); *Everett v. Staton,* 192 N.C. 224 (2c, 3d); *Mfg. Co. v. Bell,* 193 N.C. 371 (4c); *Thompson v. Shepherd,* 203 N.C. 314 (2c).

R. A. CROWELL v. J. M. PARKER ET AL.

(Filed 26 April, 1916.)

1. Principal and Agent—Sale of Lands—Commissions.

In an action for the alleged breach of a brokerage contract for the sale of lands by the agent to recover his commissions it is necessary for the agent to show he had been successful in procuring a purchaser who not only was able and willing to take the lands in accordance with the terms of the contract, but who would have done so except for the defendant's default.

2. Same—Deeds and Conveyances—Escrow—Parties—Parol Contracts—Trials—Evidence—Questions for Jury.

In an action to recover brokerage commissions upon the alleged breach of the contract of a vendor of lands that the purchase price should be a certain sum payable part in cash, the deferred payment to be secured by a mortgage on the lands, there was evidence tending to show a later agreement between the parties and a proposed purchaser that the purchase price should be a less sum, and the defendant delivered the deed in escrow in the form of a receipt from the holder stating that the parties had agreed thereto, but which was not signed by either the vendor or proposed purchaser, and that the deeds were to be delivered upon receipt of part of the purchase price and a mortgage on the lands securing the deferred payment; that the proposed purchaser withdrew from the arrangement and the vendor received back the deed held in escrow and sold the lands to a stranger to the transaction: *Held*, the escrow, as to the vendee, rested in parol and was unenforcible; and upon the entire evidence the question as to whether the plaintiff had procured a purchaser in accordance with the terms of his contract was a question for the jury, under proper instructions, and it was reversible error for the trial judge to direct a verdict thereon in plaintiff's favor as a matter of law.

3. Principal and Agent—Sale of Lands—Contracts—Commissions—Default of Principal.

An agent for the sale of real estate upon commission who finds a purchaser who is ready, able and willing to purchase it on the authorized terms is entitled to his compensation, if the sale is prevented by default of his principal in refusing to consummate it.

APPEAL by defendants from *Carter, J.*, at October Term, 1915, (393) of STANLY.

Civil action. The plaintiff, a real estate broker, sued for the recovery of $450, alleged to be due by the defendants J. M. Parker and Luther Shirey, as commissions on the sale of 380 acres of land in said county, and known as the David Melton home place. The contract was as follows:

On this, 4 May, 1912, I hereby authorize and empower R. A. Crowell to sell for me my tract of 380 acres of land located on the waters of the Yawkin River near the Swift Island Ferry and known as the David Melton land or home place, at the price of $5,000, payable $2,000 cash and $1,500 and interest on the deferred payments each year for two successive years, the deferred payments to be secured by notes and mortgage on the property. And in the event the timber, or any part of it, on said land is cut before the notes and mortgage for the deferred payments have been paid, the sum of $3 per 1,000 feet for all timber cut is to be applied on said notes and mortgage, as may be agreed upon by the purchaser and myself. I make R. A. Crowell my sole agent for that purpose, and in case a sale is made by him or through his influence or advertising, I do contract and agree to execute to the purchaser a deed

in fee for the said property, reserving to myself all the rents from the property or farm this year. The said R. A. Crowell shall receive as compensation for his services 10 per cent of the price above named, to be arranged out of the first payment of $2,000. This contract may be terminated by me after six months from the above date, upon giving written notice of my withdrawal of the same.

J. M. PARKER. [SEAL]

The jury returned the following verdict:

1. Did the defendant J. M. Parker execute and deliver to the plaintiff the contract marked Exhibit "A," as alleged in the complaint? Answer: "Yes."

2. Did the defendant J. M. Parker sell the land described in said contract to the defendants L. S. Shirey and J. M. Cook before the expiration of said contract, as alleged in the complaint? Answer:
(394) "Yes."

3. Was said sale made through the efforts, influence, advertising or personal solicitation of the plaintiff? Answer: "Yes."

4. In what amount, if any, is the defendant J. M. Parker indebted to the plaintiff? Answer: "$450."

The court instructed the jury to answer the first and second issues "Yes," if they believed the evidence, and then instructed them as to the evidence upon the third issue. Judgment was entered upon the verdict, and the defendants appealed.

R. E. Austin and J. A. Spence for plaintiff.

Robert L. Smith for defendants.

WALKER, J., after stating the case: It is not necessary that we should set forth even the substance of all the evidence. The case, as we view it, turns upon the meaning of the contract between the plaintiff and J. M. Parker and the nature of the transaction between J. M. Parker and L. S. Shirey, who acted, it seems, for himself and J. M. Cook. We will assume, for the sake of discussion, that the plaintiff by his efforts and influence brought the parties, Parker and Shirey, together to make their trade in regard to the land. It appears that the first negotiations for a sale by Parker to Shirey and Cook at $5,000, the amount mentioned in the plaintiff's contract, fell through, and afterwards, but before the contract between plaintiff and Parker had been terminated by notice, Shirey agreed orally to buy the land at $4,500, payable in certain installments. On 9 November, 1912, Parker deposited with M. J. Harris, assistant cashier of a bank in Albemarle, two deeds to Cook and Shirey, duly executed and probated, one for the land and the other for the timber on the dower tract containing 108 acres, and Harris delivered to Parker

a written receipt for the same, signed by him and reciting that the deeds were to be held in escrow, upon the condition that if Cook and Shirey paid $2,000 by 1 January, 1913, and secured the balance of the purchase money ($2,000) by a mortgage on the land, the deed of Parker should be delivered to them. The paper also recited that the grantors and grantees had agreed to the arrangement set forth by it, but neither the grantors nor the grantees signed the receipt, nor is there any evidence that Shirey or Cook authorized it to be signed for them, or that they even saw it at the time it was given. It was merely a receipt which M. J. Harris gave J. M. Parker for the papers, stating the purpose for which they were left with him. The evidence, in no reasonable view of it, can be considered as showing that Shirey and Cook were bound in writing by an agreement with Parker to buy the land. As against them, the contract was legally unenforcible. This being so, what are the relations of the parties, and the rights incident thereto?

It is plain that the defendant, though he afterwards sold the property, that is, in April, 1913, has received nothing from that sale which was produced by the effort or agency of the plaintiff, and we do (395) not understand that anything is claimed as accruing to the plaintiff from it. It may also be said that the result from the agency of the plaintiff in his attempt to sell the property to Shirey and Cook has been, in one view of the evidence, unavailing, if not entirely unsuccessful. The defendants have reaped no benefit from it, but have lost valuable time in their fruitless efforts to come to a binding agreement in respect to it. The law seems to be well settled that the broker's right to commissions depends upon the successful performance of his services, and nothing is to be paid unless a bargain is effected. A prospective or contemplative agreement is not sufficient. The negotiations must culminate in the production of a person ready, able, and willing to buy, if the vendor will sell to him, or who will enter into an enforcible agreement for the purchase of the property. The subject is fully considered in *Lunney v. Healey,* 44 L. R. A. (O. S.), 593, to which there is an elaborate and exhaustive note collecting and reviewing the cases. It can make no difference, however, if the broker, by his efforts, has brought forth a purchaser able, willing, and ready to accept the principal's offer of sale, that the specific terms of the contract of sale are arranged by the latter; but the broker must show, as has been said, that he effected either a completed sale or an agreement to purchase which is susceptible of enforcement against the purchaser.

We do not think the evidence in this case was such or so conclusive as to authorize the instruction which was given by the court upon the second issue. There was, on the contrary, evidence from which a jury might reasonably find that the plaintiff had not produced a person ready,

able, and willing to buy the land, or to make a binding agreement to do so. The negotiations between the parties resulted only in a conditional sale, in the nature of an option, that Shirey should deposit $500, and upon his paying $2,000 on or before 1 January, 1913, and then executing a mortgage upon the land for the balance, the escrow should be delivered to him. But this Shirey did not do, nor was he ready, able, and willing to comply with this condition at the appointed time, nor has he since made any tender of the money or the mortgage, but has altogether withdrawn himself from this transaction. It is true that the plaintiff took the deed from the clerk on 2 January, 1913; but this he may have done because Shirey had failed to appear and perform the conditions of the agreement. Parker could not compel Shirey to perform, for the contract, as to him at least, was oral.

We do not hold that the plaintiff is not entitled to recover, as the facts are not so clearly presented as to justify such a ruling; but what we must be understood as deciding is that there is evidence from which the jury may infer that there was no sale, according to the terms of plaintiff's agreement.

(396) Without discussing the authorities in detail, we cite the following as pertinent to the case: *Trust Co. v. Adams,* 145 N. C., 161, 166; *Levy v. Kottman,* 32 N. Y. Suppl., 241, where the cases are collected; *Diamond v. Hartley,* 55 N. Y. Suppl., 994; *Kronenberger v. Bierling,* 76 N. Y. Suppl., 895; *McPhail v. Buell,* 87 Cal., 115; *Wilson v. Mason,* 158 Ill., 204.

The second case above cited closely resembles this one in some of its features. But it must be borne in mind that if an agent, who is employed to sell real estate, finds a purchaser who is ready, able, and willing to purchase it on the authorized terms, his right to commissions will not be impaired by the default of his principal in refusing to consummate the sale. The seller cannot complain if he is made to pay commissions because, by his own fault, he has lost a bargain upon his own terms. *Parker v. Walker,* 86 Tenn., at p. 569, where it is said: "To procure a purchaser of real estate not only implies that the purchaser shall be one able to comply, but the further idea, that the seller and the purchaser must be bound to each other in a valid contract. To this we must agree. An oral agreement upon the part of the purchaser would not be a valid agreement; and if he refused to complete the sale after such oral agreement, without fault upon the part of the seller, the obligation of the broker would not be fulfilled, and he could not recover his commissions. If, on the other hand, the purchaser was not only able, but willing, to complete the sale, and the vendor then refused to sell, or is unable to fulfill the terms upon his part or make a good title, or the trade falls through for any other default upon the part of the seller, the commis-

sions are nevertheless earned. Addison on Contracts (Morgan's Ed.), vol. 2, sec. 931; *Cooke v. Fiske,* 12 Gray, 491; *Tooms v. Alexander,* 101 *Mass.,* 255 (*s. c.,* 3 Am. Rep., 349); *Mooney v. Elder,* 56 N. Y., 238." See, also, *Aigler v. Carpenter P. L. Co.,* 51 Kansas, 718.

What we have stated is, of course, based entirely upon a consideration of the terms of the agreement between the plaintiff and Parker, which have been set forth. There is evidence that this contract has not been complied with.

Whether the sale fell through by reason of the fault of the owner of the property, or it failed because the purchaser was not able, ready, and willing to buy, is for the jury to determine upon all the evidence and under proper instructions as to the law applicable thereto.

The cases on the subject in our Reports have very little or no bearing upon the pecise question raised in this appeal, as the sales in those cases were generally consummated. *Trust Co. v. Goode,* 164 N. C., 19, relied on by the plaintiff, was a case of that kind, and to the same effect are the authorities cited therein. It is undoubtedly true, as decided in those cases, that a principal cannot take the benefit of his broker's services and refuse to pay for them; but that is not the only (397) question here. *Aigler v. Carpenter, supra; Pehl v. Fenton,* 119 Pac. Rep. (Cal.), 400.

There was error in the charge of the court, and a new trial therefore is granted.

New trial.

Cited: Thomas v. Realty Co., 195 N.C. 593 (1c); *Ingle v. Green,* 202 N.C. 122 (1cc); *Harris v. Trust Co.,* 205 N.C. 529 (1c); *Johnson v. Ins. Co.,* 221 N.C. 445 (1e); *Lindsey v. Speight,* 224 N.C. 455 (1c); *White v. Pleasants,* 225 N.C. 763 (1c); *Jones v. Realty Co.,* 226 N.C. 306 (1d); *Eller v. Fletcher,* 227 N.C. 347 (1c).

B. H. HENDERSON v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 26 April, 1916.)

1. Issues—Negligence—Wantonness—Pleadings—Evidence—Trials.

In an action against a railroad to recover damages for a personal injury, where there is no allegation or evidence that the act complained of was wantonly done, it is erroneous, to defendant's prejudice, for the trial judge to submit an issue as to whether the plaintiff was injured by the defendant's wanton negligence.

2. Same—Instructions—Appeal and Error—Harmless Error.

In an action for damages alleged to have been caused by the defendant's negligence, where there is sufficient evidence of the negligence complained of, the submission of an improper issue as to the defendant's "wanton" negligence places upon the plaintiff an additional burden to show that the act was wanton; and where the trial judge has properly instructed the jury that the plaintiff was only entitled to recover his actual damages, the error is harmless so far as the defendant is concerned.

3. Negligence — Railroads — Collisions—Injury to Pedestrians—Trials—Evidence—Questions for Jury.

In an action to recover damages of a railroad company for injuring the plaintiff, alleged to have been caused by the defendant's negligence, the evidence is sufficient as to the defendant's negligence, but not of wantonness, which tends to show that the defendant's branch line crossed its main line in a town; that the plaintiff was stopped by a freight train at this crossing, and while standing between the two tracks about 35 feet from the track a fast train on the main line crashed into a freight train on the crossing, and a small stick of timber was hurled upon the plaintiff, causing the injury complained of.

CLARK, C. J. concurring.

APPEAL by defendant from *Whedbee, J.*, at October Term, 1915, of CUMBERLAND.

Civil action, tried upon certain issues, the first of which reads as follows:

Was the plaintiff injured by the wanton negligence of the defendant, as alleged? Answer: "Yes."

(398) The other issues relating to contributory negligence and damage were found for the plaintiff. From the judgment rendered, the defendant appealed.

Sinclair, Dye & Ray for plaintiff.

Rose & Rose for defendant.

BROWN, J. The defendant excepted to the submission of the first issue, and also requested the court to instruct the jury that there is no evidence of wanton negligence. His Honor erred in submitting the issue. There is no allegation in the complaint, and there is no evidence, that the defendant wantonly as well as negligently injured the plaintiff. Issues are raised by the pleadings, and where the pleadings do not distinctly and unequivocally raise an issue, it should not be submitted. *Sprague v. Bond,* 113 N. C., 552.

While there is nothing in the record tending to prove wantonness upon the part of defendant's engineman, there is ample evidence of

neglect. The defendant's branch road from Sanford to Wilmington crosses its main line from Washington to Florida within the limits of Fayetteville. The plaintiff, a colored physician, on his way home, was stopped by a freight train on this crossing and, while waiting for it to move, was standing on the angle between the two tracks and some 35 feet from the track, when the midnight "flyer," the fast passenger train on the defendant's main line, crashed into the freight train at the crossing and a small stick of timber thereon—a cross-arm for a telegraph line—was hurled 35 feet, striking and seriously injuring the plaintiff. The facts are not in dispute, and the defendant put on no evidence.

While the insertion of the word "wanton" in the issue was error, yet upon an examination of the charge of his Honor we are satisfied that it was error of which the plaintiff alone could complain, because it threw upon him the burden of proving that the defendant acted wantonly, recklessly, and without due regard for the rights of the plaintiff.

It is contended by the defendant that the submission of such an issue tended to enhance the quantum of damages, and we were at first inclined to think so; but his Honor instructed the jury very clearly that they should find as damages only such sum of money as will compensate the plaintiff for injuries which are the direct result of the wanton negligence of the defendant.

He told the jury to "answer in such sum as you think in your judgment will compensate him." We think it very clear from his Honor's charge that he restricted the plaintiff's recovery to actual or compensatory damages only, and did not allow anything for punitive damages.

We are of opinion, upon a review of the entire record, and all the assignments of error, that there is no reversible error.

No error.

CLARK, C. J., concurs in the conclusion reached, and that if the (399) insertion of the word "wanton" in the issue was error, it was error against the plaintiff, as it threw upon him the burden of proving that the defendant acted recklessly and without regard for the rights of the plaintiff, since the court charged the jury to allow only compensatory damages; but does not concur that there was "no evidence of wanton negligence."

Wantonness has been defined as "acting recklessly and without due regard to the rights of others." The plaintiff was where he had a right to be. He was on his return home, near the crossing of one railroad track by the other, and in the angle made thereby, waiting for the freight train to pass, when the "midnight flyer" mail train on the other track dashed into it and hurled a small stick of timber some 35 feet, which struck and

seriously injured the plaintiff. These facts were not in dispute, and the defendant put on no evidence. The evidence was:

1. That the fast mail train was running 29 to 35 miles an hour, in violation of the ordinance of the town (in whose limits this injury occurred), which limited the speed to 10 miles an hour.

2. This train was running also in violation of defendant's own rule No. 98, which required trains approaching such points to be prepared to stop. Both the above ordinance and rule are alleged in the complaint and admitted in the answer.

3. The train was running in violation of the statute which required an electric headlight of at least 1,500 candle power on the main line. The absence of a sufficient headlight is alleged in the complaint, and it was in testimony that there was no electric headlight. This was not contradicted by any evidence.

If this last is true, the defendant company was guilty of an indictable offense, as is provided by chapter 446, Laws 1909. The collision was itself evidence of negligence. *Wright v. R. R.*, 127 N. C., 229, and many other cases. That it occurred while the defendant was in the commission of an indictable offense and running at a high rate of speed, in violation of the town ordinance, of its own rules, and of the statute of this State, was evidence of wanton negligence, that is, of "acting with reckless indifference to the rights of others." *Everett v. Receivers*, 121 N. C., 521. There is no ground upon which the defendant can complain of the conduct of the trial.

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(400)

C. S. BROADHURST AND WIFE v. T. W. MEWBORN.

(Filed 26 April, 1916.)

1. Wills—Devise of Dwelling—Messuage—Lands.

The devise of a "house," referring to the dwelling of the owner, is equivalent to the word messuage, and, in the absence of some term or clause restrictive of its meaning, conveys the lot on which the dwelling is situate, together with the outbuildings customarily used by the owner as a part of his residence, and this rule of construction is held in this case to apply to the words, "I want my mother to occupy the furnished house where we live, during her life," etc., it appearing that the house was situate upon a lot of the usual size of those of the town and clearly defined and identified.

2. Wills—Power of Sale—Executors and Administrators—Ulterior Devisees—Reconversion.

Where the testator directs in his will certain lands to be sold and the proceeds divided among certain of his heirs at law, there is no implied

power of sale in the executor, and the proceeds of the lands will go to the heirs at law designated, in their converted form, unless the devisees, being *sui generis*, elect to take the lands.

3. Wills—Power of Sale—Ulterior Devisees—Reconversion—Minors—Execution of Powers—Parties.

The doctrine of reconversion by consent of the beneficiaries under a will of lands ordered to be sold after the falling in of a life estate cannot apply when some of the beneficiaries are infants, or there is a difference of opinion among them, for then an appropriate proceeding for the execution of the power of sale is necessary, probably requiring that the heirs at law be made parties thereto.

4. Wills—Power of Sale—Reconversion—Proceeds of Sale—Vested Interests—Deeds and Conveyances.

A devise of land with direction that, upon the death of the life tenant, they be sold and the proceeds be paid in certain proportions to testator's sister and the two nieces, the daughters of another sister: *Held*, whether the lands are reconverted or sold by proper procedure, the ulterior devisees named have a vested interest either in the lands or the proceeds of sale, to the extent of her respective interest, and the deed of either of them given for such interest is valid.

CONTROVERSY submitted without action and tried before *Bond, J.*, at February Term, 1916, of LENOIR.

On the hearing it was properly made to appear that plaintiff had contracted to convey to defendant, for $2,500 the undivided interest of Annie Whitaker Broadhurst in a house and lot in the city of Kinston, N. C., or her equitable claim to the proceeds of sale of said house and lot, if this be the nature of their interest, said plaintiff being the same Annie Whitaker Broadhurst referred to in the second item of the will of Martha J. Stanley, deceased, and under which the interest of said plaintiff arises, the item of said will being in terms as follows:

"Item 2. I want my mother to occupy the house on Queen (401) Street (furnished), where we live, during her life, provided that she would be satisfied; but if she prefers to move into a smaller house to live, I want the said Queen Street house rented out and the rent applied to her support as long as she lives. At her death I want it sold and the money divided as follows: One-third to be paid to my sister, Cynthia Hart Winfrey, and the other two-thirds to be equally divided between my two nieces, Myrtle Whitaker and her sister, Annie Whitaker Broadhurst, daughter of Dr. F. A. Whitaker."

In reference to the "house on Queen Street," the subject-matter of this item, the case agreed contains additional facts as follows:

"5½. That at the time the said will was written and executed, and at the time of the death of the testatrix, she owned on Queen Street in Kinston a lot of land of not unusual residential size, there being in Kins-

ton some lots smaller, some about the same size, and some larger. The said lot was inclosed by lands of other parties with its frontage on Queen Street. The said house stood on said lot and the whole of said lot was used as one residential lot by testatrix." And it is stated, further, that plaintiff had prepared a deed, properly executed by both defendants, held in escrow by the National Bank of Kinston, purporting to convey to defendant plaintiff's one undivided third interest in the house and lot in question, and that defendant was ready and willing to pay the purchase price of said deed and on delivery would convey to defendant the title to said one-third of the house and lot or the right of plaintiff to the proceeds of such interest on sale of same, pursuant to the terms of the will.

The court entered judgment that *feme* plaintiff Annie Whitaker Broadhurst was the owner of the legal title to one-third interest in the house and the lot; that the same was held subject to a power of sale in the executrix of the will of Martha J. Stanly, and that the deed referred to, on delivery, would convey to defendant all the right, title, and interest of Annie Whitaker Broadhurst in said property, whether same be considered realty or personalty, etc.

Both plaintiffs and defendant excepted and appealed from the judgment. Plaintiffs excepted, assigning for error chiefly the ruling of the court that the executors had an imposed power to sell and convey the house and lot in question, and defendant excepted, assigning for error that the ruling on the term "house on Queen Street" included also the lot on which the same was situate.

Loftin, Dawson & Manning and Langston, Allen & Taylor for plaintiffs.

Rouse & Land for defendant.

(402) HOKE, J. The devise of a "house," when referring, as in this case, to the dwelling-house of the owner, has been held the equivalent of the word messuage, and, in the absence of some term or clause restrictive of its meaning, it is said to convey the lot on which the dwelling is situate, together with the outbuildings customarily used by the owner as a part of his residence. *Wise v. Wheeler,* 28 N. C., 196; *Common Council v. State ex re,* 5 Ind., 334; *Sparks v. Hess,* 15 Cal., 187; *Riddle v. Littlefield,* 53 N. H., 503; *Bacon v. Bowdoin,* 39 Mass., 401; *Rodgers v. Smith,* 4 Pa. St., 93; *Board of Education v. State,* 64 Kansas, 6. In *Rodgers v. Smith* it was held: "That in the devise of a 'house' in a will, the word house is synonymous with messuage, and conveys all that comes within the curtilage." And in *Sparks v. Hess, supra:* "The land will sometimes pass without specific designation of it as land, thus, the

grant of a messuage with the appurtenances will pass the dwelling-house and adjoining buildings and also its curtilage, garden, and orchard, together with the close in which the house is built. As relevant to the question, it is stated in the case agreed that at the time the will was written and at the death of testatrix his house in question was on a lot of average size in the city of Kinston, and the whole of it was used by the testatrix as one residential lot, and, on these facts, we concur in his Honor's decision that the lot is included under this clause of the will.

In regard to the position that, under the terms of the will, there was an implied power in the executrix to make sale of the house and lot for the purpose of the division, we are of opinion that no such power was conferred. True, there are numerous cases where the power of sale by the executor has been sustained. In *Lumber Co. v. Swain,* 161 N. C., 566, *Saunders v. Saunders,* 108 N. C., 327, it was held that such power existed by reason of express terms of the will, the executor having been appointed "to all intents and purposes to execute this my last will and testament according to the true intent and meaning of the same and every part and clause thereof." And the power is usually implied where there is a mixed fund of realty and personalty directed to be sold for distribution, etc., or when the proceeds of the sale is for the payment of debts or other purposes coming under the ordinary duties of an executor or duties imposed upon him by other express terms of the will, as in *Council v. Averett,* 95 N. C., 131; *Vaughn v. Farmer,* 90 N. C., 607, and other like cases. But the general rule is that when a specific piece of land is devised to be sold for purposes of division among heirs or designated beneficiaries, without more, the executor has no authority to make the sale, *Epley v. Epley,* 111 N. C., 505; *Gay v. Grant,* 101 N. C., pp. 206-207; and the present case would seem to come clearly within the principle, the devise of a house and lot to be sold for division, and, so far as appears, the proceeds not given or required for the payment of debts or any of the duties ordinarily devolving upon an executor.

We are not inadvertent to the fact that the will, in the present (403) case, contains the expression, "appointing the executrix to execute this my will," an expression, however, very far from having the same significance as the explicit and extended terms conferring powers on the executors in *Lumber Co. v. Swain* and *Saunders v. Saunders,* to which we have adverted, and the extent and condition of the property, too, was very different. In this case the expression, in our opinion, should be considered only as a direction to execute the powers ordinarily incumbent on executors in the performance of their official duties. The executrix, then, being without power in the premises, the legal title to the house and lot, under our decisions, would, in the meantime, descend to the heirs of the testatrix (*Clifton v. Owens,* 170 N. C., 607; *Beam v.*

Jennings, 89 N. C., 451; *Ferebee v. Procter,* 19 N. C., 439) until the power of sale could be enforced by appropriate proceedings, unless the beneficiaries, being all *sui juris* and all concurring, should elect to hold the property as realty, in which case there would be a reconversion under the principles approved and applied in *Phifer v. Giles,* 159 N. C., 142, and *Duckworth v. Jordan,* 138 N. C., 525; and in such the deed of these persons would convey the title to defendant according to its tenor. If, however, the interest of any one of these beneficiaries has descended upon a minor, or if there is difference concerning the sale among them, there will have to be some appropriate court proceeding for the execution of the power of sale, in which it would be desirable and probably necessary to make the heirs at law parties. Stone's Equity, p. 260. In either event the interest owned by *feme* plaintiff is a vested right of property, and, as held by the court below, her deed properly executed would convey to the defendant *feme* plaintiff's undivided interest in the property in the one case or her portion of the proceeds thereof when the sale has occurred. The parties having agreed in such case that defendant is content to accept the deed at the contract price, the judgment below is so far affirmed that plaintiff will recover the purchase price and the deed for plaintiffs' interest will be thereon delivered.

On defendant's appeal, the judgment is affirmed.

On plaintiffs' appeal, the judgment is reversed.

Cited: Mewborn v. Moseley, 177 N.C. 113 (2e, 3c); *Warehouse Co. v. Warehouse Corp.,* 185 N.C. 525 (1c); *Freeman v. Ramsey,* 189 N.C. 797 (1c); *Tadlock v. Mizell,* 195 N.C. 475 (1cc).

(404)

T. C. QUICKEL v. CITY OF GASTONIA.

(Filed 3 May, 1916.)

Cities and Towns—Sewerage—Nuisance—Injunction.

Where a citizen of a town has built his home near the place where the town's sewer emptied into a stream, and there is evidence tending to show that the flow of water was thereafter increased by concrete streets so as to carry offensive matter and germs through the sewer, into the stream, to the injury of the health of his household, a restraining order should be granted to the hearing, it appearing, by agreement, that the town was restrained only from artificially washing its sidewalks until then.

HOKE, J., not sitting.

QUICKEL *v.* GASTONIA.

APPEAL by defendant from *Webb, J.*, at chambers, continuing a restraining order until the hearing. From GASTON.

A. L. Quickel and Carpenter & Carpenter for plaintiff.
Mangum & Woltz for defendant.

CLARK, C. J. This is an action to perpetually restrain the city of Gastonia from washing its filth and organic matter into a small branch that flows through the plaintiff's lot within said city, endangering the health of himself and family and rendering the surroundings of his home unpleasant. A temporary restraining order was granted, and from an order continuing the case to the hearing the defendant appealed.

It appears that the plaintiff purchased a lot in Gastonia in August, 1911, and erected a residence thereon. This house was within town limits, but beyond the termination of the sewerage pipes. The city has constructed concrete water-tight pavements, and the plaintiff contends that the water which formerly soaked into the ground now flows off and into said branch, carrying with it offensive matter and poisonous germs. The defendant contends that the plaintiff built at that point knowing that the location was beyond the termination of the sewer pipes and that the water does not bring down noxious matter. But aside from the fact that the pavements and concrete which have been put down have increased or at least accelerated the flow of the water, in a growing town like Gastonia persons who build beyond the end of the sewer pipes have reason to expect and ask that they be accommodated, and protected against such nuisance, by an extension of the sewer pipes past their lots, if failure to do this shall prove objectionable. Whether such extension of sewerage is reasonable and whether there is a nuisance to the plaintiff are matters for the jury at the trial, upon all the testimony.

We might doubt as to the justice and propriety of granting a restraining order to the hearing, since this might require the very expense of putting in the sewer pipes, which at the hearing might be (405) found unnecessary by the jury. We are, however, relieved of any difficulty on this score by the fact that the plaintiff consented that the court should restrict, as it has done, the injunction to prohibit only the artificial washing off the sidewalks until the hearing, and does not require that the defendant shall take care of the water which comes naturally from rainfall or springs.

We think the restraining order, as thus modified, was properly continued to the hearing.

Affirmed.

HOKE, J., not sitting.

GARDNER & CLARK v. POSTAL TELEGRAPH AND CABLE COMPANY.

(Filed 26 April, 1916.)

1. Telegraph — Contract—Breach—Negligence—Commercial Telegrams—Measure of Damages.

A telegraph company is liable, on breach of its contract to properly transmit and deliver a commercial message, for such damages as were in reasonable contemplation of the parties, which are capable of ascertainment with a reasonable degree of certainty, and may extend to those arising from collateral agreements growing out of the telegraph company's contract to transmit and deliver the telegram, when coming within the rule stated.

2. Same—Collateral Contracts—Resales—Evidence—Notice.

Upon the breach of contract of a telegraph company to properly transmit and deliver a message ordering the shipment of goods for resale, and this should reasonably have been known to the company from the course of the sender's dealings with it and the character of the business he carried on at the place, the latter may recover as damages the loss of profits thereby prevented, which may be ascertained by reference to the difference between the contract price and the prices prevailing in the market; and when the goods are bought to be sold again by specific methods and in the regular course of dealings of the purchaser, and these conditions should reasonably have been known to the company, the profits ascertained by the resale made in the manner contemplated affords more accurate data for estimating the damages actually attributable to the breach, and may be shown in the absence of evidence tending to show that they were made at extravagant prices or under unusual conditions.

3. Same—Constructive Notice—Dealings.

A grocer sent a telegram in the month of June to a commission merchant with whom he customarily dealt, reading, "Ship today 150 crates of fancy cabbages, same price or less," with evidence tending to show that the cabbages were not sent, owing to the failure of the defendant to transmit and deliver the message; that his method was to order cabbages by telegraph through the defendant, handling two or three car-loads a week through the spring and summer, and sell them to his customers pending their arrival, and he had sold the whole shipment for delivery on a certain day, by which time it should have been received. There being no evidence that the resales were made under exceptional circumstances, it is *Held*, under the evidence in this case, that the prices obtained at the resale thereof were competent as evidence on the issue of damages.

(406) APPEAL by defendant from *Webb, J.*, at February Term, 1915, of FORSYTH.

Civil action to recover damages for negligent failure to deliver a telegraphic message.

There was evidence on part of plaintiff tending to show that plaintiff firm were retail grocers doing a general business of that kind in the city of Winston, N. C., and Phillips & Co. were wholesale produce dealers, doing business in Norfolk, Va.; that plaintiffs at this time were handling in their trade on an average of two to three car-loads of cabbage every week, in May about 300 crates, much of it ordered from Phillips & Co., all of it being ordered by telegraph through defendant company; that on Monday, 1 June, 1914, plaintiff filed with defendant for immediate transmission a message to said Phillips & Co., in terms as follows:

Ship today 150 crates of fancy cabbage; same price or less.

GARDNER & CLARK.

Plaintiff had ordered a car-load of this cabbage from these same dealers on 29 May, and had paid therefor $1 per crate; that at the hour the message was sent, and should have been received, cabbage had declined to 90 cents per crate; that a car-load of cabbage shipped out of Norfolk on Monday was due to arrive in Winston on Wednesday; that, in expectation of receiving the cabbage on Wednesday; plaintiffs took orders from their trade and had sold out the entire 150 crates to their customers at $2 per crate; that defendant company failed to deliver the message and, by reason of such failure, the sales booked by plaintiffs were not carried out, to plaintiff's damage as indicated.

There was proof offered, also, that Phillips & Co. were in a position to immediately fill the order, and would have done so in time for Wednesday deliveries if the message had been properly transmitted and delivered.

The court held that in no aspect of the evidence were plaintiffs entitled to recover the loss of profits on this order, and that on the issue as to damages plaintiffs were confined to the price of the message and the cost of placing the orders for selling same.

On issues submitted there was verdict of negligent failure to deliver the message and, under the charge of the court, assessing the damages at $13.25, this being the price of the message and the (407) estimated cost of employees in placing the orders.

Judgment on the verdict, and defendant excepted and appealed, assigning for error the ruling of the court as noted.

Gilbert T. Stephenson for plaintiff.

Raymond G. Parker and J. C. Buxton for defendant.

HOKE, J., after stating the facts: A telegraph company sued for breach of contract for failure to properly transmit and deliver a com-

mercial message may be held liable as in other cases, on breach established, for such damages as were in reasonable contemplation of the parties and which are capable of ascertainment with a reasonable degree of certainty. *Williamson v. Tel. Co.,* 151 N. C., 223; *Furniture Co. v. Express Co.,* 148 N. C., 87; *Tel. Co. v. Hall,* 124 U. S., 444; Thompson on Electricity, sec. 310. And the significance of the expression, "Within the reasonable contemplation of the parties," may be determined not only from the language of the message itself, but from the facts known to the company at the time or then communicated to it of a kind and character and under circumstances from which it could be reasonably and fairly inferred that the parties contemplated that they should be considered as affecting the question of damages. *Tillinghast v. Cotton Mills,* 143 N. C., 268. The principle may be extended to the recovery of damages incident to the loss of bargains to sell or purchase property and the profits to arise therefrom, not only those growing out of the principal contract, but from collateral agreements connected therewith, when these come within the rule first stated, *i. e.,* when they were in reasonable contemplation of the parties and capable of being ascertained with reasonable certainty from the facts properly in evidence. *Alexander v. Tel. Co.,* 66 Miss., 161; *Pearsall v. Tel. Co.,* 124 N. Y., 256; *Tel. Co. v. Wenger,* 55 Pa. St., 751; Scott and Jarnagin Law of Telegraph, secs. 391-392. In this last citation the author quotes with approval from the well considered case of *Griffin v. Colver,* 16 N. Y., 489, as follows: "The broad general rule in such cases is that the party injured is entitled to recover all the damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions: "The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed." And in speaking of this statement as to certainty, it was said, in *Hardware Co. v. Buggy Co.,* 167 N. C., pp. 423-425: "And as shown by further reference to the authorities, this 'certainty' referred to by the learned judge does not mean mathematical accuracy, but a reason-
(408) able certainty," citing Sutherland on Damages and Hall on Damages, pp. 70-71.

On the question of recovery of profits, as an incident of damages in these and like instances, the cases further hold that when goods are bought for resale in a certain market, and this fact is known to the vendee at the time of contract entered into, the profits may be ascertained by reference to prices prevailing in such market. *Lewis v. Rountree,* 79 N. C., 122. This damage is usually to be ascertained by the difference between the contract and general market price in the designated locality;

but when they are bought to be sold again by specified methods and in the regular course of dealing by the purchaser, and these conditions are known to the vendor, it seems that the profits ascertained by resale made in the manner contemplated afford more accurate data for the estimating of the damages actually attributable to the breach, and this, we think, could and should safely be allowed in the absence of any facts or evidence tending to show that a resale was had at extravagant prices or under unusual conditions. The position is approved and well illustrated in two cases recently decided in this Court of *Hardware Co. v. Buggy Co.*, 167 N. C., 423; *Steel and Wire Co. v. Copland*, 159 N. C., 556. In the latter case it was established that defendant had wrongfully failed to deliver a car-load of wire fencing for plaintiff's trade during a specified period, and plaintiff was allowed to recover the profits to be realized on resale at plaintiff's place of business on proof that this car-load could have been sold out at the profit claimed."

In *Hardware Co. v. Buggy Co.*, on wrongful failure to deliver a car-load of buggies sold to plaintiffs, ordered for their trade in spring of 1913, numbering 30 buggies, on proof that the entire car-load could have been readily disposed of at a profit of $15 per vehicle, the evidence was held relevant on the issue as to damages. Speaking to the principle, the Court said: "It is sometimes said that loss of profits to arise from a good bargain may not be considered in estimating the damages from breach of an executory contract; but, on examination, the position will be found to obtain only where, in a given instance, from the uncertainties of trade, the fluctuations of prices, or the like, these anticipated profits present too many elements of uncertainty to be made the basis of a satisfactory business adjustment. This, however, is not because they are profits, but by reason of their uncertainty; and where it appears that such profits were in reasonable contemplation of the parties, and the contract and evidence relevant to the inquiry afford data from which the amount may be ascertained with a reasonable degree of certainty, the profits to arise from a good bargain may be recovered." The opinion further quotes with approval from Hale on Damages as follows: "A difficulty arises, however, when compensation is claimed for prospective losses in the nature of gains prevented; but absolute cer- (409) tainty is not required. Compensation may be recovered when they are such as in the nature of things are reasonably certain to ensue. Reasonable means reasonable probably. When the losses claimed are contingent, speculative, or merely possible, they cannot be allowed." Hale on Damages, pp. 70-71.

In the present case there are facts in evidence tending to show that plaintiff, retail grocer, doing business in the city of Winston, on Monday, 1 June, ordered from Phillips & Co., general produce dealers in Norfolk,

Va., 150 crates of fancy cabbages, a definite order importing a completed contract on shipment of the goods, without more (*Crook v. Cowan,* 64 N. C., 743); that the message was given to the company in time to be transmitted and to procure the shipment of cabbage on Monday afternoon to arrive in Winston, N. C., for plaintiff's trade on Wednesday; that Phillips & Co. had the cabbage and would have shipped same if the message had been received, and on account of the company's negligent failure the shipment was not made; that plaintiff, relying on the timely arrival of the produce ordered, booked the entire order at a stated profit for Wednesday's deliveries, and lost the sales and incidental profits by reason of the nonarrival of the goods; that plaintiff did business with Phillips & Co. through the spring and summer of that year, handling two to three car-loads of cabbage per week, much of it ordered from Phillips & Co. and all orders sent by telegrams through defendant company.

On this evidence, we think that the question of compensatory damages, including the loss of profits, should be submitted to the jury, and, if the facts as claimed by plaintiffs are accepted by them, plaintiffs are entitled to recover for the loss of profits as evidenced by the resales made by them according to their usual methods of dealing. Assuredly so unless there was evidence offered tending to show that, owing to exceptional circumstances, the prices obtained on resale were out of the expected and ordinary, in which case the difference between the cost and charges paid for cabbage and the value in the retail market in Winston would more properly be the rule.

The cases to which we were referred by counsel for appellee, notably, *Newsome v. Tel. Co.,* 144 N. C., 178; *Tanning Co. v. Tel. Co.,* 143 N. C., 376; *Williams v. Tel. Co.,* 136 N. C., 82, and *Walser v. Tel. Co.,* 114 N. C., 440, were cases where there was nothing in the message itself or in the facts known or communicated which gave any fair or reasonable intimation that the damages claimed were to be expected or where the evidence did not tend to establish the loss of a definite contract, but only disclosed the preliminary negotiations or trade inquiries from which a contract might or might not arise.

There was error in the rule for awarding the damages adopted by his Honor, and plaintiff is entitled to a new trial of the cause.

New trial.

Cited: Nance v. Telegraph Co., 177 N.C. 317 (1c); *Cary v. Harris,* 178 N.C. 628 (1c); *Johnson v. R. R.,* 184 N.C. 105 (1c); *Jeanette v. Hovey,* 184 N.C. 143 (1p); *Jolley v. Telegraph Co.,* 204 N.C. 139 (1c); *Troitino v. Goodman,* 225 N.C. 412 (1c).

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NEW HANOVER SHINGLE MILLS ET ALS. v. THE JOHN L. ROPER LUMBER COMPANY ET AL.

(Filed 26 April, 1916.)

1. Appeal and Error—Admissions of Record.

An admission entered of record in a case on appeal, as having been made on the trial in the Superior Court, that the plaintiff could not recover the lands in dispute if certain deeds in his chain of title were excluded from the evidence, is recognized in the Supreme Court, and binding upon the party making it.

2. Deeds and Conveyances—Foreign Probate—Certificates—Statutes—Evidence.

Our statute, Revisal, sec. 990, prescribing how deeds may be proven and acknowledgment and privy examination taken in other States as well as in foreign countries, must be followed, or they and the registration thereon will be declared void; and where the probate to a deed is taken by a commissioner of deeds in another State, and the certificate of the clerk of the court of that county is alone to that effect, without indication of authority of the commissioner to act therein for the State of North Carolina, the registration here upon the probate, as well as the probate, are both ineffectual, and will not be received as evidence of title.

APPEAL by plaintiff from *Connor, J.*, at October Term, 1915, of ONSLOW.

Civil action. At the close of the evidence the defendants made a motion for judgment of nonsuit. The motion was sustained. Plaintiffs excepted and appealed.

Rountree, Davis & Carr, G. V. Cowper, C. D. Weeks, E. M. Koonce for plaintiffs.

Moore & Dunn for defendant lumber company.

Rudolph Duffey, Frank Thompson, Herbert McClammy, McLean, Varser & McLean for defendant Foster.

BROWN, J. In the case on appeal it is stated that when the motion for nonsuit was made at the close of plaintiffs' evidence "the plaintiffs admitted that unless all the deeds offered in evidence by them were admitted in evidence they could not recover." This is an admission of record made in the Superior Court upon the consideration by his Honor of the motion to nonsuit. It was acted upon by his Honor, and the motion granted. Such admission is binding upon the plaintiffs in this Court.

It would be unfair to the defendants as well as unjust to his Honor if we should disregard such an admission solemnly made and recorded in

the case on appeal. This precludes us from considering any other
(411) source of title than that based upon the validity of the deeds offered in evidence by the plaintiffs. It obviates the necessity of considering the sufficiency of any evidence of possession under color of title.

One of the deeds in the plaintiff's chain of title is a deed dated 22 December, 1902, from C. M. Carrier to Ralph E. Carrier. This deed was probated in the city of Buffalo, State of New York, before E. A. Kingston, "commissioner of deeds in and for Buffalo, N. Y." Attached to it is certificate by John H. Price, clerk of the courts of Erie County, the same being courts of record, certifying that the said E. A. Kingston was at the time of taking such acknowledgments a commissioner of deeds for the city of Buffalo in the county of Erie.

Upon those certificates the deed was ordered to be registered by the clerk of the Superior Court of Onslow County, North Carolina, and duly recorded by the court. Our statute, Revisal, sec. 990, prescribes how deeds may be proven and the acknowledgment and privy examinations taken in other States as well as foreign countries. There is no authority in the statute for the probate of a deed before a commissioner of deeds for Buffalo City. There is nothing in the record or upon the face of the deed tending to prove that Kingston was a commissioner for the State of North Carolina or a notary public or occupying any official position which authorized him to take probate of deeds for lands in this State.

The point is expressly decided in *Wood v. Lewey,* 153 N. C., 402. In that case the deed was acknowledged before a commissioner of deeds for the State of New Jersey, and not before some official authorized by the laws of this State to take such acknowledgment. The court declared that the probate was void and that the registration was also void.

It being admitted that this deed is a necessary link in the plaintiff's chain of title, and the probate being insufficient to authorize its registration, the motion to nonsuit was properly allowed.

Affirmed.

Cited: Whitman v. York, 192 N.C. 90 (1c); *McClure v. Crow,* 196 N.C. 660 (2c).

HENRY J. FAISON ET AL. v. COMMISSIONERS OF DUPLIN COUNTY.

(Filed 3 May, 1916.)

1. Appeal and Error — Elections—Reference—Findings—Review—Stock Law—Constitutional Law.

Where under legislative authority the question of "stock law" or "no stock law" has been submitted to the voters of a county, with a provision authorizing a levy of taxes to build and maintain a county fence in the event that, as a result of the election, a free-range territory, etc., were established; and upon the question of whether a majority had voted against the "stock law" (Constitution, Art. VII, sec. 8), it appears by the report of the referee, confirmed by the judge, that the registration books, as revised, showed the requisite majority, it is *Held*, that the Supreme Court may disregard its jurisdiction, if any, to review the findings, especially when it is apparent that the same conclusion will be reached.

2. Counties—Stock Law—Elections—Taxation—Ballots.

The building of a county-line fence around free-range territory is not a necessary county expense, and for its building and maintenance a vote of the people of the county is required, and, under the act, the consent of the people that the tax may be levied is sufficiently declared by a majority of ballots cast in favor of a "no stock" law. *Keith v. Lockhart, post*, 451.

3. Taxation—Uniformity—Benefits—Counties—Constitutional Law.

A tax may not be levied upon one part or district of a county, without benefit to it, when it clearly appears that such tax is for the exclusive benefit of another part of district.

4. Same — Counties — Stock Law — Local Districts—Statutes—Presumptions.

Where the voters of a county have established a free range for the county, at an election held under a statute authorizing it, except as to certain portions, said portions then having the "stock law," and providing the levy of a special tax within the excepted territory for building and manitaining its own fence, and also that a special tax be levied for the whole county for the building and maintenance of a county fence: *Held*, the presumption arises that the Legislature had concluded that the excepted "stock-law" territory would receive special benefit from its own as well as the county-line fence, and the courts will not hold the act unconstitutional on the mere presumption that this is not true and that it was not a uniform taxation of property in the "stock-law" territory, without benefit to the residents therein. Laws should not be declared unconstitutional and void unless they are clearly and unmistakably so.

CIVIL ACTION heard by *Connor, J.*, on 15 February, 1916, on (412) a motion to vacate a restraining order.

This action was brought by the plaintiffs for the purpose of having the defendants enjoined from proceeding under Public-Local Laws 1915, ch. 512, to build a fence around the county of Duplin and from contract-

ing any debt or levying taxes to pay for the same or the maintenance thereof, and generally from attempting to execute or carry out the provisions of said statute. *Judge Connor* granted a restraining order, which was dissolved by him, after hearing the report of referees appointed to ascertain and report the facts in regard to the result of the election held under the statute, and after having first approved the finding of the referees that a majority of the qualified voters of the county had voted against "stock law." A part of the territory of the county was already subject to "stock law" under the provisions of previous enactments, and under the act of 1915 they remained so, notwithstanding the ad-
(413) verse vote at the election. It was provided by the act of 1915 that an election should be held on Tuesday after the first Monday of October, 1915, upon the question of "stock law" or "no stock law," and that if a majority of the votes were in favor of "stock law" it should be unlawful for stock to run at large, and the county should be subject to certain provisions of Revisal, 1905, ch. 35, and sections 1681, 3319, 3320, 3321, applicable to stock-law territory. It is further provided that "in the event a majority of the votes cast be in favor of stock law it shall not be necessary to erect a fence around the county, district, or territory that had a stock law prior to 1 March, 1914," and if the majority of the votes be against stock law, it shall be lawful for stock to run at large in the county as therein provided, except in that part of the county already under the operation of stock laws, and in that case the county commissioners are required to build a fence around the county, or any part thereof, or around such parts of the same as will protect the citizens of the county, and also such fences around territory already under stock law as are necessary to protect the inhabitants of that section of the county from the stock of other counties. The statute then authorizes the commissioners to borrow money and to levy the necessary taxes from time to time for the purposes of defraying the expense of building the county fence and of maintaining the same in good condition, the tax not to exceed 15 cents on $100 of the assessed value of property and 45 cents on the poll until the indebtedness is fully paid. It is further provided, in section 4 of said statute as follows: "Such part of the said fence as does not constitute a boundary of stock-law territory in Duplin County shall be and remain a county charge, to be kept up and maintained by the county of Duplin, and the board of commissioners of Duplin County may annually levy a special tax, not exceeding 15 cents on the $100 valuation on property in said county and not exceeding 45 cents on the poll, to keep up and repair said county fence; but the expense of keeping up and repairing the fence in the special stock-law territories in said county shall be borne by the levy of a tax annually of not more than 15 cents on the $100 valuation on the real and personal property

and 45 cents on the poll in each of said respective districts, the amount to be levied to be as requested by the fence commissioners in the respective territories." Section 5 provides: "In case the vote of the citizens of Duplin County cast at said election shall be a majority vote against the stock law, none of the provisions of this act shall be effective until the fence or fences shall be erected as provided by section 3 of this act."

The plaintiffs appealed from the order of *Judge Connor* by which he vacated the restraining order formerly issued by him.

Grady & Graham for plaintiff.
Duffy & Day and L. A. Beasley for defendants.

WALKER, J., after stating the case: 1. The first position taken (414) by the plaintiffs is that the election held under the act of 1915 is of no effect, as a majority of the qualified voters did not cast their votes "against stock law" in the county. They contend that this is true, because the report of the canvassing board shows that there were 3,851 voters in the county and that only 1,774 votes were cast against a stock law, while 802 votes were cast in favor of it. But the registration books were revised and purged of all voters who had died or lost the right to vote, and the true number of qualified voters ascertained to be 3,343 and the 1,730 votes cast against stock law constitute a clear majority of this number, the difference being 58 votes. This result was ascertained by three impartial referees, who were selected by the court and the parties, one by each of them. Their report was approved and confirmed by the judge, and though we may have the jurisdiction to review the finding, we have no disposition to do so, under the circumstances, and if we should do so we would reach the same conclusion, as there is no evidence before us that necessarily conflicts with or that cannot be easily reconciled with it. It, therefore, must be that the contention of the plaintiffs, "that a majority of the qualified voters of Duplin County did not participate in said election and vote 'against stock law,' and thereby authorize the commissioners of Duplin County to contract the debt attempted to be authorized by said act, and levy the taxes therein provided for, with which to repay said debt, as required by Article VII, sec. 8, of the Constitution of North Carolina," cannot be sustained.

The plaintiffs attack the validity of the legislation upon two principal grounds:

1. That the act is void because the taxes thereby authorized are not uniform; the property and polls in one section of the county being taxed at a greater rate than the property and polls in other sections of the county.

2. Under the assessment plan the act is void, because the property situate within the special stock-law territories cannot in any manner be benefited by the assessment.

At the present term we have held, in *Keith v. Lockhart, post,* 451, that the building of a fence around a county under the circumstances as they appear in this case is not a necessary expense, and a vote of the people is required to raise the means of taxation for paying the cost of it, but that a vote by the people of the county in favor of free range, or, as it is termed in the statute, "no stock law," under the provisions of the statute, is equivalent to a vote for the tax, and confers authority to levy the tax. There were other questions decided in that case, but they are not pertinent to the matters now before us.

It is a correct proposition that the property in one district may not be taxed, when it clearly appears that such tax is for the exclusive
(415) benefit of another. *Keith v. Lockhart, supra.* The principle of uniformity in taxation forbids the imposition of a tax on one municipality or part of the State for the purpose of benefiting or raising money for another, 37 Cyc., 749, and *Harper v. Comrs.,* 133 N. C., 106, furnishes an illustration of the same general principle when applied to a local assessment for building such fences. In that case it appeared clearly that Federal Point Township would derive no benefit whatever from the building of the fence, and was taxed under the act of 1903 solely for the benefit of the other part of the county of New Hanover, which was stock-law territory. The General Assembly, by this and previous legislation, not necessary to be more particularly described, has conferred upon those parts of Duplin County, composing its stock-law territory, certain rights and privileges which they desired to enjoy, and which are peculiarly local in character. It was deemed wise that the question as to whether the stock law should be adopted in the entire county should be submitted to a popular vote. This was, of course, in practical effect, submitting the question as to whether in the other part of the county not then under the operation of the stock law there should be stock law or a free and open range. This was a policy in which the whole county might be interested, at least the Legislature so thought, as it did not restrict the election to any one section, large or small, but extended it to all the county. If "no stock law" was adopted for that part of the county not already within stock-law bounds, it required that a county fence should be built and provided for the levy of a tax to pay for its construction and another tax upon the entire county to pay for its maintenance and repair, and for the levy of still another tax upon the stock-law territory to pay for the maintenance and repair of its own part of the fencing necessary to the enjoyment of its special privileges. This legislation should not be declared by us as unconstitutional and

invalid unless upon the clearest showing that it is so, as there is a strong presumption in favor of its validity, nor unless a conflict between it and the Constitution is manifest. *Lowery v. School Trustees,* 140 N. C., 33; *Sutton v. Phillips,* 116 N. C., 502; *S. v. Baskerville,* 141 N. C., 811. The court is exercising a very delicate function when it is sitting in judgment upon the validity of an act of legislation. It is one that should be exercised sparingly, and the legislation should be permitted to stand unless its constitutionality is clear beyond any reasonable doubt. We are not to question the wisdom or policy of the statute under consideration, but should enforce it as it is written, unless we conclude that there is an unmistakable conflict with the organic law. 8 Cyc., 776. We may assume a fact to exist which will sustain an act, but not one which may impeach its validity, and everything must clearly appear upon which the court can declare it to be void, for a presumption exists in favor of its validity, as we have shown. *Lowery v. School Trustees,* 140 N. C., 33. (416)

The Legislature, in the passage of the statute before us, has proceeded upon the idea that the parts of Duplin County which were, before its enactment, under the operation of stock law were not only specially benefited thereby, but that they would also receive an additional benefit from the building and maintenance of the county fence, as, on the face of the statute, the avowed purpose in building the fence is to protect the citizens of the county. We have nothing here to show that this is not true, but we can readily perceive how it may be correct.

It is said by defendants in their brief: "There is no discrimination in this case, for that the excepted districts have what they regard as the benefits of stock law, and all property in such districts is taxed alike to secure this benefit. There is no double tax, for that the county, as a whole, pays for fencing the county fence, as authorized by the vote of the people, while the excepted districts are made stock-law territory, which must be fenced by the people living therein and enjoying the benefits thereof."

The establishment of a separate taxing district for local purposes does not exempt its inhabitants from any charges for the general public good, as, for example, the creation of a school district in order to confer special educational facilities there which its residents would not enjoy under the public school system of the county in which the school district is situated. This does not relieve them from the burden of taxation for general school purposes.

Judson on Taxation (1903), sec. 355, thus states the general theory upon which this kind of taxation rests: "Special assessments for local improvements are made under the sovereign power of taxation, yet they are clearly distinguished from regular tax levies made under State

authority for general public purposes. Taxes proper, or general taxes, proceed upon the theory that the cost of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no special benefit, but only secures to the citizen that general benefit which results from the protection of person and property and the promotion of those various schemes which have for their object the welfare of all. On the other hand, special assessments or special taxes are justified by the principle that when a local improvement enhances the value of neighboring property that property should pay the expense. Special assessments are made upon the assumption that a portion of the community will be specially and peculiarly benefited by the enhancement of the value of property peculiarly situated as regards the contemplated expenditure of public funds; and, in addition to the general levy, special contributions in consideration of the special benefit are required from the party
(417) specially benefited," citing *Ill. Cent. R. R. v. Decatur,* 147 U. S., 190. And, again, in section 358: "Although special assessments are usually made for public improvements in municipalities, and form one of the most perplexing problems in municipal government, their use is not limited to municipalities. Public improvements, which may be of special benefit to property in a certain locality, may be required in any part of the State, and the application be thus warranted of the principle on which special assessments rest, that the property benefited by the improvement should pay the cost. The State, therefore, has the general power not only to determine that public improvements shall be made, whenever it deems them essential to the health and prosperity of the community, but also to determine to what extent the cost of such public improvements shall be paid by the public at large and what part shall be paid by the property specially benefited thereby."

We have freely conceded that the few ought not to be taxed for the sole benefit of the many, or the whole, nor should the latter be taxed for the sole benefit of the former. It follows that a single township, or specially formed district, in a county ought not to bear the whole county expenses, neither ought the whole county be taxed for the benefit of a single township or district. Any other rule might burden those who are not benefited at all, and benefit those who are exempt from the corresponding burden. As said in *Kansas City v. Bacon,* 157 Mo., 450: "There are two kinds of taxation, both emanating from the taxing power of the Government, but each resting on a different principle, the one aimed to raise a revenue for general governmental purposes, the other to raise a fund to be devoted to a particular purpose. The one for its justification leaves out of view the question of individual benefit, merg-

ing the individual in the community; the other, for its justification, advances the theory that the individual is benefited by the improvement contemplated, and because of this benefit he must contribute to the cost." But a tax imposed upon the stock-law districts under the act of 1915 to pay for the special benefit conferred upon the same districts as parts of the county, and another for the benefit accruing to the county or general public, do not violate those rules. The Legislature evidently thought that the stock-law districts received a double benefit, one arising from their special local privileges and advantages and the other from the building and maintenance of the county fence, which it enjoys in common with the other districts. We are not disposed to question the correctness of this view upon mere supposition of nonparticipation in both classes of benefits.

Our conclusion is that there was no error in the judgment of the court. Affirmed.

Cited: Archer v. Joyner, 173 N.C. 77 (2c); *Reade v. Durham,* 173 N.C. 676 (2c); *Comrs. v. State Treasurer,* 174 N.C. 146 (3c); *Comrs. v. State Treasurer,* 174 N.C. 152 (3j); *Hood v. Sutton,* 175 N.C. 100 (3c); *Hill v. Lenoir Co.,* 176 N.C. 587 (3j); *Parker v. Comrs.,* 178 N.C. 96 (3j); *Riddle v. Cumberland,* 180 N.C. 329 (2cc); *Coble v. Comrs.,* 184 N.C. 355 (3j); *Jones v. Board of Education,* 185 N.C. 310 (3e); *New Hanover County v. Whiteman,* 190 N.C. 334 (c); *Henderson v. Wilmington,* 191 N.C. 284 (4c); *Ellis v. Greene,* 191 N.C. 765 (3c); *Hinton v. State Treasurer,* 193 N.C. 500 (4c); *Fletcher v. Comrs. of Buncombe,* 218 N.C. 13 (3c).

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THOMAS W. SPRINGS v. J. W. COLE.

(Filed 3 May, 1916)

1. Conversion—Evidence—Mortgages—Registration—Notice.

In an action upon a note and for wrongful conversion of a cow, it appeared that H. bought the cow from the defendant, giving the note with the plaintiff as indorser and a mortgage to the plaintiff to secure him therein, the mortgage not having been registered. H. returned the cow to defendant upon condition that he pay the note and deliver it to him. *Held,* upon redelivery of the cow, the defendant was a purchaser for value, unaffected with notice of the mortgage lien, and the action for conversion of the cow cannot be maintained against him.

2. Principal and Surety—Statute of Frauds—Original Promise—Mortgages —Registration—Notice.

The defendant received from H. a note for the purchase price of a cow whereon the plaintiff was an indorser secured by an unrecorded mortgage, of which the defendant had actual knowledge. The defendant received the cow from H. upon condition that he pay off the note then held by a bank. *Held*, the defendant's promise was an original one not falling within the statute of frauds, inuring to the exoneration of the plaintiff as surety, though not made to him, the consideration of the transaction moving to the defendant being the value of the cow, represented by the amount of the note. *Nicholson v. Dover*, 145 N. C., 145.

3. Principal and Surety — Evidence — Statute of Frauds—Questions for Jury.

It is held in this case that, under the conflicting evidence, the question as to whether the defendant's promise was an original one inuring to the benefit of an indorser on a note given for the purchase of a cow should be submitted to the jury upon appropriate issues.

APPEAL by plaintiff from *Justice, J.*, at December Term, 1915, of GASTON.

Civil action. At the conclusion of the evidence the court sustained the motion to nonsuit, from which the plaintiff appealed.

Mangum & Woltz for plaintiff.

Carpenter & Carpenter for defendant.

BROWN, J. The plaintiff sues to recover the sum of $36.80 from the defendant Cole for the wrongful and unlawful conversion of a certain red cow. For a second cause of action plaintiff seeks to recover of said defendant for fraudulently obtaining possession of the said cow by promising to pay a certain note which the defendant afterwards refused to pay.

The testimony tends to prove that one Henley purchased from the defendant Cole a cow and gave his note for $35, dated 28 Feb-
(419) ruary, 1914, due 18 November, 1914, bearing 6 per cent interest from date, and that the plaintiff became surety or indorser on the said note for Henley. Henley executed a mortgage on the cow to the plaintiff to secure payment for indorsing the note. Afterwards Henley traded the cow back to the defendant Cole upon the condition and promise upon the part of the defendant Cole that he was to pay the said note and return it to the plaintiff, and that Cole paid nothing else for the cow. This is substantially the testimony of Henley, and it is corroborated by the testimony of the plaintiff.

1. It is plain that the plaintiff cannot recover of Cole by virtue of the mortgage on the cow for wrongful conversion, for the reason that the

mortgage was not recorded, and while the mortgage was good between the plaintiff and Henley, when Henley traded the cow back to Cole, the mortgage, not being on record, would not continue to be a lien upon the property. The plaintiff upon his own showing cannot recover the cow from the defendant Cole, who is in law a purchaser, and consequently he cannot recover for its conversion. *Herring v. Tilghman,* 35 N. C., 392. Although Cole had notice of the outstanding mortgage, that will not supply the place of registration. *Blalock v. Strain,* 122 N. C., 283; *Piano Co. v. Spruill,* 150 N. C., 168.

2. Notwithstanding the plaintiff cannot recover for the wrongful conversion of the cow, we are of opinion that there is evidence upon which he may recover the amount of the note from Cole upon an express promise upon the part of Cole to pay the said note, which promise, although made to Henley, was made, also, for the plaintiff's benefit, as well as Henley's. There is evidence that the plaintiff held an unregistered mortgage on the cow; that the defendant Cole knew it; that the note for the purchase money of the cow was given to Cole and he had transferred it to the Mount Holly Bank. When the defendant Cole took the cow from Henley, according to Henley's evidence, the price to be paid for her was the amount of the note, and that was to be applied not only in exoneration of Henley, but necessarily, also, in exoneration of Henley's surety. This was not a promise upon the part of defendant Cole to pay Henley's debt, and, therefore, required to be in writing, but was practically an original promise upon the part of defendant Cole to apply the puchase money which he was to pay for the cow to the note on which the plaintiff was surety and in satisfaction of the mortgage on the cow. This promise was made as well for the plaintiff's benefit as for Henley's, and, we think, can be enforced by the plaintiff under the principles laid down in *Nicholson v. Dover,* 145 N. C., 18.

We think these inferences may be drawn from the testimony of Henley; but there is evidence, also, tending to prove that Cole agreed to take another mortgage on the cow and a hog and wait until the fall for the money to be paid by Henley, and that Henley failed to give (420) the mortgage on the cow and hog. If those are the facts, and Cole's promise to pay the debt was based on that condition, which was not complied with, then Cole would not be liable for the debt. The evidence is by no means plain, and we think, under the circumstances, the case should be submitted to the jury upon proper issues.

New trial.

Cited: Coxe v. Dillard, 197 N.C. 346 (2c); *Canestrino v. Powell,* 231 N.C. 195 (p).

L. FORD ET AL. V. T. C. MCBRAYER ET AL.

(Filed 3 May, 1916.)

1. Wills—Rule in Shelley's Case.

The application of the *Rule in Shelley's case* is recognized in North Carolina, with a disposition of our courts to restrict rather than enlarge its operation in order to effectuate, when practicable, the intention of the grantor or testator as gathered from the will or deed.

2. Same—"Issue"—Testator's Intent.

The language of the *Rule in Shelley's case* confines its application to cases where the ancestor takes an estate of freehold with limitation over "to his heirs or the heirs of his body in fee or in fee tail," etc., and the words "issue" or "issue of the body" not being employed, and being more flexible than the word "heirs," this latter expression will ordinarily be construed as meaning children, or particular persons designated to take after the falling in of the life estate, in contradistinction of heirs generally, so as not to extend the rule, but to preserve the intention of the testator or grantor, when nothing appears upon the face of the instrument to show the contrary.

3. Same—Estates for Life—Residuary Clause.

The objection to the application of the *Rule in Shelley's case*, that there is no precedent life estate, is minimized or destroyed in this case, by a residuary clause in the will construed which disposes of all other property of the testator.

4. Wills—Rule in Shelley's Case—"Bodily Issue"—Testator's Intent.

A devise of a certain tract of land to the testator's two children, John and Laura, "to be equally divided between them, the part of Laura to be hers as long as she lives, and then to her bodily issue; and if she should marry, my son shall see that her husband shall not dispose of her lands." *Held*, the restrictive words as to Laura's estate not being used as to that of John, or elsewhere in the will as to similar devises, she will not be construed to take a fee simple, under the *Rule in Shelley's case*, and the words "her bodily issue" will be construed as meaning "children."

5. Same—Deeds and Conveyances—Estoppel—Residuary Devises.

A devise of land to J. and L., to be divided between them; to J. in fee and to L. for life, with limitation over to her children, the balance of the testator's estate to go to J. and L. and other of the testator's children under a residuary clause in the will. J. and L. divided the land, giving interchangeable deeds with covenants and warranties, and L. died without child, having first conveyed the lands described in her deed from J. to a stranger. *Held*, the deed from J. to L. estopped J. and those claiming under him as against the later grantee of L., and the deed of L., being for her present and future interest, conveyed also all the interest in the land L. may have acquired either by deed, descent, or as a devisee in the residuary clause of the will, in this case there being no difference between the latter two.

FORD *v.* MCBRAYER.

APPEAL by plaintiffs from *Harding, J.*, at August Term, 1915, (421) of RUTHERFORD.

This is a procceding for the partition of a tract of land formerly belonging to Joshua Ford, who died leaving a will, the parts of which material to this controversy are as follows:

"Third. It is my will that my daughter Laura and son John shall have the tract of land on which I now live, containing 84¾ acres, to be equally divided between them. Said Laura's part to be hers as long as she lives, and then to go to her bodily issue; and, if she should marry, that my son John shall see that her husband shall not dispose of her part of the land.

"Fourth. It is my will that my son John shall have one mule and one wagon, one cow to John, and one cow and calf to Laura.

"Fifth. It is my will that all my other property be equally divided between my son James and my daughters Rachel and Hannah and Laura and my two sons, Lewis and John, to be divided by themselves if they can agree; if not, to pick three disinterested men to divide for them."

After the death of Joshua Ford, his two children, John and Laura, divided the land referred to in the third item of the will by deeds with full covenants.

At the time of the death of Joshua Ford, he left surviving six children—Lewis, James, John, Rachel, Hannah, and Laura. These were the six children mentioned in the residuary clause of the will of Joshua Ford. Hannah died before Laura, and John died after Laura; and neither Hannah nor John left a will, nor did either of them leave any descendants. Laura's husband died before 10 February, 1902.

Laura conveyed the land in controversy, being the land described in the deed to her from John Ford, to the defendant McBrayer, and died leaving no children, and no children were ever born to her.

The plaintiffs contend that Laura Ford took only an estate for life under the will of Joshua Ford, and that upon her death without having had children the title descended to the heirs of Joshua Ford, or passed under the residuary clause in the will.

The defendant McBrayer contends that Laura took an estate in fee under the rule in *Shelley's case,* and, therefore, that he is the owner of the whole of said land under the deed from Laura.

He contends further that if she had only a life estate he is the (422) owner of two-fifths of said land under the several deeds executed by the parties.

His Honor held that Laura took an estate in fee, and entered judgment accordingly, and the plaintiffs excepted and appealed.

Eaves & Edwards for plaintiffs.

McBrayer & McBrayer, Tillett & Guthrie, and Didlake & Gower for defendant.

ALLEN, J. The rule in *Shelley's case* is well established as a rule of property in this State. It is much older than the case which has given it a name, which was decided in the reign of Queen Elizabeth.

"Some writers trace its origin to the feudal system, which favors the taking of estates by descent rather than by purchase, because in the former case the rights of wardship, marriage, relief, and other feudal incidents attached, while in the latter the taker was relieved from those burdens. Others attribute it to the aversion of the common law to fees in abeyance, a desire to promote the transferability of real property, and, as far as possible, to make it liable for the specialty debts of the ancestor." *Daniel v. Whartenby*, 84 U. S., 639.

That rule is thus stated by Coke: "Where the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same instrument an estate is limited, either mediately or immediately, to his heirs in fee or in fee tail, *the heirs* are words of limitation of the estate and not of purchase." Coke, 104. And by Chancellor Kent: "Where a person takes an estate of freehold, legally or equitably, under a deed, or will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of any interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." 4 Kent Com., 245.

The rule has been abrogated by statute in most of the States, and in those where it still prevails the disposition is to restrict rather than enlarge its operation, because it so frequently defeats the expressed intention of the grantor or testator.

The language of the rule confines it to cases where the ancestor takes an estate to freehold and there is a limitation "to his heirs in fee or in fee tail," and it is an extension of the rule to apply it to a limitation to "issue" or "issue of the body" or "bodily issue," which are not *ex vi termini* within the rule (*Daniel v. Whartenby*, 84 U. S., 639; *Timanus v. Dugan*, 46 Md., 402); and which when used in relation to property are susceptible of three meanings: (1) as describing a class who are to take as joint tenants or tenants in common with those named; (423) (2) as descriptive of a class who are to take at a definite and fixed time as purchasers; (3) as denoting an indefinite succession of lineal descendants who are to take by inheritance (23 Cyc., 259; *Mendenhall v. Mower*, 16 S. C., 201); but when used in the latter sense, as

an indefinite succession of lineal descendants who are to take by inheritance, they have been frequently held to be words of limitation and not of purchase, and to give to the first taker a fee under the rule, although Mr. Fearne says (p. 149) that the word "issue" "has not the same established legal import and extent" as heirs, and on page 495, that a "devise of a term to A. for life, and afterwards to his issue, it seems does not enlarge the estate of A., but after his death the whole rests in the issue."

The cases construing the terms "issue," "issue of the body," "bodily issue" are collected in 4 Words and Phrases, p. 3782 *et seq.;* and it will also be found from an examination of these and other authorities that there is much difference of opinion as to the method of approaching the construction of the language when used in deeds and wills, some courts holding that the primary meaning of "issue" is a succession of lineal descendants, and that this interpretation must be given to the term unless a contrary intent appears, while others, when dealing with the rule in *Shelley's case,* which they are not disposed to extend, and having in mind that the word "issue" is "more flexible" than the word "heirs" (*Daniel v. Whartenby, supra*), and may be applied to those who take by purchase, hold that it must clearly appear that it was the intention to use the term as one of limitation to denote a succession of lineal descendants who are to take by inheritance before that construction will be adopted.

The latter view seems to prevail in this State. *Smith v. Proctor,* 139 N. C., 322; *Faison v. Odom,* 144 N. C., 107; *Puckett v. Morgan,* 158 N. C., 347.

The Court said in the first of these cases, after stating the rule: "There are, however, well recognized exceptions to this rule, two of which we will advert to at present in general terms: In the first place, whenever the testator or grantor annexes words of explanation to the word 'heirs,' indicating that he meant to use the term in a qualified sense, as a mere *descriptio personarum* or particular description of certain individuals, and that they, and not the ancestor, were to be the points of *termini* from which the succession to the estate was to emanate or take its start, then in all such cases where the word 'heir' is thus explained or restricted it is to be treated as a term of purchase, and not of limitation. For example, the expressions, 'heirs now living,' 'children,' 'issue,' etc., are words of limitation or purchase, as will best accord with the manifest intention of him who employs them. Under this qualification of the rule, the intention prevails against the strict construction"; in the second: "There have been cases where it was the manifest intention of the testator that the second taker should (424) take, not from him, but from the first taker; then the words

'children,' 'issue,' etc., as well as the word 'heirs,' have been construed in some jurisdictions as words of limitation, and the rule in *Shelley's case* applied. *Brinton v. Martin,* 197 Pa. State, 618. In the will under consideration there is no manifest intention that Edward Faison should be the root of a new succession and that those in remainder should take as his heirs. In order to bring the rule into operation, the limitation must be to the 'heirs *qua* heirs' of the first taker. 'It must be given to the heirs or heirs of the body as an entire class or denomination of persons, and not merely to individuals embraced within such class.' 25 Am. and Eng. Enc., 650, and cases cited. When the devise is to one for life, and after his death to his children or issue, the rule has no application, unless it manifestly appears that such words are used in the sense of heirs generally. 25 Am. and Eng. Enc., *supra,* 651, and cases cited"; and, in the third: "In all cases where the word 'issue' is used, or it is clear that the words 'heir or heir of the body' were used in the sense of 'issue' it has been held that the rule did not apply."

Applying these principles to the will before us, is it manifest that the words "bodily issue" "are used in the sense of heirs generally"?

The strongest position taken by the defendant is that there is no limitation over in the event of the death of Laura without issue, and that if the construction of the plaintiff is adopted, and Laura took only a life estate, there has been no disposition of the remainder in fee, and he invokes the presumption that the testator intended to dispose of all his property; but this position is minimized, if not destroyed, by the fact that there is a residuary clause which disposes of all other property of the testator.

There is also clear indication on the face of the will that the testator did not intend to devise a fee-simple estate to Laura.

The land is devised to Laura, "to be hers as long as she lives," and *Lord Chancellor Sugden* said in *Montgomery v. Montgomery,* 3 J. and L., 47, speaking of the language, "during his natural life": "These words are, I think, entitled to weight, although when the intention requires it they may be wholly rejected." The devise to the issue is, in apt words, to create a remainder—"to be hers as long as she lives, *and then to go to her bodily issue.*"

The use of the term "bodily issue" has some significance, although, technically, "issue," "issue of the body," or "bodily issue" mean the same thing. "The words 'issue of his body' are more flexible than the words 'heirs of his body,' and courts more readily interpret the former as the synonym of children and a mere *descriptio personarum* than the latter." *Daniel v. Whartenby,* 84 U. S., 639.

In the third item of the will the testator devises the entire tract (425) of land to John and Laura, and it is clear that he did not intend that they should have the same estates in the land, and it is not questioned that John took an estate in fee. If the testator thought it necessary to add the words "and then to go to her bodily issue" in order that Laura might take a fee, why do not the same words follow the devise to John, and why do they not appear in the residuary clause where all the rest of his property is devised to his six children? Again, there are two devises and one bequest to Laura, and different language is used. He gives her a cow and calf and her part of the residue without qualification, but as to the land in controversy it is only "to be hers as long as she lives, and then go to her bodily issue."

Why this difference in language used in connection with devises and bequests to the same person if it was not intended that different interests should pass?

The clause requiring John to see that the husband of Laura should not dispose of her part of the land is equally consistent with the construction giving Laura a life estate or a fee, and furnishes very little if any aid in arriving at the intent of the testator as to the estates devised; and, giving to the whole will full consideration, we are of the opinion, and so hold, that Laura took an estate for life.

If so, what interest in the land in controversy did the defendant acquire under the deed executed to him by the devisee, Laura?

It would seem that the remainder in fee in the land in controversy, being undisposed of in the third item of the will by reason of the death of Laura without issue, would pass as property undisposed of to the residuary devisees named in the fifth item (*Faison v. Middleton, ante,* 170); but it is not important to determine this question, because the same parties are heirs and residuary devisees, and in either event would take the same interest.

The deed from John Ford to Laura purports to convey the land and not his interest in it, and it has full covenants of warranty and seizin, and the deed from Laura to the defendant also conveys the land and has the same covenants of warranty and seizin, and they would, therefore, operate not only to pass the title owned by the grantors at the time of the execution of the deeds, but also after-acquired title by reason of the estoppel. *Wellborn v. Finley,* 52 N. C., 228; *Foster v. Hackett,* 112 N. C., 546; *Zimmerman v. Robinson,* 114 N. C., 49; *Buchanan v. Harrington,* 141 N. C., 39; *Beacom v. Amos,* 161 N. C., 357.

Therefore the defendant McBrayer takes—

1. Laura's one-sixth interest. This passed by the express words of her conveyance to McBrayer.

(426) 2. Laura's one-fifth interest in her sister Hannah's one-sixth, thus giving Laura one-thirtieth of the whole. This one-thirtieth passed to defendant McBrayer by virtue of Laura's deed to him containing covenants of warranty and seizin, and in this way passing the one-thirtieth interest which Laura acquired after the date of her deed.

3. John's one-sixth interest. This passed to Laura under John's deed to her, which conveyed to Laura with covenants the entire fee-simple interest in the land in question, this one-sixth interest having passed to defendant McBrayer.

4. John's one-fifth interest in Hannah's one-sixth interest. Upon Hannah's death intestate, without descendants, John acquired a one-fifth interest in her one-sixth interest, that is to say, one-thirtieth of the whole. This one-thirtieth which John acquired at Hannah's death passed first by virtue of John's deed to Laura, because of the covenants contained in John's deed to Laura, and it passed from Laura to the defendant McBrayer, as a title after acquired by Laura, and passing by virtue of the estoppel arising out of the covenants in Laura's deed to McBrayer.

Thus defendant McBrayer has acquired one-sixth plus one-thirtieth plus one-thirtieth or two-fifths of the whole land described in the complaint.

The judgment of the court below is reversed, and judgment will be entered in accordance with this opinion.

Reversed.

Cited: Cohoon v. Upton, 174 N.C. 90 (2d); *Kornegay v. Cunningham,* 174 N.C. 210, 211 (4c); *White v. Goodwin,* 174 N.C. 725 (1c, 2d); *Nobles v. Nobles,* 177 N.C. 245 (2e); *Parrish v. Hodge,* 178 N.C. 134 (2d); *Etheridge v. Realty Co.,* 179 N.C. 408 (4c); *Wallace v. Wallace,* 181 N.C. 161 (4c); *Bobbitt v. Pierson,* 193 N.C. 437 (4c); *Barnes v. Best,* 196 N.C. 670 (2c, 4c); *Turpin v. Jarrett,* 226 N.C. 136 (4c); *Ratley v. Oliver,* 229 N.C. 121 (2e).

SCHIELE & KRIGSHAKER v. NORTH STATE FIRE INSURANCE COMPANY ET AL.

(Filed 3 May, 1916.)

1. Judgments, Set Aside—Meritorious Defense.

Upon a motion to set aside a judgment for excusable neglect, etc., it is only necessary to *prima facie* show a good defense, which is sufficient when it appears that the plaintiff had intervened in an action in another

State for the purpose of attaching the debt therein alleged to be due by the defendant, resulting in a judgment which defendant paid into court, and was released from further liability, and thereafter, without further notice, judgment was taken against him.

2. Same—Excusable Neglect.

Where a judgment has been obtained upon a judgment which had been rendered in another State, and upon motion made to set it aside for excusable neglect it appears that plaintiff's attorneys had been informed by the defendant's attorneys that the judgment had been paid, the action was commenced twenty months afterwards, and eight months later the complaint was filed; that after several subsequent terms of the court the plaintiff's attorney indicated he would not set the case for trial, while the bar was setting the calendar for the term, but notified the clerk of the defendant's attorneys he would insist on judgment that day unless answer was filed, was informed by the clerk that he could not communicate with defendant's attorneys and advised plaintiff's attorney to do so, which they did not do, this being Wednesday of the third week of the term, on which the judge finished up the business of the court, including signing the said judgment, but left the term to expire by limitation at the end of the week, in which remaining time the defendant filed an answer setting up a meritorious defense: *Held*, excusable neglect is shown, and the action of the trial judge in setting aside the judgment is sustained on appeal.

3. Same—Attorney and Client—Laches.

Where a defendant has employed local attorneys to represent him, and made them aware of his defense to the action, so that there is nothing more for him to do personally to put the action at issue, the neglect of his attorneys in not filing an answer, nothing else appearing, will not be attributable to him; and when he has shown a meritorious defense, the judgment should be set aside without regard to whether his attorneys are solvent.

CLARK, C. J., dissenting.

APPEAL by plaintiff from *Justice, J.*, at December Term, 1915, (427) of GUILFORD.

Civil action to set aside a judgment by default final, on the ground of surprise and excusable neglect, and at the hearing the court found the following facts:

"That suit is brought upon a judgment alleged to have been obtained by the plaintiffs against A. J. Dillard and the defendant North State Fire Insurance Company in July, 1909, at Hot Springs, Arkansas, and the same was placed in the hands of Messrs. Douglas & Douglas, attorneys practicing at the Greensboro bar, for collection. That in June, 1913, Messrs. Douglas & Douglas wrote a letter to the Dixie Fire Insurance Company, which company had merged with the North State Fire Insurance Company and assumed its liabilities, notifying it of this

claim. That the last named company advised Messrs. Douglas & Douglas that they had referred the matter to their counsel, Mr. Brooks, of Brooks, Sapp & Williams. That thereafter Mr. Brooks met Mr. Martin Douglas, of the firm of Douglas & Douglas, and stated to him that the Dixie Fire Insurance Company was not indebted to the plaintiff, and that it had twice paid the obligation which the plaintiff was now seeking to recover, and that he would like to show him some time in his office the data to satisfy him of this fact. That no further action was taken in the matter until February, 1915, when summons was issued and served in the case. That no complaint was filed in the case
(428) until 18 October, 1915. That on the same day Messrs. Douglas & Douglas sent a copy of said complaint to counsel for defendant, and wrote counsel for defendant as follows:

18 October, 1915.

Schiele v. Dixie Fire.

MESSRS. BROOKS, SAPP & WILLIAMS,
Attorneys at Law, Greensboro, N. C.

GENTLEMEN:—We take pleasure in herewith inclosing copy of the complaint filed in the action therein stated; and ask that you will kindly send us a copy of your answer when filed.

You may recollect that on 16 June, 1913, you wrote to us, stating that our letter of the 11th inst. had been turned over to Mr. Brooks, and that Mr. Brooks would soon take up this matter with us. Having waited a reasonable time, we issued summons and a few days ago filed complaint.

Our clients are desirous of a speedy termination of this matter, and we would be obliged if you can be ready to try this case at the next term of court. Very truly yours.

(Signed) DOUGLAS & DOUGLAS.

"That an order was made at the October term allowing time to file pleadings, and that a similar order was made at each term thereafter, including the last term of this court.

"That the case has never been calendared for trial, and at the meeting of the bar to prepare a calendar for last week's term of court, Mr. Martin Douglas, of the firm of Douglas & Douglas, was present, and when this case was called upon the clerk's docket, Mr. Martin Douglas indicated in the usual way not to put the case in question on the calendar for trial. That on Wednesday of last week, during the session of court, Mr. Douglas stated to Mr. Shuping, who is employed in the office of Brooks, Sapp & Williams, that he was going to take judgment at that term in this case unless an answer was filed, and requested that he advise Mr. Brooks of that fact. Mr. Shuping replied that he was engaged in the hearing of a case in another court, and asked Mr. Doug-

las if he would phone Mr. Brooks or Mr. Sapp to this effect. That no notice was given to either Brooks, Sapp, or Williams of the purpose to take judgment on that day of court. That on Friday of last week answer was filed. That the judge opened court at noon on Monday of last week and left the bench at noon on Wednesday of last week, but did not adjourn court, but allowed same to expire by limitation of law. That before the expiration of said term the answer in this case was filed. That by inspection of the answer, which is duly verified, it appears that the defendant has a complete and meritorious defense to the cause of action sued upon by the plaintiff. The plaintiff procured a judgment to be signed by the judge on (429) Wednesday of last week.

"That at the bar meeting to set the next calendar after the complaint was filed, Douglas & Douglas asked to have the case put on the calendar for trial; but Mr. Sapp, of the firm of Brooks, Sapp & Williams, asked them to let it go over, as the answer had not been filed; this was agreed to, but told them that the answer would have to be filed by next term.

"The court further finds that one term of court had passed after the filing of the complaint and before the term at which judgment was taken."

The motion was allowed and the plaintiffs excepted and appealed.

Douglas & Douglas for plaintiffs.

S. Clay Williams for defendant.

ALLEN, J. The court finds as a fact that the defendant has a meritorious defense, and if the allegations of the answer are true, it was justified in so doing.

It appears from the answer and the findings of fact that an action was instituted in the courts of Arkansas in 1907 by one Dillard against the defendant insurance company; that the plaintiffs in this action intervened in said action for the purpose of attaching the debt due from the insurance company to Dillard; that the defendant answered in said action; that thereafter Dillard recovered judgment; that the defendant paid the full amount of this judgment into court, and an order was entered in said action, to which the present plaintiffs were parties, releasing the defendant from further liability and discharging it from the claims of attaching creditors; that thereafter and without further notice to the defendant the judgment on which this action is brought was taken in said action, and this establishes the defense of payment *prima facie,* which is all that is required on motions for relief for excusable neglect.

Has "mistake, inadvertence, surprise, or excusable neglect" been shown within the meaning of section 513 of the Revisal?

The judgment upon which the plaintiffs sue was obtained in Arkansas in 1909, and four years thereafter, in June, 1913, it was sent to attorneys at Greensboro for collection.

These attorneys made demand upon the defendant and were informed that the judgment had been paid, and were referred to the attorneys of the defendant, who were fully informed of the defense relied on.

Twenty months later this action was commenced, in February, 1915, and eight months later, in October, 1915, the complaint was filed.

An order was made at the October, November, and December Terms of 1915, extending the time for filing pleadings, and when the (430) calendar was being set for December Term, 1915, the attorneys for the plaintiff indicated that they would not ask to have this action set down for trial. The December term lasted only two and a half days, the judge presiding leaving the court at noon Wednesday.

On Wednesday, the day the judge left, counsel for plaintiff notified a young gentleman employed in the office of the attorneys for defendant that they would take judgment by default unless an answer was filed during the term, and were requested to notify counsel for defendant, which was not done, and on the same day judgment by default was taken. The judge presiding did not adjourn court when he left on Wednesday, but permitted it to expire by limitation, and the answer was filed on Friday after the judgment was entered on Wednesday.

On a similar state of facts, except they were not so favorable to the defendant, this Court refused to interfere with an order setting aside a judgment upon the ground of surprise and excusable neglect in *Foley v. Blank*, 92 N. C., 476, the Court saying: "The judge left the term open—to expire by its own limitation. The defendants may, therefore, have thought, and not unreasonably, that they had the right to file their answer at any time during the last day of the term, although the judge was not present. But a pleading placed on the files of the court in the absence of the judge, after he has left for the term, is not filed in contemplation of law, and we repeat, the judge ought never to leave the term open to take care of itself. Such practice has no legal sanction, and it gives rise to misapprehension, confusion, and wrong. Leaving the term of court open, to expire by its own limitation, may have led the defendants to mistake their right to file their answer at the time they undertook to do so. As they could not properly file it in the absence of the judge, they may have been surprised. Such mistake or surprise would not be unreasonable, and it would be such as would authorize the judge in a proper case, in the exercise of his sound discretion, to set a judgment aside."

After the long delay in prosecuting the action and in filing the complaint, and when counsel had been informed that the defense of payment would be relied on, and had indicated that they did not expect the action to be tried at the term at which judgment by default was taken, and with an order in force made at that term extending the time to file pleadings, the defendants' counsel could reasonably expect that no advantage would be taken of their failure to answer before the end of the week.

The plaintiffs' counsel seem to have felt that the circumstances required them to give notice before demanding judgment, but they did not attempt to do so before Wednesday, which left little if any time for preparing and filing the answer before the judge left at noon.

If, however, the counsel were negligent, there is no negligence (431) on the part of the defendant, and there is ample authority that when a defendant employs local counsel and informs him of his defense, so that there is nothing more for the defendant to do to put the action at issue, he will be relieved against a judgment taken for want of an answer. *Griel v. Vernon*, 65 N. C., 76; *Bradford v. Coit*, 77 N. C., 76; *Ellington v. Wicker*, 87 N. C., 16; *Gwathney v. Savage*, 101 N. C., 107; *Taylor v. Pope*, 106 N. C., 271; *Gaylord v. Berry*, 169 N. C., 733.

The Court said in the first of these cases: "In this case the party retained an attorney to enter a plea for him; that an attorney should fail to perform an engagement to do such an act as that we think may fairly be considered a surprise on the client, and that the omission of the client to examine the records in order to ascertain that it had been done was excusable neglect"; and this is quoted in the other authorities cited; and in *Gwathney v. Savage, supra:* "The distinction between the neglect of parties to an action and the neglect of counsel is recognized in our courts, and except in those cases in which there is a neglect or failure of counsel to do those things which properly pertain to clients and not to counsel, and in which the attorney is made to act as the agent of the client to perform some act which should be attended to by him, the client is held to be excusable for the neglect of the attorney to do those things which the duty of his office of attorney requires. It was the duty of the attorney to file the defendant's answer; if it required verification, as it did, it was his duty to inform his client of the fact. The client is not presumed to know what is necessary. 'When he employs counsel and communicates the merits of his case to such counsel, and the counsel is negligent, it is excusable on the part of the client, who may reasonably rely upon the counsel's doing what may be necessary on his behalf.' *Whitson v. R. R.*, 95 N. C., 385. The distinction between neglect of counsel taken in *Griel v. Vernon*, 65 N. C., 76, has been followed by a number of cases since, and may be regarded

as settled." And in the last case: "If the defendant retained a reputable attorney, who regularly practiced in Brunswick Superior Court; paid him $35 as his fee; apprised him of the facts, and the attorney promised to attend court and look after the defendant's interests, all of which he says was done, and the attorney failed to file an answer, and the defendant was not in fault himself, but acted with ordinary prudence, this would constitute excusable neglect. *Francks v. Sutton,* 86 N. C., 78; *English v. English,* 87 N. C., 497; *Wiley v. Logan,* 94 N. C., 564."

Norton v. McLaurin, 125 N. C., 185, is an illustration of the distinction between the negligence of the party and of his counsel. The action was to recover land, and a motion to set aside a judgment (432) taken by default for want of an answer was denied because of failure of the defendant to file a bond, which is a duty devolving on the party.

This statement of the law contained in the cases cited was made without regard to the solvency or insolvency of the attorney, and it has remained unchallenged for near half a century.

And why is not this the wise and just rule and in accordance with the letter and spirit of the statute?

The attorney is an officer of the court, and acts under its direction and control, and the client employs him, because of his learning and skill, to do something he cannot do for himself, and his fitness for the duty is certified to by the courts who have licensed him.

If so, and the client has been guilty of no neglect, and a valuable right has been lost by the failure of the attorney to file an answer, why should he not be relieved under a statute (Rev., sec. 513) which gives authority to the court to relieve a "party" on account of "his" surprise, etc., and which "is not restricted to cases of 'excusable neglect,' but embraces cases where the judgment or other proceeding has been taken 'through his mistake, inadvertence, or surprise'? These words are not mere surplusage, but mean entirely different things, though, of course, the most common instance in which this section has been invoked has been in cases of excusable neglect." *Mann v. Hall,* 163 N. C., 53.

The party who has employed local counsel, and who has given him all the information necessary for filing his answer, and who has omitted no duty which the law imposes on him may well claim surprise that his attorney has failed in his duty and has permitted a judgment to be taken against him for want of an answer.

It is urged, however, that this rule will encumber the dockets with motions and will delay the proceedings in the courts.

If true, this would not furnish a reason for writing into the statute what cannot be found there, that a party, who is in no default, can have

no relief provided his counsel is solvent; but the danger from the adoption and enforcement of the rule is more imaginary than real.

The instances in which relief is invoked under the statute are not of frequent occurrence, and as it would be based on the neglect of counsel, involving professional character and standing, it would not open up an inviting field to attorney or client.

The rule also leads to the determination of causes upon their merits, as a judgment cannot be set aside under the statute unless a meritorious defense is shown to exist.

It is no sufficient answer to say that if the attorney is solvent the party is not hurt, because he can recover the amount of his loss from the attorney.

The party may be made a bankrupt by the payment of the (433) judgment, or he may lose his home before he can sue his attorney, and when he sues he must take the chance of the jury finding the issues against him or reducing the amount of his recovery, or, if he recovers judgment, of the attorney becoming insolvent during the progress of the action.

The three cases in our Reports which give color to the contention that the party is not entitled to relief if his attorney is solvent (*University v. Lassiter,* 83 N. C., 38; *Chadbourn v. Johnston,* 119 N. C., 282; *Ice Co. v. R. R.,* 125 N. C., 17) are not in conflict with the views we have expressed.

In the *Lassiter case* the defendant, who moved to set aside the judgment, did not employ counsel, and he paid no attention to an action commenced in 1876 until after final judgment in 1879, and relief was denied upon the ground of the negligence of the party, and not of the attorney.

In the *Chadbourn case* the summons was returned served, an order of sale made, a sale had thereunder, a report of sale, and a decree of confirmation, and the motion to set aside the orders and decree was not made on the ground of surprise or excusable neglect, but because it was contended by the defendant that the summons was not in fact served, and that the appearance by attorney was without authority; and in the *Ice Co. case* stress was laid on the fact of the insolvency of the attorney as a reason for the exercise of the discretionary power of issuing the writ of *certiorari* in lieu of an appeal, lost by the failure of the attorney to serve case on appeal within the statutory time.

We, therefore, conclude that the order of his Honor should be sustained.

Affirmed.

CLARK, C. J., dissenting: This is a motion to set aside a judgment for excusable neglect. The facts found are that the plaintiffs obtained a judgment in 1909 against the defendant insurance company in the Circuit Court of Arkansas, which was a court of general jurisdiction. The judgment recites that the defendants were served with process of attachment and filed an answer admitting liability and that judgment by confession was rendered against them.

A transcript of the judgment duly certified was sent to plaintiffs' counsel in Greensboro, N. C., who informed the defendants in June, 1913, who referred them to their counsel. Said counsel of the defendants asked plaintiffs' counsel for delay, and action was deferred until 24 February, 1915, when summons was issued. Plaintiffs' counsel still further waited on defendants' counsel until 18 October, 1915, at the October term of Guilford, when they filed a verified complaint
(434) and served a written copy thereof on the defendants' counsel with the following request indorsed thereon: "Our clients are desirous of a speedy termination of this matter, and we would be obliged if you can be ready to try this case at the next term of court." No answer, either verbal or written, was made to this letter.

At the Bar meeting to set the calendar for the next (November) term plaintiffs' counsel asked to set the cause for trial, but defendants' counsel requested that it might go over, as answer had not been filed. Plaintiffs' counsel consented to this, but on condition that the answer would be filed at said November term. At the December term, no answer having been filed, plaintiffs' counsel notified the defendants' counsel that unless answer was filed before court adjourned a judgment by default would be asked for. No answer was filed, and court adjourned on Wednesday of the second week, and the plaintiffs moved for and obtained judgment by default on that day.

Upon these facts, the neglect of the defendants has not been excusable. At the request of defendants' counsel, the matter was held up from June, 1913, till 24 February, 1915, when summons was issued. The matter was then held up at the request of defendants' counsel till 18 October, when a verified complaint was filed, and the defendants counsel notified (which was not necessary) that the answer must be filed at the next (November) term. The plaintiff was entitled to a judgment at the October term if the answer was not filed. But time was voluntarily given to the November term with notice that the answer must be on file then. At the November term the answer was not on file, and the plaintiffs were again entitled to judgment by default, but at request of defendants' counsel the case was allowed to go over again till the December term, with notifications, however, that if the answer was not then filed judgment by default would be taken.

This was the third term that the complaint had been in the files of the court. The plaintiffs were entitled to move for judgment by default at any time during that term. The judge did not adjourn court till Wednesday of the second week, and, the answer not then being on file, the plaintiffs moved for and obtained the judgment to which they had been so long entitled. In all this there was no excuse for the conduct of the defendants in not filing their answer, and none is now offered.

By reason of the motion to set aside the judgment and the appeal necessitated by granting it, it is now May, 1916, and the plaintiffs, after three years delay, are still deprived of their judgment upon a certified judgment from another State.

The judgment entered by *Judge Justice* recites that the "summons was issued and served on the defendants in this cause on 24 February, 1914; that the verified complaint was filed on 18 October, 1915, stating a cause of action on a duly certified judgment of another State, and that no answer had been filed thereto, and that on motion of (435) counsel for plaintiffs judgment was entered for the sum of $678, with interest from 24 February, 1914, with costs."

On the motion to set aside the judgment the court finds the above as facts, and that the said judgment of *Judge Justice* by default was rendered "on 8 December, 1915, being Wednesday of the last two weeks term of Guilford."

Cited: Seawell v. Lumber Co., 172 N.C. 324 (3c); *Lumber Co. v. Cottingham*, 173 N.C. 328 (3d); *Gallins v. Ins. Co.*, 174 N.C. 555 (1c, 3c); *Grandy v. Products Co.*, 175 N.C. 513 (3c); *Edwards v. Butler*, 186 N.C. 201 (3c); *Pailin v. Cedar Works*, 193 N.C. 257 (3d); *Sutherland v. McLean*, 199 N.C. 350 (3c); *Gunter v. Dowdy*, 224 N.C. 524 (3c).

CARRIE S. APPLEBAUM v. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA.

(Filed 3 May, 1916.)

1. Insurance—Fraternal Orders—Restricted Beneficiaries.

A fraternal assessment benefit association having a representative form of government may, by its contract and constitution, confine the beneficiaries to certain blood relatives, wife, affianced wife, persons dependent upon the member, etc., in conformity with the laws of the State wherein it has its head organization; and where such beneficiary sues upon a policy, claiming as the wife of the deceased member, and it appears that in fact the marriage was bigamous, she may not recover, though the certificate states she was his wife.

2. Same—Wife—Bigamy—Evidence—Questions of Law—Trials.

Where the plaintiff seeks to recover upon a certificate issued by a fraternal assessment benefit association as the wife of the deceased, and it appears that the marriage ceremony was twice performed, but at a time when the deceased had a lawful living wife, and that under the valid terms of the certificate she could not otherwise recover as a beneficiary: *Held*, a recovery will be denied as a matter of law.

3. Insurance—Fraternal Orders—Restrictive Beneficiaries—"Dependents."

Where a certificate of membership in a fraternal assessment benefit association confines the beneficiaries, among others, to a certain class of blood relations, to the wife and to "persons dependent upon the member," it means to such persons as are legally dependent and of the same class *ejusdem generis* as the relationship already stated, and may not be extended to include one claiming as a wife, but in fact by a bigamous marriage.

APPEAL by plaintiff from *Lane, J.*, at March Term, 1915, of MECKLENBURG.

J. Frank Flowers and Anderson, Slate & D'Orr for plaintiff.
Tillett & Guthrie for defendant.

CLARK, C. J. This is an action to recover $5,000 on account of the accidental death of Jerome Applebaum and $1,300 for benefits by the plaintiff as the beneficiary of a certificate of membership issued
(436) upon his application to said Jerome Applebaum by the defendant company.

The certificate recites as follows: "Payment in case of death by accident under the provisions of the constitution shall be made to Callie S. Applebaum, 606 Kinston Avenue, Charlotte, N. C., whose relationship to me is that of wife."

Said application also contains the following:

"NOTE.—By the statutes of Ohio, the payment of death benefits shall be confined to the family, heirs, relatives by blood, marriage, or legal adoption (named), affianced wife, or to a person or persons dependent upon the member; and no certificate shall be made payable to 'myself,' 'my estate,' 'persons named in my will,' or to any beneficiary other than designated by the statutes above cited."

Section 7 of defendant's constitution followed this statute and limited the beneficiary to the above named classes. The defendant, as set out in its answer, is a fraternal benefit association with lodges, ritualistic form of work, and representative form of government, organized for the purpose of making provision for the payment of benefits as the result of accident and for the sole benefit of its members and their

beneficiaries, and not for profit. The defendant provides no benefit for profit, but by means of assessments raises funds to be disbursed to its members and their beneficiaries according to the rules and regulations set forth in the constitution and by-laws.

There was much evidence tending to show that the death of Jerome Applebaum was not an accident, but was caused by pistol shots at the hands of the plaintiff. We need not consider the exceptions raised as to this matter, for it seems to us that upon the face of the certificate and upon the uncontradicted evidence the plaintiff is not entitled to maintain her action.

Upon the uncontradicted testimony the plaintiff went through the marriage ceremony with the deceased in 1911 in New Orleans. She again was a party to the marriage ceremony with him 1 July, 1912. It appears that she was married twice before, but the plaintiff states that she was divorced from both of these husbands. She does not know whether or not they are still living.

Jerome Applebaum was legally married to Blanche Dean 18 May, 1909, and this marriage continued in effect until 13 February, 1913, at which time she obtained a divorce from him at Kansas City, Mo. He died or was killed 25 February, twelve day thereafter, in Atlanta, Ga. It is very clear from this statement that the plaintiff was not his wife at the time of his application and the issue of the certificate of membership, nor at date of his death. By the terms indorsed on said application and under the statute of Ohio where the company is chartered the "payment of death benefits shall be confined to the family, heirs, relatives by blood, marriage, or legal adoption, affianced wife, or to a person or persons dependent upon the member." The (437) plaintiff does not come under either of these terms. By "person dependent upon the member" is meant legally dependent and of the same general class *ejusdem generis* as the relationship already cited. It follows that the plaintiff cannot maintain the action, and the nonsuit was properly ordered.

The defendant had a right to agree with its members, and did agree, for a restriction of the benefits to those legally dependent upon him and connected by ties of blood or marriage or by adoption or affianced wife. The plaintiff upon her own testimony does not belong to any of the classes named. She is his bigamous wife, and does not come within the class named as beneficiaries. The defendant is not, therefore, required to assess its other members to raise the sum of $6,300 for the plaintiff. Naming her as the applicant's wife in the application was a fraud, and does not entitle her to be a beneficiary of the contract. The judgment of nonsuit is

Affirmed.

Cited: Andrews v. Masons, 189 N.C. 700 (c).

O. N. PETREE ET AL. v. B. J. SAVAGE ET AL.

(Filed 3 May, 1916.)

1. Courts—Jurisdiction—Amount Demanded—Pleadings.

Where an action upon a contract is brought in the Superior Court, and the demand is made in good faith and comes within the jurisdictional amount, a recovery of a less sum will not defeat the court's jurisdiction. Upon the evidence in this case, and from the verdict of the jury, it appears that the demand was made in accordance with the requirements.

2. Appeal and Error—Supreme Court—Parties—Motion to Dismiss.

Where one of several makers of a note has paid it and caused it to be assigned to a trustee, *semble*, the actions to recover from his comakers are several; but where he sues them all in the same action the remedy is by *demurrer* for mispoinder of parties, and cannot be taken advantage of in the Supreme Court upon motion to dismiss the action, upon the ground that the Superior Court had no jurisdiction because the action arose by contract, and the recovery sought against each defendant, taken separately, was less than $200.

3. Appeal and Error—Evidence—Depositions—Objections and Exceptions—Harmless Error.

Where a deposition is objected to as immaterial and irrelevant, and not that it was irregularly taken, its admission as evidence is harmless error at most, and not prejudicial to the complaining party.

4. Courts, Discretion—Issues—Appeal and Error—Harmless Error.

The discretion of the trial judge in settling and framing the issues is not reviewable on appeal, when the issues submitted present every phase of the controversy, and under them all material and relevant evidence could have been introduced by either party.

5. Trials—Evidence—Fraud—Instructions.

In this action for contribution upon a note paid by a joint maker and assigned to his trustee, there was allegation, in defense, that the note sued on was procured upon the fraudulent representation that the makers thereof should be ten in number and pay their proportionate parts. Upon the entire testimony it is held that there was no evidence of fraud, and the instruction of the court in that respect was not erroneous.

(438) APPEAL by defendants from *Shaw, J.*, at November Term, 1915, of STOKES.

Civil action tried upon these issues:

1. Did the plaintiffs, other than John A. Bruton, trustee, pay off the notes in controversy and have the same assigned to said Burton, as trustee, for their benefit, as alleged in the complaint? Answer: "Yes."

2. Were the defendants induced to execute the notes in question by reason of the false and fraudulent representations as alleged in the answer? Answer: "No."

3. Are the defendants indebted to the plaintiffs, and if so, in what amount? Answer: "Yes, as follows: B. J. Savage, $149.79 with interest from 26 October, 1912; Wade H. Bynum, $149.79 with interest from 26 October, 1912; DeWitt Tuttle, $149.79 with interest from 26 October, 1912; W. H. Grubbs, $162.46 with interest from 26 October, 1912."

From the judgment rendered, defendants appealed.

J. C. Buxton, R. G. Parker, O. N. Petree for plaintiffs.

R. C. Strudwick, Jones & Patterson, Phillip Williams for defendants.

BROWN, J. The evidence tends to prove that plaintiffs and defendants are principal obligors on certain notes given for the purchase of a horse. The notes were duly indorsed to one Hairston before maturity, for value. After Hairston became the owner of all the notes, plaintiffs and defendants paid their proportionate part of the first note, and the three defendants, Bynum, Tuttle, and Savage, paid part of the second note, and also the interest on the third note, and no question was raised as to any irregularity, nor was any charge of fraud made. The payments reduced the unpaid notes to such an amount that the defendant Grubbs owed a balance on the entire indebtedness of only $162.46 and the other three defendants owed only $149.79 each, making a total of $611.83 owing by the defendants. Hairston required the payment of the balance due, and the four defendants refusing to pay, the plaintiffs in this action paid Hairston the total indebtedness of $1,053.20 and Hairston assigned the notes to plaintiff Bruton, trustee, for (439) their benefit, and brought this action against the defendants for contribution. The defendants pleaded fraud, in that they were imposed upon by one of the plaintiffs, Chap. Bodenhamer, who, they aver, represented that there were ten men who had contracted to buy the horse of Bridges & Flora for $2,000, and each was to pay $200, and each signer to pay $200; whereas, in fact, only eight men signed the notes, and that R. J. Petree and O. N. Petree did not pay anything, and that they secured their interest in the horse without paying anything.

The defendants moved in the Supreme Court to dismiss the action upon the ground that it appears upon the face of the record that the

sum demanded is less than $200, and that the Superior Court did not have jurisdiction.

In an action upon contract the jurisdiction of the court is determined by the sum demanded. *Brantley v. Finch,* 97 N. C., 91; *Knight v. Taylor,* 131 N. C., 84; *Sloan v. R. R.,* 126 N. C., 490. The demand must be made in good faith and not for the purpose of conferring jurisdiction. *Wiseman v. Withrow,* 90 N. C., 140. Where the sum demanded in good faith exceeds $200 the Superior Court has jurisdiction. *Carter v. R. R.,* 126 N. C., 437; *Horner v. Westcott,* 124 N. C., 519.

In the case at bar the sum demanded is $611.83, and that it is demanded in good faith is not only apparent upon the complaint, but is manifested by the amount recovered by the judgment of the court.

It may possibly be that in an action for contribution such as this the remedy is in severalty for the aliquot part due from each defendant. *Adams v. Hayes,* 120 N. C., 383. But it is well settled that if there is a misjoinder of parties or causes of action the defect must be taken advantage of by demurrer in the Superior Court. It cannot be taken advantage of for first time in this Court by a motion to dismiss the action. *McMillan v. Baxley,* 112 N. C., 578; Clark's Code, sec. 239, subsec. 5, and cases cited.

There are three assignments of error:

1. For that the court erred in admitting the deposition of Cabell Hairston, "as it was immaterial and irrelevant." No objection is made to the regularity of the deposition, and as it is immaterial and irrelevant to the controversy between plaintiffs and defendants, its admission is harmless error.

2. For that the court committed error in submitting the issues. These issues appear to present every material phase of the controversy, and under them all relevant and material evidence could be introduced by both parties. In such case the trial judge's discretion in settling and framing the issues is not reviewable. *Redmond v. Mullenax,* 113 N. C., 505; *Downs v. High Point,* 115 N. C., 182.

(440) 3. For that the court committed error in charging the jury as follows: "And if they believe all the testimony, there is no evidence of fraud, and they will answer the second issue 'No.' No one of the defendants has sworn that Mr. Duckworth or Mr. Bodenhamer told him there were to be ten signers of the note, the share of each to be $200."

An examination of the record fails, in our opinion, to disclose any evidence of fraud, and the statement of the judge to the jury appears to be borne out by the testimony of the witnesses.

No error.

Cited: Williams v. Williams, 188 N.C. 730 (2c); *Bunker v. Llewellyn,* 221 N.C. 4 (2p).

ELLEN SETTEE v. CHARLOTTE ELECTRIC RAILWAY COMPANY.

(Filed 3 May, 1916.)

1. Evidence—Witness—Absent from State—Stenographer's Notes.

The testimony of a witness, stenographically taken at a former trial, who is absent from the State under such circumstances that his return is merely contingent or conjectural, may be received as evidence on a subsequent trial of the same cause of action when its correctness is testified to by the official stenographer who took and transcribed it, and there is no suggestion that the record thereof was not full and entirely accurate. As to whether this will apply when the witness is temporarily absent, *quære.*

2. Trials—Instructions—Interest—Appeal and Error—Harmless Error.

In this action to recover damages for a personal injury the plaintiff attacks a release given to an agent of defendant for fraud, and the agent's testimony as to the transaction, in defendant's behalf, has been given and received after he had quit the defendant's service: *Held,* the reference by the court, in his charge to the jury, to the plaintiff's interest in the case was not prejudicial to the plaintiff.

3. Evidence—Release—Fraud—Trials—Questions for Jury.

Where a release is set up as a defense to an action to recover damages for a personal injury, it is properly admissible as evidence when its execution is shown, and when the question of fraud in its procurement is relied upon by the plaintiff it is for the jury to determine.

4. Evidence—Fraud—Inducement—Appeal and Error.

Fraud in the procurement of a release, relied upon as a defense in an action to recover damages for a personal injury, must have induced the execution of the release, or it will be harmless, and insufficient to invalidate it.

APPEAL by plaintiff from *Carter, J.,* at February Term, 1916, of MECKLENBURG.

The plaintiff brought this action to recover damages for personal injuries alleged to have been caused by defendant's negligence, which consisted in permitting an iron frog to be left in a street of (441) Charlotte. Plaintiff, while walking on the street, stepped on the frog and her foot was caught in the same and she was injured. The case was here at the last term, and plaintiff then was granted a new trial. 170 N. C., 365. At the last trial the jury returned the following verdict:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

2. Was the release set out in the answer secured by undue advantage and fraud, as alleged in the replication of the plaintiff? Answer: "No."

3. What damages, if any, is the plaintiff entitled to recover of defendant? (No answer.)

Defendant offered as evidence the examination of W. W. Rhodes, a witness who testified for the defendant at the former trial. It was taken down by a stenographer, who testified that it was a correct and literal reproduction of all that the witness said at the time. It appeared that W. W. Rhodes was in Arizona when this testimony was introduced, and had been there for nearly a year, he having gone there for his health. He had been an employee of the defendant, and was such at the time the alleged release of plaintiff was executed. He carried it to her home for her signature. "His salary, though, ceased at the time he left the service of the company." His testimony related exclusively to the signing of the release to the defendant by the plaintiff and what occurred at her home when it was signed. Plaintiff objected to the testimony, the objection was overruled, and plaintiff excepted. The typewritten examination was admitted and read to the jury. The objection was based on its incompetency, its relevancy being admitted. There were other exceptions taken by the appellant which will be considered in the opinion. Judgment was entered upon the verdict, and plaintiff appealed.

J. W. Keerans for plaintiff.

Osborne, Cocke & Robinson for defendant.

WALKER, J., *after stating the case:* The precise question involved in the admission of the proof as to the testimony of W. W. Rhodes, a witness for the defendant at the former trial of this case, has never before been considered by this Court. But it is thoroughly well settled, as it seems, by the great weight of authority and numerous precedents that evidence of the kind is admissible when the witness is absent from the State and not within the jurisdiction of the court. We need not decide as to whether a temporary absence will render the evidence competent, as in this case it appears that the witness is absent permanently, or, at least, for such a prolonged or indefinite period
(442) that his return is merely contingent or conjectural. He may now fairly be considered as a nonresident in this State.

The rule in regard to such evidence which has generally been followed is thus stated in 1 Greenleaf on Evidence (16 Ed.), sec. 1639:

"The death of the witness has always and as of course been considered as sufficient to allow the introduction of his testimony. The absence of the witness from the jurisdiction, out of the court's process, ought also to be sufficient, and is so treated by the great majority of courts." 5 Enc. of Ev., p. 904, says: "The absence of the witness from the State is a sufficient ground for admitting the testimony," citing in the notes many cases which support the text. The following authorities sustain the rule: Wigmore on Ev., sec. 1404; Stephens Digest of Evidence (1886), art. 32; Wharton on Ev., sec. 178; 1 Atkyns Rep. (1737), p. 444; *B. N. Natl. Bank v. Bradley,* 30 So., 546; *M. Mill Co. v. M. & S. R. Co.,* 51 Minn., 304; *Reichers v. Dammeier,* 45 Ind. App., 208; *Kolodvianski v. Am. L. Works,* 29 R. I. 127; *Gibson v. Patterson Mills,* 187 Pa. St., 513, and *A., T. & S. F. Ry. v. Baker,* 37 Okla., 48, where many of the cases are cited and reviewed. In *Minn. Mill Co. v. Minn. St. Ry. Co.,* 51 Minn., 304, the Court (by *Mitchell, J.*) quotes what is said by Starkie in his work on Evidence, as follows: "Starkie, in his work on Evidence (page 310), says the prevailing English rule is to admit the deposition of the witness, not only where it appears that he is dead, but in all cases where he is dead for all the purposes of evidence; as where he cannot be found after diligent search, or resides in a place beyond the jurisdiction of the court, or where he has become a lunatic or attainted." It is then said by the Court: "The admission of the testimony of a witness on a former trial is frequently inaccurately spoken of as an exception to the rule against the admission of hearsay evidence. The chief objections to hearsay evidence are the want of the sanction of an oath, and of any opportunity to cross-examine, neither of which applies to testimony given on a former trial. The real objection to such evidence is that it is only testimony of some one else as to what the witness swore to on the former trial; and before the day of official reporters in our trial courts the accuracy or completeness of such evidence depended entirely upon the fallible memory of those who heard the witness testify. It can be readily seen why, under such circumstances, courts were disinclined to admit such evidence except in cases of actual necessity. But where the words of a witness as they come from his lips are taken down in full by an official court stenographer, this objection does not apply. We do not see why such testimony is not as satisfactory and reliable as a new deposition, taken out of the State, would be. Rules on such subjects should be practical, and subject to modification as conditions change." And in *R. R. v. Osborne,* 64 Kan., 189, the reason for the rule is thus given: "The provision (443) made by statute for the taking of depositions does not militate against this rule. Testimony taken down word for word at a former trial, and preserved as the law provides, is evidence of at least as high

grade as a deposition. The testimony is taken in open court, in the presence of parties and witnesses, under the eye and supervision of the trial judge, where there is full opportunity to examine and cross-examine the witness, to search his motives, appeal to his conscience, and test his recollection and the accuracy of his statements. So taken, it must be as high order of testimony as a deposition taken upon interrogatories in the private office of a notary public, or other like officer, in some town or city remote from the one in which the trial is had." 10 Ruling Cases, sec. 143, after considering the question and citing the cases, thus states the result: "The text-books quite generally state broadly that the evidence of a witness given at a former trial or examination between the same parties may be introduced if the witness has since died, become insane or sick, and hence unable to testify, is out of the jurisdiction, or has been kept away from the trial by the opposite party. So far as civil actions are concerned, this is probably a sufficiently accurate statement of the general rule. All authorities agree that testimony given in a former action or at a former trial of the same action by a witness who has since died is admissible. It is also well settled that where a witness has been sworn or his deposition has been taken on a former trial and the witness has become insane, his testimony or deposition as previously given is admissable in evidence. And with equal uniformity it is held in civil cases that evidence taken at a former trial may be proved on a second trial of the same action if the witness has removed from the State or is otherwise beyond the jurisdiction of the court." These references to the authorities are sufficient to show the decided trend of the decisions, and there are many more cases which might be added to those we have selected, but it is unnecessary that we should do so, as they will be found readily in the text-books and in the other cases we have cited. They constitute a very large majority of the decisions upon this question. There was no suggestion here that the record of the evidence was not full and entirely accurate. It appears, on the contrary, that the witness's testimony was transcribed to the paper, word for word, and the testimony itself is of such a nature as to show most conclusively that there was nothing material left out that the witness could have said. The examination was both searching and exhaustive. Nor was there any intimation that the witness had been kept away or induced not to attend the court by any act or conduct of the defendant. If a deposition had been taken and read, instead of this proof, we do not see how the plaintiff would have been benefited in the least. *Smith v.* (444) *Moore,* 149 N. C., 185, has no bearing on this case. The witness in that case was merely sick, the nature of the malady and its probable duration not appearing, and she was also in the State and within reach of the court's process. Nor is *Dupree v. Ins. Co.,* 92 N. C.,

424, any more applicable. The evidence as to what the witness had testified at a former trial was excluded for a reason very different from the one assigned here for the objection to Rhodes' former testimony. This will clearly appear when *Dupree's case* is read in connection with *Gadsby v. Dyer,* 91 N. C., 311, cited therein. This is plaintiff's main exception, and, therefore, we have considered it at some length, and, further, it is a comparatively new question in this State.

We are of the opinion that the judge's reference to the interest of the plaintiff in the cause, as something that should induce them to weigh his testimony cautiously, was not calculated to prejudice the plaintiff, under the facts and circumstances of the case. Besides, it was shown that Rhodes had quit the service of the defendant at the time he testified, and had no interest whatever in the result of the litigation. It may also be added that the charge of the court on the question of interest was rather more favorable to the plaintiff than the strict rule of the law would permit, and it surely worked no harm. She has no just cause to complain.

The execution of the release having been shown, the court properly admitted it in evidence. This did not prevent the plaintiff from attacking it as fraudulent. The judge should not, as he could not, have told the jury that the release was fraudulent and void as matter of law. The parties did not agree as to the amount of damages, nor did they plainly appear. This was a disputed matter. The plaintiff claimed large damages, and the defendant asserted that the injury was slight and the damages small. The court could not take the case from the jury where the facts were disputed. But the objection was to the introduction of the release, and this was properly overruled after the execution of the release had been shown. Its introduction was proper, as part of the evidence, even if it was fraudulently obtained.

The court was right in charging the jury that the fraud, if any, must have induced the execution of the release by the plaintiff, otherwise the fraud, if practiced upon the plaintiff, would have been harmless. It would seem that this exception is based upon a misconception of the particuluar nature of the instruction given by the court, which related to the operation or effect of the alleged fraudulent conduct upon the mind and will of the plaintiff. The charge of the court, as to what constituted fraud, was based upon special prayers of the plaintiff, as it seems, and given in accordance therewith. It was, anyhow, sufficiently full and explicit, and the jury must have understood what was meant, and what was necessary for them to find in (445) order to invalidate the paper.

Having carefully examined the record, we find no ground for a reversal.

Cited: Bank v. Whilden, 175 N.C. 53 (1c); *S. v. Maynard,* 184 N.C. 657 (1c); *S. v. Casey,* 204 N.C. 414 (1c); *S. v. Ham,* 224 N.C. 131 (1c).

A. A. COBLE v. JOHN A. BARRINGER.

(Filed 19 April, 1916.)

1. Appeal and Error—Theory of Case—Deeds and Conveyances—Frauds.

A case on appeal in the Supreme Court is determined upon the theory on which it was tried in the Superior Court, and where therein a deed was sought to be reformed for fraud, and damages recovered on a breach of covenant and warranty of title in its corrected form, it may not be determined on the question as to whether there had been such breach in the conveyance as actually drawn.

2. Deeds and Conveyances—Interest Conveyed—Covenants—Warranty.

A covenant of warranty does not enlarge or curtail the estate granted in the premises of a deed to land, but is merely an assurance or guaranty of the title conveyed; and where a grantor conveys "all his right, title, and interest in and to the land," it will not be construed as a conveyance of the land itself, but only of the grantor's interest therein, and the warranty will be limited to the estate described.

3. Same—Interpretation of Deeds.

A conveyance of all the grantor's "right, title, and interest" in lands, with habendum to the grantee and his heirs forever, and with covenant that the grantor "is seized of the interest conveyed" as evidenced by a certain deed to him; that he has a right to convey such interest in fee simple; that he will warrant and defend the title to the said interest, etc.; and where the deed referred to conveys the "right, title, and interest" of the grantor therein, with full covenants of warranty: *Held,* construing the deed as a whole, the intent of the grantor, and the effect of his deed, was to convey only whatever interest he may have had in the land.

APPEAL by plaintiff from *Cline, J.,* at January Term, 1916, of GUILFORD.

The action was brought to recover damages for an alleged fraud in the preparation and execution of a deed for land, and on account of failure of the title agreed to be conveyed and warranted. On 28 February, 1913, defendants conveyed to plaintiff "all their right, title, and interest in and to two tracts or parcels of land" which are described in the complaint, with the following habendum and covenant of warranty: "To have and to hold the aforesaid tract or parcel of
(446) land and all appurtenances thereunto belonging to him, the said A. A. Coble, and his heirs forever, to his and their only use and

behoof. And the said John A. Barringer, one of the grantors herein, doth covenant that he is seized of the interest conveyed in this deed, evidenced by a deed made to him by Cyrus Clapp and others, and recorded in Book 245, page 105, in the register of deeds' office, in fee simple, and that he has a right to convey such interest to the grantee herein in fee simple, and that he will warrant and defend the title to the said interest to the grantee herein against all claims whatsoever." The allegation of fraud is that instead of conveying only the defendants' "right, title, and interest in and to the land," the male defendant represented to plaintiff that he was at the time the owner in fee of a five-ninths interest in the land, and that it was agreed that said defendant, who wrote the deed, should so draw the same as to state his interest specifically and to convey that interest with a corresponding covenant of warranty, and that the deed was written by said defendant not according to the agreement of the parties, but falsely and fraudulently, so as to convey only the right, title, and interest of the defendants.

The jury found against the plaintiff as to the fraud, under issues submitted to them by the court, which, with the answers thereto, are as follows:

1. Did the defendant represent to the plaintiff at the time of the execution of the deed from the defendant to the plaintiff that he, the defendant, was the owner of five-ninths interest in the lands described in the said deed? Answer: "No."

2. Did the defendant at the time of the delivery of said deed mislead and deceive the plaintiff by words or conduct which led the plaintiff to believe that he (defendant) had inserted in the deed words which represented that defendant was the owner of and warranted the title to a five-ninths interest in the land? Answer: "No."

3. Was there at the time of the execution of the said deed an outstanding and paramount title to said land in the University of North Carolina? Answer: "Yes."

4. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: "Nothing."

The male defendant acquired whatever title he had from Cyrus Clapp and others, who were then supposed to be the heirs of Charles Dick, a former slave, who owned the land. It turned out that they were not the legal heirs of Charles Dick, but that he died without any heirs and the land escheated to the University of the State. Cyrus Clapp and others had commenced a special proceeding against other supposed heirs of Charles Dick to sell the land for partition. The University intervened in that proceeding, and the plaintiff was made a party thereto. It all resulted in a compromise, which was entered in that case and under which plaintiff was allowed $349.92 out (447)

of the proceeds of sale, and he is now suing for the difference between that amount and what he paid defendant for the land, viz., $500.08, the amount paid to the defendant, as the consideration of his deed to the plaintiff, being $850. The defendants were not parties to the proceeding, but there was evidence that they were notified by the plaintiff of its pendency and were requested by him to come in and defend the title against the adverse claim of the University, and they refused to do so. The deed from Cyrus Clapp and others to the male defendant conveyed, for the consideration of $600, "all their right, title, and interest in and to the two tracts of land," with this habendum and covenant of warranty: "To have and to hold the aforesaid tracts or parcels of land, and all privileges and appurtenances thereunto belonging; and the said parties of the first part do covenant that they are seized of said premises in fee simple and have the right to convey the same in fee simple; that the same are free from encumbrances and that they will warrant and defend the said title to the same against the claims of all persons whatsoever."

Judgment was entered for the defendant upon the verdict, and the plaintiff appealed.

Jerome & Jerome for plaintiff.

R. C. Strudwick for defendant.

WALKER, J., after stating the case: First. We hear and determine a case here according to the theory upon which it was tried in the court below. *Allen v. R. R.*, 119 N. C., 710; *Hendon v. R. R.*, 127 N. C., 110; *S. v. McWhirter*, 141 N. C., 809; *Warren v. Susman*, 168 N. C., 457. In *Allen v. R. R., supra*, it was said by the Court that "While we are not bound by an erroneous admission of a proposition of law, we must have respect to the manner in which parties present and try their cases."

It is manifest, we think, that the plaintiff elected to base his right to a recovery and to stake his fortune upon the allegation of fraud. In other words, his idea was that if there was this alleged fraudulent conduct, and the deed should be so reformed as to correspond with the true agreement, there would be a breach of the covenants of seizin and warranty and right to convey. The case was tried on the issues as to the fraud, and, having lost on his chosen ground, the plaintiff must abide by the result. No issue as to the covenant and its breach was tendered or submitted, but only the issues as to the fraud and the outstanding title in the University.

Second. But if an issue as to the covenant and its breach had been submitted, we are of the opinion that the result would have been

the same. Cyrus Clapp and others conveyed to the defendant, (448) John A. Barringer, not the land or a good and indefeasible title therein, but only their "right, title, and interest in the land." They conveyed what they had to convey, and nothing more. This was not enlarged or changed into a conveyance of the land itself by the covenants of seizin and warranty, though general in character. *Chief Justice Shaw* said of such a deed, in *Blanchard v. Brooks,* 29 Pick., 47, 67: "The grant in the deed is of all his right, title, and interest in the land, and not of the land itself, or any particular estate in the land. The warranty is of the premises, that is, of the estate granted, which was all his right, title, and interest. It was equivalent to a warranty of the estate he then held or was seized of, and must be confined to estate vested. A conveyance of all the right, title, and interest in the land is certainly sufficient to pass the land itself, if the party conveying has an estate therein at the time of the conveyance; but it passes no estate which is not then possessed by the party. *Brown v. Jackson,* 3 Wheat., 452." The case of *Allen v. Holton,* 20 Pick., 458, strongly supports the same view. It was there held that "in the case of a deed conveying 'all my right, title, and interest in and unto the ferry called and known by the name of Tiffany's ferry, and the boat which I built and now use in carrying on the ferry, and all the estate, land, and buildings standing thereon as the same is now occupied and improved by me,' with covenants of ownership, general warranty, etc., the deed purported to convey merely such right as the grantor had in the land, and that the covenants were qualified and limited by the grant." The same question was presented in *Sweet v. Brown,* 12 Metcalf, 169 (53 Mass.), where "the right, title, and interest" only were conveyed, and *Justice Wilde* said, at p. 177: "The warranty must be taken in a limited sense. It must be restricted to his title and interest. The covenant here attached to the estate and interest conveyed, and is not a general covenant of warranty of the whole parcel, particularly described by metes and bounds. Such construction will reconcile all parts of the deed and give effect to each. The question now presented is not a new one, but has been directly decided." We have cited the above authorities because the plaintiff has relied upon three cases, one of which was decided in the same court as those above mentioned: *Hubbard v. Aphthorp,* 3 Cush. (57 Mass.), 419; *Mills v. Catlin,* 22 Vt., 98; *Lull v. Stone,* 37 Ill., 224. There is no conflict, though, between these cases, when properly considered with reference to their special facts, and those which support our view.

In *Hubbard v. Aphthorp, supra,* there was a conveyance of the land with definite boundaries. These words were added, however: "meaning and intending by this deed to convey all my right, title, and interest

therein.' The Court said that "The construction of a deed is
(449) to be such, if possible, as to give effect to the intentions of the parties," and, therefore, when it is a mere conveyance of all the title of the grantor, it may be held that the covenants (such as we have in this case) have no application beyond the words of the grant itself. The Court then proceeded to say: "As it seems to us, this second description was added rather for fullness and certainty than with the view of any limitation as to the tracts of land conveyed." So that the case, instead of being against the view we have expressed, is an authority in support of it. The other cases cited by appellant are substantially to the same effect, and all of them were different from the case we are considering.

The office of a covenant of warranty is, of course, not to enlarge or curtail the estate granted in the premises of the deed, but the covenant is intended as an assurance or guaranty of the title. *Roberts v. Forsythe,* 14 N. C., 26; *Snell v. Young,* 25 N. C., 379. When there is a question of construction, the covenants may well be resorted to in order to ascertain the meaning, as the whole deed must, in such a case, be considered. *Mills v. Catlin, supra.* The Court said with reference to this matter, in *Allen v. Holton, supra:* "Whatever may be thought of the intention of the parties in that case, we think the intention as to the extent of the grant in the present case is sufficiently plain. The grantor conveys his own title only, and all the subsequent covenants have reference to the grant, and are qualified and limited by it. That this was the intention of the parties cannot, we think, be reasonably doubted, and the words of the covenants are to be so construed as to effectuate that intention."

Third. But a deed should be construed as a whole. One part is to help expound another, and every word, if possible, is to have effect, and none should be rejected if material, and all the parts thereof should be reconciled and stand together so as to ascertain and execute the intention. *Gudger v. White,* 141 N. C., 507; *Triplett v. Williams,* 149 N. C., 394; *Lumber Co. v. Lumber Co.,* 169 N. C., 80; *Mills v. Catlin, supra.* Applying this well recognized principle to a case having facts similar to this one, the Court said, in *Sweet v. Brown, supra:* "The covenants are in terms general; but in the construction of a deed we are to look at the whole deed, and the covenants are to be construed so as to give effect to the intention of the parties, so far as it can be done consistently with the rules of law. The warranty is of the premises which were granted and conveyed by the deed. But that was 'all my right, title, and interest in and to the parcel of real estate,' etc. It was not a grant of certain land, in general terms, but of his title and interest in such lands, and this particularly and fully expressed." There

can be no question in this case that the parties were doubtful as to the title, and especially as to whether Cyrus Clapp and the (450) others, who conveyed the land to Mr. Barringer, had inherited from Charles Dick, who had been a slave, under the provisions of the statute in regard to the descent and devolution of property from former persons who had been in slavery, and this was doubtless the reason why they worded the deed cautiously and conveyed only "the right, title, and interest," whatever that may have been at the time. It is apparent from both deeds that the intention was not to go beyond the right, title, or interest of the grantors in describing what was conveyed. The covenant in the deed of Mr. Barringer refers three times to the interest and not to the land, showing clearly that he intended to restrict the covenant to that interest, whatever it was and if it was anything, and that it was also intended not to convey a good title with a covenant to protect it, but only an interest—not the title itself, but only the chance of a title. The theory of the defendants, as to both deeds, is, therefore, this: that the conveyance is to be treated as one only of the right, title, and interest of the grantor in the land described, and the covenant as coextensive with such a grant only, and so as not to extend further; and in this view we concur. Apart from the actual intention as gathered from the deeds, there are many authorities sustaining ours as the legal construction of the instruments, in addition to those already cited. *Reynolds v. Shaver,* 59 Ark., 299; *Hanrich v. Patrick,* 119 U. S., 175; *Allison v. Thomas,* (Cal.) 1 Am. St., 90; *Derrick v. Brown,* 66 Ala., 162; *Wightman v. Apofford,* 56 Iowa, 145; *Cummings v. Dearborn,* 56 Vt., 441; 1 Warville on Vendors (2 Ed.), p. 516, sec. 437; 9 Am. and Eng. Enc., 104; see, also, generally, *Lumber Co. v. Price,* 144 N. C., 53; *Bryan v. Eason,* 147 N. C., 292.

The Court in *Reynolds v. Shaver, supra,* quoting Tiedeman on Real Property, sec. 858, says: "If a deed purports to convey in terms the right, title, and interest of the grantor to the land described, instead of conveying in terms the land itself, a general covenant of warranty will be limited to that right or interest, and will not be broken by the enforcement of a paramount title outstanding against the grantor at the time of the conveyance." To the same effect is *Allison v. Thomas, supra,* where it is said: "It has been uniformly held that a conveyance of the right, title, and interest of the grantor vests in the purchaser only what the grantor himself could claim, and the covenants in such deed, if there were any, were limited to the estate described." *Coe v. Persons Unknown,* 43 Me., 432; *Blanchard v. Brooks, supra; Brown v. Jackson,* 3 Wheat., 449; *Adams v. Cuddy,* 13 Pick., 460; 25 Am. Dec., 330; *Allen v. Holton, supra; Sweet v. Brown, supra; Pike v. Galvin,* 29 Me., 183.

The jury, in passing upon the first and second issues, as to the fraud, have virtually found as a fact that the parties intended that (451) the "right, title, and interest" should pass, and it would be strange to hold, in opposition to that verdict, that the plaintiff has acquired a greater interest than the one which the parties intended should be conveyed by the deed, the latter clearly being the only interest protected by the covenant. We have shown that the legal construction accords with the actual intention as found by the jury.

But we are not deciding as to the scope of any covenant of warranty other than the particular one in the Barringer deed, and now under construction. Whether the cases we have cited were correctly decided it is not necessary for us to say. They were cited as showing how very far the courts have gone in the direction of restricting a warranty to the estate granted by the deed. We are simply confining ourselves to the question before us and the language of the deeds. The warranty here is limited by its very terms to the estate granted, as the draftsman was careful in writing the covenant to restrict its operation "to the said interest granted," which means, of course, theretofore granted in the deed.

The other exceptions and positions need not be specially considered, as our ruling disposes of them all. We may properly add that the questions were ably and learnedly presented by both sides.

The case was correctly tried, and the exceptions are overruled.

No error.

Cited: Webb v. Rosemond, 172 N.C. 850 (1c); *Olds v. Cedar Works,* 173 N.C. 165 (2d, 3d); *Morton v. Lumber Co.,* 178 N.C. 167 (2c, 3c); *Ingram v. Power Co.,* 181 N.C. 361 (1c); *Kannan v. Assad,* 182 N.C. 78 (1c); *Cook v. Sink,* 190 N.C. 626 (2p, 3p); *Eller v. Greensboro,* 190 N.C. 721 (1c); *Shipp v. Stage Lines,* 192 N.C. 478 (1c); *Mfg. Co. v. Hodgins,* 192 N.C. 580 (1c); *In re Will of Efird,* 195 N.C. 84 (1c); *Turpin v. Jackson County,* 225 N.C. 391 (2cc, 3cc).

B. F. KEITH ET AL. v. N. H. LOCKHART ET AL., COMMISSIONERS OF PENDER COUNTY.

(Filed 26 April, 1916.)

1. Stock Law — Counties — Fences — Necessary Expense—Constitutional Law.

The building of a county fence by a county having the free-range law, between it and an adjoining county having the stock law, is not a neces-

sary expense within the meaning of Art. VII, sec. 7, of the Constitution, prohibiting counties, towns, etc., from "contracting debts, etc., and levying taxes except for its necessary expenses," etc.

2. Statutes—Pari Materia—Stock Law.

Statutes passed at the same session of the Legislature, or one at a later session thereof, upon the same subject-matter, being *in pari materia*, should be construed together as the same law; and where by special enactment a county is authorized to submit to the voters thereof the proposition of continuing the stock law in effect, and by a later statute makes provision for the building of a county-line fence between it and an adjoining county having the stock law in effect, and the later act expressly refers to the former one and provides for the levy of a special tax for the purpose, it is *Held*, that the two acts are *in pari materia*, and should be construed together as a whole.

3. Elections—Related Propositions—One Ballot—Statutes—Stock Law—Elections.

Where a legislative enactment authorizes a county to submit to its voters the question of continuing the stock law therein, except as to certain stated and defined portions, and should its discontinuance be voted favorably upon the county should maintain a line fence between it and adjoining counties having the no-fence law, and levy a special tax for the purpose, it is *Held*, that the several propositions are so related as to authorize the Legislature to have them submitted upon the single ballot of "for" or "against" the stock law; and those voting against the stock law will be considered as voting in favor of building and maintaining the fence and issuing a special tax for that purpose.

4. Taxation—Stock Law—Reserved Localities—Constitutional Law.

Where under legislative authority a county submits to its voters the question, by ballot, of continuing the stock law therein, reserving certain defined localities, and in event the question of its continuance should be negatived the county should maintain a line fence between it and an adjoining county having the stock law, and levy a special tax for that purpose, but with the proviso that the tax shall not be levied on the property of natural persons in the localities reserved: *Held*, the proviso violates the mandate of our Constitution, Art. VII, sec. 9, "That all taxes levied by any county, etc., shall be uniform and *ad valorem* upon all property except property exempt by the Constitution."

5. Constitutional Law—Statutes—Invalid in Part—Taxation—Stock Law—Counties.

Where under authority of the statute a county has voted to discontinue the stock law, and to maintain, by special taxation, a line fence between it and a county having the stock law, but with provision that the property in the reserved territory should not be taxed for the maintenance of the county fence, the courts may not decree the proviso invalid, and make effective the levy of the special tax, for such would impose the tax upon the property in the reserved locality, contrary to the intent of the statute; and to divide the county into two districts, stock-law and free-range territory, would impose a tax upon localities contrary to the intent of the

statute; and the statute, so far as it provides for the special tax, will be declared unconstitutional. Constitution, Art. VII, sec. 9.

6. Same—Several Parts—Vote of the People.

Where a county, under legislative authority, has voted to repeal an existing stock law and establish a free-range territory, but upon condition that a fence be maintained between it and an adjoining county having a stock law, to be provided for by an unconstitutional special tax (Constitution, Art. VII, sec. 7), or from its public general funds, and it appears that the moneys in its treasury were for other special purposes, and that the general tax for county revenue had already been levied to the constitutional limit, it is *Held*, the valid portions of the law are distinct and severable from the invalid portions, and the vote to establish the free-range policy will be declared valid, and to be put into effect whenever by appropriate and valid legislation the means are provided for building the fence, requiring another vote of the people if they are to be raised by a special tax.

ALLEN, J., dissenting.

(453) CIVIL ACTION, heard on return to preliminary restraining order before *Stacy, J.*, at March Term, 1916, of PENDER.

The action was instituted by plaintiffs, citizens and taxpayers of said county, to restrain the board of commissioners from borrowing money to build a public fence around certain portions of Pender County abutting upon other counties, where the stock or no-fence law prevailed.

On the hearing it was, among other things, properly made to appear that prior to 1915 the no-fence law prevailed in the county of Pender by legislative enactment, and in said year the Legislature passed two statutes designed and intended to submit the question of its continuance to the voters of the county, excepting from the operations of these statutes certain specified sections of the county, to wit, those townships and localities where the stock law had been established prior to 1912, such localities including Rocky Point Township and a taxing district of 2 miles square at or near the center of the county, including Burgaw, the county site, and perhaps one other. The statutes referred to, being chapters 116 and 505 of Public-Local Laws, 1915, are as follows:

"That it shall be the duty of the board of county commissioners of Pender County to call an election and submit questions of stock law to the qualified voters of Pender County on Tuesday after the first Monday in November, 1915, and if at such election a majority of the votes cast be in favor of stock law, then the provisions of chapter 35, Revisal 1905 of North Carolina, relating to the stock law, shall be in force over the whole of Pender County from and after the first day of March, 1916; but if at such election a majority of the votes cast shall be

against stock law, then the provisions of section 1660 of chapter 35 of the Revisal of 1905, and other sections in said chapter, relating to the fence law, shall be in full force and effect in said county from and after 1 March, 1916: *Provided further,* that this act shall not apply to any district or territory in said county under the stock law prior to 1 January, 1912: *Provided further,* that if a majority of the votes cast in said election be against stock law, then in that event, and before the provisions of this act shall become operative, the board of county commissioners of Pender County shall, at the expense of said county, erect and maintain a sufficient and substantial fence along the county line of said county where stock law in the counties adjoining obtains."

And chapter 505: "That in the event a majority of the votes (454) cast at the election to be held in November, 1915, on the question of 'stock law' or 'no stock law' be against stock law, then the commissioners of Pender County are authorized and directed to levy a special tax on all taxable property, not exceeding 25 cents on the $100 valuation of property and a tax not more than 75 cents on each poll, for the purpose of erecting a sufficient fence between Pender and all stock-law counties: *Provided,* that the provisions of this act shall not apply to the real or personal property of any natural person within the boundary of the stock-law district of Rocky Point. That the county commissioners of Pender County be further empowered and directed to use any surplus funds, now or which may hereafter be in the treasury, for the purpose of building the said fence, the same to be replaced out of the funds raised for the special tax provided for in this act."

In further connection with his rulings, his Honor found relevant facts as follows:

"That an election was duly held as provided by chapter 116, Public-Local Laws 1915, and a majority of the qualified voters of Pender County voted at said election 'against stock law.'

"That at the present time there are no surplus funds in the hands of the sheriff and treasurer of Pender County available for the purpose of building a fence as so authorized to be used by chapter 505, Public-Local Laws 1915.

"That the commissioners of Pender County have levied no tax as provided by chapter 505, Public-Local Laws 1915, and that they have already made levies for general State and county purposes up to the constitutional limit of 66⅔ cents on the $100 valuation of property and $2 on each poll.

"That prior to 1 January, 1912, there was a stock-law district in Rocky Point Township, which borders on the line of New Hanover County, where stock law obtains, and a stock-law district in Burgaw Township in said county, and that the fences around said district have

been allowed to go down, and that at the present time stock law is in force over all of Pender County."

And being of opinion, first, that the building of the fence was a condition precedent to the operation of the acts; second, that same could not be regarded as a necessary county expense; third, that the two acts were *in pari materia* and, under the same, the election held and carried "against stock law" was tantamount to a vote authorizing the special tax contemplated in chapter 505, *supra,* he entered judgment as follows:

"It is now, therefore, considered, adjudged and decreed by the court, that chapter 505, Public-Local Laws 1915, is valid and constitu-
(455) tional, except that portion of said chapter which contains the proviso as follows: *'Provided,* that the provisions of this act shall not apply to the real or personal property of any natural person within the boundary of the stock-law district of Rocky Point Township,' which is hereby declared unconstitutional and void, and is stricken from said act.

"It is further ordered and adjudged that the commissioners of Pender County have no authority to pledge the faith and credit of the county for the purpose of building said fence, and that the said commissioners be and they are hereby restrained and enjoined from borrowing money or pledging the faith and credit of the county for the purpose of building the fence provided for under chapter 116, Public-Local Laws 1915, until sufficient available surplus funds shall come into the hands of the treasurer of Pender County, or until the taxes authorized by chapter 505, Public-Local Laws 1915, can be levied and collected.

"It is further ordered that the plaintiffs recover of the defendants their costs in this action incurred, to be taxed by the clerk of this court."

Thereupon plaintiffs except and appeal, assigning error in terms as follows:

"The plaintiffs except to so much of the foregoing judgment as declares and holds that chapters 116 and 505, Public-Local Laws 1915, are companion acts *in pari materia,* and that the election held under chapter 116 is tantamount and equivalent to a ratification of chapter 505, and to so much of said judgment as declares and holds that chapter 505, Public-Local Laws 1915, is valid and constitutional."

And defendants except and assign errors as follows:

"The defendants except to so much of said judgment and findings of fact as hold that the building of said fence is a condition precedent to the said act becoming operative; and also except to the finding of fact that there is no surplus fund in Pender County as contemplated in said act; and also except to so much of said judgment as holds that the

commissioners of Pender County have no authority to pledge the faith and credit of the county for the purpose of building said fence; and the defendants also except to so much of said judgment as restrains them from borrowing money or pledging the faith and credit of the county to build said fence, and to so much of said judgment as taxes them with the costs."

C. D. Weeks and C. E. McCullen for plaintiff.

Duffy & Day, John D. Kerr, A. G Ricaud, H. L. Stevens, J. J. Best, and J. H. Burnett for defendant.

HOKE, J., after stating the case: The Court is of opinion that his Honor correctly ruled that a county fence of the kind involved in the appeal is not a "necessary expense" within the meaning of (456) Article VII, sec. 7, of the Constitution, prohibiting counties, towns, etc., from contracting debts, etc., and levying taxes "except for its necessary expenses." While this term may not be given a fixed or arbitrary meaning, *Fawcett v. Mount Airy,* 134 N. C., 125, it more especially refers to the ordinary and usual expenditures reasonably required to enable a county to properly perform its duties as part of the State Government. Speaking to the subject in *Jones v. Comrs.,* 137 N. C., pp. 579-599, the Court said: "The term may be said to involve and include the support of the aged and infirm, the laying out and repair of public highways, the construction of bridges, the maintenance of public peace and the administration of public justice, expenses to enable the county to carry on the work for which it was organized and given a portion of the State's sovereignty." This being its general meaning, the term, "necessary expense," should not be extended to include an indebtedness for a line fence around a part of a county which may, at times, require an extended outlay and which may or may not be desirable in more especial reference to the interest of private ownership in particular localities.

We concur, also, in his Honor's view, that the two statutes, chapters 116 and 505, Public-Local Laws 1915, passed at the same session and being *in pari materia,* should be construed together as one and the same law. This is not only true as a general principle of statutory construction applicable to statutes referring to the same subject, and usually whether passed at the same session or not, *Cecil v. High Point,* 165 N. C., 431; *Greene v. Owen,* 125 N. C., 219, and *Wilson v. Jordan,* 124 N. C., 683; but the later statute, chapter 505, in express terms, refers to and makes itself a part of the former.

Considering, then, the principal features of this legislation as a whole, and dependent on approval of a popular vote, a method estab-

lished and allowed in matters relating to municipal corporations, Cooley on Court Limitations, p. 138, we have the statute providing:

1. That no stock or free-range law shall prevail in Pender County except as to those portions of the county where the stock law prevailed prior to 1 January, 1912.

2. That the act should not become operative till a county-line fence should be constructed in those parts of the county line adjacent to stock-law territory in other counties.

3. That the commissioners, on a majority vote for "no-stock law," could levy a special tax to maintain the fence with certain restrictive limitations.

And we see no reason why, as designed by this last section, if it had been otherwise valid, a majority vote for "no-stock law" should (457) not be construed and considered as an adequate and sufficient expression of approval by the voters, authorizing the commissioners to lay a tax for the specific purpose. We have held that the combining of two related propositions and taking the sense of the voters thereon by a single ballot is, as a general rule, a question for legislative determination, *Winston v. Bank,* 158 N. C., 512; *Briggs v. Raleigh,* 166 N. C., 149; and there is nothing here to show that there has been an improper exercise of the power. Doubtless, if two unrelated propositions were submitted on a single ballot, and in such a manner that the one was so clearly burdensome and coercive as to amount to a suppression of the voters' will upon the other, the proposition might become one for judicial scrutiny and control; but in the present instance the two questions are directly related, and the proper and special tax for the county-line fence is an undertaking desirable not only to protect the stock-law territory of adjacent counties, but to restrain the stock of free-range territory in Pender County from straying across the county line, where they are liable to be impounded.

While the voters, therefore, may be held to have approved the measure, the statute, to which he has assented, in the feature providing for a tax levy cannot be enforced by reason of the proviso therein that the tax shall not be levied on the property of *natural* persons in Rocky Point Township, thus clearly violating our constitutional provision, Article VII, sec. 9: "That all taxes levied by any county, city, town, or township shall be uniform and *ad valorem* upon all property in the same, except property exempt by the Constitution."

Speaking to this question in *Kyle v. Mayor, etc., of Fayetteville,* 75 N. C., at page 447, *Bynum, J.,* said: "It is the provision and purpose of the Constitution that thereafter there should be no discrimination in taxation in favor of any class, person, or interest, but that everything, real or personal, possessing value as property and the subject of owner-

ship, shall be taxed equally and by uniform rule," a statement fully approved in *Puitt v. Comrs.*, 94 N. C., 709, and many other cases. "A law, therefore, cannot exempt the property of individuals of a county, township, etc., while imposing a tax on property of same kind belonging to corporations." And the statute authorizing such a tax cannot be enforced. It is insisted for defendant that only the proviso being unconstitutional, this can be eliminated and the statute authorizing a special tax upheld. It is the recognized principle that "Where a part of the statute is unconstitutional, but the remainder is valid, the parts will be separated, if possible, and that which is constitutional will be sustained."

In Black on Constitutional Law the rule is said to be: "That if the invalid portions can be separated from the rest, and if, after their excision, there remains a complete, intelligible, and valid statute (458) capable of being executed, and conforming to the general purpose and intent of the Legislature as shown in the act, the same will not be adjudged unconstitutional *in toto,* but sustained to that extent."

The position, however, is not allowed to prevail when the parts of the statute are so connected and dependent the one upon the other that to eliminate one will work substantial change to the portion which remains. Thus, in Black's work, the author further says, page 63: "And if the unconstitutional clause cannot be rejected without causing the statute to enact what the Legislature did not intend, the whole statute must fall."

Speaking to the same subject in the first of the *Employers' Liability Cases,* 207 U. S., pp. 463-501, the present *Chief Justice White* said: "Equally clear is it, generally speaking, that when a statute contains provisions which are constitutional and others which are not, effect must be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that what is indivisible may be divided. Moreover, even in a case where legal provisions may be severed in order to save, the rule applies only when it is plain that the Legislature would have enacted the legislation with the unconstitutional provisions eliminated." Citing *Illinois Central R. R. v. McKenonill,* 203 U. S., 514.

The doctrine so stated has been applied in this State in numerous cases, *Greene v. Owen,* 125 N. C., 212; *Riggsbee v. Durham,* 94 N. C., 800, and is not infrequently extended to provisos which are unconstitutional; but, recurring to the principle and the limitations upon it, the position can never include a case such as this, where "to strike out the offending proviso would result in enlarging the effect and operation

of the body of the law." This position is very well stated in 1 Lewis Sutherland Statutory Construction (2 Ed.), sec. 306, as follows:

"If by striking out a void exception, proviso, or other restrictive clause, the remainder, by reason of its generality, will have a broader scope as to subject or territory, its operation is not in accord with the legislative intent, and the whole would be affected and made void by the invalidity of such part." To strike out the proviso here would be to subject the property of the individual owners of property in Rocky Point Township to the tax, and thus would be to read into the body of the law what the Legislature had not put there and what they did not intend.

It is suggested that all taxation on property in Rocky Point Township might be eliminated as unconstitutional, on the ground that the effect of the legislation we are considering is to divide Pender
(459) County into two districts, the stock law and free-range territory, and to tax Rocky Point, which had to build and maintain its own fence, in order to construct a fence for the protection of the no-range territory, would be a violation of right, in that it taxed one district for the exclusive benefit of another. This, too, is a recognized principle, that, under ordinary conditions, the property of one district may not be taxed when it clearly appears that such tax is for the exclusive benefit of another. *Burrett v. Mayor,* 12 Cal., 76; *Wells v. City of Weston,* 22 Mo., 384; *Hutchinson v. Land Co.,* 57 Ark., 554. But to withdraw the property of Rocky Point Township from the effect of the act on any such principle would require the application of a like rule as to the Burgaw taxing district, which the Legislature clearly intended to be taxed, and would thus substantially alter the law as expressed and intended by the lawmaking power, and which the voters had approved. While we must hold that the unconstitutional proviso necessarily has the effect of destroying the entire portion of the statute relevant to the special tax, including the *express* legislative authority to apply any surplus money in the county treasury to building the fence, *Harper v. Comrs.,* 133 N. C., 106, it does not follow that the entire vote on the free-range policy is to be ignored.

The statute as an entirety contains, as stated, the three propositions:

1. That on approval of the popular vote, free-range law shall prevail in all that portion of Pender where the stock law did not exist prior to January, 1912.

2. That the act should not go into effect till the county-line fence was built.

3. That a special tax should be laid to raise money for the fence, etc.

And under the principle, heretofore stated, that the valid portions of the law shall be sustained which are distinct and severable, we think the

vote as to the establishment of the free-range policy should be upheld, to be put in effect whenever by appropriate and valid legislation the means are provided for building the fence, *Moran v. Comrs.*, 168 N. C., 289; requiring another vote of the people, however, if the means are to be raised by a special tax.

It may be that the building of the fence, having been sanctioned by the Legislature, has so far become a valid county charge that if at any time there are surplus funds in the county treasury arising from general taxation, and not required for current expenses of the county, the commissioners would have the power to build the fence from such funds, *Comrs. v. McDonald*, 148 N. C., 125; *Jackson v. Comrs, ante*, 379; but no such question is presented here, the facts showing that the only moneys now in the treasury are those arising from taxation for special purposes and which may not be lawfully used for any other, *R. R. v. Comrs.*, 148 N. C., 221; and the general tax for (460) county revenue has already been levied to the constitutional limit, and no funds, therefore, are presently available for the purposes of the fence.

Having held that the fence in question is not a necessary county expense, and that the special tax provided to build it may not be levied because its provisions are in violation of Article VII, sec. 7, of the Constitution, prohibiting municipalities from contracting debts, etc., or levying taxes except for necessary expenses unless approved by popular vote, the judgment below restraining the borrowing of money for the contemplated purpose is so far modified as to strike therefrom the words "until the taxes authorized by chapter 505, Public-Local Laws 1915, can be levied and collected," and, so modified, same is affirmed, the result being that

On appeal of plaintiff, judgment modified and affirmed.

On appeal of defendant, judgment affirmed.

ALLEN, J., dissenting: I understand the following principles to be recognized and approved in the opinion of the Court, to which I agree:

1. That the building of a fence for the purpose of carrying into effect the statutes referred to in the opinion is not a necessary expense.

2. That under the legislative acts it is necessary that a fence be built before the free range is operative in Pender County.

3. That a vote for free range necessarily included a vote for the tax prescribed in the statute.

4. That the proviso in the statute relating to Rocky Point stock-law district is unconstitutional and void.

5. That the effect of voting for the free range was to divide the county into two districts, in one of which were the stock-law territories

in existence prior to 1912, and that the other was the free-range district.

6. That the property in the districts left under the stock law after the vote cannot be taxed for the purpose of building the fence around the free-range district, because this would destroy the principle of uniformity.

7. That a part of a statute may be constitutional and a part unconstitutional, and that the constitutional part may be enforced.

I dissent from that part of the opinion holding that the tax provided for by the statute cannot be levied on the property in the free-range district for the purpose of building the fence around the free-range district without another vote of the people.

The question has already been submitted to the people and they have already voted for free range and for the tax; and striking from
(461) the tax list the property left in the stock-law district does not increase the taxes upon those left in the free-range district, because the rate of taxation for which they have voted is prescribed in the act.

If the principle is recognized that the property in the stock-law district cannot be taxed for the purpose of building the fence, and the question was again submitted to the people, they would be called upon to vote on the same proposition which they have already determined.

In other words, the people in the free-range part of the county have voted for free range and that a fence shall be built and for a specific tax, and if it is held that the tax cannot be collected in the territory left under the stock law and can be collected in the district for which free range has been voted, the voters in the free-range district get what they voted for, and they are not subjected to the payment of any more taxes than they would have to pay if those in the stock-law territory also paid the tax.

Cited: Faison v. Comrs., 171 N.C. 414, 415 (1c); *Dickson v. Perkins*, 172 N.C. 361 (2c); *Moose v. Comrs.*, 172 N.C. 462 (5c); *Worley v. Comrs.*, 172 N.C. 817 (2c); *Archer v. Joyner*, 173 N.C. 77 (1c); *Comrs. v. Spitzer*, 173 N.C. 148 (1d); *Claywell v. Comrs.*, 173 N.C. 660 (5c); *Reede v. Lockhart*, 173 N.C. 676 (1c, 3c); *Comrs. v. State Treasurer*, 174 N.C. 152 (4j); *Wood v. Staton*, 174 N.C. 250 (2c); *Comrs. v. Boring*, 175 N.C. 109 (4c); *Hill v. Lenoir County*, 176 N.C. 583 (3d); *Road Com. v. Comrs.*, 178 N.C. 64 (2c); *Parker v. Comrs.*, 178 N.C. 96 (4j); *Hamlin v. Carlson*, 178 N.C. 433 (2c); *Allen v. Reidsville*, 178 N.C. 523 (3c); *Riddle v. Cumberland*, 180 N.C. 329 (3cc); *S. v. Barksdale*, 181 N.C. 625 (2c); *Paschal v. Lockhart*, 183 N.C. 133 (3d); *Minton v. Early*, 183 N.C. 202 (2p); *Roebuck v. Trustees*, 184 N.C. 146

(3c); *Coble v. Comrs.*, 184 N.C. 355 (4j); *Morris v. Trustees*, 184 N.C. 636 (3c); *Armstrong v. Comrs.*, 185 N.C. 409 (1p); *Ketchie v. Hedrick*, 186 N.C. 394 (1p); *Lazenby v. Comrs.*, 186 N.C. 550 (3c); *Bank v. Lacy*, 188 N.C. 29 (6c); *Storm v. Wrightsville Beach*, 189 N.C. 681 (1p); *Henderson v. Wilmington*, 191 N.C. 277, 278, 282 (1p); *Henderson v. Wilmington*, 191 N.C. 282 (1j); *Ellis v. Greene*, 191 N.C. 765 (4c); *S. v. Barkley*, 192 N.C. 187 (6c); *Forsyth County v. Joyce*, 204 N.C. 739 (4c); *Atkins v. Durham*, 210 N.C. 301 (1p); *Fletcher v. Comrs. of Buncombe*, 218 N.C. 13 (4c); *Cox v. Brown*, 218 N.C. 355 (2c); *McGuinn v. High Point*, 219 N.C. 88 (2c); *Banks v. Raleigh*, 220 N.C. 37 (6c).

WILL WOOTEN v. CHARLES E. HOLLEMAN AND JAMES W. DUNNEGAN.

(Filed 12 April, 1916.)

1. Master and Servant—Safe Place to Work—Duty of Master—Rule of the Prudent Man.

The master is not held to the liability of an insurer or guarantor of his servant's safety under the rule that it is his duty to furnish the servant a safe place to do the work required of him, but only to exercise ordinary care to provide a place where the servant can do the work with reasonable safety.

2. Same—Trials—Instructions.

A requested instruction, in an action for damages for failure of the defendant to furnish his servant a safe place to work, alleged to have resulted in the injury complained of, that leaves out of consideration the negligence of the defendant under the rule of the prudent man, and makes his liability that of an insurer, is properly refused.

3. Same—Concurrent Negligence—Independent Contractors.

The rule holding the master liable in damages to his servant when the negligence of both concur in inflicting the injury on the latter complained of, depends for its application upon the fact of the master's negligence, either directly or through his subcontractor, and a requested prayer for instruction tendered by the plaintiff which precludes this inquiry upon the evidence is properly refused.

4. Appeal and Error—Trials—Requested Instructions—Issues.

It is not erroneous for the trial judge to refuse special requests for instruction not addressed to the issues.

APPEAL by plaintiff from *Cline, J.*, at September Term, 1915, (462) of FORSYTH.

Civil action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant.

The defendant James W. Dunnegan, a building contractor, was employed by his codefendant, Charles E. Holleman, to build a house for him, which was to be a turn-key job. In order to do a part of the work it became necessary to erect scaffolding on one side of the house. Dunnegan employed plaintiff as one of his workmen and instructed him and M. L. Miller, another of his employees, to build the scaffold, and in doing so they failed to drive enough nails in the purlock by which the scaffold or framework was fastened to the window-jamb of the house, the other end being nailed to a post. They put but one nail in the purlock, which was pulled out by the weight, and this broke the scaffold, which fell at one end, where the plaintiff was working, and caused him to fall to the ground, thereby receiving the injuries for which he brings this action.

The plaintiff offered testimony to the effect that he did not build the scaffold, nor did he help to do so, and that he did not drive the nail in the purlock, though he stated that he could have discovered that there was only one nail in it had he examined it, and there was nothing to prevent him from examining it, as it was not hid, and if he had seen it he would have driven more nails into the purlock; but he did not examine, and simply did what he was told to do.

There was evidence for the defendants which tended to show that plaintiff was specially instructed to nail the scaffold securely, with a plenty of nails, as there would be considerable weight on it when the shingles were handed up and the men were on it at their work, and it was testified, further, that defendant Dunnegan gave instructions as to how it should be placed and nailed. There was also evidence tending to show that, as between the two defendants and the plaintiff and his coemployees, James W. Dunnegan was an independent contractor.

Upon the issues submitted to the jury, the following verdict was rendered:

1. Was the plaintiff injured by the negligence of the defendant J. W. Dunnegan, as alleged in the complaint? Answer: "No."

2. Was the said J. W. Dunnegan an independent contractor? Answer: .....

3. Was the plaintiff injured by the negligence of the defendant Charles E. Holleman, as alleged in the complaint? Answer: "No."

4. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: .....

5. What damages, if any, is the plaintiff entitled to recover? Answer: .....

Judgment in favor of the defendant having been entered on (463) the verdict, the plaintiff appealed to this Court.

A. E. Holton and W. H. Beckerdite for plaintiff.

Jones & Clement, Hastings & Whicker, S. J. Bennett, and Louis M. Swink for defendants.

WALKER, J., after stating the case: The exceptions in this case were taken to the refusal of the court to give two requests for instructions, and to portions of the charge. The instructions asked by the plaintiff are too narrow, as they omit the important element as to whether the failure of the defendants to furnish a safe place in which the plaintiff could perform his work was due to their negligence. The exceptions are predicated generally upon the assumption that the master must furnish a reasonably safe place to his servant for the doing of his work and reasonably safe appliances, in the sense that he is an insurer or guarantor of the servant's safety, whereas the law requires only that he should exercise proper care in the discharge of this duty to his servant. He cannot delegate this primary duty to another without being liable for his negilgence if injury results; but if this primary duty is assigned to another by him, and he still exercises due care and supervision in the performance of it, the law will not hold him responsible for any injurious result, the measure of his duty being the exercise of ordinary care in furnishing a place where his servant can work with reasonable safety.

It is true, as contended by the plaintiff, that where the negligence of the master and a fellow-servant concur in producing an injury to an employee, the latter, being himself free from blame, can recover damages for the injury from either or both; but this is because the master, as well as the fellow-servant, was negilgent; and if there was no negligence on the part of the master, although the fellow-servant was negligent, the concurrent elements of liability do not exist. There must be the coexistence of the negligence of the master and that of fellow-servant. Where this is the case the law will not undertake to apportion the negligence, but holds the master liable because he contributed to produce the injury by his failure to exercise due and proper care.

We said in *Marks v. Cotton Mills,* 135 N. C., at p. 290, it is the negligence of the employer in not providing for his employee a reasonably safe place in which to work that makes him liable for any resultant injury to his employee who is himself free from fault; and referring later to this rule, we said in the same case, at marg. p. 291: "The rule which calls for the care of the prudent man is in such cases the best and safest one for adoption. It is perfectly just to the employee and not

unfair to his employer, and is but the outgrowth of the elementary
(464) principle that the employee, with certain statutory exceptions, assumes the ordinary risks and perils of the service in which he is engaged, but not the risk of his employer's negligence. When any injury to him results from one of the ordinary risks or perils of the service, it is the misfortune of the employee, and he must bear the loss, it being *damnum absque injuria;* but the employer must take care that ordinary risks and perils of the employment are not increased by reason of any omission on his part to provide for the safety of his employees. To the extent that he fails in this plain duty he must answer in damages to his employee for any injuries the latter may sustain which are proximately caused by his negligence." We have approved that case and applied the same doctrine frequently since its decision. *Patterson v. Nichols,* 157 N. C., 407; *Pigford v. R. R.,* 160 N. C., 93; *West v. Tanning Co.,* 154 N. C., 48; *Tate v. Mirror Co.,* 165 N. C., 273; *Steele v. Grant,* 166 N. C., 635, and more recently in *Cochran v. Mills Co.,* 169 N. C., 57, where, quoting from *Steele v. Grant, supra,* we said: "The duty of the master to provide reasonably safe tools, machinery, and places to work does not go to the extent of a guarantee of safety to the employee, but does require that reasonable care and precaution be taken to secure safety, and this obligation, which is positive and primary, cannot be avoided by a delegation of it to others for its performance. The master's duty, though, is discharged if he does exercise reasonable care in furnishing suitable and adequate machinery and apparatus to the servant, with a reasonably safe place and structures in and about which to perform the work, and in keeping and maintaining them in such condition as to afford reasonable protection to the servant against injury," citing *R. R. v. Herbert,* 116 U. S., 642; *Gardner v. R. R.,* 150 U. S., 349; *R. R. v. Baugh,* 149 U. S., 368. A late decision upon the question is very applicable to the facts of this case. In *Gregory v. Oil Co.,* 169 N. C., 454, *Justice Hoke* says: "It is urged for the appellant that the duty of the master to provide his employee with a safe place to work is 'primary, absolute, and nondelegable,' and that for a failure in this respect the master was guilty of negligence, and, on the testimony, the jury could well find that there was concurrent negligence of the master and the employees who threw the bale on the platform. The position is sound in so far as it states the duty of the master to be primary and nondelegable; but it is not 'absolute' in the sense that the employer of labor is ever an insurer of the safety of his laborers. He is held to the exercise of proper care in providng a safe place to work, and this, as a general rule, is the measure of his obligation," citing *Ainsley v. Lumber Co.,* 165 N. C., 122; *West v. Tanning Co., supra.* In *Gregory v. Oil Co., supra,* it is further said that where there is joint or concurring negligence of

the master and a fellow-servant which produces the injury, the master is liable if the injured servant is free from fault; but in order to a proper application of the pinciple, the negligence of the em- (465) ployer must be first established. Both of the instructions requested by the plaintiff ignore this essential element of liability.

The most important of the facts to be found was the negligence of the defendants, and under neither of the defendants' prayers would that fact have been passed upon by the jury. The form of the two prayers for instructions is also objectionable, as they are not addressed to any specific issue. *Whitsell v. R. R.*, 120 N. C., 557; *Earnhardt v. Clement*, 137 N. C., 93; *Satterthwaite v. Goodyear, ibid.*, 302; *Lynch v. Veneer Co.*, 169 N. C., 173.

The case of *Gregory v. Oil Co., supra,* sufficiently answers all objections to the charge of the court.

The duty of constant supervision and the exercise of ordinary care by the defendants as a condition of immunity from liability on their part is a pervasive feature of the instructions which were given by the court to the jury, and they have found the essential facts against the plaintiff's contention. Not only did the presiding judge give prominence to the necessity of such care on the part of the employer as is required by applying the rule of the prudent man to the facts and circumstances in order to exonerate the master, but he kept it constantly before the jury as a fact to be found by them before there could be any liability of the defendants, and he gave the plaintiff, at the same time, the full benefit of the law as previously declared by this Court, following our decisions with painstaking care and close adherence.

It is not to be overlooked that there was evidence that plaintiff was associated with Miller in nailing the scaffold, and was himself responsible for the injury to himself as the result of his neglect to properly fasten the purlock to the jamb of the window, and, further, that he afterwards admitted that the injury was due to his own fault in thus failing to take proper precaution for his own safety. This, though it does not affect the legal aspect of the matter, may have had great weight with the jury.

We have carefully examined the case, and find no error in the record.

No error.

Cited: Cook v. Mfg. Co., 182 N.C. 209 (3c); *Johnson v. R. R.*, 191 N.C. 79 (3c).

(466)

JEFF P. ROBERTS ET AL. v. E. E. DALE.

(Filed 10 May, 1916.)

1. Deeds and Conveyances — Heirs — Division—Parties—Res Inter Alios Acta.

Where a wife is in possession of a tract of land after the death of her husband under a deed he had made to her, proceedings for a division of his lands among his heirs at law, to which she has not been made a party, are *res inter alios acta* as to her, and no title can be thereunder acquired as to her lands so held.

2. Same—Executors and Administrators—Sales.

Where the wife remains in possession of lands conveyed to her by her husband, after his death, living thereon with their son, who dies before his mother, the son acquired no title to such lands under a division of his father's lands among the heirs at law, in which his mother was not a party, and a sale thereof by his administrator to make assets to pay his debts is a nullity.

3. Deeds and Conveyances—Tenants in Common—Interest Conveyed.

A conveyance by a tenant in common of the entire tract of land so held can only operate as a conveyance of the interest therein of the tenant in common executing the conveyance.

4. Partition—Title—Evidence—Instructions—Directing Jury—Courts.

Where, upon issue as to plaintiff's title in partition proceedings the cause is transferred to the trial docket, and it appears on the trial that he and those under whom he claims have been in possession under a chain of title for sixty years preceding the institution of the action, and that the title is not affected by attempted proceedings for division among the heirs at law of the original owner or by an attempted sale to make assets by an administrator of one of them, an instruction is proper that if the jury find the facts to be as testified, to answer the issue "Yes," in plaintiff's favor.

APPEAL by defendant from *Shaw, J.*, at November Term, 1915, of CALDWELL.

Edmund Jones and Wakefield & Williams for plaintiffs.
W. C. Newland and Squires & Whisnant for defendant.

CLARK, C. J. This was a petition for partition which upon the plea of sole seizin was transferred to the civil-issue docket at term. At the close of the evidence the court refused the motion to nonsuit and charged the jury that there was but one issue, "Are the plaintiffs and defendant tenants in common of the land in controversy, as alleged in the petition?" and instructed them that the plaintiffs alleged that they

owned two-thirds of the land and the defendant one-third, and that if the jury found the facts to be as testified to by the wit- (467) nesses, to answer the issue "Yes." This presents the entire matter for our consideration.

Hosea Tilley executed a deed for this land to his wife, Nancy Tilley, 11 February, 1852, which was recorded 22 December, 1914, before the beginning of this action. It was in evidence that she was in possession of the land in controversy from the date of the deed to her from her husband till she conveyed the land to Sarah Roberts, 18 March, 1898. Sarah Roberts died in the fall of 1902, intestate, leaving her surviving Jeff P. Roberts and Vance Roberts and Margaret Walker. Jeff P. Roberts, one of the plaintiffs and an heir at law of said Roberts, went into possession of the land in the spring of 1903 and remained in open and continuous possession until the beginning of this action, 22 December, 1914. He and his sister, Mrs. Walker, are the plaintiffs. Vance Roberts, by deed of 25 November, 1911, conveyed his entire interest in said land to one Beall, in trust to secure the payment of a debt. The property was sold under said trust deed and was conveyed to the defendant Dale 6 October, 1913.

There is evidence of the division of the lands of Hosea Tilley by his five heirs at law 25 April, 1889, but at that time the title to this tract was in Nancy Tilley, and she was not a party to the division of Hosea Tilley's land in which this tract of land was allotted to Ed. Tilley. His mother, Nancy Tilley, was still living, and this proceeding among the heirs at law of Hosea Tilley was *res inter alios acta,* and in no wise affected the title to this land. Ed. Tilley was not in possession of the land, though he lived there, according to the evidence, with his mother. He was an unmarried man and died before his mother.

There was also evidence that W. J. Dula, as administrator of Ed. Tilley, filed a petition and caused this tract of land to be sold to make assets to pay the debts of Ed. Tilley, at which sale Vance Roberts bought. But this proceeding was a nullity as to these plaintiffs, for the reasons above given.

When Vance Roberts conveyed this tract of land he conveyed, and could convey, only what interest he had in the land, which was one-third. *Shannon v. Lamb,* 126 N. C., 46; *Roscoe v. Lumber Co.,* 124 N. C., 47; *Page v. Branch,* 97 N. C., 97; *Ward v. Farmer,* 92 N. C., 93; *Caldwell v. Neely,* 81 N. C., 114.

If the evidence is to be believed—and it is not contradicted—the plaintiffs and those under whom they claim were in possession of this tract for more than sixty years preceding the institution of this action. The above mentioned proceedings being void in law as to these plaintiffs, and properly so held by the court, there was no conflict of evidence,

and the court properly instructed the jury, if they believed the (468) evidence, to answer the issue "Yes." *Nelson v. Ins. Co.*, 120 N. C., 305; *Wool v. Bond*, 118 N. C., 1; *Chemical Co. v. Johnson*, 101 N. C., 223.

This is not a case where a party under a junior registered deed claims in preference to a prior unregistered deed from the same grantor; nor is it a case of a party claiming under possession with color of title. It is simply a case where, if the evidence is to be believed, the plaintiffs claim under a chain of title and possession for more than sixty years, and the defendant claims under a sale for partition of the land as the property of another and under a sale of the property to make assets by the administrator of the party to whom the land was allotted in said proceedings. There is no estoppel for Nancy Tilley was not a party to the partition by Hosea Tilley's heirs, nor were the plaintiffs, or those under whom they claim, parties to the proceeding to sell the land by the administrator of Ed. Tilley, to whom this tract was allotted in the partition of the lands of Hosea Tilley. The plaintiffs do not claim under Hosea Tilley's heirs, he having conveyed the land to Nancy Tilley by deed of 1852. They claim by virtue of continuous possession for sixty years under deed from him.

No error.

Cited: Bank v. Leverette, 187 N.C. 745 (p); *Stone v. Guion*, 222 N.C. 550 (4c).

MARY J. ALEXANDER v. MRS. J. R. JOHNSTON.

(Filed 10 May, 1916.)

1. Wills—Statutory Right.

The right to dispose of property by will being exclusively statutory, the heir may not be deprived of his inheritance if the provisions of the statute with regard to the exercise of this right are disregarded.

2. Same—Interpretation of Statutes.

In construing a will, the intent of the testator should be given controlling effect, the efficacy of the instrument as a will being dependent upon the legislative intent gathered from the language of the statute, construed from a consideration of the existing law and the evils to be remedied, so that the remedy may be applied.

3. Same—Holograph Wills.

The purpose of our statute authorizing holograph wills is to enable persons to make valid wills by executing the instrument in their own handwriting, their names appearing therein, when they cannot procure

the assistance of others or do not desire the intended disposition of their property to be known; and this without the formal attestation of witnesses.

4. Same—Identification.

The requirement that a holograph will, to be valid, must have been found among the valuable papers of the deceased or deposited with some person for safe keeping is to furnish evidence that the deceased attached importance to the paper as a testamentary disposition and lessen the opportunity for fraud; and that the writing should be that of the testator, with his name therein appearing is for the purpose of identity and to prevent the possibility of unauthorized alterations, and of furnishing evidence that the paper is a completed instrument.

5. Same—Separate Papers—Sealed Envelope—Indorsed Signature.

A holograph will may be valid if written on different papers and their connection established, if the name of the testator therein appears and the whole is in his handwriting; and where a paper-writing is found among the valuable papers of the deceased after his death, purporting to be a testamentary disposition of his property, though his name does not therein appear, but it is inclosed in a sealed envelope with the name of the deceased indorsed thereon and immediately thereafter the word "will," and all is shown to be in the handwriting of the deceased, it is held sufficient in this respect to establish the writing as his holograph will.

APPEAL by caveators from *Carter, J.*, at February Term, 1916, (469) of MECKLENBURG.

This is a caveat to two papers offered for probate as the will of Julia W. Johnston.

One of these papers is an envelope on which is written the words, "Julia W. Johnston Will," and the other is a paper found on the inside of the envelope, in the following words:

"LITTLE MILLS, RICHMOND COUNTY, March 31, 1911.

"My mind being as sound as usual, I herewith make my will.

"To my dear mother, if she survives me, I will my farm in Gaston County, that is, my part of my father's plantation.

"To my unmarried sisters, and to my little niece Margaret Barton Alexander, I leave the remainder of my property, to be equally divided."

The propounders offered evidence tending to prove that the words "Julia W. Johnston Will" indorsed on the envelope and the whole of the paper inclosed therein were in the handwriting of Julia W. Johnston, the testatrix; that the papers were found after the death of Julia W. Johnston among her valuable papers, and that she had stated prior to death that she had made her will, and told where it could be found, which is the place where it was found.

It was also in evidence that the envelope when found after death, with the paper inclosed therein, was lightly sealed.

The propounders contended that the envelope and the paper on the inside constituted the will of Julia W. Johnston and should be admitted to probate.

(470) The caveators contended that the statute as to holographic wills had not been complied with, in that the name of the testatrix had not been subscribed to or inserted in the will as required by the statute, and requested his Honor to so instruct the jury, which he refused to do, and the caveators excepted.

His Honor instructed the jury as follows:

"Gentlemen of the jury, if you believe the evidence, and it satisfies you by its greater weight, that the paper-writing introduced in evidence, and the envelope introduced with it, are both in the handwriting of Julia W. Johnston, deceased, and that they were intended to speak together as the last will and testament of said Julia W. Johnston, deceased; and if you are further satisfied, by the greater weight of the evidence, that the envelope and the paper were found among the valuable papers and effects of the said Julia W. Johnston, deceased, the envelope being at the time lightly sealed; and if you are further satisfied from the evidence that at the time of the making of said writing the said Julia W. Johnston was of the age of 21 years or more, and that she was of sound mind and memory, you will answer this issue 'Yes, and every part thereof.' If you are not so satisfied, gentlemen, you will answer it 'No.'"

The caveators excepted.

There was a verdict in favor of the propounders, and from the judgment rendered thereon the caveators appealed.

Pharr & Bell and Archibald G. Robertson for caveator.

Clarkson & Taliaferro for propounder.

ALLEN, J. The right to dispose of property by will is statutory (*Pullen v. Comrs.*, 66 N. C., 361), and can only be exercised by following the requirements of the statute. *In re Jenkins Will,* 157 N. C., 429.

These requirements, prescribed by the legislative department for the execution of a will, are essential, and cannot be disregarded. They are the measure of the exercise of the right, and the heir cannot be deprived of his inheritance except in the way pointed out.

In determining the construction of a will, the controlling idea is to discover and give effect to the intent of the testator, but when the question of its formal execution is at issue we look to the intent of the

Legislature (*In re Seamon,* 2 A. and E. Anno Cases, 726), and this intent must be gathered from the language, and from a consideration of the existing law, the evils intended to be remedied, and the remedy applied.

Blackstone says, page 14: "There are three points to be considered in the construction of all remedial statutes—the old law, the mischief, and the remedy; that is, how the common law stood at the (471) making of the act, what the mischief was for which the common law did not provide, and what remedy the Parliament hath provided to cure this mischief. And it is the business of the judge so to construe the act as to suppress the mischief and advance the remedy."

Our Court has also said, referring to the statute as to holographic wills: "The provisions of the statute are, of course, mandatory and not directory, and, therefore, there must be a strict compliance with them before there can be a valid execution and probate of a holographic script as a will; but this does not mean that the construction of the statute should be so rigid and binding as to defeat its clearly expressed purpose. It may be construed and enforced strictly, but at the same time reasonably." *In re Jenkins' Will,* 157 N. C., 435.

The purpose of the statute is to enable persons who cannot procure the assistance of others in the preparation of a will, or who are inclined to make known prior to death what disposition has been made of their property, to execute a valid will by a paper in their own handwriting, and without the formal attestation of witnesses, and the formalities as to execution are intended to effectuate this purpose and not to defeat it.

The paper must be found after death among the valuable papers of the deceased or deposited with some person for safe keeping. This is to furnish evidence that the deceased attached importance to the paper as a testamentary disposition and to lessen the opportunity for fraud or imposition. The paper must be in the handwriting of the deceased. This is to identify the testator, and to form the causal connection between the writer and the writing, and to prevent the possibility of change and alterations without the consent of the testator. The name of the testator must be subscribed to the paper or inserted in some part thereof, and this is also for identification of the testator, and to furnish evidence of the paper being a completed instrument.

All of these provisions of the statute have admittedly been followed in the present case, unless there has been a failure to subscribe or insert the name of the testator in the paper offered for probate.

Has there been such failure, and what is the meaning of the language to subscribe or insert the name of the testator?

The General Assembly is presumed to know of existing law and to adopt and enact statutes in conformity with it, and it is settled in this

State that a valid will may be executed on separate papers (*In re Swain's Will,* 162 N. C., 213), and that the name of the testator need not be subscribed; but that it is a sufficient signing if the name appears in any part of the will. *Boger v. Lumber Co.,* 165 N. C., 559.

The Court said in the first of these cases, quoting from *Chief Justice Gibson*: "It is a rudimental principle that a will may be made
(472) on distinct papers, as was held in *Earl of Essex's case,* cited in *Lee v. Libb,* 1 Show., 69. It is sufficient that they are connected by their internal sense, by coherence or adaptation of parts," and in the second, quoting from *Richards v. Lumber Co.,* 158 N. C., 56: "It is well settled in this State that when a signature is essential to the validity of an instrument it is not necessary that the signature appear at the end, unless the statute uses the word 'subscribe.' *Devereux v. McMahan,* 108 N. C., 134. This has always been ruled in this State in regard to wills, as to which the signature may appear anywhere."

Under these decisions, if there had been no indorsement on the envelope, and one paper had been found on the inside in the handwriting of the deceased, beginning, "My mind being as good as usual, I Julia W. Johnston, herewith make my will"; or if two papers had been found in the envelope, one in the form of the one found, which undertakes to dispose of property, and the other in the handwriting of the testator, saying, "I, Julia W. Johnston, do make the paper inclosed herewith as my will"; or if the paper found which disposes of property alone had been in the envelope, but the testator had written on the inside of the envelope, "I, Julia W. Johnston, make the inclosed paper my will": in either event the papers could be admitted to probate.

If so, why should probate be denied when words of similar import are used on the outside of the envelope?

The identity of the testator is established by the handwriting on the envelope and on the paper on the inside, and the physical connection by the indorsement and the paper inclosed and the sealing of the envelope.

In 1 Schouler on Wills, sec. 316, the author says, speaking of a will not in the handwriting of the testator and requiring attestation: "A valid signature may be made on a separate piece of paper which is stuck or fastened to the body of the will and contains nothing but the signature and attestation, provided it be shown that the execution was *bona fide* and regular in other respects and the paper duly fastened at or before the time of attestation."

We have found only one decided case directly in point, *Fosselman v. Elder,* 98 Pa., 159, which is approved in *In re Harrison,* 196 Pa., 576. In the *Fosselman case* the testatrix died leaving a will in due form, dated 1878, which was duly admitted to probate. Subsequently there was found among her valuable papers an envelope bearing the inscrip-

tion, in decedent's handwriting: "Dear Bella, this is for you to open," and inside was found a $2,000 note, and the following writing in testatrix's own hand:

LEWISTON, 21 October, 1879.

My wish is for you to draw this $2,000 for your own use should I die sudden. ELIZABETH FOSSELMAN.

The Court allowed the probate of the envelope as part of the (473) will, saying, in the opinion: "The only remaining question is whether the testatrix has sufficiently designated the plaintiff as the object of her bounty in the paper that is claimed to operate as a codicil to her will. The court below held that she had not, and accordingly entered judgment in favor of the defendant *non obstante veredicto.* In this we think there was error. It is true, the testamentary paper of 21 October, 1879, does not designate the plaintiff by name, and if we had no written evidence to show who was meant by the pronoun 'you,' the bequest of the note would be void for uncertainty; but it is a settled fact that the envelope is addressed to the plaintiff, and why should not that indorsement in the handwriting of the testatrix be taken as part of the testamentary disposition? It is well settled that a will may be written on several separate pieces of paper. It is not even essential to its validity that the different parts should be physically united; it is sufficient if they are connected by their internal sense or by a coherence and adaptation of parts. *Wikoff's Appeal,* 3 Harris, 281. . . .

"Without pursuing the subject further, we are of opinion that the inscription on the envelope should be read as the preface to and in connection with the paper inclosed therein, and that they together constitute a valid testamentary disposition of the accompanying note, operating as a codicil to the will of the testatrix."

The case of *Warwick v. Warwick* (Va.), 10 S. E., 843, relied on by the caveators, has facts something like those before us, but the opinion is based on a statute unlike ours, as is shown by the decision that the paper offered for probate was not signed, although it began, "I, Abram Warwick, declare this to be my last will and testament," which, as we have seen, is a signing under our statute.

The case of *Vogle v. Lekritter,* 139 N. Y., 223, also relied on, did not involve a holograph will, and the Court rejected an envelope as a part of a will because it was not intended as a testamentary disposition, but as a record of the official act of the notary who prepared the papers.

We have given the question involved careful consideration, and have reached the conclusion that the judgment ought not to be disturbed.

No error.

Cited: Hunt v. Eure, 188 N.C. 719 (2c); *In re Perry,* 193 N.C. 398 (d); *In re Will of Thompson,* 196 N.C. 274 (5c); *In re Will of Lowrance,* 199 N.C. 785 (3c, 4c); *In re Will of Rowland,* 202 N.C. 375 (3c, 4c); *In re Will of Wallace,* 227 N.C. 461 (3c, 4c); *Young v. Whitehall Co.,* 229 N.C. 367 (2c).

(474)

RING FURNITURE COMPANY v. P. M. BUSSELL ET AL.

(Filed 12 April, 1916.)

1. Partnership—Retiring Partner—Notice.

For a retiring member of a partnership to escape liability for the subsequent indebtedness of the firm continuing under the same name and doing the same kind of business, it is necessary for notice of his retirement to be expressly or impliedly given in some adequate way to those with whom the partnership had been dealing.

2. Principal and Agent—Traveling Salesman—Partnership—Retiring Partner—Scope of Agency—Secret Limitations.

The question as to whether the principal is impliedly bound with the knowledge of his agent depends upon the scope of the duties of the agent in respect to the particular transaction in which the agent acquired such knowledge, which is not affected by any secret and undisclosed limitations by the principal upon the power of the agent to so act; and where the traveling salesman of a concern is informed of the retirement of a member of a firm to which he had sold goods for his principal, and thereupon sells goods to the new firm, it becomes his duty to inform his principal of the change in the firm, and this knowledge will be imputed in his principal.

3. Same—Trials—Questions for Jury—Subagencies—Questions of Law.

Where a manufacturing concern contracts with another that the latter shall sell its products, upon a commission, through its traveling salesmen, and there is evidence that one of these salesmen had collected accounts and represented the manufacturing concern in extending credit, it is *Held,* that the question as to whether his knowledge would be imputed to his principal in the sale of its goods on credit to the continuing members of a partnership, so as to release the retiring partner from liability, should be submitted to the jury, notwithstanding there was also evidence that the principal alone passed upon such matters. As to whether the principal would be bound by the knowledge of the subagent as a matter of law, *quære.*

CIVIL ACTION, tried before *O. H. Allen, J.,* at September Term, 1915, of DURHAM.

Two actions were brought before a justice of the peace, one to recover a balance of $50 due for goods sold by plaintiff to the defendant

Southern Furniture Company on 19 August, 1913, and the other to recover $200, a balance due for goods sold by plaintiff to said company in November, 1913. The cases were consolidated in the Superior Court and tried together, defendant T. T. Frazier having appealed from the judgments of the justice to that court.

The jury returned the following verdict:

1. Was the partnership composed of T. T. Frazier and P. M. Bussell dissolved on or about 26 August, 1913? Answer: "Yes."

2. Was the plaintiff duly notified of such dissolution before (475) the purchase of the property in controversy? Answer: "No."

3. Is the defendant T. T. Frazier indebted to Ring Furniture Company, and, if so, in what amount? Answer: "Yes; $200, less credit of $50."

4. Did the plaintiff receive actual notice of the retirement of T. T. Frazier from the defendant partnership, and, if so, was such notice given prior to 16 December, 1913? Answer: "No."

5. Did the plaintiff accept one or all of the notes offered in evidence in payment of the $50 account? Answer: "No."

The defendant Frazier denied his liability to plaintiff as to the $50 account, upon the ground that he had been relieved and discharged by certain dealings and transactions between his codefendants and the plaintiff by which the latter agreed to receive a stipulated sum, less than the full amount of the account, in full payment and satisfaction of the same, plaintiff contending that the said sum and note were received with the express reservation of their right to sue the appellant, and that this was well understood at the time of the settlement. The Southern Furniture Company, in August, 1913, was the name of a partnership composed of defendant T. T. Frazier and P. M. Bussell, trading and doing business under that name. On 26 August, 1913, defendant T. T. Frazier retired from the firm and a new partnership was formed, composed of P. M. Bussell, J. L. Austin, and C. P. Watson, three of the original defendants in these suits, and they continued in the same kind of business as that which had theretofore been conducted by Frazier and Bussell, and under the same firm name. A. H. Holland was traveling salesman of the Forsyth Furniture Company, which sold goods for the plaintiff Ring Furniture Company, through the Forsyth Chair Company.

Mr. Fulp, secretary and treasurer of the plaintiff, testified: "Mr. Holland made the sales to the Southern Furniture Company for us."

Q. Mr. Fulp, did you employ a traveling salesman to represent your company? A. Our method of selling goods was through the sales department of the Forsyth Chair Company. We have a combination

whereby Forsyth Chair Company of Winston-Salem charges to the different factories a certain commission for selling goods.

Q. Did you furnish to the Forsyth Chair Company information as to your stock and price list? A. Do you mean the goods I manufacture and price list of these goods? If so, I will say yes. He has a set of photographs and price list. These photographs were made up by my company. They were photographs of our stock, showing style and cut of various articles of furniture that we manufacture and sell. The photographs and price list are designed for the use of salesmen in making sales for my company.

(476) Q. Did you have a salesman that had one of these photographs and price list representing your company in 1913? A. Yes; Mr. Holland for this immediate territory right here.

Q. He was for Durham territory? A. Yes.

Q. Did you ever come and make any sales in Durham? A. Yes; I have made a few sales in Durham; but I do not recall that I ever made any to the Southern Furniture Company myself. Mr. Holland, or whoever had this catalogue and price list of my company, was authorized to take orders for the company. He was a traveling salesman. I never had any conversation with T. T. Frazier and know nothing about him of my own knowledge. . . . The Forsyth Chair Company is a separate corporation from my concern. They employ the salesmen, pay them salaries and expenses, and our part of it is to pay into that office a certain commission on the goods sold by their salesmen and shipped by us. We do not pay the salesmen one cent. It is all paid by the Forsyth Chair Company. We have nothing whatever to do with the selection of the salesmen who represent my company. This man Holland was sent out by the Forsyth Chair Company, and I had no contract with him myself. I had a contract with the Forsyth Chair Company that their employee was to represent us on the road. I have a copy of their contract if you desire to see it. Mr. Holland has represented our company through the Forsyth Chair Company in this territory since the organization in 1910. I think 1910 was the first year we had a contract with the Forsyth Chair Company. The Forsyth Chair Company under the agreement had nothing whatever to do with the credit department of my company. It was Mr. Holland's duty to solicit business for us in the territory allotted to him by the Forsyth Chair Company, and for his services we paid the Forsyth Chair Company a certain percentage on the amount of goods shipped at the end of each month, and as far as our shipping all orders he took, we were not forced to do it, only such orders as we considered the financial standing of the party made satisfactory. All rejected orders had to be returned within a limited time, or they claimed commission on them.

We were not required to accept an order that was not sold on our regular price list or regular terms either. We had a right to reject such orders as that. Those orders go through the chair company office and are then forwarded to us, together with orders of the other salesmen. I pass on all credits at our factory myself. I passed on the credit of the Southern Furniture Company. (Order No. 1124 and Order No. 1311 shown to witness.) They are the original invoices. They purport to have been taken by Mr. Holland. They are my bills from the office. They were made from the order sent in by Mr. Holland. These orders covered the particular property in controversy. Mr. Holland has collected unpaid balances for us in a few in- (477) stances, but that is not a part of his duties."

A. H. Holland testified: Q. Were you representing the Ring Furniture Company through the Forsyth Chair Company? A. Yes, sir.

Q. Were you representing Forsyth Chair Company at the times these bills were contracted? A. I was representing the Ring Furniture Company through the Forsyth Chair Company. The Ring Furniture Company did not pay me a per cent direct. The contract was made between me and the Forsyth Chair Company. My duty with respect to Ring Furniture Company was to offer their goods for sale and sell them if I could. I sold other goods besides those of Ring Furniture Company. I guess at one time I had as many as twenty or more. I would pick up a side line. A man selling furniture tries to supply his customers with anything he wants. I would be called, strictly speaking, a commission salesman, as far as the Ring Furniture Company was concerned; but I would not as far as Forsyth Chair Company was concerned. One is direct and the other indirect. I had nothing to do with the credit department of the Ring Furniture Company. My duty consisted in soliciting and taking orders, and I sent them to Forsyth Chair Company and they sent them to the Ring Furniture Company. They had a right to send it or reject it. It was to my interest to take as many orders as possible. I do not make it a practice to investigate the credit of purchasers. I would not sell a man that I knew was not solvent. I do not make it a point to look up the credit. That is not my business. I am a traveling salesman. I was a traveling salesman for the Ring Furniture Company indirectly, not directly. I am not in the employ of them. I got a commission on things sold from the Ring Furniture Company. I solicited orders for them. I do not recall collecting any account for them. I may have done so at special request of Ring Furniture Company. I may have collected from the Chatham Furniture Company for the Forsyth Chair Company, but if I did for the Ring Furniture Company, it was by special request from them, and they would send me the bill to collect it. I do

not recall any special instance, and will not say that they did it. I say I would have done so, but do not recall any special instance. I suppose I took the orders of 19 August and 29 November. I sold to Southern Furniture Company two bills. I cannot tell whether these are the ones. I should say the first was sold somewhere about four weeks prior to 19 August. I sent orders to Forsyth Chair Company. In pursuance of the order, goods were delivered here in Durham. That is the stuff in controversy, I presume. . . . When I sold this last bill I had photographs of the different articles I was offering for sale. I had a price list and photographs. It is practically the same thing as (478) a catalogue. I cannot say whether Mr. Bussell told me Dr. Frazier was not in the business at the time I took the last orders. I came in possession of those facts some time, but I could not say whether it was prior or some time afterwards. I could not say when it was I learned this.

P. M. Bussell, witness for defendant, testified: "I am engaged in the furniture business and have been since 1912. Dr. T. T. Frazier and myself formed a partnership about March, 1912. We were engaged in the furniture business. The partnership began buying goods of the Ring Furniture Company in 1912. We ordered goods from the Ring Furniture Company in 1913. One order was for 19 August, 1913. These are the invoices for the goods purchased by the Southern Furniture Company from the Ring Furniture Company. (Invoices exhibited.). . . I gave these orders to Mr. Holland, and selected the style and grade of furniture wanted. He took the orders away with him. The furniture came in accordance with the terms of the orders from the Ring Furniture Company. Payments have been made on this account. The first payment was with a note and check, as well as I remember. . . . I gave Mr. Holland the order dated 29 November, possibly about the middle of November. The furniture was shipped later. The Ring Furniture Company sent me the furniture on that bill. I selected the stuff from Mr. Holland. I had bought furniture from Mr. Holland—from the Ring Furniture Company—on an average possibly of once a year. The partnership existing between Dr. Frazier and myself was dissolved on 26 August, 1913. I published notice of the dissolution in the *Durham Sun*. I told Mr. Holland that Dr. Frazier was out of the firm, but I didn't give him written notice. This was possibly the middle or latter part of September; I would say about 20 September, 1913. I told him also when I bought that car in November that you have reference to in this second deal. . . . I published notice in the *Durham Sun*. I did not mail a copy of it to any one. The only notice the Ring Furniture Company had of the dissolution of the partnership was what I told Mr. Holland. I do not

know whether any commercial agency actually got notice of the dissolution. Mr. Holland was representing several furniture companies. He represented a good many of them as salesman. The only way the Ring Furniture Company could get word about this dissolution was through Mr. Holland. He represented these furniture companies as commission salesman. He told me he worked for the Forsyth Chair Company. I talked with Mr. Holland in September, 1913. That was after the $50 account had been made and before it was due. I told him positively that I had bought Dr. Frazier's interest in the partnership. He went to dinner with me, and we discussed it all the way back. I did not buy anything from him on that trip. My sister (479) was with us going to dinner. I do not suppose any one else heard the conversation. We were on the street. I bought another bill of furniture from him in November. I told him then that Dr. Frazier was out of the partnership. I did not tell the Ring Furniture Company. I never sent any notice to the Ring Furniture Company direct. I have been seeing Mr. Holland here a good many times. He never made inquiry as to my financial rating. He always solicited my orders and sent them in. That was about all he did, so far as I know.

Q. Did he have anything to do with the taking of these notes? A. No; but he assured me they would be absolutely all right to take them when he sold me this second car. I hesitated buying a car, from the fact that I was afraid we would not be able to take care of it when it became due, and he assured me they would take our notes. I told him I was afraid they would want Dr. Frazier to indorse them, because we were going on our own feet, and he assured me they would take my notes as quick as they would Dr. Frazier. I do not know that I had any conversation with him prior to November, in the way of discussing notes.

Q. The Ring Furniture Company did not know Dr. Frazier was out of partnership, did they? A. Mr. Holland always told me if there was any time they did not want to renew the note or extend it, to take it up with him, and he would see that it was all right.

Q. Didn't he tell you he knew they would be accepted, because that was customary for these wholesale houses to extend credit in that way to these installment dealers? A. No; on the other hand, he told me that most of them would not do it. I do not know whether it is the custom or not with all of them.

There was other evidence in the case, but that which we have recited is sufficient for an understanding of the questions decided. The court instructed the jury to answer the second and fourth issues "No," and defendant excepted. As to the fifth issue, the court charged the jury that the defendant would not be relieved of liability for the $50

account "unless the notes were accepted in full settlement and discharge of the original account or unless they were satisfied from the evidence that the Ring Furniture Company took the notes in settlement of the account and with knowledge of Dr. Frazier's retirement from the Southern Furniture Company." Defendant excepted.

There was a judgment upon the verdict for the plaintiff, and an appeal by the defendant.

McLendon & Hedrick for plaintiff.

Bryant & Brogden for defendant Frazier.

(480) WALKER, J., after stating the case: It may be conceded that an outgoing member of a firm should take his name out with him, for if he leaves it behind he will be considered as still holding himself out as a partner, whatever may be his real relation to the firm, unless he gives notice of his withdrawal to those who dealt with the firm or were its customers while he was a partner. *Straus v. Sparrow*, 148 N. C., 309; George on Partnership, 261 and 407.

The question for our consideration is whether the notice to A. H. Holland, the traveling salesman, was sufficient in law to fix the plaintiff with notice of the retirement of the defendant T. T. Frazier from the firm of which he had been a member, and which was succeeded by the new firm, composed of different members, but which continued to conduct a like kind of business under the same name. This depends again upon whether it was within the scope of Holland's agency to receive the notice and his duty to communicate it to the plaintiff, either directly or indirectly through the Forsyth Furniture Company.

Mechem on Agency, sec. 721, lays down the following rule:

"The law imputes to the principal and charges him with all notice or knowledge relating to the subject-matter of the agency which the agent requires or obtains while acting as such agent and within the scope of his authority or which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it. *Provided, however,* that such notice or knowledge will not be imputed (1) where it is such as it is the agent's duty not to disclose, and (2) where the agent's relation to the subject-matter or his previous conduct render it certain that he will not disclose it, and (3) where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal."

This statement of the law was affirmed in *Jenkins v. Renfrow*, 151 N. C., 323.

It will be convenient to determine, in the beginning, whether Holland was such an agent, being what is known as a "commercial traveler" and taking orders for the sale of goods, without regard to his special relation to the Forsyth Chair Company and the plaintiff.

In *Cox v. Pearce,* 112 N. Y., 637 (*s. c.,* 3 L. R. A., 563), cited and approved by this Court in *Straus v. Sparrow, supra,* four propositions were decided:

1. The failure of an agent to communicate to his principal information acquired by him in the course and within the scope of his agency is a breach of duty to his principal; but as notice to the principal it has the same effect as to third persons as though his duty had been faithfully performed.

2. If a person gives notice of his withdrawal from a firm to an (481) agent with authority to receive orders for an article, when the latter seeks from him, as a supposed partner, an order from the firm for such article, it is of no consequence, so far as the effect of the notice is concerned, that on a subsequent sale to a new firm of the same name the agent had forgotten the notice.

3. Notice to a party, actual or constructive, in a particular transaction, of a fact which exempts another from liability in that transaction is notice in all subsequent transactions of the same character between the same parties.

4. Notice to a special representative for procuring orders for coal from a firm who acts exclusively in the interest of certain dealers, and who has previously procured orders from the firm, on soliciting another order, that one of the former members of the firm had withdrawn, constitutes notice to the dealers whom he represents.

The case of *Ach v. Barnes,* 53 S. W. (Ky.), 293, held that notice to plaintiff's traveling salesman (at the time he sold the goods) that defendant had withdrawn from a firm to which the salesman had sold the goods for the plaintiff was notice to the plaintiff, so as to relieve the defendant from liability for the price of the goods sold. The Court there said, at page 294: "When an ostensible partner retires from the firm, he must give notice of his retirement to those who have had dealings with the firm in order to avoid future responsibility, or must show actual knowledge on their part, or adequate means of knowledge that the firm no longer exists; but it is not important in what manner the notice is given. See *Milchum v. Bank,* 9 Dana, 166; *Gaar v. Huggins,* 12 Bush., 261; Pars. on Partn., p. 412, and Collyer Partn., p. 1059. And notice to the agent in reference to or in connection with any business in which the agent is engaged by authority of the principal, and where the information is so important a fact in the transaction as to make it the duty of the agent to communicate it to the principal, is,

in contemplation of law, notice to the principal, upon the theory that it is the agent's duty to communicate to his principal knowledge which he has respecting any business in which he is engaged for the principal; and the presumption is that he will perform his duty." And again: "We are of the opinion that if information of the dissolution of the partnership was actually communicated to the salesman of appellants at the time of or before the sale of the goods, it is, in contemplation of law, a sufficient notice thereof to appellants." See, also, *Straus v. Sparrow, supra; Jenkins v. Renfrow, supra,* and *Cowan v. Roberts,* 133 N. C., 629, where it was said: "Of course, if any salesman had been notified of the dissolution of the firm, and he had afterwards sold goods to Rob-
(482) erts, Redmond (the partner who had retired) would not have been liable."

The rule which imputes to the principal the knowledge possessed by the agent, and the extent of it, applies, as has been well said, only to cases where the knowledge is possessed by an agent within the scope of whose authority the subject-matter lies; in other words, the knowledge or notice must come to an agent who has authority to deal in reference to those matters which the knowledge or notice affects. The facts of which the agent had notice must be within the scope of the agency, so that it becomes his duty to act upon them or communicate them to his principal. As it is the rule that whether the principal is bound by contracts entered into by the agent depends upon the nature and extent of the agency, so does the effect upon the principal of notice to the agent depend upon the same conditions. Hence, in order to determine whether the knowledge of the agent should be imputed to the principal, it becomes of primary importance to ascertain the exact scope and extent of the agency. *Trentor v. Pothin,* 46 Minn., 298 (24 Am. St. Rep., 225), op. by *Mitchell, J.*

It has been held by this Court that whether one is entitled to represent another as his agent, and thus to bind the principal by his conduct, is to be determined not by the descriptive name employed, but by the nature of the business and the extent of the authority given and exercised, and that such agent is not any subordinate employee without discretion or power to act in the particular matter, but must be one regularly employed, having some charge or measure of control over the business intrusted to him, or of some part of it, and of sufficient character and rank to afford reasonable assurance that he will communicate the fact in question to his employer. *Whitehurst v. Kerr,* 153 N. C., 76, 80.

If an agent acquires knowledge of a fact which it is important that his principal should know in reference to a particular matter, and while engaged in the transaction to which the fact related, it would seem to be

his duty to make it known, so that the principal can act inteligently and advisedly in regard to it; for otherwise he might be seriously prejudiced by the agent's silence.

It would follow that if Holland was acting as salesman for the plaintiff when he sold the last bill of goods to the new firm, trading as Southern Furniture Company, he was under the duty to aprise it of what had been said to him by Bussell as to the withdrawal of defendant from the firm. We do not see why the fact that plaintiff had a rating book and passed upon all orders should alter the case. In the first place, this was not known to the Southern Furniture Company, and, for all that appeared to this firm at the time, Holland rated (483) the plaintiff's customers with whom he dealt, and he was, therefore, the one, as Bussell evidently thought, to be informed of the change in the firm, so that he might communicate the fact to his principal. If the plaintiff had a rating list and passed upon the orders, it does not appear to have done so in this particuluar instance, and was actually misled by the failure of Holland to perform his duty, showing by practical illustration the fairness and reasonableness of the rule.

The next question is whether Holland's special connection with the Forsyth Chair Company and his consequent relation to the plaintiff prevents the application of the usual rule to this case. We have already stated that, so far as appeared to the Southern Furniture Company, Holland represented the plaintiff, or, at least, there is evidence tending to show this as a fact. He had photographs of plaintiff's goods and its price lists, which was the same as a catalogue; and M. V. Fulp, plaintiff's secretary and treasurer, testified: "Mr. Holland, or whoever had this catalogue and price list of my company, was authorized to take orders for the company. He was a traveling salesman. . . . I had a contract with the Forsyth Chair Company that their employee was to represent us on the road." It is true, there is evidence which tends to show that Holland was employed by the chair company, but he also represented the plaintiff, according to some of the testimony. But suppose he was a subagent as to the plaintiff, or represented it, not directly, but through the chair company. Tiffany on Agency, p. 265, says: "If an agent has authority to employ a subagent, it seems that the same principles must apply as to the notice to be imputed to the principal in cases of agents appointed by him directly, and that notice to the subagent of any fact material to the business which he is authorized to transact is notice to the principal. This rule is frequently applied in cases of subagents appointed by insurance agents. Nor would it seem to be material, so long as the agent had authority to appoint the subagent, whether privity of contract existed between him and the principal. If the principal is bound by his act, he should also

be charged by his knowledge." The author refers in the text and note to *Hoover v. Wise,* 91 U. S., 208, as being supposed to establish a contrary doctrine; but that case is not like this one, and the opinion of the Court, even in that case, met with a strong dissent by three very able judges, *Justices Miller, Clifford, and Bradley,* the first of the three writing the dissenting opinion. The case, as a precedent, has also been doubted in other jurisdictions. The evidence in this case, though, presents a question very different from the one considered there.

The Court, in *Bates v. Am. Mortgage Co.,* 37 S. C., 88, referring to the general rule we have stated, says: "It is insisted that the doctrine
(484) does not apply when another or subagent is introduced; that notice to the agent, but not to the subagent, will be imputed to their principal. There seems to be no case in our Reports upon that precise point, but I confess that I am not able to perceive the principle on which the alleged distinction rests, if both the agent and subagent are, as here, engaged in the same business for the principal, although it may be on different parts of that business. Such seems to be the general rule. Where an agent has power to employ a subagent, the acts of the subagent, or notice given to him, in the transaction of the business, have the same effect as if done or received by the principal. *Sooy v. State,* 41 N. J. L., 394; Story Ag., secs. 452, 454. An attorney employed by an agent for his principal is the principal's attorney. *Porter v. Peckham,* 44 Cal., 204." The case of *Hoover v. Wise, supra,* is there mentioned with apparent disapproval, but held to be distinguishable, even as it was decided.

It appears that Holland, the traveling salesman, collected for the plaintiff, or at least there is some evidence from which a jury could draw that inference, and there also is evidence that he had other financial relations with plaintiff, as he seems to have been able to procure extensions and like favors for its customers; and this would bring the case directly within the principle of the decision in *Straus v. Sparrow, supra,* and *Jenkins v. Renfrow, supra,* and would further indicate that he was not acting strictly as a subagent through his alleged principal, the chair company, but dealing directly with the plaintiff.

There is evidence from which a jury may infer that the plaintiff knew all along that Holland was selling its goods, although he was the salesman of the chair company. Even in *Hoover v. Wise, supra,* the Court said: "The general doctrine, that the knowledge of an agent is the knowledge of the principal, cannot be doubted. *Bank v. Davis,* 2 Hill, 451; *Ingalls v. Morgan,* 10 N. Y., 178; *Fulton Bank v. N. Y. and S. Can Co.,* 4 Paige, 127. It must, however, be knowledge acquired in a prior transaction then present to his mind, and which could properly be communicated to his principal. *The Distilled Spirits,* 11 Wall.,

356, 20 L. Ed., 167; *Ingalls v. Morgan, supra.* Neither can it be doubted that where an agent has power to employ a subagent, the acts of the subagent, or notice given to him in the transaction of the business, have the same effect as if done or received by the principal. Story Ag., secs. 452, 454; *Storrs v. Utica,* 17 N. Y., 104; *Boyd v. Vanderkamp,* 1 Barb. Ch., 273; *Rourke v. Story,* 4 E. D. Smith, 54; *Lincoln v. Battelle,* 6 Wend., 475. The rule of law is undoubted that for the acts of a subagent the principal is liable, but that for the acts of the agent of an intermediate independent employer he is not liable. It is difficult to lay down a precise rule which will define the distinctions arising in such cases. The application of the rule is full of embarrass- (485) ment. For a collection of the cases and illustrations of the doctrine, reference may be had to Story on Agency, sec. 454, and following." And, referring to Story on Agency, sec. 454, we find it stated that the principal is represented not only by the person who is immediately employed in the business, but also by others employed by that agent under him or with whom he contracts for the performance of the business, and will be responsible for his acts done within the scope of his agency.

This case differs from *Hoover v. Wise* essentially in this respect, that plaintiff contracted with the chair company that the latter should sell its goods through its own salesmen, they being to some extent engaged in the same line of business, and while there is evidence that plaintiff retained the right to pass upon the sales and to investigate the financial credit of customers, however the authority of Holland may have appeared to the Southern Furniture Company, whether restricted or not, the latter was not bound by secret instructions to Holland, not known to them, but had the right, in the exercise of good faith and due prudence, to act upon his apparent authority, as held in *Bank v. Hay,* 143 N. C., 326; *Stephens v. Lumber Co.,* 160 N. C., 107; *Latham v. Field,* 163 N. C., 356; *Wynn v. Grant,* 166 N. C., 39; *Powell v. Lumber Co.,* 168 N. C., 632. There is evidence in this case that the chair company was not an "intermediate independent employer" of Holland, as the attorney was held to be in *Hoover v. Wise, supra,* but was something more, as there is some evidence to show, being engaged by the plaintiff as agent to sell its goods; and, further, the understanding was that the chair company would make the sales through its own salesmen. This view is sustained by what was held in *Cox v. Pearce,* 112 N. Y., 637, 3 L. R. Anno at p. 364, where the Court said: "We are of the opinion that the relation of Marriott to Cox and Boyce was such as to charge that firm with the notice given to Marriott in 1878, by Hosea O. Pearce, of his withdrawal from the firm of Pearce & Hall. The notice was material to the very negotiations in which Marriott was then

engaged, and it was his duty to inform Cox and Boyce of the information he received, because it was a material fact bearing upon the question whether they should fill the order then made. Marriott, in his dealings with Pearce & Hall, was not acting simply as a broker in the general sense. In receiving orders from Pearce & Hall, he was acting exclusively in the interest of Cox and Boyce, and it was so understood by the vendor and purchaser. Cox and Boyce permitted him to exercise powers, limited, it is true, but such as are usually exercised by agents. The occasion called for the notification given by Pearce to Marriott. The application for another order was made to the (486) former, according to the course of business prior to that time, and good faith required Pearce to make the disclosure; and we think he had a right to assume that it was within the scope of Marriott's agency to receive it in behalf of his principals."

We do not decide that notice to Holland as to the withdrawal of defendant from the firm is to be imputed to the plaintiff as matter of law, but that there is evidence for the jury to consider upon that question, and as the court peremptorily instructed against the defendant on that point, and as we think the instruction was calculated to prejudice the defendant upon the essential matters, a new trial is granted as to all the issues.

New trial.

Cited: Chesson v. Cedar Works, 172 N.C. 34 (2e); *Hunsucker v. Corbitt,* 187 N.C. 503 (2c); *Bobbitt v. Land Co.,* 191 N.C., 328 (2c); *Corporation v. Cooper,* 194 N.C. 560 (1c); *Bank v. Sklut,* 198 N.C. 593 (2c); *Austin v. George,* 201 N.C. 381 (1c); *R. R. v. Lassiter & Co.,* 207 N.C. 414 (2c); *Warehouse Co. v. Bank,* 216 N.C. 253 (2c); *Service Co. v. Bank,* 218 N.C. 537 (2e).

R. C. SPRINGS AND WIFE v. H. L. HOPKINS.

(Filed 10 May, 1916.)

1. Deeds and Conveyances—Interpretation—Intent.

In construing a deed, the intention of the grantor as gathered from the instrument will control, and will be enforced if not inconsistent with the law.

2. Same—Vesting of Estates.

The rule of interpretation that the law favors the early vesting of estates will not control when the intention of the testator, as gathered from the instrument being construed, is clearly expressed otherwise.

3. Deeds and Conveyances—Estates—Limitations—Successive Survivors—Vested and Divested Interests—Tenants in Common.

A gift of land by deed, in consideration of love and affection, to the wife of a son of the donor for life, then in trust for the use of his children by this or any future wife, until the youngest child shall have become 21 years of age, the share of any child dying without issue to the others of such children surviving and their heirs, with limitation over in the event all of them should die without issue: *Held*, upon arrival of the youngest grandchild at the age of 21, after the falling in of the life estate, each of said grandchildren took a vested interest as tenants in common of the lands, subject to be divested as to each by his or her dying without issue, creating a succession of survivorships.

4. Uses and Trusts—Title—Statute of Uses.

A trust created to the use of the donor's grandchildren in a conveyance of land, to vest, according to the terms of the instrument, when the youngest thereof should reach the age of 21 years: *Held*, upon the arrival of the youngest grandchild at the age of 21, the trust becomes passive and the legal title is transferred to the use by reason of the statute of uses.

5. Deeds and Conveyances — Interpretation — Intent—Uses and Trusts—Power of Revocation.

Where it clearly appears in construing a gift by deed to lands that the donor's intention was to create a vested interest therein for her grandchildren as tenants in common, depending upon successive survivorships, a reserved power of revocation, which she had not exercised, will have no effect upon the construction of the instrument.

6. Deeds and Conveyances — Perpetuities — Vested Estates — Uses and Trusts.

The rule against perpetuities refers solely to the vesting of estates, and not to their enjoyment, and does not require that interests must end within specified limits; and the interpretation of the limitations expressed in the deed in this case is held not to violate this rule.

ALLEN, J., dissenting.

APPEAL by defendant from *Carter, J.*, at February Term, 1916, (487) of MECKLENBURG.

The case was submitted to the court below upon the pleadings and exhibits for its opinion and judgment as to whether the plaintiffs were seized in fee simple absolute of a one-third undivided interest in the lands in question, which undivided interest the plaintiff contracted, for the sum of $5,000, to sell and convey to the defendant, vesting in him a good and sufficient indefeasible title for said estate therein, with the usual covenants of warranty. A proper deed has been tendered to the defendant, and the plaintiffs have otherwise complied with the contract, on their part, provided their title is good, and this must be determined by a construction of the deed fully set out in the case, as follows:

This deed, made this 6 April, 1880, by and between Nancy S. Smith, widow of the late B. R. Smith, of the county of Mecklenburg and State of North Carolina, of the first part, Carrie E. Smith, wife of W. Mc. Smith, the said William Mc. Smith and W. H. Bailey, of the same county and State, of the second part, and Lillian A. Smith and W. Bernard Smith, children of the said W. Mc. Smith and Carrie E. Smith, and Anna B. Lee and B. Rush Lee, children of Junius M. and Elizabeth Jane Lee, and Elizabeth Jane Lee, of the third part: witnesseth, that the party of the first part, in consideration of the natural love and affection she has towards the parties of the second part and third part, and the sum of $1 by the said parties of the second part in hand paid (the receipt of which is hereby acknowledged), has given, granted, bargained, and sold, and by these presents does give, grant, bargain, sell, and convey unto the said Carrie E. Smith, for and during the life of her husband, the said W. Mc. Smith, and in the event she survives him, so long as she shall remain his widow, that portion of the tract of land, hereinafter described, which lies westerly of the track of the Charlotte, Columbia and Augusta Railroad, the
(488) whole tract being situate in said county on the waters of Sugar Creek, adjoining the lands of Martin Icehouer, John Griffith, and others, and bounded as follows, to wit: (Here follows the description of the lands by metes and bounds), containing 430 acres, more or less. And after the death or second marriage of the said Carrie E. Smith (outliving her said husband), to the said Lillian A. and W. Bernard Smith and their heirs, with limitations hereinafter expressed. If that event shall happen in the lifetime of the said W. Mc. Smith, to him, the said W. Mc. Smith, in special trust, and for the only use, support, benefit, and behalf of the said Lillian A. Smith and W. Bernard Smith and such other children as shall have then been born to the said W. Mc. Smith by the said Carrie or any future wife, until the youngest child shall arrive at the age of 21 years; and upon the arrival of the youngest child aforesaid at 21 years of age, then to the use of the said Lillian A. Smith, W. Bernard Smith, and any other child or children that may be born to the said W. Mc. Smith by the said Carrie E. Smith or any future wife, and their heirs forever; and in the event of the death of any of said children without issue, his or her share shall vest in the survivor or survivors and their heirs; and in the event of the death of all of said children without issue in the lifetime of said W. Mc. Smith, then to W. H. Bailey and his heirs, in trust to receive and pay the profits thereof on the first day of January and August in each and every year to the said W. Mc. Smith for the support of him, the said W. Mc. Smith (being the son of the party of the first part), to an amount not exceeding the sum of $500 annually, the said trust being

intended to be created under and pursuant to section 11 of chapter 42 of Battle's Revisal, for and during the natural life of the said W. Mc. Smith, and after the death of all of the children of the said W. Mc. Smith as aforesaid without issue, and the death of the said W. Mc. Smith, to the said Anna B. Lee and B. Rush Lee and their heirs; and in the event of the death of either of the last named without issue, to the survivor and his or her heirs, as the case may be; and if both should die without issue after the vesting of the estate in them upon the contingencies as above contemplated, then to the said W. H. Bailey and his heirs, in trust for the sole and separate use of the said Elizabeth Jane Lee and her heirs, free from the control and without being in any way subject to the debts of her husband, Junius M. Lee: *Provided,* that the said Elizabeth Jane Lee shall not have the power to sell her said estate or the profits arising thereform by anticipation or otherwise; and *Provided, also,* and it is hereby agreed and declared, that it shall and may be lawful to and for the party of the first part, at any time during her natural life, by any writing under her hand and seal, attested by two or more credible witnesses, or by her last will and testament in writing so attested as aforesaid, to alter, change, revoke, (489) annul, and make void the uses hereinbefore limited to the children of the said W. Mc. Smith, limited to vest after the death or second marriage of the said Carrie E. Smith, and to limit, appoint, and declare such use to take effect only from and after the death of the said W. Mc. Smith, and that for the interval between the death of the said Carrie E. Smith and the said W. Mc. Smith she may limit the estate to the said W. H. Bailey and his heirs, to hold in trust as to the profits for the said W. Mc. Smith in like manner and with like force and effect and subject to the same restrictions as hereinbefore contingently provided for upon the death of all of the children of the said W. Mc. Smith without issue in his lifetime; and *Provided, also,* and it is further hereby agreed and declared, that it shall and may be lawful for the party of the first part, in manner and form aforesaid, to alter, change, revoke, annul, and make void the uses and estates hereinbefore contingently limited, appointed, and declared to the said Elizabeth Jane Lee, Anna B. Lee, and B. Rush Lee, or any or either of them, and any other use in lieu and stead of such of these as she may revoke, to limit, appoint, and declare, as to her, the said party of the first part, shall seem meet, does hereby authorize and empower the said Carrie E. Smith to sell or mortgage the said realty in fee simple as both a power attached and appurtenant to her estate as well as by virtue of a power from the party of the first part as her attorney in fact under the power of revocation and new appointment herein inserted.

In witness whereof the parties to this deed have hereunto set their hands and seals the date above written.

NANCY S. SMITH, [SEAL]
CARRIE E. SMITH, [SEAL]
W. M. SMITH, [SEAL]
W. H. BAILEY, [SEAL]
ELIZABETH JANE LEE, [SEAL]
ANNA B. LEE, [SEAL]
His
B. RUSH × LEE. [SEAL]
mark

In regular proceedings between the parties, the lands conveyed by the above deed were sold and the proceeds reinvested in the lands, which are the same described in the contract between the parties to this action, and the title of the grantors of said lands is admitted to be good. It is further admitted that Carrie E. Smith, wife of W. Mc. Smith, died 18 April, 1912, two weeks before the death of her husband, he not having remarried. They had four children, W. Bernard Smith, Lillian Smith, who intermarried with R. C. Springs (plaintiffs in this action), Julia E. Smith and Junius M. Smith. At the date of
(490) the original deed from Mrs. Nancy S. Smith to B. R. Smith and others, Lillian Smith (now Springs) was 3 years old, and Julia E. Smith and Junius M. Smith were not then born, but the three children of W. Mc. Smith and Carrie E. Smith, Lillian, Julia E., and Junius M. Smith, have each for some time been over 21 years of age. The other child, W. Bernard Smith, died in infancy, during the lives of his parents, being without issue, as he was only 6 years old at the time of his death. Anna B. Lee died unmarried and without issue, leaving surviving her mother, Mrs. Elizabeth Jane Lee, a widow, and her brother, B. Rush Lee, who intermarried with Ella Wriston, and Mrs. Lee and B. Rush Lee and wife have conveyed their interests in said land to the plaintiffs, Mrs. Lee having had only two children, Anna B. Lee and B. Rush Lee. Nancy S. Smith has been dead for many years.

The contention of the plaintiffs is that the interests of the three surviving children of W. Mc. and Carrie E. Smith, viz., Lillian S. Springs, Julia E. Smith, and Junius M. Smith, vested absolutely in them when Junius, the youngest of them, arrived at full age, or when their father died in 1912, some time before this suit was brought, while the defendant contends that the legal effect of the limitations and restrictions in the deeds is to confine the estate of the plaintiffs to a defeasible fee, or one subject to be divested by the death of the plaintiff Lillian S. Springs without issue, and that the estate of the said plaintiff and the other tenants in common is dependent upon the principle of survivor-

ship *inter se*, and, further, that the contingent estates following that of the plaintiff and her cotenants are "good, valid, outstanding and subsisting estates," and, therefore, the plaintiffs are unable to comply with their contract, as they cannot convey the estate described therein.

The court held with the plaintiffs, and judgment was entered accordingly, from which defendant appealed.

Charles S. Glasgow for plaintiffs.

A. G. Robertson for defendant.

WALKER, J., after stating the case: The general rule for the construction of a deed is not essentially different from that which governs in the interpretation of other instruments, which is, that we must seek for the intention, and, when discovered, it should be enforced if not inconsistent with the law. *Rowland v. Rowland,* 93 N. C., 214. Technical rules must generally yield if, in their application, they will disappoint or defeat the clearly expressed intention. *Beacom v. Amos,* 161 N. C., 357; *Lumber Co. v. Lumber Co.,* 169 N. C., 80; *Shuford v. Brady, ibid.,* 224. It is true that the law favors the early vesting of estates, but this rule must not be allowed to defeat the intention of the grantor when clearly expressed. It is apparent from the contents of this deed that the grantor, Mrs. Nancy S. Smith, intended to (491) provide for Mrs. Carrie E. Smith, the wife of her son, W. Mc. Smith, for her life, and, therefore, conveyed a life estate in the land to her, with the provision that at her death it should go to her son, W. Mc. Smith, if her death occured in his lifetime, to be held by him in trust for the only use, benefit, and support of their children, Lillian A. Smith and W. Bernard Smith, and such other children as shall have been born to them or to him and any future wife. This trust was to continue until the youngest of the children should be 21 years old, when the use passed to them and their heirs forever, freed from the trust, the share of any of said children without issue to vest in the survivor or survivors of them, and their heirs, and if all should die in the lifetime of W. Mc. Smith without issue, then over to W. H. Bailey, to be held by him upon the trusts declared in the deed. When the grantor provided that when the youngest child should attain to full age the use should go to the children named, the trust which was theretofore active became passive, and the use was executed by the statute, for there was nothing for the trustee to do except to hold the legal title, and this, by virtue of the statute, was transferred to the use. This vested the complete title, then, in fee, though not absolute, as the share of each child was subject to be divested and go over to the survivors or survivor upon his or her death without issue, finally vesting the sole estate absolutely

in the last survivor, if the others had died without issue. This limitation created successive survivorships in the children, depending upon the happening of the events, as to each of them, of dying without issue until the last in the succession is reached, in whom the estate will vest absolutely. The case, in this view of it and without reference to the other terms of the will, is brought directly within the principle thus stated in *Harrell v. Hagan,* 147 N. C., 111, and more recently approved in *Smith v. Lumber Co.,* 155 N. C., 389: "The clause of the will here in question conveyed to the four daughters named an estate of remainder in fee, after the life estate of their mother, and determinable as to each holder's share on her dying without leaving a lawful heir. *Sessoms v. Sessoms,* 144 N. C., 121; *Whitfield v. Garris,* 134 N. C., 24. Under several of the more recent decisions of the Court the event by which the interest of each is to be determined must be referred, not to the death of the devisor, but to that of the several takers of the estate in remainder, respectively, without leaving a lawful heir. *Kornegay v. Morris,* 122 N. C., 199; *Williams v. Lewis,* 100 N. C., 142; *Buchanan v. Buchanan,* 99 N. C., 308. And by reason of the terms in which the contingency is expressed, 'that if each or all of the girls die without leaving a lawful heir, then the land,' etc., and other indications which could be referred to, the estate does not become absolute in the (492) other daughters on the death of one of them without leaving such heir, but the determinable quality of each interest continues to affect such interest until the event occurs by which it is to be determined or the estate becomes absolute. *Galloway v. Carter,* 100 N. C., 112; *Hilliard v. Kearney,* 45 N. C., 221." The event of one or more of the children dying without issue has never occurred, except as to W. Bernard Smith, and the three surviving children, Lillian A. Smith, Julia E. Smith, and Junius M. Smith, all being more than 21 years old, Junius being the youngest, are seized of defeasible estates as tenants in common, with the right of survivorship as indicated. They are vested interests, but subject to be divested upon the happening of the contingency. *Whitfield v. Garris,* 134 N. C., 24; *Starnes v. Hill,* 112 N. C., 1; *Whitesides v. Cooper,* 115 N. C., 570; *Bowen v. Hackney,* 136 N. C., 190. It is said in *Whitesides v. Cooper, supra,* quoting from Gray on Perpetuities, 108: "The true test in limitations of this character is that if the conditional element is incorporated into the description of the gift to the remainderman (as it is in the case under consideration), then the remainder is contingent, but if after the words giving a vested interest a clause is added divesting it, the remainder is vested. Thus on a devise to A. for life, remainder to his children, but if any child die in the lifetime of A. his share to go to those who survive, the share of each child is said to be vested, subject to be divested by its death. But on a devise

(as in the present case) to A. for life, remainder to such of his children as survive him, the remainder is contingent."

The extended reference to this feature of the case will more fully appear hereafter.

By the terms of the deed, then, when the youngest child arrived at full age the estate in the land vested in the children, subject to be determined as to each if he or she died without issue at any time, and this succession of survivorships extended to the longest liver, and if he or she had died without issue during the life of W. Mc. Smith, the limitation to Mr. Bailey, the trustee named in the creation of the spendthrift trust, would have taken effect; but as all the children survived their father, W. Mc. Smith, the limitation over was defeated, and the estate remained in them, with its defeasible quality.

But it is contended by the counsel, Mr. Glasgow, who argued the case here for the plaintiff, and who certainly presented it with great force and learning, that the estate became absolute in the children either at the time the youngest was 21 years old or, at all events, at the death of W. Mc. Smith; but we think if it were so held it would be contrary to the clearly expressed intention of the donor and the terms of the deed. The contention is based upon several considerations, among them being that in doubtful cases any interest, whether vested or contingent, ought, if possible, to be construed as abso- (493) lute or indefeasible in the first instance rather than defeasible; but if it cannot be so construed, such a construction ought to be put upon the conditional expressions which render the estate defeasible as will confine their operation to as early a period as may be, so that it may become an absolute interest as soon as it can fairly be considered to be so, and that the law favors the free and uncontrolled use and enjoyment of property, with the power of alienation, while the defeasible quality of an interest tends to abridge both. We do not see at what period we could hold that the estate should become absolute in the children, if it is not indicated in the deed. It is very sure that at the maturity of the youngest child it was intended that the estate should "then" vest in them as tenants in common, subject to be defeated by the death of any without issue. When the youngest is of age, the limitation is then made to the children, designating two of them by name, and there is nothing to show an intention that they should then take absolutely, for the condition as to survivorship is attached to the estate in common *then* created, or which *then* vested in possession, freed from the trust. It was not intended that they should take absolutely at the death of W. Mc. Smith, if they survived him, as there are no words to indicate that the event of dying without issue should take place in his lifetime rather than at any time, or which authorize us to select the event of his

death as the one upon the happening of which the estate should vest absolutely and unconditionally in them. When the grantor comes to provide for the ulterior limitation, he fixes the death of all of them as the event upon which the estate should go over and vest in the trustee for the benefit of W. Mc. Smith; but that is all. If this event should not happen, it was her clear intention that, as among themselves, their estates should be defeasible and there should be successive survivorships. There is no provision for a division of the land. There is nothing to confine the defeasible quality of their estates to any single period, other than that of the death without issue of all the children save one. *Hilliard v. Kearney,* 45 N. C., 222.

It will be observed that in this deed the words are substantially employed which *Chief Justice Pearson* said would create a successive survivorship. If any of them shall die, his or her share shall vest in the "survivors or survivor."

The cases relied on by plaintiff are not in point. There is no term fixed for a division, as in *Bank v. Johnson,* 168 N. C., 304, as the estate is to remain in common until the final period of vesting absolutely has come. The ulterior limitation is gone, because the event has not happened upon which it was to take effect, and but one estate is left, it being the one given to the children, and they take according to the
(494) terms of the gift, and not otherwise. A dying in the lifetime of their father is not mentioned, except as it refers to the death of all of them without issue, which has not occurred, and, therefore, the estate remains in them as it was originally created and subject to the condition which was annexed thereto. *Williams v. Lewis,* 100 N. C., 142; *Galloway v. Carter, ibid.,* 111.

It will appear from a perusal of this deed that the grantor was striving to keep the property within one line of devolution, so that those she favored, or the primary objects of her bounty, could have and enjoy it as long as permitted by the law, and for this purpose she created the estates of survivorship to the last one in the line, and even reserved a power of revocation for the purpose of better effectuating her intention, and she did revoke the power given to Carrie E. Smith, to sell or mortgage her estate. As she did not revoke the use in favor of the children, either by her will or by any other writing, the power of revocation has no effect upon the construction of the deed as to them. *Witherington v. Herring,* 140 N. C., 495.

It was argued that our construction of the limitation would violate the rule against perpetuities, but we do not think so, for the rule, as its very language implies, refers solely to the vesting of estates, and does not concern itself with their possession or enjoyment, nor does it require that interests should end within specified limits. 30 Cyc., 1480,

1482; *Baker v. Pender,* 50 N. C., 351; *Blake v. Page,* 60 N. C., 252; *Williams v. McCombs,* 38 N. C., 450. The cases just cited were decisions upon executory devises; but conditional limitations, or shifting uses, are governed by the same reason. *Smith v. Brisson,* 90 N. C., 284, where *Justice Ashe* says: "At common law a fee simple could not be limited after a fee simple. There was no way known to that law by which a vested fee simple could be put an end to and another estate put in its place; and the reason is, because no freehold could pass without livery of seizin, which must operate immediately or not at all. But after the Statute of Uses, 27 Henry VIII, when the possession of the legal estate was transferred to the use, vesting the legal estate in the *cestui que use* in the same quality, manner, form, and condition that he held the use, and the courts of law assumed jurisdiction of uses, it was held that an estate created by a deed operating under the statute might be made to commence *in futuro* without any immediate transmutation of possession; as by a bargain and sale, or a covenant to stand seized to uses. *'Cessante ratione cessat et lex.'* And consequently it was held that, by such conveyances, inheritances might be made to shift from one to another upon a supervening contingency, which, to avoid perpetuities, was required to be such as must happen within a life or lives in being and the period of gestation and twenty-one years thereafter. Thence arose the doctrine of springing and shifting uses, or con- (495) ditional limitations. A springing use is one which arises from the seizin of the grantor, and where there is no estate going before it; but a conditional limitation, or shifting use, is always in derogation of a preceding estate. 2 Minor's Inst., 816. An example of this is where an estate is conveyed by bargain and sale or by covenant to stand seized to A. and his heirs, but if B. shall pay to A. $100 within thirty days, then to B. and his heirs. It was under this doctrine of a shifting use that it has been held, since very early after the statute of uses, that a fee simple may be limited after a fee simple, either by deed or will. If by deed, it is a conditional limitation; if by will, it is an executory devise. 'And in both these cases a fee may be limited after a fee.' 2 Blk. Com., 235."

Our conclusion is that there was error in the ruling of the Superior Court. It may be, though we give no opinion in regard to it, that by reciprocal conveyances or mutual releases, as between the three children, the title can be perfected in each of them as to his or her third interest, *Beacom v. Amos, supra,* 161 N. C., 357; *Snyder v. Grandstaff,* 96 Vo., 473; but that is a matter which the parties will consider and act upon as they may be advised.

Reversed.

ALLEN, J., dissenting.

Cited: Lee v. Oates, 171 N.C. 726 (4c); *Smith v. Witter,* 174 N.C. 617, 618 S. c.; *Whitfield v. Douglas,* 175 N.C. 49 (3c); *Kirkman v. Smith,* 175 N.C. 582 (3c); *Willis v. Trust Co.,* 183 N.C. 269 (1c); *Robertson v. Robertson,* 190 N.C. 562 (3c); *Boyd v. Campbell,* 192 N.C. 401 (1c); *Lee v. Barefoot,* 196 N.C. 114 (1c, 2c); *Bank v. Sternberger,* 207 N.C. 819 (4c); *Fisher v. Fisher,* 218 N.C. 48 (4c); *Whitley v. Arenson,* 219 N.C. 121 (1j); *Springs v. Hopkins,* 228 N.C. 463 (6c); *Mercer v. Mercer,* 230 N.C. 103 (6c); *Ellis v. Barnes,* 231 N.C. 545 (1c).

KELLY HANDLE COMPANY v. CRAWFORD PLUMBING AND MILL SUPPLY COMPANY ET ALS.

(Filed 19 April, 1916.)

1. Statute of Frauds—Principal and Agent.

The principle that a general agent may not bind his principal by his promise to answer for the debt of another does not obtain when made concerning matters within the apparent scope of the agent's authority and induces an agreement to extend credit to another wherein the principal has a direct and beneficial interest.

2. Same—Consideration.

An original promise to pay an obligation founded upon a distinct consideration moving to the promisor at the time, and not simply collateral or superadded to that of the principal obligor, does not fall within the meaning of the statute of frauds, requiring that it must be in writing, etc.

3. Same.

The plaintiff, a manufacturer of handles, contracted with B. to manufacture and furnish it with certain slabs suitable for its business, which necessitated the purchase by B. of an engine to drive the machinery used in making the output. In order to enable B. to get the engine, the general agent of the plaintiff, acting within the ostensible scope of his employment, promised the defendant seller of the engine that the plaintiff would see that the engine should be paid for within a reasonably short time if sold on a credit, and the defendant, acting on this promise, was induced to make the sale accordingly. *Held,* the promise of the agent was binding upon the plaintiff, his principal, and being founded upon a consideration, did not fall within the meaning of the statute of frauds.

4. Claim and Delivery — Mortgage — Mortgagee's Possession—Mortgage Notes.

Claim and delivery cannot be maintained against a mortgagee in possession of personal property, the subject of the proceedings, when the mortgage was given to secure two or several notes, one of which the mortgagee still owns; and upon conflicting evidence of such ownership, the question

is for the determination of the jury. As to whether the proceedings would lie where the mortgage secured but one note, the title to which had been transferred by indorsement to the plaintiff, *quære.*

CIVIL ACTION tried before *Cline, J.*, and a jury, at September (496) Term, 1915, of FORSYTH.

Plaintiff brought the action to recover certain personal property, with damages for its detention, and the amount of certain notes alleged to be due by defendants to it. The defendants Wooten & Benigar were engaged in manufacturing handle slabs, which were used by the plaintiff in its business. Plaintiff contracted with Wooten & Renigar to purchase from them all the handle slabs they could manufacture which were suitable for use in its mill, and in order to assist Wooten & Renigar in making the slabs, plaintiff agreed to supply them with a certain amount of money to buy timber and to pay their employees, title to the slabs, bolts, and stumpage to be retained by plaintiff as security for the advances made by it. Slabs were manufactured and delivered to plaintiff under this contract, for which plaintiff paid $3,838.01, leaving a balance due by defendants Wooten & Renigar of $589.72, as alleged, which was secured by a bill of sale for all handle timber then on the yards of the debtors. In order to make the handle slabs called for in the contract with the plaintiff it was necessary for the firm of Wooten & Renigar to have certain machinery and other supplies which they proposed to buy from their codefendants, Crawford Plumbing and Mill Supply Company, called hereafter the Crawford Company, which contended that the superintendent of plaintiff's mill at Winston-Salem, N. C., had agreed for and in behalf of plaintiff to assume responsibility for the payment of the price of the machinery and supplies purchased by Wooten & Renigar from the Crawford Company, and that this was done before the contract of purchase was made or any of the goods were delivered. This transaction is explained in the testimony of R. R. Crawford, as follows:

"Mr. Tatem, I think, was the first one mentioned it to me. He (497) said they had a man that they were going to start in business, to saw handles for them, and he wanted to know if I had a 20 or 25 h. p. engine and boiler that would suit them, and I told him I did; told him I had one in Statesville, 25 h. p., and in a few days Mr. Wooten and Mr. Renigar came to see me, and I asked them what terms they wanted to buy the rig on, and they said they might be able to pay $100 cash and the balance they would want some time on. So, then, a little later—I think probably the same day—I think they brought Mr. Tatem with them. I don't know whether it was the same day or the next day—along about that time. It was the Mr. Tatem of the Handle Company. He

was superintendent at that time, and we talked the matter over and finally agreed that this outfit would suit them, and Mr. Tatem said: 'These men haven't anything, but we are going to start them in business; they are going to saw timber for us, and I will see that you get your money,' and he would see that we got pay for the outfit.

"He said a good deal. I couldn't say exactly as to anything else at that time. I don't remember of anything else he said right at that time. Then Wooten & Renigar said they would be back to get the boiler and engine in the course of a week or something like that, and at the end of the week they were to come and pay $100 cash and the balance was to be notes, three, six, and nine months. At the end of the time they came back and didn't have the money. They had not been able to raise the $100, and Mr. Tatem told me: 'You go ahead and let them have it, and I will see that you get your $100 inside of a short while, next week or two.' So we let them have the boiler and engine; told him he could go and get the boiler and engine at Statesville. That was about 25 miles from their point of business.

"We sold them the boiler and engine and what is included in the chattel mortgage. I can't give the exact language Mr. Tatem used when he spoke about letting them have the boiler and engine, but the substance of it was, 'We will see that you get your money.' That's as near as I can state it. I can't say that he used the name of the Handle Company, except that he said he was acting as the agent for the Kelly Handle Company. Tatem was working for the Kelly Handle Company. I had had a conversation with him before that about it. He is the first man that came to see me about the outfit. He said Wooten & Renigar wanted to buy a boiler and engine. He said they had no money. I did not know them. I don't think I had ever seen them before. I possibly might have seen Mr. Wooten before that time. He worked at the Handle Company before that. I let them have it because the Kelly Handle Company said they would be responsible for it. The amount of the bill for the
(498) boiler and engine was $450, and of that amount they were to pay $100 cash and give two $125 notes and another note for $100."

The judge excluded, by his ruling, from the consideration of the jury the question as to plaintiff's indebtedness to the Crawford Company based upon the evidence relating thereto, upon the ground, as stated in the argument, that the alleged contract of plaintiff with the Crawford Company was within the statute of frauds and should have been in writing. Issues covering this feature of the case were tendered by the Crawford Company, but rejected by the court, and the company excepted.

Plaintiff caused to be issued claim and delivery process under which the property mortgaged to the Crawford Company to secure the debt

due by Wooten & Renigar to it was seized, the Crawford Company contending that, as the mortgage was made to it, the possession was rightfully in it at the time of the seizure under the writ, which was, therefore, illegal, and especially so as it owned one or more of the notes secured by the mortgage, one of the notes for $128.75 secured by the mortgage having been transferred by the Crawford Company in writing on the back thereof, to the plaintiff, together with another note for $101, which, as plaintiff alleges, was represented by the Crawford Company as also secured by the mortgage, though in fact it was not. The Crawford Company contended that the note for $128.75 was transferred by it merely to pass the title thereto, as against Wooten & Renigar, to the plaintiff, without any understanding or intention by the parties that it should make the company liable as indorser.

This statement, we think, will be sufficient to explain the issues and the nature of the matters in controversy between the parties.

The jury, upon the issues submitted by the court, returned the following verdict:

1. Are the defendants Wooten & Renigar indebted to the plaintiff? If so, in what sum? Answer: "Yes; $819.47."

2. Is the plaintiff the owner of the handle timber, saw-rig, belting, and other property used in connection with the milling business of Wooten & Renigar, as alleged in the complaint? If so, what was its value at the time of the bringing of this suit? Answer: "Yes; $192."

3. Did the defendants, or either of them, destroy or appropriate to their own use the handle timber, saw-rig, belting, and other property used by them in their milling business? If so, what is the value of the same? Answer: " 'Yes' as to the handle timber; 'No' as to the saw-rig, belting, etc.; value unknown."

4. Is the defendant Crawford Plumbing and Mill Supply Company liable to the plaintiff by reason of its indorsement of the notes, as alleged in the complaint? If so, in what sum? Answer: "No."

5. Are the notes or either of them which are described in the (499) complaint secured by the chattel mortgage to the Crawford Plumbing and Mill Supply Company, as alleged in the complaint? Answer: "Yes.; one note, $128.75."

6. Did the defendant the Crawford Plumbing and Mill Supply Company represent to the plaintiff that the $100 note sued on, originally executed by Wooten & Renigar to Crawford Plumbing and Mill Supply Company, was secured by chattel mortgage upon the sawmill and boiler in the same manner as the $128 note, and did Kelly Handle Company take over and pay the Crawford Plumbing and Mill Supply Company $101 of said note upon the understanding and in the belief that it

was secured by the chattel mortgage, as alleged in the complaint? Answer: "Yes."

7. In what amount, if anything, is the defendant indebted to the plaintiff on said note? Answer: "$101."

8. What was the value of the property conveyed in the chattel mortgage to the Crawford Plumbing and Mill Supply Company, at the time it was levied on in the claim and delivery proceedings? Answer: "$300."

9. What is the value of the property conveyed in the chattel mortgage to the Crawford Plumbing and Mill Supply Company at this time? Answer: "$150."

After ascertaining the amount of plaintiff's claim against Wooten & Renigar, the court entered judgment therefor, and then decreed that the chattel mortgage be foreclosed to pay the debts secured thereby, and a commissioner was appointed to sell the same, if the $128.75 was not paid by the defendants on or before a date fixed in the judgment. The court further adjudged that plaintiff recover of defendants Wooten & Renigar the handle timber, saw-rig, beltings, and other property mentioned, and unless the same was delivered to plaintiff it should recover on the redelivery bond such damages as it had sustained by the detention, deterioration, or destruction of the same. There were directions for the recovery of damages upon the other issues, depending upon whether or not the property described in the mortgage to the Crawford Company was delivered up for the purpose of sale under the judgment. There was also a recovery by plaintiff against the Crawford Company for the amount of the $101 note. Defendants were adjudged to pay the costs. The Crawford Company excepted to certain rulings of the court and to its judgment, and appealed.

Louis M. Swink and Gilmer Korner, Jr., for plaintiff.
Jones & Patterson and Philip Williams for defendant.

WALKER, J., after stating the case: There was no appeal in this case by Wooten & Renigar, and we are confined, therefore, to the ques-
(500) tions arising on the appeal of the Crawford Company, which may be reduced conveniently to three heads:

First. Is the plaintiff bound by the contract of its general superintendent, viz., that if the Crawford Company would let Wooten & Renigar have the engine, boiler, and fittings they needed to carry on their business and manufacture the handle slabs or handle blanks for the plaintiff, the latter would see that the company was paid for the same? It is true that a general agent has no power, merely as such, to agree that his principal will stand for the performance of another's contract, as by guaranteeing the payment of a note given by a third party; but

the rule of liability is different where the promise is an original one made for the purpose of advancing the interest of the real promisor, or where, as in this case, the corporation in whose behalf the promise is made has a direct and beneficial interest to be subserved by the performance of the principal contract, and especially where the guaranty is necessary, or requisite, to the performance of that contract, and there is evidence that the agent has ostensibly been clothed with the power thus to contract, and the promisee is induced to enter into the contract and, in this case, furnish the materials by reason of the promise that payment will be made by the corporation for which the promise was made, by its agent, and which will be specially benefited if the goods are sold by the promisee.

1 Corpus Juris, pp. 641 to 644, says, at sections 285 and 287: "In the absence of anything to show a different intention, the power to make or indorse commercial paper will be construed as extending only to bills, notes, or drafts executed or indorsed in the business of the principal and for his benefit. The broadest possible authority to make and indorse paper presumptively is to be exercised in the principal's interest only, and does not impliedly extend to making or indorsing paper for the accommodation of third persons, and still less for the agent himself. . . . It will be sufficient to bind the principal for acts or contracts by the agent, that they were reasonably necessary to keep the property in good repair, or the business a going concern, or to protect the interests confided to the management of the agent; and when the principal leaves the agent as his sole representative in doing the business, third persons are justified in relying on his acts as to matters that would naturally devolve on the principal in such a business. One who is put in the place of a general manager is thereby clothed with his powers."

Substantially the same view is thus expressed in 31 Cyc., pp. 1386, 1387: "Agency to manage implies authority to do with the property what has been previously done with it by the owners, or others with their express or implied consent; or, further, to do with it what is usual and customary to do with property of the same kind in the same locality. But in the absence of a grant of such power in specific terms, no power to do acts beyond the ordinary needs of the principal's (501) business is to be inferred from the use in his authorization of general terms of the broadest import. Thus an agent is not authorized to make permanent additions or improvements to the property under his control, or to grant any easements or licenses, or impose other burdens upon his principal's property. But it will be sufficient to bind the principal for contracts by the agent that they were reasonably necessary to keep the property in good repair, or the business a going concern, or to protect the interests confided to the management of the agent. And when

the principal leaves the agent as his sole representative in doing the business, third persons are justified in relying on his acts as to matters that would naturally devolve on the principal in such a business. One who is put in the place of a general manager is thereby clothed with his powers. Since it is the agent's business to keep the business a going concern, he has no implied authority to take steps for its winding up or to sell it out."

Speaking of the implied power of a general agent to make or indorse a bill so as to bind his principal, it was said in *Bank v. Johnson,* 33 S. C. (3 Rich.), at p. 46: "The use of negotiable securities so universally prevails in trade as the means of credit that, from Wray's general agency, his power may be inferred to make bills and notes in the defendant's name in payment of his liabilities in the course of business, and in like manner to take such securities in settlement of debts due, and to negotiate and discount them. But this authority of the agent to bind his principal as a party to bills and notes must be restricted to such as derive a consideration from liabilities contracted by the agent in the course of trade, or from the direct use and application of them for the convenience or necessities of the business."

The same was held in regard to the authority of a superintendent of a mining corporation, in *Stuart v. Adams,* 89 Cal., 367.

There is evidence here that some of the handle blanks made with the machines sold by defendant, the Crawford Company, have been seized by the plaintiff, and it claims the right to have received more of them, and this claim is still insisted upon, even after notice of the alleged agreement between its superintendent and the Crawford Company.

We are of the opinion that there was evidence sufficient to take the case to the jury upon the authority of Tatem, the superintendent, to make the promise of payment.

Second. This being so, the promise, if made as alleged, was not within the statute of frauds, but it was an original promise founded upon a distinct consideration moving to the plaintiff at the time, and was not simply collateral and superadded to that of Wooten & Renigar to pay the debt.

Our case falls within the principle stated in *Dale v. Lumber Co.,* 152 N. C., 651, where the matter is clearly stated by *Justice Hoke,*
(502) who, quoting from the well considered case of *Emerson v. Slater,* 63, U. S., 28, at p. 43, said: "Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally

have the effect of extinguishing that liability. This position has been sustained and applied in other cases of the same Court, notably in *Davis v. Patrick,* 141 U. S., 479, in which it was held: 'In determining whether an alleged promise is or is not a promise to answer for the debt of another, the following rules may be applied: (1) If the promisor is a stranger to the transaction, without interest in it, the obligations of the statute are to be strictly upheld; (2) but if he has a personal, immediate, and pecuniary interest in a transaction in which a third party is the original obligor, the courts will give effect to the promise. The real character of a promise does not depend altogether upon form of expression, but largely upon the situation of the parties, and upon whether they understood it to be a collateral or direct promise.' " The position is also sustained by decisions in other jurisdictions, which are cited in the *Dale case,* and the general doctrine has been frequently recognized and approved by this Court. *Deaver v. Deaver,* 137 N. C., 241; *Threadgill v. McLendon,* 76 N. C., 24; *Voorhees v. Porter,* 134 N. C., 591-605; *Mason v. Wilson,* 84 N. C., 51; *Whitehurst v. Hyman,* 90 N. C., 487.

In *Voorhees v. Porter, supra,* the Court, in referring to *Mason v. Wilson, supra,* closely follows the case of *Emerson v. Slater, supra,* in its language, for it is said: "The doctrine there stated is that if a third person promise the debtor to pay his antecedent debts in consideration of property placed in the hands of the promisor by the debtor for the purpose, which is afterwards converted into money, the creditors may recover on the promise as for money had and received, for, although, says the Court, the promise is in words to pay the debt of another, and the performance of it discharges that debt, still the consideration was not for the benefit or ease of the original debtor, but for a purpose entirely collateral, so as to create an original and distinct cause of action; and it is immaterial, as is further said by the Court, whether the liability of the original debtor is continued or not, the promise being an independent and original one founded upon a new consideration and binding upon the promisor. . . . When the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the original contracting parties, the creditor may sue the promisor, whether his debtor remains liable to him or not." (503)

The principle is repeated in *Peele v. Powell,* 156 N. C., 553, where *Justice Allen* has stated the law upon this subject fully and with apt and clear discrimination between those cases which are and those which are not affected by the statute of frauds. It is there said that if the promise is based on a consideration, and is an original obligation, it is valid, although not in writing. The obligation is original if made at the time or before the debt is created, and the credit is given solely to the

promisor; or if credit is given on the promises of both, as principals and as jointly liable, and not on the promise of one as the surety for the other; or if a promise is based on a new consideration of benefit or harm passing between the promisor and the creditor. We here reproduce the language of that case which bears more directly upon the evidence in this record: "Where the promise is for the benefit of the promisor, and he has a personal, immediate, and pecuniary benefit in the transaction, as in *Neal v. Bellamy,* 73 N. C., 384, and in *Dale v. Lumber Co.,* 152 N. C., 653; or where the promise to pay the debt of another is all or part of the consideration for property conveyed to the promisor, as in *Hockaday v. Parker,* 53 N. C., 17; *Little v. McCarter,* 89 N. C., 233; *Deaver v. Deaver,* 137 N. C., 242; *Satterfield v. Kindley,* 144 N. C., 455; or is a promise to make good notes transferred in payment of property, as in *Adcock v. Fleming,* 19 N. C., 225; *Ashford v. Robinson,* 30 N. C., 114, and in *Rowland v. Rorke,* 49 N. C., 337, the promise is valid, although in parol. If, however, the promise does not create an original obligation, and it is collateral, and is merely superadded to the promise of another to pay the debt, he remaining liable, the promisor is not liable unless there is a writing; and this is true, whether made at the time the debt is created or not." Citing numerous cases.

We have evidence here which tends to show (and we must view all of it most favorably for the Crawford Company) that the promise, if made by the plaintiff, was for its benefit and advantage. The engine, boiler, and fittings were needed by Wooten & Renigar to manufacture the handle blanks or slabs, which in their turn were needed by the plaintiff to carry on its business; and moved by this consideration of benefit or profit to itself, it induced the Crawford Company to part with its property to Wooten & Renigar by the promise on plaintiff's part to see that they were paid for. If this be the case, the statute does not apply. *Kanter v. Hofheimer,* 88 S. E., 60.

It follows from this view of the matter that the court erred in not submitting the question as to the promise, and plaintiff's liability thereon, to the jury.

Third. The question as to the right of the plaintiff to seize the property under claim and delivery proceedings depends upon whether the original mortgage of Wooten & Renigar to the Crawford Com-
(504) pany secured, at the time of the seizure, more than one note. The defendant contends that when the new notes and mortgage were taken from Renigar, after the dissolution of the firm of Wooten & Renigar, the Crawford Company did not surrender the first mortgage given by Wooten & Renigar, while the plaintiff contends, as we understand their position, that it was given up by the Crawford Company and the new notes and mortgage of Renigar taken in the place thereof, and, this

being so, that only the note for $128.75 was then secured by that mortgage, and that the Crawford Company had agreed with plaintiff to transfer both the note for $128.75 and the mortgage securing it to the plaintiff. If the first mortgage still subsisted in favor of the Crawford Company and secured two notes, one of which belonged to it and the other to the plaintiff, we do not see how plaintiff can claim the possession of the property covered by the mortgage to the exclusion of the Crawford Company, both being equally interested in it and the mortgage having been made to the latter company.

Where there is only one note secured by a chattel mortgage the authorities conflict upon the question as to whether a transfer of the note will carry the mortgage with it to the extent of conferring on the transferee the right to sue in replevin for the property. Cobby on Replevin, sec. 186, refers to the conflict as follows: "The assignment of the note carries the mortgage with it, notwithstanding that it may not be a legal transfer of the mortgage. The debt and the security are inseparable, and cannot reside at the same time in different parties; and he who controls the debt also controls the mortgage. I am aware that this is a disputed question, and that Jones says, 'The mortgagee's legal interest does not pass by his assignment of the debt. Such assignee cannot maintain replevin in his own name for the mortgaged property, though he may, in the absence of any express or implied stipulation to the contrary, bring such action in the name of the motgagee, who holds, in such case, the legal title in trust for such assignee's benefit.' But this evidently puts the case of a single note secured by a chattel mortgage."

We are not required in this case to select between these conflicting views, as the court decided peremptorily as to the right of plaintiff to recover the property and instructed only upon the rule of damages as it is in an action of replevin. As the case goes back for a new trial, the facts may be ascertained more clearly in this respect, and a proper issue submitted for the finding of the jury in regard to them. There was error, as above indicated, in the rulings of the court, on account of which a new trial becomes necessary, and it will extend to all the issues.

New trial.

Cited: Charlotte v. Alexander, 173 N.C. 518 (2c); *Mercantile Co. v. Bryant,* 186 N.C. 554 (2c); *Jennings v. Keel,* 196 N.C. 681 (2c); *Coxe v. Dillard,* 197 N.C. 346 (2c); *Garren v. Youngblood,* 207 N.C. 89 (2c); *Gennett v. Lyerly,* 207 N.C. 205 (2e); *Balentine v. Gill,* 218 N.C. 499 (2e).

(505)

R. C. BANKS AND WIFE v. R. B. LANE, SHERIFF, ET ALS.

(Filed 10 May, 1916.)

Drainage Districts — Process — Injunction—Different County—Motions—Notice.

Where a drainage district has been established under a valid statute, an injunction against the assessment provided for may not successfully be prosecuted in an independent action by the owner of the land in the district, on the ground that the statutory notice had not been given him, the remedy being by motion in the proceedings instituted in the county for the formation of said district wherein are the records and where a proper reassessment may be had if the same should be lawfully required; and the plaintiff may obtain his restraining order in those proceedings if he is entitled thereto. *Semble*, notice of the motion should be served on the owners of land in the district as required by the statute.

WALKER and BROWN, JJ., concurring; ALLEN, J., dissenting.

Loftin, Dawson & Manning for plaintiffs.
Guion & Guion for defendants.

CLARK, C. J. This is a petition to rehear this case, 170 N. C., 14. The action was brought by R. C. Banks and wife, the *feme* plaintiff being the mortgagee of a tract of land embraced in the "Mosely Creek Drainage District," against George B. Lane, the sheriff of Craven County, and George B. Pate, the mortgagor and owner of said tract of land, who was in possession, and the Mosely Creek Drainage District.

The *feme* plaintiff set out her chain of title down to August, 1913, when she conveyed to George B. Pate and took from him a mortgage back to secure the purchase money. Her complaint averred that she and those under whom she claims had no notice served on her personally of the proceedings for the assessment made in said drainage district; that said George B. Pate was insolvent, and asked a restraining order against the collection of said assessment.

It is very evident that by the expression, "those under whom she claims," the *feme* plaintiff refers to the grantors in the deeds set out in her chain of title, and not to George B. Pate. The answer does not deny, but asserts, that the latter, who is in possession, has been served with summons in the cause. In our former decision we called attention to the fact that the statute did not require that mortgagees and lien-holders by judgment or otherwise should be served with summons; that to require them to be parties would greatly increase the difficulty of creating these drainage districts, and they would have no interest to serve in the creation thereof. As was said in *Drainage Comrs. v.*

Farm Assn., 165 N. C., 701, where the point was presented, mortgagees and lien-holders are not required to be served with notice personally, because "A mortgage is subject to the authority to form (506) these drainage districts for the betterment of the lands embraced therein. The statute is based upon the idea that such drainage districts will enhance the value of the lands embraced therein to a greater extent than the burden incurred by the issuing of the bonds, and the mortgagee accepted the mortgage knowing that this was the declared public policy of the State."

In our former opinion we held that it was no more necessary that mortgagees and other lien-holders should be consulted in the formation of such districts than to permit a mortgagee or lien-holder, in the like absence of statutory provision, to enjoin an assessment for the pavement of sidewalks or streets or other improvements of property. We said that the proceeding was *in rem*, and that the decree for the formation of the district could not be made until a majority of the original landowners, and the owners of three-fifths of all the land which will be affected, have signed the petition, and until all other landowners in the district are notified, and that the decree creating the district must be presumed to have been regularly granted and advertisement of notice for other persons interested in the land has been made as required by secs. 5 and 15, chapter 442, Laws 1909, and sec. 1, chapter 67, Laws 1911. The complaint does not aver that the plaintiff is the owner of the land, but, on the contrary, that George B. Pate is the owner and in possession, and does not negative that notice by publication was duly made as to all others in interest, but merely avers that the *feme* plaintiff was not served personally—which is not necessary.

The Drainage Act has been held constitutional, and the validity of the district laid off under it cannot be attacked collaterally. *Newby v. Drainage District*, 163 N. C., 24.

The district has been formed, the assessments made without objection from landowners, and Laws 1909, chapter 442, sec. 37, provides that the collection of assessments shall not be defeated, where the proper notices have been given, by reason of any defects occurring prior to the order confirming the final report, but that such report shall be conclusive that all prior proceedings were regular, unless appealed from. This is absolutely necessary if the public are to be protected in their purchase of the bonds put upon the market. It is to be presumed that when the Court has rendered such final judgment and the bonds are issued there will be no interference with the collection of the assessments to pay the bondholders, but that all controversies were thrashed out and settled before such final judgment.

Though the proceeding to create the drainage district was instituted before the plaintiff executed her deed to Pate in August, 1913, (507) yet it may well be that the summons, as the answer avers, was served on him after that date and before the final judgment making the assessments and directing the issue of the bonds. This is another reason why the motion should be made in that cause where the facts in regard to the proceedings are of record.

If the plaintiff wishes to allege collusion between the owner of the land, Pate, and the other members of the drainage district, which she has not done, she ought to be allowed a day in court to do this. But she cannot do it in this collateral way under a restraining order against the sheriff of the county, who has no interest, but was obeying a legal mandate of the court, for the statute puts these assessments upon the same basis as the levy of taxes. She must seek her remedy by a motion in the cause in which the judgments were entered creating the district and confirming the assessment and directing the issue of bonds. In that proceeding are the records which will show whether the publication was made of notices required as to others than the owners of the land (which last alone were required to be served with summons), and whether there was any fraud or collusion to her detriment.

On such motion being made before the clerk in that cause, the plaintiff can, if so advised, at once apply to the judge to issue a restraining order therein until her motion shall be passed upon, and if an issue of fact is raised, this issue can be transferred to the court at term for trial by a jury.

The counsel for the plaintiff seem to be aware that the records in that case were necessary, for they have applied on this rehearing for a *certiorari* to send up the records in that case. This motion we have refused because that proceeding was no part of this case, and, indeed, the records therein were not before us on hearing the appeal whose decision it is now sought to rehear. The authorities are numerous that an injunction will not lie against an execution by an independent action, but that the remedy is always by motion in the cause whose decrees it is sought to impeach (except where fraud is alleged), and by a restraining order in that cause, if necessary. *Parker v. Bledsoe*, 87 N. C., 221, and cases there cited, and cases since, citing that case. The records to be passed upon are in that cause, and should not be brought into another case for examination collaterally.

The plaintiff, therefore, has a remedy by proceeding regularly under a motion in that cause and by a restraining order therein if necessary. This will entail no disadvantage or delay upon her, for the present injunction will hold until this opinion is certified down to the court be-

low, which will then dismiss this action. In the meantime, the plaintiff can make her motion and application for a restraining order in that cause.

Besides, this proceeding would be an attempt to take "two bites (508) at a cherry," for if the restraining order were made permanent in this case the plaintiff must proceed in the original cause to have the assessment reallotted if there has been any action taken which makes it illegal or excessive. Such reassessment could not be made in this proceeding, and certainly the tract of land is not entitled in any event to be exempt from all assesments. The parties chiefly interested are the other members of the drainage district, who will have notice of any motion in that cause, and have opportunity to defend. Whatever reduction, if any, is made in that proceeding in the assessment on this tract will necessarily be made up by raising the assessment on the owners of the other lands in that district, and they should have opportunity to be heard.

This denies the plaintiff no right if she has been wronged, and will cause her no delay. We send her to the proper tribunal to move in the action in which the assessment has been made of which she has complained, and she can there be fully heard to vindicate her rights, if any, to a reduction in the assessment. Indeed, that proceeding was brought in Craven County, where the records therein are to be found, while this collateral proceeding to question the regularity of proceedings therein is brought in Lenoir.

The mere fact, so strongly insisted on by plaintiff's counsel, that while this assessment is only $445, all the assessments on this tract aggregate $2,200 on a tract of land which brought before it was drained $4,000 is a matter that was doubtless considered before the decree making the assessment and directing the issue of bonds was entered. The presumption is that the land was benefited far more than the amount of these assessments, or objection would have been made by Pate, the landowner, or by the plaintiff, as to whom notice by publication is, by the statute, presumed to have been given. But if there has been any wrong done, it is in that cause that the assessment should be reconsidered and upon proper proof reduced or reaffirmed.

Petition denied.

WALKER, J., concurring: The original proceedings are pending in Craven Superior Court, and this action to enjoin the execution issued upon the judgment rendered therein is brought in Lenoir. The judge merely finds as a fact that there was no service upon the plaintiff, but does not find that it appears affirmatively on the face of the Craven judgment there was no such service, and for all that does appear

it may be and is very likely that the judge did not have the original record before him at the time he made his findings. If it appeared from the record that the plaintiff was served when in fact she was not, then by all our cases on the subject the *only* remedy is (509) by motion in the cause to correct the record. *Doyle v. Brown,* 72 N. C., 393; *Johnson v. Futrell,* 86 N. C., 122; *Sumner v. Sessoms,* 94 N. C., 371. The judgment is presumed to have been rendered on proper service appearing in the record, until the contrary is shown. We cannot assume that a court will give a judgment against a party in a case where it appears on the face of the proceedings that there had been no service upon him, either actual or constructive, because no court can be presumed to render a void judgment. All things, on the contrary, are supposed to have been done regularly and according to the course and practice of the court. This being so, and it being admitted that there is a judgment upon which process had issued to subject the plaintiffs' land to its satisfaction, we must act on the assumption that the record will show that the court proceeded regularly, and that it appears upon the record that process was duly served in one form or another, and we are not at liberty to presume otherwise. This being so, the only remedy, upon reason and ample authority, for correcting the record and making it speak the truth, if it states the fact falsely, is by a motion in the cause itself for proper relief, where the court that rendered the judgment can find the fact for itself and enter the proper order if a mistake was committed. If we should allow this to be done by an independent action in another county, it would produce confusion and unseemly conflict between the court rendering the judgment and some other court not having charge and control of the record, and it might also result in injustice, as even the most prudent person would search only the records of Craven County to find what judgments are docketed there, and would not consider it necessary that he should search the records of all the counties to ascertain if a judgment in Craven County had been impaired in an independent action or proceeding brought in some other county. This is no hardship on the defendant in the judgment, who alleges that he was not served with process, as when the motion is made in the proper court to correct the judgment or set it aside the court has the jurisdiction, upon application, to stay the execution which has been issued thereon, by a *supersedeas* or injunction, until the matter can be fully heard, the facts found in the orderly way, and the proper relief administered, if there has been irregular action by the court in the respect complained of by the petitioner. There is not the slightest danger of the plaintiff losing her land, or being prejudiced longer by the judgment condemning it to the payment of the assessment, if she

will proceed with reasonable diligence in the manner indicated. Each court is the keeper of its own records, and can and will, on proper application, amend them so that they will actually speak the truth, and not merely import verity, which in law they do.

BROWN, J., concurring: When this case was first before us, I, (510) with the other members of the Court, was under the impression that service of the summons in the drainage proceedings was made on the mortgagor Pate, and that he owned the land subject to the mortgage to Mrs. Banks at the time the drainage proceeding was commenced. Upon further investigation, it appears that when that proceeding was commenced, Mrs. Banks had not sold the land, and that the relation of mortgagor and mortgagee did not then exist between her and Pate. It appears now by the judge's findings that no service of the summons was ever made on either Mrs. Banks or Pate. It sufficiently appears, however, that the lands then belonging to plaintiff, formerly Florence Spivy, were set out and embraced in said drainage proceedings and were duly assessed in her name as one of the landowners within said district.

The drainage proceeding is placed in the county of Craven and this action is pending in the county of Lenoir. I am of opinion that plaintiffs are entitled to relief, but that they should seek it by motion in the cause, to be made upon notice in the drainage proceeding pending in Craven County.

I admit that *Bowman v. Ward,* 152 N. C., 602, is an apparent authority for the position that plaintiffs can seek such relief in an independent action, but in that case it appeared affirmatively upon the face of the record that no service was made either personally or by publication. In this case it does not appear affirmatively upon the face of the drainage proceedings that plaintiff was not made a party by service of summons or by publication. Those proceedings are not before us. It only so appears by the findings of the judge. I think this case, therefore, comes within what is held in *Foard v. Alexander,* 64 N. C., 69.

This is especially true in a case like this, which is not an action *in personam,* but one *in rem.* The land is sued and not the owner. No personal judgment is rendered against the owner, but the judgment condemns the land to pay the assessment. In the drainage proceedings the land is described and identified doubtless by the name of the owner. All the other owners have a personal interest in maintaining the integrity of the asessment. If the plaintiff is required to make her motion in the drainage proceedings, she is put to no disadvantage, and all the other landowners will be represented.

As pointed out by the Court, she is entitled to an injunction to be issued by a Superior Court judge in that proceeding, as ancillary thereto, to stop the sale of her lands until the matter can be heard.

In this particular case I think this method of proceeding is more conducive to a proper administration of justice than an independent action.

(511) ALLEN, J., dissenting: I agreed to the former opinion because I understood from the oral argument it was conceded that process had been served in the drainage proceeding on Pate, the mortgagor in possession; but I find on the rehearing not only that it was not intended to make such an admission, but also that this is not the fact, and while disposed to sustain proceedings for the drainage of swamp lands, which tend to improve the public health and add to the wealth of the State, I cannot give my assent to the doctrine that a court of equity is without power to restrain the sale of land under a judicial proceeding when neither the owner of the land nor any one under whom she claims has had a day in court, or has been served with process personally or by publication.

I do not believe it has ever been so held before, and the citation of one authority in support of the position (*Parker v. Bledsoe,* 87 N. C., 221), in which the summons was served, an answer filed, and judgment rendered for the amount admitted to be due, leads to the conclusion that the ruling is without precedent.

What are the facts?

The land of the plaintiff, Mrs. Banks, was advertised for sale by the sheriff of Craven County on 1 February, 1915, to satisfy an assessment alleged to have been levied in a certain drainage proceeding, and this action was then commenced to restrain the sale upon the ground that no process was served on the plaintiff in the drainage proceeding, and that the assesment was therefore void.

A temporary restraining order was issued, and after several continuances it came on for hearing, the sheriff and the drainage district being parties and represented, and the plaintiff filed affidavits in support of their allegations; but his Honor, not content with this, required the original papers in the drainage proceeding to be brought before him "in order that the court may determine the question of service as bearing upon the validity of the assessment above mentioned, lack of service having been pleaded, as a ground for injunctive relief against said sale." (See order, record, pp. 11 and 12.)

His Honor, then, having before him the affidavits and the original papers in the drainage proceeding, found the following facts: "And at this hearing, the plaintiffs having denied that any personal service

has ever been made upon them or upon any of those under whom they claim, and having filed affidavits accordingly, and having denied that any proper and legal service of any kind has ever been made upon them or upon any of those under whom they claim, and the defendants having offered before the court nothing tending to prove that personal service has ever been made upon the plaintiffs or either of them, or any one under whom they claim, and having offered nothing to show that service of any nature has ever been made upon the plaintiffs, (512) or either of them, or any of those under whom they claim, and the defendants claiming that the status of this cause and the drainage laws of the State of North Carolina pleaded eliminate the necessity of service in order that said land may be assessed; the court finds as a fact for the purpose of this hearing that no personal service has ever been made upon either of the plaintiffs or any of those under whom they claim, and finds that no service of publication has been properly made so as to authorize the said assessment against the said land, holding hereby that the assesment against the said land is invalid for the want of service upon the landowners and for lack of opportunity to be heard in court."

These findings have not been disturbed, nor was the exception filed that they were not supported by evidence, and *in them is the finding that neither the plaintiff nor any one under whom she claims was served with process, personally or by publication, in the drainage proceeding;* and as the mortgagee claims under the mortgagor, this is a finding of fact that neither the mortgagee nor the mortgagor was served.

This is the record, and, as it seems to me, we ought not to give a narrow construction to the findings and one different from their legal effect, when we know from the agreed return to the *certiorari,* which counsel on both sides assumed would issue as a matter of course, that if the term "nor any one under whom she claims" does not include the mortgagor it is because the final judgment in the drainage proceeding was entered in 1912 and the mortgage was not executed until 1913, so that it was impossible for the mortgagor to have been served, because the mortgage was not in existence until after the proceeding was concluded.

We should either refuse to consider this agreed statement of counsel and give to the language "nor any one under whom she claims" its legal effect, and say it includes the mortgagor, or we should consider it and say that Pate was not served because he executed the mortgage after the drainage proceeding was at an end.

If there was no service of process, personally or by publication, on the plaintiff or on any one under whom she claims, in the drainage proceeding, is the plaintiff entitled to restrain the sale of her land?

I think so, and that the case of *Bowman v. Ward,* 152 N. C., 602, in which the opinion was written by *Associate Justice Brown* for a unanimous Court, is an authority directly in point.

In the *Bowman case* the land of the plaintiff was advertised for sale under execution, and an independent action was brought to restrain the sale upon the ground that there had been no service of process
(513) on the plaintiff in the action in which the judgment was rendered, and it was held that the plaintiff was entitled to injunctive relief.

The Court said: "The plaintiff sues to restrain the selling of her land under execution upon a judgment rendered by a justice of the peace and docketed in the Superior Court of Henderson County. . . . No service of the summons or of the attachment has ever been made, either personally or by publication, and no publication made. . . . His Honor denied the injunction upon the ground that the proceeding was void on its face. We agree with him that the judgment is void, because it appears affirmatively upon the face of the record that no service, personally or by publication, has ever been made, either of the summons or attachment. . . . We think, however, his Honor should have restrained the sale, as the plaintiff is entitled to have the question finally determined as to the liability of her land for the judgment, and not be made to take the chance of losing it by forced sale under execution. If her land is liable for the judgment she should have the opportunity to pay it after a judicial determination."

There is no intimation in the opinion that the plaintiff ought to have proceeded by motion in the original action, as is now suggested in the opinion of the Court; and why should she do so? If she has not been made a party to that proceeding by the service of process, why should she be compelled to make herself a party by moving therein, instead of requiring those interested in the proceeding to issue process against her, if they wish to bind her land?

I have felt constrained to express my views because on this record the land of the plaintiff, which she has sold for $4,000 on a credit, since the assessment was made and without knowledge of it, has been assessed $2,293.60, when she has had no day in court and no opportunity to be heard; and this is not only a confiscation of her property, but it is subversive of the constitutional guarantee that no one shall be deprived of his property "but by the law of the land."

Cited: Leary v. Comrs., 172 N.C. 27 (d); *Lumber Co. v. Comrs.,* 173 N.C. 119 (d); *Lumber Co. v. Comrs.,* 173 N.C. 121 (j); *Comrs., v. Spencer,* 174 N.C. 38 (c); *Mann v. Mann,* 176 N.C. 375 (j); *Pate v. Banks,* 178 N.C. 140, 141 (c); *Farms Co. v. Comrs.,* 178 N.C. 667 (c);

Caviness v. Hunt, 180 N.C. 386 (c); *Daugherty v. Comrs.,* 183 N.C. 152 (c); *Scott Register Co. v. Holton,* 200 N.C. 480 (c); *Newton v. Chason,* 225 N.C. 207 (c).

STUYVESANT INSURANCE COMPANY v. J. P. REID ET AL.

(Filed 10 May, 1916.)

1. Insurance, Fire—Policy Contract—Intent—Chattel Mortgages.

Where a dealer in pianos insures all the pianos in his building not to exceed a stated amount, "whether rented, leased, loaned, or on installment," with provision that "in case a purchaser does not carry insurance the policy is extended to cover such piano," and one of these pianos is destroyed while in the possession of a purchaser under a contract reserving title in the vendor, amounting, in effect, to a mortgage or conditional sale, the relationship between the vendor and purchaser will be regarded as that of mortgagee and mortgagor; and the law, looking to the intent of the parties and not to the form of the policy contract, will construe it to cover the interest of the mortgagee in the piano thus destroyed.

2. Same—Mortgagor and Mortgagee—Insurable Interest—Subrogation.

Either the mortgagee or the mortgagor may insure his separate interest in the mortgaged property for his own sole benefit; and where the former has done so at his own expense, without imposing any obligation on the mortgagor in that respect, and without reference to the latter's interest, he may collect the insurance to the extent it impairs the value of the mortgage security; and where the mortgagor has assumed the risk of loss or damage, under his contract of purchase, the insurer, having paid the loss, is subrogated to the rights of the mortgagee; and a writing obtained by the insurer from the mortgagee to that effect, and assigning his interest to the insurer, is valid and enforcible.

CIVIL ACTION tried on appeal from a justice's court and upon (514) case agreed, before *Justice, J.,* at Spring Term, 1916, of GASTON.

The relevant facts, as shown in the case, are as follows:

1. On or about 23 September, 1913, upon authority duly given him by the defendants, Joseph S. Wray executed a contract for the purchase of a Stieff piano, a copy of which contract is hereto attached, marked "Exhibit A."

2. That thereupon Charles M. Stieff delivered to the defendants the piano described in said contract.

3. That the defendants paid the installments called for by said contract except the last three of $50 each.

4. That on or about 22 May, 1914, the said piano was destroyed by fire while in the possession of the defendants.

5. That on or about 1 April, 1914, Frederick P. Stieff, trading as Charles M. Stieff, successor to Charles Stieff and Frederick P. Stieff, trading as Charles M. Stieff, entered into an insurance contract with the plaintiff, a copy of which is hereto attached, marked "Exhibit B." This insurance policy was taken out by the firm of Charles M. Stieff, at its own expense, and without any agreement with the defendants, and the defendants paid no part of the premiums therefor.

6. That after the said piano was destroyed by fire the plaintiff paid to Frederick P. Stieff, trading as Charles M. Stieff, the sum of $150, due by reason of said insurance contract, and in consideration therefor the said Stieff duly executed the subrogation receipt and the assignment, copies of which are hereto attached, marked respectively "Exhibit C" and "Exhibit D." That the contract referred to as (515) "Exhibit A" was in form of a conditional sale, retaining title in Charles M. Stieff till payment of the purchase price and closing with the following stipulations on the part of the purchaser: "And I further agree to bear all loss in case of fire."

The insurance policy referred to (Exhibit B) was a contract insuring Frederick P. Stieff, trading as Charles M. Stieff, against all drect loss or damage by fire to an amount not exceeding $25,000, etc., on pianos and organs, etc., rented, leased, loaned, etc., or on installment, or which they have for sale, while contained in any building, sheds, piers, wharves, etc., or in transportation, etc., and containing further provision: "It is understood that in case a purchaser does not carry insurance the policy is extended to cover such piano."

The Exhibits C and D referred to are as follows:

EXHIBIT C. SUBROGATION RECEIPT.

Received of the Stuyvesant Insurance Company, by the hand of J. S. Frelinghuysen, general agent, the sum of $150, being in full of all claims and demands for loss and damage by fire on 22 May, 1914, to the property insured by Policy No. 55384, issued at the J. S. Frelinghuysen agency of said company, and in consideration of such payment the undersigned hereby assigns and transfers to the said company each and all claims and demands against any person, persons, or property arising from or connected with such loss or damage (and the said company is subrogated in the place of and to the claims and demands of the undersigned against said person, persons, or property in the premises) to the extent of the amount above named.

FREDERICK P. STIEFF,
Trading as Charles M. Stieff.

EXHIBIT D.

In consideration of $150 paid to him by the Stuyvesant Insurance Company, Frederick P. Stieff, successor to Charles Stieff and Frederick Stieff, trading as Charles M. Stieff, sells, assigns, and transfers to the Stuyvesant Insurance Company and its assigns, without recourse on him, the contract of which the annexed is a copy, together with all claims for the balance due on the indebtedness represented by it.

FREDERICK P. STIEFF, [SEAL]
Trading as Charles M. Stieff.

Upon the facts as stated there was judgment for defendant, and plaintiff excepted and appealed.

Charles W. Tillett, Jr., for plaintiff.
Mangum & Woltz for defendant.

HOKE, J., after stating the case: It is well recognized that a (516) mortgagee and mortgagor may each insure the mortgaged property for his own benefit, and where a mortgagee has taken out such insurance at his own expense, without stipulations in favor of the mortgagor or conditions of any kind imposing an obligation or duty on the mortgagee to protect the property for the mortgagor's benefit, such mortgagee, in case of loss of the property by fire or damage thereto, is not accountable to the mortgagor for the amount collected from the insurance company, either on the debt or otherwise. *Leyden v. Lawrence,* 79 N. J. L., 113; *Ins. Co. v. Woodbury,* 45 Me., 447; *Fire Ins. Co. v. Bond,* 48 Neb., 743; *Gillespie v. Ins. Co.,* 61 W. Va., 169; *Ins. Co. v. Ins. Co.,* 55 N. Y., 343; 1 Jones on Mortgages (4 Ed.), sec. 420. In *Ins. Co. v. Woodbury* the principles referred to are stated as follows:

a. If a mortgagee insures his own interest without any agreement between him and the mortgagor, and a loss accrues, the mortgagor is not entitled to any part of the sum paid on such a loss to be applied to the discharge or reduction of his mortgage debt.

b. When the mortgagee effects insurance at the request and cost and for the benefit of the mortgagor as well as his own, the mortgagor has the right in case of loss to have the money applied in discharge of his indebtedness.

And it is further held by the great weight of authority that where the mortgagee has taken out insurance on the mortgaged property for his own benefit, paying the premiums therefor himself, and without agreement with mortgagor or stipulations or conditions, as stated, imposing a duty to protect in that way the mortgagor's interest, the in-

surance company, in case of loss, on payment of the policy, and satisfaction of the debt, is entitled to be subrogated to the rights of the mortgagee, and it would seem that, on payment of the policy, satisfying the debt in part, the right would arise *pro tanto,* subordinate, however, to the claim of the mortgagee for any unpaid balance. *Carpenter v. Providence, etc., Ins. Co.,* 41 U. S., 495; *Baker v. Monumental Assn.,* 58 W. Va., 408; *Leyden v. Lawrence,* 79 N. J. L., 113; *Ins. Co. v. Woodruff,* 26 N. J. L., 541; *Honore v. Lamar Fire Ins. Co.,* 51 Ill., 409; *Phœnix Ins. Co. v. Bank,* 85 Va., 765; *Forest Oil Co. Appeal,* 118 Pa. St., 138; 4 Cooley Ins. Benefits, p. 3915; May on Insurance, sec. 449; 1 Jones on Mortgages, sec. 420.

In Cooley's Insurance Briefs it is said: "It is the general rule that where the interest of a mortgagee is separately insured for his own benefit, and a loss occurs before payment of the mortgage, the underwriters are bound to pay the amount of such debt to the mortgagee, provided it does not exceed the insurance, and are thereupon entitled
(517) to an assignment of the debt from the mortgagee, and may recover the same from the mortgagor. The payment of insurance by the underwriter does not, in such case, discharge the mortgagor from the debt, but only changes the creditor. In Jones on Mortgages the same position is thus stated: "In the first place, it is the undisputed doctrine of all the cases that the mortgagor himself can claim no benefit from such insurance. The question in dispute is whether, upon payment of the loss under such a policy, the insurer shall be subrogated to the security held by the mortgagee, or whether he may, after having collected the insurance money, proceed to collect the mortgage debt from the mortgagor, and the property mortgaged.

The general rule and the weight of authority is that the insurer is thereupon subrogated to the rights of the mortgagee under the mortgage. This is put upon the analogy of the situation of the insurer to that of a surety. The mortgagor and mortgagee have each an insurable interest. If the mortgagee obtains insurance on his own account, and the premium is not paid by or charged to the mortgagor, the latter cannot claim the benefit of a payment of the policy; but the insurer is entitled to be subrogated to the claim of the mortgagee and may recover upon the note." And in *Leyden v. Lawrence, supra,* it is held: "That a mortgagee of real estate has an insurable interest therein, and when he insures the property at his own expense and solely for his own benefit, the insurer, if obliged to pay a loss occasioned by injury to the property, may be subrogated *pro tanto* to the rights of the mortgagee under the mortgage. (2) When the insurance has been taken by the mortgagee of real estate at the expense and for the benefit of the mortgagor as well as for his own protection, the

mortgagor, in case of loss, is entitled to have the avails of the policy applied for his benefit towards the discharge of the indebtedness."

Under our decisions the claim of the insured in this case was, in effect, and for most purposes, a chattel mortgage, *Lancaster v. Ins. Co.*, 153 N. C., 285, and a proper application of the foregoing principles is, in our opinion, against the conclusions and judgment of his Honor below.

While the insurance policy carried by the Stieff Company for $25,000, covering all pianos, etc., situate in this company's buildings, etc., "whether rented, leased, loaned, or on installment, and when kept for sale," might have justified a recovery for the full value of an instrument so situate, the right in some of the instances mentioned growing out of the relationship of bailee on the part of the Stieffs and imposing on the company the obligation to take reasonable care of the property committed to their keeping, when an instrument was sold and taken by the purchaser into his own possession and control under a contract of this character, the relationship, by the terms (518) of the policy, became, in effect, that of mortgagor and mortgagee, and the rights and liabilities of the parties in reference to the insurance money must be determined by the principles applicable to that relationship. True, the language of the policy is that "the same is extended to cover the piano," but the question does not depend so much on the form in which the stipulation is expressed, but rather on the intent of the parties and the nature of the obligations assumed. Angell on Fire Ins., sec. 59, p. 108, and note 2.

As to the piano sold and delivered to the purchaser, the Stieff Company, in the absence of some arrangement with the mortgagor or some obligation growing out of the relationship between them, could only insure the property in reference to their interest in it, that is, against loss or damage by fire to the extent that the same diminished the value of their security. And on the facts in evidence showing that the mortgagee insured on his own account, paying the premiums himself, and without reference to the rights and interests of the mortgagor in the property or any agreement with him concerning it, it must be held that the mortgagor has no claim to the insurance money and no protection from plaintiff's right of subrogation arising by reason of its payment, a position that derives force, we think, from the stipulation also appearing in the contract of sale: "That the purchaser is to bear all loss in case of fire."

We do not understand that the cases to which we were more especially cited by counsel, of *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S., 527; *Lucas v. Ins. Co.*, 23 W. Va., 258; *Lockhart v. Cooper*, 87 N. C., 149, are in conflict with these principles. They were cases

upholding the right of a warehouseman or merchant, acting in part as such, to recover the entire value of the property destroyed by fire, not exceeding the sum insured, where the policy insured goods or merchandise in their keeping and control, either their own or "held by them in trust" or "on commission," the recovery to be held by the warehouseman to the extent of his interest and the remainder in trust for the owner. The claimant, as bailee, in control and care of the property destroyed, had a right to insure the property to the extent of its insurable value, and was allowed to recover because it contemplated and was taken out for the purpose of protecting the owners as well as himself. But the position does not apply to our case where, as stated, the mortgagee, without any agreement with the mortgagor and having no care or further control of the property, insures the same at his own expense and for his own benefit.

The case of *King v. State Mutual Fire Ins. Co.,* 7 Cushing, 1, to which we were also cited, may not be allowed to affect the result.
(519) That was an action at law in which a mortgagee, holding a debt thus secured for $400, sued on an insurance policy of $300, and payment was resisted because of a demand by the company that plaintiff assign them his security. The right of subrogation, or the extent of it, was not presented in that action, nor could it be finally determined therein, and the Court very properly held that the plea of the company was no valid defense. To the extent, however, that the opinion gives countenance to the position that the right of subrogation could in no event arise, even on payment of the mortgagee's debt, it is, as stated, contrary to the great weight of authority, and may not be considered authoritative on the facts presented in the record.

There is error in the judgment, and, on the facts as agreed upon, there must be a judgment for plaintiff.

Reversed.

Cited: Batts v. Sullivan, 182 N.C. 132 (1c); *Bank v. Bank,* 197 N.C. 71 (1d); *Bryan v. Ins. Co.,* 213 N.C. 396 (1c, 2c).

EVA S. TORREY v. D. FRANK CANNON.

(Filed 10 May, 1916.)

1. **Contracts—Interpretation—Uphold Validity—Favor of Promisee—Advantage of Wronged Party.**

Where the language of a contract renders it of doubtful meaning it should be interpreted so as to uphold the writing, and in a manner most beneficial to the promisee and to prevent the promisor from taking advantage of his own wrong, when such matters are involved and may reasonably be considered as arising from the expressions used.

2. **Same—Compromise—Terms as to Validity.**

A writing executed in consideration of compromise of an action at law provided that the defendant should pay the plaintiff and her attorneys a certain sum of money, each, and a stated sum monthly to the plaintiff for a period of five years, with further provision that should the defendant fail to perform any of the obligations required of him the agreement shall be void. The defendant paid the plaintiff and her attorney two of the monthly payments, and then failed to pay any further, and it is *Held*, that by correct interpretation the contract was contemplated to become void at the option of the plaintiff, the promisee, and was otherwise valid and enforcible by her.

CIVIL ACTION heard upon demurrer by *Webb, J.*, at the Fall Term, 1916, of MECKLENBURG.

This is an action on the following contract:

STATE OF NORTH CAROLINA—MECKLENBURG COUNTY.

This agreement, entered into by and between Miss Eva S. Torrey and D. Frank Cannon, witnesseth:

Whereas a certain suit has been brought in the Superior Court of Mecklenburg County by Miss Eva S. Torrey v. D. Frank (520) Cannon, and said action is now pending in said court; and whereas the said parties, plaintiff and defendant, have agreed on terms of compromise between themselves, the terms of said compromise being that the said D. Frank Cannon shall pay to Miss Eva S. Torrey the sum of $100 in cash and $10 per week for every week hereafter, the first payment of $10 to be made on the 5th day of October, A. D. 1914, and $10 to be paid on every Monday thereafter for the term of five (5) years; and the said D. Frank Cannon is to pay the sum of $150 to David B. Paul and Stewart & McRae, attorneys for Miss Eva S. Torrey in said action, and that said Eva S. Torrey, at the October term of Superior Court of Mecklenburg County, is to take a nonsuit in the case now pending against the said D. Frank Cannon.

It is understood and agreed that in the event that said D. Frank Cannon shall fail to comply with any of the terms of the above agree-

ment, or shall fail to pay any installment when same shall become due, this agreement shall become null and void and of no effect; and if the said D. Frank Cannon shall fail to pay the said attorneys the sum of $500 as attorneys' fees, then this agreement shall be null and void and of no effect.

This 25 September, A. D. 1914. D. FRANK CANNON, [SEAL]
EVA S. TORREY, [SEAL]

Witness: A. A. KEENER.

The complaint alleges the execution of the contract, the performance of all the conditions of the contract by the plaintiff, the payment by the defendant of $100 and two weekly installments as provided therein, and the refusal of the defendant to make further payments and his renunciation of the contract.

The defendant demurred to the complaint on the following grounds:

1. That the said complaint does not set forth a cause of action against the defendant, for that it appears from the face of said complaint that the defendant has failed and refused to comply with the terms of the contract therein sued on, and utterly repudiated the same; and it further appears from the face of said complaint that, upon such failure or refusal and repudiation on his part, the entire contract sued on shall become null and void and of no effect.

2. That it appears from the face of said complaint that the contract sued on in this case was null and void and of no effect prior to the institution of this action, by reason of the fact that the defendant had failed and refused to comply with the terms thereof, and had repudiated the same, thereby rendering it null and void and of no effect.

The demurrer was overruled, and the defendant appealed.

(521) *E. R. Preston, Duckworth & Smith for plaintiff.*
J. D. McCall and Cansler & Cansler for defendant.

ALLEN, J. The position of the defendant that he can render the contract he has executed void and of no effect by refusing to perform its stipuluations violates well settled rules generally applied in the construction of contracts.

It is presumed "that when parties make an instrument the intention is that it shall be effectual, and not nugatory" (*Hunter v. Anthony,* 53 N. C., 385), and acting on this presumption, if the contract "is susceptible of two meanings, one of which will destroy it or render it invalid, the former will be adopted so as to uphold the contract" (9 Cyc., 586; 2 Page Cont., sec. 1120; 6 R. C. L., 839), and "a promise which is made conditional upon the will of the promiser is generally

of no value, for one who promises to do a thing only if it pleases him to do it is not bound to perform it at all." 9 Cyc., 618.

Again the construction is usually adopted, other things being equal, which is most beneficial to the promisee. 6 R. C. L., 854; *Kendrick v. Life Ins. Co.,* 124 N. C., 320. In the case cited the Court says: "In *Hoffman v. Ins. Co.,* 32 N. Y., 413, the rule is laid down by the New York Court of Appeals as follows: 'It is a rule of law, as well as of ethics, that where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was *understood* by the promisee. *Potter v. Ins. Co.,* 5 Hill, 147, 149; *Barlow v. Scott,* 24 N. Y., 40.' It is also a familiar rule of law that if it be left in doubt, in view of the general tenor of the instrument and the relations of the contracting parties, whether given words were used in an enlarged or a restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee. Coke Lit., 183; Bacon's Law Maxims, Teg. 3; *Doe v. Dixon,* 9 East, 16; *Marvin v. Stone,* 2 Cowan, 806."

It is also a rule running through the administration of the law that one cannot take advantage of his own wrong (6 R. C. L., 932), or, as expressed in *Smith v. Gugerty,* 4 Barb., 621, "Undoubtedly a party cannot take advantage of the nonperformance of a condition if such nonperformance has been caused by himself."

If these principles are properly applied, the contention of the defendant cannot be sustained, because it would give a construction to the contract against the promisee; it would enable the defendant to profit by his own breach of the contract, and it would destroy and render of no legal effect a solemn contract entered into for the compromise and settlement of important litigation.

If the defendant could refuse to pay after two weeks and avoid (522) the contract, he could do so before making any payment, and a contract presumably entered into in good faith and to protect the rights of the parties would have no binding force or legal effect.

If the parties intended such a result, they ought to have stipulated that the contract could be terminated at the will of either party.

What, then, is the meaning of the provision that the "agreement shall be null and void and of no effect" upon failure of the defendant to comply with any of the terms of the agreement?

Keeping in mind that the construction should be in favor of the promisee, that the defendant ought not to be allowed to take advantage of his own nonperformance of the contract, and that the contract ought to be so construed that it may be operative, clearly the terms "shall become null and void and of no effect" mean at the option of the plaintiff, the promisee.

The case of *Bryan v. Bancks,* 4 Barn. and Ad., 402, seems to be directly in point. A lease for coal lands provided that it should be void to all intents and purposes if the tenant should cease working two years at any time, and it was held upon ceasing to work two years that the lease was not absolutely void, but only voidable at the option of the lessor. All the judges wrote opinions.

Abbott, C. J.: "I am of opinion that the legal effect of this instrument is that it is voidable at the election of the landlord."

Basley, J.: "I am of opinion that the true construction of the proviso in this lease, 'that it shall be null and void to all intents and purposes upon a cesser of two years,' is that it shall be voidable only at the option of the lessor, and that it does not lie in the mouth of the lessee, who has been guilty of a wrongful act in omitting to work in pursuance of his contract, to avail himself of that wrongful act, and to insist that thereby the lease has become void to all intents and purposes."

Holroyd, J.: "The tenant cannot insist that his own act amounted to a forfeiture."

Best, J.: "I take it to be an universal principle of law and justice that no man can take advantage of his own wrong. Now, it would be most inconsistent with that principle to permit the defendant to protect himself against the consequences of this action by afterwards setting up his own wrongful act at a former period."

In *Hughes v. Palmer,* 115 E. C. L., 405, *Byles, J.:* "There are cases innumerable to show that 'void' may mean 'voidable' or 'void,' at the election of the party contracted with, where otherwise the wrongful act of the other party would put an end to the covenant."

(523) In *Malins v. Freeman,* 6 Scott, 191, an act of Parliament was considered which authorized auctioneers to demand payment of bidders, and provided, "upon neglect or refusal to pay the same such bidding shall be null and void to all intents and purposes," and *Tindal, C. J.,* says: "If we hold this to mean that the sale shall be voidable at the option of the vendor, I think we do all the act requires." In the last case *Bryan v. Bancks* is approved.

We are, therefore, of opinion, upon reason and authority, that the judgment must be sustained.

Affirmed.

Cited: Dry-Kiln Co. v. Ellington, 172 N.C. 486 (c); *Wellington v. Tent Co.,* 196 N.C. 751 (c).

THE BOARD OF COMMISSIONERS OF BUNCOMBE COUNTY
v. WALTER SCALES ET AL.

(Filed 24 May, 1916.)

1. Appeal and Error—Service of Case—One Exception—Motion to Dismiss.

Service of appellant's case on appeal is unnecessary when there is only one exception taken and the judgment itself is excepted to; and a motion in the Supreme Court to dismiss for the lack thereof will be denied.

2. Courts—Jurisdiction—Special Appearance—Waiver.

A defect of the jurisdiction of the court as to the person may be waived by his motion asking for relief upon the merits of the case, the practice being for the movant to specially appear and move to dismiss for the lack of the court's jurisdiction, and, if this is denied, except, and then plead to the merits or demur in the trial court.

3. Same—Permission to Plead—Merits.

Where a defendant against whom a judgment has been obtained moves the court to set it aside for want of service upon him, and further states in his motion that it is upon the ground "of irregularities and illegalities," and obtains leave to file an answer to the merits of the cause, he will be deemed to have waived objection to the alleged defect in the jurisdiction of the court.

4. Judicial Sales—Tax Liens—Foreclosure—Deed Vacated—Pleadings—Judgments.

Where a sale of lands has been ordered by the court, at the suit of the county, to satisfy a lien thereon for taxes, which has been made and the lands conveyed to the purchaser, and thereafter, on motion of the owner, the sale and the deed have been set aside, but not the order of sale, with leave given the movant to file an answer, it is error for the court at a subsequent term to effectuate the deed because the answer had not been filed in the time prescribed, for the answer would have been unavailing at the time in the face of the order for the sale of the property.

5. Appeal and Error—Judgments—Judicial Sales—Tax Liens—Courts—Innocent Purchaser.

Where a sale of land has been made and a deed executed to the purchaser, at the suit of the county to enforce its lien for taxes thereon, and the deed and the sale subsequently set aside, on motion of the owner of the lands, it is error for the court, at a still subsequent term, to reinstate the deed and declare it valid on the ground that the purchaser was an innocent one for value, the proper procedure in such matters being an appeal to the Supreme Court from the order invalidating the deed.

6. Judgments Vacated—Motions—Notice—Procedure.

Where under a judgment of court lands have been sold to enforce a lien thereon for taxes, and conveyance thereof made to the purchaser upon motion of the owner of the lands, an order vacating the sale and setting aside his deed without notice to such purchaser is void as to him, and he

should properly be notified and the matter thereafter regularly proceeded with under the motion theretofore made.

(524) CIVIL ACTION heard by *Long, J.*, on a motion to set aside a judgment at November Term, 1915, of BUNCOMBE.

The action was brought by the plaintiff to foreclose a tax lien. Upon the complaint filed and verified the court entered a judgment at February Term, 1912, in favor of plaintiff, as follows:

"That the plaintiff recover of the defendants J. J. Bailey Estate, Walter Scales, Mary Scales, heirs of Pink Lattimore, deceased (names unknown), Charles Bailey, heirs of James Bailey, deceased (names unknown), being the heirs of James Bailey and Rebecca Bailey, his wife (also deceased), the sum of $....., together with the costs of this action and interest at 20 per cent per annum upon said sum of $....., and that said principal, interest, and cost are hereby declared a first lien upon the property described in the complaint, as provided by law for the nonpayment of taxes under the laws of this State."

The court then, in the judgment, ordered a sale of the property and appointed a commissioner for that purpose, who was directed to sell the land and to execute a deed to the purchaser. On 20 June, 1912, James J. Bailey moved the court to set aside the judgment entered at February Term, 1912, and to dismiss the action for want of proper service, and proposed to enter a special appearance for the purpose. The motion was based on an affidavit setting for the fact that he had not been served with process; that he had paid all his taxes, and that the land was insufficiently described in the tax proceedings. The commissioner made the sale and reported the same to July Term, 1912, C. D. Justice being the purchaser, and the sale was confirmed by the court at the same term, and a deed was made to the purchaser.

Affidavits were filed by the respective parties, and at November Term, 1912, on motion of James J. Bailey, based upon affidavits filed (525) by him, the court, Judge Foushee presiding, set aside the sale of the lands and the deed of the commissioner to C. D. Justice, the purchaser, and directed that notice be issued to C. D. Justice so that he may be made a party to the action, and that James J. Bailey be allowed forty days to answer. In the judgment the court found as facts that James J. Bailey was 53 years old and had resided in Buncombe County all his life, and that no summons in this action was ever formally served upon him, nor had any written notice been given to him or any of his tenants of the sale of the land for taxes. It was further stated in the judgment that James J. Bailey, through his attorney, had come into court and made himself a party to the action.

At November Term, 1913, the plaintiff moved that the judgment rendered at November Term, 1912, be set aside, upon the ground that James J. Bailey had not filed his answer within the forty days allowed him for the purpose, and C. D. Justice moved for the same relief upon the same ground, and for the additional reason that the sale and deed to him had been set aside without any notice to him. Both parties asked for a reinstatement of the sale and deed.

At Fall Term, 1915, the court referred the case to J. B. Cain to find the facts, and he reported certain findings to the same term, whereupon the court set aside the judgment rendered by Judge Foushee at November Term, 1912, because James J. Bailey had not filed his answer, and that notice had not issued to C. D. Justice and he was never made a party to the suit, and, lastly, that C. D. Justice was an innocent purchaser of the lands at the sale ordered by the court to be made. It was further ordered that the judgment of February Term, 1912, and the judgment confirming the sale entered at July Term, 1912, be reinstated, together with the deed of the commissioner to C. D. Justice, and that James J. Bailey be taxed with the costs.

The defendant James J. Bailey excepted and appealed.

J. Frazier Glenn and A. Hall Johnston for plaintiff.

J. Scroop Styles and Mark W. Brown for defendants.

WALKER, J., after stating the case: There was a motion to dismiss the appeal, as no case on appeal had been served by the appellant, but we do not think a case was required, as there is only one exception to the judgment, and that was taken at the trial. There are assignments of error, but they all turn upon the one question, whether the last judgment was a proper one. No case was necessary to present this question, as it is done by the exception, and, even without it, by the appeal from the judgment. *Brooks v. Austin,* 94 N. C., 222; *Wilson v. Lumber Co.,* 131 N. C., 163; and especially *Clark v. Peebles,* 120 N. C., 31, and cases collected in Pell's Revisal, vol. 1, sec. 591, at bottom of p. 317 and top of page 318, and Clark's Code (3 Ed.), sec. 550, p. 770. It (526) appears that James J. Bailey has become a party to the action on his own motion and has also asked for relief upon the merits by his motions. He has therefore waived any defect of jurisdiction as to his person. *Scott v. Life Assn.,* 137 N. C., 516; *Dell School v. Peirce,* 163 N. C., 424; *S. v. White,* 164 N. C., 408. Instead of making and relying upon a motion to dismiss, he first asks the court, in his motion, to set aside the judgment, and then that he be allowed to appear specially and move to dismiss, "because of improper service *and* irregularities and illegalities." He has, also, at his own request, been allowed by Judge

Foushee to plead, and this Judge Long found as a fact. We are of the opinion that he has waived his motion to dismiss for want of proper service of the summons, even if he made it under a special appearance, which may be doubted, as he has become a party to the action. *Hassell v. Steamboat Co.*, 168 N. C., 296. But he may rely upon his motion to set aside the order of sale, the confirmation thereof, and the deed of the commissioner upon any ground not involving the court's jurisdiction of his person, as this right was not, in our opinion, taken from him by the last judgment which was entered at Fall term and signed by Judge Long. By that judgment the one rendered by Judge Foushee was set aside, and the sale, order of confirmation, and deed reinstated.

Three reasons were assigned by the court for rendering this judgment: (1) that James J. Bailey had failed to answer; (2) that C. D. Justice was an innocent purchaser. These two reasons were invalid, because Bailey could not answer at that stage of the proceeding, as the order of sale had not been set aside by Judge Foushee, but only the sale and the deed, and an answer to the complaint would have been of no avail after the court had granted the relief prayed for in it by ordering a sale. As to the second reason, the court had no power to set aside the judgment, even if it thought that C. D. Justice was in law an innocent purchaser, because, if Judge Foushee had erred in holding that he was not, and then setting aside the judgment, this was mere error in law, which could be corrected only by an appeal from that judgment. The remedy for correcting an erroneous judgment is not by setting it aside, but by having it reviewed upon an appeal from it. But the third reason assigned for the present judgment, and for vacating the judgment of Judge Foushee, is sound, and justified the action of the court. C. D. Justice was not a party to this action and had no notice of the motion to set aside the judgment rendered by Judge Foushee. It was, therefore, void as to him, and the court did the proper thing in setting it aside. *Johnson v. Whilden, ante,* 153. But this did not dispose of James J. Bailey's prior motion to set aside the order of sale, and that motion has not been distinctly considered and passed upon. He alleges several irregularities, and is entitled to be heard in regard to them. Among
(527) them is that the judgment of the court under which the commissioner sold the land was irregular on its face, as it did not specify the amount due, and the owners of the land could not redeem it from the sale, as they did not know what to pay and no reasonable time was allowed for paying the amount adjudged to be due, which they say is usual and according to the course and practice of the court in such cases. He also alleges that no notice of the intention to bring the suit under the statute was given, and that the sale was confirmed at a term of the court when the motion to set aside the order of sale was pending. This Court

may find hereafter that there were irregularities which vitiated the judgment of February Term, 1912, under which the land was sold, and that they are such as will invalidate the title acquired by the purchaser, if he had notice of them, either express or implied; but before we can determine, as matter of law, whether there were any irregularities, and, if so, whether they will affect the title of the purchaser, we must know the facts, and will not, at this stage of the case, express any opinion upon the merits. We merely sustain the order of Judge Long setting aside the order of Judge Foushee for the reason only that C. D. Justice had no notice of the motion before Judge Foushee to vacate the former judgment under which he bought the land, with this modification, that James J. Bailey may now be heard upon his motion to set aside the order of sale, and the sale and deed made thereunder, upon due notice to C. D. Justice, and the last order or judgment is allowed to stand, but subject to James J. Bailey's right to proceed in the cause as indicated. The practice where a motion is made to dismiss for defective service of process is well settled. When such a motion is refused, an appeal does not then lie, but the defendant should note his exception and then answer or demur; but he can't move to dismiss and answer at the same time, for answering or demurring is equivalent to a general appearance. The motion to dismiss should first be passed upon and an exception reserved if the ruling is adverse to him, and this should be done before answering. Clark's Code (3 Ed.), p. 738, sec. 548, and numerous cases there cited. We cannot determine whether C. D. Justice is an innocent purchaser, nor can we decide the other question until all the facts are before us and there have been specific rulings upon them.

The cause is remanded, with directions to proceed further therein as above directed, and to this extent the judgment is modified. The costs will be paid equally by the plaintiff county of Buncombe and the defendant James J. Bailey, as we have sustained the judgment so far as C. D. Justice is now concerned. Notices will be issued, and parties brought in, if necessary, and such further proceedings had as will determine the case finally upon its legal merits.

Modified.

Cited: Bessemer Co. v. Hardware Co., 171 N.C. 729 (1c); *Montgomery v. Lewis,* 187 N.C. 578 (3p); *R. R. v. Cobb,* 190 N.C. 376 (2d); *Winchester v. Brotherhood of Railroad Trainmen,* 203 N.C. 743 (1c); *Buncombe County v. Penland,* 206 N.C. 304 (3c); *Privette v. Allen,* 227 N.C. 165 (1c).

(528)

IN RE WILL OF JOSEPH CLODFELTER.

(Filed 26 April, 1916.)

1. Evidence—Depositions—Exhibits, Detached—Proof.

While it is customary, and the better practice, to attach to a deposition a paper-writing therein referred to, or, if there are more than one deposition, to attach it to one and identify it by reference in the others, and in case the writing is a matter of record or in the custody of the court, over which the parties have no control, to attach an exemplified copy, it is not required by our statutes that the writing be so attached, and when this has not been done, the fact of identity may be proved as any other fact in evidence.

2. Same—Wills.

Depositions were taken in proceedings to caveat a will, referring to a paper-writing which was not attached. *Held*, competent for the commissioner to identify the paper-writing as a part of the deposition.

3. Evidence—Compromise—Denials.

In an action to caveat a will a caveator, a witness in his own behalf, testified that the propounder and devisee had acknowledged that the writing set up as a valid will was not genuine, and offered to compromise the matter. *Held*, competent for the propounder to deny this statement and testify to the full conversation he had had with the caveator relating to the subject-matter, and say that the offer to compromise came from the caveator.

CIVIL ACTION tried before *Justice, J.*, and a jury, at November Term, 1915, of DAVIDSON.

This is an appeal from a judgment rendered upon the trial of an issue of *devisavit vel non*, which was decided against the caveators.

The will was probated in common form, and thereafter the caveat was filed, and the issue raised was tried in the Superior Court.

On the trial the deposition of L. N. Mock was introduced, in which he testified that he was acquainted with the handwriting of Joseph Clodfelter, and that a paper-writing shown to him, including the signature, was in his handwriting. The paper was not attached to the deposition nor was it marked as an exhibit.

The propounders introduced the commissioner who took the deposition, and proved by him that the paper shown to the witness was the same paper offered for probate as the will of Joseph Clodfelter, and the caveators excepted.

J. A. Clodfelter, one of the caveators, was examined as a witness, and, among other things, testified to a conversation with Isaac Clodfelter, the propounder and devisee. He said that the propounder made several

propositions for settlement of the controversy, and that he admitted that the paper-writing he was offering for probate was not a valid will.

Isaac Clodfelter was then introduced as a witness. He admitted having a conversation with J. A. Clodfelter, but denied having the conversation as detailed by him. He then stated the conversation in (529) detail and, among other things, that J. A. Clodfelter said in the conversation that if he (Isaac Clodfelter) would pay some money they would compromise everything. The caveators excepted upon the ground that the witness could not speak of an offer of compromise.

Walser & Walser and McCrary & McCrary for propounders.
Raper & Raper and Gilbert T. Stephenson for caveators.

ALLEN, J. It is the customary practice, when a paper-writing is referred to in a deposition, to attach the writing to the deposition as an exhibit, or, if two or more depositions are taken referring to the same writing, to attach to one and to identify it in the other by reference, or if the paper is one over which the parties have no control, as in the case of a record or of a paper in the custody of a court, to attach an exemplified copy (Thompson on Trials, sec. 825), and this is the safer and better rule, as it lessens the opportunity for deception and fraud; but in the absence of statutory regulation this is not the only means of identifying the paper.

The section cited from Thompson on Trials concludes with the statement: "Moreover, it has been said that where papers alleged to have been exhibited to the witness at the giving of his deposition are not sufficiently identified by the officer, they may be identified by parol evidence," and this language is almost identical with that used in Weeks on Depositions, sec. 358, except in the latter it is stated as a positive rule of evidence.

In *Dailey v. Green,* 15 Pa. St., 127, *Bell, J.,* discussing the identification of a paper referred to in a deposition, says: "We have the testimony of Green, who was present, that the papers thus referred to are those which were exhibited to the witness. I am at a loss to comprehend why, under the circumstances, parol evidence is not admissible to prove the fact."

With us there is no statute requiring exhibits to be attached to the deposition, as there is in some States, and in the absence of such provision the fact of identity may be proved as any other fact in issue.

The paper exhibited to the witness in this case could not have been attached to the deposition, if it was the paper offered for probate, because in that event it had been probated in common form and was on file

in the clerk's office as required by Revisal, sec. 3129, and the witness who identified the paper was the comissioner, who was disinterested.

It also appears that the caveators were represented at the taking of the deposition, and that they offered no evidence tending to contradict the commissioner.

(530) The case of *Jones v. Herndon,* 29 N. C., 79, while not directly in point, is authority for the position that it is not indispensable to attach the paper to the deposition as an exhibit.

We therefore conclude that the evidence as to the identification of the paper was competent.

It is true, as contended by the caveators, that offers of compromise cannot generally be given in evidence (*Hughes v. Boone,* 102 N. C., 137), although it is competent to prove distinct admissions of fact made in the course of an effort to reach a settlement (*Baynes v. Harris,* 160 N. C., 307), but the evidence of Isaac Clodfelter objected to by the caveators does not come within these principles.

J. A. Clodfelter testified for the caveators to a conversation with Isaac Clodfelter to the effect that the latter admitted that the paper he was offering for probate was not a valid will, and that he made various offers of settlement, and Isaac Clodfelter was then introduced for the propounders, not to prove an offer of compromise, but to relate his version of the conversation, and he had a right to tell all that was said relating to the subject-matter. *Paine v. Roberts,* 82 N. C., 453; *Roberts v. Roberts,* 85 N. C., 9; *Gilmore v. Gilmore,* 86 N. C., 303.

If the caveator could say that the propounder offered to settle, why could not the propounder say, in reply, "No; you offered to settle or compromise"?

No error.

Cited: Connor v. Mfg. Co., 197 N.C. 67 (3c).

MRS. MOSES H. CONE v. UNITED FRUIT GROWERS' ASSOCIATION, C. C. SMOOT, No. 3, DR. M. L. TOWNSEND, ET AL.

(Filed 24 May, 1916.)

1. Vendor and Purchaser — Sales on Commission — Misappropriation of Funds—Corporations—Officers—Parties—Actions, Joint and Several.

When goods are consigned to a corporation to be sold and properly accounted for, the proceeds are regarded as a trust fund and may be recovered by appropriate action, not only as to the corporation appropriating the same, but as to the officers thereof knowingly participating in the

wrong; and in case of liability the action can be maintained against the parties jointly or severally.

2. Evidence—Nonsuit.

The rule being that upon defendant's motion to nonsuit the evidence will be regarded in the light most favorable to the plaintiff, where there is sufficient evidence, though conflicting, to sustain his contention the motion will be denied without considering the evidence of the defendant in his own favor.

CIVIL ACTION tried before *Shaw, J.*, and a jury, at January Term, 1916, of WILKES.

The action was to recover for misappropriation of moneys, pro- (531) ceeds of sale of an amount of apples assigned by plaintiff to defendant corporation, to be sold and proceeds properly accounted for, etc., and in which the president of the company, the general manager and treasurer, and three directors were joined as individual defendants and charged with being participants in the alleged wrong.

At the close of the evidence, on motion made in apt time, there was judgment of nonsuit as to the individual defendants, whereupon plaintiff submitted to a nonsuit as to corporation defendant and appealed.

James H. Pou and Hackett & Rousseau for plaintiff.

Hayes & Jones for defendant.

HOKE, J., after stating the case: It is held in this State that when goods are consigned to a factor or commission merchant to be sold and properly accounted for, the proceeds may be regarded as a trust fund, to be pursued and recovered by appropriate action. Such cases, *Lance v. Butler,* 135 N. C., 419; *Hoffman v. Kramer,* 123 N. C., 566. The position extends to consignments of this character to corporations; and, in application of the principle, it is further held that when the proceeds of such a sale have been intentionally misapplied, the officers in control of the fund who have knowingly participated in the wrong may be held individually liable. *Chemical Co. v. Floyd,* 158 N. C., 455; *Lance v. Butler, supra; Alpha Mills v. Watertown Engine* Co., 116 N. C., 797; *Mealor v. Kimble,* 6 N. C., 272; *Freeman v. Cook,* 41 N. C., 373; *Bennet v. Preston,* 17 Ind., 291; *Dollar v. Lockney Supply Co.,* 164 S. W. (Tex.), 1076; 28 A. and E. Enc., pp. 1063-64-65. And in case of liability an action can be maintained against the parties either jointly or severally. *Solomon v. Bates,* 118 N. C., 311, 321.

In the well considered case of *Chemical Co. v. Floyd, supra, Associate Justice Allen* delivered the opinion, the general principle to which we have adverted is stated as follows: "By a contract for the sale of fer-

tilizer, which generally provides that the fertilizer, with notes, liens, bills of sale, etc., arising from sales, etc., thereof, shall be kept separate for the use and benefit of the vendor, subject to his order, the fertilizer, etc., to remain the property of the vendor, converting his vendee into a trustee of the notes, etc., taken for its sale to others, who holds them for the benefit of the owner of the fertilizer, together with money derived from the sales, or collections on the notes given therefor. When a corporation has entered into a contract for the sale of fertilizers under which the proceeds of sales, moneys collected on notes, etc., are to be the property of one furnishing the fertilizer, an action against certain of its officers brought by the owner of the fertilizer and notes, alleging in the complaint that the defendants, with knowledge of the facts, mis-
(532) applied and misappropriated the moneys drived from the sales or collections on notes given therefor, sets forth a good cause of action, and is not demurrable; and when alleging a joint wrong it is not a misjoinder of parties." And in *Dollar v. Lockney, supra,* it is held, among other things: "That corporate directors or trustees who commingle money collected for another with the corporate funds, contrary to the instructions of the owner, or knowingly permit their employees to do so, resulting in the loss of such funds, are personally liable therefor; and, second corporate directors who knowingly appropriated to the use of the corporation the proceeds of cotton held by the corporation and belonging to another, or knowingly permitted the corporation to do so, are *jointly* and *severally* liable to the corporation therefor."

In view of these principles, and considering the record under the rule universally acted on, that when a nonsuit is ordered the evidence which makes in favor of plaintiff's claim shall be taken as true and construed in the light most favorable to him, we are of opinion that there was error in the order of nonsuit as to the president and as to the general manager and treasurer of the corporation, to wit, C. C. Smoot III and Dr. M. L. Townsend.

As the case goes back for a new trial, we do not consider it desirable to dwell at length on the testimony in support of plaintiff's cause of action, but we have carefully examined the record and are of opinion that there are facts in evidence permitting the inference that defendant corporation, having received of plaintiff a consignment of apples for sale on account, disposed of same and received therefor money to the amount of $732.91 over and above reasonable costs and charges, and have remitted to plaintiff only about $300 or $350, and without right to do so have applied the remainder of these proceeds to the purposes and expenses of the corporation and the conduct of its business; that this misappropriation was done with the knowledge and under the direction of

the president and the then treasurer and general manager, who, at the time, had active part in and control of the corporate business; and if these facts are accepted by the jury, under the principles heretofore stated, these defendants would be individually liable for the misappropriation.

True, there are also facts in evidence that these officers had the right to dispose of the funds as they did, and that it was in pursuance of the contract with plaintiff and in duly authorized furtherance of her interest; but this is testimony coming from defendants and may not be considered on the case as now presented.

We are unable to see any testimony in the record tending to show that the other directors named in the summons had any knowledge of the alleged misappropriation of this money or any fair opportunity to discover it, and, as now advised, the order of nonsuit as to them is confirmed; but as to C. C. Smoot, the president, and the former (533) treasurer and general manager, Dr. Townsend, there was error.

The order of nonsuit as to them and the defendant corporation will be set aside. This will be certified, that the cause as to these three defendants may further be proceeded with.

Reversed.

M. L. MORRIS v. CAROLINA, CLINCHFIELD AND OHIO RAILROAD.

(Filed 17 May, 1916.)

Master and Servant—Railroads—Safe Appliances—Negligence—Evidence —Nonsuit.

The master, a railroad, is not liable to its servant for an injury received while at work on its railroad track, driving a 6-inch spike into a cross-tie, because the face of the hammer had been worn slick, he had been promised a new one, and he was standing at the time on a loose pile of dirt, and was hurried by the foreman for the passage of an expected train, the injury being a sprain in the servant's back; for such could not have reasonably been anticipated by the master, does not come within the rule of liability requiring the master to furnish safe tools, etc., and a judgment of nonsuit was proper.

APPEAL by plaintiff from *Justice, J.*, at January Term, 1916, of *McDOWELL.*

M. T. Morgan for plaintiff.

J. J. McLaughlin and Pless & Winborne for defendant.

CLARK, C. J. This is an appeal from a nonsuit. The plaintiff was driving a spike about 6 inches long into a cross-tie, which had been driven in two-thirds of its length when his hammer slipped off the head of the spike, striking the tie 2 inches below. The allegation is that this caused the plaintiff to sprain his back. He alleges that the face of the hammer was worn slick and that he had been promised a new hammer, and that, besides, he was standing on a pile of loose dirt, and that, a train being expected, he was ordered by the section foreman to hurry up and get the tie in place before the arrival of the train.

The plaintiff was engaged in the simple work of driving a spike into a cross-tie. An injury could not be expected because the face of the hammer was worn smooth, nor that the plaintiff would strike the head of the spike at such an angle that the hammer would glance and go 2 inches further till it struck the tie; nor was it negligence that, the train being due, the foremen asked the men to hurry up; nor was it negli-
(534) gence that in repairing the track the plaintiff happened to be standing on a small pile of loose earth. No injury could reasonably have been foreseen because of any one of these circumstances, nor from all three combined.

As Mr. Pless for the defendant well says, if a chopper is sent with a dull axe into the woods on the mountain-side, where the ground is uneven, on which the workman may slip, the employer cannot be held liable if under such circumstances the dull axe may glance, causing the laborer to slip and wrench his back. The cases are analogous.

In *Martin v. Mfg. Co.*, 128 N. C., 264, known as "the hammer case," it was held that "tools of ordinary and everyday use, which are simple in structure, requiring no skill in handling—such as hammers and axes—not obviously defective, do not impose a liability upon the employer for injuries resulting from such defects." That case cites many authorities and has been cited with approval since in many cases. There a sliver flew off the face of the hammer, striking the plaintiff in the eye; but we said: "Injuries resulting from events taking place without one's foresight or expectation, or an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and, therefore, not expected, must be borne by the unfortunate sufferer." This was cited with approval in *Lassiter v. R. R.*, 150 N. C., 483, where the plaintiff was injured in unloading rails from a flat car by the rail bounding back in an unusual and unexpected way and striking him, and the Court said: "The plaintiff's injury was the result of an unforeseen and unavoidable accident, and a nonsuit should have been entered."

In *Bryan v. R. R.*, 128 N. C., 387, the Court said: "The employer is not responsible for an accident simply because it happens, but only when he has contributed to it by some act or omission of duty."

The whole subject has been very recently reviewed by *Hoke, J.*, in *Wright v. Thompson, ante,* 88, with full citation of authorities. In that case, in repairing a dredge whose crane and dipper had become loosened, the plaintiff, in driving in the drift-pin to fasten them, struck it with a hammer, when a piece of steel from the defective and broken drift-pin flew off and struck the plaintiff in his eye and put it out. We set aside the nonsuit because it was shown that the drift-pin furnished the plaintiff had been broken off and had remained so at least thirty days, and that the plaintiff had notified the foreman of its defective condition. Injury might reasonably have been expected from such cause. That was certainly a very different case from the present. Here the tool was a hammer, and it could not be anticipated that on striking the spike to drive it into a cross-tie the hammer would slip, nor that by its going 2 inches further the plaintiff's back would be sprained. His standing upon a loose mound of earth also certainly was a mere incident, and could not have been expected to cause injury.

The authorities are numerously cited in *Wright v. Thompson,* (535) *supra,* and the line so plainly "marked and run" that we do not think it necessary to go over the same ground.

It seems to us that the injury in this case was purely an accident, and that no negligence on the part of the defendant was shown. The judgment of nonsuit is

Affirmed.

Cited: Rogerson v. Hontz, 174 N.C. 29 (d); *Winborne v. Cooperage Co.,* 178 N.C. 91 (c); *McKinney v. Adams,* 184 N.C. 564 (d); *Robinson v. Ivey,* 193 N.C. 811 (d); *McCord v. Harrison-Wright Co.,* 198 N.C. 745 (d).

V. R. BARNETT v. J. A. SMITH ET AL.

(Filed 10 May, 1916.)

1. Evidence—Demurrer—Trials—Nonsuit.

In an action to recover damages for the breach of a contract, there was evidence tending to show that the plaintiff purchased certain lands from defendant, giving mortgage to secure balance of purchase price, sold certain interests to other parties, and finding that he could not pay the balance of the purchase price, the defendant agreed with the plaintiff to convey the land to another purchaser and repay the plaintiff the amount he had already paid, to wit, $100, less $2 which the plaintiff had received from the purchasers of his interest. There was evidence *per contra* by the same witness, and it is held that defendant's demurrer thereto was properly overruled.

2. Pleadings—Counterclaim—Evidence—Issues.

Where a counterclaim in an action has not been pleaded, and there is no evidence to sustain such plea, had it been made, the refusal of an issue relating thereto is proper.

3. Contracts—Deeds and Conveyances—Rescinded by Parties—Notes—Interest.

Where it is established by the verdict of the jury that a deed to lands with mortgage thereon to secure the balance of the purchase price has been rescinded by the parties, the seller is not entitled to interest on the notes given for the deferred payments.

4. Witnesses—Impeaching Evidence—Appeal and Error—Harmless Error.

If evidence is erroneously admitted to impeach the testimony of a witness, it will not be regarded as reversible error when it appears that it could not have had any appreciable influence upon the verdict rendered.

CIVIL ACTION tried before *Webb, J.*, and a jury, at December Term, 1915, of GASTON.

This is an action, commenced before a justice of the peace and tried in the superior Court on appeal, to recover $98 alleged to be due by contract.

The plaintiff introduced evidence tending to prove that he bought a tract of land from the defendant for $2,500; that he was to pay
(536) $100 cash and to secure the balance of $2,400 by a mortgage on the land; that the defendant executed a deed to him for the land and he executed the mortgage pursuant to the agreement; that thereafter he agreed to let one Wooddle and one Costner have an interest in the land upon their agreement to pay to him a part of the purchase price; that he paid to the defendant the sum of $98 and that Costner and Wooddle made payments to him which were a part of the sum paid to the defendant by the plaintiff; that thereafter, being unable to pay for the land, it was agreed between the plaintiff and the defendant that the plaintiff would convey the land to one Blackwood, to whom the defendant had agreed to sell it, and that in consideration therefor the defendant would repay to the plaintiff all the money he had paid on the land; that the defendant has refused to pay according to this agreement.

The defendant introduced evidence contradicting the evidence on the part of the plaintiff, and there was also evidence on the cross-examination of the plaintiff tending to sustain the contention of the defendant that Wooddle and Costner made their payments to the defendant.

There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

The following are the assignments of error considered in the brief:

1. To the refusal of the court to nonsuit the plaintiff at the close of the plaintiff's evidence, as appears in defendant's first exception.

2. To overruling the defendant's objection to testimony, as appears from defendant's second exception, as follows:

This is the question asked the witness:

Q. How many times has that been? (Objection by defendants to testimony of civil action in court, as tending to impeach witness.)

A. I don't know; I haven't so many actions in court: You know how many you and Mason have brought against me.

3. To the failure of the court to nonsuit the plaintiff at the close of all the exidence, as appears from defendant's third exception.

4. To the failure of the court to submit the issue as tendered by the defendant, to wit: "What amount, if any, is the defendant entitled to recover by reason of defendant's counterclaim? Answer."

No counsel for plaintiff.

Mangum & Woltz for defendant.

ALLEN, J. There are some portions of the evidence of the plaintiff which support the contention of defendant that Wooddle and Costner paid a part of the money on the purchase price of the land, and that the plaintiff cannot recover that part; but there is also positive and direct evidence that the payments made by Wooddle and Costner were to the plaintiff, and that the plaintiff was the only debtor as between him and the defendant, and that all payments made to the de- (537) fendant were by the plaintiff. There is also evidence that the defendant promised the plaintiff to repay all amounts paid by him in consideration of the execution of the deed to Blackwood.

The plaintiff testified: "I had paid the defendant Smith all of the $100 except $2, and the agreement was that he was to return the $98."

There being, therefore, evidence sustaining the plaintiff's cause of action, the motion for judgment of nonsuit could not be sustained because of contradictory statements of the witness. *Poe v. Tel. Co.*, 160 N. C., 316.

The issue tendered by the defendant was properly refused, no counterclaim having been pleaded, and there is no evidence to sustain the plea.

The claim of the defendant that he is entitled to recover the interest on the notes executed by the plaintiff up to the time of the conveyance to Blackwood has been repudiated by the jury, as the verdict, considered in connection with the evidence, necessarily means that the original contract was rescinded by mutual agreement upon the terms that the plaintiff was to execute a deed to Blackwood and the defendant to return the money paid to him.

It is also in evidence that the defendant received the rents from the land in lieu of interest.

The answer of the defendant to the impeaching question asked him on cross-examination could not have had an appreciable influence on the verdict, and if erroneous to admit it, it would be harmless.

No error.

Cited: Smith v. Coach Line, 191 N.C. 591 (1c).

J. E. COULTER AND WIFE, L. A. COULTER, v. R. L. WILSON ET AL.

(Filed 17 May, 1916.)

1. Deeds and Conveyances — Warranty — Breach — Outstanding Title — Parties.

In an action to recover damages for breach of covenant and warranty contained in plaintiff's deed to lands, with allegation of outstanding title in another which had been determined by a court of competent jurisdiction, and, upon making such third person a party to the action, such facts have been established, the retention of the holder of the outstanding title is not necessary to the plaintiff's cause of action, and it should be dismissed as to him.

2. Parties—Actions—Unnecessary Parties—Misjoinder—Motions.

Where it is alleged and shown that a certain party defendant is not necessary to the plaintiff's cause of action, and that it cannot be maintained as to him, the question presented is not alone that of misjoinder of parties, where objection should be made by formal written demurrer, or waived by answer filed; and as to such party, the action should be dismissed.

3. Same—Code—Practice.

Our Code procedure permitting or requiring parties to an action to litigate matters between themselves is with reference to the plaintiff's demand, and only permitted when the determination of the issues is essential and desirable for a complete determination of the controversy; and does not extend to the retention of a party who, upon the pleadings and evidence, is shown to be an unnecessary one.

(538) CIVIL ACTION tried before *Shaw, J.,* and a jury, at October Term, 1915, of BURKE.

The action was instituted by plaintiffs against R. L. Wilson to recover damages for breach of the usual covenants in a deed by which said Wilson conveyed the land to *feme* plaintiff; plaintiff alleging, among other things, that there was a breach of covenant by reason of title para-

mount in R. S. Fraser, C. N. Kidd, *et al.*, and that this title had been successfully asserted by these parties in an action against plaintiffs and judgment entered establishing the superior title in them. Defendant R. L. Wilson, grantor, answered, denying that there had been a breach of the covenants and making averment that the true title was in himself, and that plaintiffs, in their own neglect and wrong, had failed to make proper defense to the action brought against them by R. S. Fraser and others, but had voluntarily submitted to a judgment, etc. Thereupon, at a former term of the court, leave was given to make said R. S. Fraser and others parties defendant, and this having been done by publication of summons and attachment of property within the jurisdiction of the court, plaintiffs filed an amended complaint reaffirming, in effect, the allegations of the original complaint, and making averment further, that there was a dispute between the original defendant, R. L. Wilson, and others as to the title, etc. These last parties answered, alleging title in themselves and that this had been adjudged in an action instituted by them against plaintiffs, as set out in the original complaint.

The cause coming on for trial, on motion there was judgment dismissing the action as against R. S. Fraser, *et al.*, and the trial proceeding between plaintiffs and R. L. Wilson, the following verdict was rendered:

1. Has there been a breach of covenant of warranty of the defendant R. L. Wilson, as alleged in the complaint? Answer: "Yes."

2. If so, what damage is the plaintiff entitled to recover? Answer: "Value of 6⅝ acres (of) land at $10 per acre, making $66.23."

Judgment on verdict for plaintiffs against R. L. Wilson. Plaintiffs excepted and appealed, assigning for error the order dismissing the action as to Fraser, *et al.*

Avery & Ervin for plaintiff. (539)

S. J. Ervin for R. S. Fraser et al.

John T. Perkins for defendant.

HOKE, J., after stating the case: The Court is unable to perceive that the plaintiffs, either in their allegations or evidence, have established any cause of action against defendants R. S. Fraser, *et al.*, appellees, or shown any right to have them retained further in the case.

Not only is it alleged in the original and amended complaint that these appellees are the holders of the true title, and that this fact has been established as between plaintiffs and appellees by judgment of a competent court, but the further proceeding has disclosed that the original defendant, R. L. Wilson, grantor of plaintiffs, had broken his

covenants of seizin and warranty in reference to the title, and plaintiffs have recovered judgment against such defendant for the damages incident to the breach. Holding, therefore, by title paramount to both plaintiffs and the original defendant, R. L. Wilson, these appellees were improperly made parties in the first instance, *Clendenin v. Turner,* 96 N. C., 422; *Robbins v. Harris,* 96 N. C., 557; *Ely v. Early,* 94 N. C., 1; *Asheville Div. v. Aston,* 92 N. C., 588; *Colgrove v. Koonce,* 76 N. C., 363; and the action was properly dismissed as to them whenever it was made to appear that plaintiff had no claim against them and their presence was not necessary to a complete and proper determination of the controversy between plaintiffs and the original defendant, R. L. Wilson.

It is suggested that the question of joining these defendants as parties should have been raised by formal written demurrer, and that the objection is waived by answer filed. This may have been true if the objection only presented a case of misjoinder of parties or causes of action, but is not maintainable when the facts alleged in the pleadings or disclosed in evidence show that plaintiff has no cause of action. Pomeroy's Code Remedies (4 Ed.), p. 278; Revisal, sec. 478. In the last citation it is provided in reference to objections of this character: "If no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action." And in Pomeroy it is said: "Finally, whatever be the completeness or defect of the allegations made by plaintiff and of the issues raised in the answers of defendants, if on the trial the evidence fails to establish a cause of action against some portion of the defendants, and it thus appears that they have been wrongfully proceeded against in the action,

(540) the plaintiff will be nonsuited or his case dismissed as to them and his recovery limited to the others against whom a cause of action has been made out."

It is urged further that the plaintiffs have the right to retain these parties as necessary to a decision of the question of title. But to what purpose or on what principle? Doubtless, under our present procedure, codefendants may be allowed or required to litigate matters between themselves; but this must be determined in reference to the demand made by plaintiffs, and is only permitted when the decision of such issues is essential or desirable for a complete determination of the controversy in the principal case. Codefendants may not be required or allowed to raise and debate issues between themselves which are entirely irrelevant to the demand as made by plaintiff and are not required in any way to a full and correct determination of his cause of action.

"A cross-action by a defendant against a codefendant or third party must be in reference to the claim made by plaintiff, and based upon an adjustment of that claim. Independent and irrelevant causes of action cannot be litigated by cross-actions." 31 Cyc., 224, citing, among other cases, *Joyce v. Growney,* 154 Mo., 253.

There was no error in dismissing the action against the appellees, and the judgment to that effect is

Affirmed.

Cited: Montgomery v. Blades, 217 N.C. 656 (3p); *Blades v. R. R.,* 218 N.C. 704 (3d); *Schnepp v. Richardson,* 222 N.C. 230 (3c); *Moore v. Massengill,* 227 N.C. 246 (1c, 3c); *Horton v. Perry,* 229 N.C. 322 (3c); *Fleming v. Light Co.,* 229 N.C. 404, 405 (1c, 3c).

ISABELLA A. SEHORN v. CITY OF CHARLOTTE.

(Filed 17 May, 1916.)

Municipal Corporations—Negligence—Streets and Sidewalks—Trials—Evidence—Questions for Jury.

A city is required to keep its streets and sidewalks in a reasonably safe condition by continuous supervision, but it is not held to warrant them at all times to be absolutely safe; and while permitting a hole several inches deep left by the removal of a water meter by its own employees, about 16 or 18 inches in diameter, partly in the concrete sidewalk and partly on a grass plat within the curbing, to remain there for six months, affords evidence of actionable negligence for a personal injury thereby caused, it may not be declared negligence *per se* as a matter of law.

APPEAL by defendant from *Carter, J.,* at February Term, 1916, of MECKLENBURG.

F. M. Redd and J. F. Newell for plaintiff.

Chase Brenizer for defendant.

CLARK, C. J. This action is to recover damages for negligence. (541) The plaintiff, a lady about 62 years of age, while walking on a street in Charlotte, stepped into a hole in the sidewalk, with the result that her knee-cap was fractured and permanently injured.

A cement sidewalk had been laid on this street extending to the curb, and the water meter was left within the surface of the cement sidewalk. The curb was moved further off, leaving some 6 or 7 feet of

grass plat between the curb and the cement sidewalk. The water meter was then taken out of the cement walk and its removal left a circular hole about three-fourths within the cement sidewalk, the hole being 16 to 18 inches in diameter and originally knee deep. It is admitted that the city itself moved the meter and left the hole there, and it is in evidence that it was partially filled up, but the earth was not tamped, and the plaintiff was injured by stepping therein.

The court charged as follows: "If the city caused this water meter to be removed and left in the sidewalk there a hole of 4 to 7 inches in depth and permitted that hole to stay there for the space of from six to twelve months, this would be negligence *per se*, and the defendant would be responsible to the plaintiff for such injuries as were directly caused by such negligence."

There was evidence of negligence to be left to the jury, but it was error to charge that this was negligence *per se*. In *Foster v. Tryon*, 169 N. C., 183, we said: "The duty which municipal corporations owe to those using their streets, and the degree of responsibility imposed upon them by law, are stated clearly and accurately by *Associate Justice Hoke* in *Fitzgerald v. Concord*, 140 N. C., 110, which has been approved in *Brown v. Durham*, 141 N. C., 252; *Revis v. Raleigh*, 150 N. C., 353; *Johnson v. Raleigh*, 156 N. C., 271; *Bailey v. Winston*, 157 N. C., 259, and in other cases. He says: 'The governing authorities of a town are charged with the duty of keeping their streets and sidewalks, drains, culverts, etc., in a reasonably safe condition; and their duty does not end at all with putting them in a safe and sound condition originally, but they are required to keep them so to the extent that this can be accomplished by proper and reasonable care and continuing supervision . . . The town, however, is not held to warrant that the condition of its streets, etc., shall be at all times absolutely safe. It is only responsible for negligent breach of duty, and to establish such responsibility it is not sufficient to show that a defect exists and an injury has been caused thereby. It must be further shown that the officers of the town knew or by ordinary diligence might have discovered the defect, and that the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated.'"

In *Smith v. Winston*, 162 N. C., 50, a new trial was ordered
(542) because the judge of the Superior Court charged the jury that it was the duty of the municipal corporation to keep the streets in safe condition.

The measure of duty established by these authorities is that the streets shall be maintained in a reasonably safe condition, and whether the corporation has done so or not is a question of fact to be decided by a jury, and cannot be declared as matter of law. This is particu-

larly true under the evidence in this record, as Mr. Redwine, who described the hole in the sidewalk with more particuarity than any other witness, and who said it was 4 or 5 inches deep, also said: "It did not look dangerous to me." If the judge can say it is negligence *per se* to leave a hole in the sidewalk 4 inches deep, as he has done in this case, can he say so as to a hole 3 inches deep, or 2 or 1? Where is the line to be drawn? It is safer and wiser to leave the conditions and circumstances to the jury.

Error.

Cited: Rollins v. Winston-Salem, 176 N.C. 413 (c); *Graham v. Charlotte,* 186 N.C. 664 (c); *Tinsley v. Winston-Salem,* 192 N.C. 599 (c); *Michaux v. Rocky Mount,* 193 N.C. 551 (c); *Ferguson v. Asheville,* 213 N.C. 573, 574 (c); *Houston v. Monroe,* 213 N.C. 791 (d); *Barnes v. Wilson,* 217 N.C. 194 (c); *Barnes v. Wilson,* 217 N.C. 198 (j); *Gettys v. Marion,* 218 N.C. 269 (c).

I. C. NANCE, TRADING AS THE MONTGOMERY HARDWARE COMPANY, v. JOHN C. ATKINS ET AL.

(Filed 17 May, 1916.)

Judgments—Mortgages—Payment—Appeal and Error.

In an action to foreclose a real estate mortgage to secure a note for $300 it appeared that defendant owed other notes secured by chattel mortgage, and it was admitted that on them all the defendant had paid in various sums the amount of $655. Upon proper issues the jury ascertained that half of the amount of the payments should have been applied to the note secured by the real estate mortgage. *Held,* a judgment against defendant for any amount due on the land mortgage was erroneous, and it is set aside on appeal. Judgment is entered that the note has been paid, and taxing plaintiff with costs.

CIVIL ACTION tried before *Lane, J.,* and a jury, at October Term, 1915, of MONTGOMERY.

This is an action to foreclose a real estate mortgage executed to secure the payment of a note of $300.

The plaintiff held two other notes against the defendant secured by chattel mortgages, one for $235 and the other for $225.

The plaintiff filed a bill of particulars with his complaint in which the three notes were charged against the defendant and which showed payments aggregating $655.

The defendant filed an answer admitting the execution of the $300 note and the mortgage to secure the payment of the same and pleaded payment.

(543) The jury returned the following verdict:

1. Is the defendant indebted to the plaintiff; and, if so, in what amount? Answer: "$300, with interest on same from 19 April, 1909, less a payment of $210 made on 15 August, 1911."

2. Did the said parties agree, at the time of executing the mortgage of 19 April, 1909, upon the real estate of John C. Atkins, that one-half of all payments made by John C. Atkins or his son, James Atkins, upon the several mortgages held by said Nance should be applied to the said land mortgages? Answer: "Yes."

3. Did the said James Atkins direct, at the time of making payments, that one-half of all sums paid should be applied to the discharge of the land mortgages? Answer: "Yes."

Judgment was entered upon the verdict in favor of the plaintiff, declaring $90 to be due on the real estate mortgage and ordering a sale of the land, and the defendant excepted and appealed.

Charles A. Armstrong for plaintiff.

Howell & Hurley and Dockery & Wildes for defendant.

ALLEN, J. It is probable that his Honor intended to set aside the findings upon the first and second issues, but he did not do so, and with those issues standing the judgment rendered is clearly erroneous.

The plaintiff admits payments on the three mortgages amounting to $655, and the jury has found that it was the agreement of the parties that half of this amount should be applied to the $300 note, which will fully satisfy and discharge it.

The defendant is, therefore, entitled to have the judgment set aside and a judgment entered that the note has been paid, and for costs.

Reversed.

BLUE RIDGE LAND COMPANY v. WILLIAM FLOYD.

(Filed 24 May, 1916.)

1. Deeds and Conveyances—Color—Adverse Possession—Burden of Proof—Degree of Proof.

The defendant in an action to recover lands, depending upon adverse possession thereof under color of title, where the plaintiff has proved a perfect chain of paper title, has the burden of proving this defense by the

greater weight of the evidence, Revisal, sec. 386; and while an instruction thereon that the defendant must satisfy the jury thereof has been held sufficient, a further charge in connection therewith, that the defendant need not satisfy the jury by the greater weight of the evidence, is in effect a charge that the jury may be satisfied by less than the greater weight of the evidence, and constitutes reversible error.

2. Deeds and Conveyances—Color—Adverse Possession—Constructive Possession—Outer Boundaries.

Upon the question as to whether defendant's possession of a small strip of land beyond his own line and within that of the plaintiff was sufficient to extend his adverse possession by construction to the boundaries of his deed under which he claims as color, *Green v. Harmon*, 15 N. C., 162, is cited and approved.

CIVIL ACTION tried before *Harding, J.*, and a jury, at May (544) Term, 1914, of HENDERSON.

This action was brought to recover land. Plaintiffs showed a complete chain of title from the State by grant and mesne conveyances. Defendant relied on adverse possession under color of title. The court charged the jury as follows: "If the defendant has satisfied you by the evidence in this case—he is not required to satisfy you by the greater weight of the evidence or beyond a reasonable doubt, but to satisfy you upon the evidence in this case; the burden being upon the plaintiff to satisfy you by the greater weight of the evidence of its right to recover. The burden is upon the defendant to satisfy you by the evidence—not by the greater weight, nor beyond a reasonable doubt, but to satisfy you; and if the defendant has satisfied you by the evidence in this case that George Thomas in 1872, under a deed from Solomon Jones, entered upon the land in controversy, and the deed covered the land, and that he held it in his possession openly, notoriously, adversely, and continuously for a period of seven years, then it would be your duty to answer the first issue 'No.'" The jury returned a verdict for the defendant, and plaintiff appealed from the judgment thereon. See case on former appeal, 167 N. C., 686.

McNinch & Justice and Smith & Shipman for plaintiff.
Stanton & Rector and O. V. F. Blythe for defendant.

WALKER, J. When this case was before us at a former term it appeared, as it does in this record, that plaintiff claimed under a grant and mesne conveyances which vested the title and right of possession in him. This entitled him to recover unless defendant could show that there was an outstanding paramount title or that he had in some way acquired title. He undertook to do this by showing color of title and

adverse possession under it, which he says was sufficient to ripen his title. But this was an independent defense, affirmative in its nature, and imposed upon the defendant the burden of proof to establish it, and this burden required that he should satisfy the jury of the truth of his (545) defense by the greater weight of the testimony. We said, by *Justice Hoke,* in the former opinion, 167 N. C., at p. 688: "On the facts as they are now presented, in order to defeat the title vested in plaintiff company under its grant and written deeds, it was necessary for defendant to show seven years continuous possession in the assertion of ownership under the Thomas claim. The evidence, as stated, not showing or tending to show that the occupation of the third persons, other than Cook, was in any way connected with this claim, the presumption is that they held under the true title, and we are of opinion that plaintiff was entitled to the instruction prayed for by him: 'That there was no evidence that Abe Shipman or any other occupant of the Payne House, except Cook, was in posseession of the land in controversy at any time, claiming the same under George Thomas.'" It will be seen, therefore, that the burden was placed upon the defendant to prove his adverse possession under color. The court charged at the last trial, and correctly, that the burden, in the first instance, was upon the plaintiff to satisfy the jury by the greater weight of the evidence that it is entitled to recover; but we are of the opinion that there was error in the other part of the charge to the effect that the defendant, who attempted to show an independent title, was not required to do so by a preponderance of the evidence. The statute, Revisal, sec. 386, places the burden upon the defendant to show his color and adverse possession, for otherwise "his occupation shall be deemed to have been under and in subordination to the legal title." *Bryan v. Spivey,* 109 N. C., 57; *Monk v. Wilmington,* 137 N. C., 322; *Bland v. Beasley,* 145 N. C., 168; *Stewart v. McCormick,* 161 N. C., 625; *Ruffin v. Overby,* 105 N. C., 78. In *Bryan v. Spivey, supra,* it is said that if the plaintiffs have shown that they had the title, the defendants aver that "they are protected by their adverse possession under color of title for seven years. This defense is an affirmative one, and the *onus probandi* is, of course, upon the defendants to establish it," citing *Ruffin v. Overby, supra.* The case of *Chaffin v. Mfg. Co.,* 135 N. C., 95, relied on by the defendant, does not sustain his position. The question there was whether the use of the word "satisfied" in an instruction that "the jury should be satisfied by the greater weight of the testimony" increased the degree of proof required by the party upon whom rested the burden. We held that it did not, and then said: "The use of the word 'satisfied' did not intensify the proof required to entitle the plaintiffs to their verdict. The weight of the evidence must be with the party who has the burden of proof, or else he

cannot succeed. But surely the jury must be satisfied, or, in other words, be able to reach a decision or conclusion from the evidence and in favor of the plaintiff which will be satisfactory to themselves. In order to produce this result, or to carry such conviction to the minds of the jury as is satisfactory to them, the plaintiffs' proof need not be (546) more than a bare preponderance; but it must not be less. The charge, as we construe it, required only that plaintiffs should prove their case by the greater weight of the evidence"; and the other cases cited by defendant support this view. *Fraley v. Fraley,* 150 N. C., 504; *S. v. McDonald,* 152 N. C., 807. But in this case the court not improperly used the word: "satisfy" in charging upon the burden of proof and weight of the evidence, but the error consists in excluding the idea that the defendant must prove his color and adverse possession by a preponderance of the evidence. There must at least be a preponderance, whether the word "satisfied" is used or not. The instruction given in this case was that the jury must be satisfied, but not by a preponderance of the evidence, which was erroneous. The instruction was equivalent to saying that though the jury must be satisfied, it may be done by less than the greater weight of the evidence. The authorities show that this is not the correct rule. This case is not like *Winslow v. Hardwood Co.,* 147 N. C., 275, and that class of decisions, where there was no separate and distinct affirmative defense pleaded, as insanity, infancy, coverture, and the like, but only a denial of plaintiffs' cause of action.

Plaintiff contends that the evidence shows that defendant occupied only a small strip of the land just across the line, and that possession of this small piece was not sufficient to extend the adverse possession by construction to the boundaries of the deed, which defendant claims as color of title.

This question was discussed by *Chief Justice Ruffin* in *Green v. Harman,* 15 N. C., at p. 162, where he said: "The operation of the statute of limitations depends upon two things: The one is possession continued for seven years, and the other the character of that possession—that it should be adverse. It has never been held that the owner should actually know of the fact of possession, nor have actual knowledge of the nature or extent of the possessor's claim. It is presumed, indeed, that he will acquire the knowledge, and it is intended that he should. Hence, nothing will bar him short of occupation, which is a thing notorious in its very nature, and that must be continued seven years in order to afford him, not that time to bring suit for redress of a known injury, but full opportunity to discover the wrong. To the extent of the occupation there is, *prima facie,* no hardship in holding that it is on a claim of title and adverse, and that the owner knew of it. Every man must be considered cognizant of his own title, the boundaries

of his land, and of all possessions on it, either by himself or others. Ordinarily, possession taken by one of another's land is of a part sufficient in quantity or value to show to the jury that the possession was taken adversely, and also to afford unequivocal evidence to the
(547) other claimant of that intention. And as far as the actual occupation goes, it seems to furnish such evidence in almost all cases. If, indeed, two persons own adjoining lands, and one runs a fence so near the line as to induce the jury to believe that any slight encroachments were inadvertently made, and that it was the design to run on the line, the possesesion constituted by the inclosure might be regarded as permissive, and could not be treated as adverse, even for the land within the fence, except as it furnished evidence of the line in a case of disputed boundary. The line being admitted, it would not make a title, where a naked adverse possession will have that effect, because there was no intention to go beyond his deed, but an intention to keep within it, which by a mere mistake he has happened not to do." We followed this view of the law in *Currie v. Gilchrist,* 147 N. C., 648.

We have no doubt that at the next trial proper instructions will be given to the jury upon this matter, and according to the phase of the evidence then presented, so that the jury may determine whether the defendant has had adverse possession as the law defines it, under color of title for the requisite time.

For the error as to the degree of proof the defendant should adduce, another trial must be had.

New trial.

Cited: Hunter v. West, 172 N.C. 162 (2c); *Vanderbilt v. Chapman,* 175 N.C. 13 (2c); *Speas v. Bank,* 188 N.C. 528 (1c); *Penny v. Battle,* 191 N.C. 224 (1c); *Barbee v. Bumpass,* 191 N.C. 523 (1c); *Power Co. v. Taylor,* 194 N.C. 233 (1c).

G. W. FISHER v. TOXAWAY COMPANY ET AL.

(Filed 24 May, 1916.)

1. Appeal and Error—Tenants in Common—Partition—Betterments—Objections and Exceptions.

Where proceedings to partition lands are referred, and it appears in the referee's report that the lands are capable of actual partition, and that the appellee has put valuable improvements thereon; and upon the report judgment has been entered appointing commissioners to divide the land in such manner and proportion as to allow the appellee for betterments

(in developing a water power) he has placed thereon, and no appeal was taken from this order, but the appellant insisted upon it: *Held*, the order of the court concluded the right of the appellant to have the question of the good faith of the appellee in putting the improvements on the land inquired into, upon appeal from the confirmation of the report of the commissioners.

2. Appeal and Error — Tenants in Common — Partition — Betterments— Commissioners' Report—Approval.

The findings of commissioners appointed to partition lands among tenants in common, allowing betterments to one of them, and approved by the trial judge under the circumstances of this case, are not reviewable on appeal.

3. Appeal and Error—Objections and Exceptions.

The appellant is confined in his oral argument in the Supreme Court to the exceptions appearing of record.

4. Appeal and Error—In Forma Pauperis—Briefs—Rules of Court.

Upon appeal to the Supreme Court *in forma pauperis*, the appellant is required to file six typewritten copies of his brief upon penalty of having his case dismissed, and printed briefs must be filed by the appellee for him to be heard on the oral argument.

APPEAL by plaintiff from judgment rendered by *Harding, J.*, (548) at September Term, 1915, of TRANSYLVANIA.

This is an appeal by the plaintiff from a judgment confirming the report of commissioners appointed to partition certain lands between the plaintiff and the defendant, the plaintiff being entitled to one-eighth and the defendant to seven-eighths thereof.

During the pendency of the proceeding and between 27 February, 1912, and 17 June, 1912, the defendant made valuable improvements on said land, consisting in the development of a water power.

The cause was referred to Bartlett Shipp, Esq., and at Spring Term, 1913, his report was affirmed, and in the judgment of Judge Adams confirming the same are the following provisions:

"It is further ordered and adjudged that the plaintiff be and he is hereby declared to be a tenant in common with the defendant, The Toxaway Company, in the lands in controversy in this action as defined in the referee's report, and as such is the owner in fee and entitled to an undivided one-eighth interest in said lands.

"It appearing from the report of the referee that the said lands are susceptible of actual partition, without injury to the interests of either of the tenants in common, that a sale of the lands is not necessary, and that the defendant has in good faith made improvements on said lands costing several thousand dollars:

"It is further ordered and adjudged that G. W. Wilson and J. C. King and T. T. Loftis be and they are hereby appointed commissioners to make partition of the lands in controversy between the plaintiff and defendant according to their respective interests as herein declared; that said commissioners, after being duly sworn, shall meet on the premises and partition the land between their respective interests therein, that is to say, said commissioners shall partition and allot to the plaintiff in severalty one-eighth interest therein, and to the defendant in severalty seven-eighths interest therein. It is further ordered and adjudged that no land shall be allotted to the plaintiff on which are situated the improvements made by the defendant or any part thereof, and that the land allotted to the defendant shall be valued without regard to the improvements made upon said property."

(549) The plaintiff did not except to said judgment, and, on the contrary, asked that it be affirmed on the appeal of the defendant. (165 N. C., 663.)

The commissioners named in the judgment of Judge Adams failing to act, other commissioners were appointed by Judge Long to act under the order of Judge Adams.

These last commissioners met upon the premises, examined the land, heard evidence offered by the plaintiff and defendant, and made a full report, the material parts of which are as follows:

"We further report that in making the allotments hereinafter set out we did not consider the value of the power house and plant above referred to, but allotted the land on which said house and plant is situated to the defendant above named.

"We further report that the land herein allotted to the plaintiff, G. W. Fisher, is situated on a public road of Transylvania County, North Carolina.

"We further report that in all of our proceedings we acted in accordance with the order of his Honor, B. F. Long, above referred to, and the order of his Honor, W. J. Adams, herein referred to, and allotted no land to the plaintiff on which are situated the improvements made by the defendant or any part thereof, and valued the land allotted to the defendant without regard to the improvements made upon said property or any of them. We valued the water power existing on said land without regard to any increase thereof by reason of the presence of said dam and said lake, or without regard to any development or improvement thereof. This value we find to be $2,000, of which the share of the plaintiff herein is worth $250.

"We carefully examined all of the land embraced in the above boundary, under the direction of the surveyor familiar with the boundary, and considered the value thereof without regard to any of the improve-

ments made thereon by the defendant or any of them. We find that the land situated in the southern and southwestern portions of said boundary is of somewhat less value per acre than the remainder of said boundary and that 75 acres of said land in said south and southwestern portion is equal in value to a one-eighth interest in said entire boundary without regard to any of the improvements made thereon by said defendants and without regard to the value of said water power as above found.

"We *further find that the land in the northeastern portion of the* boundary allotted to G. W. Fisher is worth on an average $25 per acre, and that ten (10) acres thereof is equal in value to the share of the plaintiff in the water power as above set forth.

"We, therefore, allot to said plaintiff as his share in said property, to be partitioned by us, 85 acres from the south and (550) southwestern portions of said boundaries above described, as fairly and equitably equaling in value his one-eighth interest in the above described boundary and in said water power thereon, as above set forth, and said tract of land so allotted to said plaintiff in severalty is bounded and described as follows: . . .

"We allot to said defendant as its share in said property, to be partitioned by us, ...acres, from the northern portion of said boundary above described, together with the water power thereon, above mentioned, and valued by us at the sum of $2,000, as fairly and equitably equaling in value its seven-eighths interest in the above described boundary and in said water power thereon, as above set forth, and said tract of land so allotted to said defendant in severalty is bounded and described as follows: (Description omitted.)"

The plaintiff filed the following exceptions to the report:

1. Because the commissioners erred in finding as a fact that the power plant and power house erected by the defendant corporation, The Toxaway Company, on the tract on which the plaintiff had an undivided one-eighth interest, had been erected by the defendant corporation in good faith, and with no purpose or desire to deprive the plaintiff of any of his rights or privileges as a tenant in common with the said defendant in the lands described in the order of the court. This was a question of fact which could only be passed upon by a jury, and upon which there was much conflicting testimony before the commissioners.

2. The plaintiff further excepts to the report as filed by the commissioners because the valuation put upon the water power by the commissioners was far below the actual value as shown by the evidence heard by the commissioners.

3. We further except to the report of the commissioners because the land allotted to the plaintiff is a rough tract of mountain land entirely

cut off from the main public road and is not equal in value to any of the acreage allotted to the defendant corporation. Wherefore the plaintiff asks that the said report be set aside and that the question of fact involving the actual value of the water power upon the said tract and the good faith of the defendant corporation in making the improvements on the said tract after the court had decided that the plaintiff was a tenant in common with the defendant corporation be first submitted to a jury for its consideration and finding.

The report was confirmed, and the plaintiff excepted and appealed.

H. S. Ewart for plaintiff.
Winston & Biggs for defendant.

ALLEN, J. The exceptions of the plaintiff cannot be sustained.

(551) The finding of good faith on the part of the defendant in making improvements is immaterial, as the commissioners followed the judgment of Judge Adams in making the allotment between the plaintiff and the defendant and this judgment "ordered and adjudged that no land shall be allotted to the plaintiff on which are situated the improvements made by the defendant or any part thereof, and that the land allotted to the defendant shall be valued without regard to the improvements made upon said property."

This judgment established the rights of the parties, and the plaintiff not only failed to except to it, but he resisted the effort of the defendant to set it aside or reverse it, and under its provisions no part of the land on which improvements had been made could be allotted to the plaintiff, and he, therefore, had no interest in the question of good faith in making them.

It appears from the report that the commissioners allotted to the plaintiff 10 acres of land in lieu of his one-eighth interest in the water power, valued as if unimproved, and 75 acres, one-eighth in value of the remainder of the land, which is in strict accordance with the former judgment.

We cannot review the findings of the commissioners, approved by the judge, as to the value of the water power and of the land allotted to the plaintiff; but, if disposed to do so, it would be impossible, as the evidence is not sent up with the record.

We are confined to the exceptions, and cannot consider other matters, not arising upon the exceptions, which were presented on the oral argument.

We call the attention of the profession to the rule regulating the filing of briefs when the appeal is *in forma pauperis*.

The appellant is required to file six typewritten copies of his brief, the penalty for failing to do so being the dismissal of his appeal, and the appellee must file a printed brief or he will not be heard on the oral argument.

Affirmed.

Cited: Daniel v. Power Co., 204 N.C. 277 (2c); *Jenkins v. Strickland*, 214 N.C. 444 (2c).

J. A. FORE, RECEIVER PIEDMONT LUMBER COMPANY, v. M. S. FEIMSTER ET AL., MEMBERS OF THE BOARD OF COMMISSIONERS OF IREDELL COUNTY.

(Filed 17 May, 1916.)

1. Municipal Corporations—Contractor's Bond—Statutes—Interpretation—In Pari Materia.

In an action to enforce individual liability upon the members of the board of county commissioners for failure to take a bond from a contractor for the erection of a county poorhouse required by our statute, ch. 150, Laws 1913, it is *Held*, that the entire body of the law applicable to this subject is *in pari materia* and should be construed as one statute.

2. Same—County Commissioners—Individual Liability—Penalties.

Revisal, sec. 1319, declares every county a body politic and corporate, having certain powers enumerated by the statute and those implied by law, and no others, which can only be exercised by the board of commissioners, or in pursuance of a resolution adopted by them, and construing this section with other relevant sections of the Revisal imposing penalties upon the commissioners for failure to perform such duties, or making them indictable; and with reference to sections expressly making the commissioners individually liable when knowingly taking inadequate bonds from sheriffs, tax collectors, etc., it is *Held*, the county commissioners are not individually liable for the failure of their ministerial duty to take the bond required by ch. 150, Laws 1913, from a contractor for the erection of a county home, such not having been expressly declared; and the remedy is by indictment.

3. Statutes — County Commissioners — Individual Liability — Expressio Unius.

Where the Legislature has created certain duties to be performed by the county commissioners, and has expressly imposed a personal liability upon their failure to perform some of them, but not as to others, such liability only attaches where it is expressly so declared.

4. Mechanic's Liens—Municipal Corporations—Contractors' Bonds.

Semble, ch. 150, Laws 1913, requiring municipal corporations to take bond from contractors for county buildings, is for the protection of the

counties, and subcontractors and materialmen acquire no rights thereunder.

(552) CIVIL ACTION tried before *Webb, J.*, and a jury, at November Term, 1915, of MECKLENBURG.

There were facts in evidence tending to show that in 1913 defendants, as the board of commissioners of Iredell County, entered into a contract with the Solomon Construction Company that the latter would supply all material, etc., and construct for the county a county home, at the contract price of $23,000, the construction company giving bond in the sum of $8,000 to save the county harmless by reason of nonperformance of the stipulations of the contract; that the home has been built and paid for except a small amount, which has been tendered to plaintiff and refused; that during performance of the work Piedmont Lumber Company furnished to Solomon Construction Company certain material and supplies to be used and which were used in said building, and there is a balance due for same of $622.65; that the construction company is insolvent, and the Piedmont Lumber Company being also insolvent, plaintiff, as receiver of said company, brings the present suit to hold the members of the board of commissioners personally liable for the debt, on the ground that they failed to take a bond to protect materialmen and laborers as required by Laws 1913, chapter 150.

(553) At the close of the testimony, pursuant to motions made in apt time, judgment of nonsuit, and plaintiff, having duly excepted, appealed.

Stewart & McRae and McNinch & Justice for plaintiff.

L. C. Caldwell and H. P. Grier for defendant.

HOKE, J., after stating the case: In direct reference to the question presented, the statute makes provision as follows: "Every county, city, town, or other municipal corporation which shall let a contract for the building, repairing, or altering any building shall require the contractor for such work to execute a bond with one or more solvent sureties, payable to the said county, city, town or other municipal corporation, and conditioned for the payment of labor done and the materials and supplies furnished for the said work, . . . if the official of said county, town, or other municipal corporation whose duty it shall be to take said bond shall fail to require said bond herein provided to be given, he shall be guilty of a misdemeanor. Any laborer doing work on said building, and materialman furnshing material therefor and used therein, shall have the right to sue on said bond the principal and sureties thereof, . . . for the recovery of the amount due them respectively."

The conditions of the bond taken being only to save the obligee, that is, the county of Iredell, harmless by reason of default in complying with the stipulations of the contract, as now advised the bond does not seem to extend or apply to the claims of materialmen and laborers for sums due them from the contractor, *Mfg. Co. v. Andrews,* 165 N. C., 285, and the question presented is whether the members of the board of commissioners, as individuals, should be held liable to plaintiff, a materialman, for failure to take the bond in terms as required by the law. While it is the recognized position here and elsewhere that, "One who holds a public office, administrative in character, and in reference to an act clearly ministerial, may be held individually liable in a civil action to one who has received special injuries in consequence of his failure to perform or negligence in performance of his official duties," *Hipp v. Farrell,* 169 N. C., pp. 551-555, in several authoritative decisions on the subject in other States it has been held that where an act of the Legislature in reference to a corporate body in its terms imposes a corporate duty, the individuals, as such, composing the corporation or charged with the general management and control of its corporate affairs shall not be held to personal liability unless expressly made so by the statute itself or unless they have been charged with or have undertaken some individual or personal duty concerning the matter. This principle declared in *Bassett v. Fish,* 75 N. Y., 303, has been extended to cases similar to the one before us in *Blanchard v. Burns,* 110 Ark., 528; *Mounier v. Godbold,* 116 La. Ann., 165; *Hydraulic* (554) *Co. v. School District,* 79 Mo. App., 665.

In the Arkansas case it is said: "The failure of public officers to comply with the statute directing the taking of a bond from a contractor for public work conditioned on paying all indebtedness for labor and material, upon which bond any person, etc., may sue, does not render them individually liable."

In the Missouri case, *supra, Bland, P. J.,* delivering the opinion, said: "It is to those corporations, and not to the living persons through whom they manifest their will and power, that the Legislature has spoken, and when the contract for the erection of the school building was let by the school district of Kirkwood, it became its duty to require the contractor to give the bond; the duty was a corporate one, and the failure to perform this duty was the negligence of the corporation and not of the individuals who compose the board of directors of the district. In the letting of the contract and in their failure to take the bond of the contractors, the directors did not act as individuals engaged in the enterprise of erecting a building, but as a board of directors through which the school district manifested its will."

Without at present giving our full approval to its application in these last three cases, the position finds support, and becomes controlling in this jurisdiction by a proper consideration of the general statute law under which our counties are established and exercise their duties, and the features of this legislation by which a proper performance of these duties are enforced. In chapter 23 of Revisal, sec. 1319, it is declared that "every county is a body politic and corporate and shall have the powers prescribed by statute and those necessarily implied by law, and no others, which powers can only be exercised by the board of commissioners, or in pursuance of a resolution adopted by them." Then follows an elaborate statement of powers conferred, and in this and other chapters and sections of the Revisal appear the penaltics imposed for failure to perform those enumerated and general duties. In some cases the members of the board are made indictable; in others penalties are imposed. In certain specified instances, and particularly in cases of taking official bonds of sheriffs and tax collectors, the commissioners are expressly made individually liable as sureties where they knowingly take such a bond that is inadequate or inefficient, Revisal, secs. 313 and 2914; and under penalty of forfeiting his office, their clerk is required to keep a record of the vote on official bonds so that evidence may be available as to how each member of the board has voted on these questions. These boards of commissioners, charged with manifold and important duties in the governance and well ordering of their counties, many of them legislative or *quasi*-judicial in their nature, serving (555) oftentimes at great personal sacrifice, should not be held individually responsible unless clearly made so by express enactment or some imperative principle of law, and while the duty in this case is no doubt ministerial, when proper weight is given to the language of the statute itself, imposing the duty on "counties, cities, towns, or other municipal corporations," thus in terms creating a corporate duty, and to the fact that in the body of the law applicable, whenever individual liability has been heretofore desired, express provision has been made for it, we are of opinion that it is the correct interpretation of this legislation that, in its coercive features, the remedy is confined to that given by the statute itself, to wit, by indictment, and that no civil liability on the individual members of the board is intended or permissible.

The entire body of law applicable to this subject, being *in pari materia,* is to be construed as one and the same statute, and the fact that the Legislature, having created in terms a corporate duty, has imposed the personal liability in the one case and failed to do so in the other is equivalent to a legislative declaration that, in the latter instance, the liability does not exist. *People v. Hutchison,* 172 Ill., 498; *S. v.*

Wrightson, 56 N. J. L., 201, cited in *S. v. Knight,* 169 N. C., 333; Black on Int. Laws, p. 146.

There is no error, and the judgment of nonsuit must be Affirmed.

Cited: Hipp v. Ferrall, 173 N.C. 171 (c); *Marshall v. Hastings,* 174 N.C. 481 (cc); *Noland Co. v. Trustees,* 190 N.C. 252 (cc); *Holmes v. Upton,* 192 N.C. 179 (c); *London v. Comrs.,* 193 N.C. 103 (p); *Moffitt v. Davis,* 205 N.C. 569 (d); *Old Fort v. Harmon,* 219 N.C. 245 (3c).

CLARA J. BROWN v. ASHEVILLE POWER AND LIGHT COMPANY.

(Filed 24 May, 1916.)

1. Railroads—Street Railways—Care of Passengers—Guard-rails—Absent Conductor—Negligence—Evidence—Questions for Jury.

Where a street railway company runs its open car to its amusement park, the car provided with guard-rails held in place only by their own weight, and there is evidence tending to show that these rails are easily lifted by passengers entering or leaving the car, which the presence of the conductor, in looking out for the safety of his passengers, would prevent; that at a time when the car was crowded and a crowd of passengers was expected at the park, the conductor left the car to throw a switch, just before reaching the park platform, and the plaintiff, an old and feeble woman, attempting to get on the car at its regular stop, was injured by the rail, which had been held up by the passengers entering and leaving the car, falling on her head; and that a special man was occasionally employed to throw the switch, but was absent on this occasion: *Held,* evidence of actionable negligence, and it was reversible error for the trial judge to charge the jury that the car was properly equipped, and that the defendant was not liable if the injury to the plaintiff was caused by the rail having been lifted by the other passengers, there being no fastening and no one present charged with the duty to prevent them.

2. Railroads—Street Railways—Stopping of Cars—Invitation Implied.

The stopping of a car at its regular place for the purpose of taking on passengers is an implied invitation for passengers to board the car there.

APPEAL by plaintiff from *Harding, J.,* at March Term, 1916, (556) of BUNCOMBE.

Mark W. Brown for plaintiff.

Martin, Rollins & Wright for defendant.

CLARK, C. J. The plaintiff, an aged lady, on a visit to her daughter in Asheville, went with said daughter and infant grandchild on the defendant's car to Riverside Park, a place of amusement conducted by the defendant. On the return trip, as they came out from the park to the platform provided for passengers, there was a crowd of people thereon to take the car, and when the car arrived that also was crowded.

The conductor left the car a short distance from the point where passengers were received and discharged, in order to change a switch, while the car went on, without the conductor, to the usual stopping place at the platform. There was evidence that the defendant had sometimes furnished an extra man to change the switch, so that the conductor could remain on the car to supervise and to protect passengers from injury when there was a crowd. The car on which the plaintiff was injured was an open car provided with a guard-rail, running the length of the car on each side, which remained in position by its own weight when down and was held by hooks when raised to the top of the car for passengers to get on or off. When the guard-rail was down, either end could be raised up without disturbing the other end. These rails are 25 to 30 feet long, 4 inches wide, and 1 inch thick. There were steps on each side of the car running its whole length which would be lowered when passengers were getting off or on the car, and at other times these steps were raised and fastened with an iron made for that purpose. On this occasion the car stopped with the left side next to the platform for passengers, who began to get off and on, on both sides of the car. The plaintiff's daughter boarded the car from the platform with her baby in her arms and took a seat, and the plaintiff was in the act of getting into the car on the same side when the guard-rail fell upon her head, causing serious injury.

The defendant's conductor testified that when he returned to the car, after operating the switch, "the guard-rail was being pushed up and down by ladies and men who were holding it up, and that passen-
(557) gers were dodging in and out of the car, under it"; that the plaintiff had already been injured, and he took hold of the guard-rail and held it in position until all the passengers had gotten off, and that he then let it down into position. He further testified: "I saw that Mrs. Brown had been hurt before I let the rail down. When I saw that she was hurt, she was beside the car; she must have been within 5 or 6 feet of me. The people were still getting off the car; that was the first time that I discovered that she was hurt. I knew she was hurt because she was standing in a stooped position and had her hand to her head like she was hurt. I didn't see the guard-rail hit her; from every sign I thought she had been hit."

The conductor also testified that there was nothing to keep the guard-rail down; that anybody could push it up at will, and that if the extra man had been in charge of the switch, so that he could have remained in the car, he "would have been there to keep the rail down," and that if he had been there this would have been a part of his duties; that at that time of the year the cars were pretty well crowded, and there usually were large crowds making a rush to take the car back to town.

At the request of the defendant, the court instructed the jury that there was no evidence of any negligence on the part of the defendant in the way and manner in which the car was equipped, and that if the injury was caused by the acts of the passengers on the car, the jury should find that there was no negligence on the part of the defendant, and that if the guard-rail referred to was caused to fall and strike the plaintiff by the acts of the passengers on the car the jury should find that there was no negligence.

In this there was error. It was the duty of the conductor to be at his station at the platform where the passengers were in the habit of boarding the cars and to give necessary assistance. *Clark v. Traction Co.*, 138 N. C., 77. The carrier had reason to expect a large crowd on that occasion, and knew that a rush was usual in which the strong and alert passengers might cause injury by crowding, or in other ways, those who were feeble, and it was its duty to have the conductor supervise the station platform and premises so that they should be in a reasonably safe condition when passengers were getting off and on, *Mangum v. R. R.*, 145 N. C., 152; and if he could not be there it was a defect in equipment that the rail was not fastened so it could not be raised or lowered except by the conductor.

It is true, the court charged that the plaintiff, being an aged person, was entitled to more care and attention from the conductor than ordinary persons. *Clark v. Traction Co. ,supra.* But he, in effect, withdrew that instruction when he further charged that if the conductor was not on the car, and the plaintiff was injured by the act of the passengers, the defendant was not negligent. The fact that the guard-rail was up was an invitation to plaintiff and other passengers, and the de- (558) fendant was liable for injuries sustained in attempting to get on, since if the conductor had been present at his post of duty the rail would not have been up until the proper moment, and in the rush of the passengers it would not have dropped on the plaintiff.

It was the duty of the conductor to raise and lower the rail, and if he were present it would have been negligence to permit it to be raised or lowered at such time or in such way as to drop on the plaintiff. It was still greater negligence that the conductor was called away to look after changing the switch, for which the company should have (and

sometimes had) provided another man. In *Arrowood v. R. R.*, 126 N. C., 629, it was held, in regard to the duty of keeping a proper lookout on the track, that if the engineer and fireman were insufficient to keep a proper lookout with due attention to their other duties, the company should have had a third man to do this; that the company were not absolved from negligence because by reason of such other duties the engineer and fireman were not able to keep a proper lookout, and that the question was not whether the engineer and fireman were negligent, but whether the company was.

In this case it was necessary that the switch should be altered, and the conductor was not negligent in attending to this duty; but it was negligence of the company in not having a man to look after the switch so that the conductor could attend to the lowering and raising of the rail at the proper time, which it was his duty to do, and to prevent the passengers from doing this in their rush to get on the car. The passengers were not charged with the duty of carefully looking after this matter. They were each rushing for a seat, and there are always some passengers more intent upon this than considerate of the possible injury to other passengers.

When the car reached the platform and had stopped at the usual place for passengers to alight, and for others to board the car, this was an invitation to the plaintiff to get aboard. *Kearney v. R. R.*, 158 N. C., 521. The defendant company knew that on such occasions there was likely to be a rush of passengers, and that there was necessity to have a conductor in charge to prevent injury to passengers by other passengers in a heedless rush for seats. It was negligence not to have a man to attend to the switch, so that the conductor could have been present at the station when the passengers were getting on and off, to prevent injury to some of them by others recklessly raising or lowering the rail, or crowding feeble passengers against the car, or causing injury in any other manner which would be likely in such a crowd when there is no supervision by an officer of the company.

Error.

(559)

THE BANK OF UNION v. R. B. REDWINE, JOHN C. SIKES, ET AL.

(Filed 24 May, 1916.)

1. Equity—Deeds and Conveyances—Mistake of Draftsman—Issues.

Where a phase of the controversy depends upon the correction of a paper-writing for mutual mistake of the parties, and the issue submitted was at the request of the appellant, he cannot complain that it related to

the mistake of the draftsman and not to that of the parties, it appearing that the mistake of the draftsman necessarily involved that of the parties in the presentation of the case as it was constituted.

2. Equity—Deeds and Conveyances—Correction—Signing Instruments—Mutual Mistake—Rule of Prudent Man.

The usual rule that equity will not aid one in correcting an instrument which he should have read before signing is not of universal application, and is subject to exceptions, the test being, in the absence of fraud, whether the party seeking the correction acted with ordinary prudence under the circumstances; and it appearing in this case that the draftsman, a man of repute, in the presence and with the consent of the parties, assumed to make the correction when brought to his attention, equity will not bar the complaining party of his right because he failed to reread the paper-writing thereafter before signing it.

3. Equity—Deeds and Conveyances—Mutual Mistake—Correction—Original Parties.

It is held in this case that the equity of correcting an instrument for mutual mistake is not confined to the original parties, approving *Sills v. Ford*, *post*, 733.

4. Equity—Deeds and Conveyances—Mutual Mistake—Mistake of Draftsman.

When it is shown that a deed or other paper-writing was not drawn by the draftsman in accordance with the prior agreement of the parties thereto, equity will correct it.

5. Same—Evidence—Trials—Questions for Jury.

Evidence tending to show that the maker of a mortgage included among its security certain certificates of stock he had theretofore on the same day pledged with a bank, that the name of the president of the bank was erroneously inserted in the instrument by the draftsman for the name of his corporation, that the maker was indebted to the corporation, and not to its president, is sufficient to be submitted to the jury upon the question of correcting the instrument accordingly on the ground of mutual mistake of the parties.

6. Deeds and Conveyances — Equity — Correction — Liens — Conflicting Claimants.

In construing a mortgage of certain lands and a pledge of certificates of stock, stating in the deed that it was subject to "any existing conveyance of said stock to B., and this only in the event the security, including personal, he now holds, when exhausted would not pay off (560) and discharge his existing debt against" the maker, it appeared that through mutual mistake the name of B. had been inserted for the name of a bank of which he was president, and that the maker owed the bank and not B., and had prior, but on the same day, pledged the same certificates to the bank to secure his indebtedness there. The instrument being construed was drawn without the knowledge of the bank, but for the parties to that agreement, and the provision as to exhausting other securities, etc., was not contained in the assignment of the certificates to the bank: *Held*, this provision did not apply to the bank, but to the grantee

in the deed, the latter of whom held subject to the lien of the former, and was required to first exhaust the other securities he held.

7. Deeds and Conveyances—Pledges of Security—Conflicting Claimants—Ambiguity—Third Parties.

Where the owner of securities has assigned them for a debt to different parties, A. and B., on the same day, and in the assignment to B. there are provisions as to first exhausting other securities, but not contained in that to A., to whom the securities had been prior assigned, and who knew nothing of the subsequent transaction: *Held*, the instrument of B., in case of doubt as to the meaning of the provision, will be construed against him in determining the meaning of the parties.

8. Deeds and Conveyances—Intent—Interpretation—Extrinsic Evidence.

In construing instruments relating to the same subject-matter the courts may regard the surrounding circumstances, the condition of the parties executing it, and the objects they had in view.

9. Deeds and Conveyances—Interpretation—Intent—Mala Grammatica.

The maxim, *Mala grammatica non vitiat chartam*, does not apply in the interpretation of an instrument when it appears that the draftsman was educated and intelligent, and that a grammatical and proper construction will throw light upon its interpretation.

10. Deeds and Conveyances — Registration — Probate — Deputy Clerks—Office—Women—Constitutional Law.

Where the owner of certificates of stock has assigned them to different persons as collateral security to the payment of a separate debt to each, the first of which is registered and the latter is not, and it appears from the latter instrument that the prior assignment was the first lien on the shares, the questions of notice by registration and the validity of probate taken by a female deputy clerk of the court, or whether it may be impeached by parol evidence, do not arise. *Semble*, the position of deputy clerk is an office. *S. v. Knight*, 169 N. C., 333, is cited and approved, *obiter dictum*.

11. Actions—Contracts—Usury.

An action on a contract bearing usurious interest may be maintained in our courts, and the action will not be dismissed because some usurious interest has been charged.

BROWN, J., concurring; CLARK, C. J., dissenting.

(561) CIVIL ACTION tried before *Carter, J.*, and a jury, at October Term, 1915, of UNION.

This action was instituted by the Bank of Union against the defendant R. B. Redwine and others, for the purpose of establising its right in and to ten shares of the capital stock of the Lake Land and Lumber Company, belonging to the defendant E. C. Williams and by him assigned to the plaintiff bank as security for certain indebtedness; the immediate purpose of the action being to restrain the defendant John

C. Sikes, trustee for R. B. Redwine, from proceeding to sell said shares of stock under a deed of trust alleged by plaintiff to constitute a junior lien upon the same. Issue was joined by defendant Redwine on the priority of plaintiff's lien and on the amount of the debts secured thereby, the said defendant claiming that the plaintiff bank had charged defendant Williams usurious interest on the loan secured by said stock, and asking that plaintiff's debt be reduced on that account. He also invoked the doctrine of marshaling assets, and asked that before proceeding against said stock plaintiff be compelled to exhaust its security on the home place of the defendant Mrs. J. W. Griffin. Mrs. Griffin, who had signed with defendant Williams the note secured by the mortgage of her home place and by the pledge of the said corporate stock, answered that she had signed said note as a surety, and demanded that the plaintiff, before foreclosing the mortgage on her home, exhaust its security on the stock.

An injunction pending the hearing was obtained from Judge Shaw in December, 1914, and the case came on for hearing before Judge Devin at May Term, 1915. At this hearing the issues involving the priority of plaintiff's lien were tried and determined in favor of plaintiff; and it was also found by the jury and adjudged by the court that Mrs. Griffin was merely a surety on the note secured by mortgage of her home and the corporate stock. Judge Devin then referred the case to W. J. Pratt, Esq., to determine the amount of the debts of plaintiff secured by the stock, and to pass upon the question of marshaling. The referee made his report to Judge Carter at October Term, 1915, who passed upon exceptions thereto filed by both sides, and sustained plaintiff's contention that the defendant Redwine, being merely a junior encumbrancer, could not plead usury in the debt of Williams to plaintiff, and held that this was not an appropriate case for the application of the principle of marshaling assets. The court also overruled a motion to dismiss the action because usury had been charged. From these judgments of Judges Devin and Carter adverse to him the defendant Redwine appealed to this Court.

The verdict of the jury before Judge Devin was as follows:

1. Was the paper-writing from E. C. Williams to J. C. Sikes, trustee, executed by said E. C. Williams subsequent to the execu- (562) tion of the assignment of the Bank of Union? Answer: "Yes."

2. Was the name W. S. Blakeney in said paper-writing from E. C. Williams to J. C. Sikes, trustee, inserted therein in lieu of the words, the Bank of Union, by mistake of draftsman, as alleged in the complaint? Answer: "Yes."

3. Did defendant Redwine take the paper-writing executed by E. C. Williams to J. C. Sikes, trustee, with notice of assignment by said

Williams to the Bank of Union of the ten shares of stock in controversy? Answer: "Yes."

4. Was the subscribing witness of the paper-writing executed by E. C. Williams to J. C. Sikes, trustee, in proving same before the deputy clerk of court, sworn upon the Holy Bible? Answer: "No."

5. Was the defendant Mrs. J. W. Griffin surety on the note for $7,500 to the Bank of Union, as alleged in her answer? Answer: "Yes."

The plaintiff, the Bank of Union, claimed the ten shares of stock under a written assignment made to it by said Williams on 12 January, 1902, which assignment was not recorded until 17 November, 1914; and notwithstanding the fact that the deed of trust made to Sikes, trustee, was dated 4 January, 1912, and the trust was accepted by Sikes, trustee, 6 January, 1912, the plaintiff contended that this deed of trust was executed subsequent to the assignment to the plaintiff. The jury found it was executed subsequently. The plaintiff further contended that it was entitled to the stock in controversy under and by virtue of another assignment. This assignment was dated 1 April, 1914, and recorded on the same date. The plaintiff further contended that the name "W. S. Blakeney" was inserted in the deed of trust to Sikes by mutual mistake of the parties or by inadvertence or mistake of the draftsman in lieu of the name "The Bank of Union." The jury so found. The defendant contends that there was not sufficient evidence of a mistake, and the judge should have so instructed the jury.

The plaintiff further contends that the defendant Redwine had notice of the assignment of the ten shares of stock to the Bank of Union, and, therefore, he took the same subject to said assignment. The jury so found.

The defendant contends that the shares of stock, as evidenced by certificate, is personal estate, and a mortgage of it as made by Williams to the plaintiff should have been recorded, and not having been recorded, no notice, however full and formal, is sufficient.

The plaintiff further contended that notwithstanding the order of probate of the clerk directing the registration of the deed of trust to Sikes for the benefit of the defendant Redwine was in due form, the execution of same was not proven upon oath legally administered, and the registration is a nullity. The jury so found.

(563) The defendant contends that for the purpose of registration or notice, the probate, being in due form, cannot be attacked by evidence *aliunde*. The defendant further contends that the certificate of stock for the ten shares having been placed in the possession of the trustee Sikes, this would be *a pledge—a delivery of the property*—and no registration was necessary.

The deed of trust to Sikes, trustee, after conveying certain personal property, purported to convey the certificate of stock, and then followed the following clause:

"This certificate subject, however, to any conveyances heretofore made of said certificate of stock to J. R. English or the English Drug Company, and also subject to any existing conveyance of said certificate of stock to W. S. Blakeney, and this only in event the security, including personal he now holds, when exhausted will not pay off and discharge his existing debt against Williams."

The plaintiff contended that this provision in the deed of trust does not apply to the security then held by Blakeney, but to that held by Redwine.

The effect of the judgment is to give to this language the construction contended for by the plaintiff, which the defendant contends is erroneous.

Judgment was rendered in favor of the plaintiff, and the defendant appealed.

Stack & Parker for plaintiff.

Armfield & Adams and Cansler & Cansler for defendant.

ALLEN, J. It is well to consider, first, the exceptions taken by the defendant upon the trial of the issues submitted to the jury, as the verdict has an important bearing on the construction and legal effect of the deed of trust under which the defendant claims the certificate of stock in controversy, and the following are the material questions raised by these exceptions:

1. Are the issues sufficient to sustain the judgment correcting the deed of trust?

2. Was there sufficient evidence of mistake to justify submitting the question to the jury?

3. Was the maker of the deed of trust guilty of such negligence in failing to read the deed that equity will deny him, and the plaintiff claiming under him, the right to correct the deed?

4. Will a court of equity correct a deed upon the ground of mistake except as between the original parties?

The issue as to mistake was tendered by the defendant, and if in any reasonable view it contains the material facts, the defendant ought not to be heard to complain.

The criticism of the issue is that it does not embrace the agree- (564) ment of the parties; but while the agreement does not appear in the issue in express terms; it is necessarily involved, because there could be no mistake of the draftsman unless there was a previous agreement which he failed to insert in the deed.

Nor do we think there was such negligence on the part of the maker of the deed as will deprive him of the benefit of the equity for correction.

The general rule is as contended by the defendant, that equity helps those who are diligent and not those who are negligent, *Capehart v. Mhoon,* 58 N. C., 178; and ordinarily one who is able to read, who signs an instrument without reading, will not be aided, *Dillenger v. Gillespie,* 118 N. C., 737; but the rule is not of universal application, and is subject to exceptions.

Mr. Pomeroy says in his work on Equity Jurisprudence, vol. 2, sec. 856: "It has sometimes been said in very general terms that a mistake resulting from the complaining party's own negligence will never be relieved. This proposition is not sustained by the authorities. It would be more accurate to say that where the mistake is wholly caused by want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be a violation of legal duty, a court of equity will not interpose its relief; but even with this more guarded mode of statement, each instance of negligence must depend to a great extent upon its own circumstances. It is not every negligence that will stay the hand of the court. The conclusion from the best authorities seems to be that the neglect must amount to the violation of a positive legal duty. The highest possible care is not demanded. Even a clearly established negligence may not of itself be a sufficient ground for refusing relief, if it appears that the other party had not been prejudiced thereby. In addition to the two foregoing requisites, it has been said that equity would never give any relief from a mistake if the party could by reasonable diligence have ascertained the real facts; nor where the means of information are open to both parties and no confidence is reposed; nor unless the other party was under some obligation to disclose the facts known to himself, and concealed them. A moment's reflection will clearly show that these rules cannot possibly apply to all instances of mistake, and furnish the prerequisite for all species of relief. Their operation is, indeed, quite narrow."

A large number of authorities are collected in the notes to *Vallentyne Land Co. v. Immigration Co.,* 5 A. and E. Anno. Cases, 215, and *Grieve v. Grieve,* 11 A. and E. Anno. Cases, 1164, supporting the position that, in the absence of fraud, the true test is whether the party
(565) seeking correction acted as one of ordinary prudence under the circumstances.

We have also said: "The law does not require a prudent man to deal with every one as a rascal. There must be a reasonable reliance upon the integrity of men, or the transaction of business, trade, and com-

merce could not be conducted with that facility and confidence which are essential to successful enterprise and the advancement of individual and National wealth and prosperity. The rules of law are founded on natural reason and justice, and are shaped by the wisdom of human experience, and upon subjects like the one which we are considering they are well defined and settled." Walsh v. Hall, 66 N. C., 238, approved in *Leonard v. Power Co.,* 155 N. C., 14.

Applying these principles to the evidence, we cannot say that the maker of the deed is barred of his equity because of his negligence in failing to read the deed.

He testified, in substance, that he had agreed to execute a deed of trust for the benefit of Redwine; that Redwine prepared the deed; that the deed was read in the office of Redwine, and when he, the maker, discovered the certificate of stock was in the deed, he refused to sign, stating that he had already assigned the stock to the Bank of Union; that Redwine then said it would not hurt to make it subject to the paper of the Bank of Union; that it was agreed that the deed should be changed so that it would be made subject to the paper of the bank; that Redwine said he would make it subject to the paper of the bank, and turned to his desk and interlined the deed, and that he then signed the deed, relying upon the promise of Redwine to make it subject to the paper of the bank.

One of ordinary prudence, knowing the high character and intelligence of Mr. Redwine, might under these circumstances reasonably sign the deed without reading it.

Nor do we think that the equity of correction is confined to the original parties to the deed. It has been held otherwise at this term in *Sills v. Ford,* in which the authorities are collected and discussed in an elaborate opinion by *Associate Justice Walker,* and that case substantially covers all the exceptions arising on the trial of the issues.

The remaining question is whether there was evidence of mistake, and this must be answered against the defendant.

The equity to correct an instrument when by the mistake of the draftsman it is not drawn according to the prior agreement of the parties has been recognized from the earliest times, and we will only refer to a few of the later authorities.

The Court says, in *King v. Hobbs,* 139 N. C., 172: "The plaintiff and the defendant then went to a justice of the peace to have their contract put in writing, and the justice, evidently by inadvertence or mistake (whether of himself or the parties makes no difference), (566) omitted a material stipulation. In such case all the authorities are agreed that the instrument will be reformed so as to express the true intent and meaning of the parties.

"This is not an instance of an essential mistake or misunderstanding in the agreement itself, nor where the written instrument is supposed to embody the first and only contract of the parties, but is a case of an error of expression where the parties have come to a definite agreement before hand, and, in the endeavor to put this agreement in writing, a mistake is made, so that the instrument as drawn does not, in some material point, express the contract it was intended to evidence. In 20 A. and E. Enc. (2 Ed.), p. 823, it is said: 'That in mistakes of this kind the only inquiry is, Does the instrument contain what the parties intended that it should, and understood that it did? Is it their agreement? And it is wholly immaterial whether the defect is a statutory or common-law requisite, or whether the parties failed to make the instrument in the form they intended, or misapprehended its legal effect.' The authorities are numerous and fully bear out this statement of the doctrine. . . . 'Nor will the fact that the defendant denies that there is a mistake, and testifies that the deed was drawn according to the intention of the parties, prevent the court from granting the relief if it is satisfied that the deed is not in accordance with the agreement, but ought to be so.'" In *Arthur v. McClure,* 166 N. C., 144: "It is said in 34 Cyc., 908, to be settled by a host of authorities that where because of mistake an instrument does not express the real intention of the parties, equity will correct the mistake, unless the rights of third parties, having prior and better equities, have intervened. This is done, not for the purpose of relieving against a hard or even oppressive bargain or to give either party a better one, but simply to enforce the agreement as it was made and to prevent the injustice which would ensue if this is not done. . . . Whenever an instrument is drawn with the intention of carrying into execution an agreement previously made, and by mistake of the draftsman or scrivener it fails to do so, the mistake will be corrected and the original contract enforced according to the real intention of the parties"; and in *Shook v. Love,* 170 N. C., 99, a mistake will be corrected "when it is the mistake of the draftsman who is intrusted to prepare the instrument."

The deed bears evidence of mistake on its face, because in the absence of mistake there could be no reason for inserting the name of Blakeney in the deed, when he held no securities of the maker of the deed, Williams, and to whom he was not indebted.

There is also direct evidence of the maker of the deed, before recited, that the defendant Redwine agreed to interline the deed and make it subject to the claim of the Bank of Union, and that instead of doing so he wrote it subject to the claim of Blakeney.

(567) This can be explained only on the ground of fraud or mistake, and the plaintiffs do not charge fraud.

When the high character of the parties is considered, the reasonable conclusion is that the mistake occurred because Mr. Blakeney was president of the Bank of Union and had charge of its affairs, and one or the other of the parties spoke of him, when referring to the bank.

We, therefore, conclude that no error has been committed in the trial before the jury.

If the findings upon the first and second issues are supported by evidence, and are not disturbed, it becomes necessary to determine the meaning of the language in the deed to Sikes, trustee, as follows: "This certificate subject, however, to any conveyances heretofore made of said certificate of stock to J. R. English or the English Drug Company, and also subject to any existing conveyance of said certificate of stock to W. S. Blakeney, and this only in event the security, including personal he now holds, when exhausted will not pay off and discharge his existing debt against Williams."

It is the latter part of this stipulation, "and this only in event the security, including personal he now holds, when exhausted will not pay off and discharge his existing debt against Williams," that is in dispute.

There are three possible constructions of this clause. The first is that Blakeney is required to exhaust other securities before resorting to the stock to discharge his existing debt. This must be rejected, because Williams was not indebted to Blakeney, and Blakeney held no securities, personal or otherwise, and the jury has found that his name was inserted in the deed by mistake.

We must, then, adopt one of the other two constructions, the plaintiff contending the duty of exhausting other securities is imposed on the defendant, and the defendant that it is imposed on the plaintiff bank.

The deed of trust was drawn by the defendant Redwine, and the bank was not a party to it, and was not represented when it was prepared.

We may, then, well apply the rule apparently well settled, "that words will be construed most strongly against the party who uses them" (9 Cyc., 590), or, as stated in 6 R. C. L., 854, "A written contract should, in case of doubt, be interpreted against the party who has drawn the contract."

This rule is not conclusive or controlling, but is accepted as an aid in determining the meaning of the parties.

It is also "a fundamental rule of construction that the courts may look not only to the language employed, but to the subject-matter and surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made." *Merriam v. U. S.*, 107 U. S., 441; *R. R. v. R. R.*, 147 N. C., 382.

(568) "To ascertain the intention regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects they had in view." *Bank v. Furniture Co.*, 169 N. C., 180.

Let us, then, look at the surrounding circumstances, the condition of the parties, the subject-matter, and the object the parties had in view.

When the finding upon the first issue is read in connection with the evidence, we find that on the same day the deed was executed to Sikes, trustee, *but prior thereto,* the debtor, Williams executed a written transfer or assignment of the stock to the plaintiff bank as a security for debt, and that there is no requirement in that instrument that the bank must exhaust other securities before resorting to the stock.

Is it not reasonable to conclude, as the two papers were executed to different parties on the same day, dealing with the same subject-matter, if the restriction appearing in the deed to Sikes, trustee, was intended to refer to the bank, it would have been inserted in the assignment to which it was a party; and if it refers to the defendant Redwine, do we not find it where it would naturally appear?

The debtor Williams had already assigned the stock to the bank, and it is not to be believed that, in a subsequent deed, which he intended to make subject to this assignment, he attempted to impair its effect without the consent of the bank.

Again, the clause in the deed of trust must be read in connection with the verdict, which finds that the words "W. S. Blakeney" were inserted by mistake in lieu of the words "the Bank of Union," and, in legal effect, that it was the intention of the parties for the clause to read as follows: "The certificate subject, however, to any conveyances heretofore made of said certificate of stock to J. R. English or the English Drug Company, and also subject to any existing conveyance to the Bank of Union, and this only in the event the security, including personal *he* now holds, when exhausted will not pay off and discharge *his* existing debt against Williams."

The maxim, *"Mala grammatica non vitiat chartam,"* is applied when it appears that the instrument has been prepared by one unskilled in the use of language, and when the grammatical construction is at variance with the intent of the parties as indicated by the whole instrument; but if it appears that it is the work of the educated, intelligent draftsman, grammatical construction and arrangement will be considered, and here the pronouns "he" and "his" used instead of "it" and "its" naturally refer to the defendant, and not to the bank.

Neither party has seemed to attach any significance to the use of the word "personal," presumably because both the bank and the defendant Redwine had personal security, and it appears from the evidence of the latter that he had indorsements on some of his debts.

We are, therefore, of opinion that the true interpretation of the clause in the deed now before us is that the certificate of stock (569) was assigned as a security for the debt due the defendant Redwine, subject to the prior assignment to the plaintiff, with the restriction that he (Redwine) could not resort to the stock until he had exhausted his other securities; and thus understood, when considered in connection with the verdict finding that the words "W. S. Blakeney" were inserted in lieu of "the Bank of Union," and that the deed was executed after the assignment to the plaintiff, it is not necessary to consider the other interesting questions, argued with much learning and ability, as to whether the defendant's interest in the stock is that of pledgee or mortgagee, whether the probate of the defendant's deed is defective on account of the witness by whom the execution was proved being sworn with uplifted hand, before a woman, who purported to take the probate as deputy clerk, or whether parol evidence is admissible to attack the probate; because if a pledge of a mortgage duly probated and registered, and if the probate cannot be attacked, it is on its face and by its terms, under the construction we have placed on it, subject to the assignment to the plaintiff. *Hinton v. Leigh,* 102 N. C., 28; *Bank v. Vass,* 130 N. C., 593.

In the last case the words in the mortgage following the description of the land, "said 239¾ acres subject to a mortgage or deed of trust for about $1,900, balance of purchase money on the same," were held sufficient to establish a trust in favor of the holder of the first mortgage, although registered after the second mortgage.

In declining to pass on the other question raised we must not be understood as entertaining any doubt as to the right of a woman to hold the office of deputy clerk of the Superior Court, and we mention it lest citizens might be misled by our silence to jeopardize their titles. That the position is, by statute, an important public office is clear from the duties to be performed; that deputies are required to take and subscribe the oaths required of clerks (Rev., sec. 898); that the clerk is required to make a record of the appointment of the deputy in his own office and to require it to be registered in the office of the register of deeds (Rev., sec. 899); that the clerk is required to make a record of the removal of the deputy from *"his office"* (Rev., sec. 899); that the deputies are subject in all respects to the laws applicable to clerks (Rev., sec. 900); and that they may administer oaths only if they are "sworn officers" (Rev., sec. 2350); and if it is a public office, a woman cannot hold it until the Constitution is changed. *S. v. Knight,* 169 N. C., 333.

It is unnecessary to repeat the reasons given for the decision of the Court in the *Knight case,* but none of them were based on the inferiority of women or their unfitness for office. The propriety and wisdom

of female suffrage, and of the eligibility of women to hold office are political questions, which must be settled by the people, and which we cannot discuss or consider in the determination of legal questions. (570) We simply declare the law as we find it, without usurping the power to change the Constitution, a power which the people have reserved to themselves.

The question is also raised as to the right of the defendant Redwine to plead usury in the debt between the defendant Williams and the plaintiff; but as we understood it to be admitted on the argument, and the admission seems to be borne out by the record, that this plea, if sustained, would not afford any relief to the defendant if the claim of the plaintiff to priority was upheld, which we have done, we do not consider it.

The motion to dismiss the action because it appears that some usurious interest has been charged cannot be allowed.

The statute prescribes the penalties for usury and does not declare that no action may be maintained upon contracts tainted with illegal interest, and numerous precedents for such actions in law and equity may be found.

The facts found by the referee and the judge, when reviewing the report, seem to be fully supported by the evidence.

No error.

BROWN, J. I concur in the well considered opinion of the Court by *Justice Allen* in this case. As it is admitted that the right of a woman to perform the duties and fill the position of a deputy clerk of the Superior Court or of deputy register of deeds is not involved in the decision of this appeal, I prefer to withhold my judgment upon that interesting question until it is necessarily presented for adjudication.

CLARK, C. J., dissenting: The plaintiff bank, holder of a junior registered mortgage, seeks to restrain John C. Sikes, trustee for R. B. Redwine, from proceeding to sell ten shares of stock of the lumber company conveyed in a prior registered deed of trust to him by the same grantor, E. C. Williams. It is admitted that said deed to Redwine was registered first upon a probate thereof which was taken and certified by the deputy clerk of the Superior Court, Mrs. Katherine Huntley, who at the time of taking the probate was Miss A. K. McDowell.

The point is made in the plaintiff's brief that the registration of the Redwine deed is void "because the deputy clerk was a woman, and, therefore, not qualified to administer an oath." The opinion of the Court holds with that contention, and if such holding is correct, the other points discussed in the opinion are unnecessary and merely *obiter*

dicta. The point is one of far-reaching importance to the public, lies at the root of this matter, and it is not necessary to do more in this dissent than to give the reasons why the writer does not concur in that conclusion.

This Court has repeatedly held that registration upon an invalid (571) probate is void. *Todd v. Outlaw,* 79 N. C., 235; *Long v. Crews,* 113 N. C., 256; *Lance v. Tainter,* 137 N. C., 249; and there are other cases to the same purport. In *Long v. Crews,* 113 N. C., 258, the Court held that "the attempted acknowledgment of the deed in trust before an officer disqualified to act is a nullity," and could not be cured by registration.

The question, therefore, is simply whether a woman is disqualified to act as deputy clerk of the Superior Court. The probate, like any other judgment, is no judgment if the official had no authority to make it.

The decision, aside from its effect on the parties to this action, is one of great importance to the public. Not only the deputy clerk taking this probate in Union County was a woman, but three other ladies have filled the same position in that county in recent years, and if this probate is invalid because taken before a woman, it may seriously affect a large number of titles in that county as well as the validity of legal proceedings which have been verified before them. Besides, in Sampson also and other counties in this State it is well known that women have discharged the duties of deputy clerk. In Henderson County and some others women have very acceptably discharged the duties of deputy register of deeds. It did not occur to the clerks and registers in those counties that there was any innate, inherent inferiority in women which made it improper for them to discharge those duties, which they doubtless did faithfully and acceptably, and the intelligent lawyers in those counties were evidently not able to point out any provision in the State Constitution, or in the statutes, which disqualified women from holding those positions.

Deputy clerks are appointed by the clerks and are paid by the clerks themselves, except in the counties where the officers are on a "salary basis." Revisal, 989, provides that probates and acknowledgments of all instruments may be made "before the deputy clerks of the Superior Courts." Neither that statute nor any other requires that such deputies shall be males. The assertion that in North Carolina women cannot hold such position, or, indeed, any other, is challenged by this case. The rights of the parties depend upon this question.

Approaching the subject freed from preconceived opinions, we shall find nothing that disqualifies women from holding this position either in our Constitution or in our statutes or in our system of government, nor in England, from which we derive our laws.

The only provision in the Constitution which refers to a "voter" in any connection with "office" is in the Constitution of 1868, and that, as we said in *S. v. Bateman,* 162 N. C., 581, is not a provision disqualifying from office every one who is not a voter. But the provision is "just the opposite," and prohibits a voter from being disqualified
(572) for office. We pointed out the reason for this, which did not exist under the previous Constitution of this State, in that in 1868 a large number of colored voters were enfranchised and the convention that framed the Constitution, fearing that in the future there might be an effort to disqualify them to hold office, provided that every voter should be eligible to office, with the disqualifications mentioned further on in the Constitution. It would be singular if negro men are competent, while white women are their political inferiors.

The constitutional provision, therefore, it will be seen, does not disqualify women from holding any office, even constitutional ones. It merely prohibits the disqualification of voters from holding office unless disqualified by the Constitution itself. Art. VI, sec. 8, and Art. XIV, sec. 7.

The convention that formed the Constitution seems to have had the most implicit faith that the people were competent to select their own officers, and, therefore, Art. VI imposes no disqualifications upon any one to hold office except those named in the above sections. "The Amendment of 1900, while imposing some restriction upon suffrage, left intact the provision that all who continued to be 'voters' remained eligible to office." *S. v. Bateman, supra.*

This decision, rendered as recently as the spring of 1913, calls attention clearly to the fact that our Constitution does not prohibit any one from holding office because not a voter, but, on the contrary, merely prohibits the Legislature from disqualifying any voter from holding office.

The preconceived opinion that women are disqualified to hold any office is based upon the error that the qualification for suffrage and the qualification for office are the same. This is not true, and never has been so under any of the Constitutions of this State. Our present Constitution clearly prescribes a qualification for suffrage, but except as to the age, which is required as to certain State officers therein named, there is no qualification required for office, but that is left to the sound judgment of the voters. It is not even required that judges shall be lawyers. The Legislature is merely prohibited, as is seen, to disqualify any voter from holding office.

Under the Constitution of this State adopted at Halifax in 1776, many were disqualified from voting who were eligible to office, and many were disqualified from office who were eligible to vote. For in-

stance, up to the Convention of 1835, no one was eligible as a voter to choose the Governor, the judges, or the State officers, unless he was a member of the Legislature; and up to 1856 no one could be a voter in the election of a State Senator unless he owned 50 acres of land. On the other hand, citizens were eligible to the State offices, to the judgeships, and for United States Senator, even though they were not qualified electors for those positions because not members of the (573) Legislature. Qualifications for office were required which were not required for the electors for such office: for instance, a member of the Senate was required to own not less than 300 acres of land in fee, while an elector for that position was required to own only 50 acres. A member of the House was required to own not less than 100 acres of land, while an elector for that position was required only to be 21 years of age and to have paid his taxes. The Governor was required, as he is still, to be 30 years of age, but the requirement then and now as to the voters is 21 years.

On the other hand, though those otherwise qualified were disqualified to vote unless 21 years of age, there was no disqualification by reason of age as to holding office (except as to the Governor), and there were instances of men serving in the Legislature under 21, though they could not vote themselves for such members. The changes in 1835 and since have consisted in removing property qualifications for voting and for holding office and by adding the new requirements that a Senator must be 25 years of age, that a member of the House must be "a qualified voter"—the only instance of this—but (except for the Governor and Lieutenant Governor) there is no age requirement as to any other officers, and, singularly enough, there is no requirement that these last two or any other officers than members of the House, shall be a voter. The provision as to the Governor is that he must be a "citizen of the United States and a resident of this State." As far as possible, our present Constitution has left the qualifications for office to the voters or the appointing power, as the case may be, the restriction being, as already stated, that the Legislature shall not disbar any one who is a voter from being eligible to any office (with the above qualifications as to the age of certain officials) except as provided in section 8 of Art. VI, and sec. 7, Art. XIV of the Constitution.

We look in vain in the Constitution, as it is written by the Convention and ratified by the people, to find any disqualification placed on women to hold any office in the State. In that respect we pursued the same policy as the Constitution of the United States, under which women are eligible for any position from President to United States Commissioner. Under the Federal Government women have held thousands of positions, a large number of them being postmasters, and they have

filled many other positions, among them, Collector of Internal Revenue. In the *same absence of restriction* in our State Constitution as in the Federal Constitution, there is no reason why the women of North Carolina who are competent to hold any position in the Federal Government should be disqualified from holding any position under the State to which they can secure an appointment or an election.

(574) Certainly there can be no reason why a woman cannot be a deputy clerk, when she can be a postmaster, since there is neither statute nor constitutional provision giving them greater recognition under the Federal Government than under the State.

Surely, as to the position of deputy clerk, a woman should not be held ineligible, since we have held that a minor, who cannot be a voter, is eligible to be a deputy sheriff. *R. R. v. Fisher,* 109 N. C., 1; *Yeargin v. Siler,* 83 N. C., 348. In the latter case it is held that a minor can be a general deputy sheriff as well as a special deputy sheriff, and that "this is the current of authority in this country."

If we could import into our Constitution words and phrases which are not there, because of the supposed custom that women were disqualified in England, we will find that this suggestion is equally unfounded. From the time of William the Norman, the founder of the dynasty which still reigns in England, there have been forty executive heads of the Government, and of these seven have been women. Among these, the two ablest executives, certainly the two most illustrious and successful, the first of whom reigned for forty-five years and the latter for sixty-four, were Elizabeth and Victoria. In that country women have held many other high positions, and among them, as all lawyers know, the highest legal position in England, that of Lord Chancellor, was held by a woman, Eleanor of Provence, nearly a century before any man was trusted in that high office other than an ecclesiastic. Women have held many other positions in England of every kind (among them that of sheriff, who there is a judicial officer and sits on the bench with the judges), though they were not voters until thirty years ago, when they were granted municipal suffrage. This shows that there, as well as here, qualifications for suffrage and qualifications for office are not the same, the choice as to officers not being restricted by any artificial barriers as to sex, but left to the sound judgment of the electors or the appointing power.

We know that in other countries the greatest executives have been, in Russia, Catherine the Great; in Austria, Maria Theresa; in Spain, Isabella, and among the sovereigns now on the throne, in the present great world catastrophe, none has steered the ship of state more safely than Queen Wilhelmina of Holland. Evidently there is no inherent inferiority which has disqualified women for even the highest offices.

The Salic law which barred women from being the sovereign, the highest office, did not exist in any country in Europe (outside of Turkey) except in France. That law was based on the idea that the chief executive should be a fighter. The modern republican conception is that the qualification for office is not physical strength, but mental capacity and character. There is, therefore, no ground to write the Salic law into our Constitution.

Nor is there anything in Scripture, as it has been asserted, (575) against it, for we know that Deborah was ruler over all Israel, with supreme power, both executive and judicial.

But it is urged that the duties of the deputy clerk, though not a very high position, are "judicial." It is perhaps natural that judges should think that "duties judicial" require a peculiar qualification of mind. They would not like to say, perhaps, "a mind superior to that possessed by women," but "a mind of a different cast from that of women," for though they have been able sovereigns, they might not make good judges, and might be "too emotional" to properly probate this deed in trust! But Sacred History says that Deborah, when she was "Judge over all Israel, judged wisely," and that during her judicial administration of forty-five years "Israel had peace"—after the brilliant victory which proved her genius for war as well as in peace. We know, too, that Portia won great fame as a judge in a great case, and in English law, as already stated, from the Norman conquest in 1066 down to 1341, when Sir Robert Bourchier was the first layman appointed, the only Lord Chancellor who was not an ecclesiastic was Eleanor of Provence, who was appointed Lord Chancellor in 1253, and Lord Campbell in his "Lives of the Lord Chancellors" says that she sat in the Aula Regis in person and administered the duties of her high position with vigor.

There is nothing in our statute that prohibits a woman from being a deputy clerk. The provision in the statute, cited by the Court, that the clerk shall make the record of the removal of the deputy "from *his* office," is no implied disqualification of women, for Revisal, 2831 (1), provides that in all statutes "Every word importing the masculine gender only shall extend to and be applied to females as well as to males, unless the context clearly shows to the contrary." This is the well settled previous judicial holding, that when any statute uses the word "his" it means "his or her" unless something in the context prohibits.

Nor will it be any answer that some former judges have expressed an opinion that women are disqualified for office by our Constitution. In those cases the point was not made, certainly not as to this office. But if it had been, those judges were as likely to err as are the judges of today. When the question is as to the provisions of a Constitution,

the inquiry is not what the judges on some other occasion have said that the Constitution provides, but what does it in fact provide. The disqualification of women for office is not there. We can read as well as they, and the test is not what they said, but what is the text of the Constitution.

"We must not make the *word* of none effect by our traditions."

Women pay taxes and own approximately one-half of the property of the State, for they inherit equally with their brothers when there
(576) is no will, and are rarely discriminated against when there is. They do more than one-half the work of keeping up our civilization. As a class, they are the equals of men in intelligence and their superiors in morality. Why should they be barred from all public employment of every kind, or of any kind? The Court should not place the bar sinister of disqualification upon the whole sex, and disqualify them from holding office, unless there is an express provision of the Constitution.

The last census showed that out of 950,000 persons in this State employed outside of their homes, in gainful occupations, 275,000, or nearly 30 per cent, were females. They are engaged in making an honest living; and while women are rarely aspirants for office, even in the many States and countries where they now enjoy full suffrage, it is but right, in consideration of their contribution of labor and taxes to the public weal, that they should not be debarred from obtaining the compensation attached to an office like this, whose small compensation is paid by the clerk himself, when the appointing power (the clerk) has deemed them competent, and, indeed, has selected four women in succession for the duties which they had discharged evidently to his satisfaction.

Even if any judge has heretofore expressed an opinion (without the thorough light which has now been thrown upon the subject by the general public discussion of the matter) that "women are ineligible to office," such previous opinion is no estoppel. When in the House of Lords an ex-Lord Chancellor observed to Lord Brougham that twenty years previous he had agreed with him in the legal views then expressed, Brougham replied. "In twenty years I have become wiser. The noble Lord has had the same opportunity." In a debate in Congress, on a memorable occasion, an opponent made a similar remark to Robert Toombs of Georgia. He replied: "That is one of my discarded errors. The gentleman may defend it, if he can."

Upon looking at the subject in the cold, clear light of the words of the Constitution and of our statutes, it will be found that women are not disqualified to hold office either by the Constitution of this State or of the Union, nor by any statute, nor by the precedents in England, nor

by the experience of other countries, nor by anything that can be cited from the Scriptures.

Office, from the Latin *"Officium,"* means duty or service. Officers are public servants. Why should the Constitution prohibit the people from getting the best service and the public servants they may desire? There is nothing in human experience, or in history, to sustain the idea of the inherent incapacity and inferiority of women. What have the mothers, wives, sisters, and daughters of the voters of North Carolina done that the Constitutional Convention should have branded them with the opprobrium of being incompetent to render public service? In the language of Scripture, "Have they not done us good, and not (577) evil, all the days of our lives?" They pay taxes and are subject to the laws. Why should they be held barred from the honors or the emoluments of any employment which the voters or the appointing power may select them to discharge? Why should the defendant Redwine lose the priority given him by the registration of his mortgage because the public official furnished him by public authority to take the probate (which was done in due form) was a woman?

If the prior lien of the defendant Redwine is destroyed for this reason, and he is postponed to the payment of the junior registered lien of the plaintiff bank, he should at least have the right to reduce the debt of the bank, which is thus preferred to his by no fault of his, by striking out the usury therein charged. As the bank has appealed to the courts to get this advantage over the defendant Redwine, who held the first registered mortgage, the bank debt should not go ahead of his debt except to the extent that the bank debt is lawful, that is, after purging it of the usury.

The bank ought not to recover its debt with usurious interest, nor should Redwine's prior registered mortgage, acknowledged before a duly appointed and recognized deputy clerk, be invalidated because she happened to be a woman. She exercised only the power of all deputy clerks, as conferred by Revisal, 989.

Cited: Hunter v. Sherron, 176 N.C. 228 (8c); *Preston v. Roberts,* 183 N.C. 62 (10c); *Bank v. Smith,* 186 N.C. 642 (6c); *Colt v. Kimball,* 190 N.C. 172 (2e); *Perry v. Surety Co.,* 190 N.C. 291 (8c); *Finance Co. v. McGaskill,* 192 N.C. 559 (2e); *Hubbard & Co. v. Horne,* 203 N.C. 209 (2c); *Harvey and Co. v. Rouse,* 203 N.C. 299 (4c, 5c); *Lumberton v. Hood, Comr.,* 204 N.C. 176 (8c); *Hubbard & Co. v. Horne,* 204 N.C. 743 (4c); *Trust Co. v. Braznell,* 227 N.C. 213 (4c).

JOHN KISTLER, BY NEXT FRIEND, v. SOUTHERN RAILWAY COMPANY.

(Filed 24 May, 1916.)

1. Damages—Physical Injuries—Mental Powers—Trials—Evidence.

Damages for the loss of mental powers arising from a personal injury negligently inflicted are not recoverable when there is no evidence tending to show that such have been sustained therefrom.

2. Same—Instructions.

The charge of the trial judge to the jury should be construed as a whole; and where a recovery for mental suffering arising from a personal injury is permissible, and the charge to the jury is that the plaintiff is entitled to reasonable compensation for the loss of both bodily and mental powers, *or* for actual suffering, both of body and mind, which are the immediate and necessary consequences of the injury, the word "or" is used to introduce matter explanatory or interpretative of what immediately precedes it, and not in the disjunctive; and, thus construed, it does not permit a recovery for the loss of mental powers, concerning which there is no evidence.

3. Damages—Mental Anguish—Evidence—Trials.

Evidence tending to show that the plaintiff suffered in consequence of a personal injury inflicted by the defendant, a severe blow just above the kidneys, which resulted in an attack of jaundice, and brought about a condition not infrequently very humiliating to him, is sufficient to be submitted to the jury upon the question of damages for mental suffering, in the event the defendant's liability is established.

(578) CIVIL ACTION tried before *Justice, J.*, and a jury, at January Term, 1916, of MCDOWELL.

The action was to recover damages for personal injuries caused by the alleged negligence of the defendant company.

On denial of liability, there was verdict for plaintiff, assessing damage. Judgment on verdict, and defendant excepted and appealed.

C. C. Lissenbee and Hudgins & Watson for plaintiffs.

S. J. Ervin and J. W. Pless for defendant.

HOKE, J. The evidence tended to show that, on 17 July, 1914, plaintiff, a boy 17 years of age, was unloading ice, consigned to his employer, from a box car on defendant's side-track at Marion, N. C., having been directed to said car by the agents of defendant company. While so engaged, and without warning of any kind, an engine of the company was run with great violence against the car, shoving the same along the track for two or three car lengths, throwing the plaintiff over the wagon onto a pile of chestnut wood, causing serious and painful injuries, from which plaintiff still suffers. It could not be seri-

ously contended that defendant was not liable on the issue as to negligence, the proximate cause of plaintiff's hurt. There is no claim or testimony tending to show contributory negligence on part of plaintiff; but defendant insists that there was error committed to his prejudice on the issue as to damages, in that the court charged the jury they could estimate for the loss of mental powers as a result of plaintiff's injuries, when there were no facts in evidence which tended to show any such loss. It has been held in several of our decisions, *Worley v. Logging Co.*, 157 N. C., 490; *Bryan v. R. R.*, 134 N. C., 538, and some others, that it amounts to reversible error where the loss of mental powers has been submitted to the jury as a distinct element of damages and there were no facts in evidence tending to show such loss; but we do not think the charge in the present case comes properly within the principle. On the trial it was proved, among other things, that plaintiff received many bruises at the time of the occurrence, among others, a severe blow just above the kidneys, which resulted in an attack of jaundice which was distressing and protracted and the effects of which are still and not infrequently manifested in a way very humiliating to plaintiff; and his Honor, referring to this and other circumstances attendant on the injury, in his charge to the jury, on the question of damages, made use of the following expression: "Plaintiff is entitled to have reasonable compensation for loss of both bodily and (579) mental powers or for actual suffering both of body and mind which are the immediate and necessary consequence of the injury."

It is said that the word "or" is not always "disjunctive," but is not infrequently used to introduce matter that is explanatory or interpretative of what immediately precedes it, *Blumenthal v. Berkshire*, 96 N. W., pp. 17, 18; *Dowers v. Allen*, 22 Fed., 809, and, in the present instance, we think the latter clause should be construed and held to so modify and interpret the first that the charge, by correct intendment, signified that the jury could award compensation for the actual suffering of body and mind naturally attributable to the injury—a charge that has been approved in cases of this kind, and whether the witnesses speak directly to the mental suffering or not. *Ferrebee v. R. R.*, 163 N. C., 355.

In *S. v. Exum*, 138 N. C., pp. 599-619, and in other cases, the Court has approved the position as stated in Thompson on Trials, sec. 2407, "That the charge of the court is to be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it states the law fairly and correctly to the jury, it will afford no ground for reversing its judgment, though some of its expressions when standing alone might be regarded as erroneous"; and, on pe-

rusal of this charge, as a whole, we think the cause has been fairly and correctly presented to the jury, and the judgment in plaintiff's favor is affirmed.

No error.

Cited: Milling Co. v. Highway Com., 190 N.C. 697 (2c).

CHATHAM ESTATES, A CORPORATION, v. AMERICAN NATIONAL BANK, A CORPORATION.

(Filed 10 May, 1916.)

1. Actions—Damages—Wrongful Injury—Pleadings—Demurrer.

The defendant had entered suit against the plaintiff, denying its title to lands, the complaint therein constituting a *lis pendens*, and thereafter submitted to a voluntary nonsuit. In the present action the plaintiffs allege that the defendants knew that the title to the lands was in the plaintiff, and instituted the action willfully, wantonly, and intentionally to injure the plaintiff's credit, and the cloud thus cast upon their title to the lands caused them damages in preventing the sale thereof. *Held*, the defendant, in its action, was not privileged to damage the plaintiff, as stated, the matter being between the parties, and a demurrer to the complaint in the present action will be overruled.

2. Same—Cloud Upon Title—Levy—Possession.

Where it appears that the defendant had cast a cloud on the title to the plaintiff's land by an action wantonly, willfully, and wrongfully instituted by it, thereby causing the damages claimed by the defendant in the present suit, it is not necessary that the defendant should have seized the property or that attachment should have been levied, when the cloud cast upon the title of the plaintiff caused the damages.

3. Actions—Wrongful Injury—Nature of Actions—Demurrer—Appeal and Error.

Where the complaint sufficiently alleges a cause of action against the defendant for damages to the plaintiff's property by casting a cloud upon its title, in a former action, it is not necessary to decide, in passing upon the sufficiency of the demurrer thereto on appeal, whether the action was one for slander of title, malicious prosecution, or for an abuse of legal process.

(580) CIVIL ACTION heard, on demurrer, by *Webb, J.*, at November Term, 1915, of MECKLENBURG.

From a judgment sustaining the demurrer and dismissing the action, the plaintiff appealed.

F. I. Osborne, H. L. Taylor for plaintiff.

Herbert McClammy, H. B. Smith, Tillett & Guthrie for defendant.

BROWN, J. The substance of the complaint is that the defendant brought an action against the plaintiff in the Superior Court of Mecklenburg County about July, 1913, and filed a complaint, as well as a *lis pendens* therein. Copies of the said complaint and *lis pendens* are attached to the complaint in this action, marked "Exhibits A and B."

It is needless to set out the allegations of Exhibit A more fully than to say that the purpose of the action, as indicated by the allegations of the complaint and the prayers for judgment, was, first, to compel the directors of the United Development Company to transfer to the American National Bank a certificate of stock; second, to compel Paul Chatham, W. S. Lee, and N. A. Cooke to pay into the treasury of the United Development Company a balance due for stock; third, to have certain credits entered on certain notes given by the Chatham Estate, Inc.; fourth, to declare void a certain deed for all of its lands and properties, executed by the United Development Company to the Chatham Estate, Inc.; fifth, to recover of Paul Chatham the sum of $2,000.

The principal object of the action, however, seems to have been to set aside the deed from the United Development Company to the Chatham Estate. The present complaint alleges that at September Term, 1914, of the Superior Court of Mecklenburg County the American National Bank submitted to a voluntary nonsuit in said (581) action as to the United Development Company, W. S. Lee, and N. A. Cooke, and that a demurrer was filed to the complaint by the other defendants, which was sustained by the court, and the action dismissed, and from this ruling no appeal was ever taken or perfected by the American National Bank.

The complaint in the present action further alleges that the above action, together with the complaint and *lis pendens* filed therein, constitute a cloud upon plaintiff's title to the lands conveyed to it, and hindered, delayed, and prevented the plaintiff from borrowing money upon the security of said lands, which it attempted to do for the purpose of improving the lands and putting them upon the market in salable condition; that in consequence of this, plaintiff sustained the loss of a large sum of money and was compelled to withdraw practically all of the said lands from the market during the pendency of the said action. The complaint goes on to give instances of agreements to sell parts of the land to certain individuals, which the plaintiff was compelled to abandon because of the pendency of the said action.

The complaint further alleges that this defendant well knew that the plaintiff was seized in fee simple of said land, and that it commenced the said action without probable cause, with reckless disregard of the plaintiff's rights, and wantonly, falsely, willfully, maliciously intending to injure the plaintiff in its good name, fame, and credit, and that it caused the plaintiff to be generally suspected and believed not to be the owner of the said lands which the plaintiff was endeavoring to sell.

The complaint further alleges that the action was brought falsely, wantonly, willfully, maliciously, without probabe cause and with reckless disregard of the plaintiff's rights in the premises, for the purpose of breaking down the plaintiff's good name, fame, and credit, and that the action terminated by judgment in plaintiff's favor, from which this defendant did not appeal.

The defendant demurs to this complaint substantially upon the ground that no cause of action is stated and that its right to bring the action complained of is privileged, and cannot be made the basis of a cause of action against it. The demurrer is a legal admission of the facts set forth in the complaint, and, therefore, they must be taken to be true, and, so taking them, they charge a complete invasion of the rights of the plaintiff and a substantial wrong done to it.

It is not necessary that we should decide whether this action is one for slander of title, malicious prosecution, or for an abuse of legal process. If the facts in the complaint constitute a cause of action upon the proof of which to the satisfaction of the jury damages are allowable, then the complaint is sufficient, and, as is said in *R. R. v. Hard-*
(582) *ware Co.*, 138 N. C., 174, it is immaterial whether the action be classified as one for malicious prosecution or for an abuse of legal process. It seems to us to be beyond question that one who wantonly, maliciously, without cause, commences a civil action and puts upon record a complaint and a *lis pendens* for the purpose of injuring and destroying the credit and business of another, whereby that other suffers damage, must be liable for the legal consequences. This complaint not only alleges all this was done wantonly, maliciously, and without probable cause, but that the plaintiff suffered actual damage in the conduct of its business by the stoppage of the sale of its lands.

It is earnestly contended that this action cannot be maintained because there was no seizure of the plaintiff's property and no attachment was levied upon it. This position cannot be maintained, in view of the fact that the complaint and *lis pendens* taken together constituted such a cloud upon the plaintiff's title that it effectually stopped the sale and transfer of its lands, as much so as a writ of attachment levied upon them would have done.

In considering this case, it must be borne in mind that the allegations of the complaint are to the effect that the action against the plaintiff was brought maliciously, wantonly, falsely, without probable cause, for the express purpose of injuring the plaintiff's credit, and with full knowledge that the plaintiff had title to the lands which it was offering for sale.

It would be a reproach to the law to give no damage in such a case. *Collins v. Whitehead,* 34 Fed., 121; *Kirkham v. Coe,* 46 N. C., 423.

Where one resorts to the process of the law without probable cause, willfully and maliciously, for the purpose of injuring his neighbor, there is no ground of public policy which excuses him from the damage inflicted by his wrongful act, and as is said by *Chief Justice Pearson* in the last cited case: "It is a matter between private citizens, and if the wrongful act of one causes loss to another, there is no reason why compensation should not be made."

The judgment of the Superior Court is reversed, and the cause is remanded, to the end that the defendant may answer over.

Reversed.

Cited: Jerome v. Shaw, 172 N.C. 862, 863 (1d, 2d); *Shute v. Shute,* 180 N.C. 388 (1c, 2c); *Bank v. Bank,* 197 N.C. 531 (3c); *Nassif v. Goodman,* 203 N.C. 456 (1c).

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(583)

J. E. STAGG v. SPRAY WATER POWER AND LAND COMPANY.

(Filed 31 May, 1916.)

1. Corporations—Dividends—Guaranty.

An indorsement on a certificate of preferred stock in a corporation guaranteeing the payment of the stated dividend in whole or in part, should be fairly and reasonably interpreted to effectuate the intention of the parties with regard to their objects and purposes as gathered from its language.

2. Same—Interpretation—Bona Fides.

A guaranty, written on shares of preferred stock in a corporation, that the indorser binds himself to pay any deficiency in the stated dividend, upon certain notice to him, will not be construed as a guaranty only of the fidelity of the officers of the corporation to pay the dividends upon the stock, if earned by it, or that they will be paid, whether earned or not, but as a guaranty that he will pay the dividends or any part thereof to the extent that the company may have failed to earn, declare, and pay them.

3. Same—Corporate Existence.

Where one has indorsed on a certificate of preferred stock in a corporation his obligation to pay the holder any deficiency of payment by the company of the stated dividends, arising from the failure of the corporation to pay, the intention of the parties, nothing else appearing, will be construed as contemplating the continued existence of the corporation as a going concern as the basis of their agreement of guarantee; and the holder may not recover the dividends which the corporation has failed to pay by reason of its having become insolvent and adjudged a bankrupt by the proper court.

4. Same—Corporate Suspension.

A guaranty that a corporation will pay the preferred dividends on its stock will not be construed to be without value because of the interpretation that the guaranty will cease should the corporation thereafter become insolvent and its existence as a going concern be legally suspended or terminated.

5. Same—Bankruptcy.

While the adjudication in bankruptcy is not necessarily the legal termination of a corporation, the effect of the adjudication is to suspend it, for the time being, at least, as a going concern; and where one has guaranteed the payment, in whole or in part, of such dividends as it may fail to pay, evidencing the intention that the guaranty was for such period as the company could lawfully pay them, no recovery therefor can be had during this period of suspension in an action brought since the adjudication and before the discharge of the corporation in bankruptcy.

6. Same—Statutes—Constitutional Law.

Legislative charters are under our Constitution, Art. VIII, sec. 1, subject to legislative alteration or repeal; and by our statute, Revisal, sec. 1196, a dissolution under a judgment of a court, as therein prescribed, is valid, among other things, if the corporation become insolvent or suspends its ordinary business for the want of funds, or be in danger of insolvency, or has forfeited its charter rights. The retrospective provisions of Laws 1913, as to their validity, discussed by WALKER, J.

7. Corporation—Dividends—Corporation Guarantor—Life of Corporation.

The principle that preferred dividends guaranteed by indorsement on the certificates of stock in a corporation may be construed as upon condition that the corporation remains a going concern is not affected by the fact that the guarantor is a corporation and has agreed that it should be binding during its own life; for the period indicated is only the extreme duration of the guaranty, or that in which it may be enforced, if the condition contemplated continues that long. As to whether the guaranty in this case was *ultra vires*, or otherwise invalid, *quære*.

CLARK, C. J., and BROWN, J., dissenting.

(584) APPEAL by defendant from *Justice, J.*, at June Term, 1915, of ROCKINGHAM.

This action was brought to recover $1,080, alleged to be due under guaranties of the defendant indorsed upon three certificates each for twenty shares of the cumulative preferred stock which was issued by The American Warehouse Company, the par value of each share being $100. The certificate is in the following form:

THE AMERICAN WAREHOUSE COMPANY.

Authorized Capital, $1,000,000.

This certifies that J. E. Stagg is the registered owner of twenty cumulative preferred shares, of the par value of $100 each, in the capital of The American Warehouse Company, transferrable only on the books of the corporation in person or by attorney on surrender of this certificate. The corporation will pay to the registered holder of this certificate a dividend of 6 per cent on the third Wednesday of July in each year before any dividend shall or can be paid or declared on the common stock; and in addition thereto, in any year in which the company shall earn and pay a dividend of 6 per cent on the common stock the balance of dividends paid shall be distributed equally among the holders of preferred and common stock, and the holder thereof shall be entitled to his share of such extra dividend. If in any year the entire dividend on the preferred stock shall not be paid, the amount remaining unpaid shall be and remain a charge against the earnings of future years until all such arrears have been paid; and until such payment in full no dividend can or shall be paid on the common stock.

Executed at Spray, N. C., 5 January, 1905.

THE AMERICAN WAREHOUSE COMPANY,
By F. L. FULLER, *President.*

Countersigned:

F. M. ELLETT, JR., *Secretary.*

Shares, $100 each.

The indorsement therein is as follows: (585)

[*Copy—Back of Certificate No. 124*]

In each and every consecutive year from and after this date, should the dividends or any part thereof called for upon the face of the within certificate not be paid on its due date, for value received Spray Water Power and Land Company guarantees and binds itself to pay in cash ten days after notice of such default, to the holder of the within certificate, any such deficiency in the dividend as may arise from the failure of The American Warehouse Company to pay its annual dividend as stated in said certificate. This agreement is binding during the life of Spray Water Power and Land Company. It is un-

derstood and agreed that any certificate or certificates issued in lieu of this certificate upon the proper surrender and cancellation of this certificate is to have the same guaranty as that certificate so canceled.

Witness the seal of the company and the signature of its president and secretary, this 5 January, 1905.

SPRAY WATER POWER AND LAND COMPANY,
By B. FRANK MEBANE, *President.*

W. R. WALKER, *Secretary.*
(Corporate seal.)

The case was heard on a demurrer to the following complaint:

The plaintiff, complaining of the defendant, alleges:

1. That the defendant Spray Water Power and Land Company is now, and has been since 14 February, 1891, at which time it was duly incorporated by an act of the General Assembly of North Carolina for a period of ninety-nine years, a corporation with its principal place of business at Spray, North Carolina; the principal business of said corporation being to develop and sell its lands and water power to corporations which B. F. Mebane and W. R. Walker promoted or could induce to locate at Spray, North Carolina; and that The American Warehouse Company was incorporated under the laws of North Carolina in the year 1899.

2. That by the terms of its charter said corporation was, among other things, authorized as follows:

"SECTION 3. The said company shall have the power to make advances of money and of credit to other parties and to aid in like manner manufacturers and others; to indorse and guarantee the payment of bonds and the performance of the obligations of other companies, corporations, and parties, and to assume, become responsible for, execute and carry out any contracts, leases, or subleases made by the company to or with any other company or companies, individuals, or firms whatsoever."

(586) 3. Upon information and belief, it is alleged that B. F. Mebane was the founder and promoter of the community of Spray and its textile industries and factories, and as a part of his plan to make that community a large manufacturing center, he conceived the idea of acquiring or controlling sites for such establishments and for the houses usually appertaining thereto, as well as the means of supplying power to said establishments; and further, as a protection to said factories and establishments, to acquire the control of a large part of the valuable and desirable lands in and around Spray; and to carry out his plan and purpose aforesaid, he incorporated or caused to be incorporated, or, after incorporation and organization, acquired the stock of the de-

fendant Spray Water Power Company, or a majority thereof, in which movement he associated with him his wife and his business associate and close personal friend, W. R. Walker, said corporation being the source and means of carrying out the plans and ideas that the said Mebane had with respect to Spray and its industries, he electing to put into execution his ideas and plans through the medium of this corporation rather than individually or otherwise; the other two stockholders becoming such at his special instance and request, and for no other purpose than to comply with the law requiring three stockholders, it being well understood by those stockholders that the said Mebane was the dominant and controlling spirit of the movement and of the defendant corporation, said stockholders being acquainted with his purpose and plans and acquiescing therein.

4. That the said Spray Water Power and Land Company is now and was in 1905, and prior thereto, and has been at all times between those dates, the owner of large and valuable tracts of land situated in and around Spray, North Carolina, and a valuable water power on Smith River, which flows through said lands, or a portion thereof, the aforesaid land being so situated with respect to Spray and its textile industries as to afford the owner thereof the opportunity and means of exercising a dominant if not controlling influence upon any and all industries that were or may be established at Spray.

5. Upon information and belief, it is alleged that among other industries promoted and organized as aforesaid were the Nantucket Mills Company and The American Warehouse Company, the lands upon which the last named company erected its plant being purchased from the defendant.

6. That prior to 5 January, 1905, the plaintiff was the owner of shares of stock in one or more of the corporations promoted and organized by said B. F. Mebane, and carrying on business in the town of Spray in said Rockingham County, which said corporations were owned or controlled by the defendant Spray Water Power and Land Company, being at said time the owner of sixty shares of said stock of the par value of $100 per share; that some of the stockholders of (587) Nantucket Mills Company, one of the corporations promoted and organized by the said B. F. Mebane, and the majority of the stock of which was controlled either directly or indirectly by the defendant herein, including the plaintiff herein, became dissatisfied with their holdings in said company and were threatening litigation with respect thereto; whereupon the said Mebane, desiring to avoid such litigation, proposed to this plaintiff an exchange of stock, and as a result of negotiations following this proposal the said Mebane caused The American Warehouse Company to issue and deliver to the plaintiff sixty shares of

the 6 per cent cumulative preferred stock in said The American Warehouse Company, said stock being in the form of three certificates for twenty shares each, said certificates being Nos. 123, 124, and 125, in exchange for the stock which he owned in other corporations at Spray, North Carolina, and caused the defendant Spray Water Power and Land Company, by an indorsement on the certificates of The American Warehouse Company issued as aforesaid, to agree to pay to the holder of said certificates a dividend of 6 per cent on the third Wednesday of July in each year, in case the regular annual dividend on the preferred stock of The American Warehouse Company was not paid by that company. Copies of said certificates Nos. 123, 124, and 125, issued to said plaintiff as aforesaid, together with the indorsement thereon, are hereto annexed as exhibits, which are asked to be taken as a part of this paragraph as fully as herein set out.

7. That he is informed and believes, and, therefore, alleges that said exchange of stock and said indorsement appearing on the certificates of stock of said The American Warehouse Company were made with the acquiescence and consent of all the stockholders of said defendant.

8. That he is informed and believes, and, therefore, alleges that said defendant Spray Water Power and Land Company was organized by the said B. F. Mebane, and that the stock was and is still owned or controlled by him, and that said defendant in turn, both before and since 5 January, 1905, owned a controlling amount of the capital stock of said The American Warehouse Company, which said warehouse company in turn, either by ownership of stock by contract or otherwise, controlled and dictated the business and acts of all the other textile corporations doing business in the town of Spray in said Rockingham County, and all of which were promoted, organized, and exploited by the said B. F. Mebane, who was president of said defendant as aforesaid; that said The American Warehouse Company by its charter had power, among other things, to manufacture textile products and to conduct a general warehouse business, to develop real estate and water power, to deal in goods, wares, and merchandise, and choses in action, and was also empowered to own and hold stock in

(588) other corporations; that by contract with the other textile corporations located and doing business at Spray, promoted and organized by said B. F. Mebane as aforesaid, said The American Warehouse Company did the warehousing and finishing of the products of said other companies, the result being that said Spray Water Power and Land Company, by virtue of its ownership or control of a majority of the stock of said The American Warehouse Company, controlled and dominated said company, and all the other corporations hereinbefore referred to, and they were operated and their business conducted in a

way beneficial to said defendant, and that whatever was for the benefit of any of said corporations resulted in benefit to said defendant.

9. That as an inducement and consideration for plaintiff to effect the exchange of stock as aforesaid, the defendant executed and indorsed, for the reasons and under the circumstances herein set out, upon said certificates the indorsement that appears on the copies of said certificates hereto attached, and in acquiring said stock of said The American Warehouse Company the plaintiff relied upon said indorsement of said defendant, and but for such indorsement would not have consented to said exchange.

10. That B. F. Mebane and W. R. Walker were stockholders, as this plaintiff is informed and believes, in The American Warehouse Company during the year 1905, and both prior and subsequent thereto, and were active in organizing and promoting said company and were interested pecuniarily both in The American Warehouse Company and in Spray Water Power and Land Company, the last named company being at the time of the exchange of the stock as aforesaid, as this plaintiff is informed and believes, the owner of a large portion of the stock of The American Warehouse Company, which constituted at least a majority thereof.

11. From 5 January, 1905, up to but not including the dividend due on the third Wednesday in July, 1911, The American Warehouse Company paid to this plaintiff the dividends called for by the said certificates of its stock hereinbefore referred to, but defaulted in the payment of the dividend due thereon on the third Wednesday in July, 1911, which dividend, however, was paid to the plaintiff by one Malcolm R. Harris, who took from the plaintiff an assignment of said dividend claim, and who, as the plaintiff is informed and believes and, therefore, alleges, paid to him said dividend with money furnished by the said B. F. Mebane, and said dividend claim so assigned to the said Malcolm R. Harris was by him assigned to the said B. F. Mebane.

12. That said The American Warehouse Company failed, neglected, and refused to pay to the plaintiff the dividends due on said sixty shares of its stock held by him, and due and payable on the third Wednesday in July of the years 1912, 1913, and 1914, as provided for (589) in said certificates, said dividends amounting to the sum of $1,080.

13. That the plaintiff, after said default by said The American Warehouse Company in the payment of said dividends, duly notified the defendant of such defaults, and made written demand upon it for the payment of the amount of said dividends, due as aforesaid, such demand being in conformity with the terms of the aforesaid indorsement upon said certificates of said The American Warehouse Company.

14. That on 21 December, 1911, said The American Warehouse Company was adjudicated a bankrupt in the District Court of the United States for the Western District of North Carolina.

15. That the defendant, notwithstanding the matters and things above alleged, has neglected, failed, and refused and still refuses to pay to the plaintiff the dividends due him as above alleged, according to the terms of its said indorsement. Wherefore, the plaintiff prays judgment against the defendant, fixing its liability for the payment to the plaintiff of the dividends, as is provided by said indorsement, and for the sum of $1,080, with interest on $360 thereof from the third Wednesday in July, 1912, on $360 thereof from the third Wednesday in July, 1913, and on $360 thereof from the third Wednesday in July, 1914, and for the costs and for such other and further relief as the plaintiff may be entitled to.

The defendant demurred upon several grounds, in substance, as follows:

1. That The American Warehouse Company was authorized by its charter and undertook by its certificates of stock to pay dividends from earnings, and that it could, under the law of this State, pay them in no other way, and the defendants guaranteed only that if it earned and declared dividends they would be paid or honestly distributed to shareholders, and that as the guaranty refers solely to dividends "called for by the certificates of stock," and as no such dividends have accrued, there being no earnings, it follows that nothing is due under the guaranties declared on.

2. That there was no consideration for the contract of guaranty, but, on the contrary, it was entered into by certain officers of the defendant, having no authority to make the guaranty in its behalf, and this was well known to the plaintiff, as they knew defendant, under its charter, had no such power itself.

3. That as The American Warehouse Company could not pay dividends on its shares of stock, preferred or common, except from earnings, if it undertook to do so, its contract would not be enforcible, and, consequently, any guaranty of such a contract by the defendant would be void and of no effect.

(590) 4. That said warehouse company could not issue certificates of stock containing a promise to pay dividends of any kind therein beyond the corporate life of the company, and it being alleged in the complaint that the said company has been duly adjudicated a bankrupt in the proper court and has ceased to do business, its corporate activity is thereby suspended, and of course its power to earn and pay dividends, and, therefore, any obligation of the defendant arising out

of its guaranty, if the latter is valid, has also been suspended, and cannot be revived until the defendant has been discharged and resumes its corporate functions as a going concern.

5. That the guaranty operates without limit, as defendant, by its charter, is a perpetual corporation, unless it is restricted to the life of The American Warehouse Company.

6. That as The American Warehouse Company could pay dividends only from earnings, and as it has been judicially declared to be a bankrupt, there can be no dividends, and, therefore, under the terms of the guaranty, there can be no liability to the plaintiff for any breach of the guaranty, if it is valid in itself.

7. That a contract of The American Warehouse Company to pay dividends, not out of its earnings, would be illegal and void, and any contract of the defendant guaranteeing that it would do so would be illegal and void, both under its charter and the general law.

8. That the alleged contract of guaranty is not authorized by the charter of the defendant, but is forbidden thereby and is *ultra vires*, and, therefore, void and of no effect.

9. It was also objected *ore tenus* that by a recent act of the General Assembly, Public Laws 1915, ch. 134, if a corporation is or has been adjudicated a bankrupt under the laws of the United States, its charter becomes forfeited without further action, unless its stockholders shall, within ninety days after 8 March, 1915, by resolution adopted by them, a duly certified copy of which shall be filed with the Secretary of State, determine to continue its corporate existence, and that it is not alleged in the complaint that any such action has been taken by the stockholders, and that in view of the dissolution of The American Warehouse Company by the forfeiture of its charter, under said statute, the liability of the defendant, if any, under its guaranty has ceased, as it was made with reference to the continued existence of The American Warehouse Company as a corporation.

The court overruled the demurrer, and defendant appealed.

Manly, Hendren & Womble, Fuller & Reade for plaintiff.

A. D. Ivie, C. O. McMichael, E. S. Parker, Jr., Brooks, Sapp & Williams, King & Kimball for defendant.

WALKER, J., after stating the case: This case, with others, (591) involving substantially the same questions, was exhaustively discussed by counsel and well prepared briefs filed presenting numerous points; but we do not deem it necessary to consider more than two or three of them.

The defendant contends that there has been no breach of the guaranty, as it only extends to the payment of such dividends as are earned and declared by the warehouse company, and is, therefore, merely a contract to the effect that if such dividends are not paid, the guarantor will pay the same, which would amount to no more than a guaranty of the honesty and fidelity of the officers to pay dividends if earned and declared. This, we think, would be a very narrow construction of the contract of guaranty, and is one which we could not adopt. The principle in regard to the interpretation of such instruments as the one we are now considering may, as gathered from the authorities, be thus stated: When it is said that a guarantor is entitled to stand upon the strict terms of his guaranty, nothing more is intended than that he is not to be held liable for anything that is not within the express terms of the instrument in which his guaranty is contained; that his liability is not to be extended by implication beyond these limits, or to other subjects than those expressed in the instrument of guaranty. But for the purpose of ascertaining the meaning of the language which he has used, and thus determining the extent of his guaranty, the same rules of construction are to be applied as in the construction of other written instruments. His liability is not to be extended by implication beyond the terms of his guaranty as thus ascertained. The language used by him is, however, to receive a fair and reasonable interpretation for the purpose of effecting the objects for which he made the instrument, and the purpose to which it was to be applied. If this language is fairly susceptible of two interpretations, either of which is within the spirit of the guaranty, he is not at liberty to say that the person to whom it is given was not justified in acting upon either, or that he should have acted upon one rather than the other. *London, etc., Bank v. Parrot,* 125 Cal., 472; 1 Brandt on S. and G., sec. 103; *E. C. Ry. Co. v. Maryland Casualty Co.,* 145 N. C., 114; 20 Cyc., 1423. This guaranty means what its terms express, that if the warehouse company fails, in any one year during the continuance of the contract, to pay "the dividends, or any part thereof, called for upon the face of the certificate," the defendant agrees to pay any and all such deficiency in the dividend as may arise from such failure. It is not a promise that the warehouse company will pay illegal dividends, for it does not require that the latter will pay, at all events, so much money, but that it will pay any deficiency only in the event that the warehouse company fails to declare and pay its stock dividends from
(592) its earnings, and that is what it clearly means. If the warehouse company fails to earn, declare, and pay any part of its dividend, the amount to be paid would be 6 per cent on the par value of the stock, and if it earns, declares, and pays but a part, then the difference be-

tween the amount so paid and the full dividend of 6 per cent would be the amount due under the guaranty. *Lorillard v. Clyde,* 142 N. Y., 456 (24 L. R A., 113). It was in no sense a guaranty that the warehouse company would do the illegal act of declaring a dividend, not payable from earnings applicable thereto, but from its other assets. We will incidentally touch upon this question again when discussing the relation of the warehouse company to this contract of guaranty. We, therefore, decline to hold that the guaranty of the defendant is illegal, because, as defendant contends, it calls for the performance of an unlawful act by the warehouse company.

It is next contended by the defendant that the contract of guaranty is not within the corporate powers of the defendant company as conferred by its charter, which fixes the limit of its authority to contract. This is a very serious question and is involved in very grave doubt, but we do not consider that a decision of it is indispensable to a full disposition of this appeal, and, therefore, we may well omit any discussion of it, and withhold our views until we are required to decide it. This renders unnecessary any consideration of the doctrine of *ultra vires* and estoppel, so fully treated by counsel in their briefs. We have now come to what we regard as one of the decisive questions in the case. It is alleged in the complaint, and of course admitted by the demurrer, that the warehouse company has been adjudged to be a bankrupt by a Federal court having jurisdiction of the case, and it has ceased to do business, its affairs and assets now being under the control and management of that court for the purpose of being administered according to the Federal statute in such cases made and provided. It is not, therefore, a going concern; its functions as a corporation being, at least, suspended, and since the adjudication of its bankruptcy, viz., on 8 March, 1915, the Legislature by a public statute ratified on that day declared the charter of all corporations to be forfeited if they had been adjudicated bankrupts. We will refer to these matters more specifically hereafter.

In this state of the case, we must inquire what effect the bankruptcy and the forfeiture of its charter had upon the contract of guaranty sued on. The plaintiff says that they have no effect to change the obligation of the defendant or to terminate its liability upon the guaranty, while defendant insists that its obligation and liability have ceased and been determined thereby, as the contract was made in contemplation of the continued existence of the warehouse company as a corporation, and when it forfeited its charter by reason of its bankruptcy, and was dissolved, it ceased to exist as a corporation, and there was (593) nothing left to be done with respect to it but to wind up and settle its affairs; that it ceased to have any earning capacity, so as to make

and declare dividends, and its stock is held by its shareholders, including the plaintiff, only for the purpose of a final adjustment of its affairs and the distribution of its assets among those entitled thereto, whether creditors or stockholders.

We will first consider whether the contract of guaranty was made with reference to the continued existence of the corporation whose stock is held by the plaintiff. While the warehouse company is not a party to the guaranty, nor privy thereto, in the sense that, in law, it is at all liable thereon either to the plaintiff or to the defendant, or they to it, yet the continued existence of the company was a thing contemplated by both parties when they made the contract, and performance was impliedly made to depend upon it. They understood that as the basis of the contract there should be a corporation capable of earning dividends—not that it should actually earn them, but that it should be potentially able to do so; and this could not be said of a corporation which had lost its charter and had ceased to do business. This was not an original and independent promise to pay each year, at all events, the equivalent of a full or partial dividend, without regard to the earning capacity or existence of the corporation, but the guaranty imposed a secondary liability, that is, one to pay so much provided that the warehouse company failed to earn and pay. The promise was, therefore, not absolute, but conditional. The failure of the other corporation to pay was to precede any liability on the part of the defendant, and this could not be so unless the former continued to have the capacity to earn and pay. Its continued existence was, therefore, presupposed, by the parties. This question was substantially involved in *Lorillard v. Clyde,* 142 N. Y., 456. The contract of guaranty in that case was to last for seven years, but the corporation the payment of whose dividends was guaranteed was dissolved before the expiration of that time, and the Court said: "The question whether the obligation of the defendants under their guaranty continued in force as to the part of the seven years unexpired at the time of the dissolution of the corporation, in the absence of any responsible agency of either party for the causes which led to the dissolution, must be determined by the intention of the parties as ascertained from the language of the contract, and, if ambiguous, from such language and the surrounding circumstances. The contract contains no explicit statement on the subject. It assumed that the corporation would be in existence during the whole period over which the guaranty extended. The guaranty was not for the yearly payment of a sum equal to 7 per cent
(594) on the capital stock of the plaintiff in the corporation, or on the nominal amount of his stock. It was that the dividends of the corporation should annually for seven years equal that sum. The plain-

tiff would under the contract and by virtue of his right as a stockholder be entitled to dividends declared by the company, whether they should be more or less than 7 per cent per annum, and if dividends less than that amount should be made, the liability of the defendants on their guaranty would be limited to a sum sufficient to make up the deficit. In case the dividends equaled or exceeded 7 per cent, there would be no liability; and in case no dividends were declared, then the guaranty would stand in lieu of dividends." And again it was said with reference to the same question: "It is incontrovertible that the right to manage the business of the corporation and to earn and to receive the commissions on freight were the considerations upon which the guaranty rested. The plaintiff conceded these rights to the Clydes for this equivalent. The defendants could receive the benefits of the contract only in case the corporation should continue in being during the running of the guaranty. The death of the corporation would terminate their management, and prevent their earning commissions; the business would end, and the court, in administering the assets, would return to each party his proportion of the capital remaining for distribution. The death or dissolution of the corporation would withdraw all the capital invested so far as it remained, and take away for the future the whole consideration upon which the guaranty was based. There would thereafter be no corporation earning or capable of earning dividends, and nothing left upon which the obligation to pay them could be predicated.

"The general doctrine that when a party voluntarily undertakes to do a thing, without qualification, performance is not excused because, by inevitable accident or other contingency not foreseen, it becomes impossible for him to do the act or thing which he agreed to do, is well settled. This doctrine protects the integrity of contracts, and one of the reasons assigned in its support in the early case of *Paradine v. Jane,* Aleyn, 26, is that as against such contingencies the party could have provided by his contract. See *Harmony v. Bingham,* 12 N. Y., 99, 62 Am. Dec., 142; *Ford v. Cotesworth,* L. R., 4 Q. B., 134; *Jones v. United States,* 96 U. S., 24, 24 L. Ed., 644. But it is now well settled that when performance depends on the continued existence of a given person or thing, and such continued existence was assumed as the basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation. Executory contracts for personal services, for the sale of specific chattels, or for the use of a building are held to fall within this principle. *Dexter v. Norton,* 47 N. Y., 62; *People v. Globe Mut. L. Ins. Co.,* 91 N. Y., 174; *Taylor v. Caldwell,* 3 Best and S., 826. These cases are not exceptions to the rule that contracts voluntarily made are to be enforced, but the courts, in (595) accordance with the manifest intention, construe the contract as

subject to an implied condition that the person or thing shall be in existence when the time of performance arrives. So if after a contract is made the law interferes and makes subsequent performance impossible, the party is held to be excused. *Jones v. Judd,* 4 N. Y., 412. It must be conceded that it is difficult to draw the line and to determine the exact limitations of the principle. When the executory contract relates to specific chattels, and the subject-matter is destroyed without fault of the party, the implied condition arises and excuses performance. But where the contract is based on the assumed existence and continuance of a certain condition, or upon the continuation of a subject-matter which, however, is not the direct object of the contract, is the principle in such cases excluded? The present case illustrates what we have in mind.

"The contract in question was not with the corporation whose life was extinguished by the judgment of dissolution. But the guaranty assumed that the corporation would continue in existence during the seven years period. The liability which the defendants assumed was in consideration of the benefits which might accrue to them from the management of the transportation business of the corporation during that period.

"Upon the assumption that the death of the corporation was brought about without their fault, were they thereafter bound? Is the doctrine of implied condition less applicable than it would be if the contract had been between the defendants and the corporation? If in the one case the contract, so far as it was unexecuted, would be terminated, did not the happening of the same event terminate the engagement of these parties, based on the assumed continuance of the corporation in life?"

A similar contract was construed in *Columbus Trust Co. v. Moshier,* 100 N. Y. Suppl., 1066, and the Court held: "There is an express provision in the agreement referred to which makes the continuance of the corporate life of the company a condition precedent to the right to enforce the provisions thereof. As a general rule, the unqualified undertaking of a party to perform an act is not to be excused because the situation existing when the contract was made did not continue to exist at the time stipulated for performance. *Labaree Co. v. Crossman,* 100 App. Div., 501, 92 N. Y. Suppl., 565; *Lorillard v. Clyde,* 142 N. Y., 456, 37 N. E., 489, 24 L. R. A., 113. This rule, however, is not without exceptions; and where performance depends on the continued existence of a given person or thing, and such continued existence was assumed as the basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation. (596) *Lorillard v. Clyde, supra; Babbitt v. Gibbs,* 150 N. Y., 281-286,

44 N. E., 952; *Herter v. Mullen,* 159 N. Y., 28, 44; 53 N. E., 700, 44 L. R. A., 703, 60 Am. St., 517; *Matter of Daly,* 58 App. Div., 49, 68 N. Y. Suppl., 596. In such cases the courts have implied a condition in the contract that a party is relieved from its terms when its performance has, without his fault, become impossible. *Herter v. Mullen, supra.*" . . . "I think it clear that it was within the contemplation of both parties that the corporation should continue to exist during the life of the contract of guaranty, and that an implied condition should be read into the contract to that effect. The agreement was not to pay a sum equal to the amount of a dividend, whether declared or not, but was a guaranty that dividends should be paid. The payment of a dividend necessarily implies the existence of a corporation. The word 'dividend,' when used in connection with corporate stock, means a proportionate part of the profits which have arisen from corporation transactions. They are payable out of profits alone. Taylor Priv. Corp., secs. 563, 565; 2 Purdy's Beach Priv. Corp., secs. 451, 453. Again, the agreement had reference to the sale of the capital stock in the company. Capital stock is the interest which the members of a corporation (the stockholders thereof) have in the property of the corporation. 1 Purdy's Beach Priv. Corp., sec. 184. When the corporation ceased to exist and its property was distributed there was no longer any capital stock. When the corporate stock was wiped out, of necessity there could be no profits from corporate transactions, nor any possibility thereof. Without the possibility of profits from corporate transactions, there could be no dividends. The contract of guaranty did not fix a specific amount which Mr. Harrison was to receive. It provided that he should receive at least 3 per cent dividends. But so long as he remained the owner of the stock, he or his transferee, if he had transferred the same, would be entitled to receive all of the dividends earned and declared on such stock. If such dividends amounted to 10 per cent semiannually, the holder of the stock would be entitled to receive that. If it amounted to only 2 per cent semiannually, the holder of the stock would receive that amount from the company and could then hold the guarantor for the difference between the 2 per cent dividends received and the 3 per cent dividends guaranteed. This being so, the implied condition above referred to must be read into the contract, and it must be presumed that the parties contracted with reference to the continued existence of the corporation. Since this was the basis of the agreement, the destruction of the corporation terminated the obligation. This seems to me to be true both upon principle and authority. *Mason v. Standard Distilling and D. Co.,* 85 App. Div., 521; 83 N. Y. Suppl., 843; *Lorillard v. Clyde, supra.*" That case was affirmed in 193 N. Y., at p. 634.

(597) The question, therefore, is whether the guaranty becomes wholly inoperative for want of something to which it is applicable, or whether, on the other hand, it can be understood as binding the defendant to pay the deficiency of the dividend in any contingency and to respond in damages to an equivalent amount in case of failure. The latter is the theory of the plaintiff, reading the contract as one not dependent in the least upon the corporate capacity of the warehouse company to earn and pay dividends and as operative without any regard to its continued corporate existence. We cannot assent to this view. It is not what the language of the contract imports, and evidently not what the parties intended. The condition precedent to liability on the guaranty was the existence of a corporation having stock and capable of earning and paying dividends thereon, but not necessarily able to do so. This was made an essential element of the guaranty. It referred necessarily to a live and not a dead corporation. We would not properly refer to a defunct or dissolved corporation as one which could earn or pay annual dividends. It would be proper to refer to the part or share to be received in the final *division* of its assets by its creditors or shareholders as a *dividend,* but that is not the kind of dividend which was intended by the parties to this guaranty when they used that word; but it is perfectly clear, on the contrary, that they meant an annual dividend, and nothing else. The language is if the warehouse company fails to pay its annual dividend. The contract must have a natural and reasonable construction. *Justice Cooley* said of this question in *Lockhart v. Van Alstyne,* 31 Mich., at p. 79: "A dividend to the stockholders of a corporation, when spoken of in reference to *an existing organization engaged in the transaction of business,* and not of one being closed up and dissolved, is always, so far as we are aware, understood as a fund which the corporation sets apart from its profits to be divided among its members. . . . A dividend among preference stockholders exclusively is understood to imply that the sum divided has been realized as profits, though the earnings do not yield a dividend to the stockholders in general. We hazard nothing in saying that this is the primary and universal understanding of a dividend on stock, except when made use of in respect to a final closing up and distribution of assets on the occurrence of insolvency or in view of a dissolution." No one can well read this guaranty without being convinced that the parties intended and contemplated the continuance of the life of the company, whose default in paying annual dividends should raise a liability upon the guaranty to pay the liquidated damages. As a dead corporation could not pay the dividends, it was not in the minds of the parties when they drew their contract.

We have a case in our own Reports which clearly affirms the validity of the principle herein applied. *Steamboat Co. v. Transportation Co.*, 166 N. C., 582, at 587, 589. There the object of the contract (598) was frustrated by the destruction of the property to which it mainly related, as nearly all courts seem to hold, and this Court held it fell within the exception to the rule that the obligation of a contract is imperative, which applies generally, but which is subject to the qualification that when the principal subject to which the contract relates ceases to exist, the obligation is at an end, citing and approving 9 Cyc., p. 627 *et seq.*, it being said at p. 631: "Where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing to which it relates, the subsequent perishing of the person or thing will excuse the performance. Thus, where the contract relates to the use or possession or any dealing with specific things in which the performance necessarily depends on the existence of the particular thing, the condition is implied by the law that the impossibility arising from the perishing or destruction of the thing, without default in the party, shall excuse the performance, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the subject of the contract."

It appears, therefore, that the ground upon which the promisor is excused from performance is that from the nature of the contract there is an implied condition that the thing upon which it depends will continue to exist. We take this to be the rule as declared in *Taylor v. Caldwell*, 3 Best and Smith, Q. B. (113 E. C. L., Ed. 1867), 824:

1. Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible.

2. But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied.

3. Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfillment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

This was recognized as a rule in itself in Blackburn on Sales, p. 173. There are instances where the implied condition is of the life of a human being, but there are others in which the same implication is made as to the continued existence of a thing, or of an equity having a
(599) corporate, though artificial, as distinguished from a natural life, both being liable to perish. It is not a new doctrine, but quite an ancient one, for Pothier in his treatise on the Contract of Sale (*Traité du Contractde Cente)* part 4, sec. 307 *et seq.*, and part 2, ch. 1, sec. 1, art. 4, sec. 1, thus states the same rule: "The vendor should be freed from his obligation when the thing sold has perished without his fault, is a consequence of another principle, that every obligation *de certo corpore* is destroyed when the thing ceases to exist, *Traité des Obligations,* part 3, ch. 6. This principle is founded in the nature of things, for the thing due being the subject of the obligation, it follows that when the thing ceases to exist the obligation can no longer exist, not being capable of existing without a subject." See Blackburn on Sales, marg. p. 173.

The case of *Atkinson v. Schoonmaker,* 12 Mo. App., 425, is somewhat like the one under consideration. There the performance of the contract depended upon the continued existence of a corporation, a gaslight company, which was placed by order of a court in the hands of a receiver, and it was held that its corporate life or activity was suspended, and that the contract of the third parties, who had assumed the obligation declared on, could not be enforced during the period of the receivership. And in *Appleby v. Myers, infra, Justice Blackburn* said, in substance, that when the subject to which the contract related is destroyed without fault on either side, so that performance becomes impossible—that is, the kind of performance contemplated by the parties—it is a misfortune affecting both parties, and *excusing* them from further performance of the contract, *but* giving a cause of action to neither. Many cases could be gathered here in illustration of the principle and showing how variously it has been applied by the courts. We will only cite a few of them. *Lovering v. B. M. Coal Co.,* 54 Pa. St., 291; *Malcolmson v. Wappoo Mills,* 88 Fed., 680; *Livingston County v. Graves,* 32 Mo. App., 478; *Walker v. Tucker,* 70 Ill., 527; *Ward v. Vance,* 93 Pa. St., 499; *Appleby v. Myers,* L. R. 2 C. P. (Exch. Ch.), 650, citing *Taylor v. Caldwell, supra,* and referring especially to an extract therefrom in which *Justice Blackburn* states the doctrine very clearly. See, also, *The Tornado,* 108 U. S., 342, where it was said that there was a condition implied from the nature of the contract that a certain ship would remain seaworthy and capable of earning freight, but had become disabled before she had broken ground for her voyage. The court held that the parties were excused from performance. In that case the reason for the rule was said to be that without "any express stipula-

tion that the destruction of the person or thing shall excuse the performance," "that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel." The case cites *Taylor v. Caldwell, supra,* and *Appleby v. Myers, supra.* In *Walker v. Tucker, supra,* the Court said at p. 543: "It is ele- (600) mentary law that when the contract is to do a thing which is possible in itself, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it, for it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. 1 Chitty on Conts. (11 Am. Ed.), 1074. But where, from the nature of the covenant, it is apparent the parties contracted on the basis of the continued existence of a given person or thing, a condition is implied that, if the performance became impossible from the perishing of the person or thing, that shall excuse such performance. *Ib.,* 1076.

Several cases show that the doctrine applies where performance has become impossible by act of the law, as in the case where a receiver is appointed to take charge of the affairs of a corporation; and bankruptcy, of course, is within the same category; and so it was said, substantially, in *Malcolmson v. Wappoo Mills, supra*: It is a well settled rule of law that if a party, by his contract, charge himself with an obligation possible to be performed, he must make it good unless its performance be rendered impossible by the act of God, *the law,* or the other party. Unforeseen difficulties will not excuse him. *Dermott v. Jones,* 2 Wall., 1. But, as appears, the complete fulfillment of the contract was prevented by the order of this Court in the appointment of the receiver. A delivery of the rock by the company after that was impossible. It will be noticed, also, that the completion of the contract on the part of Mitsui & Co. was by the same action of the Court made impossible. If the company had tendered the delivery of the rock, the injunction of this Court forbade them to accept it. In like manner they could not have paid to the company the price of the rock. But when the contract cannot be specifically performed, and the only remedy is by way of damages, the court will not inflict such damages on the corporation if the breach of contract for which damages are sought has been occasioned by the law, the performance of the contract having been made impossible, citing *People v. Globe Mutual Life Ins. Co.,* 91 N. Y., 174. In the latter case, a corporation had entered into a contract with a general agent for his services for a specified time and at a stipulated salary. The contract continuing, and the services being rendered, the corporation was placed in the hands of a receiver, who did not continue the agent in his employment. He sued for dam-

ages. The court held that he could not recover, because, as it said, the company could not employ him, for the reason that it would be a violation of the order of injunction. The agent could not meddle in the affairs of the company, for that equally would violate the injunction. It was *damnum absque injuria.* The court adopted the principle as stated in the New York cases. The supposed answer to the (601) application of this established doctrine is that the contract would be of no value in such a case; but this is a total misapprehension of the nature and scope of the contract and the principle. If the warehouse company had continued to exist as an active concern, capable of earning dividends, the contract would have remained in full force and effect during its corporate life, and the guaranty was made upon that basis, if we are to be governed by its terms. So it is clearly seen that the contract was of value and great value, too.

As was said in one of the cases, it is the misfortune of the plaintiffs that something happened which does not seem to have been anticipated, and, therefore, was not provided against in the contract. There is a substantial promise to guarantee payment, to which the law annexes the condition that it shall last only during the life of the warehouse company, because, in the absence of a negative provision, it will read such a term into the contract as one naturally arising from what is expressed. This discussion, of course, assumes (without deciding) the validity of the contract in other respects.

We conclude, therefore, both upon reason and authority, that a guaranty such as we have in this case is at an end when the company whose stock is to pay the dividend has been dissolved. This brings us to a consideration of the methods by which a corporation is dissolved.

The Constitution of this State provides, in Art. VIII, sec. 1: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes and in cases where, in the judgment of the Legislature, the object of the corporations cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed." A well known text-writer says: "Although it has been frequently said that there are but four ways in which corporations may be dissolved, yet on a little reflection it appears that there are five ways: (1) By the expiration of the term of existence granted by the Legislature, either in its charter where it is organized under a special charter, or under its governing statutes where it is organized under a general law; (2) by an act of the Legislature, where power has been reserved for that purpose either in its charter where it is created by a special charter, or in a constitutional provision or a general statute operative upon it; (3) by a surrender of its franchises, which is accepted, and a volun-

tary dissolution; (4) by a loss of all its members, or of an integral part, so that the exercise of corporate functions cannot be restored; (5) by a forfeiture of its franchises by a judicial proceeding, usually an information in the nature of a writ of *quo warranto,* but sometimes, under the operation of statutes, a proceeding in a court of equity, which at the same time winds up the corporation and distributes its assets." 10 Cyc., 1270. And again it is said in Cyc., at p. 1272: "Charters are protected from legislative alteration or repeal unless the (602) power to alter or repeal has been reserved by the Legislature in making the grant of the franchises, either in the particular act in which the grant is embodied or in some general law applicable to the subject. In the latter case a statute dissolving a corporation and annulling its charter is not unconstitutional. Where this reservation has been made, a corporation may be dissolved by an act of the Legislature repealing its charter. Where the Legislature has reserved to itself the power to repeal, and exercises it, the courts will not presume that the power has been improperly or unconscionably exercised." It is provided in the Revisal that a corporation may be dissolved voluntarily by proceedings taken as set forth in section 1195, and, under section 1196, dissolution may further take place under judgment of a court having jurisdiction in a civil action brought by a stockholder or a creditor, or by authority of the Attorney-General in the name of the State for the causes therein enumerated, and, among them, "if the corporation shall become insolvent, or shall suspend its ordinary business for want of funds to carry on the same, or be in imminent danger of insolvency, or has forfeited its corporate rights." But, as already shown, the Legislature had the power to declare the charter of a corporation to be forfeited, and thereby to dissolve it.

We need not discuss the question whether the law of 1913 can be made to operate retrospectively, as we are of the opinion that the adjudication of bankruptcy had the same effect substantially and *pro tempore* as a dissolution of the corporation. It may be conceded that bankruptcy does not, of itself, work a dissolution of the corporation, as in the sententious language of *Judge Bleckley* in *Bolland v. Heyman,* 60 Ga., 181: "It is not the purpose of the bankrupt law to dissolve corporations. The assets are seized, but the franchise is spared. 'Your money,' not 'your life,' is the demand made by the bankruptcy act." But the company for the period of its bankruptcy has ceased to do business, and as completely lost its capacity to earn dividends as if its corporate life had become extinct. Where there is the same reason there must be the same law.

While it is not essential to a disposition of this appeal that we should commit ourselves to any special view regarding the power of the

Legislature to pass the retroactive clause of the law of 1913, and we will not do so, it may be well to reproduce here the clear exposition of the law by *Justice Harlan* in respect to the scope and effect of the reservation in constitutions or statutes to amend or repeal charters granted to corporations, which we find in *Hamilton G. & C. Co. v. City of Hamilton,* 146 U. S., 258 (L. Ed., 963), as follows: "This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed
(603) under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the Constitution, may be a contract; but where one of the conditions of the grant is that the Legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the contract, whatever may be the motive of the Legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the Constitution, must be held to have assented to such reservation. These views are supported by the decisions of this Court. In *Greenwood v. Union Freight R. Co.,* 105 U. S., 13, 17 (26: 961, 963), the question was as to the scope and effect of a clause in a general statute of Massachusetts providing that every act of incorporation passed after a named day 'shall be subject to amendment, alteration, or repeal at the pleasure of the Legislature.' This Court, referring to that clause, said: 'Such an act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the Legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the Legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it or on the soundness of the reasons which prompted it. The words 'at the pleasure of the Legislature' are not in the clauses of the Constitution of Ohio or in the statutes to which we have referred. But the general reservation of the power to alter, revoke, or repeal a grant of special privileges necessarily implies that the power may be exerted at the pleasure of the Legislature."

The plaintiff contends that a clause has been inserted in the guaranty which specially fixes its duration and provides that it shall continue during the life of the defendant company; but this was also true in the case of *Lorillard v. Clyde, supra,* as the time there was seven years from the date of the guaranty, and the corporation was dissolved within that period. The clause in the guaranty upon which plaintiff relied does not prevent the application of the principle we have discussed. It merely limits the extreme duration of the guaranty. It was held in the able and exhaustive opinion of *Justice Andrews,* speaking for a unanimous Court in *Lorillard v. Clyde, supra,* that this did not prevent the full application of the principle; that the contract of (604) guaranty was made with strict reference to the continuance of the defendant's corporate life and its capacity to earn dividends, this being the indispensable condition upon which the guaranty should continue to be effective, and the very basis upon which it rested. The bankruptcy, while it did not destroy the life of the defendant company, suspended its corporate capacity and the exercise of its corporate functions, and it ceased altogether to be a going concern, capable of earning dividends. It was dormant, if not dead, for all practical purposes. Our view is greatly strengthened by the position taken by the plaintiff, that the guaranty is not one conditioned upon the payment of a dividend by the warehouse company, whether earned or not, but only upon the payment of the dividend "called for by the certificate," which is an earned dividend, and the promise is to pay any deficiency therein which may occur in any one of "the consecutive years" succeeding the date of the guaranty. The parties contemplated that there should, at least, be a chance for the company to make profits and pay dividends.

The case of *Kernochan v. Murray,* 2 L. R. A. (N. Y.), 183, is not in point, as there the guarantor, who was an individual, and not a corporation, died. This, of course, did not affect the guaranty. In our case, the warehouse company is not the guarantor, nor is it even a party to the contract, but an outsider, with reference to whose continued life, as a corporation, the contract was made, which presents a case very different from *Kernochan v. Murray, supra.* Nor is *Cownie v. Dodd,* 149 N. W., 904, any more applicable, for there the provision was that the guaranty should continue "until said stock has been retired"; and this event never happened. As stated by plaintiff in his brief, "the court held that the time limit of the guaranty was not the life of the corporation, but until the stock had been *retired.*" The company had ceased to do business, but this did not "retire" its stock, and, therefore, the "time limit" had not been reached. The Court, in that case, stated that the principle we have applied to this case had been recognized and established in several decisions. It is to be noticed that

Kernochan v. Murray is a New York case, and the Court of Appeals of that State, as we have seen, sustains our view; but neither of the two cases cited by the plaintiff conflicts with anything we have said, but both are in entire harmony therewith.

As the warehouse company was a bankrupt when this action was commenced, and its business was suspended, so that it could not earn dividends, our conclusion is that the plaintiff had no cause of action on the guaranty at that time. Whether the guaranty has ceased for all time to be operative because it has reached the limit of its duration by the dissolution of the corporation, we are not required to declare.

(605) We have not, for the reasons already stated, considered the reasonableness of the contract of guaranty, if it bears the construction which the plaintiff insists that it should have, nor the other objections to its validity which the defendant has discussed in its brief.

There was error in the judgment of the court. It will be reversed and the demurrer sustained.

Reversed.

CLARK, C. J., dissenting: The guarantee given by the defendant, upon which this action is brought, is as follows: "In each and every consecutive year from and after this date, should the dividends or any part thereof called for upon the face of the within certificate not be paid on its due date, for value received, the Spray Water Power and Land Company guarantees and binds itself to pay in cash, ten days after notice of such default, to the holder of the within certificate, any such deficiency in the dividend as may arise from the failure of the American Warehouse Company to pay its annual dividend as stated in said certificate. This agreement is binding during the life of the Spray Water Power and Land Company."

The sole question presented is the meaning of the above guarantee. Probably there is no other case in the books which presents a guarantee in exactly the same words, and it would be small, if any, aid to consider the construction placed by other courts upon guarantees more or less dissimilar.

Even if there had been presented to other courts a guarantee in these identical words, there has been none in our court. The construction of this guarantee should not be complicated by the view taken of more or less dissimilar guarantees by other courts. The sole question is the construction of the words, and their intent as derived from the four corners of the guarantee itself. It is a question of the meaning of these plain English words.

A guarantor on a note, bond, or other obligation is not released because the promisor or obligor becomes insolvent, bankrupt, or dies. His guarantee is to provide against the risk of those very contingencies.

It can make no difference that the promisor, or obligor, and the guarantor are corporations.

The original obligation of the American Warehouse Company is to pay 6 per cent preferred, accumulative, dividends on its certificates during the left of the obligor company, which was chartered for thirty years. When that company fails to pay, whether because it does not earn dividends or dies by legal dissolution or bankruptcy, the guarantor faces the very contingency provided for by the guarantee, and for which it was exacted.

The guarantor company is specially authorized by its charter to make this guarantee. The guarantee specifies that it "is binding during the life of the Spray Water Power and Land Company." This leaves no doubt as to the duration of the guarantee.

Whether this duration would be restricted to the thirty years (606) chartered life of The American Warehouse Company should its life not be extended by a renewal of the charter of that company is a question not presented. The guarantee cannot be for less than thirty years in any event, and it was given to secure the payment of the accumulative 6 per cent dividends should The American Warehouse Company fail to pay such dividends, regardless of the cause of the default—whether such default is caused by the failure to earn dividends or by legal dissolution or bankruptcy or any other cause.

This is the plain language of the guarantee. If it was not given for that purpose, and the guarantor is absolved either by failure to earn dividends or by the legal dissolution or bankruptcy of the Warehouse Company, it is difficult to conceive for what purpose the guarantee was required. It was intended to add something to the security afforded by the obligation of the original obligor, insuring against the contingencies by reason of which said company might fail or be unable to pay its dividends as stipulated.

BROWN, J. concurs in this opinion.

Cited: Burch v. Bush, 181 N.C. 127 (3c); *Midland Co. v. Glass Co.,* 205 N.C. 764 (3c).

W. S. WILSON v. S. H. SCARBORO AND WIFE.

(Filed 10 May, 1916.)

1. Deeds and Conveyances—Timber—Vested Interests—Divested Interests.

A conveyance of timber growing upon lands, to be cut and removed within a stated period, vests the title to the timber, subject to be divested if not so cut and removed by the grantee.

2. Deeds and Conveyances — Timber — Breach—Conversion—Damages—Evidence—Diminution.

Where the grantor breaches a provision of his deed, conveying timber standing upon his lands, by entering thereupon and preventing the grantee from removing, etc., the timber within the stated period, the defendant's act is, in effect, a reconversion of the timber to his use, and he is liable for the damages caused thereby; and evidence introduced solely for the purpose of showing that the grantor could have purchased other timber in the same locality from other parties in lieu of the timber the defendant had sold him, and thus have minimized his damages, is incompetent, though admissible in rebuttal of the plaintiff's testimony upon a different phase of the case, had it been offered for that purpose.

3. Contracts — Breach—Damages—Diminution—Evidence—Knowledge—Deeds and Conveyances.

Where it is permitted a party, who has breached his contract, to prove that the other party thereto could have minimized the damages by acquiring like property similarly situated, it is necessary for such party to show that the other had knowledge of the conditions relied upon at the date of his breach.

4. Deeds and Conveyances — Timber — Contracts — Breach — Measure of Damages.

Where the grantor has breached the terms of his deed to standing timber by entering upon the lands and preventing the grantee from cutting and removing the timber within the stated period, the rule of damages is the difference between the actual value of the timber and the contract price, and, if the price had been paid, the value of the timber.

ALLEN, J., dissenting.

(607) UPON rehearing.

Douglass & Douglass, R. N. Simms for plaintiff.
Jones & Bailey for defendants.

BROWN, J. This case comes up upon a petition to rehear and reverse our former decision, reported in 169 N. C., 654. The action is brought to recover damages for trespass upon plaintiff's property, to wit, certain standing timber which plaintiff alleges the defendant wrongfully

and unlawfully prevented plaintiff from cutting and removing, in violation of the terms of a conveyance of said timber, executed by defendants to plaintiff. The issues are set out in the report of the case in 169 N. C.

The case was before us at Fall Term, 1913, and is reported in 163 N. C., 387. We then construed the deed executed for the timber by defendants to plaintiff and held it to be an *executed* and not an *executory* contract, and that it passed a present estate in the timber, defeasible as to all timber not cut by the grantee within the time limit fixed by the parties in the instrument. At the last trial only issues of damages were submitted and passed on, and the judgment of the Superior Court was affirmed.

On the trial defendants' counsel asked these questions, which were excluded, and defendants excepted, viz.:

"Will you state what the price of stumpage was of the character of the Scarboro timber in that neighborhood in the years 1909, 1910, and 1911?

"Do you know whether there was any stumpage in the neighborhood of the Scarboro timber in those years?

"Do you know how much there was to be had in that neighborhood?"

The counsel for defendants stated in open court that the purpose of these questions was to show that at the time of the alleged breach of contract by the defendants there was available in that community, in substantially the same situation and substantially of the same character, very much more timber for sale at a price not exceeding the price the plaintiff was to give this defendant.

In announcing his ruling the judge said that the evidence was (608) offered on the theory that plaintiff could have bought more timber and used it in place of that on the Scarboro land, and stated that he excluded the evidence *for that purpose.*

The court was asked to instruct the jury: "The measure of damages in this case is the difference between the contract price of the timber and its market value in the vicinity where it is located; and if the plaintiff could have obtained all the timber he wanted, in that vicinity or elsewhere, as good as the Scarboro timber and as easily accessible to Wyatt, the place of shipment, and at the same or less price, then he should have done so."

The court instructed the jury that the measure of damages for the conversion of the timber was the difference between the contract price and its market value in the vicinity where it is located, and refused the remainder of the prayer. The defendants excepted.

In the petition to rehear we are asked to reverse our opinion upon this assignment of error. After a further consideration, we are con-

firmed in the opinion that the ruling of the court below was correct in rejecting the evidence for the purpose for which it was offered.

1. Assuming that such evidence in mitigation of damage is competent in a case like this, the offer to prove as well as the prayer for instruction is fatally deficient in one material particular. It is essential that the plaintiff should have had knowledge at the date of the breach of the contract that he could have obtained the same timber at the same or less price in substantially the same situation in that community. The defendants' offer to prove fails in this essential averment.

Evidence offered to establish a defense, operating to mitigate damages, must tend to prove all essential facts, or it is properly excluded. Knowledge by the party complaining of a breach of a contract that he could by reasonable diligence have prevented or lessened the damage caused by another's wrongful act is essential. *Huntington Co. v. Parsons,* 62 W. Va., 26.

2. We do not think, however, that the rule of law invoked by defendant applies to this case. The gravamen of plaintiff's complaint is that he purchased from defendants the timber standing and growing upon certain lands at a certain contract price, which plaintiff agreed to pay and defendants agreed to receive; that the defendants conveyed the timber to him by deed and that he had five years within which to cut and remove it; that defendants wrongfully prevented plaintiff from cutting and removing the timber under the terms of the deed and converted same to their own use. The cause of action being established, the quantum of damage is alone to be adjusted.

We have long since held that standing timber, growing upon land, is a part of the realty and is governed by the laws applicable to that (609) kind of property. *Hawkins v. Lumber Co.,* 139 N. C., 160. In consequence, this deed of defendants to plaintiff has been construed to vest in plaintiff an absolute estate in the timber, defeasible at the end of the term as to uncut timber. It follows, therefore, that when defendants entered during the term and deprived plaintiff of his property in the timber, it was practically a conversion to defendants' use. The rule of damage was, therefore, correctly stated by the court. It is the difference between the actual value of the timber and the contract price. Of course, if the price has been paid, it would be the value of the timber. There may be cases in which other incidental damages may be allowed.

There are many cases of breach of contract and of tort in which the rule contended for by the defendant applies. Illustrations are given in the opinion of *Mr. Justice Walker* in this case, 169 N. C., 657. But neither the diligence of the learned counsel for defendants nor our own

researches have been able to produce a case where such rule has ever been applied to actions like this.

The plaintiff owned the timber growing on the land. He had a property right in it, which he had the right to use and enjoy to the fullest extent, and defendants had no right to deprive him of it. And as is held by the Supreme Court of Georgia in *Mfg. Co. v. Rucker,* 80 Ga., 291: "Whenever the right to enjoy one's property to its fullest extent is invaded, and injury arises therefrom, he may recover any damages sustained by reason of such invasion; nor is he bound to do anything to avoid the consequences thereof." See, also, *Price v. Shoals,* 132 Ga., 250; *Satterfield v. Rowan,* 83 Ga., 187.

In *Reynolds v. Chandler Co.,* 43 Me., 513, it is held that when damage is caused by the flow of water from a dam, the owners are liable to the full amount of the injury, notwithstanding the injury might have been prevented by an expenditure less than the amount of damage.

The Court of Appeals of Texas, in *Ry. Co. v. Borsky,* 21 S. W. Rep., 1012, held that "though it is the duty of a party to protect himself from the injurious consequences of the wrongful act of another, if he can do so by ordinary effort and care, or at moderate expense, such rule has no application in a case for damages against a railroad for the destruction of plaintiff's crops by overflow from the defective construction of defendant's roadbed, where injury could only have been prevented by the digging of a ditch at a cost of $300."

When the defendants wrongfully deprived plaintiff of the right to cut and remove the timber they had conveyed to him, we do not think he was required to go around the community and inquire if there was other timber for sale, in an effort to replace that which had been wrongfully taken from him.

Plaintiff had a right to purchase other timber and to cut and sell it and make all possible profit on it; but had he done so it would not have relieved defendants from the consequences of their wrongful (610) act in respect to the timber he had purchased from them. Suppose plaintiff had bought A's timber and the timber of a dozen others in that community, and had cut and sold it, making a profit on it, that is no reason why the defendants should be permitted to take the timber plaintiff had purchased from them and wrongfully convert it to their own use and not pay for it. Plaintiff had the right to cut and sell that timber and make what profit on it he could, regardless of how many other tracts he could buy and sell at a profit.

If the rule of damages insisted upon by the defendant could apply to this case, a multiplicity of collateral issues would be raised which would completely obscure the original cause of action. The plaintiff would be required to prove:

1. Whether or not there was any stumpage for sale in the neighborhood of the timber in question *at the time of the breach* of the contract.

2. The quality and location of timber that might have been for sale in said neighborhood in comparison with the Scarboro timber.

3. That Wilson could have purchased the stumpage in question.

4. That Wilson could have purchased stumpage for sale, with the privilege of cutting it at any time within five (5) years, and on terms as set forth in the Scarboro deed.

5. That the parties, who were willing to sell, each had a good and indefeasible title to the land upon which the timber grew.

Upon each of these issues it would be competent for both parties to offer evidence pro and con.

The statement of the proposition and the issues that would be raised by its adoption conclusively demonstrates that it would be a dangerous innovation to hold that the vendor of timber can disregard the terms of his solemn deed, *reap the profits himself,* and then hold the vendee to strict accountability for not buying more timber. But even in respect to common carriers in dealing with goods which have been lost by their negligence, the courts will not apply this rule to the owner when he sues to recover the value of his property.

It is held in *R. R. Co. v. Cobb,* 64 Ill., 128, that "Where a person has bought and paid for an article, and suffers loss by reason of a default on the part of a carrier by whom it is shipped to get it to the point to which it is consigned, the carrier cannot claim that the injured party could have bought similar goods on the market at the point of consignment, in order to reduce the loss."

It is contended that the evidence rejected should have been admitted on another ground. The plaintiff was permitted to prove the value of standing timber similar to this in that community and the price at which lumber was selling in that market. This evidence was declared competent in the previous opinion of this Court. It was perfectly com-
(611) petent for the defendant to rebut this evidence by showing that the value of the timber in the neighborhood and the price of lumber on the market was less than the testimony offered by the plaintiff tended to prove, and if the evidence had been offered for this purpose, we have no doubt it would have been admitted. But according to the statement of his Honor, the evidence was offered for the purpose of showing that the plaintiff could have bought more timber and used it in lieu of the Scarboro timber and made equally as much thereon, thereby lessening or entirely obviating any damage. His Honor states that the evidence was offered for that purpose and excluded, and we think properly so.

The petition to rehear is

Dismissed.

ALLEN, J., dissenting: This is an action to recover damages for breach of contract, the plaintiff alleging that the defendant sold him the timber growing upon lands belonging to defendant at $2.25 per thousand feet, and that he refused to permit the plaintiff to cut the timber.

The plaintiff was permitted, over the objection of the defendant, to prove that he was under contract to deliver 800,000 feet of lumber, and that in order to perform his contract he was compelled to buy timber at $4 per thousand feet.

If this evidence was accepted by the jury—and we have no means of knowing that it was not—it shows that the plaintiff had lost on this contract the difference between $2.25 and $4 per thousand feet, or $1,400.

The defendant then offered to prove, in reply to this evidence and for the purpose of showing that it was not necessary for the plaintiff to pay $4 per thousand feet in order that he might perform his contract, that there was available in that community in substantially the same situation and substantially of the same character very much more timber for sale at a price not exceeding $2.25 per thousand feet.

I think this evidence was clearly competent and that its exclusion entitles the defendant to a new trial.

W. LYNCH v. C. R. JOHNSON ET ALS.

(Filed 31 May, 1916.)

1. Deeds and Conveyances—Trusts—Delivery by Mail—Trials—Questions of Law.

Where two purchasers of lands have them conveyed to one of them to be held in trust for both, and the holder of the legal title executes a good and sufficient deed to the other for the latter's interest in the lands, and deposits the deed in the postoffice in an envelope properly addressed, by mailing the deed the grantor parts with his authority and control over it; this passes the title in the property to his grantee, whether the latter was aware of the fact or not, it being assumed that he will accept the title to the lands for which he has paid; and where, in an action involving this question, the evidence of both parties is harmonious, such delivery will be held valid as a matter of law.

2. Deeds and Conveyances—Delivery by Mail—Trusts—Title.

Where the holder of the legal title to lands in trust for himself and another executes and mails to his *cestui que trust* a deed sufficient to pass the title, the trust estate ceases and the grantee holds the legal title to his part of the lands under his deed.

3. Same—Bankruptcy—Registration—Laches—Title—Notice.

Where a valid delivery of a deed to lands is made by mailing the deed to the grantee, which he has not received, and waits for fifteen years after receiving notice of the fact, and three years after his partner has become a bankrupt and the lands sold to a purchaser at the bankrupt sale, without demanding the reëxecution of the deed or taking legal steps to secure it (Revisal, sec. 336): *Held*, the trustee in bankruptcy, being regarded as a purchaser for value under the amendment to the Bankrupt Act of 1910, acquires a valid title as against the holder of the unregistered deed, under Revisal, sec. 980, which no other formal notice will affect, which title inures to the purchaser at the bankrupt sale.

4. Deeds and Conveyances—Delivery by Mail—Return Address.

The valid delivery of a deed by mail is not affected by the fact that the grantor's return address was given on the envelope, though it appears that in fact the grantee did not receive the conveyance and that it was not returned to the grantor.

HOKE, J., concurring in result.

WALKER and BROWN, JJ., writing concurring opinions.

ALLEN, J., dissenting.

(612) PETITION to rehear.

Aydlett & Simpson for plaintiff.

Small, MacLean, Bragaw & Rodman for defendants.

CLARK, C. J. This is a petition to rehear this case, reported 170 N. C., 110, in which the opinion was filed 17 November, 1915. On the same day we filed another opinion, *Hinton v. Williams,* 170 N. C., 115, on the same point, both decisions being rendered by a unanimous Court. The petition to rehear presents no question that was not discussed and considered on the former hearing, and no authority or argument appears to have been overlooked.

In the former decision we held that as the plaintiff and the defendants claimed under a common source of title, the defendants' deed being recorded and the plaintiff claiming under an unrecorded deed, the plaintiff was not entitled to recover, and that since the amendment of 25 June, 1910, to the Bankruptcy Act the conveyance to the trustee in bankruptcy had exactly the same effect as if it had been made (under the Connor Act) to a purchaser for value.

(613) The evidence, in brief, is that in 1895, C. R. Johnson purchased a tract of land from W. E. Shallington and received a deed therefor in consideration of the payment of $550. The plaintiff Lynch alleges, and his witness Johnson testifies, that Lynch paid him one-half of this amount and that he agreed to convey one-half to said Lynch. He fur-

ther testified: "Shortly after I purchased this land in 1895 and within four or five years thereafter I made, executed, and acknowledged a deed conveying a half interest in the same to the plaintiff Lynch. I placed this deed, in a stamped envelope with my return address on it, in the postoffice, directing the same to the plaintiff. Mr. Lynch told me afterwards that he did not receive this deed. I was adjudged a bankrupt in the District Court of Virginia in 1911; the property described in this action was sold on 4 May, 1914. I did not tell Mr. Davis (the trustee in bankruptcy) or any one else that Mr. Lynch claimed an interest in the same. After the sale was made I asserted a right of dower in the entire tract in behalf of my wife, and I executed with her a deed to the Juniper Corporation (the purchaser), releasing her right of dower in the same. The deed which I mailed to Lynch bore my return address. The deed was never returned to me. I have not seen the same since I mailed it." The plaintiff Lynch also testified: "Johnson told me some time ago that he had executed a deed to me for a half interest in this land; that the same had been mailed to me. I never received this deed. I have never listed the property for taxation since it was purchased in 1895."

It is sufficint that we rest the decision on the uncontradicted testimony of the plaintiff's witness, Johnson, that he duly executed and acknowledged the deed and placed it in the postoffice postpaid, directed to Lynch, and with Johnson's return address on the envelope, and that the deed was not returned to him. Johnson testifies that he told Lynch of this execution and deposit of the deed in the postoffice and Lynch testifies that Johnson so told him. There is no evidence contradicting this fact. This was a delivery to the addressee and completed the execution of the instrument, for there was nothing more the grantor could do. This was so held in *McKinney v. Rhoads,* 45 Pa. St. (5 Watts), 343.

In *Phillips v. Houston,* 50 N. C., 302, it is held that the delivery of a deed to a third person, signed and sealed to be proved and registered, without retaining any authority or control over it, was a complete delivery. This case cites *Hall v. Harris,* 40 N. C., 303, which holds that there is a delivery of a deed when, "signed and sealed, it is put out of the possession of the maker." In the present case the uncontradicted testimony of the plaintiff's witness is that the deed was not only signed and sealed, but was duly probated; and when it was put in the mail it was beyond the control of the grantor and was a delivery. *Phillips v. Houston, supra,* cites many cases to the same effect and is itself (614) cited in many other cases. See Anno. Ed. Among these cases is *Robbins v. Rascoe,* 120 N. C., 80, where the Court held that when "the maker of a deed delivers the same to some third party for the grantee, without retaining any control over it, the delivery is complete and the

title passes at once, although the grantee may be ignorant of the fact, and no subsequent act of the grantor can defeat the effect of such delivery." That case cites many others, as *Threadgill v. Jennings,* 14 N. C., 384, "A deed is good if delivered to a stranger to the use of the obligee," and *Tate v. Tate,* 21 N. C., 26, where the deed was delivered to the uncle of the parties for the benefit of his infant children, and after his death the grantor obtained possession of it before its registration and canceled it, the Court held that the title was in the children. There is also cited in *Robbins v. Rascoe, supra, Kirk v. Turner,* 16 N. C., 14, where the Court held that the deed being "delivered to a third party to be carried to the grantee, the acceptance is presumed until the contrary is shown." And in the present case the grantee, when told of the execution and deposit of the deed in the postoffice, did not repudiate it nor deny the fact. In *Morrow v. Alexander,* 24 N. C., 388, a father living in South Carolina delivered the deed for his daughter to his son, to be delivered to his daughter, and the Court held that the execution was complete and the title passed. In *McLean v. Nelson,* 46 N. C., 396, also cited in *Robbins v. Rascoe, supra,* the Court held: "When one delivers a deed to a third person, in the absence of the grantee, the latter is presumed to accept it, so that it forthwith becomes a deed, and the legal effect is to pass the property."

The above case, *Phillips v. Houston,* that the delivery of a deed to some third party for the grantee, without the grantor retaining any control over it, is a "delivery complete, and the title passes at once, although the grantee may be ignorant of the facts," is cited and approved by *Brown, J.,* in *Fortune v. Hunt,* 149 N. C., 360, and *Walker, J.,* in *Buchanan v. Clark,* 164 N. C., 62. In the present case the absolute delivery of the deed, duly probated, by placing it in the postoffice, postage paid, directed to the grantee, is proven by the testimony of the plaintiff's witness, who testifies, also, that he told the grantee that this had been done, and the grantee testifies that he was so informed, and offers no testimony to deny it or that he declined to accept the title. It follows that the legal title thus passed in pursuance of the previous parol agreement (if it existed) put an end to the trust, and this legal title was not destroyed by the loss of the deed any more than in the above cases where the grantor, subsequently obtaining possession of the deed, destroyed it before registration. It was the grantee's own fault (the plaintiff in this action) that he did not apply to Johnson to execute the deed, nor institute proceedings under Revisal, 336, to compel reëxecution of the
(615) lost deed and to register the same. He could have filed *lis pendens* if necessary, to protect his rights during such proceedings.

The plaintiff, not having caused the deed to be reëxecuted and registered, is in no better position than if he had lost the deed or destroyed

it before registration. The legal title was passed to him by the execution of the deed, and upon discovering its loss he could have had a re-execution or a duplicate registered.

But even if the delivery of the deed to a third party for him was not shown by the testimony of his own witness and by his failure to negative such delivery, or, when told of the fact, to repudiate the transaction, was not sufficient, there are other reasons why the plaintiff cannot recover. Equity will not enforce a stale claim. On the evidence here of the plaintiff, it was more than nineteen years after the alleged oral agreement was made to convey a half interest in this land to him before he took any steps to assert his rights. It was fifteen years after the deed was deposited in the postoffice, duly executed and directed to him, before he moved in the matter; the grantor went into bankruptcy in 1911, and for three years he took no steps to notify the trustee in bankruptcy that he had any claim, though the land was fully described in the advertisement thereof; and he did not object to the confirmation of the sale. It is true, he testified that at the sale, in an ordinary tone of voice, he stated to the crier (not to the trustee or the purchaser) that he claimed an interest in this land. The trustee in bankruptcy and Mr. Hardy, president of the National Bank of Norfolk, who was president of the Juniper Corporation and bought the land for said company, both testified that they did not see Lynch at the sale, and had no notice at that time or any other before this action was brought that the plaintiff asserted any interest in the land. The land when conveyed to Johnson brought $550, of which the plaintiff claimed that he paid $275 to Johnson for a half interest. It is now worth $4,000. In *Hamlin v. Mebane,* 54 N. C., 18, it was held that equity would hold less than twenty years an abandonment. See citations in Anno. Ed.

Moreover, since the adoption of the Constitution the Revisal, 399, after providing limitations for legal proceedings, enacts as follows as to equitable proceedings: "An action for relief not herein provided for must be commenced within ten years after the cause of action shall have accrued." It was held: "This section covers all causes, equitable and legal, not otherwise provided for." *McAden v. Palmer,* 140 N. C., 258.

"An action to have a trust declared and a conveyance would be barred by ten years." *Norcum v. Savage,* 140 N. C., 472. In *Phillips v. Lumber Co.,* 151 N. C., 521, it is held: "An action to have a party declared a trustee is barred by ten years. *Johnston v. Lumber Co.,* 144 N. C., 717; *Norcum v. Savage,* 140 N. C., 472; *McAden v. Palmer, ib.,* 258; *Ritchie v. Fowler,* 132 N. C., 788; *Norton v. McDevit,* 122 N. C., 759." The evident object of this section, Revisal, 399, was to (616) substitute for the provision as to stale claims obtaining in equity the definite period of ten years. Even if the ten years should not be

counted, from the time when the alleged oral agreement was made in 1895, it certainly ran from the time that the executed deed in pursuance of the oral agreement was placed in the postoffice in 1899 or 1900, of which he was notified, according to testimony both of Johnson and Lynch himself. It was, however, some fifteen years after that date before he brought this action to set up the alleged oral agreement, which he had notice had been terminated by the delivery of the deed to the postoffice for him.

Independent of the above grounds, either one of which is fatal to the plaintiff's claim, Revisal, 980 (the Connor Act), which was passed to prevent frauds and perjuries and to insure purchasers protection against secret and latent liens and claims under unregistered deeds and conditional sales, provides: "No conveyance of land, or *contract to convey,* or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor, or lessor, but from the registration thereof, within the county where the land lies." It is unnecessary to cite the numerous cases sustaining this act, and holding that no notice, "however full and complete," can avail when such conveyance or contract or lease is not registered.

The plaintiff claims under a *contract* to convey. If that contract was in writing it would be utterly valueless, no matter how full the notice of its existence, unless it was duly registered, as against a creditor or purchaser for a valuable consideration. Under the act of Congress amendatory to the Bankrupt Law, 25 June, 1910, the trustee in bankruptcy represents the creditors and is a purchaser for value. If, therefore, the contract was in writing, being unregistered, it could not avail against creditors, or the trustee in bankruptcy, who represents them. The plaintiff certainly cannot occupy any better position by reason of the fact that his contract was not in writing and, therefore, could not be registered. It was his duty to have had the contract placed in writing and recorded. He has delayed to do so for nineteen years, and this laches is inexcusable. He failed for more than fifteen years to have the deed reëxecuted after its delivery in the postoffice in 1899 or 1900, and is certainly barred by Revisal, 399. He is also barred by the fact that, the title having been passed to him by the execution of the deed, he did not have it reëxecuted and recorded.

It would be indeed a strange anomaly if Revisal, 980, which requires "contracts to convey" to be registered in order to prevent frauds and perjuries and to give purchasers security against oral evidence of unrecorded or secret and latent liens, should not require oral contracts to be put in writing and registered, but should exempt them from such
(617) registration on the ground that, being oral, they could not be registered.

We will not be understood as applying this to oral trusts arising *ex maleficio* by fraud or duress. That proposition is not presented in this case for consideration, and we make no intimation in regard to such cases. We are holding that under the language and spirit of the Connor Act it applies to *contracts* to convey, whether oral or written.

The act amendatory to the Bankrupt Act, 25 June, 1910, places a trustee in bankruptcy not only in the position and with rights of creditors, but endows him "with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings," which includes, of course, the position of a judgment creditor. This statute was enacted to correct the decision of the United States Supreme Court in the *Cassell case,* 201 U. S., 304. It has been repeatedly so held in the cases cited in the former decision of this case, 170 N. C., 110, and in the opinion filed the same day, in *Hinton v. Williams,* 170 N. C., 115, and has been more recently sustained in *Fairbanks Steam Shovel Co. v. Wills,* 10 April, 1916, in which it is held (36 Supreme Court Reporter, 466) that the mortgagee in a chattel mortgage unregistered cannot perfect his title as against the bankrupt by taking possession of the property, if the mortgage was not recorded at the date of filing the petition. It is also held in *Bailey v. Ice Cream Co.,* 36 Supreme Court Reporter, 50, that the rights of the trustee in bankruptcy are those of a creditor having a lien by judgment or equitable proceedings on the date of filing the petition. Here the petition was filed in 1911, and the plaintiff did not bring his action till three years later, after the property was duly advertised, sold, sale confirmed, and deed executed.

Petition dismissed.

HOKE, J., concurs in result.

WALKER, J., concurring: As the debts of C. R. Johnson, the bankrupt, were evidently contracted since the creation of the alleged trust, the trustee in bankruptcy, under the amendment of 1910, stood in the position of a creditor and was vested, by the amendment, with all "the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon" as to all property in the custody of the bankruptcy court. A creditor, holding such a lien, founded upon a debt contracted since the creation of the resulting or parol trust, and with a record which disclosed that Johnson was the absolute owner of the property, would hold his lien on the land discharged of the trust, as he would be in the analogous position of a purchaser for a new consideration of value, who had bought the land without notice of the trust, as both creditors and purchasers are protected in the same way and for the same reason. They are both innocent holders, (618)

who are favored by the law. Even a creditor or purchaser whose right is based upon an antecedent debt or consideration is considered as holding his right for value, under the 13th Elizabeth, as against other creditors, though not under the 27th Elizabeth as against a prior donee; but if the consideration is parted with upon the faith of an absolute title in the debtor, as appears by the record, the creditor with a lien in law upon the land should fairly come within the principle which protects purchasers and creditors against prior equities. *McKay v. Gilliam,* 65 N. C., 130. It is said by Mr. Black in his recent work on Bankruptcy (1914), sec. 316, that the amendment of 1910 gives the trustee a superior position to the one held by him before that change in the law. And Mr. Collier, in his book on Bankruptcy (9th Ed. of 1912), p. 1000, says that "The amendment of 1910 has extended the title of the trustee, so that he has now more than the limited title of the bankrupt," and this must needs be so, for otherwise the amendment would have little or no force or effect. Black also says, in the section above cited, that the old decisions have but slight application since the change in the law. There is no pretense here that creditors of Johnson, whose position the trustee now occupies, had any notice of the trust at the time their claims were contracted or since. If the purchasers at the bankrupt's sale bought with notice, they would yet get a good and valid title as against plaintiff Lynch, if the creditors of Johnson had no notice and the trustee is to be regarded as one holding the rights of a creditor with a judgment lien. Suppose a creditor had sued and obtained judgment before the bankruptcy, his lien on the land would be preserved; and if his judgment was based on a debt antedating the bankruptcy, it would seem that his right would prevail over that of the plaintiff holding a mere equity; and by the amendment the trustee holds, for the creditors, just as if they had judgment liens at the time of the adjudication of bankruptcy. It further appears to me, on the other question, as to the delivery of the deed, that the fact of there being a return card on the envelope, instead of weakening the defendant's case, tends greatly to strengthen the presumption that the deed was received, as it did not come back, when in the usual course of the mails it should have done so. It doubles the presumption in strength.

As to the acceptance of the deed, this was not necessary, as plaintiff, on his own showing, had the full beneficial interest and Johnson only the naked legal title. The statute (27 Henry VIII.) having executed the use, it was Johnson's duty to convey the legal estate to Lynch, who already had it, by virtue of the statute, but not the written evidence of it. There are decided cases in which the bankruptcy courts have ordered trustees to make just such conveyances where the right

to the deeds was clear and the equity free from any claim of (619) creditors.

I would also refer to the doctrine of laches as applicable to this case, but in the closing hours of the term, and for lack of time, it will be impossible for me to make any reference to the authorities upon that question.

BROWN, J., concurring: This is a petition to rehear this cause, reported 170 N. C., 110. The object of the action is to convert the defendant, the Juniper Company, into a trustee of one-half the land for plaintiff's benefit and for a division. At the conclusion of plaintiff's evidence and again at the conclusion of all the evidence defendant moved to nonsuit, which motion was overruled, and defendant excepted.

I am of opinion that the motion should have been allowed, and that plaintiff is not entitled to a judgment in any view of the evidence.

C. R. Johnson, introduced as a witness by plaintiff, testified that he purchased the land in 1895 for plaintiff and himself, and that plaintiff paid half the purchase money; that by agreement with plaintiff the title to the entire tract was made to Johnson, who agreed to hold it in trust for plaintiff and himself in equal interest. Witness further testifies:

"Shortly after I purchased this land in 1895, and within four or five years thereafter, I made, executed, and acknowledged a deed conveying a half interest in the same to the plaintiff Lynch. I placed this deed, in a stamped envelope with my return address on it, in the post-office, directing the same to the plaintiff. Mr. Lynch told me afterwards that he did not receive this deed. I was adjudged a bankrupt in the District Court of Virginia in 1911. The property described in this action was sold on 4 May, 1914. I did not tell Mr. Davis or any one else that Mr. Lynch claimed an interest in the same. After the sale was made, I asserted a right of dower in the entire tract on behalf of my wife, and I executed with her a deed to the Juniper Corporation, releasing her right of dower in the same. The deed which I mailed to Lynch bore my return address. The deed was never returned to me. I have not seen the same since I mailed it."

Johnson was adjudged a bankrupt, and on 4 May, 1914, his trustee duly sold and conveyed the entire tract to defendant, the Juniper Company. The jury have found that Johnson held the land in trust for plaintiff and himself and that plaintiff gave notice at the sale, and that said defendant thus had actual notice of plaintiff's alleged equity.

Plaintiff testified: "Johnson told me some time ago that he had executed a deed to me for a half interest in this land; that the same had been mailed to me. I never received this deed."

(620) This evidence was all introduced by plaintiff, and there is nothing tending to contradict or qualify it. I am of opinion that the nonsuit should have been allowed because, according to the uncontradicted evidence offered by plaintiff, he has no equitable title to half the land resting in Johnson or the Juniper Company, as both legal and equitable title had been conveyed to plaintiff by Johnson by deed duly executed and delivered long before this action was brought or the Juniper Company acquired any title. There is no finding by the jury upon this phase of the evidence, but I think defendant can get the benefit of it under the motion to nonsuit, because the burden of proof is on plaintiff to show that at the commencement of his action the Juniper Company held the *legal title* to half the land in trust for the plaintiff. That it did not hold it is proven by plaintiff's own evidence. The legal and equitable title to half the land passed out of Johnson and vested in plaintiff by the deed which his own witness, Johnson, testified he executed and mailed to him. That same witness who proved the plaintiff's equitable title to the land also proved that such equity had passed along with the legal title by deed to plaintiff. Consequently there is no trust estate in the Juniper Company for the decree of the Court to operate upon.

In order to constitute a delivery of the deed, it is not necessary that plaintiff should have received it. When Johnson deposited the deed in the postoffice he parted with all control over it and could not recall it. The title thereby became vested in plaintiff, although he may not have received it. This Court has held that "when the maker of a deed delivers it to some third person for the grantee, parting with the possession of it, without any condition or any direction as to how he shall hold it for him, and without in some way reserving the right to repossess it, the delivery is complete and the title passes *at once,* although the grantee may be ignorant of the facts, and no subsequent act of the grantor or any one else can defeat the effect of such delivery." *Fortune v. Hunt,* 149 N. C., 358.

This case cites many authorities and is itself cited with approval by *Justice Walker* in *Buchanan v. Clark,* 164 N. C., 63, and by *Justice Allen* in *Huddleston v. Hardy,* 164 N. C., 213. *Chief Justice Henderson* defines the delivery of a deed to be "a parting with the possession of it by the grantor in such a manner as to deprive him of a right to recall it," and further says: "A delivery of a deed is in fact its tradition from the maker to the person to whom it is made, or to some person for his use, for his acceptance is presumed until the contrary is shown. It being for his interest, the presumption is, not that *he will accept it,* but that he *does.*" *Kirk v. Turner,* 16 N. C., 14.

"When the deed is beneficial to the grantee, the acceptance of the grant is presumed." *Arnegaard v. Arnegaard,* 75 N. W., 797.

In considering whether the consent of a grantee to accept and (621) receive the deed is necessary it must be borne in mind that it is not the ordinary purchase and sale of land in which the grantee must be consulted; such is not the case. This is a case where the trustee of an express trust, who admits that he holds the land of a grantee, is endeavoring to get rid of his trust and convey the legal title to the person who in equity owns the land. As this was a pure unmixed trust, in my opinion, the trustee had a right to rid himself of the legal title by executing a deed to the *cestui que trust,* whether the latter consented or not. It is not necessary to show acceptance upon the part of this particular grantee, because he was the *cestui que trust* and already owned the land.

It is well settled that it is not essential to the immediate operation of a deed that it be placed directly in the hand of the grantee. It is essential, as well as indispensable to its effect, that the grantor should part with it and all control over it by putting it into a course of transmission or delivery. *McKinney v. Rhoads,* 45 Pa. (Watts), 343.

In that case it is held, in an opinion by so great a judge as *John Bannister Gibson,* that "the deposit of a deed in the postoffice directed to the grantee is equally availing for that purpose as a delivery of it to a messenger." In the opinion he further says: "The assent of the assignee (grantee) may be anticipated as it was in *Smith v. The Bank of Washington,* 5 Serg. and Rawle, 318."

In *McLean v. Nelson,* 46 N. C., 397, it is held that "Where a deed is delivered to a third person in the absence of the grantee, the latter is presumed to accept it, and it *forthwith* becomes effectual to pass the property included in it." To same effect is *Merrills v. Swift,* 18 Conn., 257.

It is contended that the deposit in the postoffice raises only a presumption that the deed reached the addressee (grantee), and that such a presumption may be rebutted. The case of *Sherrod v. Ins. Assn.,* 139 N. C., 169, is relied on to sustain this position. In my opinion, that case has no application here. I admit that where a letter is duly mailed a presumption arises that the addressee received it, and that the addressee may rebut such presumption by showing that in fact he did not receive it. In that case it was necessary that the addressee should have received the letter. In this case there is no presumption of delivery to the addressee to rebut. It is not necessary that the grantee should have received the deed. Its delivery was complete when the grantor, Johnson, parted with all control over it, by mailing it to the plaintiff, the grantee. When Johnson deposited it in the

postoffice, stamped and addressed to the plaintiff, it had the same force and effect as if he had sent it by a special messenger. If the messenger lost it, the delivery to the grantee was nevertheless complete.

(622) But it is contended that there is no finding of fact that Johnson did mail the deed to plaintiff. It is not necessary that there should be. That fact was proven by plaintiff's witness and was in evidence when the motion to nonsuit was made at close of plaintiff's evidence as well as when the motion was renewed.

When Johnson, plaintiff's witness, testified that he held the legal estate subject to plaintiff's equity, he at the same time testified that he had parted with both legal and equitable estate by mailing the deed to plaintiff. The latter cannot take the benefit of one-half of Johnson's statement and discard the other half.

I am of opinion that at commencement of this action plaintiff was holding his interest in the land not by virtue of a resulting trust or other equity by virtue of the deed Johnson had made him. It was his duty, when he was informed of the fact that Johnson had mailed him a deed, to procure another from Johnson and put it on record, or commence proceedings to establish his lost deed, which from their inception would operate as a *lis pendens*. Having failed to do either, I am of opinion that no verbal notice, however full, prevented the purchaser from acquiring the land discharged of the alleged equity. With entire deference for the opinion of others, to hold otherwise upon the facts of this case, as testified to by plaintiff and his witnesses, would, in my opinion, practically nullify the registration laws of this State. I think the petition to rehear is properly dismissed.

ALLEN, J., dissenting: The opinion of the Court rests upon the single position that the plaintiff is "claiming under an unrecorded deed," and as I do not think this statement finds any support in the record, I cannot agree to the judgment.

Neither the plaintiff nor the defendant alleges in the pleadings that the plaintiff ever had a deed for any part of the land, registered or unregistered, nor is there any finding by judge or jury to that effect, and, on the contrary, the plaintiff alleges and seeks to enforce a parol trust, and this was the question tried in the Superior Court.

The only part of the record which gives color to the statement in the opinion is that Johnson, who was a witness for the plaintiff, testified on cross-examination by the defendant that he signed, sealed, and probated a deed conveying one-half of the land to the plaintiff, and inclosed this deed in a return envelope, duly stamped, addressed to the plaintiff, and that he deposited this letter in the postoffice; and the plaintiff testified that he never received the letter or the deed.

Has, then, the plaintiff, on this evidence, ever held an unrecorded deed, and can this Court so declare?

He has not unless a deed was delivered to him, because "A delivery is essential to the validity of a deed. It is the final act which consummates the deed, is as necessary as the seal or signature of the (623) grantor, and without it all other formalities are ineffectual, and the deed is void *ab initio,* being at most a mere proposition to convey, which may be withdrawn at any time before acceptance by the other party. Delivery has been called the life of a deed. Certainly no title passes in its absence, even though the intent to deliver is clear and the failure to deliver due to accident." 8 Ruling Case Law, 973.

Has there been a delivery of a deed to the plaintiff? And note here the difference between delivery, ascertained as a fact, and evidence of delivery; and herein, I think, consists the error of the Court, in assuming as a fact that there has been a delivery, when there is only evidence of delivery, and when this was rebutted by the evidence of the plaintiff that he never received the deed.

Th first objection to ordering a nonsuit upon the ground that the deed was delivered to the plaintiff is that the jury, and the jury alone, have the right to pass on the credibility of the witness Johnson when he testified that he *mailed the letter.* This Court has no such power, and no one will claim on this record that the plaintiff ever had an unrecorded deed unless Johnson mailed the letter.

Neither the judge nor the jury in the Superior Court has passed on the question, and I respectfully submit this Court cannot.

It is true that a party cannot impeach his own witness, but "it is always open to a litigant to show that the facts are otherwise than as testified to by his witness" (*Smith v. R. R.,* 147 N. C., 608), and when new matter is brought out on cross-examination, not touched on in the examination in chief, the witness becomes as to that matter the witness of the party cross-examining him. 40 Cyc., 2562.

If, however, we assume that the letter, inclosing the deed, was mailed, does this establish a delivery to the plaintiff? And here we must bear in mind that there is no evidence that the plaintiff requested the defendant to send a deed by mail, and that the defendant selected the agency for sending the deed.

Clearly the evidence of Johnson could do no more than raise a presumption of delivery, and the evidence of the plaintiff that he never received the deed, if believed, rebutted the presumption.

"When a letter is properly addressed and mailed, with postage prepaid, there is a rebuttable presumption of fact that it was received by the addressee as soon as it would be transmitted to him in the usual course of the mails. In some States the presumption is recognized by

express provision of statute. The rule is founded upon the presumption that officers and employees of the Postoffice Department will do their duty, and the regularity and certainty with which, according to common experience, the mail is carried. The real reason is the second. . . . The presumption of due receipt of a letter may be re-
(624) butted by evidence that it was not in fact received, or not received in the ordinary course of the mails." 16 Cyc., 1070.

The same rule is stated in *Bragaw v. Supreme Lodge,* 124 N. C., 160, as follows: "When a letter is duly mailed, it is presumed that it reaches its destination and is received by the party to whom it is addressed. This is a presumption of fact, and may be rebutted by evidence, to be considered by the jury. This presumption is an inference of fact, founded on the probability that the Government officials will do their duty, and the usual course of business," approved in *Bennett v. Tel. Co.,* 168 N. C., 498.

Mr. Chamberlayne says, in his work on Modern Evidence, vol. 2, sec. 1057: "Within the more settled portions of the civilized world the regularity of the mail service is a matter established by experience. It will, therefore, be inferred that in a particular instance of transportation by mail the same regularity of transmission was applied. When certain necessary conditions are complied with, the mailing of a letter or other postal matter gives rise to an inference that it arrived at its destination in due course of mail. The presumption or inference is one of fact. In other words, the fact of mailing, under certain conditions, is relevant to or probative of the fact of receipt of the addressee of the letter"; and in sec. 1062: "Evidence rebutting the inference of receipt from mailing may be of several kinds. The person to whom the mail matter is addressed may testify that he did not, in point of fact, receive it at all, or if he did receive it, that it was delivered to him later than it should have been."

In the note to the last section he cites, in support of the text, many authorities, and among them, *Sherrod v. Ins. Assn.,* 139 N. C., 167. In the *Sherrod case* the question involved was as to giving notice of an assessment, and the defendant introduced evidence tending to prove that the notice was duly mailed, and the plaintiff testified that he never received the notice.

The court instructed the jury that proof of the mailing of the notice, "properly addressed and postpaid, raised a presumption that the notice was received by the plaintiff; but this is only a presumption of fact, and could be rebutted, and that it was for the jury to find whether such notice was in fact properly addressed and mailed; if so, then the presumption was that plaintiff received it; and unless he rebuts this presumption by showing that he did not receive the notice, the plaintiff

could not recover"; and this Court said: "The instructions of the court to which the defendant excepts are correct and are fully sustained by the authorities. If the insurer sends the notice by mail properly addressed and stamped, the law presumes the addressee received it. The presumption may be rebutted, as appears to have been done in this case. *Rosenthal v. Walker,* 111 U. S., 185; Lawson on Presumptive Ev., 69; Am. and Eng. Enc. (1 Ed.), pp. 80-81, (625) and cases cited."

This case recognizes the principle that the evidence of the addressee that he has not received the letter, if believed, rebuts the presumption.

The question was again considered in *Mill Co. v. Webb,* 164 N. C., 89, involving the delivery of a draft and bill of lading transmitted by mail, and *Walker, J.,* then speaking for the Court, says: "The City National Bank, it appears, mailed the letter with the draft and bill of lading to the defendant bank. This was evidence of its receipt by the latter, and raised a rebuttable presumption of the fact to be submitted to the jury, along with any evidence in the case tending to show that it was or was not in fact received. This is said to be founded upon another presumption, that officers of the Postoffice Department will do their duty, or upon the better reason, the regularity and certainty with which, according to common experience, the mail is carried. It is, at least, evidence from which the jury may reasonably infer the fact that the mail matter was received in due course of transmission and delivery. . . . It is not conclusive. The contrary may be shown or may be inferred from all the testimony, but it is some evidence of the fact. 'The burden of proving its receipt remains throughout upon the party who asserts it.' *Huntley v. Whittier, supra.*"

The sending of a deed by mail, when there has been no previous request, is in the nature of an offer, which is not binding as an offer until receipt, and does not become a contract until accepted. It is otherwise as to the letter accepting the offer, which makes the contract complete from the time of mailing.

The author draws the distinction in 9 Cyc., 294-5, where he says: "Where a person uses the post to make an offer, the postoffice becomes his agent to carry the offer. The offer is not made when the letter is posted, but when it is received, and the offerer must suffer the consequence arising from delay or mistake on the part of the postoffice. . . . Where a person makes an offer and requires or authorizes the offeree, either expressly or impliedly, to send his answer by post or telegraph, and the answer is duly posted or telegraphed, the acceptance is commuicated and the contract is complete from the moment the letter is mailed or the telegram sent."

It is also evident that the defendant did not think that the delivery of the deed to the plaintiff was established upon the record, as otherwise he would not have asked his Honor to submit the issue to the jury which he tendered: "Did C. R. Johnson, after the purchase of said land and prior to May, 1914, execute, and deliver to the plaintiff a deed for one-half interest in said land?"

(626) Suppose this issue had been submitted to the jury, what would have been the charge of his Honor?

He would, in the first place, have told the jury that if they did not believe the evidence of Johnson that he mailed the deed, they would answer the issue "No"; but if they did believe this evidence, and found from the evidence that the deed was mailed, that this would raise a presumption that it was received by the plaintiff, and that upon this presumption, if not rebutted, they would answer the issue "Yes."

And he would have further charged the jury that if they believed the evidence of the plaintiff that he did not receive the deed, this would rebut the presumption, and if they so found they would answer the issue "No."

Cases like *Fortune v. Hunt,* 149 N. C., 359—and there are many in our Reports announcing the same doctrine—that there is a delivery when the grantor parts with the possession and control of the deed, do not, in my opinion, have any bearing on the question, because in all of them the grantee was claiming under the deed, and the only fact in controversy was whether the grantor had parted with the control of the deed.

They do not present the question of delivery, where the grantee has neither received the deed nor claimed under it, which is now before us, nor do they controvert the proposition that acceptance by the grantee is necessary to complete the delivery and transfer of the title.

"An estate cannot be thrust upon a person against his will" (8 Rul. Case L., 975), or, as said by *Justice Ventris* in *Thompson v. Leach,* 2 Vent., 198, a man "cannot have an estate put into him in spite of his teeth."

In the note to *Emmons v. Harding,* 1 A. and E. Anno. Cases, 868, decisions from the Supreme Court of the United States and from the highest courts of twenty-two States and of England are cited in support of the principle that "In order to effect a valid transfer of the title there must be an acceptance of the conveyance by the grantee."

When the deed is beneficial to the grantee and he claims under it, there is a presumption of acceptance, but "there is no actual acceptance of the title until the grantee has elected to claim under the deed." 8 Rul. Case L., 1001.

Perhaps the best statement that can be found of the rule that acceptance by the grantee is essential to pass the title, and that it will

not be presumed unless the grantee has received the deed and is claiming under it, is in *Hibberd v. Smith,* 56 A. R., 735, in which the principles to be deduced from the decided cases are summed up as follows:

"1. In every deed there must necessarily be a grantor, a grantee, and a thing granted (4 Crews, 12); that delivery by the grantor and acceptance by the grantee are essential to the validity of a deed; that a deed takes effect only from its delivery, and there can be no (627) delivery without acceptance, either expressed or implied, delivery and acceptance being necessarily simultaneous and correlative acts, *Richard v. Jackson,* 6 Cow., 617; *Church v. Gillam,* 15 Wend., 658; *s. c.,* 30 Am. Dec., 82. Other authorities cited *post.*

"2. Delivery may be made, first, to the party himself, or any other by his appointment, or to any one authorized to receive it; or, second, to a stranger for and in behalf and to the use of him to whom it is made without authority, under certain circumstances. 2 Roll., 24 L., 48; Touchstone, 75. See *post.*

"3. In cases of delivery to a stranger, without authority from the grantee to accept, the acceptance of the grantee at the time of delivery will be presumed, under the following concurring circumstances, viz.: (1) that the deed be upon its face beneficial to the grantee; (2) that the grantor part entirely with all control over the deed; (3) that the grantor (except in case of an escrow) accompany delivery by a declaration, intention, or intimation that the deed is delivered for and in behalf and to the use of the grantee; (4) that the grantee has eventually accepted the deed and claimed under it. 4 Crews, 34; Touchstone, 57, and other authorities *post;* 4 Gilm., 175, 176."

It would seem to follow that this Court cannot declare as matter of law the deed from Johnson to the plaintiff was delivered, when the plaintiff swears he never received it, and when he has not claimed under it.

But let us assume there is nothing in this position; that acceptance by the grantee is not essential, and that the controlling fact to make good a delivery is that the grantor shall have parted with the possession and control of the deed: still a delivery cannot be declared by this Court as a legal conclusion, because there is evidence that the grantor only parted with the possession of the deed temporarily, and that he retained control of it, as Johnson, the grantor, testified that he mailed the deed in a return envelope.

In other words, Johnson selected his agent, and said to him, "If you see Lynch, give him this deed, and if not, bring it back to me," and this would at least raise a question for the jury as to the intent of the grantor at the time the letter was mailed.

If these positions are not sound and the opinion of the Court states the law correctly, it to my mind introduces new and startling propositions.

It says, after quoting the evidence of Johnson that he mailed the deed: "This was a delivery to the addressee and completed the execution of the instrument," and it was necessary to say this in order to sustain the position that the plaintiff had an unrecorded deed. This proposition involves, first, the power of this Court to pass on the ques-
(628) tion of the credibility of Johnson and to find as a fact that he mailed the deed, in the face of the evidence of the plaintiff that he did not receive it; second, that this Court may order a nonsuit upon the statement of a fact, adverse to the plaintiff, on the cross-examination of one of his witnesses; third, that mailing a letter inclosing a deed, without previous request and without knowledge of the grantee, is a delivery of the deed to the grantee; and, fourth, that a deed may be delivered without acceptance by the grantee.

The last two will be of peculiar interest to those who have lands for sale, as hereafter, instead of hunting a purchaser, they may select one able to pay, and sign probate and *mail* a deed to him, and draw for the purchase money.

I therefore think the appeal cannot be dealt with upon the assumption that the plaintiff is "claiming under an unrecorded deed," and that the real question involved is the right of the plaintiff to establish and enforce a parol trust against the defendant, a purchaser of the land in controversy, who bought with notice of the equity, at a sale by a trustee in bankruptcy.

The jury returned the following verdict:

1. Did the defendant C. R. Johnson, at the time of the execution of the deed from W. E. Shallington and wife to said C. R. Johnson, dated 1 August, 1895, recorded in book 41, page 498, of the register of deeds of Tyrrell County, agree with the plaintiff to take said land and hold the same in trust for the plaintiff and himself, as alleged in the complaint? Answer: "Yes."

2. Did the plaintiff pay one-half the purchase price for said land, as alleged? Answer: "Yes."

3. Did the Juniper Corporation have actual notice of the claim to said land at the time the same was sold by Davis, trustee in bankruptcy of C. R. Johnson? Answer: "Yes."

4. What was the value of said land on the day the same was bid off by the said Juniper Corporation? Answer: "$4,000."

5. What amount did said Juniper Corporation pay for said land at said sale? Answer: "$1,000."

6. Is the plaintiff the equitable owner of an undivided one-half interest in and to the 500-acre tract described in the complaint? Answer: "Yes."

This verdict established the following facts: That the plaintiff and the bankrupt, Johnson, bought the land in controversy, each paying one-half of the purchase price; that the land was conveyed to Johnson, he agreeing at the time that he would hold the title in trust for himself and the plaintiff; that thereafter Johnson became a bankrupt and the land was sold by the trustee in bankruptcy and bought by the defendant; that at the time of the purchase the defendant had notice of the equity of the plaintiff, and that it paid only $1,000 for land that (629) was worth $4,000.

This, according to all the decisions in this State, creates a trust in favor of the plaintiff against Johnson (*Anderson v. Harrington,* 163 N. C., 142), and prior to the amendment of the Bankruptcy Act of 1910 and independent of the Connor Act, it is clear from all the authorities that the plaintiff could have the defendant, who purchased from the trustee of Johnson, declared a trustee for him and could compel a conveyance of one-half interest in the land. *Thompson v. Fairbanks,* 196 U. S., 516; *New York Mfg. Co. v. Cassell,* 201 U. S., 344; *Hinton v. Williams,* 170 N. C., 115.

The Supreme Court of the United States said in the *Fairbanks Case,* "Under the present Bankrupt Act the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or an encumbrance of the property which is void as against the trustee by some positive provision of the act"; and in the *Cassell case,* "The trustee stands simply in the shoes of the bankrupt, and, as between them, he has no greater right than the bankrupt." This is held in *Hewit v. Berlin Mach. Works,* 194 U. S., 296. The same view was taken in *Thompson v. Fairbanks,* 196 U. S., 516.

It was there stated, under the present Bankrupt Act the trustees take the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt. See *Yeatman v. New Orleans Sav. Inst.,* 95 U. S., 764; *Stewart v. Platt,* 101 U. S., 731; *Hauselt v. Harrison,* 105 U. S., 401. The same doctrine was reaffirmed in *Humphrey v. Tatman,* 198 U. S., 91; and in the *Hinton case* the language from the *Cassell case* was quoted and approved.

The decision of the question, therefore, depends upon whether the amendment to the Bankruptcy Act of 1910 changes the rule that the trustee in bankruptcy takes the title of the bankrupt subject to prior equities, and whether the Connor Act has the effect of destroying equities as against purchasers, who take with notice of the equity.

I will first consider the amendment of 1910, which provides: "And such trustees as to all property in the custody or coming into the custody of the Bankruptcy Court shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the Bankruptcy Court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied," ch. 412, par. 8, 36 Stat. at L., 840;
(630) U. S. Com. St. 1913, par. 9631, which was declared in *Bernard v. Carr,* 167 N. C., 482, to vest in the trustee "all the rights of a judgment creditor upon whose judgment execution has been issued and returned unsatisfied."

What, then, are the rights of a judgment creditor? It is well settled in this State that he may issue his execution and sell the property of the debtor, but that the purchaser takes subject to equities. *Freeman v. Hill,* 21 N. C., 389; *Dudley v. Cole,* 21 N. C., 435; *Williams v. Lewis,* 158 N. C., 576.

In the first of these cases the Court said: "A sale under a *fieri facias* is a prescribed mode in which the law carries into effect its seizure of property of a debtor, for the satisfaction of the demand of his creditors. The mandate gives no authority to the officer to seize any other estate than the estate of the debtor; and the vendee under execution acquired no other estate than the law directed to be seized for this purpose. The vendee represents the judgment creditor, but is not regarded a purchaser from the proprietor. The well-known doctrine of equity, which refuses to enforce a trust against a purchaser for valuable consideration and without notice, applies only in cases of sales *between parties,* not to vendees under execution," and in the last, quoting from *Ruffin, C. J.:* "Upon the argument, the counsel for the defendant placed not much stress on the defenses brought forward in the answer; and we think very properly, as they are clearly insufficient. In the first place, the sheriff's sale is no bar, even if a legal title had been the subject of it, as the purchaser only succeeds to the defendant in the execution, and is affected by all the equities against him. *Freeman v. Hill,* 21 N. C., 389. . . . If the purchase be of the legal title, but with notice of an equity in another, or if it be only an assignment of an equity, with or without notice of a prior equity in another person, in either case the estate must, in the hands of the purchaser, answer all the claims to which it must have been subject in the hands of the vendor."

It would seem, therefore, to be clear that as the Act of 1910 only confers the right of a judgment creditor upon the trustee, and as a purchaser at a sale by a judgment creditor takes his title subject to

the equities of the defendant, that a purchaser at a sale by a trustee in bankruptcy would also take subject to equities, and that the rule still exists, stated by *Connor, J.*, in *Supply Co. v. Machin*, 150 N. C., 746, "that every person buying at a bankrupt sale, as at one made by the sheriff, must take notice that nothing is proposed to be sold except the interest of the bankrupt or the defendant in the execution," and in *Steadman v. Taylor*, 77 N. C., 134, "That a purchaser at a sale by an assignee in bankruptcy stands on the same footing with the purchaser at execution sale."

This construction of the amendment of 1910 is in accordance (631) with the language of the Bankruptcy Act, which only vests in the trustee the "title of the bankrupt" (sec. 70a), and with its spirit, which is designed to give the creditor all the bankrupt owns and no more.

It is suggested that this makes very little change in the law as it existed prior to 1910, and that the amendment confers no special benefit upon the trustee; but the answer is that it gives to the trustee the lien of a judgment creditor and operates to give him priority over unregistered deeds and mortgages, required by the law of the State to be registered, as is illustrated by the case of *Hinton v. Williams, supra.*

Does the Connor Act have the effect of destroying equities against a purchaser who buys with notice of the equity? The question was discussed, but not decided, in *Wood v. Tinsley*, 138 N. C., 507, which holds that one in possession under a parol contract to buy has no enforcible equity, in which *Connor, J.*, says: "It is true that when one takes with notice of an equity, he takes subject to such equity. To permit him to take free from an equity attaching to the title in the hands of his grantor, with notice thereof, would be to permit him to participate in a fraud and profit thereby."

He who takes with notice of an equity takes subject to the equity (*Derr v. Dellinger*, 75 N. C., 300), and Mr. Pomeroy says, vol. 2, sec. 753, Pom. Eq. Jur.: "The rule is universal and elementary, that if a purchaser in any form receives notice of prior adverse rights in and to the same subject-matter, before he has completely acquired or perfected his own interest under the purchase, his position as *bona fide* purchaser is thereby destroyed, even though he may have paid a valuable consideration."

Has this rule, which gives to the purchaser all he has bought and which prevents him from repudiating an equity of which he has notice, been abrogated by force of the legislative act?

The statute (Revisal, sec. 980) does not refer to equities, and there is no word in it which by any rule of construction can be held to include equities, and it must be kept in mind that we are not dealing

with the wisdom of the legislation, but with the meaning of the statute as it is written.

It speaks only of "conveyances," "contracts to convey," and a "lease for more than three years."

It says: "No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor, or lessor, but from the registration thereof within the county where the land lieth."

The conveyance must be in writing, and by section 976 of the Revisal all contracts to convey and all leases for more than three years are declared to be void unless "put in writing."

(632) It would seem to follow that as conveyances must be in writing and as contracts to convey and leases for more than three years are required by section 976 to be in writing, that when the same words are used in a subsequent section of the Revisal, dealing with the same subject-matter, they should be given the same construction, and that therefore the Connor Act only deals with titles and rights evidenced by writing, which can be put on the registry, and not to equitable rights resting in parol, which cannot be registered.

The language in the statute, "but from the registration thereof," necessarily implies a writing—something that can be registered, and excludes the idea that trusts, which are in parol and cannot be registered, are covered by the statute.

In *Bell v. Couch,* 132 N. C., 346, it was held that wills are not within the operation of the act, and *Connor, J.,* says: "The evil which it was intended to remedy was the uncertainty of titles to real estate caused by persons withholding deeds, contracts, etc., based upon a valuable consideration, from the public records"; and the same judge, in *Skinner v. Terry,* 134 N. C., 309, referring to a decree directing a title to be made in an action for specific performance: "We would not feel authorized to extend the language of chapter 147, laws of 1885, to include a decree of the character before us in the record."

I submit that there is more reason to enlarge the language of the act to include wills and equitable decrees, which can be placed on record, than to equities in parol.

There are two cases in our Reports which seem to put the matter at rest and to establish the principle that under the law as it stands today a purchaser who takes with notice of an equity takes subject to the equity.

The Connor Act is modeled after and is in almost the same language as the act requiring the registration of mortgages and deeds of trust (*Wood v. Tinsley,* 138 N. C., 509), and it was held in *Witt-*

kowsky v. Gidney, 124 N. C., 441, that an equity to correct a deed could be enforced as against one holding a registered mortgage.

It has also been held in *Sills v. Ford, post,* 733, that this equity for correction may be enforced against a purchaser claiming under a registered deed who bought with notice of the equity.

I cannot see any distinction in principle between these two cases and the one before us.

It is true that in this case it is an effort to enforce a parol trust, while in the two cases cited the relief demanded was the correction of a deed, but in all of them the aid of the Court is invoked to enforce an equity resting in parol and against purchasers with notice.

I have found nothing in our Reports in conflict with this view except the *obiter dicta* in *Quinnerly v. Quinnerly,* 114 N. C., 145, which has been repeated several times, and last in *Trust Co. v. Sterchie,* (633) 169 N. C., 22, to the effect that "all secret trusts, latent liens, and hidden encumbrances are and were intended to be cut up by the roots by force of our registration laws."

There was no secret trust or latent lien in *Quinnerly v. Quinnerly* or in the subsequent case, the question in the first being the priority of a registered deed to one unregistered, and in the last the priority of the lien of a judgment duly docketed as against the holder of an unregistered deed.

The history of these cases is that the statement in *Quinnerly v. Quinnerly* is taken from *Blevins v. Barker,* 75 N. C., 436, which involved the right of a vendor to a lien for the purchase money, and that in turn rests on the authority of *Womble v. Battle,* 38 N. C., 190, in which the language used is "secret deeds of trust and mortgages," and not "all secret trusts and latent liens."

The right which the plaintiff seeks to enforce is not a stale claim, and his failure to assert it for nineteen years will not affect his right to relief, as the defendant does not plead the statute of limitations or laches, and for the reason that there has been no denial of his right until shortly before suit brought.

This is explained by the evidence of Johnson, who testified: "We were buying lands together. The plaintiff was buying lands in other counties, and it was agreed I should own a half interest in those lands. I went into bankruptcy in 1911. Lynch paid one-half of the purchase money. He made the contract of purchase with W. E. Shallington according to the agreement between him and myself. I have always recognized the right to a one-half of the lands. I have always recognized his right to one-half. When he sold the timber on this land to Fleetwood and Jackson, one-half of the money was paid to Lynch and one-half to me, and the deferred payments were evidenced

by notes, one-half of which were paid to Lynch and one-half to me. In my petition in bankruptcy, in the schedule, the property was only listed (one-half of the land, that is) 250 acres. It was put down in the schedule as 250 acres. There are 500 in the whole tract."

I am therefore of opinion that the plaintiff is entitled to enforce the trust found in his favor upon the verdict as it now stands, but I also think the defendant is entitled to a new trial on account of the refusal of his Honor to submit an issue as to the delivery of the deed to the plaintiff by Johnson in execution of the trust.

There is evidence of an actual delivery of the deed, and if the plaintiff received the deed the Connor Act would be operative, as it applies to lost and unregistered deeds. *Hinton v. Moore,* 139 N. C., 44.

If this presents an incongruity in that a parol trust may be enforced against a purchaser with notice, notwithstanding the Connor Act,
(634) and the rights under an unregistered deed cannot be, the remedy is with the General Assembly, which has to this time deemed it wise to restrict the operation of the act to "conveyances," "contracts to convey," and "leases for more than three years." It is enough for us that the law is so written.

If my view should prevail, the defendant would be deprived of nothing it has bought. It would still get all the land listed by the bankrupt, 250 acres, worth $2,000, for $1,000; but if the opinion of the Court stands the defendant will have 500 acres, worth $4,000, for which it paid $1,000, and be freed from an equity of which it had notice.

In my opinion, both the law and justice are with the plaintiff.

Cited: Pritchard v. Williams, 175 N.C. 321 (3c); *Pritchard v. Williams,* 175 N.C. 327 (3j); *Chatham v. Realty Co.,* 180 N.C. 505 (p); *Wooley v. Bruton,* 184 N.C. 440 (1d); *Fox v. Ins. Co.,* 185 N.C. 124 (1c); *Roberts v. Massey,* 185 N.C. 166 (3c); *Sexton v. Farrington,* 185 N.C. 342 (p); *Hospital v. Nicholson,* 190 N.C. 121 (p); *Banking Co. v. Green,* 197 N. C. 538 (2c); *Ferguson v. Ferguson,* 206 N.C. 483 (2c); *Bank v. Gahagan,* 213 N.C. 514 (2p); *Ballard v. Ballard,* 230 N. C. 633 (2c).

STEPHENSON DAVIDSON, ADMINISTRATOR, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 10 May, 1916.)

1. Railroads—Contributory Negligence—Public Crossings—Look and Listen—Issues—Last Clear Chance.

Where the evidence tends to show that the plaintiff's intestate, without looking or listening, attempted, in the daytime, with an unobstructed view, to cross defendant's railroad track in front of a slowly approaching train, heedless of a shout of warning by defendant's employee thereon given to another, when he was 6 feet and the locomotive 10 feet at right angles to the point of contact, but continued to walk forward, and received the injury resulting in his death: *Held*, should the facts be accordingly established, the contributory negligence of the intestate will be regarded as the proximate cause of the resulting injury, and bar recovery, and an issue as to the last clear chance is properly refused.

2. Same—Presumptions.

Where in an action against a railroad company to recover damages for the negligent killing of plaintiff's intestate there is ample circumstantial evidence that his death was proximately caused by his contributory negligence in failing to look and listen, or observe the caution required of him before going upon the track in front of defendant's train, there can be no presumption in his favor that he had previously looked or listened for the approach of the train.

APPEAL by plaintiff from *Carter, J.*, at March Term, 1916, of MECKLENBURG.

Civil action tried upon these issues:

1. Was the plaintiff's intestate's death caused by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

2. Did the plaintiff's intestate contribute to her death by her own negligence, as alleged in the answer? Answer: "Yes."

3. What damages, if any, is the plaintiff entitled to recover? (635) Answer: .....

The plaintiff tendered the following additional issue: "Notwithstanding the contributory negligence of the plaintiff's intestate, could the defendant, by the exercise of ordinary care, have avoided the injury and death of plaintiff's intestate?" The court declined to submit this issue. Plaintiff excepted.

From the verdict and judgment rendered, plaintiff appealed.

J. M. Roberson for plaintiff.

Cansler & Cansler for defendant.

BROWN, J. This case was before us at last term and is reported in 170 N. C., 281. On that trial a motion to nonsuit had been sustained apparently on the ground that upon the plaintiff's evidence his intestate was guilty of contributory negligence which barred a recovery. We then held that the evidence was of the character that required the issue of contributory negligence to be submitted to the determination of a jury. We are of opinion that the court properly refused to submit the issue tendered by the plaintiff, as there is no evidence upon which to base it.

The evidence of contributory negligence on this last trial is clearer than on the first trial, and tends to prove that plaintiff's intestate was familiar with this crossing, as she had been passing over it daily for three weeks. As she approached the crossing, defendant's train, which consisted of an engine and three box cars, with either one or two box cars in front of the engine, stopped at the main-line switch. The switch was opened and then the train approached the crossing, coming up grade about 2 or 3 miles an hour. The engine was puffing and making a noise, but neither ringing a bell nor blowing a whistle. There was a brakeman on the box car who was so close to the leading end that he could be seen when he was halfway, standing up, by a man standing on the ground 12 or 14 feet away. There was a man standing on the track, just within the gates of the ice plant, with his back towards the train. When the leading end of the box car was on Eleventh Street within 10 feet from where the plaintiff's intestate was struck, the brakeman on the box car warned the man, who was standing on the track, by shouting "Look out!" loud enough to be heard 50 yards, and the man (plaintiff's witness Overcash) jumped from the track. When the man hollered "Look out!" Lucy Davidson was 6 feet from the track, and the front end of the train was 10 feet from her. It had to run 10 feet while she was going 6 feet. She was walking with her head down, paying no attention. There was nothing to keep her from seeing the train as she approached the track. It is manifest that
(636) if she had listened she would have heard it, and if she had looked she would have seen it.

The only eye-witness, Overcash, testifies that: "He (the brakeman) hollered loud enough for any one to have heard him 50 yards. There was nothing to prevent the woman from looking up and seeing the car as it came towards her, when I first saw her, if she had been looking."

The evidence shows that after the brakeman hollered, the train moved 10 feet and the intestate continued to walk 6 feet before she ran into the moving train. She was in the act of stepping on the rail as the end of the car hit her. The evidence fully warrants the court in refusing to submit the issue tendered by plaintiff, and plainly justifies the instructions given upon the issue as to contributory negligence.

It is well settled that where a pedestrian, in the *daytime,* steps upon a railroad track, the view of which is unobstructed, and is injured thereby, and has not looked or listened, his own negligence is the proximate cause of the injury, and such negligence will preclude his recovery.

In the case of *Trull v. R. R.,* 151 N. C., 545, in which the facts are similar to the facts in the present case, the engine, before approaching the crossing, had to stop and allow a switch to be thrown, and then came onto the crossing without giving the usual signals. Just at the crossing, and at the precise time of the impact, the plaintiff stepped from a position of apparent safety onto the track, just in front of the moving engine, and was run over and killed.

The Court said: "On this statement we think the intestate was guilty of contributory negligence, barring recovery, and the order of the court below dismissing the case on a judgment of nonsuit must be affirmed."

That case seems to be on all-fours with the case at bar.

In *Coleman v. R. R.,* 153 N. C., 322, we said: "The doctrine that such negligence bars recovery has been consistently recognized by this Court in at least thirty-five cases, beginning with *Parker v. R. R.,* 86 N. C., 221, and ending with *Mitchell v. R. R.,* this term."

The plaintiff requested the court to charge the jury upon the second issue that in the absence of all evidence tending to show whether plaintiff's intestate stopped, looked, and listened before attempting to cross defendant's track, the presumption would be that she did.

This instruction is predicated upon the theory that there is no evidence whatever throwing light upon the intestate's conduct as she approached the track. The instruction was properly refused, because there is abundant evidence tending to prove that the intestate did not stop, look, and listen as she approached the track, but actually walked heedlessly into the moving car and was struck as she put her foot on the rail. This conclusion was evidently deduced by the jury from the testimony of plaintiff's witness Overcash, and the testimony fully (637) supports it.

The cases cited by the learned counsel for plaintiff are all wanting in any kind of evidence, positive or circumstantial, throwing light upon the conduct of the deceased. That is not the case now before us. The presumption of the exercise of due care on the part of the deceased is repelled if the circumstances in evidence, as in this case, show that she must have seen the train if she had looked, or must have heard it, if she had listened, in time to have prevented the accident. *Imes v. R. R.,* 105 Ill. App., 37; *Crawford v. R. R.,* 109 Ia., 433; *Malott v. Hawkins,* 159 Ind., 127; *So. Ry. Co. v. Davis,* 34 Ind. App., 377; *Mitchell v. R. R.,* 64 N. Y., 655; *Haetsh v. R. R.,* 87 Wis., 304; *Wilcox v. R. R.,* 39 N. Y., 440; 100 Am. Dec., 440 and Notes.

In this last case, supported by copious citations in the notes to the Am. Dec., it is held that it will be presumed that a person injured in attempting to cross a railroad track did not look before crossing, if it appears that had he done so he must have seen the approaching train in time to have avoided it.

In deference to our former opinion, the court submitted the issue of contributory negligence to the determination of the jury with clear and appropriate instructions, placing the burden of proving it upon the defendant. The jury found it against the plaintiff, and we find nothing in the trial of which he has just cause to complain.

No error.

Cited: Holton v. R. R., 188 N.C. 277 (1c); *Rigsbee v. R. R.*, 190 N.C. 233 (2d); *Pope v. R. R.*, 195 N.C. 69 (1cc); *Redmon v. R. R.*, 195 N.C. 770 (1c); *Butner v. R. R.*, 199 N.C. 698 (1e); *Eller v. R. R.*, 200 N.C. 531 (1c); *Young v. R. R.*, 205 N.C. 533 (1c); *Rimmer v. R. R.*, 208 N.C. 199 (1c); *Boykin v. R. R.*, 211 N.C. 115 (1d).

M. E. COZAD v. F. S. JOHNSON, TRUSTEE.

(Filed 31 May, 1916.)

1. Judgments—Chambers—Issues of Fact—Agreement of Parties.

A judgment rendered by the court, without a jury, upon issuable facts raised by the pleadings, in the absence of consent of the parties, invades the province of the jury, and is not conclusive; but where such facts are found to be in favor of plaintiff appellant, in accordance with the allegations of the complaint, the objection is not open to him on appeal.

2. Contracts—Options on Lands—Specific Performance.

The purchaser of an option on land who in accordance with its terms tenders to the owner of the land the purchase price agreed upon, within the specified time, may maintain his action for specific performance of his contract, upon refusal of the owner to make the contemplated conveyance, and his demand will be enforced if his option is a legally valid one.

3. Trusts—Trustees—Courts—Delegation of Powers.

A trustee appointed by the court to sell lands for the benefit of the creditors of the judgment debtor, or other beneficiaries, except by order of court or unless otherwise provided by the instrument under which he acts, may not grant an option on the land subject to the trust, to another, for a protracted and indeterminate period; for his selection as a trustee implies some measure of confidence in his judgment and discretion in the performance of the duties imposed on him at the time of sale, which he is not permitted to refer to another.

4. Same—Options on Land—Protracted Litigation—Benefits—Liens.

A trustee appointed by the court to sell the lands of a judgment creditor is not, by the sole virtue of his appointment and without express authority in the order thereof, empowered to grant an option thereon upon condition that the optionee, at his own expense, bring suit to remove a cloud upon the title of the lands, and, if successful, pay the agreed price within sixty days from the final termination of the suit; but where the optionee, in accordance with the terms of his agreement, has incurred the costs of successful litigation, beneficial to the trust estate, he is entitled to recover such costs, with reasonable attorneys' fees, and the same will constitute a prior lien upon the proceeds of the sale of the land, which must thereafter be made by the trustee and administered in accordance with the authority conferred upon him. As to whether the trustee could give an option on the lands for a short and definite period, with the view of promoting a present and advantageous sale, *quære.*

APPEAL by defendant from *Ferguson, J.,* at September Term, (638) 1915, of GRAHAM.

This was a civil action to enforce specific performance of an agreement to purchase a body of land, and plaintiff's right to the relief sought is based upon two options, one given by Jacob S. Burnett, defendant's predecessor in office, to R. W. Burnett, in terms as follows:

Agreement made this 12th day of June, A. D. 1909, by and between Jacob S. Burnett, as trustee of the Tuckaseegee Mining Company, hereinafter called the grantor, and Robert W. Burnett, of Franklin, N. C., hereinafter called the grantee, witnesseth:

That whereas said grantor was by decree of the Superior Court of Graham County, North Carolina, at December Term, A. D. 1900, appointed trustee of said the Tuckaseegee Mining Company, with full power to hold the title to the lands of said company, and to sell the same for the purpose named in said trust:

Now, therefore, be it known that the said grantor, as trustee as aforesaid, in consideration of one dollar ($1) to him paid by said grantee, the receipt whereof is hereby acknowledged, and for other valuable considerations, does hereby grant unto said grantee the option to purchase, at the price of not less than $2 per acre, the lands of said Tuckaseegee Mining Company which are situate in Graham County, North Carolina; said price to be net to said grantor over all charges and expenses.

Said option hereby granted to extend for one year from the date (639) hereof, and, in case legal proceedings should arise in carrying out this option, the time of the option may be extended sixty (60) days after the conclusion of such proceedings; but no part of any legal costs or expenses thereby incurred is to be paid by the grantor. And in case of such legal proceedings arising, said grantor agrees to prosecute them without delay and conclude them in the least possible time.

In witness whereof the said parties have hereunto, and to a duplicate hereof, set their hands on the day and year first above stated.

JACOB S. BURNETT,
Trustee of the Tuckaseegee Mining Co.
ROBERT W. BURNETT.

The second, by which said R. W. Burnett professed to assign the option to plaintiff, as follows:

"This agreement, made and entered into on this the 4th day of October, 1909, by and between Robert W. Burnett of the town of Franklin in said county and State, party of the first part, and M. E. Cozad of Cherokee County in said State, party of the second part, witnesseth: that

"Whereas Jacob S. Burnett, trustee of Tuckaseegee Mining Company, on the 12th day of June, 1909, entered into a certain agreement with the said Robert W. Burnett, party of the first part herein, by which agreement said Jacob S. Burnett, trustee, agreed to sell to the said Robert W. Burnett all those certain lands in Graham County, North Carolina, mentioned and described in a certain decree heretofore entered in an action pending in the Superior Court of said Graham County, in which the Tuckaseegee Mining Company was plaintiff and Willis F. Goodhue *et al.* were defendants, by which said decree said Jacob S. Burnett was named as a trustee for the lands mentioned and described in said decree for the purpose of holding title thereto and selling and disposing of the same for the purpose in said decree fully set out; and

"Whereas it is provided in said agreement between the said Jacob S. Burnett, trustee, and the said Robert W. Burnett that the said Robert W. Burnett should have the right to purchase said lands within one year from the date of said agreement, and, in case legal proceedings should arise in regard to said lands, that said right to purchase should be extended to a period of sixty (60) days after the conclusion of such legal proceedings; and

"Whereas legal proceedings were necessary for the protection of the title of said Jacob S. Burnett, trustee, and a summons was duly issued by him as such trustee as on the 28th day of October, 1909, against one H. B. Whilden, for the purpose of having set aside certain deeds and conveyances under and by virtue of which said Whilden claims
(640) title to said lands, which said suit is now pending in the Superior Court of Graham County:

"Now, therefore, it is agreed by and between said Robert W. Burnett, party of the first part, that in consideration of ten dollars ($10) to him in hand paid by the party of the second part, the receipt of which is hereby acknowledged, and for other valuable considerations, that the

said party of the first part does give and grant unto the party of the second part the exclusive right or option to purchase said lands mentioned and described in said decree in the case of the *Tuckaseegee Mining Company v. Willis F. Goodhue et al.* and lying in Graham County, North Carolina, at the price of not less than four dollars ($4) per acre, said price to be net to said party of the first part over and above all charges and expenses incurred relative to the purchase of said lands or securing title thereto; and upon the payment of said price for said lands the said party of the first part agrees and binds himself to execute to the party of the second part, in fee simple, good and sufficient deeds for said lands.

"It is further agreed, however, that this contract shall extend only for a period of one year from the date thereof:

"*Provided, however,* that if said litigation now pending in Graham County instituted by said Jacob S. Burnett, trustee, v. H. B. Whilden or any other necessary legal proceedings shall not have been finally determined within said period of one year, then the said party of the second part shall have the right and option to purchase said land upon the terms herein named within a period of sixty (60) days from and after the conclusion of said suit or legal proceedings, and the said party of the first part agrees to convey the same within said period upon the tender of payment of the purchase money herein provided for.

"In witness whereof said parties have hereunto set their hands and seals this the day and year first above mentioned."

And the relevant facts relative to the plaintiff's rights to enforce the same are to a large extent embodied in his Honor's judgment, as follows:

This case coming on to be heard before his Honor, G. S. Ferguson, judge of the Twentieth Judicial District, and it appearing to the court that to the lands mentioned and described in the complaint under and by virtue of a certain judgment or decree made and entered in the case of Tuckaseegee Mining Company against the Goodhues and others at Fall Term, 1909, of the Superior Court of Graham County vested the title to said lands to Jacob S. Burnett in trust to sell and with power and authority to sell the same at public or private sale, as he might deem best, and to convey to the purchaser or purchasers and out of the proceeds to pay the debts of said Tuckaseegee Mining Company, whether said debts accrued, became due or were incurred before (641) or after said suit was begun, and to divide the surplus between the stockholders; and it further appearing to the court that on 12 June, 1909, the said Jacob S. Burnett, trustee, as aforesaid, agreed to sell and granted unto R. W. Burnett the exclusive right to purchase said lands at the price of two dollars ($2) per acre, said price to be net to said grantor over all charges and expenses, the said R. W. Burnett to

prosecute any and all legal proceedings at his own cost and expense; and it further appearing that on 17 June, 1909, the said R. W. Burnett, acting under said contract of 12 June, 1909, entered into a further contract or agreement with one M. E. Cozad under and by virtue of which the said Cozad was granted the exclusive right or option to purchase said land at four dollars ($4) per acre, said $4 per acre to be the net price to be received for said lands, it being further agreed that the said Cozad should bear all the expense of investigation of titles, surveying, or any other expenses, and should prosecute in any and all necessary litigation to declare the title thereto.

And it further appearing that at the time last mentioned contracts were made, and for several years prior thereto one H. B. Whilden had been claiming said lands adversely to the trustee, and that said Whilden claimed to be the owner in fee simple of said lands under and by virtue of a deed from one A. M. Frye, said Frye claiming under an execution sale and deed pursuant thereto; and said Whilden also claimed to be the owner under a tax deed made to him by the sheriff of Graham County; and it further appearing that the said Cozad accepted the terms of the said contract hereinbefore mentioned, immediately thereafter, at his own cost and expense, began a suit against said Whilden in the Superior Court of said Graham County for the purpose of clearing the title to said lands which were so claimed by said Whilden and which rendered the titles such that a sale by said trustee was impossible, and that said litigation was prosecuted diligently by said Cozad at great cost and through a number of years both in the Superior Court of Graham County and in the Supreme Court of North Carolina, and resulted in a decree declaring that said title so claimed by said Whilden was invalid and that the said trustee's title was good and sufficient for the purposes of said trust; and it further appearing that the said Jacob S. Burnett died about the year 1911 and the defendant Fred S. Johnson was substituted by order of court in his place and stead; and it further appearing that after the determination of said suit against said Whilden in the Superior Court and within the time mentioned in said contracts, to wit, within less than sixty days, said Cozad tendered and offered to pay said defendant Johnson, trustee, for said lands at the price of $4 per acre, but that said trustee refused to accept [except] the same and
(642) execute a deed to the said Cozad. It is now ordered that upon the payment by the said M. E. Cozad or his assigns to the said Johnson, trustee, of the sum of $4 per acre, that the said trustee is hereby ordered, directed, and instructed to carry out and perform said contracts of 12 and 17 June, 1909, and to convey said lands in fee simple to said Cozad or such person as he may designate, and to hold the funds received therefrom for the purpose and to be distributed in the manner

mentioned and designated in said decree of 1900. It is further ordered that said H. B. Whilden is allowed to come in if he is so advised and make himself a party for the purpose of claiming the proceeds of said sale or such part thereof as may be left after the payment of all indebtedness and for the purpose of setting up such rights as he may claim as one of the beneficiaries in said trust. And it is further ordered that Robert W. Burnett be made a party to this suit and that a summons issue by the court to him to come in and show to the court such right as he may have or claim in the proceeds received from the sale and conveyance of said lands as herein decreed.

G. S. FERGUSON,
Judge Presiding.

From this judgment defendant, having duly excepted, appealed.

No counsel for plaintiff.
Bryson & Black and Gilmer & Gilmer for defendant.

HOKE, J., after stating the case: There is doubt if the issuable facts in this case have been authoritatively determined. We find nowhere in the record as now presented any consent of parties that the court should try the cause, and unless this is made to appear, and in the way prescribed by statute, the issues raised by the pleadings, under our Constitution and system of procedure, must be decided by the jury. *Hockaday v. Lawrence,* 156 N. C., 319; *Hahn v. Brinson,* 133 N. C., 8; *Wilson v. Bynum,* 92 N. C., 718. The objection suggested, however, is not open to plaintiff, as the court has found the issuable and controlling facts to be as they are alleged by him in his complaint, and, considering the cause in that aspect, our decisions hold that the instrument on which plaintiff bases his cause of action is an option, properly exercisable by payment or tender of the purchase price within the specified time, and that, in case of a valid and binding agreement, the remedy by specific performance is a recognized mode of relief. *Ward v. Albertson,* 165 N. C., 218; *Winders v. Kenan,* 161 N. C., 628.

But, pretermitting the question whether the option is not void by reason of indefiniteness as to the price to be paid, authority here and elsewhere is to the effect further that a trustee with power of sale for the benefit of creditors or other beneficiaries, except by order of court or unless otherwise provided by the instrument under which he acts, may not grant an option for a protracted and indeterminate (643) period and thereby deprive himself of the right in the meantime to do what the best interest of the estate may require. His selection for the position imports, or should import, some measure of confidence in his judgment and discretion, and in the proper performance of his duty

he should keep himself in a position to exercise this judgment and discretion at the time the sale is made, and not by these unilateral contracts extend a proposition of that kind into the indefinite future and refer its decision to another, that is, the holder of the option. This was held with us in the case of executors with power of sale in *Trogden v. Williams,* 144 N. C., 192, and the position is recognized as sound in other cases. *In re Armory Board,* 60 N. Y. Supp., p. 882; *Oceanic Steam Navigation Co. v. Sutherberry,* 16 Chan. Div., 236, L. R., 1880-81; *Clay v. Rufford,* 5 DeG. and Sm., 768, English Reprints, vol. 64, pp. 1337 and 1342. These cases referred to with approval in 1 Lewin on Trusts, p. 426; 2 Perry on Trusts, sec. 764.

In Lewin on Trusts the author succinctly states the position and the reason for it as follows:

"And executors and administrators, equally with trustees, cannot bind the trust estate by a proviso in a lease that the lessee shall during the term have an option of purchasing the property at a fixed price, for it is the duty of trustees to exercise their discretion at the time of sale as to whether the terms are, in the circumstances as then existing, beneficial to the *cestuis que trustent";* and the same principle is stated by *Vice Chancellor Parker* in *Clay v. Rufford* as follows: "In my opinion, such a contract cannot be entered into by the managing body under the powers contained in this deed. The deed contains a simple trust of sale, and I take it to be too clear for argument that the trustee cannot enter into a contract of this kind, binding those who succeed him in the trust to sell at a future time at a price now fixed, without exercising any judgment whether the thing is beneficial or not at the time," meaning the time of sale.

It may be that an option given for a short and definite period according to customary methods and with a view of promoting in effect a present and advantageous sale would not necessarily be disapproved, but, under the principles just stated, these instruments, under which plaintiff claims the right to enforce specific performance, given by a former trustee and professing to bind him to make sale of the property at the election of the obligee at the termination of an uncertain and protracted litigation, extending, as a matter of fact, from 1909 to 1915, may not be upheld against him as trustee or his successor in office, the present defendant. On the facts, therefore, as alleged in plaintiff's complaint and found by his Honor to be true, there should have been judgment denying the special relief as sought by plaintiff. While we are of
(644) opinion that these alleged options are not binding agreements, we must not be understood as holding that the plaintiff is to lose the sums he has expended in ascertaining the amount of land, etc., and in the litigation required to clear the title, including reasonable attorney's fees,

paid to this end. These outlays may not be recovered under the contract. In fact, there is express stipulation therein that they are to be borne by plaintiff. But, as reasonable and necessary expenditures in the care of the trust estate and in furtherance of its interest, they may be reimbursed to plaintiff and allowed as valid vouchers in the proper administration of the trust.

This opinion will be certified, that judgment may be entered declaring the options to be invalid; that the advancements made by plaintiff in the interest of the estate, including the cost of litigation adjudged against the trustee by any competent court, and also reasonable attorney's fees paid or due by plaintiff in furtherance of litigation, shall be ascertained and the same declared a valid charge against the trust estate, to be paid before distribution had among creditors and claimants. That the present trustee proceed to sell the property at public or private sale, as may be for the best interest of the estate and of the beneficiaries, and shall apply the proceeds to the reimbursement of plaintiff of the amount shown to be due him, including the cost of the present proceedings down to the time of entering this decree below, and shall make disposition of the remainder as directed and required by the terms of the decree under which he holds the property.

The cause will be retained and proceeded with in the court below in accordance with this opinion and until the trust estate has been finally administered.

Reversed.

Cited: Crews v. Crews, 175 N.C. 171 (1c); *Hershey Corp. v. R. R.,* 207 N.C. 125 (1c); *Utilities Com. v. Trucking Co.,* 223 N.C. 695 (1j).

R. M. HILLIARD ET AL. v. A. S. ABERNETHY ET AL.

(Filed 24 May, 1916.)

Processioning—Title—Estoppel.

Proceedings for processioning the boundaries between lands of adjoining owners may not put the title in issue, but this may now be done under our statute, Revisal, sec. 717; and a final adjudication thereupon will operate as an estoppel both as to title and the correct location of the disputed line.

APPEAL by defendants from *Shaw, J.,* at December Term, 1915, of BURKE.

Civil action, tried upon these issues:

1. Are the defendants estopped from setting up title to any (645) part of the lands in controversy lying above or northeast of the red line, as alleged in the complaint? Answer: "Yes."

2. Are the plaintiffs the owners and entitled to the possession of the lands described in the complaint and lying northeast of the red line, as shown upon the plat in the processioning proceeding, and introduced in evidence? Answer: "Yes."

3. Do the defendants wrongfully withhold possession thereof from the plaintiffs? Answer: "Yes."

The court charged the jury as follows:

"The court instructs you that if you find the facts to be as testified to, you will answer the first issue 'Yes' and the second issue 'Yes' and the third issue 'Yes.' It is agreed by plaintiffs and defendants that the annual rental value of the property is $50."

The defendants appealed.

J. T. Perkins, E. M. Hairfield for plaintiff.

W. A. Self, Council & Yount, Avery & Ervin, J. C. Little for defendants.

BROWN, J. The basis of his Honor's ruling is a processioning proceeding instituted between these parties and tried before *Cline, J.*, at June Term, 1913, Superior Court of Burke County upon this issue:

"Is the true location of the dividing line between the plaintiffs and defendants as located on the court map by the red line "B" to "C"? Answer: "Yes."

The sole question presented is whether this processioning proceeding to settle the boundary line between these plaintiffs and defendants is an estoppel on the defendants from now claiming the lands in plaintiff's boundary by an alleged superior title.

The processioning proceeding in this and many other States was originally devised in order solely to locate boundary lines, and was similar in all respects to the English perambulation, which was a custom of going around the boundaries of the manor with witnesses to determine and preserve recollection of the extent and location of its boundary and to see that the landmarks had not been removed.

The powers of the processioners extended only to locating and establishing lost or doubtful boundaries. They had no authority to disturb title, or rights of possession, or to establish a new line. That was the law in this State prior to 1893. *Williams v. Hughes,* 124 N. C., 3.

Since the act of 1893, Revisal, 717, parties may, under the processioning act, establish the division line and boundary between them without

putting the title in issue, or they may join issue also upon the title. *Whitaker v. Garren,* 167 N. C., 660. Where the force and effect of the defendant's plea is to put the title in issue, the final judgment will operate as an estoppel both as to title and as to the correct loca- (646) tion of the line. *Maultsby v. Braddy, ante,* 300.

In the processioning proceeding relied on as an estoppel, the pleadings, the evidence, and the charge of the judge were all introduced on this trial and are printed in the record. It is plain that in the petition and answer the title to the land was put in issue, and further it appears from the evidence introduced and from the charge of the judge that the question of title was submitted to the jury under the form of issue as framed by the court.

We are of opinion there is

No error.

Cited: Nash v. Shute, 182 N.C. 531 (d).

REED COAL COMPANY v. A. A. FAIN AND W. E. HOWELL.

(Filed 31 May, 1916.)

1. Instructions—Requested Prayers.

When a requested instruction is substantially given in the general charge, without weakening its force, this is sufficient.

2. Same—Appeal and Error.

When a charge by the court to the jury is correct, if construed as a whole, apparent error in a part thereof, taken disconnectedly, is not reversible; and when a particular phase of the controversy has been omitted from the general charge, exception must have been taken upon the refusal of a proper prayer covering this phase before the omission will be considered on appeal.

3. Partnership, Scope—Contracts—Individual Liability—Trials—Evidence—Questions for Jury.

A partnership is not ordinarily bound by the contracts of a partner not within the scope of the objects of the partnership, for his own benefit, and where a firm of druggists, not dealing in coal, had ordered a car-load of coal in August, which it had used and paid for, and there is evidence that a member of the firm, on the firm's stationery and in the firm's name, had ordered for his own use a car of coal from the plaintiff for each of the months of September, October, November, and December, without the knowledge of the other partner, and of which neither he nor the partnership business received benefit, it is sufficient to sustain a verdict of the jury exonerating the other partner, and the firm, as such, from liability.

COAL CO. *v.* FAIN.

CIVIL ACTION tried before *Ferguson, J.*, and a jury, at January Term, 1916, of CHEROKEE.

Defendants were partners in the drug business and on 25 August, 1910, bought one car-load of coal from the plaintiffs, who were coal dealers at Knoxville, Tenn. They paid the price of the same, which (647) was $71.05. When the coal was received by defendants, they used some of it at their homes and the rest was used in the stores. In the months of September, October, November, and December of the same year plaintiff received orders, written on letter-heads of Fain & Howell, for one car-load in each month, amounting in all to $414.26, on which $150 was paid, but it does not appear that any of this amount was paid by the defendants' firm, or A. A. Fain, and there is evidence tending to prove that a part of it, at least, was paid by Howell. The balance claimed by the plaintiff is $264.26. There was evidence tending to show that A. A. Fain, one of the partners in the drug firm, knew nothing of the transactions in the months of September, October, November, and December, 1913, and there was further evidence from which the jury might reasonably infer that Howell was using the firm name in ordering the coal in those months without any authority from the firm or his partner, A. A. Fain, and that neither the latter nor the firm received the coal, or any benefit therefrom, but that it was sold for the sole account of Howell, through one L. F. Beal, and that it was really an individual and not a partnership transaction, conducted by Howell in the firm's name, for his own benefit. There was also some evidence of the liability of the defendant A. A. Fain, as a partner, for the coal.

The plaintiff requested that the following instructions be given to the jury:

1. That one partner has the right to bind the firm by his order for goods, even though they may be of different kinds from the goods usually dealt in by the firm.

2. That the plaintiff has the right to rely upon the defendants' letter-head and the signature of the firm to the letter as evidence that the members of the firm *bona fide* made the order and were bound thereby.

The letter-heads showed that Fain & Howell was a drug firm.

These prayers of the plaintiff will be considered in the opinion. Judgment by default was entered against W. E. Howell.

The jury rendered a verdict for the defendant A. A. Fain, and from the judgment thereon the plaintiff appealed.

M. W. Bell for plaintiff.

Dillard & Hill, O. L. Anderson, and J. D. Mallonee for defendants.

WALKER, J., after stating the case: The instructions requested by the plaintiff were substantially given by the court, and more strongly in plaintiff's favor than if the language of the prayers had been adopted. It is not necessary that the court should use the words of the prayer, and an instruction, in answer to a request, is sufficiently responsive if it contains the substance of it, and does not weaken its force. *Baker v. R. R.*, 144 N. C., 36; *Marcom v. R. R.*, 165 N. C., 259. There is another rule in regard to instructions of the court, that they are (648) to be construed as a whole. "We are not permitted to select detached portions of the charge, even if in themselves subject to criticism, and assign error to them, when, if considered with the other parts of the charge, they are readily explained and the charge in its entirety appears to be correct. Each portion of the charge must be construed with reference to what precedes and follows it, and this is the only reasonable rule to adopt." *Kornegay v. R. R.*, 154 N. C., 392; *In re Drainage District*, 162 N. C., 127. It also is a familiar rule that if a party desires a more particular charge on any given question, or to present by an instruction any special phase of the case arising upon the evidence, he should bring the matter to the attention of the court by a special instruction. *Simmons v. Davenport*, 140 N. C., 407; *Gay v. Mitchell*, 146 N. C., 509.

We are sure that the jury under the evidence and instructions of the court have reached the right conclusion upon the legal merits of the case. They have evidently found, considering the evidence and the charge, that the contract for the purchase of the car-loads of coal, for the price of which this action was brought, was not that of the firm of Fain & Howell, but the sole contract of the defendant Howell, and judgment has been rendered against him, as he did not contest the plaintiff's right to a recovery against himself.

A car-load of coal had been purchased by the firm in August, 1910, for the private consumption of the partners and the firm, and not for resale. The partnership had not gone outside its usual and regular line of business as a drug firm to engage in the purchase and sale of coal. They bought the car-load just as any other private consumer would buy one for his own use, and not for the purpose of selling it and making a profit. The plaintiff, by the letter-heads, must have known that Fain & Howell were conducting a drug and not a coal business, and they would hardly need such a large quantity of coal for such a purpose. At any rate, the jury could take this view of the matter, and it seems that they did so. There is really no evidence that Fain profited in the least by the purchase of the coal, which was made by Howell for the sole benefit of himself or the joint benefit of himself and L. F. Beal, nor does it appear that Fain or the firm of Fain & Howell used any of the coal or

received any benefit therefrom. There was no express authority given to Howell to buy the coal.

Mr. George in his work on Partnership (1897), p. 213, thus states the principle as to the liability of a partnership for the acts of a member of the firm done under an implied authorization: *"Prima facie,* a partner has implied authority to bind the firm by any act necessary for carrying on the business in the ordinary manner. Unless limited by agreement between the partners, this implied authority is actual; when it is so limited, such authority is only apparent. A partner has power to (649) bind the firm by any act within his express or implied authority, either actual or only apparent, provided the person with whom he deals acts *bona fide,* and without notice of the limitation of his authority." *Winship v. Bank,* 5 Peters (U. S.), 529, 560; *Irwin v. Williar,* 110 U. S., 499. *Chief Justice Marshall* in the *Winship case* states the general rules relating to the liability of a partnership for acts of the partners with his usual force and accuracy.

The implied authority of a single partner does not extend to transactions beyond the scope and objects of the partnership. These large and repeated orders for the shipment of coal are not such as are ordinarily made in the conduct of a drug business, as usually carried on among the people generally, but the jury have settled that question against the plaintiff, and he must be satisfied with the judgment against the defendant, who was the real customer and as such solely responsible to it.

No error.

Cited: Webb v. Rosemond, 172 N.C. 851 (2c).

N. B. BROWN ET ALS. v. HENRY BROWN ET ALS.

(Filed 17 May, 1916.)

1. Deeds and Conveyances—Undue Influence—Fraud.

Undue influence which will invalidate a paper-writing purporting to be a deed need not necessarily consist in active fraud, and it is sufficient if it amounts to coercion produced by persistent importunity, or by a silent and controlling influence of a strong will over a weaker one, destroying free agency and causing the testator to do what he would not otherwise have done if left to himself.

2. Same—Circumstantial Evidence—Trials—Questions for Jury.

Undue influence over the mind of a testator in making his deed may be inferred by the jury from a number of facts, each of which standing alone

may have but little weight, but taken collectively may satisfy a rational mind of its existence.

3. Same—Confidential Relations—Presumptions.

In a suit to set aside a paper-writing, purporting to be the deed of the deceased, for undue influence, to some of his heirs at law, there was evidence tending to show that the deceased conveyed the lands in question to two of his sons, who were living with him and had entire control and management of his business and property; that he was old and infirm, drank a great deal, and was generally in no condition to exercise sound judgment, and did not know what he was doing when he made the deed; that there was an inadequacy of consideration: *Held*, sufficient to raise a presumption of undue influence, and the issue should be submitted to the determination of the jury.

APPEAL by plaintiffs from *Harding, J.*, at March Term, 1915, (650) of YADKIN.

Civil action, tried upon these issues:

1. Did George W. Brown, deceased, have sufficient mental capacity to execute the deed from George W. Brown and wife, Priscilla Brown, to Mark Brown, dated 25 September, 1910, recorded in Book S, page 260, at the time of the execution of said deed? Answer: "Yes."

2. Did George W. Brown, deceased, have sufficient mental capacity to execute the deed from George W. Brown and wife, Priscilla Brown, to Henry Brown, dated 25 September, 1900, recorded in Book S, page 262, at the time of the execution of said deed? Answer: "Yes."

3. Did George W. Brown, deceased, have sufficient mental capacity to execute the deed from George W. Brown and wife, Priscilla Brown, to Henry Brown, G. B. Vestal, and T. W. Wagoner, dated 19 January, 1903, recorded in Book U, page 13, at the time of the execution of said deed? Answer: "Yes."

4. Did George W. Brown, deceased, have sufficient mental capacity to execute the deed from George W. Brown and wife, Priscilla Brown, Mark Brown and wife, J. D. Brown, to Henry Brown, dated 27 March, 1903, recorded in Book U, page 110, at the time of the execution of said deed? Answer: "Yes."

5. Was the execution of the deeds referred to above in the first, second, third, and fourth issues by George W. Brown or either of them procured by fraud, or the exercise of undue influence of the defendants, or of any of them, upon said George W. Brown? Answer: "No."

6. Did George W. Brown, die seized and possessed of any land not described in the deeds above referred to in the first, second, third, and fourth issues? Answer: "No" (by consent of plaintiff and defendant).

7. Did George W. Brown die seized and possessed of the land described in the complaint? Answer: "No."

From the judgment rendered, plaintiff appealed.

A. E. Holton, Benbow & Hanes for plaintiffs.
E. L. Gaither for defendants.

BROWN, J. This is an action for partition in which the defendants plead sole seizin. George W. Brown, during his lifetime, was seized and possessed of certain lands in the county of Yadkin, described in the deeds referred to in the issues. The plaintiffs and the defendants are his children and heirs at law. The defendants claim the lands by virtue of the said deeds, and the plaintiffs aver that the said deeds were obtained by fraud and undue influence of the defendants, and that the said George W. Brown did not have sufficient mental capacity to make a deed.

There are a number of exceptions taken by the plaintiffs on the
(651) trial which it is unnecessary to comment upon in view of the fact that there is to be another trial.

The court instructed the jury that "There is no evidence that the execution of the deeds in question by George W. Brown was procured by the fraud or the exercise of undue influence of any of the defendants upon the said George W. Brown, and you are, therefore, instructed to answer the fifth issue 'No.'"

In this we think there was error, as in our opinion there is some evidence that the defendants, Mark and Henry Brown, procured the execution of the deeds by the exercise of undue influence. This particular influence, while in some cases denominated a fraudulent influence, does not necessarily require the proof of active fraud. It is really a coercion produced by importunity or by a silent and strong influence, which a strong will will often exercise over a weak one, and which influence cannot well be resisted. Undue influence is said to be that which destroys free agency and constrains one whose act is brought in judgment to do what he otherwise would not do if left to himself. 39 Cyc., p. 687.

It is an influence which acts to the injury of the person who is swayed by it. Experience has shown that direct proof of undue or fraudulent influence is rarely obtainable, but inference from circumstances must determine it. Undue influence is generally proved by a number of facts, each of which standing alone may be of little weight, but, taken collectively, may satisfy a rational mind of its existence. For a discussion on the subject, see *Everett's Will,* 153 N. C., 85.

There is evidence in this case tending to prove that at the time of the execution of the deeds to the defendants, their father, George W. Brown, was a very old and infirm man; that he was of a weak and unsound mind; that two of the defendants, Mark and Henry Brown, were living with him and had the entire control and management of his business

and property; that he drank a great deal and generally was in a condition not to exercise sound judgment. There is also some evidence of inadequacy of consideration and that the defendants said the land did not cost them much, and also evidence tending to prove that George W. Brown did not know what he was doing when he made the deeds.

These two sons occupied a very confidential relation towards their father, and there cannot be any doubt but that they had opportunity—whether it was taken advantage of or not—to procure from him these deeds for an inadequate consideration.

It is very generally held, when a will or deed is executed through the intervention of a person occupying a confidential relation to the maker of the instrument, whereby such a person becomes a large beneficiary, the circumstances create a strong suspicion that undue influence has been exerted. Generally, evidence of power over a testator, especially of one of weak mind, or suffering from age and bodily infirmity, though not to such extent as to destroy testamentary capacity, has been (652) held to be sufficient to raise a presumption that ought to be made and overcome before a will is allowed to be established. *Robinson v. Robinson,* 203 Pa. St., 403; *Miller v. Miller,* 187 Pa., 572; *Boyd v. Boyd,* 66 Pa., 283.

Professor Wigmore says: "Where the grantee or other beneficiary of a deed or will is a person who has maintained intimate relations with the grantor or testator, or has drafted or advised the terms of the instrument, a presumption of undue influence or of fraud on the part of the beneficiary has often been applied." Wigmore on Evidence, sec. 2503.

We think his Honor erred in withdrawing the consideration of the fifth issue from the jury. He should have submitted it upon the evidence for their determination under proper instructions.

New trial.

Cited: Plemmons v. Murphey, 176 N.C. 677 (3c); *In re Will of Efird,* 195 N.C. 89 (2d).

W. B. TILGHMAN v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 31 May, 1916.)

1. Evidence — Witnesses — Medical Experts — Text-books — Appeal and Error.

Where the plaintiff contends that he was suffering with locomotor ataxia as a result of an injury he alleged was negligently inflicted upon him by the defendant, and defendant's medical expert witnesses have testified that locomotor ataxia could not result from a wound or personal injury,

the testimony of one of these witnesses, brought out on cross-examination, that certain authors in their works on the subject stated it could so result, is substantive testimony of the opinion of such authors introduced without their oath and without subjecting them to cross-examination, and is reversible error.

2. Same—Impeaching Evidence.

While it is competent, under certain circumstances, to impeach the testimony of a medical expert witness by asking him, on cross-examination, whether text-books from which he informed himself had not given contrary opinion to his own, this does not apply where the witness has not referred to the text-books on his direct examination, and the context is brought out as substantive evidence and is not confined by the court to the purpose of impeachment.

CLARK, C. J., dissenting.

CIVIL ACTION tried before *Connor, J.*, and a jury, at January Term, 1916, of WAKE.

The plaintiff brought this action to recover damages for personal injuries sustained in a collision on defendant's railroad near Granite, N. C., 19 November, 1913. At the time of the collision plaintiff was employed as conductor on defendant's passenger train No. 84, run-
(653) ning from Columbia, S. C., to Richmond, Va., and this train collided with southbound train No. 81, running from Richmond, Va., to Columbia, S. C., and to points south of Columbia.

At Norlina, N. C., on the trip north, the train in charge of plaintiff as conductor (No. 84) stopped, and plaintiff received an order fixing a meeting point with southbound train No. 81, and alleged negligence in connection with this order is the basis of plaintiff's claim for damages.

Plaintiff alleged, and offered evidence tending to prove, that his injury was due to the negligence of the defendant in ordering train No. 81 to meet train No. 84 at Granite, N. C., and train No. 84 to meet train No. 81 at Grandy, Va., and that the defendant was negligent in that it delivered to plaintiff at Norlina, N. C., a train order for the meeting of his train, No. 84, with train No. 81, "written in such form and manner that if the same was intended to refer to any other meeting place than 'Grandy,' nevertheless, the same was so negligently written that the word appeared to be 'Grandy'; and in that when the plaintiff read his said order to the defendant before leaving Norlina he did so read it aloud in a plainly audible and distinct tone of voice, 'Grandy,' the defendant negligently assented to and approved the said reading and pronunciation of the said 'Grandy'; and in that thereafter, and before the plaintiff's train reached the station, Granite, N. C., the defendant negligently twice read the said train order to the plaintiff, and each

time read and pronounced the same in respect to the meeting place therein designated, 'Grandy.'"

The defendant denied that the collision was in any manner due to its negligence, and pleaded contributory negligence and assumption of risk as defenses. The fact of the collision was not denied, but it was contended by the defendant that the sole cause of the collision was the negligence of the plaintiff himself in failing to properly read the order given him, and in failing to stop at Granite, N. C. It appeared in evidence that plaintiff's train had passed the station at Granite, and was proceeding north to Grandy when the collision occurred.

The plaintiff, W. B. Tilghman, testified that when he arrived at Norlina, N. C., on the run from Columbia, S. C., to Richmond, Va., on the morning of the collision, the operator at Norlina, by the name of Watson, gave him an order to meet train No. 81 at Grandy; that Grandy is about 30 or 39 miles from Norlina, and Granite is a little over 7 miles from Norlina; that Granite is between Norlina and Grandy; that when he got this order to meet train No. 81, engine 93, at Grandy, he read it to the operator and used the word "Grandy" distinctly, and the operator didn't say anything; that he had two copies of the order, and delivered one to Engineer Beckham, who read the order to him, and read the station "Grandy"; that when the train passed Granite it was running between 50 and 60 miles an hour.

"I read it to him first, and when I got to the word Grandy, I (654) said, 'Meet where?' and he spelled it out, G-r-a-n-d-y, with the order in his hand. I said something to him about there being two stations with the names somewhat similar. I don't exactly remember the words; it was something to this effect: I said, 'Bryant, I think it is liable to cause trouble having stations so near, so similar in names, so close together on the main line—names so similar as Grandy and Granite'—something to that effect; I don't remember exactly. I had some conversation with Mr. Bryant about Grandy and Granite. I did not inquire of him what the meeting point on the order was; I asked him to spell it out. The rules do not require the baggage master to read orders to the conductor—merely require that I should read the order to Mr. Bryant."

The plaintiff's witness, J. T. Bryant, testified to the same effect.

J. L. Watson, defendant's operator at Norlina, N. C., testified that he received the order offered in evidence by defendant over the telephone from the dispatcher on the morning of the collision; that the order was made in triplicate by the use of carbons; that he wrote it down as he received it over the telephone; that after he received this order, he spelled the name of the station over the telephone to the dispatcher at Richmond, G-r-a-n-i-t-e, and that he again spelled it over the telephone,

after it was made complete by the signature of the conductor. He testified further that Conductor Tilghman read the order over to him, and read the meeting point as Granite.

L. W. Perkins testified that he was operator for the defendant at La Crosse, Va.; that he was on the telephone line with the operator at Norlina, N. C., and dispatcher at Richmond, Va., and heard the order given for train 81 to meet train 84 at Granite, and that he heard the operator at Norlina spell the meeting place, "G-r-a-n-i-t-e"; that the same order was intended for him, to be given by him to the conductor of southbound train 81; that he copied it at the time and gave a copy to Shannonhouse, conductor on train 81. The copy of the order delivered to Conductor Shannonhouse appears in the record as an exhibit, and shows the meeting point to be Granite.

The defendant showed by the testimony of W. B. Carlyle, Walter Moore, J. R. Bissett, and W. L. Stanley that the copy of order offered in evidence as Exhibit "A" was found on the body of Engineer Beckham after the collision.

C. E. Matthews, one of the defendant's conductors who has been in the railroad service for fifteen years, testified that if a conductor has doubt about the meeting point fixed by his train order, it is his duty to stop at the first station and have it corrected or straightened out and to satisfy himself that he was right; that when he reached one of the stations about which he was in doubt, it would be his duty to stop.

(655) W. P. Clements, a conductor of twenty-five years experience, testified: It is the duty of a conductor, in case of doubt, to take the safe side and run no risk. If a conductor should take an order fixing a meeting place, and he was in doubt about the meeting point, it would be his duty to stop immediately. If the conductor should reach one of the points that created the doubt, it would be his duty to stop there and find out.

L. W. Renn, one of the defendant's conductors, testified that it was necessary for him to know the meeting point of trains 84 and 81 in handling his train at Norlina, and that on the morning of this collision, and before the collision occurred, he read the order addressed to conductor of train 84, and read the meeting point "Granite," and told the engineer that the meeting point was Granite, and this information was used in operating his train at Norlina. This was corroborated by Engineer Tudor.

The plaintiff offered evidence tending to prove that he was suffering with locomotor ataxia, and that it was caused by the injuries he received in the collision.

The defendant introduced Dr. C. O'H. Laughinghouse and other medical experts, who testified that locomotor ataxia could not be caused

by trauma, a wound or an injury, and that the sole cause of this condition was syphilis.

On the cross-examination of Dr. Laughinghouse, the court permitted the following questions to be asked and answered over the objection of the defendant:

Q. Have you read Strumpell? It is a book on locomotor ataxia. A. Yes.

Q. Published in 1914? A. Not in 1914, no.

Q. Have you read the 1912 edition? A. Yes.

Q. I will ask you if he does not lay down trauma as a producing cause of locomotor ataxia?

Q. I will ask you if Strumpell is not an authority on locomotor ataxia? A. He is considered so; yes.

Q. You consider him so? A. Yes.

Q. I will ask you if Strumpell does not lay down trauma as one of the producing causes of locomotor ataxia? A. In the 1913 edition my recollection is he does.

Q. Have you read Osler? A. Yes.

Q. What edition? A. Eighth, 1907.

Q. I will ask you if he does not lay down trauma as one of the producing causes of locomotor ataxia? A. He does.

Q. He is good authority? A. Yes.

Q. Have you read Forsheimer? A. Yes.

Q. Is that good authority? A. Yes.

Q. I will ask you if he does not lay down trauma as one of the (656) producing causes of locomotor ataxia? A. He does, in his 1909 edition.

Q. Does not he do it in his 1914 edition? A. I do not know.

Q. I will ask you if each of these authors does not also state that a dormant condition of locomotor ataxia may be aggravated and brought into activity by traumatic injury? A. My recollection is that they do.

Q. Do not Strumpell, Osler, and Forsheimer, each one of them, state in rare cases locomotor ataxia has been produced by trauma? A. They state it is said to have been produced by trauma; yes.

The jury returned the following verdict:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? A. "Yes."

2. Did the plaintiff contribute to his injury by his own negligence, as alleged in the answer? A. "Yes."

3. What damage, if any, is the plaintiff entitled to recover? A. "$14,833."

Judgment was rendered in favor of the plaintiff, and the defendant appealed.

Douglass & Douglass and R. N. Simms for plaintiff.
Murray Allen for defendant.

ALLEN, J. It is not to be expected that we should discuss all of the assignments of error, ninety-four in number, and it is not conceivable that a judge commissioned to hold the courts of the State should have committed so many errors in the trial of an action to recover damages for negligence.

Much useless labor is imposed on counsel and the courts by the multiplication of exceptions, and the practice would seem to be defensible only upon the ground that counsel do not feel confident that any exception is well taken, but hope to form a chain strong enough to sustain a new trial.

We have carefully examined the exceptions arising on the first and second issues, and find no substantial error, but we are of opinion there was error in permitting the plaintiff to place before the jury on the cross-examination of Dr. Laughinghouse the opinions of three distinguished experts, Strumpell, Osler, and Forsheimer, when these opinions had not been given under the sanction of an oath, and when the experts had not been subjected to a cross-examination.

Mr. Chamberlayne in Modern Evidence, vol. 1, sec. 859b, says: "Judicial administration views, therefore, with conspicuous apprehension and suspicion the use, in dealing with the jury, of works of science containing a large proportion of statements resting upon incomplete observation and moral evidence," and he speaks of this field of in-
(657) vestigation as the "fog-enshrouded, mirage-haunted house of the expert," the "battle-ground of theory," and the authorities in this State and elsewhere, except when allowed by statute, generally condemn the use of medical books in the trial of issues of fact, and if the book cannot be introduced to prove the opinion of the writer, the attempt to make the proof by examining a witness who has read the book simply subjects the evidence to the additional objection that the party must offer the best evidence, and that secondary evidence will not be admitted when the primary evidence is easily available.

The question has been considered in this State in *Melvin v. Easley,* 46 N. C., 386; *Huffman v. Click,* 77 N. C., 55; *Horah v. Knox,* 87 N. C., 483; *S. v. Rogers,* 112 N. C., 874; *Butler v. R. R.,* 130 N. C., 15; *Lynch v. Mfg. Co.,* 167 N. C., 98.

In *Huffman v. Click* the Court says, in speaking of the use of medical books before the jury: "If the work is read, it must be to prove the truth of the facts contained in it, and the justness of the conclusions which the author draws from these facts. But if medicine is a science (and it claims to be such), it belongs to that class called 'inductive

science.' Such treatises are based on data constantly shifting with new discoveries and more accurate observation, so that what is considered a sound induction today becomes an unsound one tomorrow. The medical work which was 'a standard' last year becomes obsolete this year. Even a second edition of the work of the same author is so changed by the subsequent discovery and grouping together of new facts that what appeared to be a logical deduction in the first edition becomes an unsound one in the next. So that the same author at one period may be cited against himself at another. The authors of such works do not write under oath; the books themselves are therefore often speculative, sometimes mere compilations, the lowest form of secondary evidence; and as the authors cannot be examined under oath, the authorities on which they rely cannot be investigated nor their process of reasoning be tested by cross-examination. Such writings are nothing more or less than hearsay proof of that which living witnesses could be produced to prove. Wharton Law Evidence, sec. 665. "And in *Lynch v. Mfg. Co.*, where the general question as to whether *all* medical authorities agreed on a certain point was admitted: "It is very generally recognized that extracts from medical books are not admissible in evidence, and for the very sufficient reason that the author does not write under the sanctity of an oath and had not been subjected to cross-examination, and the decisions of this State are to the effect that statements from these books may not be presented as such in the arguments of counsel nor introduced by means of questions put on cross-examination, as by reading an opposing opinion from a text-book and asking the witness if it is true or not true, for this would have the effect of putting the state- (658) ment in evidence, and thus accomplish by indirection what is expressly forbidden, *Butler v. R. R.*, 130 N. C., 15; *Huffman v. Click*, 77 N. C., 55; *Melvin v. Easley*, 46 N. C., 386; for, as said by *Bynum, J.*, in *Huffman's case:* 'If this practice were allowed, many of our cases would soon come to be tried not on the sworn testimony of living witnesses, but upon publications not written under oath.'

"The principle, however, is not as exigent in case of cross-examination, and when a witness has testified as an expert, professing to have special training and knowledge from standard works of his profession, a general question of this kind may be allowed with a view of testing the value of his opinions."

These decisions are sustained by the opinions of other courts and by the text writers generally.

In *Allen v. R. R.*, 212 Mass., 191, it was held on the trial of an action of tort against a street railway company for personal injuries alleged to have been caused by a collision of cars, a medical expert, testifying for the defendant, could not be asked on cross-examination whether he

was familiar with any authorities which said that a certain disease with which the plaintiff contended he was suffering as a result of the accident might come as a result of a blow, nor could he be asked questions about books written by persons other than himself. The Court said: "It hardly has been contended that the cross-examination of Dr. Baldwin was proper. The evidence thus obtained was plainly incompetent. It comes under the settled rule that neither medical books, though of recognized authority, nor the opinions of medical experts, unless testified to by themselves as witnesses, can be received as evidence (citing a number of Massachusetts cases). That cross-examination was directed mainly to showing what the opinion of other medical authorities were as to the effect of the plaintiff's alleged injuries in causing the disease called diabetes mellitus."

The Supreme Court of Michigan held that "It is error to read medical authorities to a witness on cross-examination." *Foley v. R. R.*, 157 Mich., 67.

And again: "The only circumstances under which medical books can be read in evidence are where the witness has based his opinion upon them and has referred to them as authority. The established rule is that it is incompetent to read from these books. This rule cannot be evaded on cross-examination." *Hall v. Murdock*, 114 Mich., 239.

In *Union Pacific Railway Co. v. Yates*, 79 Fed., 584, *Thayer, Circuit Judge*, says: "The authorities, both English and American, are practically unanimous in holding that medical books, even if they are
(659) regarded as authoritative, cannot be read to the jury as independent evidence of the opinions and theories therein expressed or advocated."

Following this statement, *Judge Thayer* gives the grounds for the exclusion of such books as evidence, and in a long list of cases cites *Melvin v. Easley*, 46 N. C., 386.

In *Chicago City Railway Co. v. Douglas*, 104 Ill. App., 41, one of the expert witnesses for defendant, who had not referred to any medical books or author as authority for the opinion which he expressed, and who had not been asked about any such book or author, was asked on cross-examination the following questions:

Q. Did you ever read any books on medicine or surgery that give blows and injuries as a cause for cystic tumors? A. "Yes."

Q. There are a number of authors that give blows and injuries as the exciting cause of cystic tumors, are there not? A. "Yes."

Q. But you are not in accord with these authors? A. "No, sir."

In reversing the judgment for error in admitting this evidence, the Court says: "It would not have been competent for plaintiff's counsel to produce and read to the jury medical books; much less was it compe-

tent to attempt to prove the contents of such books by witnesses testifying solely from memory."

"Medical works are not admissible in evidence, and, when not alluded to in direct examination, cannot be gotten before the jury, over objection, on cross-examination; nor can this be done by indirection in assuming their supposed teachings." *S. v. Blackburn,* 136 Iowa, 747.

The opinion of an expert witness cannot be contradicted by showing on cross-examination what some author has said. *Mitchell v. Leech,* 69 S. C., 413; *Knoll v. State,* 55 Wis., 249.

"When an expert has given an opinion and cited a treatise as his authority, the book cited may be offered in evidence by the adverse party as impeaching testimony. But unless the book is referred to on cross-examination it cannot be used for this purpose. It would be a mere evasion of the general rule under discussion if counsel were allowed on cross-examination to read to the witness portions of such works, and to ask if he concurred in or differed from the opinion there expressed; hence this is not allowed." 3 Jones on Evidence (Blue Book), sec. 579.

Professor Wigmore says: "It has been in some courts held that counsel on cross-examination may, for discrediting purpose, read a professional treatise as opposing the statement of an expert on the stand, or ask whether a contradictory opinion has been laid down by others. But this is generally repudiated." Wigmore on Evidence, vol. 3, sec. 1700, citing *Butler v. R. R.,* 130 N. C., 15.

It will be observed that several of these authorities (*Lynch v. Mfg. Co., Allen v. R. R., Chicago City Railway Co. v. Douglas, S. v. Blackburn*) meet the position taken by the plaintiff, that although (660) the book may not be introduced in evidence, it is competent on cross-examination to ask for the opinions of experts as contained in books, for the purpose of testing the witness.

The law does not permit that to be done by indirection which cannot be done directly, and the fallacy in the position is in assuming that the unsworn declaration contained in a book is a test of the correctness of the opinion of a witness under oath.

This evidence elicited from the witness on cross-examination was very important on the issue of damages, as one of the controverted questions on this issue was whether locomotor ataxia could be caused by the injury received in the collision, and the plaintiff had the benefit of the opinions of Strumpell, Osler, and Forsheimer, when under the law he was not entitled to them.

The evidence was not restricted at the time of its introduction, nor in the charge, and if intended as a test of the knowledge of the expert, as now contended, it was before the jury as substantive evidence, and was of a character calculated to influence a finding upon perhaps the most

important element in the issue of damages, and that there was some controlling influence is apparent from the fact that the damages assessed at the last trial are about twice as large as the amount awarded upon the first trial.

There must, therefore, be a new trial; and as upon the trial of the issue of damages under the Employers' Liability Act the parties would have the right to introduce all of the evidence bearing on the issues of negligence and contributory negligence, it would serve no good purpose on this record to restrict the new trial to a single issue.

New trial.

CLARK, C. J., concurring in part and dissenting in part: I concur with the opinion of the Court that there have been no errors committed on the first and second issues, but I cannot concur that there should be a new trial on the third issue.

The questions asked Dr. Laughinghouse on cross-examination, as to the opinions set down in the text-books as the views of Drs. Strumpell, Osler, and Forsheimer, were not intended to put the views of those physicians in as substantive evidence, but merely to shake the credit to be given the testimony of Dr. Laughinghouse by proving by his own testimony that he differed from the text-books which he had studied.

Rule 27 of this Court prescribes that it shall not "be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks at the time of its admission that its purpose shall be restricted." This was not asked by the appellant on this occasion, but its counsel objected generally to the
(661) competency of the testimony. It was competent for the purpose of testing the witness to show that he differed from the text-books which he had studied and from which he derived his professional education. In this view it was entirely competent, and in no wise infringes upon the rule that the testimony of experts cannot be read from the books as substantive testimony. There can be no doubt that the counsel for the plaintiff was using this testimony simply for the purpose of shaking the credit to be given the testimony of the professional expert by showing that he differed from the standard authorities. The jury must have taken the same view. To them the names of Strumpell, Osler, and Forsheimer conveyed no particular weight, and they must have understood merely that the witness on the stand was differing from the views of other physicians whom his profession and the witness himself considered as authority.

It was not necessary that the plaintiff's counsel should make this plainer than they did. Rule 27, just quoted, provides that such evidence, being competent for some purpose (*i. e.*, as impeaching testimony), was

properly admitted "unless the appellant asks at the time of its admission that its purpose shall be restricted." This rule was adopted by this Court in consequence of many glaring instances of miscarriage of justice, in that appellants would take advantage of the fact that evidence competent for some purposes might not be competent for others. This Court thereupon adopted the common-sense rule that an appellant should not hereafter obtain a new trial upon such grounds unless at the time of making the objection he should ask that the evidence be restricted by the court to the purpose for which it was competent.

A trial is for the ascertainment of the truth of the matters in controversy, and its only object is to secure justice. In this case the plaintiff was seriously injured, and, he alleges, by the negligence of the defendant company. Two juries after long-drawn-out trials, in which the learning and the ability of numerous counsel on both sides have been brought to bear, have found that these allegations are true. On this appeal this Court has again determined that there was no error as to the verdict on these two issues. It is inconceivable that the verdict on the issue as to damages should have been materially affected by the fact that the views of three eminent physicians contained in the text-books studied by the witness on the stand should have differed from his to the extent that the jury should have accepted their views instead of his. The only effect of the difference would be that the jury would give possibly less weight to his opinion without being aware that the opinion of the other physicians had any especial weight *per se*. It is true that the views of physicians as published in the text-books are not substantive evidence, but the plaintiff's counsel did not offer them as such, and it is solely the defendant's fault that if its counsel thought the testimony (662) would have that effect he did not ask the judge to restrict the testimony to the purpose for which it was competent—of contradicting or testing the witness on the stand and affecting the weight to be given to his testimony.

It is not so important in ruling upon testimony that the judge should always be explicit, especially when not requested by the party objecting, as to the exact bearing of the testimony. The question is not as to a theoretical and precise observance of accurately drawn requirements, but whether substantial justice has been done by a judge and jury who understood the matters laid before them for their decision.

In the English courts, while they have rules as to evidence which are intended to be observed (and when they are not observed the court points out the error on appeal), it is rarely that an English court grants a new trial for an error in the admission or rejection of testimony, except the testimony was rejected and was not only competent,

but material. New trials are not there granted for the admission of testimony, nor for any theoretical error even in rejecting testimony.

It seems to me that another trial, a third trial, should not be granted the defendant at great expense and hardship to the plaintiff, who long since was crippled and injured by the negligence of the defendant, as two juries have found, and when the only error alleged is that it was not made sufficiently plain to the jury that the views of certain eminent physicians laid down in the text-books were admitted merely as impeaching evidence and not as substantive evidence. It may well be that the jury would not understand the difference between the two. Certainly the defendant's counsel did not ask that the court should instruct the jury as to the difference, and Rule 27, to prevent just such miscarriage as this, provides that unless such instruction is asked an exception on that account is waived.

As we said in *Wilson v. Mfg. Co.*, 120 N. C., 96 (often cited since, see Anno. Ed.): "A trial is not a game of skill in which the object is to catch the judge out on first base by an inadvertence or error," and whose result an umpire must rule out unless the rules of the game are in every respect strictly observed. But it is a serious and solemn determination of the rights of the parties, and justice should not be delayed by a controversy as to whether there has been an exact observance of requirements, more or less theoretical, however admirable and logical those rules may be, when the result would not be affected.

Cited: S. v. Summers, 173 N.C. 790 (2cc); *Conn v. R. R.,* 201 N.C. 160 (2c); *S. v. Lea,* 203 N.C. 34 (c); *Cole v. R. R.,* 211 N.C. 599 (c).

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(663)

A. C. FERGUSON ET AL. v. MAJESTIC AMUSEMENT COMPANY AND T. A. LYNCH.

(Filed 31 May, 1916.)

1. Principal and Agent—Contracts—Implied Authority—General Agents.

Where the evidence tends to show that the holder of most of the stock in an amusement corporation wired the agent of a theatrical troupe an offer at a certain price per week, which was accepted, but in pursuance thereof the agent visited the town for the purpose of reducing the contract to writing, saw the manager of the place where he was to perform his engagement, and was referred to one held out by the corporation to be its general manager, who drew the contract and instructed the manager to sign, and it was thus entered into by the parties, with a stipulation that it was to terminate upon two weeks previous notice given by either

one thereof to the other: *Held*, under the principle that one is bound by the acts of his agent within the apparent scope of the latter's authority, the corporation was bound by the contract, and was responsible for the legal damages the troupe had sustained owing to the failure of the corporation to give the required previous notice to terminate the contract.

2. Principal and Agent—Contracts—Evidence—Knowledge—Ratification.

Where the corporation, owner of places of amusement, has obtained an acceptance of its offer at a certain price per week from a theatrical troupe to give performances in one of these places, and the troupe has thereafter entered into a written contract with one ostensibly the corporation's general agent, based upon the former's offer, but containing a provision for the termination of the contract upon two weeks previous notice by either party, the duration of the contract being otherwise indefinite, the performance by the troupe in corporation's place of entertainment for two weeks with its knowledge, and evidence that it had endeavored to modify the agreement as to price the troupe was to have been paid, is evidence that the corporation knew of the stipulation as to the previous notice each was to give the other to terminate the contract, and of its ratification of the contract made in its behalf.

APPEAL by defendants from *Long, J.*, at October Term, 1916, of BUNCOMBE.

Civil action tried upon these issues:

1. Did E. A. Ludette have authority from the defendants to execute the paper-writing set out in the complaint? Answer: "Yes."

2. Are the defendants indebted to the plaintiffs, and if so, in what amount? Answer: "Yes, $650."

From the judgment rendered, the defendants appealed.

Mark W. Brown for plaintiffs.

Lee & Ford for defendants.

BROWN, J. This action is brought to recover upon a written contract alleged to have been entered into by plaintiffs and defendants. Under the terms of the contract plaintiffs agreed to furnish a full acting company at the Majestic Theater, a place of amusement in the (664) city of Asheville conducted by the defendants. The Amusement Company is a corporation under the control of the defendant S. A. Lynch, who owns most of the stock. He and the corporation operate the theater.

Under the contract defendants agreed to pay plaintiffs $325 per week for each week of the engagement, which was indefinite as to duration, but to be terminated only by two weeks written notice by either party.

The plaintiffs arrived in Asheville with their company in due season and commenced to play their engagement.

It is not denied that they were performing the contract in all respects upon their part, when at the end of two weeks, without giving the notice required by the contract, defendant Lynch summarily put an end to the engagement and directed plaintiffs to remove their company and its belongings from the theater building, which was done.

At the close of the evidence the court overruled the motion to nonsuit. The contention of the defendants is that they are not bound by the contract. The evidence tends to prove that defendant Lynch wired plaintiffs, offering $325 per week, and defendants replied that the terms were acceptable. Ward, the advance agent of the plaintiff, arrived in Asheville, saw Ludette, manager of the Majestic Theater, and asked him who was going to fix up the contract with him. Ludette replied that it would be done by Henery, the general manager of the Majestic Amusement Company, also general agent of the defendant Lynch and the general manager of the Lynch enterprises. The contract was drawn in the office of the defendants by Ludette and turned over by him to Henery to see if it was all right, and see if Ludette must sign it. Henery looked over the contract, which was in duplicate, struck out certain provisions and told Ludette to sign it "E. A. Ludette, Mgr.," which was done. After that Ludette notified plaintiffs by wire. Plaintiffs would not go without a written contract, and received the contract before leaving for Asheville. Plaintiffs opened their engagement at the theater the following Monday and continued their performances for two weeks. The middle of the second week Lynch proposed that he and plaintiffs divide the box receipts in lieu of the weekly guarantee and told defendant that otherwise they would have to close up on the following Saturday night. On Saturday night plaintiffs requested that their baggage stay in the theater overnight. Henery and Ludette agreed, provided plaintiffs would release defendants from the written contract. Plaintiffs refused to sign the release, and the baggage was put out of the house under orders of Henery. For two weeks thereafter plaintiffs were unable to find any work.

Defendant Lynch testified that during the first week of plaintiff's engagement he agreed with them to allow them to work the second
(665) week, provided plaintiffs would make no claim under the contract; and that plaintiffs continued during the second week upon that understanding. Plaintiffs denied that such an agreement was ever entered into. Their version seems to have been accepted by the jury.

The evidence tends to prove that Ludette was the manager of the Asheville Theater, and had before signed contracts for that theater by Lynch's authority. Henery was the general manager of all of Lynch's enterprises, which are extensive and embraced many theaters. The evidence shows that Henery was the general agent of the defendant and

was so held out to the public by them. He exercised all the powers and performed all the duties generally incident to the position of a general agent, with the knowledge of defendants and presumably by their authority. He supervised the preparation and execution of the contract with plaintiffs, and directed Ludette to sign it on behalf of defendants. The contract embodied the offer Lynch himself had made by wire; but as no time limit had been fixed, it was mutually agreed that the engagement should be terminated only upon two weeks written notice. This provision was inserted with Henery's consent and was equally advantageous to both parties, as well as practically necessary in a contract without a definite limit to its duration. The act of Henery in reducing the contract to writing was well within the apparent authority of a general manager, especially of theatrical enterprises. Henery did not transcend the powers usually conferred upon and exercised by a general agent. If there were any limitations upon such powers in his case, they had not been made known and plaintiffs were ignorant of them. The terms of the contract were not unusual, or such as to put plaintiffs upon inquiry as to the extent of Henery's authority, and the two weeks notice required for its termination was of mutual benefit to both. Under such circumstances the law holds the principal liable for the act of the general agent.

"The principal is bound by all the acts of his agent within the scope of the authority which he holds him out to the world to possess, although he may have given him more limited private instructions, unknown to the persons dealing with him; and this is founded on the doctrine that where one of two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence, and as having authority in the matter, shall be bound by it." *Carmichael v. Buck,* 10 Rich. Law, 332 (70 Am. Dec., 226); Story on Agency, sec. 127.

Where a person by words or conduct represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency existed in fact." *Trollinger v. Fleer,* 157 N. C., 81; *Metzger v. Whitehurst,* 147 N. C., 171.

These cases fairly illustrate this doctrine and define its limits. (666) They are quoted in the opinion of *Justice Walker* in *Latham v. Field,* 163 N. C., 360, where the subject is fully discussed. The same principle is stated by *Justice Hoke* in *Powell v. Lumber Co.,* 168 N. C., 635: "A general agent is said to be one who is authorized to act for his principal in all matters concerning a particular business or employment of a particular nature. Tiffany on Agency, p. 191. And it is the recognized rule that such an agent may usually bind his principal as to all acts

within the scope of his agency, including not only the authority actually conferred, but such as is usually 'confided to an agent employed to transact business which is given him to do,' and it is held that, as to third persons, this real and apparent authority is one and the same, and may not be restricted by special or private instructions of the principal unless the limitations sought to be placed upon it are known to such persons or the act or power in question is of such an unusual character as to put a man of reasonable business prudence upon inquiry as to the existence of the particular authority claimed." See, also, *Gooding v. Moore,* 150 N. C., 198; *Stephens v. Lumber Co.,* 160 N. C., 107.

Furthermore, there is evidence tending to prove a ratification of the contract by defendant Lynch. He knew the plaintiffs were fulfilling their engagement, and permitted them to continue without interruption for a week and a half. During the first week the attendance was very large, but fell off during the second week. It was not till then that he notified plaintiffs they must abandon the contract and play on a percentage basis or leave at the end of that week, which was then half spent. Lynch is not only presumed by law to have knowledge of the contract under which plaintiffs were playing in his theater, but his acts show that he had actual knowledge of it. If the evidence of plaintiffs is to be believed, he endeavored to persuade plaintiffs to rescind the contract and play on a percentage basis, and, failing in that, to compel them to do so under threat of expulsion from the theater.

Taking the evidence as a whole, we have no doubt that his Honor properly denied the motion to nonsuit and correctly submitted the matter to the jury upon the issues. The exceptions to the evidence and to the charge have been considered, and in our opinion are without merit and need not be discussed.

No error.

Cited: Ferguson v. Amusement Co., 191 N.C. 328 (1c); *Bank v. Sklut,* 198 N.C. 593 (1c); *Barrow v. Barrow,* 220 N.C. 73 (1c).

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(667)

H. F. ADICKES v. JOHN C. DREWRY.

(Filed 31 May, 1916.)

1. Appeal and Error—Agreement—Facts Found by the Court—Evidence.

The facts found by the court, by agreement of the parties, and supported by the evidence, are conclusive on appeal.

2. Contracts—Insurance—Renewal Commissions—Accord and Satisfaction.

The soliciting agent brings his action against the general agent of a life insurance company to recover upon a personal parol contract, 1 per cent renewal commission upon premiums of insurance written by him, for the life of the general agent (or the period of his connection with the company), in addition to what the latter was authorized to pay under his contract with the company. The court found the facts under an agreement between the parties, and his conclusions of law, based thereupon, as to certain modifications of several written contracts between the parties, and that the parol contract had been annulled by an accord and satisfaction, are sustained on appeal.

3. Contracts — Written Letters — Statute of Frauds—Ambiguity—Parol Evidence.

A soliciting agent sued the general agent of a life insurance company upon a parol contract wherein, it was alleged, the general agent had agreed to allow him an extra commission of 1 per cent upon renewal premiums, for the life of the general agent (or the period of his connection with the company). A letter written by the defendant to the plaintiff, stating that he would allow 1 per cent commission, as stated in the contract, to continue as long as the policies remained in force and the writer continued with the company, and that he would not offer plaintiff further inducements than allowed him by his contract with the company, and it appears that the company did not permit him to pay the 1 per cent renewals claimed: *Held*, the letter is not such a writing as to exclude parol evidence of the alleged parol contract sued on, it being in no sense contractual in its terms, and, besides, too ambiguous to be complete in itself.

CIVIL ACTION, tried before *Webb, J.*, at January Term, 1915, of BUNCOMBE.

The action was instituted by plaintiff, who had been an agent of the New Jersey Mutual Life Insurance Company, against John C. Drewry, a general agent of the company, to recover fees and commissions to the amount, in the aggregate, of $1,416.20, alleged to be due from defendant to plaintiff by reason of a special contract between them, an oral contract whereby, as plaintiff claimed, defendant personally was to pay plaintiff certain renewal commissions for and during the life of the defendant, etc.; this claim being in addition to and in excess of fees and commissions due according to the written contracts of the parties.

Defendant denied that he had made any binding agreement to pay the commissions, as claimed, but contended that his only obligation was in the written contracts made with the approval of the company, whereby plaintiff's right to commissions on renewals was re- (668) stricted to nine years, and that defendant had paid plaintiff any and all amounts that were due him on the contracts existent between them.

A jury trial was formally waived by the parties and the questions at issue were submitted to the court under agreement in part as follows:

"It is stipulated and agreed by the parties in the above entitled cause that a trial by jury of all questions or issues of fact is hereby waived with the assent of the court, and that the presiding judge shall try all issues or questions of fact arising in said cause, and that his findings thereon shall have the same force and effect as the verdict of a jury, and he shall find and report all conclusions of law applicable to his findings of fact therein, and the same shall be embodied in his judgment."

That, pursuant to said agreement, his Honor heard the evidence and made disposition of the questions of law and fact involved in the controversy and embodied the same in his judgment, as follows:

This cause coming on to be heard at the January term of the Superior Court, and a jury trial being waived, and it being agreed, by consent of all parties hereto, that the court shall find the facts in the case as well as applying the law, and the cause being heard, the court finds the following facts:

1. That H. F. Adickes rendered the service alleged from April, 1901, to 1 January, 1907, but that said services were not rendered under a *quantum meruit* or oral agreement, but were rendered under a written agreement between John C. Drewry and H. F. Adickes, which was approved by the Mutual Benefit Life Insurance Company, the common employer for whom each worked.

2. That the written agreement dated 10 April, 1901, did not embrace the entire contract, but the terms of the supplemental agreement (which was redrawn two or three times), as appears from the evidence, were finally agreed upon between the parties and approved 26 May, 1902.

3. That there was a new contract drawn between the parties under date of 10 August, 1903, by which the drawing allowance to H. F. Adickes was increased from $100 to $125, and the additional 1 per cent on the nine renewal commissions allowed to H. F. Adickes; that this agreement was submitted to Col. Le-Gage Pratt, superintendent of agencies of the Mutual Benefit Life Insurance Company, and approved by him.

4. That a new contract was drawn and entered into between the parties, dated 1 July, 1905, whereby the drawing amount was increased from $125 to $150 and the additional 1 per cent allowed 10 August, 1903, was canceled, and the contract dated 10 April, 1901, was expressly canceled.

5. That H. F. Adickes terminated his agreement with John C. Drewry as of 1 January, 1907, and a full settlement was arranged between them by E. W. Wiles.

(669) 6. That the letter dated 25 March, 1903, was not a contract nor an affirmance of any previous oral contract, but, as the court con-

strues it, was a letter written by J. C. Drewry to H. F. Adickes in explanation of the contract. It limits itself by the following language: "You understand, and I so stated to you, that I could not guarantee to you, or hold out to you any inducements in the way of renewals, which are not guaranteed to me under my contract with the company. I would not undertake to offer any inducements further than those which are given me under my own contract with the company itself." The court finds that this letter was never submitted to or approved by the Mutual Benefit Life Insurance Company.

7. That the contract of John C. Drewry with the Mutual Benefit Life Insurance Company limited his renewals to nine renewal commissions, which were guaranteed to him.

8. That the contract of J. C. Drewry then provided for the company allowing a collecting fee of 4 per cent, which has since been reduced to 2 per cent, which was to defray the expenses of carrying on the State agency, and out of which he had to pay postage and clerk hire in the State agency. Further, the contract provided that the collecting fee might be modified or terminated on the company giving thirty days notice.

9. That H. F. Adickes rendered the services he did under distinct written agreements, and not under a *quantum meruit* or any oral agreement between H. F. Adickes and J. C. Drewry.

10. That in May, 1911, more than three years after the contracts between the parties had terminated, as shown by the receipt of 4 August, 1908, there were negotiations between H. F. Adickes and J. C. Drewry at Raleigh, and by letters between them, in which Drewry called attention to the fact that Adickes' renewal interest was then at its highest, and would begin to decrease very materially in the course of a year or two. In the letter of 29 June, 1911, Drewry used this language to Adickes: "While I think, as I stated to you, that your renewal interest will amount to $2,500 this year, it will not amount to so much the year following, because your renewal interest will begin to diminish very materially now in the course of a year or two. A part of your renewal business terminated last year, but that was only on the Virginia business and the small amount of business written in 1901, the first year we returned to North Carolina. After next year your renewal interest on all business written in 1902 will terminate and in the course of three or four years your renewal interest will be considerably less than now. Besides, we do not know what emergency may arise to terminate a large volume of the business; so for these reasons you will notice I have changed the wording of the notes you sent me." That in the letter of 29 June, 1911, was inclosed two promissory notes, one for (670) $2,000, due January, 1912, and the other for $2,500, due 1 Sep-

tember, 1912, both of which H. F. Adickes accepted and discounted at the Wachovia Banking and Trust Company, which notes were paid by J. C. Drewry according to their tenor.

11. That H. F. Adickes did not assert any claim under the letter of 25 March, 1903, until after the receipt and discounting of the two notes of J. C. Drewry, of $2,000 and $2,500, each for a period of about eight years, and he did not offer to return the notes which he had received on the basis of that settlement.

12. That the rules of the Mutual Benefit Life Insurance Company, the common employer of J. C. Drewry and H. F. Adickes, provided that all agreements between agents respecting the company's business should be submitted to and approved by the company before they should be binding.

The court has given this case very careful consideration, and it has been a rather perplexing case for the court to deal with, and the court is of the opinion that Mr. Adickes is and has been sincere in his contentions, but the court, from all the evidence in the case, and the exhibits filed, cannot bring its mind to the conclusion that Drewry entered into or intended to enter into an oral agreement with Mr. Adickes to give him 1 per cent on all renewals as long as claimed by Mr. Adickes; and hence the court finds as a fact that Mr. Adickes performed the services, which he did perform, under written contracts as heretofore referred to, and that no oral contract was entered into between Drewry and Adickes, as claimed by Adickes.

CONCLUSIONS OF LAW.

1. That the services rendered by H. F. Adickes were not under a *quantum meriut,* nor oral contract, but where under the written contract of 10 April, 1901, as modified by supplements thereto and new agreements in writing, such as were made in accordance with the rules of the company.

2. That the agreement of 10 August, 1903, allowing the additional 1 per cent on the nine renewals and increasing the drawing allowance from $100 to $125 per month, superseded the provision as to the compensation in the agreement of 10 April, 1901, and in supplement thereto, so far as they might conflict.

3. That the agreement dated 1 July, 1905, annulling the extra 1 per cent, and especially canceling the agreement dated 10 April, 1901, annulled all previous agreements and settled all differences between the parties, and was in accord and satisfaction of the same.

4. That the letter of 25 March, 1903, was an explanation of and dependent upon the agreement dated 10 April, 1901, which was ap-
(671) proved 21 April, 1901, and the concellation of the original agreement by the making of new contracts dated 10 August, 1903, and

1 July, 1905, which canceled by name the contract of 10 April, 1901, canceled any supplement thereto, though the same might not be called by name.

It is therefore considered, adjudged, ordered, and decreed by the court that the plaintiff is not entitled to recover anything in this action, and the defendant's motion to nonsuit, made at the close of all the evidence, is allowed, and this action is dismissed; and the defendant will recover of the plaintiffs the cost of this action to be taxed by the clerk.

JAMES L. WEBB,
Judge Presiding.

To the foregoing judgment the plaintiff excepts and appeals to the Supreme Court. Notice of appeal waived. Appeal bond fixed at $50.

WEBB, J.

Bourne, Parker & Morrison, T. F. Davidson, and R. B. Loughran for plaintiff.

A. B. Andrews, Martin, Rollins & Wright for defendant.

HOKE, J. There is evidence to support his Honor's findings of fact, which makes them as binding as a verdict of the jury thereon. *Stokes v. Cogdell,* 153 N. C., 181; *Branton v. O'Briant,* 93 N. C., 99. His conclusions of law are correctly made, and we see no reason for disturbing the judgment which has been rendered in the case.

It is chiefly urged for error that defendant is estopped from resisting plaintiff's claims for indefinite renewals by reason of a letter, dated 25 March, 1903, of defendant to plaintiff, introduced in evidence and appearing on page 45 of the record, as follows:

"In further explanation of our contract of 10 April, 1901, I wish to state that it is my purpose to allow your renewal interest of 1 per cent, as stated in the contract, to continue as long as the policies remain in force and I remain with the Mutual Benefit. Of course, you understand that at my death my contract with the company would terminate and my renewal interest would only continue for the period of years as stated in my contract with the company, and your interest in renewals would have to terminate necessarily, in the same manner and at the same time as my contract with the company. You understand, and I so stated to you, that I could not guarantee to you or hold out to you any inducements in the way of renewals which are not guaranteed to me under my contract with the company. I would not undertake to offer any inducements further than those which are given me under my contract with the company itself." The position being, as we understand it, that this letter contains written acknowledgment of plaintiff's claim for indefinite

renewals, and that it is not permissible for defendant to maintain (672) the contrary by parol evidence. But we do not concur in this view. Even if the letter were in terms conclusive, it is not and does not purport to be the contract between the parties on which plaintiff sues, and which was entered into, if at all, two years before. It is only a statement of defendant's then recollection of the contract; in writing, it is true, but in no sense contractual within the meaning of the principle which forbids the introduction of parol evidence in contradiction of written agreements. But the letter itself is not conclusive in its terms, for, while in the first part of it there seems to be an admission of plaintiff's claim for renewals to the death of defendant or while he remains with the company, there is the restriction that defendant could not guarantee to plaintiff or hold out to him any inducements in the way of renewals which are not guaranteed to defendant under his contract with the company; that defendant could not undertake to offer any inducements further than those given defendant under his contract with the company itself, etc. It was proved that defendant's commissions on renewals were limited to the nine years, so that, even if the letter was intended to be contractual in character, it is so far ambiguous that parol evidence would have to be resorted to in order to arrive at its true significance.

Having given the facts in evidence our most careful consideration, we are of opinion that the controversy has been properly disposed of on its merits and the judgment in defendant's favor should be affirmed.

Affirmed.

Cited: McGeorge v. Nicola, 173 N.C. 709 (1c).

R. P. VOGH v. F. C. GEER COMPANY, WELLS BROTHERS COMPANY, ET ALS.

(Filed 24 May, 1916.)

1. Contracts—Independent Contractor.

Where a contractor for the erection of a five-story building enters into a contract with another to construct all the steel and iron work for the building, employing his own artisans and having entire charge of the steel and iron works to be constructed in accordance with the plans and specifications of the architect, the latter is an independent contractor and not an employee of the former.

2. Same—Contractor Furnishing Implements.

The relation of independent contractor for the iron and steel work in a building is not affected by the fact that the subcontractor had agreed with the original contractors that the latter would allow him the use of a guy derrick and engine and plank necessary to be used in the erection of the iron and steel work, to be kept in good condition and returned accordingly, the repairs or replacements to be done at the cost and risk of the subcontractor, who assumed all responsibility in the operation and use of this equipment and plank.

3. Contracts—Independent Contractor—Negligence—Liability—Dangerous Work.

The rule that work intrinsically dangerous may not be let out by independent contract so as to avoid responsibility for consequences does not ordinarily apply to the collateral negligence of the contractor; and where the steel and iron work of a building is to be erected by an independent contractor, and an employee of the latter is injured by the breaking of a plank furnished for him to stand on while at work, caused by an imperfection or knot hole in the plank, neither the owner nor his contractor is held responsible for the sole negligence of the subcontractor, if established.

4. Contracts — Independent Contractor—Negligence—Dangerous Work—Implements—Inspection—Trials—Instructions.

A contractor to erect a five-story building let out, by independent contract, the steel and iron work therein, and while an employee of the independent contractor was at work, standing on a defective plank furnished for the purpose, the plank broke and he fell and received the injury complained of, and brought his action against the original contractor for his consequent damages. There was evidence tending to show that these plank were furnished at the request of the independent contractor on the order of the contractor upon a reliable manufacturing plant; that they were of average grade and quality; that it was the duty of the independent contractor to have inspected them, and the privilege of the plaintiff to have done so under the rules of an association of which he was a member, and that he helped to place the plank which caused his injury: *Held*, an instruction to the jury was reversible error which made the liability of the defendant contractor to depend solely upon his care in inspecting the plank, leaving out of consideration the duty of the independent contractor and the plaintiff to have done so.

5. Same—Fellow-servant Act—Assumption of Risks.

In this action to recover damages by an employee of an independent contractor, brought against the original contractor, the defendant's liability being dependent upon the question of whether the duty of inspecting certain defective plank had properly been observed by the independent contractor of the plaintiff, it is *Held*, the doctrine of the fellow-servant act and of assumption of risks do not arise.

HOKE, J., concurs in the result.

CLARK, C. J., dissents.

(673) CIVIL ACTION, tried before *Devin, J.*, at January Term, 1916, of DURHAM, upon these issues:

1. Was the plaintiff injured by the negligence of the defendant, Wells Brothers Company of New York, as alleged in the complaint? Answer: "Yes."

2. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: "No."

3. Did the plaintiff voluntarily assume the risk and danger of being injured in the manner in which he was injured, as an incident of his employment? Answer: "No."

(674) 4. What damages, if any, is the plaintiff entitled to recover? Answer: "$15,000."

Fuller & Reade for plaintiff.

W. G. Bramham for defendant Wells Brothers.

BROWN, J. This is an action brought to recover of the defendant Wells Brothers Company damages for an injury sustained by the plaintiff. The F. C. Geer Company is named as defendant, but no recovery is sought as to them. The firm of Soper & McDonald is also named as defendant, but they have not been served with process and are not parties to the action.

The Geer Company entered into a contract with the defendant Wells Brothers Company to erect a five-story building in the city of Durham in accordance with the plans and specifications of the architect. This defendant thereupon entered into a contract with Soper & McDonald, construction steel and iron contractors, in a written contract set out in the record. Under the terms of this contract Soper & McDonald undertook to construct all the steel and iron work for the building, employing their own artisans and having entire charge of the steel and iron work to be constructed in accordance with the plans and specifications of the architect. It is plain that according to this contract Soper & McDonald were independent contractors, and also, upon all the evidence, that the plaintiff was their servant exclusively. *Young v. Lumber Co.*, 147 N. C., 26; *Gay v. R. R.*, 148 N. C., 336; *Beal v. Fiber Co.*, 154 N. C., 147.

The added circumstance that the Wells Company allowed Soper & McDonald to use their derrick and engine, and loaned them plank for covering the girders temporarily during the erection of the building, cannot have the effect to change their relationship, nor does it establish the relation of master and servant between the Wells Company and the plaintiff. *Emerson v. Fay*, 94 Va., 60; *Gay v. R. R., supra.*

That portion of the contract which is material is in these words: "It is understood that party of the first part will allow party of the second

part use of one guy derrick and engine, together with the plank necessary to cover over during erection, all of which is loaned at the risk of party of the second part, and is to be returned to party of the first part in first-class condition and to be maintained and kept in good order by party of the second part until its return to party of the first part. Any repairs or replacements to be done at the cost and risk of party of the second part. It is further agreed and understood that party of the second part assumes all responsibility in the operation and use of this equipment and plank. It is also agreed and understood that the above mentioned guy derrick, engine, and plank will be delivered (675) f. o. b. cars, Durham, N. C., by party of first part to party of the second part."

It is to be noted that Soper & McDonald, the parties of the second part, assumed all the responsibility in the operation and use *"of the equipment and plank furnished them by the Wells Company."* The evidence tends to prove that the plaintiff was employed by Soper & McDonald as a steel and iron worker. On 21 October, 1914, plaintiff was working on the fourth floor of the building. The temporary plank had been laid down across the girders for the workmen to stand on. One of the planks had a knot in it that broke and caused the plaintiff to fall to the lowest floor of the building, in consequence of which he was severely injured.

The evidence tends to prove that all the planks used for temporary covering were furnished by the Cary Lumber Company of Durham upon the order and for the account of Wells Company. They were delivered at the building by the wagons of the lumber company. When Soper & McDonald needed any of these boards, their superintendent, Engler, would advise the defendant's superintendent, Holloway, and the latter would phone the Cary Lumber Company the order. No planks were ordered other than those requested by Engler.

On arrival of the planks at the building, Engler would take charge of them and he and the other employees of Soper & McDonald, including the plaintiff, would hoist the planks by means of a derrick either direct from the lumber wagons or in some instances from the ground (where a large number of them had been piled), into the building, and would lay the planks across the girders for temporary flooring.

The evidence tends to prove that none of the employees of the Wells Company had anything to do with the planks after they reached the building. Nor did they have anything to do with unloading them from the wagons, putting them in the building, or laying the floors. Soper & McDonald did all of that.

The evidence shows that all of these planks were new and of the same character. A large number of them had knots in them, all were of the

dimensions customary for such work, and were used and placed in the usual way. The evidence shows that the employees of Soper & McDonald, themselves, selected such planks as they desired and elevated them to that part of the building where they were needed, and that the use to be made of these planks and what particular planks should be laid at any particular point was left to the employees of Soper & McDonald to determine.

There is evidence tending to prove that plaintiff was a member of the Structural Steel and Iron Workers' Union, and that the rules of that union require that no one handle these covering planks except the steel workers themselves. While this is not admitted by the plaintiff, (676) there is evidence tending to prove it, and that in the work on the Geer building the rules and customs of the Steel and Iron Workers' Union were observed.

The plaintiff and his witnesses testify that the plank which broke with him contained a knot which caused the plank to break, and that there were knots in practically all of the planks they were using, but that there were no defects in this particular plank apparent to him. Plaintiff, himself, testified that he did not make any request for more plank or for any different plank, and that he made no complaint to any one when he noticed that nearly all of the planks had knots in them. Plaintiff further testified that the fact that the planks had knots in them would not make them necessarily dangerous for the work he was engaged in, nor would the matter of the thickness of the plank, but the danger would be controlled by the size of the knot.

It is insisted that the Wells Company are liable for the negligence of Soper & McDonald, upon the theory that this kind of work is what is called "intrinsically dangerous," such as blasting with dynamite and the like. According to that contention, the Geer Company, the owner of the building, would be liable as much so as the Wells Company; but the work contracted for was not of the kind described in any of the cases wherein the owner is held liable for the contractor's negligence upon the ground of inherent danger. The work contracted for here was the erection of an ordinary concrete building, hundreds of which are being constructed in this country every day. The plaintiff was an experienced artisan in that kind of work.

We find no precedent that holds that this work is of that character which the policy of the laws requires that the owner shall not be permitted to free himself from liability by contract with another for its execution. *Brogden v. Perkins,* 66 L. R. A., 924; *Lafferty v. Gypsum Co.,* 83 Kan., 349; *Boomer v. Wilbur,* 176 Mass., 482.

The rule in regard to "intrinsically dangerous" work is based upon the unusual danger which inheres in the performance of the contract,

and not from the collateral negligence of the contractor. Mere liability to injury is not the test, as injuries may result in any kind of work where it is carelessly done, although with proper care it is not specially hazardous. Therefore, it is held that the erection of a building is not within the undertakings called specially hazardous. *Richmond v. Sittending,* 101 Va., 354.

We think, however, that there was error in the charge of the court which entitled the defendant to a new trial.

There is evidence which tends to prove that Wells Brothers, the general contractors, sublet the structural steel work to Soper & McDonald, agreeing to allow them the use of a derrick and engine and the plank to cover over during erection, Soper & McDonald assuming all responsibility in the use and operation of the equipment and plank; (677) that the plaintiff was employed by Soper & McDonald, and was injured while in this employment by stepping on a defective plank; that Wells Brothers Company placed the order for plank, when needed, with a reliable manufacturing plant, which furnished lumber of average grade and quality; that the manufacturing plant delivered the plank at the building to Soper & McDonald, whose duty it was to inspect the plank and to reject any found defective; that the plaintiff was working under the rules of a union, of which he was a member, which made it a part of the contract of employment that the employee should have the right to inspect all materials furnished him, and to refuse any that was defective; that the plaintiff helped to place the plank which caused his injury.

If this evidence is true, the defendant has performed its duty, and is not negligent, and this phase of the case was not presented to the jury.

On the contrary, the jury was told, in substance, that the issue of negligence could be answered "Yes" if the defendant did not use ordinary care in selecting the plank, leaving out of consideration that it was furnished subject to acceptance and inspection by Soper & McDonald and the plaintiff.

It is unnecessary to discuss the fellow-servant doctrine or that of assumption of risk. Those questions do not arise in this case. In our opinion its proper determination depends on whether the duty of inspecting the flooring rested on the plaintiff and the subcontractors, Soper & McDonald, or on the Wells Company. Upon that proposition there is evidence which should be submitted to the jury under proper instructions.

New trial.

HOKE, J., concurs in result.

CLARK, C. J., dissenting: This is an action for personal injuries against F. C. Geer & Co., Wells Brothers Company, and Soper & McDonald. F. C. Geer, & Co., owners of the lot in Durham, contracted with Wells Brothers Company to erect a five-story building in Durham in accordance with the plans and specifications of the architect.

Wells Brothers Company contracted with Soper & McDonald to construct all the steel and iron work of the building, Wells Brothers Company agreeing to furnish the plank for covering the girders during the erection of the building, and a derrick and engine.

The defendants Wells Brothers Company as general contractors were in general and active charge of the building, supervising the subcontractors, to see that the work was done according to the plans and specifications, and, besides, they had agreed to furnish the necessary plank and the engine and derrick to use in the work of erection. These (678) planks were laid between two girders, 16 feet apart; the laborers in the course of their employment had to stand thereon. One of the planks, furnished by Wells Brothers Company for that purpose, was a perfect plank on the top side, which alone was visible to the plaintiff, but on the bottom side there was a knot running diagonally across the plank. This knot extended not only entirely across the plank, but went almost through its entire thickness, but could be seen only on the bottom side. The plank, which was therefore no stronger than the thickness between the knot and the upper side of the plank, broke when the plaintiff stood upon it, precipitating him four stories to the bottom of the building, whereby he was frightfully and fearfully injured. It is not denied that this defect was undiscoverable from the upper side of the plank by the plaintiff when he went out upon it for the purpose of doing his work, and the jury properly found that the plaintiff was not guilty of contributory negligence. There seems no controversy that the plank was defective, and that by its breaking the plaintiff was injured.

It is true that as between the contractor and the subcontractors it was agreed that the latter were to take the risk of the plank. But this did not relieve Wells Brothers Company of the responsibility to the employees, as it was their duty to furnish the plank. As between the contractors and subcontractors, the latter were liable to the former; and it is also true that the plaintiff, whether the contract had or had not contained that provision, could in any event have held the subcontractors liable. Both, however, were liable to the plaintiff, since Wells Brothers Company were in charge of the entire work to supervise its execution, and had also agreed to furnish the plank.

The plaintiff was entitled to a lien upon the contractors in chief for the wages due him by the subcontractors, and he was equally entitled to rely upon the carefulness of the contractors in chief in furnishing

the plank to the subcontractors to enable the workmen to prosecute their work. It does not appear in this case that the obligation of inspection was reserved to the subcontractors who employed the plaintiff, and it is immaterial. The general rule is that where the master (the contractor in chief) furnishes the platform, scaffolds, and supports for the use of the employees, he is liable for ordinary care and to see that they are reasonably safe. 26 Cyc., 1115. The defect here was not an improper construction by the subcontractors of the scaffold, or the floor upon which the plaintiff stood, but his injury was due solely to the defect in the plank which was furnished by Wells Brothers Company under their contract, and the defect therein should have been easily seen by Wells Brothers Company before delivery of the same to the subcontractors. The contract between them, that the subcontractors were to take the risk of defective plank, was a matter between them, and did not relieve Wells Brothers Company of their primary (679) liability to the employee, who, knowing that Wells Brothers Company were in entire charge and supervision of the building and were to furnish the plank for the workmen to stand on, could look to them for this defect in such plank which caused the serious injury. The plaintiff can hold them to liability for the legal consequence of these facts, whether he knew them at the time or not.

As to the defense that the negligence was that of a fellow-servant in laying this defective plank between the girders, it is sufficient to cite *R R. v. Peterson,* 162 U. S., 346, where *Peckham, J.,* said (as quoted in *Steele v. Grant,* 166 N. C., 645):

"The general rule is that those entering into the service of a common master become thereby engaged in a common service and are fellow-servants, and *prima facie* the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow-servant. There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. . . . . If the master be neglectful in any of these matters, it is a neglect of a duty which he personally owes to his employee, and if the employee suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engaged another to do them for him, he is liable for the neglect of the master to do those things which it is the duty of the master to perform as such." To same purport *Avery v. Lumber Co.,* 146 N. C., 592; *Tanner v. Lumber Co.,* 140 N. C., 475.

After the battle of Waterloo, in 1815, when England terminated the twenty-five years struggle with France, she did not give pensions to the

soldiers disabled in that contest or subsequently destitute (notwithstanding the peerages and enormous sums granted to a few generals), but in lieu thereof rewarded them by a "permission to beg" if found needy and deserving, coupled with a provision that if any soldier should beg without such permission from his commanding officer, or of some court, he should be hanged. The attitude as to the "soldiers of industry," the laborers upon whose exertions civilization rests, has also changed very slowly. It was long held by the courts that when a laborer was injured, though he might be one of many thousands in a common employment, yet if any other laborer was in any wise guilty of negligence which contributed to the injury of the laborer, the employer was not liable. It was first pointed out in this State by the opinion in *Hobbs v. R. R.*, 107 N. C., 1 (in 1890), that this doctrine had been created by the courts and not by any statute. Thereafter, doubtless in conse-
(680) quence of that decision, the General Assembly enacted Private Laws 1897, ch. 56 (for some reason, never explained, this statute was put in the *Private Laws* of that session), which is now Revisal, 2646, which repealed the doctrine as to railroad employees and also deprived the defendant in such cases of the defense that the employee "assumed the risk." This statute was before the Court on several occasions, but was settled finally in favor of its constitutionality in *Coley v. R. R.*, 128 N. C., 534, reaffirmed on rehearing 129 N. C., 407 (though two judges dissented), and has ever since been held valid in this State. The modern and just doctrine that when there are large numbers of employees the "business shall bear the loss' from injury to an employee, and that the whole burden shall not fall, as heretofore, with crushing effect upon the unfortunate employee and his dependent family is now the attitude of the law as it has been expressed by legislation, and later by the courts.

As to railroad employees, the Federal statute, as well as our State statute, now provides that even if the employee of a railroad company has been negligent himself, he shall not bear the entire loss of the injury, but that it shall be apportioned by the jury in proportion to the negligence respectively of the employer and the employee. In many States "Employers' Liability" acts have been passed, making similar provision as to any injuries sustained by a laborer when more than a certain number of employees are engaged in a common work.

In this case there was no evidence of either contributory negligence or assumption of risk by the laborer, and the jury have so found. The evidence is solely of negligence on the part of Wells Brothers Company, who furnished a defective plank upon which the plaintiff, attempting to stand, was precipitated four stories and was fearfully injured. The subcontractors are also liable to the plaintiff, because they should have inspected the plank, notwithstanding it had been furnished by Wells

Brothers and they had agreed with Wells Brothers Company that they would be primarily liable for such defect. But that did not relieve Wells Brothers Company, who had supervision of the work and who agreed to furnish the plank for such use by the employees of the sub-contractors, from themselves making such inspection.

The plaintiff, working for a living for himself and family, had no opportunity to require, and could not be expected to run the risk of dismissal if he had required, Wells Brothers Company to agree to furnish him with a safe place in which to work and a safe plank on which to stand lest he should be precipitated four stories to his death or great bodily harm. He had a right to rely upon the fact that Wells Brothers Company were the contractors over the whole work and had also especially agreed to furnish the plank on which he and his fellow-laborers should work when suspended on the iron girders at a giddy and dangerous height, precipitation from which would entail (681) death or terrible injury.

In Mechem on Agency, sec. 666, it is said: "If the principal was, by the terms of the contract, under obligations to the contractor to furnish the necessary machinery or appliances, or to supply a portion of the labor, he would be liable to the servant or agent of the contractor for an injury sustained by reason of his neglect to use due and reasonable care in selecting and supplying the proper machinery or appliances."

In *McCall v. Steamship Co.*, 123 Cal., 42, 10 L. R. A., 696, the defendant made the same contention as in this case, that there was no contractual privity between it and the plaintiff, who was the servant of the contractor, to whom it agreed to furnish certain tackle for unloading a cargo, and therefore did not owe him any duty. The Court in disposing of that proposition said: "But the rule is too firmly settled to be open to successful attack that where one agrees to furnish to a contractor material or appliances which he is to use in the performance of his tasks, the principal is liable to the servants and agents of the contractor for injuries which may result to them from his negligent or inadequate performance of his contract in this regard. *The liability is not based upon the relationship of employer and employee, but it is construed by some of the courts that the contract is made with the contractor for the benefit of his employees, who have, therefore, their right to a recovery for any breach of it which results to their injury.* By other courts the contractor is considered to be the dependent agent of his employer in these respects, and the doctrine of *respondeat superior* is brought into application. . . . But however that may be, the principle itself is settled beyond possibility of successful contradiction."

Cited: Scales v. Lewellyn, 172 N.C. 497 (3c); *Greer v. Construction Co.,* 190 N.C. 634, 635 (1c); *Fowler v. Conduit Co.,* 192 N.C. 17 (4c); *Lumber Co. v. Motor Co.,* 192 N.C. 381 (1c); *Wright v. Utility Co.,* 198 N.C. 206 (3c); *Teague v. R. R.,* 212 N.C. 34 (1c); *Evans v. Rockingham Homes,* 220 N.C. 263 (3c); *Hayes v. Elon College,* 224 N.C. 15 (1c); *Hayes v. Elon College,* 224 N.C. 18 (2c).

ARMOUR & CO. ET ALS. v. PEOPLES LAUNDRY COMPANY ET ALS.

(Filed 31 May, 1916.)

1. Liens—Mortgages—Priorities—Fraud—Prior Mortgages.

The dominant owner and director in a corporation of three obtained its note and mortgage for a preëxisting debt, hypothecated them as collateral to his personal note with R. Bank, and thereafter with M. Bank, for previous loans made by it to the corporation, but subject to the lien of the R. Bank; and subsequently pledged the same security to the corporation's debt to J. Still later he procured the M. Bank to increase its loan to the corporation upon fraudulent representations that the R. Bank should be paid in full, and for this increased amount the corporation gave a direct mortgage on its property to the M. Bank, which thereupon canceled its prior notes: *Held,* the second transaction with the M. Bank did not invalidate its lien under the assigned mortgage, and the corporation having become insolvent, the receiver should pay out the funds upon the following priorities; first, the debt to R. Bank; second, to the M. Bank to the extent of the amount of the lien under the assigned mortgage, and, third, the debt due to J.

2. Mortgages—Conditional Sales—Priorities.

A contract of conditional sale of personalty retaining title properly registered has a priority over liens by mortgage on corporation property subsequently made and registered.

3. Corporations—Receiver's Certificates—Liens—Priorities.

Where a receiver is appointed for an insolvent corporation to continue it in operation as a going concern, and finds that this is necessary to produce the best results for the creditors, the receiver's certificate issued accordingly by order of the court takes priority over the corporation's prior mortgage or other indebtedness; but otherwise if it has been so issued by the receiver without order of court, or without the court's approval.

(682) APPEAL by sundry creditors of defendant from *Peebles, J.,* at November Term, 1915, of WAKE.

Jones & Bailey for Raleigh Banking and Trust Company.
John W. Hinsdale for American Laundry Machinery Company.
S. Brown Shepherd for Johnson & Johnson Company.
Manning & Kitchin for Merchants National Bank.
Clark & Broughton for Morris & Eckles Company.

CLARK, C. J. This was a creditor's bill to wind up the Peoples Laundry Company, an insolvent corporation. W. S. West on 5 May, 1914, was appointed permanent receiver and authorized to carry on the business "as a going concern."

On 1 April, 1913, the Peoples Laundry Company executed a note to J. R. Golter for $9,041.25, with interest from that date, and secured the same by a mortgage on all its property, a large part of this amount being for a prior indebtedness. The referee found that Golter owned all the stock of the company except thirty-two shares of par value at $10 each; that the stockholders in the meeting authorized the mortgage to Golter, he taking a part in the meeting and without him there being no quorum present. The mortgage recites that it was authorized at a directors' meeting. There were three directors, Golter and two others, one of whom owned five shares and the other one share, which had been given them by Golter to enable them to qualify as directors. There were other creditors at the time besides Golter, including the American Laundry Machinery Company, one of the appellants, whose claims have never been paid.

On 17 April, 1913, J. R. Golter executed to the Raleigh Bank- (683) ing and Trust Company his negotiable promissory note for $5,000 and deposited as collateral security the above mortgage note of the Peoples Laundry to him for $9,041.25. However, subject to impeachment of said note, it is found as a fact that the said bank took said collateral security before due, for value, in good faith, and without any notice of any defect therein. The referee finds that there is now due on said note the sum of $3,000 and interest, which is due to said bank, and there is no contest as to the validity of said debt.

On 23 December, 1913, the Peoples Laundry executed to the Merchants National Bank its negotiable promissory note for $3,250, and on 10 February, 1913, its negotiable promissory note for $3,000, and on 24 February its further negotiable note for $1,250. All three of said notes were signed by J. R. Golter individually as surety. On 19 June, 1913, said Golter, to secure said notes (there having been paid thereon only $500, credited upon the last named note) executed an assignment and conveyance of the interest of said Golter in the note and mortgage to him from the Peoples Laundry for $9,041.25, subject only to the prior assignment of the same to the Raleigh Banking and Trust Company, which last assignment was duly recorded.

On 23 December, 1913, said Golter represented to the Merchants National Bank that the only encumbrance on the property of the Peoples Laundry was a debt of $4,000 to the Raleigh Banking and Trust Company, secured by said note and mortgage of $9,041.25, and that there would be nothing due on said last note and mortgage after the payment of said $4,000. Relying upon such representations, the Merchants National Bank on 22 December, 1913, accepted a new note of the Peoples Laundry for $8,500, indorsed by said Golter and A. Curcio individually, and secured by a mortgage of the same date on the entire property of the Peoples Laundry duly recorded. The previous notes of $3,250, $3,000, and $1,250 (on which $500 had been paid), were canceled, as was also the previous assignment of Golter's interest in the $9,041.25 note and mortgage which had been previously given as collateral security, subject to the indebtedness of the Raleigh Banking and Trust Company. The difference in the amount of the two notes was money loaned by the Merchants National Bank, and of which some $1,300 was applied to reduce balance due Raleigh Banking and Trust Company to $3,000.

On 22 November, 1913, J. R. Golter had executed and delivered for value to Johnson & Johnson Company his negotiable promissory note for $1,500, with the provision that it was secured by mortgage of even date on personal property and also by the mortgage note from the Peoples Laundry for $9,041.25, but subject to a prior lien of the Merchants National Bank for $5,041.25.

(684) On 19 March, 1914, Golter gave notice to the Raleigh Banking and Trust Company that Johnson & Johnson were entitled to the balance of his interest in said $9,041.25 note and mortgage, the indebtedness to said Merchants National Bank having been canceled.

On 4 December, 1912, the Peoples Laundry purchased from the American Laundry Machinery Company certain property for $1,489.90, the title being retained by the vendor and the contract of conditional sale being duly recorded. On this conditional sale there is still due a balance of $289.90 and interest, all of which property was embraced in the mortgage of $9,041.25 above mentioned. The American Laundry Machinery Company also claims a balance of $585 on a conditional sale registered 13 June, 1913.

Under special orders of the court, the receiver issued certificates of indebtedness incurred in the execution of his trust for $1,250.

The receiver was directed to carry on the business of the Peoples Laundry as a "going concern," and there was certain other indebtedness which as the referee finds is "due and unpaid and which was necessarily incurred by the receiver in good faith, in keeping the plant going and in running order. All of these items are for repairs and supplies and expenses necessary in the actual operation of the laundry." These

debts are held by Morris & Eckles Company and others, but no receiver's certificates were issued therefor.

The above is a condensed statement of the findings of fact in the very excellent report stated by the referee, Joseph B. Cheshire, Jr.

Upon exceptions filed, the judge decreed that out of the proceeds of the sale of the defendant's property there should be paid the costs of the action, the allowance to the referee and the stenographer and to the commissioners for making the sale, and after the discharge of said "overhead charges" the proceeds should be disbursed in the following order:

1. The receiver's certificates, $1,250 and interest, which had been issued by the order of the court, and the amount due the owner of the property, S. B. Shepherd, $805 for the rent thereon. Out of the remainder of said proceeds there should be paid to the Raleigh Banking and Trust Company the sum of $3,000 and interest, the balance due upon the mortgage which it held as collateral security, subject, however, to the prior payment to the American Laundry Machinery Company of $289.90, which was secured by the recorded conditional sale of certain personal property which had been later embraced in the $9,041.25 mortgage. The $585 also due this company by conditional sale was not registered till after registration of the $9,041.25 mortgage, and has no priority.

2. The payment to the Merchants National Bank of $5,081 and interest thereon.

It appearing to the court that these sums would consume all (685) the proceeds of the sale, and that there were no other assets out of which any further sum can be realized, it was directed that the receiver should be discharged and the final judgment recorded.

The court found as a fact that the surrender, 22 December, 1913, by the Merchants National Bank of its interest as holder of the collateral security in the $9,041 mortgage was procured by the false statement of Golter that said security would be canceled by the payment to the Raleigh Banking and Trust Company of the balance then due them, in reliance upon which the Merchants National Bank released its interest in said $9,041.25 mortgage and took a new note for $8,500, receiving no money, but, on the contrary, increasing its indebtedness by the loan of nearly $2,000, of which some $1,300 was paid to the Raleigh Banking and Trust Company, reducing the balance due them from $4,000 and interest to $3,000 principal, and that inasmuch as the note to the Johnson & Johnson Company expressly stated therein that it was subject to the payment to the Merchants National Bank of the sum of $5,081, the court held that the debt due the Merchants National Bank, referred to in said note to Johnson & Johnson Company, was not in fact paid, but was included in the larger note of $8,500, and correctly held that the

claim of the Merchants National Bank to the extent of said $5,081 and interest was not displaced by said transaction and should be paid in preference to said Johnson & Johnson Company's claim.

The court further held that the expenses incurred by the receiver without express order of the court and without reporting the same to the court, and for which no certificates of indebtedness were issued, were subordinate to the rights of the lien creditors and other claims above given priority.

The exception that the receiver's certificates, issued by order of the court, could not take priority over prior indebtedness of defendant cannot be sustained. The court adjudged that it was necessary for the protection of the fund that the property should be placed in the hands of a receiver and so managed as to produce the best results for the creditors. This could not be done without the expenditure of the sums for which the court in its sound judgment ordered the receiver's certificates to be issued.

Upon consideration of all the exceptions, the judgment is

Affirmed.

(686)

GEORGE H. BROWN, ADMINISTRATOR, ET AL. v. F. C. HARDING, ADMINISTRATOR, ET AL.

(Filed 31 May, 1916.)

1. Judgments, Irregular—Collateral Attack.

Judgments appearing of record to have been obtained according to the course and practice of the court, with nothing on their face to show invalidity, will not on appeal be set aside or their liens destroyed for mere irregularity.

2. Judgments—Clerk's Entries.

The entry by the clerk of the court of the word "judgment" on his minutes of the court's proceedings is sufficient for him to make the formal entry of the judgment afterwards upon the record, by stating the amount of the judgment, or the principal, with the date from which interest runs, and the title of the cause, with the costs.

3. Judgments—Irregular Entries—Collateral Attack.

Objection to the regularity in the entry of judgments by the clerk of court should be made by motion in the pending proceedings in the county wherein they were had, and not in a separate action, in a different county in a collateral attack on the judgments.

4. Judgments—Rights of Parties—Collateral Attack.

The question as to whether a party to an action may recover under a judgment therein rendered in his favor cannot be raised collaterally in an independent action upon the ground of its irregularity or informality.

5. Judgments—Judgment Rolls—Statutes.

The provisions of Revisal, sec. 572, as to the judgment rolls are directory, though they should be complied with; and where a judgment is otherwise regular in form, it will not be declared invalid because the clerk had not attached the various papers relating thereto.

6. Judgments—Estoppel.

Where judgments rendered in an action declare that the plaintiff is the beneficial owner of one and the sole owner of the other, they may not be collaterally attacked in a separate action by showing the plaintiff was not the owner, or that the relation of attorney and client had theretofore ceased on account of the death of the client.

7. Judgments—Payment—Parties.

In this case, upon paying the amount of the judgment into court the judgment debtor is acquitted of liability thereunder, and he is not concerned with whether certain other parties to the action should have been made.

8. Limitation of Actions—Homestead—Judgments—Statutes.

The statute of presumptions (Rev. Code, ch. 65, sec. 18) has been changed by our statute, Revisal, sec. 391, to one of limitations.

9. Same—Suspension of Statute.

By its express terms, Revisal, sec. 686, providing that the statute of limitations should run from the date of the sale of a homestead, is not retroactive in effect; and has no application where the sale of the homestead had theretofore been made, except from the date of its enactment, and in such instance the statute of limitations will be suspended during the continuance of the homestead to the extent indicated.

10. Equity—Subrogation—Judgments.

Semble, in this case, if the holder of a junior judgment paid a part of the senior judgment he is entitled to subrogation *pro tanto*, in the absence of some special agreement to the contrary.

11. Issues—Facts Assumed.

An issue tendered which assumes the existence of a disputed fact is improper.

12. Judgments—Partnership—Surviving Partner—Issues.

In this case it is held proper that an issue should be submitted to ascertain the surviving partners of a partnership alleged to be the beneficial owners of the judgments in question.

PETITION to rehear the above entitled case, which was decided (687) at the last term (170 N. C., 253).

S. J. Everett for plaintiffs.
Harry Skinner and L. G. Cooper for intervenors.
W. F. Evans for defendants Perkins et al.
N. Y. Gulley and A. C. Bernard for defendant Bernard.

WALKER, J. The errors assigned are substantially the same as those we considered in the original appeal.

First. The objection that the judgments upon which this suit is based were invalid or irregular and, therefore, were not liens upon the land, is clearly untenable. There is nothing on the face of the judgments to show their invalidity, but, on the contrary, everything to show that they were rendered according to the course and practice of the court. These judgments are more certain and formal than were those in *Davis v. Shaver,* 61 N. C., 18, and *Sharpe v. Rintels, ibid,* 34, which were held to be sufficient. See, also, *Logan v. Harris,* 90 N. C., 7; *Ferrell v. Hales,* 119 N. C., 199; *Taylor v. Ervin, ibid.,* at p. 277. In the last three cases the Court says that while there should be some entry showing that a judgment was rendered, a simple memorandum by the clerk, such as the word "judgment," is sufficient for the clerk to make the formal entry afterwards, by stating the amount of the judgment, or the principal, with the date from which interest runs and the costs, which are itemized, and the title of the case. What else could be inserted in the entry in order to make it more formal? The entries give all necessary information as to what the court did and are certain in every particular. If there was any mere irregularity, the defendant should have proceeded (688) by motion in the original cause in Beaufort Superior Court, as stated in the former opinion. He cannot attack the judgment collaterally in Pitt Superior Court on that ground.

Second. As to whether the plaintiffs in those judgments, as their names appear on the record, were entitled to recover, is a question which was foreclosed by the judgments. The defendant appeared by attorney in the actions, demurred in one case and also answered, and answered in the other case; and being thus in court, if there was any error in the judgments of the court, the defendant should have appealed; and if any irregularity—that is, if the judgments were taken contrary to the course and practice of the court—the remedy was equally plain, viz., a motion in the causes to set them aside. The provisions of Revisal, sec. 572, as to the judgment roll should of course be complied with, but they are directory, and the clerk's failure to "attach together" the papers, that is, process, pleadings, and judgment, etc., did not vitiate the judgment, which was entered of record and is regular in form. The papers were all on file, and the mere failure, if there is any proof of it here, to fasten them together surely should not invalidate a solemn and formal judgment of the court. The case of *Dewey v. Sugg,* 109 N. C., 335, does not so hold, as another question was involved, but *Chief Justice Merrimon* does intimate strongly, in accordance with the view we have expressed, that where the entries on the judgment docket show the important or material and constituent facts, to wit, names of the parties, relief granted,

date of rendition, and time of docketing, the judgment will be complete. Our conclusion is that the judgments are valid liens upon the land. It was not necessary that copies of the judgment rolls should be filed in the Superior Court of Pitt County. *Wilson v. Patton,* 87 N. C., 318. The judgments docketed in Pitt County are liens on the land in that county, and not those docketed in Beaufort County.

Third. We deem it unnecessary to say much about the interest of Henry C. and Edward Parsons in the judgments. Mr. Satterthwaite appears, on the face of the docketed judgments, to be the sole owner of one and the beneficial owner of the other judgment, and his administrator, therefore, is entitled to recover the amount thereof. Defendants cannot impeach the judgments collaterally by showing that the plaintiffs named in them are not the owners, when the court has adjudged that they are. There is no relation of attorney and client to be dissolved by the death of the attorney, so far as the judgments show, and it is too late to raise any such question now in this collateral proceeding. It appears from the judgment that Mr. Satterthwaite became indorsee of one and the beneficial owner of the other. The court so declared and adjudged, and we are now bound by the judgment, which is conclusive as to those matters. The defendant will be protected by paying the money into court. But we have sufficiently discussed this (689) phase of the case in the former opinion.

The Revisal, secs. 475, 476, 477, requires an objection because of a defect of parties to be taken by demurrer or answer, as the case may require. If it is so taken and the court rules erroneously in regard to it, the remedy is by appeal and not by a collateral attack on the judgment after it is rendered. It does not concern the debtor who receives the money, if he is acquitted of liability. *Newsom v. Russell,* 77 N. C., 277. The Parsons may come in by leave of the court and make themselves parties, if they are beneficially interested in the judgments, and are not already parties. They are proper but not necessary parties, as the facts now appear.

Fourth. There is no averment by the representatives of the defendant in the judgments that they have, in fact, been paid. The statute of limitations (Revisal, sec. 391) has taken the place of the former statute of presumptions (Rev. Code, ch. 65, sec. 18) in respect to judgments. The law in regard to laches and stale claims and lapse of time does not apply here, for the plaintiff in the judgment could not proceed to enforce it, as he was forbidden by the statute to do so. Speaking of the presumption of payment, as one of fact, under the old law, the Court by *Chief Justice Smith* said in *Long v. Clegg,* 94 N. C., 763, 769: "Now, is it not manifest that the plaintiff could not sue or collect his bond at all during the time there was no administrator of the deceased obligor?

Did not the reason of the rule of presumption of payment cease when the creditor could not collect his bond? Was not such inability to sue quite as strong and as good a cause to destroy the presumption of payment as that of the continued insolvency of a debtor, from the time the right of action accrued until the end of ten years? The latter cause has always been held to be sufficient to repel the presumption. It is said that the plaintiff might have sued the intestate of the defendant before his death, and so he might, but he was not bound to do so—no presumption of payment had arisen then; and as he did not sue, surely he ought not to lose his debt because he could not for ten years afterwards. Such injustice is not the spirit of the rule of presumption in question. It is said, also, that in such cases when the time begins to run nothing can interpose to prevent the continuance of such lapse. I cannot accept this view as correct. The very nature of the principle of such presumption of payment contravenes it. The presumption itself implies that it may be rebutted by any interposing fact that destroys its reasonableness and shows that it is unfounded in truth. The presumption of payment arising from lapse of time is in the respect mentioned different from a statute of limitations. The latter is inflexible and unyielding; it ceases to operate only in the way and for the cause prescribed by the statute."

(690) The plaintiff in the judgment could not issue process thereon during the existence of the homestead, and therefore it would not be just to raise any presumption against him from his inaction. Besides, the law suspended the operation of the statute of limitations during said period. Revisal, sec. 685, Pell's Ed., p. 362.

Fifth. As to the statute of limitations and the duration of the lien of the judgments, counsel for the defendant with his usual frankness admitted that if *Bevan v. Ellis,* 121 N. C., 224, is not overruled, his position is untenable. We do not see why the decision in that case should be disturbed, as it is a correct exposition of the statute. It was there decided that the lien of a judgment on land, which had been allotted as a homestead, does not cease at the expiration of ten years from the rendition and docketing of the judgment, but continues so long as the homestead exists, notwithstanding a sale and conveyance of the land, citing *Stern v. Lee,* 115 N. C., 426, and other cases. The statute declares that a judgment shall not be affected by lapse of time, or the statute of limitations, during the existence of the homestead (Revisal, sec. 685, Pell's Ed., p. 372), but that the running of the statute of limitations shall be suspended during said time, and there is nothing in *Sash Co. v. Parker,* 153 N. C., 130, that militates against this view. It was there said that the law, in this aspect, had at least been settled by Public Laws 1905, ch. 111 (Revisal, sec. 686), which provides that the

statute begins to operate when the homestead is conveyed, as the creditor can then proceed against the land. The decision in that case was based upon this change in the law, but the statute was in force only from the date of its ratification, as there is a proviso in it that it shall not have "*any* retroactive effect." It would not, therefore, bar plaintiff's right or impair the lien of his judgments, as it can by its own terms only operate prospectively. The Legislature merely changed the law, as it had the right to do, but it is admitted in the case cited that this Court had just previously declared the law, as then existing, to be otherwise. It may be that the act of 1905 would have operated prospectively anyhow, or if the proviso had not been inserted, but the Legislature, believing that if it was construed to operate retrospectively great injustice might result, provided expressly that it should have no such effect. It will be observed that in *Bevan v. Ellis, supra,* the Court treated the word "payments" in the act of 1885, ch. 359, as meaning "judgments," and the context shows that it could not well have any other meaning, and that act was regarded as suspending the running of the statute of limitations during the existence of the homestead. We are therefore of the opinion, as we were at the former hearing, that the act of 1905 does not so affect this case as to bar the judgments or destroy their liens. We should, perhaps, add that under the view of the facts taken by the Bernards the judgments are not barred, nor have the liens ex- (691) pired, as even, in that case, the statute ceased to run when the original summons (of plaintiff George H. Brown, administrator) was issued on 8 May, 1913.

Sixth. The next question is the one of subrogation. If Mrs. Bernard paid $600 to R. A. Tyson, assignee and owner of the senior judgment entitled W. M. B. Brown, admr. of Richard Short, v. J. J. Perkins, and thereby discharged the lien or encumbrance of the judgment to that extent, it would seem that in equity she would be subrogated to Tyson's rights under the judgment *pro tanto,* so far as she has paid on the same, unless there was some agreement in respect thereto or other matter which would prevent the application of this equitable doctrine. *Liles v. Rogers,* 113 N. C., 197; 37 Cyc., 363-384; *Publishing Co. v. Barber,* 165 N. C., 478. We said as much before, and directed issues to be submitted to the jury to ascertain the facts in regard to this alleged payment and the nature of it. The jury had found no facts, as the court refused to submit any issues. We will not suggest the form of the issues, but leave the court free to adopt those which may at the next trial seem proper under the circumstances. The eleventh issue tendered by the Bernards appears to assume, in the first part of it, the existence of a fact which is disputed. This defect may easily be remedied.

It would be useless to prolong this discussion, as all other matters, and even those considered in this opinion, are fully covered by the former opinion in the case, to which we refer. The appellant has not raised any material questions in his petition except those we have considered herein.

The question has been raised by the defendants as to whether the persons named as interpleaders are the surviving partners of C. S. Parsons & Sons, who, it seems, claim to be the real or beneficial as distinguished from the legal owners of both said judgments. It may be that F. B. Satterthwaite was acting merely as attorney for C. S. Parsons & Sons, and the jury have found, in response to the sixth issue, that C. S. Parsons & Sons are the equitable owners of both judgments. If any question is made as to the interpleaders, Edward Parsons and C. S. Parsons, being the surviving members of the partnership of C. S. Parsons & Sons, and as such entitled to the proceeds of the two judgments in case of their collection, an issue should be submitted, if the matter is contested, in order that there may be a definite finding upon the question. This, though, will not affect the right of the nominal plaintiffs in the judgments, who in law also are the legal owners thereof, to recover thereon in this action.

The objections of the defendant Perkins to the testimony of R. A. Tyson and to the introduction of the assignment can be renewed at the next trial, and also the objection to issues tendered by the Ber-
(692) nards. Nothing has been decided that deprives him of this right, nor do we see why the defendants may not show, if they can, any fact that will defeat the equity of subrogation which the Bernards assert, as that matter has been left open by the decision of this Court. When the facts are fully developed, the rights of all parties may be determined. As it may be found that the W. M. B. Brown judgment is still in force and subsisting as a prior lien on the lands, that is, both parcels, it may be that the proceeds of sale of the unsold Perkins land may be exhausted in paying that judgment, and the question as to the right of Mrs. Bernard's heirs to have the Perkins land sold first may not arise or become a practical one. It was considered before upon the theory only that as between the plaintiffs and the Bernards, if the other and senior judgment was out of the way, the Bernards would be entitled to this equity.

The plaintiff in this suit, George H. Brown, has no other interest than as administrator of Mr. Satterthwaite to collect the amount due on the judgments for the benefit of his trust and in discharge of his official duty, and he will hold it for the benefit of the parties to whom the fund belongs, after reserving any sum properly chargeable against it.

We see no reason for a change of the former judgment.

Petition denied.

BROWN, J., did not sit in this case.

Cited: Watters v. Hedgpeth, 172 N.C. 312 (9c); *Chandler v. Jones,* 172 N.C. 572 (10c); *Marler v. Golden,* 172 N.C. 825 (6c); *Kirkwood v. Peden,* 173 N.C. 461 (9c); *McDonald v. Howe,* 178 N.C. 258 (2c); *Casket Co. v. Wheeler,* 182 N.C. 462 (10c); *Grantham v. Nunn,* 187 N.C. 398 (10c); *Jeffreys v. Hocutt,* 195 N.C. 342 (10c).

SADIE ZAGEIR v. SOUTHERN EXPRESS COMPANY.

(Filed 31 May, 1916.)

1. Negligence — Automobiles — Licensed Chauffeurs — Unlawful Acts — Causal Connection.

Where the owner of an automobile is driving her car upon the streets of a city in violation of an ordinance requiring a license, and the machine is injured by the backing of an express wagon onto the street in such negligent manner as to damage the car, without contributory negligence on the owner's part and which the care of a skillful chauffeur would not have avoided, it is *Held,* that the violation of the ordinance will not bar the plaintiff of recovery in her action for damages, there being no causal connection between the unlawful act and the damages sustained.

2. Courts—Verdict—Recess of Court—Consent of Counsel—Findings of Court—Appeal and Error.

The discretionary act of the trial judge in rendering judgment upon a verdict of the jury returned during recess of the court without the consent of counsel will not be reviewed on appeal when it appears from the finding of the court that the jury had not discussed the case before delivering it to the clerk, though several had done so thereafter with appellee's attorney; that the verdict was agreed to before the jurors separated, no improper influence had induced it, and the issues were not recorded until after the verdict was returned to the judge.

CIVIL ACTION tried before *Harding, J.,* at Spring Term, 1916, (693) BUNCOMBE, upon these issues:

1. Was plaintiff's property injured by the negligence of the defendant, as alleged? Answer: "Yes."

2. Did the plaintiff, by her own negligence, contribute to the injury, as alleged? Answer: "No."

3. What damage is plaintiff entitled to recover? Answer: "$800, with interest."

From the judgment rendered, the defendant appealed.

R. C. Goldstein, Mark W. Brown for plaintiff.
Bernard & Johnston for defendant.

BROWN, J. This action is brought to recover damages for injury to plaintiff's automobile. The evidence tends to prove plaintiff was driving her automobile at a very moderate speed along Charlotte Street in Asheville. As she was passing the private alleyway leading from the street to the Manor Hotel a heavy express truck belonging to the defendant backed out of the alleyway into the street and struck the plaintiff's automobile and greatly injured it. There were two men on the forepart of the truck, but none on the rear. There is evidence tending to prove that the truckmen did not keep a lookout as the machine backed into the street and into plaintiff's auto, and it is a legitimate inference from the evidence that if they had, the collision could have been avoided. There was an obstruction next to sidewalk that prevented plaintiff from seeing the truck as it backed down the alleyway into the street.

The defendant offered evidence to the effect that the plaintiff had never been examined as to her qualifications, and had no license authorizing her to drive an automobile, and that she was at the time of the collision violating the ordinance of the city.

At the conclusion of the evidence defendant moved to nonsuit and requested the court to charge the jury:

"That it being admitted that the plaintiff was driving her automobile through the streets of the city of Asheville without having stood the examination or obtained the license required by the ordinances of said city, the plaintiff was at the time of the collision complained of engaged in an unlawful act, and is not entitled to recover any damages for any injury which she might have sustained while engaged in such unlawful act, and the jury should answer the first issue 'No.' "

(694) In our opinion there is abundant evidence of negligence upon the part of defendant, and that upon all the evidence presented in this record plaintiff is entitled to recover for the damage done unless the above instruction should have been given. We think it was properly refused. It is true that the plaintiff at the time of the accident was negligent in not procuring a license from the city of Asheville to operate her automobile upon the streets of the city, but she is not placed outside all protection of the law nor does she forfeit all her civil rights merely because she violated such ordinance.

The plaintiff's violation of the law, in order to bar her recovery, must, like any other act, be a proximate cause in the same sense in which defendant's negligence must have been a proximate cause to give a right of action. A collateral unlawful act not contributing to the injury will not bar a recovery. See *Davis v. R. R.*, 170 N. C., 582.

The right of a person to maintain an action for a wrong committed on him is not taken away because at the time of the injury he was disobeying a statute, which act on his part in no way contributed to his injury. 1 Shearman and Red. Neg., sec. 94, sec. 104 (6 Ed.); *Hughes v. Atlanta Co.*, 136 Ga., 511; *Armistead v. Lounsberry*, 151 N. W., 542; *Sutton v. Wanwatosa*, 29 Wis., 21; *P. W. and B. R. R. Co. v. Towboat Co.*, U. S. 23 Howard, 209, 16 L. Ed., 433; 547 Ann. Cases, 1912 C 394, and notes.

It is held by our Court that while the violation of a city ordinance relating to the running of automobiles on the streets is negligence *per se*, it is necessary, to recover damages alleged to have been caused thereby, that the plaintiff show that this negligence was the proximate cause of the injury complained of. *Ledbetter v. English*, 166 N. C., 125.

The principle is well settled, as stated by Judge Cooley, "that to deprive a party of redress because of his own illegal conduct the illegality must have contributed to the injury." 1 Cooley on Torts (3 Ed.), 269.

The same principle is stated by Watson: "At the outset it may be stated as a general rule that the mere fact that the plaintiff, at the time of the injuries received, is engaged in the commission of an unlawful act is not sufficient to relieve the author of the wrong or liability in damages therefor." Personal Injuries, 711.

The Supreme Court of Washington decided a case exactly like this, and said: "In other words, before the violation of the statute by the person injured will constitute a defense to the negligent act of the person injuring him, there must be shown some causal connection between the act involved in the violation of the statute and the act causing the injury. Here there was no causal connection. The injury would have happened in the same manner it did happen had the respondent theretofore paid the license fee due the State and been in possession of the statutory license." *Switzer v. Sherwood*, 80 Wash., 19.

It is manifest from the evidence that the injury to the auto- (695) mobile would have occurred had the plaintiff's machine been driven by the most experienced chauffeur.

The case of *Lloyd v. R. R.*, 151 N. C., 536, is not in point. Lloyd's wrong was the proximate and sole cause of his own injury. He willfully violated a criminal statute by working twenty-three hours consecutively, and that was his only ground for recovery. He became fatigued, weakened, and exhausted, both in body and mind, having worked continuously for a long period of time without sleep and nourishment, and could not, therefore, properly exert himself for his own safety and protection. The injury would never have happened if he had obeyed the statute. It was his very violation of the statute that was the proximate cause of his injury, and in this respect *Lloyd's case* differs entirely from this plaintiff's case.

The Massachusetts cases relied on by the defendant are not authoritative. Those cases, like some in Maine and Vermont, were based on a statute prohibiting the general travel on a highway on Sunday. It was formerly held in those States that an ordinary Sunday traveler could not recover for injuries suffered from obstacles in the road or other negligence, though he could recover for wanton or willful injuries. Those statutes have now been repealed and the decisions based upon them are obsolete. In commenting upon these cases, Shearman and Redfield say that this application of the Sunday law has been repudiated by all the other courts which have passed upon it. Neg., sec. 104.

The defendant moved for a new trial upon the ground that the verdict was returned and received by the clerk during the recess, without its consent. The following are the facts found by the court:

"Immediately after the presiding judge had charged the jury, the jury retired to the jury room for the purpose of acting upon the evidence and awarding a verdict; immediately after the jury retired the court took a recess until 3 o'clock. Neither the plaintiff nor the defendant, in open court, consented that the clerk might take the verdict in the absence of the judge. After the court had adjourned for the noon recess, counsel for the plaintiff, in the absence of the judge and in the absence of defendant's counsel, stated to the clerk that he would consent for the clerk to take the verdict in the event that the jury should reach a verdict before 3 o'clock. The defendant did not enter into such an agreement. Upon convening of court at 3 o'clock, the deputy clerk stated to the court that during the noon recess the jury had come in and returned a verdict in the absence of the parties or their attorneys, and that he had taken the verdict, and that the issues had been delivered to him in writing; that he had discharged the jury and that the jury had separated. The court immediately called the jury into the box, after having to
(696) send out of the courtroom for two of them, and when all were present the presiding judge read the issues to the jury and asked if the issues read stated their findings, and they replied that they did. Whereupon, each juror was asked the question if he had discussed this case with any person after the judge had charged the jury, and prior to the convening of court, and nine of them stated that they had not and three of them stated that they had talked about the case after they had delivered the issues to the clerk and had been discharged; two of them stated that they had talked about the case to plaintiff's counsel, in the presence of the deputy clerk, but none of them had discussed it with any person before delivering the issues to the clerk or before they were discharged. The verdict upon which judgment was rendered was agreed to by the jury before the jury separated and no improper influence induced

the verdict. The issues were not recorded until after the verdict was returned to the judge."

Under the authorities we see no reason to review the exercise of discretion upon the part of his Honor in refusing to set aside the verdict in this case, inasmuch as he has found that no improper influence induced it. *King v. Blackwell,* 96 N. C., 322; *Luttrell v. Martin,* 112 N. C., 594; *Petty v. Rousseau,* 94 N. C., 362; *Tillett v. R. R.,* 166 N. C., 520. In that case *Mr. Justice Allen* says: "The custom, which is very general, of allowing juries to return their verdicts to the clerk, in the absence of the judge, is not approved, as it frequently results in misunderstanding and in an attempt to impeach the verdict; but in this case the findings of the judge show that the verdict upon which the judgment is rendered was agreed to before the jury separated, and there is nothing to indicate that any improper influence induced the verdict, and the action of his Honor in refusing to set it aside is sustained."

No error.

Cited: Hinton v. R. R., 172 N.C. 589 (1c); *Graham v. Charlotte,* 186 N.C. 666, 667 (1c); *Albritton v. Hill,* 190 N.C. 430 (1c); *DeLaney v. Henderson-Gilmer Co.,* 192 N.C. 651 (1c); *Covington v. Wyatt,* 196 N.C. 371 (1c).

CHARLES A. MOORE v. THOMAS J. HARKINS, ADMINISTRATOR OF H. S. HARKINS, DECEASED.

(Filed 31 May, 1916.)

Negotiable Instruments — Drafts — Designated Unpaid Funds—Right of Action—Limitation of Actions.

The assignee of certain drafts given to a deputy United States marshal by the United States marshal, upon condition that they were to be paid out of moneys owed the deputy for his fees and expenses as such officer, which were then due but continued to be unpaid, may not maintain his action against the administrator of the deceased drawee until such fees and expenses have been paid to the marshal by the Government, for until then the cause of action does not accrue.

CIVIL ACTION tried before *Harding, J.,* and a jury, at February (697) Term, 1916, of BUNCOMBE.

This is an action brought upon the drafts described in the complaint, five for $200 each, dated 18 February, 1880, and one for $400, dated 19 February, 1880.

The drafts were drawn in favor of the plaintiff by H. S. Harkins, intestate of the defendant, then a deputy United States marshal, on R. M. Douglas, United States marshal, and were never accepted by the drawee.

At the time the drafts were executed the said Douglas was not indebted to the said Harkins except that certain items for expenses and services rendered as deputy marshal were included in the account of said Douglas as marshal against the Government, which were to be turned over to the said Harkins upon payment by the Government, and assignments of said items were executed to the plaintiff in the following form:

For value received I hereby assign, transfer, and set over to Charles A. Moore all dues to me as deputy United States marshal from the Government and Robert M. Douglas, United States marshal for the Western District of North Carolina, on account of actual expenses, fees, and allowances as deputy United States marshal; and I direct the same to be paid to the order of said Charles A. Moore, all that is due me from 1 January, 1880, up to 18 February, A. D. 1880.

H. S. HARKINS. [SEAL]

The defendant admitted the execution of the drafts and assignments and pleaded the statute of limitations.

At the conclusion of the evidence his Honor entered judgment of nonsuit, and the plaintiff excepted and appealed.

Martin, Rollins & Wright and Marcus Erwin for plaintiff.

J. E. Swain and Kingsland Van Winkle for defendant.

ALLEN, J. The plaintiff testified: "The six drafts belong to me. I have had possession of them all the time since they were given, and I promptly told Douglas about them or I wrote him about them at once. I know they were not to be paid until Douglas got the money from the Government to pay them, and so did Harkins."

This evidence was admitted without objection, and if, true, the right of action has not accrued to the plaintiff, as the Government has not paid any part of the money claimed to be due on the account of R. M. Douglas, and the plaintiff says the drafts "were not to be paid until Douglas got the money from the Government." *Sykes v. Everett,* 167 N. C., 606; *Buskirk v. Kuhns,* 32 A. and E. Anno Cases, 932.

There was, therefore, no error in entering judgment of nonsuit.

Affirmed.

Cited: Shoe Store Co. v. Wiseman, 174 N.C. 719 (c); *Moore v. Harkins,* 177 N.C. 114 S.c.; *Moore v. Harkins,* 179 N.C. 527, 528 S.c.

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J. D. BECK v. HENKLE-CRAIG LIVE-STOCK COMPANY AND R. A. BASS.

(Filed 24 May, 1916.)

1. Issues—Gratuitous Bailee—Principal and Agent—Negligence—Veterinary Surgeons.

Where, at the request of the owner of a mule, the keeper of a stable selects a veterinary surgeon skillful and capable, who operated upon the mule in a stall in the stable, and there is evidence that the mule was injured while being operated upon, by not being properly confined, receiving injury to its back from the top bar, the two lower bars not having been left in place, and the evidence is conflicting as to whether the stable owner received compensation or generally employed the surgeon for profit: *Held*, in an action against the stable keeper and the surgeon, issues relating to the negligence of the defendant stable keeper and as to whether the injury was caused by the surgeon are not determinative of the controversy as to the former; for while there is evidence that the surgeon was negligent, the liability of the stable keeper depends upon whether he was a gratuitous bailee, or employed the surgeon for profit to act as his agent.

2. Principal and Agent—Negligence—Veterinary Surgeons.

Where a mule being operated upon by a veterinary surgeon in a stall of a stable is injured by the want of proper confinement in the stall, and during the operation the surgeon has called to his assistance the aid of a hand working in the stable, the surgeon is responsible for the negligent acts of the stable hand which operated to produce the injury.

CIVIL ACTION, tried before *Adams, J.*, at November Term, 1915, upon these issues:

1. Was the death of the plaintiff's mule caused by the negligence of the defendant Henkle-Craig Live-stock Company, as alleged in the complaint? Answer: "Yes."

2. Was the death of the plaintiff's mule caused by the defendant R. A. Bass, as alleged in the complaint? Answer: "Yes."

3. What damage, if any, is plaintiff entitled to recover? Answer: "$100."

From the judgment rendered, the defendants appealed.

Self & Bagby for plaintiffs.

W. C. Feimster, Council & Yount for defendants.

BROWN, J. The evidence tends to prove that the defendant live-stock company is engaged in the business of buying and selling horses and mules, and for this purpose conducts stables in the town of Statesville and other towns in this State. The defendant Bass is a veterinary surgeon, located at Statesville. In July, 1914, plaintiff sent his mule to

the defendant stock company, requesting that it take charge of the mule and have him operated upon for knots in his shoulders. The mule
(699) was delivered to the stock company, who called upon the defendant Bass to perform the operation. In order to enable the veterinarian to perform the operation, he put the mule in a stock or stall used for the purpose of confining unruly animals and for operating purposes. The evidence tends to prove that John Morrison, one of the defendant's servants, was called on by Bass to assist him in putting the mule in the stock. This stall or stock was so constructed as to require three bars to hold the animal inside of it. Only the top bar was put up. While the operation was being performed the mule backed under the bar and injured his spine so much that he was paralyzed and ruined.

The defendant company excepted to the issues as submitted, because they are not responsive under the allegations contained in the pleadings and are not determinative of the action.

The defendant company contends that the defendant Bass was not its agent and that the company is not responsible for his negligence; that they run their business separately and independently, and have no connection whatever the one with the other, except that the company employs Bass to treat its live stock when needed and pays him his professional fees for his services. The defendant company alleges that it had nothing whatever to do with the treatment of said mule, except as a favor to the plaintiff to phone the veterinary surgeon that the mule was at its stables awaiting treatment.

First, as to the defendant the Henkle-Craig Live-stock Company. We are of opinion that the issues excepted to and submitted by the court are not determinative of the issues raised by the pleadings. All the evidence tends to prove that the defendant company was acting as the bailee of the plaintiff and without consideration, except the defendant Bass was its agent and employed by the defendant company as a veterinary surgeon for profit. There is no evidence that the defendant company was negligent in selecting Bass as a veterinarian, as it is not disputed that he was a skillful and competent veterinary surgeon. The defendant company contends that their only relation with him was that of a veterinarian, doing business on his own account and not for them, and occasionally employed by this company to treat their own horses and mules, for which he received his professional fees.

If the fact be that Bass was not the agent and employee of the defendant company generally, but practices his profession on his own account, and was called in by the company to treat the plaintiff's mule, then the defendant company would not be liable for his negligence. But if the fact be that the defendant Bass was employed generally by the defendant company as a veterinarian, and the company received compen-

sation for his services and used him for purposes of profit, then Bass would be their agent and they would be liable for his negligence. This fact is at issue by the pleadings, and is not determined by (700) the verdict of the jury. We think his Honor erred in not submitting an appropriate issue based upon these allegations of the pleadings.

Second, as to the defendant Bass. The motion to nonsuit was properly overruled. There is evidence of negligence in the manner in which the mule was attempted to be confined in the stock. It is immaterial whether it was caused by the negligence of John Morrison, the assistant of Bass, or not. It was Bass's duty to see that the mule was properly confined so as not to injure itself, before he commenced his operations.

Upon an examination of the record as to the defendant Bass, we find no error. As to the defendant Henkle-Craig Live-stock Company there must be a new trial.

The costs of the appeal will be taxed against the plaintiff.

New trial.

BRYSON & BRYSON v. GENNETT LUMBER COMPANY.

(Filed 31 May, 1916.)

1. Liens—Laborers—Lumber—Statutes—Trials—Instructions.

In an action to establish a laborer's lien upon manufactured lumber, under the provisions of chapter 150, sec. 6, Public Laws 1913, the plaintiff must show compliance with the various statutory requisites; and a charge as to notice that the jury should return a verdict for the plaintiff should they find that he attached "the notice to the lumber" on the defendant's yard, is deficient and erroneous in leaving out the question as to whether the defendant had been served with a copy of the claim within five days after filing the lien with the justice of the peace, or that he could not be found.

2. Liens—Laborers—Lumber—Statutes—Amount Due by Owner—Subcontractors.

Where a laborer in the manufacture of lumber employs another laborer to assist him in his work, and the latter seeks to enforce the lien given by chapter 150, sec. 6, Laws 1913, for the value of the work he has done, it must be made to appear that the owner was due his own contractor, for the lien claimed can only be enforced to that extent, the object of the statute being to protect the laborer against any transfer of the lumber by the owner, who while indebted to his contractor, and insolvent, might otherwise pass the title to a *bona fide* purchaser for value, without notice of the lien.

CIVIL ACTION tried before *Ferguson, J.*, and a jury, at October Term, 1915, of JACKSON.

Plaintiffs sued for $54.45 due by account for labor performed. They were employed by one Frank Bailey to cut certain timber belong-
(701) ing to the defendants. Bailey had been employed by defendants to cut the timber and he employed plaintiffs to help him. They cut a part of the timber and received a written order from Frank Bailey to the defendants to pay them their wages, which amounted to $75. Plaintiffs presented this order to defendants (a partnership) and there is evidence that they orally accepted the same, or promised to pay it, and actually paid $20 on it at that time, but refused to pay the balance.

There was evidence on the part of the defendants which conflicted with that of the plaintiffs, and it tended to show only a conditional acceptance of the order.

The court charged the jury to return a verdict for the plaintiffs if they found that Frank Bailey owed the plaintiffs $54.45 for cutting the logs and that plaintiffs attached "the notice to the lumber" on the defendant's yard and brought their suit within the time specified in the statute, as this would give them a lien thereon, it being admitted that the defendants took possession of the lumber.

Verdict and judgment for the plaintiffs, and appeal by defendants.

No counsel for plaintiff.
Coleman C. Cowan for defendant.

WALKER, J., after stating the case: The statute under which the suit was brought is chapter 150, Public Laws 1913, sec. 6. It provides that where the laborer's wages for thirty days or less are due and unpaid, he shall file notice of his claim with the nearest justice of the peace in the county where the work was done, stating the number of days the labor was performed and the person for whom it was performed, the price per day, and the place where the lumber is situated, which statement shall be signed by the laborer or his attorney, and thereupon, and within five days after filing the notice with the justice of the peace, he shall deliver to the owner of the lumber a copy of the said notice; and if the owner cannot be found, the notice must be attached to the lumber upon which the labor was performed, and upon this being done, any person buying said lumber (after the notice has been filed with the nearest justice of the peace) shall be deemed to have purchased the same with notice of the lien, but no action shall be maintained against the owner of the lumber unless brought within thirty days after the notice was filed with the justice of the peace as provided by the statute.

The court should have embraced in its charge all of the requisites or facts material to a valid lien, so that the jury could have found the facts in regard thereto, and the validity of the lien determined. There is no

evidence that any attempt was made to serve a copy of the claim on the defendants within five days after filing the lien with the justice of the peace, and none that they could not be found. The evidence rather tends to show that they could have been found. But waiving this (702) apparent defect in the charge, we are of the opinion that it did not correctly state the law of the case to the jury. The statute of 1913, as previously construed by this Court, was intended to give a lien in favor of those embraced by its terms only when the owner of the lumber, upon which the labor was bestowed, is indebted to the contractor by whom the person claiming the lien was employed. In *Glazener v. Lumber Co.*, 167 N. C., 676, a case substantially similar to this one, the Court said: "It is admitted that the lumber company had no control over the employees of Campbell, and did not assume any obligation to pay them after they entered Campbell's employment, and the court found that the debts due the plaintiffs were the sole obligations of Campbell, except in so far as they might, as a matter of law, have the lien which they claim. . . . C. P. Hogsed worked in the band sawmill, receiving the plank as it fell from the saw and placing it upon a mechanical device, and there is due him for said service and labor a balance of $12.30 for work and labor done in November, 1913, for which he brought action and filed the lien on the same property as Fisher and Glazener. . . . The court was not asked to find whether the lumber company was indebted to Campbell upon the contract, as there is an action pending between them to settle their differences. The court adjudged that the claim of Glazener, who was an employee in the blacksmith shop making repairs on the cars, and of Fisher, who was a railroad hand working on the track and repairing bridges, were not liens upon the lumber of other property named above in the lien filed, but that the claim of Hogsed, who aided in cutting the lumber by taking the boards from the saw as cut and placing them on a truck, was a lien, provided, of course, that there was an indebtedness found to be due from the lumber company to Campbell at the time the notice of the lien was given. . . . We think his Honor's decision was well considered and correct as to all three parties."

C. P. Hogsed claimed a lien, in that case, under the statute of 1913, ch. 150, sec. 6, the same one under which the plaintiff seeks to recover in this action.

In *Hogsed v. Lumber Co.*, 170 N. C., 529, the Court said, referring to *Glazener v. Lumber Co., supra:* "In the said former case we held that the plaintiffs were entitled to a lien upon whatever interest in the lumber their employer, Campbell, should be found to have upon the settlement of the suit pending between Campbell and the lumber company. Whenever that amount is ascertained, the claims of the laborers are entitled to

a first lien thereon, and by virtue of the judgment in this case said amount must be retained by the lumber company and paid over to these plaintiffs so entitled. The lumber company will receive credit for such amount in settlement with Campbell, if they owe him so much."

It appears from those two cases that plaintiff cannot recover (703) unless he is able to show that the defendant at the time plaintiff's lien was filed was indebted to his employer, Frank Bailey; and if he succeeds in doing so, he may have judgment only to the extent of that indebtedness. This would seem to be a reasonable construction of the statute, as under the other construction the owner might in good faith and without any notice of outstanding claims against his contractor settle with him, and be subjected to a double payment without any fault on his part. The notice and lien were intended to protect the laborer against any transfer of the lumber by the owner, who, while indebted to the contractor and insolvent, might without this safeguard pass the title to a *bona fide* purchaser for value and without notice of the laborer's claim, and thereby defeat it.

It follows that there was error in the charge.

New trial.

NATIONAL NOVELTY IMPORT COMPANY v. J. M. MOORE.

(Filed 31 May, 1916.)

1. Vendor and Purchaser—Contracts—Fraud—Trials—Evidence.

Parol evidence that the plaintiff's salesman procured the written contract for the sale of jewelry sued on by falsely representing that certain named responsible dealers had purchased similar jewelry from him is sufficient to sustain a verdict setting aside the writing for fraud, and the evidence is not objectionable under the statute of frauds.

2. Quantum of Proof—Fraud—Sale of Goods.

It is not required that the defendant show fraud in the procurement of a written contract for the sale of goods, by clear, strong, and convincing proof, when such fraud is relied upon in defense of an action to recover the contract price.

3. Instructions Requested—General Charge—Appeal and Error—Harmless Error.

An erroneous prayer for instruction asked by appellant, and substantially given by the judge in his general charge is harmless error.

4. Contracts, Written—Fraud in Procurement—Parol Evidence.

Where a written contract is sought to be set aside upon parol testimony as to fraud in its procurement, the rule that the writing affords the best evidence of the contract has no application.

CIVIL ACTION, tried before *Ferguson, J.*, and a jury at November Term, 1915, of MACON, upon these issues:

1. Was the defendant induced to enter into the contract, "Exhibit A," by the plaintiff's agent falsely and fraudulently repre- (704) senting to the defendant that Sam Franks, a merchant in Franklin, N. C., had purchased and was selling said goods, and that Holmes Bryson, a merchant at Dillsboro, N. C., had purchased and was selling said goods? Answer: "Yes."

2. Did the defendant refuse to receive said goods and reship them to the plaintiff because of the false and fraudulent representations? Answer: "Yes."

From the judgment rendered, plaintiff appealed.

T. J. Johnston, H. G. Robertson for plaintiff.

G. L. Jones, Gilmer A. Jones for defendant.

BROWN, J. Plaintiff sued to recover of defendant the purchase price of certain jewelry sold by plaintiff's salesman to defendant. Upon arrival, defendant refused to accept the goods and repudiated the transaction upon the grounds as set forth in the answer:

1. That he had an agreement with the salesman of the plaintiff that he could cancel the order; and

2. That the sale was procured by fraud, in that the defendant was induced to enter into the contract by reason of certain fraudulent statements made by the salesman that such men as Holmes Bryson of Dillsboro and Sam Franks of Franklin had purchased the same line and were well pleased, when in fact neither had made such purchases.

The first defense was excluded by the court and issues were submitted to the jury on the second.

At the close of all the evidence plaintiff moved for judgment upon the pleadings and evidence. The court declined the motion and plaintiff excepted. Plaintiff then requested the court to charge the jury:

1. That if the jury believe the evidence in this case they shall return a verdict for the plaintiff.

2. That there is no evidence of fraud in this case, and it is the duty of the jury to so return their verdict.

3. That the burden is upon the defendant to satisfy the jury by clear, strong, and convincing testimony that the plaintiff or its agent practiced fraud in inducing the defendant to enter into the contract in question, and I hereby charge you that the defendant has failed to produce such testimony, and it is your duty to answer the first issue "No."

4. That when a statement is in writing, when parties have reduced and put their transactions in writing, the law attaches greater weight

to such writing than to oral testimony, depending upon the memory or recollection of witnesses. The writing cannot change. Our memories are liable to deceive us; but when a thing is in writing the law gives it greater weight than the memory of a witness or verbal evidence.

(705) The court refused to give the same, and plaintiff excepted.

We are of opinion that the court did not err in overruling plaintiff's motion for judgment.

The pleadings raise the issue of fraud in the execution of the contract sued on. The issues were properly submitted to the jury. There is sufficient evidence of fraud to justify the verdict of the jury, and, therefore, the first and second prayers for instruction were properly declined. The judge substantially but erroneously gave the third prayer, and thereby required the defendant to establish his plea by a degree of proof not required by law.

It is true, the burden of proof rested on the defendant, but not to satisfy the jury by clear, strong and convincing proof. That rule of law does not apply to cases of this kind, where defendant repudiates a contract of sale, written or verbal, upon the ground that he was induced to enter into it by the false and fraudulent representations of the seller. The true application of this rule of evidence is pointed out in *Harding v. Long,* 103 N. C., 1.

This error, however, was in plaintiff's favor. The fourth prayer was properly refused. The principle invoked by plaintiff has no application where the issue involved is one of fraud and the written contract is sought to be set aside because of fraud in procuring its execution.

Upon an examination of the record we find

No error.

Cited: Hunter v. Sherron, 176 N.C. 228 (4c).

MOUNT GILEAD COTTON OIL COMPANY v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 31 May, 1916.)

1. Telegraphs—Vendor and Purchaser—Principal and Agent—Contracts—Negligence—Damages.

Where according to custom between the parties the sendee of a telegram purchased on his own account cotton seed to be shipped to the sender at a price stated in the message, but by reason of an error in its transmission he had purchased to sell at a higher price than that actually authorized, the telegraph company cannot be considered the agent of the

sender in making the contract, or bound by the terms of the erroneous telegram, when the sender has before shipment ascertained the error in the telegram, and voluntarily pays for the seed at the higher price, and he may not recover, in his action against the company, the difference between the price authorized and that negligently stated in the telegram, but only nominal damages, or the cost of the message. As to whether substantial damages could be recovered had the seed been accepted without knowledge of the error, and damages had been sustained by the sender, with no means of recouping his loss, *quære.*

2. Same—Extra Expense.

In this action it is *Held*, that the sender of a telegram erroneously transmitted as to the price offered for cotton seed may not recover, as an element of damages, money expended on certain trips taken, as they in no wise referred to the subject of his action nor were they connected therewith.

3. Telegraphs—Vendor and Purchaser—Principal and Agent—Negligence—Damages—Duty of Sender.

It is the duty of the sender of a telegram, which has erroneously been transmitted, to his knowledge, to minimize the loss resulting to him, whether arising by contract or in tort; and where the telegram was for the purchase of cotton seed, he may not voluntarily enter into a new contract at the erroneously stated price, when he might have refused to take the seed, and then hold the telegraph company to the payment of his loss.

CIVIL ACTION tried before *Lane, J.*, and a jury, at September (706) Term, 1915, of MONTGOMERY.

The action was to recover damages caused by erroneous transmission of a telegram making an offer for purchase of cotton seed.

On the testimony, the court ruled that plaintiff's recovery was restricted to nominal damages or amount tendered therefor by defendant, to wit, 41 cents. Judgment for this amount, and plaintiff excepted and appealed.

Chas. A. Armstrong for plaintiff.

J. A. Spence for defendant.

HOKE, J. The evidence tended to show that, on 1 October, 1914, plaintiff, doing business at Mount Gilead, N. C., delivered to defendant company for transmission to John Kearns, at Wagram, N. C., a message offering $20 per ton for cotton seed, and requiring immediate acceptance; that under the arrangement between plaintiff and Kearns the latter was to buy the seed at his own price and sell to plaintiff at the price offered; that the message was erroneously delivered: "twenty-two" instead of twenty, making an error of $2 per ton; that, acting on the erroneous message, Kearns bought or contracted for immediate delivery

of four car-loads of seed, part of which were in the cars at Wagram, when the plaintiff's agent and manager, having occasion next day to go to Wagram, and ascertaining that the mistake had occurred, countermanded the order as to further purchases, paid Kearns for the seed already bought or contracted for at the price of $22, and brought suit against the company, claiming as damage the excess of $2 per ton paid or contracted for by Kearns by reason of the mistaken message, the damages so estimated amounting to $220.34.

On these the facts chiefly relevant, we are of opinion that his Honor correctly held that plaintiff could only recover nominal damages, or the amount for which judgment had been tendered by defendant, of 41 cents.

(707) There is much contrariety of decision on the question whether a telegraph company may be properly considered the agent of a sender so as to bind him by a contract made in his name or for his benefit by reason of a message which has been erroneously transmitted. In this jurisdiction it is held that the company, in such case and to that extent, is not the agent of the sender; that the latter is not bound by the terms of the erroneous message, and, unless otherwise in default, may not be held responsible for the effects of it. *Pegram v. Tel. Co.*, 100 N. C., 28. The position has the support of authoritative and well considered cases in other jurisdictions: *Pepper v. Tel. Co.*, 87 Tenn., 554; *Shingleur v. Tel. Co.*, 72 Miss., 1030; *Strong v. Tel. Co.*, 18 Idaho, 389; is said to be in accord with the English and Canadian decisions on the subject, and, in a recent work on electricity, after a full discussion of the subject, it is approved by the authors as the better rule. Joyce on Electricity (2 Ed.), sec. 907. It is said by some of the text-writers that the opposing position is supported by the weight of authority in the American courts, a statement that is examined and combated, successfully, we think, by *Judge Folkes* in his learned and forcible opinion in *Pepper's case,* to which we have heretofore referred.

The American cases which uphold the view that the company is to be properly considered the sender's agent for the purpose and to the extent indicated are made to rest chiefly on the proposition that, as the sender first resorted to this means of communication, he should be held to bear the loss arising from the company's negligent breach of duty; but this, to our minds, is very far from satisfactory. As a matter of fact, we know that neither the sender nor the addressee has any control over the operations of the company or its methods. Both are equally aware of its liability to mistakes and the extent of them, and both have equal opportunity to verify the message by repetition, etc., and it seems to us that the doctrine which undertakes to hold the sender liable under the ordinary principles of agency is unsound, and that the position as

it prevails with us and which considers the company as a public-service agency, acting, in the respect suggested, independently of either, has the better reason, and, certainly, as now advised, we have no present disposition to question it. This, then, being in our opinion the correct principle, on the facts presented in the record, his Honor correctly held that plaintiff was restricted to nominal damages or, at most, to the price of the message.

It is not at all clear that any of the seed had been delivered when the mistake was discovered; but if it were otherwise, and four car-loads of seed were then in the cars at Wagram ready for shipment, these seed purchased at $22 per ton, were not the seed that plaintiff had ordered, and he had then the legal right to reject and return them to addressee of the message. The latter could have recovered of the company (708) the damage incident to their culpable mistake. But plaintiff, having with full notice elected to take the seed at the higher price when not legally obligated to do so, has thereby entered into a new contract concerning them, and is not now in a position to sue the company because of its breach of contract with him.

It is the recognized position that in case of breach of contract or of tort, the injured party must do what reasonable business prudence required to minimize his damage. *Hocutt v. Tel. Co.,* 147 N. C., 137; *Bowen v. King,* 146 N. C., 391; *Tillinghast v. Cotton Mills,* 143 N. C., 268; *R. R. v. Hardware Co.,* 143 N. C., 54, and *a fortiori* where, in such case, the injured party, the plaintiff in this instance, has voluntarily paid the higher price for the seed when he was not compelled to do so, he has no legal right to insist on such payment as an element of damage.

It may be that if, before the mistake was discovered, plaintiff had received and disposed of the seed, and conditions were such that he had no means of recoupment for his loss, a case might be presented for recovery of such damages, as naturally arising from the company's breach of contract; but no such case is presented in this record, the facts showing that the seed or a portion of them were then in the cars at Wagram and the remainder subsequently delivered and voluntarily taken over, as stated, by plaintiff at the higher price.

It was insisted for plaintiff that he was in any event entitled to recover for certain money expended as incident to his trip to Wagram and his effort to avoid the effects of the mistake in other localities, but we are unable to see that the trip to Wagram was in any way due to the erroneous message or that plaintiff's efforts in reference to the effect of the message in other localities had any legal or sufficient connection with the defendant's default as to constitute a legitimate element of damages.

There is no error in the record, and the judgment below must be affirmed.

No error.

Cited: Leigh v. Telegraph Co., 190 N.C. 705, 706, 707 (cc); *Troitino v. Goodman*, 225 N.C. 416 (3c).

STATESVILLE FLOUR MILLS COMPANY v. WAYNE DISTRIBUTING COMPANY.

(Filed 10 May, 1916.)

1. Contracts—Breach—Independent Terms—Damages.

Whether covenants or stipulations of a contract are dependent upon or independent of each other is to be determined by the intention of the parties as gathered from the instrument; and a breach by one party of a term thereof does not necessarily relieve the other party from performance; for the term thus violated, to have this effect, must be vital to the contract, making performance impracticable, as to the other parts of the contract, to accomplish the intended purpose; when it is otherwise, compensation may be demanded for the particular damage thereby caused.

2. Same—Disputed Items—Adjustment—Vendor and Purchaser.

In an action to recover damages for a breach of contract for the sale of flour it appeared that the defendant purchased the flour, to be sent out upon his notification and to pay certain "carrying-over charges" if not ordered out by him in stated quantities at certain periods. A dispute arose between the parties as to the amount of certain "carrying-over charges" the defendant should pay, and afterwards plaintiff acceded to his demands and, in accordance with custom, authorized the defendant to deduct the amount from the amount of the next invoice, and gave him credit therefor on the balance then due by him. *Held*, the defendant was not justified in refusing to perform his part of the contract on the ground stated, and was liable for the consequent damages incurred by plaintiff.

3. Vendor and Purchaser—Price Delivered—Milling in Transit—Custom—Credits—Evidence—Contracts.

Under a contract for the purchase of a quantity of flour at a price delivered, to be shipped out in car-load lots within a stated period as designated by the purchaser, the purchaser was to pay the freight and deduct it from the invoice of the next shipments, but breached his contract by refusing to accept the flour after the first shipment. The seller shipped the flour from a western point to Goldsboro, N. C., under a milling-in-transit arrangement at S., by which the freight for the whole transit was paid by the shipper, and in his action for the price of the flour it is held that the purchaser was not entitled to deduct therefrom the freight from S. to destination, as the contract contemplated actual shipments, and the

freight was paid by plaintiff under the milling-in-transit arrangement with the railroad company, and, therefore, no freight was due at Goldsboro.

4. Vendor and Purchaser—Price Delivered—Contracts—Breach—Measure of Damages.

In an action by the seller of flour at a certain price delivered, for the breach of defendant's contract to accept it, the measure of damages is the difference between the contract price and the market price at the place of delivery.

CIVIL ACTION tried before *Ferguson, J.*, and a jury, at August (709) Term, 1915, of IREDELL.

Plaintiff sued for the recovery of damages for the breach of a contract for the sale and purchase of 500 barrels of flour. The defendant contracted with the plaintiff to buy from it 500 barrels of flour to be delivered to defendant free on board the cars at Goldsboro, N. C., under the milling-in-transit freight rates granted to the plaintiff by the railroads, the flour to be delivered during the months of February and March, 1915, at such times and in such quantities as the defendant might specify, for which the defendant agreed to pay in cash upon the presentation of a sight draft with bill of lading attached, as a basic price, the sum of $7.75 per barrel for the grade of flour manufactured by the (710) plaintiff and branded as Queen, and $7.90 per barrel for the grade of flour manufactured by the plaintiff and branded as Palace. It was further agreed that if the flour was not ordered out within the contract shipment period, that is, during February and March, 1915, defendant would pay the plaintiff, in addition to the price of the flour and at the beginning of each thirty-day period after the said contract shipment period, without notice from the plaintiff, 5 cents per barrel per month or fraction of a month, which was the usual "carrying-over charge."

The first order, which was for 100 barrels, was not made by defendant until April, 1915, after the expiration of the "shipment period," and defendant was chargeable, in addition to the price, with 5 cents per barrel as "carrying-over charges." The 100 barrels were shipped to and received by the defendant at Goldsboro, and an invoice of the shipment mailed by the plaintiff to it, in which there was an overcharge of $7.50 for "carrying-over charges." There was correspondence in regard to the discrepancy between the parties, 29 April, 30 April, 6 May, 8 May, and 11 May, the substance of it being that defendant called attention to the error and plaintiff replied that 25 barrels were shipped in April on a January contract, which entitled it to two months for carrying-over charges or 10 cents per barrel, and that there were charges for two months on the 100-barrel shipment. Defendant insisted that there was a mistake, and drew for the difference, which was $7.50. Plaintiff

replied on 8 May that it was charging all customers 10 cents per month, but that it would credit defendant's account with $7.50, to be deducted from the next invoice. On 11 May defendant canceled the contract and refused to receive any more shipments. At that time defendant sued plaintiff for carrying-over charges more than $7.50. The defendant claimed a deduction for freight from Statesville to Goldsboro, and with reference to this claim F. A. Sherrill, witness for the plaintiff, testified: "The contract shipment period is the period within which it is to be ordered out on which there is no carrying charges, to wit, February and March. The defendant ordered out 28 April, 1915, 100 barrels; that left 400 barrels due on order. The defendant never ordered out the other barrels, but repudiated and rescinded the contract 11 May, 1915; the market price of the flour in Goldsboro then (11 May, 1915) was $7.10 for Palace and $6.95 for Queen; this is 15 cents lower than stated in the complaint. I overlooked the fact that Goldsboro was a less rate than some contracts we had (freight rate). We base all our prices of flour on the Ohio River Crossing; for instance, some points will be 50, some 60, and others 65 cents. Flour is all sold delivered; the seller pays the freight and it is deducted from the invoice. We will say flour is $5 at Goldsboro,
(711) we deliver it there; it is c. a. f., cash and freight. We deduct the freight from price of flour. The price of flour is based on delivered shipments, including the freight, the price per barrel."

B. C. Thaxton, witness for defendant, testified: "On the invoice sent to us they deducted the freight. They were to deliver it in Goldsboro, and they drew for the amount of the invoice, less the freight. On the Queen I was to pay $7.75, less the freight. They made it that much less." There was evidence on the issue as to damages which showed the difference between the contract price and the market price or value of the flour at Goldsboro. The jury returned the following verdict:

1. Was there a breach of the contract by the defendant 11 May, 1915? Answer: "Yes."

2. What damage has the plaintiff sustained by reason of the breach? Answer: "$272.50."

Judgment on the verdict and appeal by defendant.

A. L. Coble and Dorman Thompson for plaintiff.

D. H. Bland and W. D. Turner for defendant.

WALKER, J., after stating the case: The defendant contends that the plaintiff broke the contract by overcharging on one item as indicated in the above statement. It is plain, we think, that if this was a breach at all, it was not such a one as justified the defendant in canceling the contract. It seems to have been the result of a misunderstanding as to the

nature of the shipments, and as soon as plaintiff discovered its mistake, in a very small amount, it agreed to rectify it, by giving the defendant credit for the amount, with leave to deduct it from the next invoice. What else could plaintiff have done? Defendant then owed it more than enough to cover the amount of the discrepancy and was fully protected, had plaintiff been insolvent, and was doubly protected if it had complied with the contract, as it had the right and the express permission to deduct the amount from the next invoice. Why the defendant should have drawn for the amount, when it was indebted to the plaintiff in a larger amount, requires more explanation than has been given. But upon well settled legal principles the defendant was in the wrong, apart from the question of good faith, in canceling the contract. The doctrine is well expressed in 9 Cyc., p. 650: "When there are several terms in a contract, a breach committed by one of the parties may be a breach of a term which the parties have not, upon a reasonable construction of the contract, regarded as vital to its existence. Such a term is said to be subsidiary, and a breach thereof does not discharge the other party. He is bound to continue his performance of the contract, but may bring an action to recover such damages as he has sustained by the default." In a case much cited on this point it appeared that the plaintiff, a professional singer, had entered into a contract with defendant, director of an opera, for his services as a singer for a considerable time, (712) and upon a number of terms, one of which was that plaintiff should be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals. Plaintiff broke this term by arriving only two days before the commencement of the engagement, and defendant treated this breach as a discharge of the contract. The Court held that, in the absence of any express declaration that the term was vital to the contract, it must look to the whole contract and see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages, and the Court held that the term did not go to the root of the matter, so as to constitute a condition precedent. *Betini v. Gye,* 1 Q. B. D., 183." To the same effect, Clark on Contracts, 457; 3 Elliott on Contracts, sec. 2045, and 3 Page, sec. 1450, where the rule as to divisible and subsidiary promises is thus stated: "It is not the breach of every covenant of a contract that may operate as a discharge of the adversary party. To have this effect, the covenant broken must be a vital term of the contract, breach of which makes performance impracticable, and the accomplishment of the purpose of the parties impossible. Breach of a minor and subsidiary covenant may give rise to an

action for damages, but it cannot operate as a discharge." And again, in the same action: "Where a contract to ship goods under the vendee's form of charter party is broken only by using another form of charter party which omits a clause that if the vessel is freed from wharfage during discharge of cargo, freight is to be reduced 4½ pence per ton, the party not in default must perform, and sue for damages if he has suffered any." *Withers v. Moore,* 71 Pac. (Cal.), 697. Another apt illustration, where the facts were similar to those before us, will be found in 3 Elliott on Contracts at sec. 2046, it being there said: "Neither is there a fatal breach in cases where the nonperformance of one of the conditions does not materially impair the benefit from the performance of the others and the loss occasioned by the breach of the particular condition is capable of compensation in damages. It is not the theory of this principle that on failure of performance in an unimportant particular that the party benefited should enjoy these benefits and render no compensation for them. This principle is abundantly illustrated in cases where contractors for construction of buildings have, in good faith, substantially but not literally complied with the specifications. In these cases where the damages are slight, so that an allowance out of the contract price will give the owner substantially what he contracted for, the breach does not discharge the entire contract." As remarked by
(713) *Tindal, C. J.,* in *Stavers v. Curling,* 3 Bing., N. C., 355, the rule has been established by a long series of decisions in modern times, that the question whether covenants or stipulations of a contract are to be held dependent upon or as independent of each other is to be determined by the intention of the parties as it appears on the instrument, and by the application of common sense to each particular case, and to this intention, when once discovered, all technical forms must give way. See *Leonard v. Dyer,* 26 Conn., 172; *Ritchie v. Atkinson,* 10 East, 295, and numerous authorities cited in notes to text-books which we have cited.

The defendant received proper credit for the overcharge in this case, and this was all that he could reasonably demand. *Withers v. Moore, supra.*

It would be contrary to reason and a reproach to the administration of justice if for so slight a breach, if substantial breach it was, we should hold the defendant to be altogether discharged from further performance of this contract.

The parties may by their language make a term have the force and effect of a condition precedent, but there is no such expression in this contract.

The determination of the other question, as to the deduction from the damages of the amount of the freight for carriage from Statesville to Goldsboro, it seems to us, must also and equally be against the defendant.

It is perfectly evident what the parties meant by the stipulation as to freight, which was to be deducted from the invoices of *actual* shipments. "The price of flour was based on delivered shipments, including freight, the price per barrel. . . Flour is all sold delivered; the seller pays the freight and it is deducted from the invoice," said plaintiff's witness. The defendant's testimony does not contradict this statement, but rather tends to corroborate it. B. C. Thaxton said that "On the invoice sent they deducted the freight; they drew for the amount of the invoice, less the freight." This meant nothing more or less than that when a shipment was made and the goods were actually transported, where there would be freight charged, the plaintiff should pay the freight to Goldsboro, and the amount should be taken from the total of the invoice. There would be no freight where there was no shipment, and, of course, no invoice to be deducted from. The reason plaintiff allowed this credit on the amount of the invoice was because it had already paid the freight through Statesville to Goldsboro, and the railroad company would refund to plaintiff the amount so paid for defendant under the "milling-in-transit" arrangement, which is well understood, and is fully explained in the evidence. Any other construction of the contract would plainly contravene the real intention of the parties, and might result in a sale of the flour below the market price.

The court gave proper instructions as to the measure of dam- (714) ages: the difference between the contract price and the market price at the place of delivery. *Heiser v. Mears,* 120 N. C., 443; *Clements v. State,* 77 N. C., 142; *Hosiery Co. v. Cotton Mills,* 140 N. C., 452, 454.

We find no error in the record.

No error.

Cited: Richardson v. Woodruff, 178 N.C. 52 (4c); *Smith v. Smith,* 190 N.C. 768 (1c); *Lamborn v. Hollingsworth,* 195 N.C. 354 (4c); *Wade v. Lutterloh,* 196 N.C. 120 (1c); *Lykes v. Grove,* 201 N.C. 258 (2c).

OUTCAULT ADVERTISING COMPANY v. A. A. FAIN AND W. E. HOWELL, PARTNERS, ETC.

(Filed 31 May, 1916.)

1. Vendor and Purchaser — Pleadings — Proof—Variance—False Representations—Opinion.

Where it is alleged in an action to recover a sum claimed to be due under plaintiff's contract to furnish cuts to be used by the latter for advertising purposes in a local newspaper, that the agent of the plaintiff

induced the defendant to enter therein upon falsely representing that the management of the paper had agreed to use the cuts at the same rate defendant had theretofore been paying, and the proof was that the plaintiff's agent had stated to defendant that it would not cost more, and upon due deliberation the defendant had accepted the offer: *Held*, there was a fatal variance between the allegation and proof, the latter amounting to no more than an expression by the agent of his opinion.

2. Same—Trials—Evidence.

Where a business concern has agreed to use, under contract, at a stated price, cuts furnished for advertising purposes, and there is evidence in defense tending to show that the vendor's agent, in making the sale, stated that the manager of a local paper said he would use them at the same advertising rates the defendant had been paying, which he had refused to do, this, of itself, is no evidence of the falsity of the representations.

CIVIL ACTION tried before *Ferguson, J.*, and a jury, at January Term, 1916, of CHEROKEE.

This is an action to recover $104 alleged to be due under a contract by the plaintiff to furnish the defendants certain metal cuts to be used in the local paper where the defendants did business, in advertising the business of the defendants.

The defendants admitted the execution of the contract and did not deny that the amount claimed by the plaintiff was due, if anything was due, but they alleged that the contract was procured by a false representation, and that therefore they did not owe the plaintiff anything.

The representation alleged to be false is that "it (the plaintiff) had arranged with the editor of the *Cherokee Scout* to print the advertising matter as set out in said order for the same price that defendants were then paying for an ad. in said paper," and all the evidence of-
(715) fered in proof of the representation and its falsity is the evidence of the defendant Howell, who testified as follows:

"I am one of the defendants in this action. The plaintiff's salesman called on me while we were in business and said he was selling good advertising matter. He came in and had a talk with me and he took out his samples and showed them to me and pulled out a copy of the *Cherokee Scout* from his pocket, showed it to me and said he had been up to the office and had talked to the editor, and that my advertising would not cost me any more than it was; and I told him I would have to study on it. He came back and I told him I believed I would take it under these terms, and I signed the contract. After this, I saw the editor of the *Scout* in regard to printing this advertisement, and the *Scout* would not print it at the same price; told me it would cost just twice as much as it was costing me. I then turned to the young man working for me and had him countermand the order. I

dictated the letter dated 29 November. I think it was the same date, or the next day after the salesman was there. The editor came down to our place every night. The first time he was there I asked him about it. I had McIver to write it."

Defendant then introduced the letter of 8 December, 1913. It was admitted only as evidence of countermanding the order.

The witness, continuing, says: "There was a little bundle of these cuts, or whatever they were, that came there. I suppose it was the cuts. I saw from the box they shipped it in that it was, and I refused to take it. It is in the Southern depot now, I guess; but I don't know that it is. I never took it out, and notified them that we would not. I did not know the cuts were there until they were brought up and put on our prescription case; they may be there yet; I don't know. I wrote them and told them I would hold them until they sent me enough money to pay express charges, which they never sent."

The defendants countermanded the order and refused to receive the cuts.

At the conclusion of the evidence the plaintiff requested the court to instruct the jury to answer the issue "Yes; $104, with interest." The court declined to give this instruction, and the plaintiff excepted.

The jury returned the following verdict:

Are the defendants A. A. Fain and W. E. Howell indebted to the Outcault Advertising Company? If so, in what amount? Answer: "Nothing."

Judgment was rendered in favor of the defendants, and the plaintiff appealed.

M. W. Bell for plaintiff.

Dillard & Hill, J. D. Mallonee, and O. L. Anderson for defendants.

ALLEN, J. The allegation of the representation made by the (716) agent of the plaintiff is that he told the defendants that the plaintiff had arranged with the editor of the *Cherokee Scout* to print the advertising matter at the same price the defendants were then paying for advertisement in the paper, while the proof is that the agent told the defendant that their advertising would not cost any more than it was then costing.

The variance between the allegation and the proof is clear, and its materiality is easily perceived when it is remembered that neither the plaintiff nor its agent had anything to do with the contract for advertising.

The plaintiff was to furnish the cuts and the defendants were to make their own contracts for advertising, and when so considered the

representation testified to amounted to no more than an expression of opinion as to the cost of advertising, which the defendants could easily verify by seeing the editor, who lived in the same town and who was at the place of business of the defendant daily.

It will be noticed there was no effort upon the part of the agent to prevent the defendants from making an investigation, and that instead of urging them to sign the contract when he first saw them, it was upon a second visit that the contract was entered into.

But suppose the representation means more and is equivalent to a statement that the editor said that the cost of advertising would not be greater than the amount the defendants were then paying; is there any evidence that this statement was false?

The editor of the paper is dead, and the defendants had to rely upon his declaration.

This was incompetent, because hearsay evidence; but as it was not objected to, we do not put our decision upon that ground.

The defendant Howell does not testify that he told the editor that the agent of the plaintiff made any statement to him, nor does he say that the editor told him that he had not told the agent that the cost of advertising would not be greater than the amount he was then paying, and considered in the most favorable light it amounts to no more than a bare suggestion that the statement which the defendants alleged was made as an inducement to the contract was false.

It is entirely consistent to say that the editor of the *Scout* told the agent that the defendants could get the advertising at the price he was then paying, and that when the defendants approached him to make the contract he had either changed his mind or for some other reason demanded a higher price.

If he had made a contract with the agent as to the cost of advertising and the agent had so stated, the evidence might have a different bearing,

(717) but it was not in the contemplation of any of the parties that the contract for advertising should be made between the plaintiff or its agent and the editor, and, on the contrary, all understood that this contract was to be between the defendants and the editor.

We are therefore of opinion upon the record as it now stands that there was error in refusing to give the prayer for instruction requested by the plaintiff, and a new trial is therefore ordered.

New trial.

B. R. LEE v. JOHN B. OATES.

(Filed 24 May, 1916.)

1. **Deeds and Conveyances—Restraint on Alienation—Estates—Conditions Subsequent.**

Where the donor of a life estate forbids the life tenant from selling the same or the proceeds arising therefrom by anticipation or otherwise, he creates a condition subsequent to the vesting of the title, which is void as against public policy, and the estate is held discharged of the condition.

2. **Same—Equitable Title.**

The doctrine that invalidates the legal title for restraint upon its alienation applies to equitable title as well.

3. **Same—Husband and Wife—Trusts and Trustees—Naked Trusts—Statute of Uses.**

An estate to the use of E. for life, free from the debts and control of her husband, with provision that "she shall not have the power to sell her said estate or the profits arising therefrom by anticipation or otherwise": *Held*, upon the death of the husband the trust created in respect to him terminated, the necessity therefor then having ceased, and the title held by the trustee being a naked one, it was transferred to the use under the statute of uses; and the provision imposing a restraint upon its alienation being void, the complete title vested in E.

4. **Deeds and Conveyances—Restraint on Alienation in Covenants.**

A covenant which is against public policy is not enforcible.

5. **Deeds and Conveyances—Trusts and Trustees—Restraint on Alienation—Reservation of Powers—Estoppel.**

A donor of an estate to E. for life, with a void restraint upon its alienation, reserved to herself the right of revocation or change. After the death of the donor it is held that E. is not estopped, equitably or otherwise, because she signed the deed, to convey such estate free from the void provision in the conveyance.

6. **Deeds and Conveyances—Estates—Contingent Remainders—Vested Interests—Defeasible Estates.**

An estate to the use of E. for life, then to the use of A. and B. or the survivors or their heirs, and should both of them die without issue, then to L., with further contingent limitations. After the death of E. and A., L. conveyed her interest to B. *Held*, that L. acquired an interest or estate subject to the happening of a contingent event, and not a bare possibility, and that though both the interests of B. and L. were contingent, each could make a valid conveyance of their respective estates.

7. **Trusts and Trustees—Passive Trusts—Statute of Uses—Husband and Wife—Restraint on Alienation—Parties.**

Where lands are conveyed in trust for a married woman for life free from the debts or control of her husband, with a restraint on alienation, which is void, and the husband has died and the trust has thereby termi-

nated, and where B., who takes under the deed a vested remainder in fee, defeasible upon his dying without issue, has acquired the interest of the ulterior donee, the three estates created by the deed of gift become vested in B., and the trust created by the deed to preserve any contingent remainder becoming passive, or no longer necessary, the trustee, or his heirs, are not necessary parties to an action by B. against his vendee of the lands to enforce his contract of sale.

8. Deeds and Conveyances — Estates—Contingent Remainders—Nonhappening of Event.

An estate for life to A., then to B. and C., or the survivor of them and his heirs, and in the event of the death of both without issue, to L. and W. and their heirs; and should either of the latter die without issue, then to the survivor or his or her heirs; and in the event of the death of both in the lifetime of their father, then to D. during her life or widowhood, with remainder to the right heirs of the donor. W., only, died in the lifetime of his father, and it is held that the remainder to D. had been defeated by the nonhappening of the event, *i.e.*, the death of both L. and W. in the lifetime of their father.

9. Estates — Contingent Remainders — Reinvestments—Trusts and Trustees—Parties—Statutes.

In proceedings under Revisal, sec. 1590, certain contingent interests in land held in trust were sold and reinvested in other lands in accordance with the terms of the trust in the original deed conveying them. The title acquired, under the original deed in trust, by the trustee had become passive in him, and it is held that as, under the statute of uses, the legal and equitable title had merged in the same person, neither the trustee nor his heirs were necessary parties to the owner's action against a purchaser to enforce his contract of purchase, and especially so when all vested and contingent interests were represented by some of the parties to the suit.

10. Estates—Contingent Remainders—Deeds and Conveyances—Technical Expressions—Intent.

While a rule of law will not ordinarily be allowed to defeat the plainly expressed intention of the donor, technical language used by him will be construed in accordance with its legal significance.

11. Estates—Contingent Remainders—Perpetuities—Statutes.

Under the facts of this case it is held that the rule against perpetuities has not been violated, as contingent remainder dependent upon the death of a certain donee without issue means, under the terms of our statute, Revisal, sec. 1581, a dying without having issue living at the time of his or her death.

(719) CIVIL ACTION heard by *Carter, J.*, at February Term, 1916, of MECKLENBURG.

The agreed facts are substantially as follows: Plaintiff contracted to convey to defendant an indefeasible fee-simple title to certain land in Mecklenburg County, for which defendant contracted to pay plaintiff the sum of $7,000. Plaintiff thereupon executed and tendered to

defendant a deed, admitted to be in due and proper form, for the land in question, which defendant refused to accept, and refused to comply with his part of the contract, on the ground that the plaintiff did not have, and his said deed did not convey, an indefeasible fee-simple title to the said land; and this controversy without action was instituted for the purpose of determining the respective rights of the parties.

The special facts relative to plaintiff's title are as follows: In 1880 Nancy S. Smith owned certain land in Mecklenburg County, and by deed which appears in the record on page 11, marked "Exhibit B," she conveyed the property to one B. R. Smith and his heirs, to be held in trust for the purpose and upon the limitations therein particularly set forth. After the death of Nancy S. Smith, and under authority of Revisal, sec. 1590, this land was sold, and the proceeds reinvested in the land which the plaintiff contracted to convey to the defendant, and which was conveyed by B. V. Dinkins and husband to B. R. Smith and his heirs and assigns, to be held in trust for the purposes and upon the limitations set forth in the deed. It was agreed that B. V. Dinkins and husband had and conveyed an indefeasible fee-simple title to the said land. Of the persons named in the original, or Smith deed, the following are dead: B. R. Smith, trustee; Junius M. Lee, who was the husband of Elizabeth Jane Lee; Anna B. Lee, who died unmarried and without issue; W. Bernard Smith, who died without issue; W. Mac. Smith, the father of Lillian and W. Bernard Smith; and Carrie E. Smith, his wife. The following are still living: Elizabeth Jane Lee, B. Rush Lee, and Lillian A. Smith (now Lillian S. Springs), having married R. C. Springs. The heirs of B. R. Smith are Garnet and Eloise Smith. The heirs of Nancy S. Smith, the grantor in the original deed, are many, and scattered. At the time of the execution of the original or Smith deed plaintiff B. R. Lee was 6 years of age. This does not appear in the case agreed, but is a fact; and is stated by defendant at plaintiff's request. The date of the reinvestment proceeding was March, 1905, and this proceeding is still formally open and pending upon the court records. After the death of B. R. Smith, the trustee in the original deed, an order was made in this reinvestment proceeding appointing W. D. Wilkinson as trustee in the place of B. R. Smith, trustee; but no notice of this order or appointment was served upon any of the parties to the reinvestment proceeding, nor upon any of the heirs at law of B. R. Smith, the original trustee, who were not (720) parties to this proceeding; nor were the heirs at law of Nancy S. Smith, the original grantor, notified of this proceeding. The limitation in the original deed reads as follows: Mrs. Nancy S. Smith on 6 April, 1880, for $1 and natural love and affection bargained, sold, and conveyed to B. R. Smith (her son), his heirs and assigns, the land described

in the deed, "in special trust for the sale and separate use and benefit of Elizabeth Jane Lee during her life, free from the debts and control of her husband, Junius M. Lee, and after her death to the use of the said Anna B. Lee and B. Rush Lee, their heirs and assigns forever; and in the event of the death of either the said Anna B. Lee or B. Rush Lee without issue, then to the use of the survivor and his or her heirs forever; and in the event of the death of both the said Anna B. Lee and B. Rush Lee without issue, then to the use of the said Lillian A. Smith and W. Barnard Smith and their heirs; and in the event of the death of either the said Lillian A. or W. Bernard Smith without issue, then to the use of the survivor of them and his or her heirs; and in the event of the death of them both in the lifetime of their father, then to the use of Mrs. Carrie E. Smith during her life and (surviving her husband) widowhood, with remainder to the right heirs of the parties of the first part: *Provided,* and it is hereby expressly agreed, that the said Elizabeth Jane Lee shall not have the power to sell her said estate or the profits arising therefrom by anticipation or otherwise; and *Provided, also,* and it is hereby agreed and declared, that it shall and may be lawful to and for the said Nancy S. Smith, party of the first part, at any time during her natural life, by any writing or writings under her hand and seal, testified by two or more credible witnesses, or by her last will and testament in writing, so testified as aforesaid, to alter, change, revoke, annul, and make void all and every the use and uses, estate and estates hereby limited, appointed, and declared, and any other use or uses, estate or estates thereof, to limit, appoint, and declare, as to her, the said Nancy S. Smith, shall seem meet."

Plaintiff has deeds in due form, executed by the respective parties, purporting to convey to him all interests of Elizabeth Jane Lee, life tenant, and of Lillian S. Springs and her husband, which deeds contain full covenants of seizin, right to convey, and warranty, further assurance, and against encumbrances. Plaintiff also has a deed from W. D. Wilkinson, trustee, conveying to him all of the title of the said Wilkinson.

Plaintiff contends that his title to the land described in the contract and the deed tendered by him is good and indefeasible, upon the following grounds:

1. The deed of the life tenant is valid, and effectual to pass her interest to the plaintiff.

(721) 2. The deed of the contingent remainderman is valid.

3. The legal title is not outstanding.

4. The heirs of Nancy S. Smith do not have an outstanding reversionary interest.

5. The deed which the plaintiff has tendered is sufficient to convey to the defendant an indefeasible fee-simple title to the land.

Defendant, on the contrary, says that the title is not good and indefeasible and that plaintiff cannot comply with the contract on his part, for the following reasons:

1. The deed of the life tenant is void, and ineffectual to pass her interest to plaintiff.

2. The deed of the contingent remainderman is not valid.

3. The legal title is still outstanding.

4. The heirs of Nancy S. Smith have an outstanding reversionary interest.

The court was of the opinion that the plaintiff is seized and possessed of a good and indefeasible title and that the deed tendered by him is sufficient to convey the same to the defendant, and adjudged that the contract be specifically performed and that defendant pay the amount of the purchase money and interest and that plaintiff deliver the deed to him. There were other provisions in the decree to provide against a default.

Defendant excepted and appealed.

C. W. Tillett, Jr., for plaintiff.

Clarkson & Taliaferro for defendant.

WALKER, J., after stating the case: The first objection to the title, which the plaintiff has offered by his deed, is that one of his grantors, Mrs. Elizabeth J. Lee, was by the deed of Mrs. Nancy S. Smith, the original source of title, forbidden to sell her life estate or the proceeds arising therefrom by anticipation or otherwise. There is such a provision in the deed, but, being a condition subsequent and one that is void as against public policy, she held her estate discharged of it. There is a conflict in the authorities, but this Court has for many years consistently held that the doctrine as to restraints on alienation applies as well to estates for life as to estates in fee simple, and to equitable estates as well as to legal estates. "A restraint on the alienation of an equitable estate is as much against public policy as is a restraint on the alienation of a legal estate. Certainly no one has ever shown a distinction." Gray's Restraints on the Alienation of Property (1895), p. 241. This is a well settled rule, as is shown clearly in our decisions, and the sound reasons for its adoption are fully stated. The question is so fully discussed in the comparatively recent case of *Wool v. Fleetwood,* 136 N. C., 460, that a bare reference to the other cases (722) is all that is required to show that it has long been the accepted doctrine of this Court. *Dick v. Pitchford,* 21 N. C., 480; *Mebane v. Mebane,* 39 N. C., 131; *School Comrs. v. Kesler,* 67 N. C., 447; *Pace v. Pace,* 73 N. C., 119; *Hardy v. Galloway,* 111 N. C., 519; *Pritchard v.*

Bailey, 113 N. C., 521; *Latimer v. Waddell,* 119 N. C., 370; *Christmas v. Winston,* 152 N. C., 48, and *Trust Co. v. Nicholson,* 162 N. C., 257; 24 A. and E. Enc. of Law, 870, and notes. "The capricious regulations which individuals would fain impose on the enjoyment and disposal of property must yield to the fixed rules which have been prescribed by the supreme power as essential to the useful existence of property." *Dick v. Pitchford, supra.* We have simply followed the English rule.

The recognized exception to the principle that provisions against alienating life interests are void is in the case of a married woman. About the beginning of the eighteenth century equity established the doctrine of the separate estate of married women, by which they could have equitable interests in property apart from their husbands and free from their husbands' control. This doctrine has always been distinctly regarded a violation of the rules of law, introduced for the benefit of married women. Gray on Restraints, pp. 138, 139. That writer says, at secs. 141, 142: "It was found that the doctrine gave very imperfect protection to married women, because they were still in danger of parting with their property under the influence or threats of their husbands, and *Lord Thurlow,* at the end of the last century, invented the clause against anticipation, which was generally adopted, and the validity of which it was declared by *Lord Eldon,* in 1817, in *Jackson v. Hobhouse,* 2 Mer., 483, 488, to be too late to question. It is only, however, in connection with the separate estate of a married woman that this restraint upon anticipation has been allowed in England; and the general doctrine that neither law nor equity allows any person, except a married woman, to have an alienable life interest has been constantly asserted. Thus, per *Lord Cottenham, Chancellor,* in the great case of *Tullet v. Armstrong,* 4 Myl. and Cr., 377, 393, 394, 405: 'The power (to prohibit anticipation) could only have been founded upon the power of this Court to model and qualify an interest in property which it had itself created, without regard to those rules which the law has established for regulating the enjoyment of property in other cases.' 'The separate estate and the prohibition of anticipation are equally creatures of equity, and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other. The two must stand or fall together.' When this Court first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy her separate estate as a *feme sole,*
(723) the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and, by another violation of the laws of property, sup-

ported the validity of the prohibition against alienation." This is a satisfactory view of the rule, its origin and development.

But the exemption of a married woman's separate equitable estate was intended for her protection just so long as she needs it, for that purpose; but when the marital tie is severed by the death of the husband, as in this case, it is required no longer as a protection against his improvidence. *Ruffin, C. J.*, says in *Mebane v. Mebane, supra:* "The doctrine rests upon these considerations: that a gift of the legal property in a thing includes the *jus disponendi,* and that a restriction on that right, as a condition, is repugnant to the grant, and therefore void; and that, in a court of equity, a *cestui que trust* is looked on as the real owner, and the trust governed in this respect by the same rules which govern legal interests; and, consequently, that it is equally repugnant to equitable ownership that the owner should not have the power of alienating his property. There is, indeed, an exception to the general rule, which is founded on the peculiar incapacities of married women and their subjection to their husbands. A gift in trust for the separate use of a married woman, or in contemplation of her marriage, may be coupled with a provision against alienation or anticipation; for, in truth, the restriction is imposed for her protection, and, as she is *sub potestate viri,* it will more frequently operate as a beneficial protection than in prejudice to her. But restraints, as conditions merely, upon alienation by a person *sui juris* have been held in a great number of cases to be null, as regards property given through the medium of a trust; and several of them are cited in *Dick v. Pitchford, supra.*" 8 Ruling Case Law, secs. 174, 175, 176, contains a clear and succinct statement of the doctrine.

But we have said when the reason for the exception in favor of a married woman ceases, the rule will then operate as fully as if there had been no exception, and this is when she becomes discovert by death or absolute divorce, so that her husband has no further control or dominion over her. Cord in his Treatise on the Legal and Equitable Rights of Married Women says at p. 427, sec. 1163: "A further and very important protection over property settled on the wife at the time of her marriage, for her separate use, is a clause against a power to sell, convey, or assign, by anticipation; such is held to be an obligatory and valid mode of securing the same more effectually to her against marital influences. This restraint, however, ceases on the death of her husband, the reason and expediency for it having ceased." A learned and able review of this subject, with a full citation of authorities bearing upon it, will be found in 2 Kent Commentaries, 12 Ed. (724) (1873), side page 170, notes b and (1). It is there said that "a clause in a gift or deed of settlement upon the wife, against anticipation,

is held to be an obligatory and valid mode of preventing her from depriving herself, through marital or other influence, of the benefit of her property." The notes to the text will show that the courts have regarded the restraint as entirely inoperative when she is discovert.

Junius M. Lee died in the year 1902, and the restraint on alienation or anticipation was void from that time, and as the deed of Mrs. Lee, his widow, was executed on 11 January, 1916, the title it passed was unaffected by this provision of Mrs. Nancy S. Smith's deed. Nor do we think that, because the restraining provision is in the form of a covenant, it is any more valid than if it had been called a condition. A covenant which is against public policy is no more enforcible, and of no greater force or effect, than a mere condition. Both restrain and are equally void. *Jervis v. Burton,* 2 Vernon, 251. "Invalid conditions or provisions against alienation in a deed or will do not defeat the estate to which they are annexed. In such cases the gift stands and the invalid condition or provision is rejected." 24 A. and E. Enc. (2 Ed.), p. 872.

There is no provision for a limitation over upon breach of the condition or covenant in this deed, which might save the condition. *Wool v. Fleetwood, supra;* Gray's Restraints on Alienation, sec. 780. But the defendant contends that as Mrs. Lee signed the deed, and thereby agreed by the terms of her covenant not to alien her estate, and as plaintiff also signed the deed, and thereby assented to the covenant restraining Mrs. Lee from conveying away her estate, they are both now estopped to violate it, as they escaped a revocation of the limitations by Mrs. Smith during her lifetime by strictly adhering to the covenant, and should not be allowed to take advantage of her death after they have received the benefit of the gift and after the power of revocation is gone. This would enforce a restriction by estoppel, which the law declares void. The covenant was a "dead letter" when it was entered into, and we do not think it can be vitalized in this way. Because Mrs. Lee did not convey in the lifetime of her mother, and not until thirty years thereafter, is no reason why the parties should be estopped for not observing a void provision in the deed. If in the lifetime of her mother Mrs. Lee had aliened her estate, there is nothing to show that Mrs. Smith would not have assented thereto, notwithstanding the restraint. When Mrs. Smith died her power of revocation ceased, and the clause of restraint on alienation being void, there is nothing to prevent a conveyance by Mrs. Lee of her interest. We can discover none of the elements of an equitable estoppel in the case, and nothng more than the exercise of a legal right to part with her life estate in
(725) the land.

The defendant's next contention is that plaintiff has only a contingent interest, as his estate is liable to go over before his death without issue and vest in Mrs. Lillian A. Springs, wife of R. C. Springs, the other donees, Anna B. Lee and W. Bernard Smith, having died without issue. But Mrs. Springs and her husband have conveyed their interest and estate to the plaintiff. This is admitted; but defendant attacks the deed upon the ground that it is void, as it conveys only a contingent remainder or a defeasible fee. This Court has frequently held that such an estate may be conveyed. *Bodenhamer v. Welch,* 89 N. C., 78; *Wright v. Brown,* 116 N. C., 26; *Brown v. Dail,* 117 N. C., 41; *Kornegay v. Miller,* 137 N. C., 659; *Cheek v. Walker,* 138 N. C., 446; *Beacom v. Amos,* 161 N. C., 357; *Hobgood v. Hobgood,* 169 N. C., 485; *Scott v. Henderson, ibid.,* 660. We said in *Kornegay v. Miller, supra,* at p. 664: "It is true, as stated in the argument, that a possibility cannot be transferred at law. But by a possibility we mean such an interest or the chance of succession which an heir apparent has in his ancestor's estate. . . . But executory devises are not considered as mere possibilities, but as certain interests and estates. After citing *Gurnell v. Wood,* Willes, 211, and *Jones v. Roe,* 3 T. R., 93, in which may be found an interesting review of the cases, the learned judge says: 'In the last case the judges seem to have considered it as settled that contingent interests, such as executory devises to persons who were certain, were assignable. They may be assigned, says Atherly, p. 555, both in real and personal estate, and by any mode of conveyance by which they might be transferred, had they been vested remainders.' It is true that the deed in that case was sustained upon other grounds, but the language used shows the opinion held by the learned and eminent judge who wrote for *Ruffin, Gaston,* and himself." And in *Cheek v. Walker, supra,* the Court held, as appears in the syllabus: "Where a father devised to his son (the plaintiff) certain property, and by a codicil provided if his son 'dies unmarried or leaving no children' the property shall go to certain relatives: *Held,* that deeds executed by said relatives and by the children of such as were dead, conveying to the plaintiff 'all the right which they now have or may hereafter have' in said property, vest in him an indefeasible title." And again: "Contingencies, which import a present interest of which the future enjoyment is contingent, are devisable and descendible, and may be the subject of release in certain cases, operating as an estoppel on the heirs and effectual as a valid conveyance." That would seem to be our case exactly, and there are others of those above cited which are strikingly similar in their facts. Mrs. Springs did not have a bare possibility, as assumed by defendant, but "a certain interest and estate," subject, it is true, to the happening of a contingent event, but nevertheless sufficiently certain, or rather

probable, to make it the subject of an assignment by a proper in-
(726) strument of conveyance. Unlike a bare possibility, as the heir's expectancy in his parent's estate, it does not depend upon the mere violation of any one, but is an interest which is fixed by the deed or will creating it, and which will finally vest in interest and possession if the event takes place.

The third position of defendant is that the legal title is outstanding. As to Mrs. Lee's life estate, so long as her husband lived, it was necessary that the trust for her separate use and maintenance should continue, as it was then active; but when her husband died, and the disability of coverture was removed, and there was no longer any necessity for a trustee to protect her interest, and as the trust then became passive, the statute executed the use and united the legal and equitable estates in her. *Cameron v. Hicks,* 141 N. C., 21; *Perkins v. Brinkley,* 133 N. C., 154; *Springs v. Hopkins, ante,* 486. "Where the use is executed by the statute, the trustee takes no estate or interest, both the legal and equitable estates vesting in the *cestui que trust;* but where the use is not executed, the legal title passes to the trustee. The extent and quality of the estate taken by the trustee depends largely upon the purposes of the trust and the duties imposed thereby, as expressed in the terms of the instrument creating the trust, which the court will so far as possible construe to best effectuate the intention of the creator. The estate of the trustee is commensurate with the powers conferred by the trust and the purposes to be effectuated by it; or, in other words, the trustee takes exactly that quantity of interest, whatever it may be, which the purposes of the trust and its proper execution may require, and no more; and the purposes of the trust being executed, the trustee's estate ceases, the title passing by operation of law to the *cestui que trust.*" 39 Cyc., 207.

As to the balance of the estate, viz., that given defeasibly to B. Rush Lee, and alternatively, upon his dying without issue, to Mrs. Lillian Springs, by way of shifting use or conditional limitation (*Smith v. Brisson,* 90 N. C., 284), there is no necessity that the legal estate originally vested in B. R. Smith, as trustee, should continue in him or his heirs, he having since died, because, as stated in *Kornegay v. Miller, supra,* and *Beacom v. Amos, supra,* the three estates, the life estate of Mrs. Lee, the estate given to B. Rush Lee in remainder, and the one limited over to Mrs. Springs, have all united in the plaintiff, and the original estate of the plaintiff and that of Mrs. Springs have thereby been divested of their contingent character. They have all, so to speak, merged in one and the same person, and no trust is required to preserve any contingent remainder, if such there was, before the conveyances were executed. 16 Cyc., 656. The estate given to the plaintiff by

the deed was a vested one—subject, it is true, to be divested upon the happening of the contingency, when the use will shift to Mrs. Springs; but nevertheless a vested one, as the conditional element (727) is not incorporated into the description of the gift to the remaindermen, but the interest is fully vested and a clause is added divesting it, which makes it a vested remainder. *Starnes v.* Hill, 112 N. C., 1; *Whitesides v. Cooper,* 115 N. C., 570; 2 Minor's Institutes, 814. The statute executed this use, or transferred the seizin to the person having the use.

This is not the case of a trustee who is appointed to preserve contingent remainders, as we have shown. Mr. Perry, in his work on Trusts (5 Ed.), sec. 378, says: "Executory devises are a species of testamentary dispositions allowed by courts of law, and when properly exercised they pass the legal estate or interest to all persons in favor of whom the dispositions are made. They are devises to take effect at a certain time in the future, or upon a certain event, and in favor of certain persons. Limitations by way of springing or shifting uses are similar in effect, except that they are created by deeds *inter vivos,* and are based upon the statute of uses. Whenever the event happens when a shifting or springing use is to take effect, the statute of uses vests the legal seizin and ownership in the person entitled by virtue of the use."

We do not ignore rules of law in construing deeds and other instruments, where there is doubt as to the intention, and construction is necessary; but where the intention is clearly expressed, a rule of law will not be allowed to defeat it, and where technical language is used, we presume the intention to be as thus expressed and as the law construes it. *Wilkins v. Norman,* 139 N. C., 40. But in any view taken of the deed, the construction must be as we have stated it. It is said in 2 Washburn on Real Property (5 Ed), p. 678, marg. p. 294: "In one important respect the law as to future executory uses, answering to springing and shifting uses, varies from that relating to contingent remainders by the way of uses as it stood until the late statutory regulations upon the subject; and that is, as to the former being affected by the changes in or destruction of the estates which precede them. It is only necessary to repeat that, in case of a contingent remainder, by destroying that upon which it depends; but nothing which the owner of a prior limited estate, in the case of a springing or shifting use, can do can bar or affect the latter, since the second estate does not depend upon the first."

We do not see, therefore, that, under our procedure, the trustee was a necessary party to the suit for a reinvestment of the land upon the uses declared in the deed, as he had no real interest in it. *Smith v. Moore,* 142 N. C., 277. The plaintiff and Mrs. Lillian A. Springs were parties,

and there were other heirs of Mrs. Nancy S. Smith, who were parties, and all vested and contingent interests were represented by some of the parties to the suit. This is said in addition to the fact that Mrs.
(728) Springs has conveyed her interest to the plaintiff and the other limitations over have been defeated. *Smith v. Moore, supra.* The trustee had nothing to do but to hold the legal title, and when it became unnecessary to do this, or the trust ceased to be active, the statute executed the use, and he, therefore, had no interest in the suit. *Smith v. Proctor,* 139 N. C., 314; *Gomez v. Gomez,* 81 Hun, 566. It should further be said that the limitation over to the use of Mrs. Carrie E. Smith for life or widowhood, with remainder to the right heirs of the donor, has been defeated, as it was dependent upon an event which did not happen, viz., the death of both Lillian A. and W. Bernard Smith, in the lifetime of their father, W. Mc. Smith, and Lillian A. Smith, now Mrs. R. C. Springs, survived him. *Smith v. Moore, supra.*

We cannot adopt the suggested view that if Mrs. Springs should die at any time without issue the use would shift to the heirs of Mrs. Nancy S. Smith, Mrs. Carrie E. Smith, the life tenant, having died. The estate became absolute in Mrs. Springs upon her surviving her father, and this was the clear intention of the donor; otherwise she would have expressed her intention differently. Both the life estate of Mrs. Carrie E. Smith and the remainder in fee of the heirs were made dependent upon the death of Mrs. Springs in the lifetime of her father. There is no violation of the rule against perpetuities, as the dying of each party, B. R. Lee or Lillian A. Smith (Mrs. Springs) without issue, means, under our statute (Revisal, sec. 1581), a dying without having issue living at the time of her or his death.

We have found no error in the judgment of the court.

Affirmed.

Cited: Brooks v. Griffin, 177 N.C. 9 (1c, 2c); *Norwood v. Crowder,* 177 N.C. 471 (1c, 2c); *Pilley v. Sullivan,* 182 N.C. 496 (1c, 2c); *Bank v. Sternberger,* 207 N.C. 819 (3c); *Murdock v. Deal,* 208 N.C. 756 (1c, 2c); *Chinnis v. Cobb,* 210 N.C. 108 (3c); *Woody v. Cates,* 213 N.C. 793 (6c); *Williams v. McPherson,* 216 N.C. 566 (1c); *Fisher v. Fisher,* 218 N.C. 48 (3c); *Buckner v. Hawkins,* 230 N.C. 101 (1c).

NORTH CAROLINA BESSEMER COMPANY v. PIEDMONT HARDWARE COMPANY ET AL.

(Filed 24 May, 1916.)

1. Appeal and Error—Order at Chambers—Objections and Exceptions.

An appeal from the order of a judge rendered in a pending action at chambers, and the sole ground of the appeal, does not require the service of a case on appeal by the appellant, and a motion to dismiss in the Supreme Court for that reason will be denied.

2. Same—"Skeleton Case"—Order to Copy Record—Case Complete.

Where an appeal is taken from an order made in a pending action by the judge at chambers, he has the right to direct the clerk what to copy from his record in the transcript on appeal; and when this has been done, and the record appears to be in full, the appellant's case will not be dismissed on the ground that a "skeleton case" on appeal has been served.

3. Receivers — Sales — Insolvent Corporations—Issues of Fact—Trial by Jury—Adjudication at Chambers—Appeal and Error.

Where receivers for an insolvent corporation have been appointed and the corporate property ordered to be sold by them and a party enters an interplea claiming prior lien upon certain of its standing timber, upon which issue has been joined, the question presented is for the determination of the jury, unless such trial has been duly waived; and it is reversible error for the judge, at chambers, to adjudicate the fact of lien and the amount; but the order for the receivers to sell will stand, it being their duty to do so to the best advantage, and retain the proceeds subject to the further orders of the court.

CIVIL ACTION pending in the Superior Court of MCDOWELL (729) County, heard at chambers at Marion, 3 February, 1916, by *Justice, J.* From the order made the petitioners William Morrison and N. B. Mills and the defendant the Piedmont Hardware Company appealed.

W. D. Turner and Dorman Thompson for appellants.

Hudgins & Watson, Guthrie & Guthrie, Pless & Winborne for appellees.

BROWN, J. The appellees move to dismiss the appeal uponthe ground that only a "skeleton case on appeal" was served, and rely upon the ruling of this Court in *Sloan v. Assurance Soc.*, 169 N. C., 257. In that case the appellee objected to the case on appeal as not being in the form required by law. Revisal, 591. The case as served was sent to this Court. Without such objection, not even by consent, would this Court act upon such a statement of a case as is shown in the record of

the *Sloan case.* That case was tried by jury, and nothing was sent up to us except a skeleton with blanks that had never been filled in. This case presents an appeal from an order of the judge at chambers. That alone is the basis of the appeal, and it is set out in full. No case on appeal was necessary. *Comrs. v. Scales, ante,* 523. That with the pleadings and orders theretofore made constitute the entire record. In stating the case the judge had the right to direct the clerk what orders to copy in the transcript for this Court. They have been copied and are before us. We find the record to be complete in every particular. The motion is denied.

It appears from the record that the plaintiff, the Bessemer Company, brought this action to recover an amount alleged to be due said Bessemer Company, and also asking for the appointment of a receiver for said Piedmont Hardwood Company. The motion for a receiver was heard on 12 July, 1915, by *Harding, J.,* at Marion, and after hearing said motion his Honor appointed W. E. Webb and W. K. M. Gilkey receivers. This order provided that service should be made on stockholders, creditors, dealers and others in the manner and way provided
(730) by statute. At September Term, 1915, of the Superior Court of McDowell County order was made that all parties holding claims against the Piedmont Hardwood Company should make proof of such claims to the receivers on or before 1 January, 1916, and that the receivers should give notice of this order.

Thereafter a controversy having arisen as to the right of the receivers to sell the uncut timber standing on the lands of the North Carolina Bessemer Company, and the receiver, Gilkey, having refused either to sell said timber or to ask the court for instructions, certain creditors of the Hardwood Company moved before *Judge Adams* for an order to Gilkey to show cause why he should not sell the timber.

In his order of 19 January, 1916, *Judge Adams* recites that Morrison and Mills are creditors of the Hardwood Company for the purpose of that motion, and directed that the receivers show cause before *Justice, J.,* at Marion why they shall not carry out the orders heretofore made relative to the sale of standing timber. This motion was heard before *Judge Justice* on 3 February.

At this hearing Receiver Gilkey answered and the Bessemer Company, plaintiff, made response.

M. L. Good, who had heretofore made himself a party plaintiff in the suit, filed an interplea, claiming a lien on the manufactured lumber in the possession of the receivers. To this interplea the Hardwood Company replied, denying the material allegations upon which the claim of lien is based. Upon this hearing the judge made a decree to which

appellants excepted. The parts of the decree to which appellants except are as follows:

1. That the Piedmont Hardwood Company is indebted to the plaintiff, the Bessemer Company, in the sum of $11,216 and interest, being balance due for purchase price on standing timber, and that said plaintiff has a vendor's lien on the timber for said sum.

2. The court adjudged that the Hardwood Company was largely indebted to interpleader Good and that he has a first lien on the manufactured lumber in hands of the receivers, and directed that receivers pay to him on account the sum of $5,000.

We are of opinion that the exceptions are well taken. At this stage of the case the judge erred in adjudicating the debts claimed by the Bessemer Company and by Good, and in directing the payment of $5,000 to the latter. The allegations of the Bessemer Company and of interpleader Good were denied. Upon the issues raised, a jury trial must be had, unless specifically waived. The judge at chambers had no power to make final adjudication upon such issues. The order is set aside except so much as requires the receivers to sell the standing timber. It is their duty to do so to best advantage and to hold (731) the proceeds subject to the further order of the Superior Court.

The costs of this Court are adjudged against the Bessemer Company and M. L. Good.

Error.

Cited: Redding v. Dunn, 185 N.C. 311 (1d); *Winchester v. Brotherhood of R. R. Trainmen,* 203 N.C. 743 (1c); *Privette v. Allen,* 227 N.C. 165 (1c); *Hall v. Robinson,* 228 N.C. 45 (1cc).

J. W. WALTER v. B. A. EARNHARDT.

(Filed 10 May, 1916.)

1. Claim and Delivery—Notes—Equity—Cancellation.

A maker of a note who has paid it may sue in equity for its cancellation and delivery, and under our statute, Revisal, sec. 859, he may also maintain claim and delivery if he does not desire to enforce the equity of cancellation.

2. Bills and Notes—Payment—Possession—Right of Action.

The maker of a note who has paid it becomes the owner thereof and is entitled to its possession, as between the immediate parties, and may maintain his action therefor.

APPEAL by defendant from *Long, J.*, at January Term, 1916, of CABARRUS.

H. S. Williams for plaintiff.
Maness & Sherrin for defendant.

CLARK, C. J. This was an action begun before a justice of the peace to obtain the possession of a certain note given by the plaintiff to the defendant. The note was originally for $350. Later $200 was credited thereon. There was some dispute between the parties as to the balance due on a settlement of accounts, and the plaintiff testified that the defendant and he made a compromise by which the defendant would take $25 off the note if the plaintiff would pay the balance. They made a calculation, he says, and found that, including the interest, the balance due on the note was $160.15, and thereupon he paid Earnhardt $135.15 in full settlement according to the contract, and Earnhardt said that he would credit the note, according to the compromise, with the other $25, but that the note was in bank and that he would go there and cancel it. Some two months afterwards the plaintiff met the defendant and asked him for the note, but he refused to give it up.

According to the evidence, the note was originally given for a pair of mules, but later the defendant had sold plaintiff a young horse which did not come up to the warranty, and by the compromise the note was to be credited with $25 on that account. The defendant did not put (732) on any evidence. The jury found, on the issues submitted, that the compromise was made that upon payment of all the note except $25 the note would be paid and settled; that the plaintiff made the payment as agreed, but that the defendant has failed to comply with his agreement, and, though in possession of the note, refused to surrender it.

There is no controversy over the facts, and the defendant relies upon his motion to nonsuit, which the judge refused. It is true, the plaintiff might have brought an action in equity for the cancellation and surrender of the note; but under our statute, Revisal, 859, the compromise, which the jury finds was made, was valid at law and enforcible, and the plaintiff was entitled upon the issues of fact found to have the note treated as paid and settled, and, therefore, to have the same delivered to him. For that purpose claim and delivery was as suitable to procure the possession of the note as a decree in equity would have been for the cancellation and delivery of the note as the result of payment.

Claim and delivery is an appropriate proceeding to recover the note when no decree of cancellation or other equitable decree is sought. *Bridgers v. Ormond,* 148 N. C., 377; *Pasterfield v. Sawyer,* 133 N. C.,

43; *s. c.*, 132 N. C., 259; *Ragland v. Currin*, 64 N. C., 357. The remedy here asked is purely legal—for possession of the note.

If it was agreed, in compromise, as plaintiff testified and the jury have found, that upon payment of all the note except $25 the note was to be deemed paid (and it is admitted that the plaintiff has done this), then the note became the property of the plaintiff, and he was entitled to have it delivered up to him by the defendant. The plaintiff has chosen to enforce this right to the specific possession of the note, instead of resorting to a proceeding in equity to obtain an order of the court to have the note canceled. He probably chose this remedy because of the small amount involved ($25). He had a right to elect this remedy, if he so chose. The courts are no longer so solicitous as to the technical form of remedy, but seek to render justice by the most direct and expeditious method, and when practicable will permit the remedy selected by the plaintiff.

The jury find that the note has been paid in accordance with the compromise, and the plaintiff is therefore entitled to its possession. It is true that as the note has been settled, it is of no value to the defendant, but the plaintiff after payment thereof is entitled to its possession, as a receipt or as a proof of payment. Indeed, the defendant is claiming that he is entitled to collect the other $25 upon the note, and hence refuses to surrender it. But the verdict has settled this against him.

If I were speaking for myself, and not for the Court, I should say that there is no reason, the amount being less than $200, why an equitable decree might not be made before the justice's court for cancellation. It has been said that "the justice has no equitable jurisdiction," but nothing to this effect can be found in the Constitution, which (733) absolutely abolishes all distinction between law and equity. The justice of the peace cannot issue an injunction, neither can a justice of this Court, but that is simply because the statute does not provide for it. However, this is merely speaking for myself for the future consideration of the Bar. Preconceived opinions are not infrequently mistaken for provisions which have been abolished, and not continued in force, by the Constitution.

No error.

WALKER and ALLEN, JJ., concurring in result.

Cited: Bradshaw v. R. R., 183 N.C. 265 (1c).

JOHN SILLS v. G. W. FORD.

(Filed 26 April, 1916.)

1. Equity—Deeds and Conveyances—Correction—Quantum of Proof—Instructions—Trials—Questions for Jury.

Where there is sufficient evidence of mutual mistake of the parties to a deed sought to be corrected in a suit, it is for the jury to decide whether it is clear, strong, and convincing, under a proper charge from the court.

2. Equity—Deeds and Conveyances—Correction—Mutual Mistake—Draftsman.

Equity will correct or reform a deed to lands *inter vivos*, where through mutual mistake, or the mistake of one of the parties induced or accompanied by the fraud of the other, it does not, as written, truly express their agreement; and this principle extends to the mistake of the draftsman in failing to express the terms of the agreement for the parties thereto, in accordance with their instructions.

3. Same—Evidence—Denial of Mistake—Questions for Jury.

Where the evidence is conflicting as to whether a deed, through mutual mistake, or the mistake of the draftsman, failed to express the intention of the parties, as written, a denial of the mistake by one of the parties will not of itself defeat the equity for correcting the instrument, and the issue is for the determination of the jury, under proper instruction from the court as to the degree of proof required.

4. Equity—Deeds and Conveyances—Correction—Privity—Parties.

The equitable relief of correcting a deed for mutual mistake or fraud will not be afforded one who is not a party to the original transaction, or claiming under or through the parties in privity.

5. Same—Registration—Statutes.

Since the enactment of our registration law, chapter 147, Public Laws 1885, a grantee in a deed to lands acquires title thereto, as against subsequent purchasers for value, from the date of the registration of the instrument (Revisal, secs. 979, 980); and where the grantor conveys the standing timber on land to A., and thereafter the land itself to B., who had his deed registered before that of A., and the former seeks to have B.'s deed corrected for mutual mistake or the mistake of the draftsman, the registration of the deed to B. makes it the first effective deed, and A., claiming title under his timber deed from the grantor of the land, is, consequently, in privity with B., and acquires, under the statute, the equity to have the deed corrected in his suit for that purpose against B., and the common grantor is not a necessary party. Revisal, sec. 980.

6. Equity—Deeds and Conveyances—Correction—Laches.

Where the timber on lands is conveyed to A. for a valuable consideration, and later his grantor conveys the lands to B., and the latter has his conveyance registered first, and A. seeks to have B.'s deed corrected so as to show that by mutual mistake of the parties it included the timber theretofore granted to him, it is held that A.'s right to the enforcement of

the equity will not be lost by his failure to have his deed sooner recorded, for if he succeeds in establishing his right it would be unconscionable to permit B. to keep the timber for which he has not paid, and which he knew was not intended to be conveyed to him by the deed.

CIVIL ACTION tried before *Peebles, J.*, and a jury, at August (734) Term, 1915, of FRANKLIN.

The action was brought to restrain the cutting of timber and to recover damages for timber already cut. The defendant claimed the pine timber under a deed executed to him by E. W. Gupton and wife on 19 March, 1913, registered 31 March, 1913, and the oak timber under a deed executed by said Gupton and wife to himself on 27 June, 1913, registered 18 December, 1914, which last deed also extended the time for the cutting and removal of the pine timber to 1 April, 1916.

The plaintiff claimed under a deed from E. W. Gupton and wife, which conveyed the land in fee, without exception or reservation of the timber, to him, dated 15 November, 1913, and recorded 2 December, 1913. It was alleged, however, by the defendant that the true contract between Gupton and wife and the plaintiff Sills was for the sale of the land, excepting and reserving the timber, and that the attorney who drew the deed, by mistake and inadvertence failed to insert a clause excepting and reserving the same in the deed. Both of the timber deeds to defendant had been executed before the deed to Sills, and defendant's sawmill was then on the land, sawing the timber, and so remained until the beginning of this action.

The attorney, who was a witness for defendant, testified that he drew all three deeds, the last deed to Mr. Ford about six months before the deed to John Sills; that he was instructed to draw the deed to John Sills with the reservation of the timber; that both parties were present and both understood the timber had been sold; that he did not then have time to draw the deed, but told them he would draw it as soon as he could and send it to them; that in drawing the deed afterwards (735) he forgot to insert the clause reserving the timber. His testimony is clear and is direct upon this point.

E. W. Gupton testified that prior to going to the attorney's office he informed John Sills of the sale of both the oak and pine timber to G. W. Ford, and of the extension of time for cutting and removing the pine timber, and that they instructed the attorney in John Sills' presence to "draw the deed in a way that Mr. Ford had bought the timber and also had the extension, and he had bought the oak timber, too."

The plaintiff in his testimony admitted that the attorney asked him if he knew the timber had been sold, and that he told him he did. He further testified: "I bought the land, knowing the timber had been sold. The reason I did not call some one's attention to the fact that the timber

reservation was not in the deed was because I did not know it had to be in the deed." This witness stated, though, that he thought reference was made to the deed for the pine timber in which the right to cut the timber was limited to 30 April, 1914, and not to the deed of E. W. Gupton and wife to G. W. Ford, which was executed 27 June, 1913, and conveyed the oak timber and extended the time for cutting the pine timber. He denied that he was present during the conversation with the attorney in the latter's office.

There was other evidence relating to the mistake in the deed of E. W. Gupton and wife to the plaintiff, John Sills, but it is not necessary that it should be stated here.

The following issue was submitted by the defendant and refused by the court on the grounds stated below:

1. Was the clause reserving the timber rights of G. W. Ford under his deed of March and 27 June, 1913, omitted from the deed from E. W. Gupton to John Sills by mistake of the draftsman?

Refused, upon the following grounds:

1. That it was admitted in open court that the land in question was the property of Mrs. E. W. Gupton, and neither she nor her husband were parties to this action.

2. There was no evidence to show that the timber reservation was left out by mutual mistake of Sills and Mr. and Mrs. Gupton.

3. That defendant was guilty of gross negligence in not having his deed recorded. Defendant excepted.

The court then submitted issues to the jury, and the following verdict resulted:

1. Is the plaintiff the owner and entitled to the possession of the land and timber therein described in the complaint? Answer: "Yes."

2. What damage has the plaintiff sustained by the unlawful cutting of timber and trespassing by the defendant as alleged? Answer: "$500."

The court charged the jury to answer the first issue "Yes" if
(736) they believed the evidence, and also instructed them upon the issue as to damages. The following is the full charge of the court upon the first issue:

"In 1885 the Legislature passed an act making a deed operative from its registration as against creditors and purchasers for value, and I believe the deed put in evidence alleges that Sills paid a valuable consideration for that land, and that registration of the deed is binding upon parties and privies, and as Gupton and his wife were parties and Ford is privy, the court charges you that upon that evidence you find the first issue 'Yes.'" Defendant excepted.

There was judgment upon the verdict, and defendant appealed.

W. M. Person and Ben. T. Holden for plaintiff.
W. H. Yarborough for defendant.

WALKER, J., after stating the case: There was sufficient proof of the mistake for the consideration of the jury. *King v. Hobbs,* 139 N. C., 170. Whether it was clear, strong, and convincing, being a question for them to decide, and not for the court. *Lehew v. Hewett,* 139 N. C., 6; *King v. Hobbs, supra; Glenn v. Glenn,* 169 N. C., 727. Whether the defendant G. W. Ford would have an equity to correct the deed from E. W. Gupton and wife to John Sills under the law as it was before the enactment of our present registration laws we need not decide, as we base his right to relief, as will hereafter appear, solely upon the legal effect of those laws which give the deed later in date, though earlier in registration, seniority and preference, as will appear hereafter. If the deed to John Sills is allowed to remain as it is, without any correction, the registration of the deed to him, before the date of recording the second or extension deed to the defendant G. W. Ford, will give John Sills the priority of right and title under Laws 1885, ch. 147 (Revisal, secs. 979, 980), provided he is a "purchaser for a valuable consideration" from his bargainors, E. W. Gupton and wife; and as to this no question seems to have been raised, it being tacitly understood, so far as appears, that he paid fair value for the land. Equity will correct or reform a written contract or other instrument *inter vivos,* where through mutual mistake or the mistake of one of the parties induced or accompanied by the fraud of the other it does not, as written, truly express their agreement. "The remedy of reformation is obviously one which is necessary to the complete and exact administration of justice, and which, moreover, can be obtained by equitable procedure alone. A court of law may construe and enforce an instrument as it stands, or may refuse, upon proper cause shown, to give any effect to it, or may treat it as a nullity. But it is plain that if the instrument has not been drawn so as to express the true intention of the parties, to enforce it in its existing condition would be simply to carry out the very mistake or (737) fraud complained of; while to set it aside altogether might deprive the plaintiff of the advantages of a contract to which he is lawfully entitled. It is obvious, therefore, that the only true measure of justice in such a case is the equitable remedy by reformation (or correction, as it is sometimes called), by means of which the instrument is made to conform to the intention of the parties, and is then enforced in its corrected shape. It need scarcely be added (parenthetically) that while equity has and exercises in proper cases the power to reform, it has no power to make a new contract. A court of chancery cannot (for example) change an agreement between A. and B. into one between A.

and C." Bispham's Pr. of Equity, sec. 468. And again: "The general principles by which the court is guided in such cases are well settled. A person who seeks to rectify a deed on the ground of mistake must establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently, in the minds of all parties, down to the time of its execution; and, also, must be able to show exactly and precisely the form to which the deed ought to be brought. To reform a contract, and then enforce it in its new shape, calls for a much greater exercise of the power of a chancellor than simply to set the transaction aside. Reformation is a much more delicate remedy than rescission. Hence, in order to justify a decree for reformation in cases of pure mistake, it is necessary that the mistake should have been mutual. Where the mistake has been made on one side only, the utmost that the party desiring relief can obtain is rescission, not reformation. The case is, of course, different if any element of fraud exists; for it has been properly held that where there is a mistake on one side, and fraud on the other, there is a case for reformation." Bispham's Pr. of Eq., sec. 469. This equity also extends to the inadvertence or mistake of the scrivener or draftsman who writes the agreement. If he fails to express the terms as they were agreed upon, the instrument will be so corrected as to be brought into harmony with them. In *King v. Hobbs*, 139 N. C., 172, it was said in regard to a mistake committed in reducing to writing an oral agreement by a justice of the peace selected by the parties for that purpose: "The plaintiff and the defendant then went to a justice of the peace to have their contract put in writing, and the justice evidently by inadvertence or mistake (whether of himself or the parties makes no difference) omitted a material stipulation. In such case all the authorities are agreed that the instrument will be reformed so as to express the true intent and meaning of the parties. This is not an instance of an essential mistake or misunderstanding in the agreement itself, nor where the written instrument is supposed to embody the first and only contract of the parties, but is a case of an error of expression where the parties have come to a
(738) definite agreement beforehand, and in the endeavor to put this agreement in writing a mistake is made, so that the instrument as drawn does not, in some material point, express the contract it was intended to evidence. In 20 A. and E. Enc. (2 Ed.), 823, it is said: 'That in mistakes of this kind the only inquiry is, Does the instrument contain what the parties intended that it should, and understood that it did? Is it their agreement? And it is wholly immaterial whether the defect is a staututory or common-law requisite, or whether the parties failed to make the instrument in the form they intended, or misapprehended its legal effect.' The authorities are numerous and fully bear

out this statement of the doctrine. *Stamper v. Hawkins,* 41 N. C., 7; *Warehouse Co. v. Ozment,* 132 N. C., 839; *Rogers v. Atkinson,* 1 Ga., 12; *Stines v. Hayes,* 36 N. J. Eq., 364; *Leitensdorfer v. Delphy,* 15 Mo., 137. In this last case it is held that 'Equity will correct a mistake, either as to fact or law, made by a draftsman of a conveyance or other instrument which does not fulfill or which violates the manifest intention of the parties to the agreement.' " And the denial of one of the parties that there was any mistake will not defeat the equity, but it depends altogether upon the finding of the jury from the pertinent evidence, which is of a clear, satisfactory, and convincing character, that a mistake was made in expressing the real agreement.

It was held in *Stines v. Hayes, supra:* "Nor will the fact that the defendant denies that there is a mistake, and testifies that the deed was drawn according to the intention of the parties, prevent the court from granting the relief if it is satisfied that the deed is not in accordance with the agreement, but ought to be so. And it has been held that the courts will correct an error of this kind when the complainant himself drew the paper. *Cassady v. Metcalf,* 66 Mo., 519."

But there is qualification of this rule in equity as to the correction of deeds and other instruments. The authorities are uniform in holding that the relief by reformation of a written instrument will be granted to the original parties thereto, and to those claiming *under* or *through* them *in privity.* Eaton on Equity, p. 621; 24 A. and E. Enc. (2 Ed.), p. 655, and note 87, and *Adams v. Baker,* 24 Mo., 162, in which case it was held: "In all cases of mistake in written instruments courts of equity will interfere only as between the original parties, or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them, with notice of the facts. Story's Equity Jurisprudence, sec. 165. Appellant belongs to neither of the above classes of persons in this case."

The defendant G. W. Ford was not a party to the contract or deed between E. W. Gupton and wife and the plaintiff John Sills, nor is he a privy thereto. He does not claim *under* Sills nor under the (739) Guptons by any deed subsequent to their deed to Sills. "A privy in estate is a successor to the same estate, and not to a different estate in the same property." *Pool v. Morris,* 29 Ga., 374 (74 Am. Dec., 68). The cases of *Dickinson v. Lovell,* 35 N. H., 9, and *Hunt v. Haven,* 52 N. H., 162, affirming the same, are cited by the authorities as stating the correct principle in regard to privity. It is there said in regard to one who is a privy: "He is any person who must necessarily derive his title to the property in question from a party bound by the judgment, return, etc., *subsequently* to such judgment, return, etc." See, also, *Coleman v.*

Davis, 36 S. W., 103; *Allan v. Hoffman,* 83 Va., 129. It is said in the last case, referring to *Dickinson v. Lovell, supra,* and treating the doctrine as extending to judgments operating as conveyances of the land: "In *Adams v. Barnes,* 17 Mass., 367, the Court states that 'A judgment which affects directly the estate and interest in the land, and binds the rights of the parties, is at least as effectual as a release or confirmation by one party to the other. Such an estoppel makes part of the title to the land and extends to all who claim under either of the parties to it.' 'A privy in blood, as, for instance, an heir, is bound by a verdict against the ancestor.' 2 Phil. Ev., side pages 6, 12-17. 'A privy in estate is any person who must necessarily derive his title to the property in question from a party bound by the judgment, return, etc., subsequently to such judgment, return,' etc. *Lovell v. Dickinson,* 35 N. H., 16." The rule is the same, in this respect, as to judgments and deeds. One claiming to stand in privity to a judgment must derive his title under a party bound thereby, and so one who asserts privity with respect to a deed must derive his title under the party to the deed and subsequently to its execution. It is said in *Patton v. Pitts,* 80 Ala., 373, 375: "To constitute one person a privy in estate to another, such other must be a *predecessor* in respect to the property in question, from whom the privy derives his right or title—a mutual or successive relationship," citing Greenleaf on Ev., sec. 189; *Hunt v. Haven, supra.* "Privity in estate denotes mutual or successive relationship to the same rights of property." *Mygatt v. Coe,* 124 N. Y., at 219. He who is in privity stands in the shoes or sits in the seat of the owner *from* whom he derives his title, and thus takes it charged with the burden attending it. Privity exists between two successive holders where the latter takes under the earlier of them, as by descent (for instance, a widow under her husband, or a child under its parent), or by will or grant, or by a voluntary transfer of possession, and privity exists because of the relationship between the parties, or because of the *derivative* character of their title. *Boughton v. Hardee,* 46 N. Y. App. Div., 352 (61 N. Y. Suppl., 574); *Sherrin v. Brochett,* 36 Minn., 154; *Hummell v. C. C. F. Natl. Bank,* 32 Pac., 72, 76; 32 Cyc., 392, and note 64; *Orthevin v. Thomas,* 127 Ill., 554.

(740) In the case last cited it is said that "A privy in blood or estate is one who derives his title to the property by descent or purchase." Bigelow on Estoppel (6 Ed.), 347; *Stacy v. Thrasher,* 6 How. (U. S.), 44-59. "There is a certain privity between the grantor and grantee of land. It is not the privity arising upon tenure, for there is no fiction of fealty annexed. It is however, the same sort of privity which enables the grantee of a purchaser to maintain an action upon the covenants of title given to his vendor." *Mygatt v. Coe, supra.*

This being the nature of privity, does it exist in this case? We are of the opinion that our registration laws supply the necessary privity, or, more properly speaking, that kind of mutual and successive relationship which is essential as a condition to the equitable right of reformation. As between two grantees, the one who first registered his deed, though the later in date of execution, obtains the title, provided he is a purchaser for value. Pub. Laws 1885, ch. 147; Revisal, sec. 980. The deed to the defendant G. W. Ford, from the common grantors, E. W. Gupton and wife, while good and effective as between them, was not valid to pass any property to him, as between him and the plaintiff John Sills, a subsequent purchaser, except from the date of its registration; and as Sills caused his deed from the Guptons to be registered some time before the deed to Ford was recorded, as provided by the statute, the deed to Sills took effect before the deed to Ford. The title of the Guptons passed by their deeds in the following order: first to John Sills and then to G. W. Ford, the same as if the two deeds had been executed on the dates respectively of their registration. This being so, there is such a mutual and successive relationship between the two parties, John Sills and G. W. Ford, as will enable the latter to avail himself of the equitable remedy of correction and have the deed to John Sills so reformed as to eliminate the mistake in the description and effectuate fully the intention of the parties to it. Under this construction of the statute G. W. Ford claims in privity with John Sills to the same extent and with the same legal effect as if the deeds to the two from the Guptons had been executed in the order above mentioned, and the grantees had promptly registered their deeds so as to preserve the same order of priority. In this view, based upon the purpose and operation of our registration laws, the dates of the respective deeds are unimportant and even immaterial, as the effectiveness of the two deeds from the same grantor to pass the title depends not upon their dates, but upon the order of their registration. Before chapter 147, Public Laws 1885, were passed, the law was different, and when a deed was registered its operation related back to the date of its execution. This view as to the effect of the statute is fully sustained by the authorities. In *Collins v. Davis,* 132 N. C., 106, 109, the opinion of the Court was delivered by *Justice Connor,* the author of the statute (Laws 1885, ch. (741) 147), and it is there said that, like deeds of trust and mortgages under the former law, deeds under the new law "can take effect only from and after registration, just as if they had been executed then and there," referring to and approving what had been decided under the former law (The Code, sec. 1254), with regard to deeds of trust and mortgages, in *Robinson v. Willoughby,* 70 N. C., 358, and in *Hooker v. Nichols,* 116 N. C., 157, where the Court adopted the same construction

in regard to deeds, under Laws 1885, ch. 147, that had theretofore applied to mortgages and deeds of trust. See, also, *Austin v. Staten,* 126 N. C., 783. The other cases are collected in the note to Pell's Revisal, sec. 980, at p. 524. It will be seen, therefore, that as between the two conflicting deeds from the same grantor, they take effect only from the dates of registration, and in the same order of succession as if they also had been the dates of their execution. The doctrine of privity, or mutual and successive relationship, debarred G. W. Ford under our former registration laws, as deeds then took effect when registered, by relation to the dates of their execution; but as this has now been changed and registration fixes the date when the deeds take effect, and as by this rule the deed to John Sills comes first, if he was a purchaser for value, and takes precedence over that to George W. Ford, it must follow, by force of the maxim, "Where there is the same reason, there is the same law," that there is sufficient privity or mutual and successive relationship between Ford and Sills to warrant the court in granting relief by reformation of the deed from the Guptons to John Sills.

All that we have said in regard to the registration of conflicting deeds from a common grantor must be understood to apply only to cases where the second grantee has purchased for value and registered his deed first, for these are essential to his right of preference. The first deed in order of execution, if registered first, will, of course, take precedence without regard to the consideration.

The argument may be reduced to this simple statement: that as John Sills has, by registration, procured the first effective deed, the defendant by his conveyance from the Guptons will be considered as having acquired their right to correct the mistake in it, and, therefore, to be in privity with Sills, both being grantees of a common grantor. 34 Cyc., 971. Having come to this conclusion, the case is brought within the principle stated and applied in *King v. Hobbs,* 139 N. C., 170, and *Moore v. Moore,* 151 N. C., 555.

We do not think the defendant G. W. Ford has been guilty of such negligence or laches as should deprive him of the right to have the Sills deed corrected, if there was such a mutual mistake in its description of the thing intended to be conveyed thereby as he alleges. It might open the door wide to the commission of fraud if we should so hold.
(742) If there was no mistake, the plaintiff acquired the better title by his diligence in having his deed promptly registered, and the defendant must bear the loss due to his tardiness; but not so if there was a mutual mistake and plaintiff's deed includes land, or any interest therein, which he did not buy, and, of course, has not paid for, as it would be unconscionable to retain it and refuse to do equity, or to keep it with the knowledge that it does not fairly belong to him. The regis-

tration law was intended to prevent fraud or dishonesty, and not to encourage or promote it. *Austin v. Staten, supra.* The actual rights of the respective parties will depend, of course, upon what the jury find in regard to the mistake. It is conceded, we believe, that John Sills is a purchaser for value.

There was error in the ruling of the court. The verdict and judgment will be set aside and a new trial ordered.

New trial.

Cited: Allen v. R. R., 171 N.C. 342 (2c); *Bank v. Redwine*, 171 N.C. 565 (5c); *Lynch v. Johnson*, 171 N.C. 632 (6c); *Potato Co. v. Jeanette*, 174 N.C. 244 (1c); *Maxwell v. Bank*, 175 N.C. 183 (2c); *Spence v. Pottery Co.*, 185 N.C. 221 (6c); *Spence v. Pottery Co.*, 185 N.C. 226 (6j); *Eaton v. Doub*, 190 N.C. 19, 22 (6e); *Lee v. Brotherhood*, 191 N.C. 360 (5cc, 6 cc); *Strickland v. Shearon*, 191 N.C. 566 (2d); *Crawford v. Willoughby*, 192 N.C. 271 (2d); *Lloyd v. Speight*, 195 N.C. 180 (3e); *Gardner v. B. & L. Asso.*, 202 N.C. 827 (2e); *Hubbard & Co. v. Horne*, 203 N.C. 208 (2c); *Hubbard & Co. v. Horne*, 230 N.C. 209 (3c); *Harvey & Co. v. Rouse*, 203 N.C. 299 (3c); *Davis v. Brigman*, 204 N.C. 682 (5cc); *Ins. Co. v. Edgerton*, 206 N.C. 407 (2c); *Lewis v. Pate*, 208 N.C. 514 (5c); *Crews v. Crews*, 210 N.C. 221 (2c); *Sansom v. Warren*, 215 N.C. 437 (6c); *Reynolds v. Wood*, 219 N.C. 628 (3e); *Waste Co. v. Henderson Bros.*, 220 N.C. 439 (1c); *Tocci v. Nowfall*, 220 N.C. 562 (6e); *Ins. Co. v. Knox*, 220 N.C. 728 (6e); *Bruton v. Smith*, 225 N.C. 587 (6j); *Trust Co. v. Braznell*, 227 N.C. 213 (5c); *Bailey v. Highway Com.*, 230 N.C. 118 (5c).

HATTIE WEST v. WILLIAM REDMOND.

(Filed 22 March, 1916.)

1. Marriage—Admissions—Evidence.

Where title to lands in controversy depends upon the legitimacy of a child born shortly after marriage, and the date of the marriage and the birth of the child are admitted, the questions as to the competency and legal effect of the record and other evidence offered to prove them are immaterial.

2. Husband and Wife—Wedlock—Children—Legitimacy—Presumption—Evidence—Rebuttal.

The law presumes the legitimacy of a child born in lawful wedlock, though within a short period of time after marriage; but the presumption may be rebutted by facts and circumstances which show that the husband

could not have been the father of the child, such as impotency or that he could not have had access to his wife.

3. Adultery—Marriage—Evidence—Admissions—Statutes—Slaves.

Where title to lands depends upon the legitimacy of the heir born in wedlock a short time after the marriage, evidence of the wife, on the issue of adultery, as to the nonaccess of the husband, is incompetent; and *a fortiori* evidence of her declarations to that effect made after her death.

CIVIL ACTION, tried by *Bond, J.*, and a jury, at November Term, 1915, of PITT.

This is a proceeding for the partition of land, tried upon an issue as to the legitimacy of the plaintiff, Hattie West.

It was admitted by the defendant: "That if plaintiff, Hattie West, is a legitimate child of William Wesley Redmond, alias Redmond
(743) Blow, alias Little Red Blow, then she owns an undivided one-half interest as tenant in common with defendant (owner of the other half interest) in the land described in complaint."

It was agreed by both sides that said William Wesley Redmond, alias Redmond Blow, alias Little Red Blow, was lawfully married to Olivia Wilkins; that both husband and wife are dead; that plaintiff, Hattie West, daughter of said Olivia, was born a few months after said marriage, and that said William Wesley Redmond was where he could have had access to said Olivia at time said Hattie was begotten.

The defendant proposed to offer, subject to its competency and legal effect, evidence tending to show the following facts:

1. Record of marriage, showing marriage between said Olivia Wilkins and said William Wesley Redmond on 31 January, 1890.

2. That Hattie (plaintiff) was born 25 May, 1890.

3. That a few days thereafter William Wesley Redmond and Hattie's mother (his wife) had a quarrel, in which William said he was not the father of Hattie and he was going to leave said Olivia, at which time said Olivia admitted that William was not Hattie's father, but that Henry Wilkes was, and said she reckoned Henry was able to take care of Hattie; that they then separated and never lived together thereafter; that defendant claims Hattie resembles Henry Wilkes and does not resemble William Wesley Redmond, and that Olivia on numerous occasions said Hattie was not William's child.

This evidence was excluded, and the defendant excepted.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

W. F. Evans for plaintiff.

Julius Brown for defendant.

ALLEN, J. The evidence offered by the defendant to prove the date of the marriage of Olivia Wilkins and William Wesley Redmond, and of the birth of the plaintiff, becomes immaterial, as the marriage was admitted and that the plaintiff was born a few months thereafter, and it is therefore only necessary to consider the admissibility of the declarations of the mother tending to prove the illegitimacy of the plaintiff.

A child born in wedlock is presumed to be legitimate, and, as stated by *Ruffin, C. J.*, in *S. v. Herman*, 35 N. C., 503, quoting from Coke on Littleton, this presumtion exists "if the issue be born within a month or a day after marriage." It is also stated by Coke, 244a, that "By the common law, if the husband be within the four seas, that is, within the jurisdiction of the King of England, if the wife have issue, no proof is to be admitted to prove the child a bastard unless the husband hath an apparent impossibilitie of procreation; as if the husband be but 8 years old"; but this has been modified by admitting evidence to (744) rebut the presumption of legitimacy which shows that the husband could not have been the father of the child. *Ewell v. Ewell*, 163 N. C., 236. The modern rule which generally prevails is that "When a child is born in wedlock, the law presumes it to be legitimate, and unless born under such circumstances as to show that the husband could not have begotten it, this presumption is conclusive; but the presumption may be rebutted by the facts and circumstances which show that the husband could not have been the father, as he was impotent or could not have had access." *S. v. McDowell*, 101 N. C., 734.

It is also generally accepted that in the absence of statutory authority a married woman is incompetent to testify to the nonaccess of her husband on the question of the legitimacy of her offspring. *Matter of Mills*, 127 Cal., 298, 91; *Craufurd v. Blackburn*, 17 Md., 49; *Scanlon v. Walshe*, 81 Md., 118; *Abindton v. Duxbury*, 105 Mass., 287; *Egbert v. Greenwalt*, 44 Mich., 245; *People v. Court of Sessions*, 45 Hun. (N. Y.), 54; *Ratcliff v. Wales*, 1 Hill (N. Y.), 63; *People v. Overseers of Poor*, 15 Barb. (N. Y.), 286; *Cross v. Cross*, 3 Paige (N. Y.), 139; *Bell v. Territory*, 8 Okla., 75, 853; *Dennison v. Page*, 29 Pa. St., 420; *Tioga County v. South Creek Township*, 75 Pa. St., 433; *Mink v. State*, 60 Wis., 583, 445; *Boykin v. Boykin*, 70 N. C., 262.

In the last case cited *Justice Bynum* says: "It is, then, conclusively settled that at common law neither the husband nor wife could prove access or nonaccess, and it is equally well settled that where they were not allowed to make such proof during marriage, neither will be allowed to do so after the death of the other, thus removing one great cause of distrust by making the confidence which once subsists ever afterwards inviolable in courts of law"; and he concludes that the statutory changes in the law of evidence have not affected the rule.

And the same principle which excludes the husband and wife as witnesses applies with greater force to their declarations because in both the same public policy is conserved, and as to declarations there is the absence of an oath, no opportunity for cross-examination and no opportunity for the jury to observe the demeanor of the declarant, which are recognized tests of truth, and which would be present if the husband or wife was examined as a witness.

It seems that the first time the admissibility of the declarations of the husband or wife on the question of illegitimacy was definitely settled was in *Goodright v. Moss,* 11 Eng. Rul. Cases, 520, decided in 1777, when *Lord Mansfield* said: "The law of England is clear that the declarations of a father or mother cannot be admitted to bastardize the issue borne after marriage"; and this has been generally followed, although there are some cases, involving issues of paternity and pedigree strictly, which appear to hold to a contrary view.

(745) In 8 Enc. Ev., p. 174, the author says: "Declarations of neither husband nor wife can be received for the purpose of assailing the legitimacy of a child born to the wife during wedlock"; and he cites many cases in the note in support of the text, among others, *Johnson v. Chapman,* 45 N. C., 217, where *Nash, C. J.,* says: "The only evidence upon which the defendants rely to prove the plaintiff to be illegitimate consists of the declarations of Frederick Johnson to his wife. This evidence is not competent. Mr. Greenleaf, vol. 2, sec. 151, says the husband and wife are alike incompetent to prove the fact of nonaccess while they lived together, nor are the declarations of either competent to prove the illegitimacy, though the child was born three months after marriage, and therefore they had separated by mutual consent"; and *Rhyne v. Hoffman,* 59 N. C., 336, in which *Battle, J.,* speaking of a child born in wedlock, states the same rule as follows: "This plaintiff must, therefore, be taken to be legitimate, unless it be proven by irrefutable evidence that the husband was impotent or did not have any sexual intercourse with his wife; but the former is not pretended, and the latter is a fact which neither the wife nor the declarations of the wife is admissible to prove. *Rex v. Luffe,* 8 East., 193. Here, independent of the declarations of the wife, which must be rejected as incompetent, there is no testimony sufficient to rebut the presumption of access." In *Wallace v. Wallace,* 137 Ia., 37, the Court says: "Declarations, as well as the evidence of either husband or wife as to access or nonaccess, are excluded whenever the issue of legitimacy is involved, and this includes cases of antenuptial conception. The first ruling on this latter phase of the inquiry was by *Sir John Romilly,* Master of the Rolls, in 1856 (*Anonymous v. Anonymous,* 23 Beav. (Eng.), 273), and it has been approved by the consensus of judicial opinion since."

This last case is also reported in 15 A. and E. Anno. Cases, 716, and in the note to that case and to *Evans v. Freeman,* 6 Anno. Cases, 816, and *Godfrey v. Rowland,* 7 Anno. Cases, 577, numerous authorities are collected sustaining the rule.

The principle is also clearly recognized in *Ewell v. Ewell,* 163 N. C., 237, where the Court says, while discussing proof of nonaccess: "The latter (nonaccess) is a fact which neither the wife nor the declarations of the wife is admissible to prove."

The cases of *Woodard v. Blue,* 107 N. C., 407, and *Erwin v. Bailey,* 123 N. C., 634, which are relied on by the defendant, are easily distinguishable from the one before us.

Those cases are based on the act of 1866 as amended by the act of 1879, legitimating the children of former slaves, and there was no valid marriage at the time of the birth at issue, which is the essential fact upon which this opinion rests.

When *Woodard v. Blue* was first reported (103 N. C., 116), (746) the Court, realizing that the same rule did not prevail under the statutes relating to slaves as in cases of a lawful marriage, said: "To repel the inference of paternity, drawn from the mere fact of cohabitation, the same stringent rules do not prevail as in cases of established legal marriage, when to bastardize the issue there must be full, affirmative, repelling proof, such as impotency, nonaccess, and the like, or the presumption of legitimacy will stand. 1 Green. Ev., par. 28; Abbott's Trial Ev., 88."

The case of *S. v. Liles,* 134 N. C., 742, also relied on, involved no issue except paternity, and contains nothing in conflict with the ruling in the Superior Court.

We are therefore of opinion that the evidence offered by the defendant was properly excluded and that there is

No error.

Cited: Croom v. Whitehead, 174 N.C. 308 (3c); *Ray v. Ray,* 219 N.C. 219 (2c); *Ray v. Ray,* 219 N.C. 220 (3c); *S. v. McMahan,* 224 N.C. 477 (2c); *S. v. Bowman,* 230 N.C. 205 (3c).

LINDSAY BRYANT v. LOULA BRYANT.

(Filed 15 March, 1916.)

Marriage and Divorce—Pregnancy—False Representations—Threats.

Allegations made in the complaint of the husband in a suit for divorce, that the defendant falsely represented herself with child of which he was the father, and driven by threats of violence from her father and of criminal prosecution he had married the defendant, and that afterwards he found that she was not pregnant at the time, are not sufficient to sustain the action.

WALKER, J., dissenting.

APPEAL by plaintiff at October Term, 1915, of WAYNE, from judgment of *Devin, J.*, sustaining the demurrer *ore tenus* to the complaint.

Langston, Allen & Taylor for plaintiff.
No counsel for defendant.

CLARK, C. J. This is an action by the husband for divorce. The complaint avers that there were intimate and illicit relations between the plaintiff and the defendant; that the defendant falsely and fraudulently represented to plaintiff that she was pregnant, and that the plaintiff was father of the child with which she was pregnant, and threatened plaintiff with criminal prosecution unless he married her, and that in addition thereto the father of the defendant threatened plaintiff with personal violence unless plaintiff married defendant; that on ac-
(747) count of the fear induced by said threats of personal violence and criminal prosecution, and coerced through the fraudulent representations of the defendant, he married the defendant, but since the marriage plaintiff has learned that the defendant is not pregnant and has not been, and he has refused to live further with her.

If the plaintiff had learned after marriage that the defendant at the time of the marriage was pregnant by another man, of which plaintiff was ignorant, it would be ground for divorce. Revisal, 1561 (4). But it is not ground for divorce that either party was unchaste or incontinent before marriage. *Steel v. Steel,* 104 N. C., 631. If it were, many a wife is entitled to divorce.

> "It is the fiend's arch mock
> To lip a wanton and believe her chaste."—BYRON.

But the plaintiff does not even allege that the defendant cohabited before marriage with any one but himself, and the best reparation he could make was to marry her. So far from being entitled to rely upon

her relations with him before marrying, the plaintiff was at least guilty of contributory negligence.

The plaintiff does not plead that he was deceived by the defendant being pregnant by another man, but the deception alleged is that the defendant was not pregnant by him. It is not averred that he was not *in pari delicto.*

The threat of criminal prosecution cannot be considered, for if he were not guilty of the charge, it would not have hurt him; but he admits the charge of fornication and adultery. Probably he feared proceeding for bastardy; but that is a civil, not a criminal proceeding. *S. v. Morgan,* 141 N. C., 726; *S. v. Addington,* 143 N. C., 685. If the defendant had been pregnant by him he should have paid the legal charge of saving the county from maintaining the child, if he were not just enough to "make the defendant an honest woman" by marrying her.

The plaintiff alleges "threats of personal violence" by the father if he did not make amends by marrying his daughter, which was but natural, as the plaintiff admits his misconduct. He does not set out any overt acts, that the court might see what was done by the father in his just indignation, nor does it appear that the plaintiff could not have had protection by causing the father to be bound over to keep the peace.

The plaintiff's allegations present a most novel case. The demurrer was properly sustained.

Affirmed.

WALKER, J., dissenting: It may be that the plaintiff is in no worse case than he should be if we consider the matter solely from a moral standpoint; but we are not the keepers of his conscience nor the censors of his morals, and if he has a legal right which has been violated, the moral quality of his act is immaterial. He alleges that by the (748) false and fraudulent representation of the defendant he was induced to marry her, and that she made the false affirmation knowingly. It related to the essentials of the contract of marriage, which requires capacity and consent as much as any other civil contract, and is governed, in this respect, by the same rules. The authorities sustain this proposition. The allegation of fraud is admitted by the demurrer, as much so as if the defendant had answered and admitted it. It is suggested that plaintiff was not deceived by it, but the conclusive answer to this is that he says that he was deceived, because he alleges that he was induced thereby to enter into the contract, and he could not well have been induced to do so if he was not deceived. It is giving a very narrow construction to the pleading to hold that he does not allege deception, and the construction of it should be liberal, and especially as against a demurrer.

The question in this case has been so recently and exhaustively treated in *Di Lorenzo v. Di Lorenzo,* 174 N. Y., 467, that I cannot do better than quote a passage from *Justice Gray's* opinion in that case. After quoting from *Judge Story,* and declaring that free and full consent, which is of the essence of all ordinary contracts, is one of the three indispensable elements of the marriage contract, he says: "The minds of the parties must meet in one intention. It is a general rule that every misrepresentation of a material fact, made with the intention to induce another to enter into an agreement, and without which he would not have done so, justifies the court in vacating the agreement. It is obvious that no one would obligate himself by a contract if he knew that a material representation, entering into the reason for his consent, was untrue. There is no valid reason for excepting the marriage contract from the general rule. In this case the representation of the defendant was as to a fact, except for the truth of which the necessary consent of the plaintiff would not have been obtained to the marriage. It was designed to create a state of mind in the plaintiff the operation of which would be to yield a consent to marry the defendant in the belief that he was rectifying a great wrong. The minds of the parties did not meet upon a common basis of operation. The artifice was such as to deceive a reasonably prudent person and to appeal to his sense of honor and of duty. The plaintiff had a right to rely upon the defendant's statement of a fact, the truth of which was known to her and unknown to him, and he was under no obligation to verify a statement to the truth of which she had pledged herself. It was a gross fraud, and, upon reason, as upon authority, I think it afforded a sufficient ground for a decree annulling the marriage contract. The jurisdiction of a court of equity to annul a marriage for fraud in obtaining it was early asserted in this State by the court of chancery, it a time when the limited powers
(749) of courts of law were inadequate for the purpose. This jurisdiction was expressly rested upon the general power to vacate contracts in all cases where they had been procured by fraud. From this general jurisdiction of equity a contract of marriage was not regarded as being excepted, when the assent to it was the result of artifice or of gross fraud. See *Ferlat v. Gojon,* Hopk. Ch., 478, 14 Am. Dec., 554; *Burtis v. Burtis,* Hopk. Ch., 557, 14 Am. Dec., 563. If the plaintiff proves to the satisfaction of the court that, through misrepresentation of some fact which was an essential element in the giving of his consent to the contract of marriage and which was of such a nature as to deceive an ordinarily prudent person, he has been victimized, the court is empowered to annul the marriage. Such was the judgment of the trial court upon the facts in this case, and I think that the learned justices of the appellate division, who concurred in reversing that judgment,

were in error in holding that the law of this State afforded no remedy to the plaintiff."

Judge Story says that while marriage is regarded as an institution of society, it is yet founded upon the consent and free will of the parties, as other contracts are, and in that respect is governed by the same rules. Story's Conflict Laws, sec. 108, N. It is said in 26 Cyc., 832, 833: "To constitute a valid marriage, it must be entered into with the consent and agreement of both parties freely and intelligently given, which may be expressed either verbally or in writing or implied from the acts of the parties or the ceremony performed; but without such consent on both sides the marriage is a nullity, although it was solemnized in form by a properly authorized minister or magistrate. Further, there must be an actual present intention on the part of both to enter upon an immediate and continuing matrimonial relation. Fraud or falsehood going to the essentials or fundamentals of the marital relation will deprive the contract of that intelligent consent necessary to its validity, and hence will render the marriage voidable at the instance of the injured party."

The plaintiff makes another allegation that he was forced by threats and intimidation of the defendant's father to enter into the contract. This, of course, the demurrer admits. The allegation is sufficient in form to show a threat of present or immediate bodily harm if he did not comply with the father's illegal demand. This vitiates the contract. 26 Cyc., p. 906.

It is freely conceded that both the fraud and duress must be such as goes to the fundamentals and essentials of the contract, but capacity and consent are surely to be considered as of this class. *Vorhees v. Vorhees,* 43 N. J. Eq., 411; *McCreery v. Davis,* 44 S. C., 195; *Hulett v. Carey,* 66 Minn., 329. They lie at the very foundation of the contract, and so say the books, as will appear by reference to the authorities above cited. The fraud must, it is true, be material to the degree that, had it not been practiced, the party deceived or affected by it (750) would not have consented to the marriage; but the fraud alleged in this case is of that kind. *Di Lorenzo v. Di Lorenzo, supra.* In *Scott v. Shufeldt,* 5 Paige, 43, a similar false representation was made, and the Court held it sufficient to annul the contract.

This case is much stronger in favor of the plaintiff than were the facts in the case of *Di Lorenzo v. Di Lorenzo,* which induced the decision there.

The antenuptial relations of plaintiff with the defendant, it has been held in a well considered case, do not deprive him of the right to have the marriage annulled. It is not considered, in law, as contributory to the result so as to have that effect. *Wallace v. Wallace,* 137 Iowa, 37.

That case also is an authority upon the other question, as to fraud, discussed by me, and supports my conclusion.

Cited: S. v. Gibson, 202 N.C. 108 (c).

ROSCOE W. TURNER, ADMINISTRATOR, v. SOUTHERN GAS IMPROVEMENT COMPANY.

(Filed 23 February, 1916.)

1. Appeal and Error—New Trial—Offer of Appellee.

Upon application in the Supreme Court for a *certiorari*, wherein it appears that the appellant has perfected his case except that for illness of the trial judge the case has not been settled, and that a new trial, at most, could be obtained; and in view of the uncertainty when the trial judge will be able to settle the case, and to avoid delay, the appellee has served on the appellant an offer that a new trial shall be granted, the Supreme Court will grant his motion, made therein to that effect.

2. Same—Costs.

Where the Supreme Courts grants appellee's motion made upon his offer for a new trial, the overruling of appellant's motion to nonsuit involves only the costs of appeal, which will be taxed in the discretion of the Court, the costs of the trial in the Superior Court being taxed against the party ultimately losing therein.

APPEAL by defendant from *Cooke, J.*, at November Term, 1915, of PASQUOTANK.

Ehringhaus & Small for plaintiff.
Ward & Thompson for defendant.

CLARK, C. J. This is an application for *certiorari*. It appears that the statement of the case on appeal and counter-case were served (751) in the proper time, and that the case on appeal, counter-case, notes of testimony, and the judge's charge were sent by registered mail by the appellant to the trial judge to settle the case; but that by reason of the illness of the judge, and his absence at a sanitarium in another State, the case has not been settled on appeal by the judge.

In the meantime the appellee has served on the appellant an offer that a new trial shall be granted. This is the utmost that could be had if the appellant should be successful in the appeal. The appellee consents to the new trial to avoid delay in view of the uncertainty as to when

the judge shall be able to settle the case for this Court. It is true that the appellant contends that one of his exceptions is to the refusal of a motion for nonsuit on the ground of the insufficiency of the evidence. But this involves only the cost of the appeal, as the same motion can be made at another trial on the evidence then offered, and the presumption is that if well founded it will be granted then or on an appeal from its refusal. Besides, as the appellee consents to a new trial, the costs on appeal must be taxed against him. The costs of the trial already had below would go against the party ultimately cast, in any event, whether the appellant had won in this appeal or not.

Under these circumstances the motion by the appellee for a new trial must be granted. *Ritter v. Grimm,* 114 N. C., 377; *S. v. Huggins,* 126 N. C., 1055.

Remanded for a new trial.

L. A. HARRISON, ADMINISTRATOR, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 15 March, 1916.)

Conflict of Laws—Issues—Negligence—Evidence—Trials—Questions for Jury.

While the issues in this action for damages against the railroad, alleging a personal injury received through defendant's negligence, are controlled by the laws of Virginia, the question of sufficient evidence of the negligence alleged is determined by the rules of evidence obtaining here, and though circumstantial, it is held sufficient to sustain the verdict in plaintiff's favor, *s. c.*, 168 N. C., 383.

ACTION tried November Term, 1915, of NORTHAMPTON, before *Lyon, J.*, upon these issues:

1. Was the intestate of the plaintiff killed by the negligence of the defendant? Answer: "Yes."

2. Was the plaintiff's intestate guilty of contributory negligence? Answer: "Yes."

3. Did defendants' employees have knowledge of the intestate's (752) position? If so, could the defendant have avoided the killing of the intestate by the exercise of proper care? Answer: "Yes."

4. What damage, if any, is plaintiff entitled to recover? Answer: "$1,350."

The defendant appealed from the judgment rendered.

Peebles & Harris, Gay & Midyette for plaintiff.
W. L. Long, F. S. Spruill for defendant.

PER CURIAM. This case was before us at Fall Term, 1914, and is reported 168 N. C., 621. Upon the second trial his Honor very properly changed the wording of the third issue so as to bring the issue squarely under the laws of Virginia. In the former opinion *Justice Brown,* speaking for the Court, held that the liability of the defendant must be determined under the law of Virginia as expounded by its highest Court, and said:

"For a similar reason, the contention that under the ruling of the Court of Virginia there is no sufficient evidence that the intestate was struck and killed by the train cannot be sustained. This fact must be determined by the rules of evidence obtaining in this State, and under our decisions there are circumstances in evidence which justify the court in submitting that disputed fact to the jury. *Henderson v. R. R.,* 159 N. C., 581; *Kyles v. R. R.,* 147 N. C., 394."

Upon a review of the evidence upon the second trial, we are of opinion that there is circumstantial evidence sufficient to go to the jury to warrant their finding upon the first and third issues, and that the case was correctly submitted to the jury.

No error.

D. F. KING v. DONALD McRACKAN ET AL.

(Filed 22 March, 1916.)

1. Vendor and Seller—Burden of Proof—Negative.

Upon this petition to rehear, the ruling in the opinion, 168 N. C., 621, putting the burden on defendant of proving he was a purchaser for value, is affirmed, and for the further reason that otherwise it would put the burden on one unacquainted with the facts, to prove a negative.

2. Appeal and Error—Affirmation of Judgment—Lower Courts—Reasons Given.

The Supreme Court will affirm a judgment appealed from if supported by facts and in accordance with law, although the reasons assigned in its support may not be approved.

(753) ACTION tried before *Allen, J.,* and a jury, at the November Term, 1914, of COLUMBUS.

Petition to rehear the case of *King v. McRackan,* reported in 168 N. C., 621.

Manning & Kitchin for plaintiff.
Winston & Biggs for petitioner.

PER CURIAM. We have carefully considered the arguments of the learned counsel for the petitioner urging us to reverse the ruling on the former appeal, holding that the burden was on the defendant to prove that he was a purchaser for value, but we are not convinced that we were then in error.

In addition to the reasons then stated, it may be suggested, without elaboration, that the opinion places the burden of proof on the purchaser, who usually knows all the facts, and who has it in his possession to inform the court of the amount paid and to whom, and of all the circumstances surrounding the purchase, while the opposite rule, and the one contended for by the petitioner, would impose the burden on one unacquainted with the facts, and he would be required to establish a negative, to wit, that the other party was *not* a purchaser for value. "It is often said that facts which are especially within the knowledge of the party must be proved by him. This rule is especially applied where the fact particularly well known to the other side presents the further difficulty in the way of adequate proof that it is negative. Under these circumstances it occurs with special frequency that the other party is called upon to prove it." Chamberlayne on Evidence, vol. 2, sec. 978.

The objection that the opinion of this Court is not upon the same theory upon which the action was tried in the Superior Court is met by the rule prevailing in appellate courts of affirming the judgment if supported by facts and in accordance with law, although the reasons assigned in its support may not be approved.

It is not improper to say that facts appearing to us on this petition absolve the petitioner from the charge, which might have been made on the first record, of buying in a title in disparagement of the claims of a client.

Petition dismissed.

Cited: Whitehurst v. Abbott, 225 N.C. 7 (1c).

(754)

B. L. GAINEY ET AL. v. DAVID GODWIN.

(Filed 22 March, 1916.)

1. Court's Discretion—Prosecution Bond—Appeal and Error.

Where the plaintiff has failed to file a prosecution bond in his action for land, in compliance with an order made at the preceding term of the court, it is within the sound discretion of the trial judge to permit him to file it, and in the absence of abuse of this discretion, his act in allowing it is not reviewable on appeal.

2. New Trial—Newly Discovered Evidence.

In this case defendant's motion for a new trial for newly discovered evidence was properly disallowed under the authority of *Johnson v. R. R.*, 163 N. C., 453.

ACTION to recover tract of land, tried September Term, 1915, of SAMPSON, before *Connor, J.*, upon these issues:

1. Was the plaintiff the owner and entitled to the possession of the lands set out in the complaint and described on map as the 16½-acre tract? Answer: "Yes."

2. Is the defendant in the wrongful posssession of any part of said tract? Answer: "Yes."

3. What damages, if any, are the plaintiffs entitled to recover of the defendants? Answer: "$10."

From the judgment rendered, defendant appealed.

Butler & Herring for plaintiffs.

John D. Kerr, Fowler, Crumpler & Gavin for defendant.

PER CURIAM. When the case was called for trial, defendant moved that the action be dismissed on the ground that plaintiffs had failed to file a prosecution bond in compliance with an order at former term. Plaintiff tendered a bond adjudged to be sufficient, and the motion was overruled. It is well settled that this is a matter within the sound discretion of the trial judge, and in the absence of evidence of gross abuse such discretion will not be reviewed by this Court.

The plaintiffs made out a *prima facie* title by introducing a grant from the State in 1892 and connecting themselves directly with it.

The defendant offered no grant from the State, but claimed under the division of the lands of John Godwin in 1879 as color of title and offered evidence of possession thereunder. Defendant showed no title prior to that date. The defendant's title depended upon the location of the division lines and possession. The matter involved is almost

entirely a question of fact, and we think was submitted to the jury in a very clear and correct charge.

The motion for a new trial upon the ground of newly dis- (755) covered evidence is denied. The affidavits in support of the motion fail to make out a case where a new trial will be granted. The requirements are fully set out by *Justice Walker* in *Johnson v. R. R.*, 163 N. C., 453.

No error.

HOKE, J., concurs in result.

Cited: Alexander v. Cedar Works, 177 N.C. 537 (2c).

H. J. STRICKLAND v. THE MONTGOMERY LUMBER COMPANY.

(Filed 29 March, 1916.)

Negligence—Independent Contractor—Contracts.

Under the facts of this case it is held that the defendant could not avoid the damages sought upon the ground that the property causing the injury was operated at the time by an independent contractor, under the authority of *Thomas v. Lumber Co.*, 153 N. C., 351.

ACTION tried at August Term, 1915, of FRANKLIN, before *Peebles, J.*, upon these issues:

1. Were the lands of the plaintiff damaged by the negligence of the defendant? Answer: "Yes."

2. What damage, if any, has plaintiff sustained thereby? Answer: "$1,000."

The following issue was tendered by the defendant, which the court refused to submit:

1. Were Newell & Bryant operating the sawmill and logging railroad as independent contractors at the time of the injury to the lands of plaintiff, as alleged?

Defendant excepted to the refusal of the court to submit the issue, and appealed from the judgment rendered.

W. M. Person, W. H. Yarborough, Jr., for plaintiff.

F. S. Spruill, W. H. Ruffin, Ben. T. Holden for defendant.

PER CURIAM. Upon an examination of the evidence in this case and the written contract, we are of opinion that the case is governed by

Thomas v. Lumber Co., 153 N. C., 351. In that case *Mr. Justice Manning* reviews all the authorities in an able and exhaustive opinion. That case, like the present one, was an action to recover damages for the burning over of timber lands. The defendant set up the same defense as in this case, that the lumber road was being operated by an inde-
(756) pendent contractor; but the Court held that whether the fire originated upon a foul right of way or from a defectively equipped or unskillfully managed engine, the defendant was liable, saying: "The weight of reason and authority is to the effect that where a party is under a duty to the public or a third person to see that work he is doing, or has done, is carefully performed so as to avoid injury to others, he cannot, by letting it to a contractor, avoid liability in case it is negligently done to the injury of another (citing numerous authorities). The duty need not be imposed by statute, though such is frequently the case. If it be a duty imposed by law, the principle is the same as if required by statute. *Cockburn, C. J.*, in *Bower v. Peate, supra.* It arises at law in all cases where more or less danger to others is necessarily incident to the performance of the work let to contract. It is the danger to others, incident to the performance of the work let to contract, that raises the duty and which the employer cannot shift from himself to another so as to avoid liability, should injury result to another from negligence in doing the work." *Arthur v. Henry*, 157 N. C., 393; *Watson v. R. R.*, 164 N. C., 176; *Dunlap v. R. R.*, 167 N. C., 669.

No error.

Cited: Bryant v. Lumber Co., 174 N.C. 361 (c); *Williams v. Lumber Co.*, 176 N.C. 181 (c); *Royal v. Dodd*, 177 N.C. 209 (c).

S. B. CHANCEY v. NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 29 March, 1916.)

Courts — Amendments — Summons — Jurisdiction — Venue — Appeal and Error.

The original summons in this case was directed to the defendant "railroad" company, and it is held that no error was committed by the trial judge in allowing an amendment thereof to correctly issue to the defendant "railway" company, and serving it as an alias summons, and this action is not appealable.

APPEAL from order of *Daniels, J.*, November Term, 1915, of COLUMBUS, upon motion of defendant to dismiss for want of service.

The court permitted an amendment to the original summons by striking out the word *railroad* and substituting *railway,* and made an order that an alias summons be issued and served upon the Norfolk and Western Railway. The defendant appealed.

Rountree, Davis & Carr, Guthrie & Guthrie, Theo. W. Reath for defendant.

No counsel for plaintiff.

PER CURIAM. Allowing the amendment to the summons was (757) a matter within the sound discretion of the judge. The summons had been served on the agent of the Norfolk and Western Railway. The original summons was directed to the Norfolk and Western Railroad. His Honor very properly allowed the amendment. As the court ordered an alias summons, no question of jurisdiction or venue arises now. The order amending summons and ordering an alias is not appealable.

Appeal dismissed.

Cited: Lee v. Hoff, 221 N.C. 238 (c).

W. A. PARRISH v. AMERICAN NATIONAL INSURANCE COMPANY.

(Filed 12 April, 1916.)

1. Insurance, Life—False Representations—Verdict—Harmless Error.

Where payment of a policy of life insurance is resisted on the ground that the applicant made false and material representations as to having a certain disease at the time, and the jury have found as a fact that applicant did not have the disease then, the inquiry as to whether she knew she had it becomes immaterial.

2. Instructions—Remarks of Court—Appeal and Error—Trials.

Where the trial judge remarks in his charge to the jury that he did not recall any evidence bearing upon a certain phase of the controversy, but they were the sole judges of what the witnesses said and must be guided by their own recollection, the defendant cannot be prejudiced thereby.

3. Instructions—Matters Relied on—Inquiry.

Where the pleadings, evidence, and the issue tendered by the insured to avoid payment of a life insurance policy for false representations present but one matter, it is not error for the trial judge, in his charge, to confine the consideration of the jury to it.

ACTION tried before *Peebles, J.*, and a jury, at August Term, 1915, of FRANKLIN.

This is an action to recover the amount of a policy of insurance on the life of Mary I. Parrish, the defense being that she falsely stated in her application that she did not have cancer of the womb.

The jury rendered the following verdict:

1. Did Mary I. Parrish in her application falsely represent to the defendant that she did not have cancer of the womb, knowing said representation to be false? Answer: "No."

2. Did Mary I. Parrish have cancer of the womb at the time of making application for the policy of insurance issued by defendant? Answer: "No."

(758) 3. In what amount is the defendant indebted to the plaintiff? Answer: "$1,000, at 6 per cent per annum from 2 February, 1914, until paid."

Judgment was rendered upon the verdict in favor of the plaintiff, and the defendant appealed.

W. M. Person and Bickett, White & Malone for plaintiff.

Ben. T. Holden and William H. Ruffin for defendant.

PER CURIAM. The first, second, seventh, and tenth exceptions relating to the incorporation into the issues and the charge of the element of knowledge on the part of the insured of the disease of which it is alleged she died, cancer of the womb, at the time of the application for insurance, become immaterial in view of the finding of the jury in answer to the second issue, that the insured did not have cancer of the womb at the time of making her application.

The third, fourth, and fifth exceptions are abandoned in the brief.

The sixth and ninth exceptions are to statements made by his Honor that he did not recall any witness saying the insured died of cancer of the womb. No exception was made to these remarks at the time, and his Honor further charged:

"You must not be guided by my recollection of the testimony or by the recollection of counsel. You must be guided by your own recollection. You are the sole judges of what the witnesses said and the sole judges of what credit is to be given the testimony of the witnesses."

We see nothing in this to prejudice the cause of the defendant.

The eighth exception is that his Honor confined the representations to cancer of the womb; but the answer to this is that the pleadings, the evidence, and the issue tendered by the defendant show that the only representation relied on to avoid the policy was that she did not have cancer of the womb.

We have carefully examined the record, and find
No error.

W. M. JACKSON, ADMINISTRATOR OF JOHN CLARK, v. NORTH CAROLINA GRANITE CORPORATION.

(Filed 19 April, 1916.)

Trials—Negligence—Evidence—Nonsuit.

An employee at defendant's quarry was killed by a shed, under which he had sought shelter from a violent wind and rain storm, having blown down upon him. *Held*, a motion of nonsuit was properly granted, under the evidence.

ACTION tried at June Special Term, 1915, of SURRY, before (759) *Shaw, J.*, for the alleged negligent killing of plaintiff's intestate, an employee of defendant at its quarry.

A motion to nonsuit at close of the evidence was sustained. Plaintiff appealed.

Folger & Folger for plaintiff.

S. P. Graves, W. F. Carter for defendant.

PER CURIAM. The plaintiff's intestate was killed by the blowing down of a shed of defendant in a violent wind and rain storm. The deceased was a workman of defendant engaged at its quarry, and ran under the shed for shelter. The only assignment of error noted in the appellant's brief is directed to the nonsuit.

Upon an examination of the record, we are of opinion that there is no sufficient evidence of negligence, and that the motion was properly sustained.

Affirmed.

J. B. COON v. SOUTHERN RAILWAY COMPANY.

(Filed 19 April, 1916.)

1. Carriers of Passengers—Freight Trains—Sudden Jerks—Negligence—Evidence—Trials.

A passenger while drinking water at the cooler in a coach in defendant railroad company's freight train was thrown forward by a sudden jerk of the train, and to prevent himself from being projected upon the car's platform, threw out his hand, which came in contact with a tool box

hanging perpendicularly at the side of the car door, breaking the glass in the box and inflicting the injury complained of by cutting his hand. There was evidence that the lower end of the box hung loose, but not that it had originally been placed horizontally. *Held*, that the accident was not one that defendant could reasonably have foreseen or anticipated, and the evidence was insufficient upon the issue of defendant's actionable negligence.

2. Carriers of Passengers—Freight Trains—Assumption of Risks—Instructions.

The charge upon the doctrine of assumption of risks of a passenger riding on a freight train was correct in this case. *Marable v. R. R.*, 142 N. C., 557.

ACTION tried before *Shaw, J.*, and a jury, at June Special Term, 1915, of SURRY.

This is an action to recover damages for personal injuries sustained by plaintiff while a passenger on the defendant's mixed train. The
(760) plaintiff purchased a ticket from Pilot Mountain to Winston-Salem over defendant's road. The train was composed of several freight cars and two passenger cars. Just before the train arrived at Bethania Station it stopped a short distance north of the station to allow the freight train to pass, and then moved down to the depot, with the passenger coaches standing opposite the station.

While the train was standing at the second stop the plaintiff went to the water-cooler and was in the act of drinking a glass of water, and while doing so the train started with a severe jerk. The rear door of the passenger coach was standing open, and when the jerk came it threw the plaintiff towards the open door, and he would have fallen on the platform but for the fact that he threw out his arm and caught the door-facing, and in doing so his open hand came in contact with the glass covering the tool box, which was hanging perpendicularly near the door-facing. The plaintiff's hand broke the glass of the tool box and was severely cut. The plaintiff offered evidence to prove that the tool box was loose and hanging perpendicularly, and contended that it ought to have been placed over the door horizontally. The plaintiff testified that he was by trade a barber, and that he had been disabled for two months, and that his thumb was permanently stiffened, which impaired his usefulness in his trade.

The defendant admitted that the jerk was a severe one, but was not of an unusual character on its line of road for mixed trains.

His Honor charged the jury, among other things, as follows:

"1. Now, as to the first ground of negligence alleged, there is evidence tending to show that the tool box was hanging near the door, beside the door and in an upright position, instead of being across the wall of the

car, and the court instructs you, if you find that to be true from the evidence, that the tool box was hanging in an upright position instead of being across the wall, that would not be negligence upon the part of the defendant." The plaintiff excepted.

"2. It is true, gentlemen, that where one takes passage upon a mixed train, as admitted in this case this train was—that is, hauling freight and passengers, that he assumes the usual risk incident to travel upon such train when the same is managed by a competent and prudent engineer or one who is operating the train in a careful manner. Whatever injuries result to him from the operation of a train in this way—why, he assumes that risk when he takes passage upon such train; but he does not assume risk, gentlemen, if caused by the negligence of the defendant in starting the train. In other words, gentlemen of the jury, the question is whether or not this train started with a sudden jerk, and, if so, was this sudden jerk caused by the slack in the train and was it necessary in the proper operation of the train that this jerk should have occurred, or was the jerk due to improper management of the engine by one of the defendant's engineers? Now, if it were due to careless (761) handling of the engine and starting off the train, if the jerk was due to that, why, then, that would be negligence on the part of the defendant; but if the jerk was due simply to drawing the slack out of the train, and not to any carelessness on the part of the engineers, why, then, it would not be negligence upon the part of the defendant, even though the plaintiff was hurt, because that would be one of the risks assumed by him when he took passage upon the train." The plaintiff excepted.

The jury answered the first issue as to negligence in favor of the defendant, and from the judgment pronounced thereon the plaintiff appealed.

J. C. Buxton and O. E. Snow for plaintiff.

W. F. Carter and Manly, Hendren & Womble for defendant.

PER CURIAM. There is no evidence that the tool box had been originally placed in a horizontal position and that it had fallen and was hanging by the door because it had been insecurely fastened, and we cannot see that it is any evidence of negligence that it was located by the side of the door-facing.

An injury such as was inflicted upon the plaintiff could not be reasonably foreseen or anticipated; and if the lower end of the box had become loose, we agree with his Honor that this had nothing to do with the plaintiff's injury.

The charge as to the risks assumed by a passenger traveling upon mixed trains is in accordance with *Marable v. R. R.*, 142 N. C., 557.

The question discussed in the brief, as to the charge upon the burden of proof, is not presented by any exception or assignment of error, and, therefore, cannot be considered.

Upon a careful consideration of the record, we find

No error.

Z. W. MORRIS ET AL. v. R. A. CARROLL.

(Filed 19 April, 1916.)

Mortgages — Foreclosure — Assignee of Mortgage—Purchaser—Heirs at Law—Deeds and Conveyances—Title—Husband and Wife—Curtesy.

An assignee of a mortgage of lands who has taken part in the control and conduct of the foreclosure sale thereunder cannot acquire an unconditional title to the lands thus sold; and where the lands were owned by the deceased mother of the plaintiffs, her heirs at law, and she and her husband, their father, had executed the mortgage, and at the foreclosure sale the father, the tenant by the curtesy, became the purchaser and immediately conveyed the lands to the defendant, the assignee of the mortgage, who had taken part in the control and management of the sale, and there is no suggestion that the latter acquired the lands for value and without notice, the plaintiffs may maintain their suit against him for the foreclosure of the mortgage, and have the proceeds of the sale applied to the mortgage debt.

(762) ACTION to redeem land alleged to be encumbered by a mortgage, and to recover possession of same, tried before *Justice, J.*, at November Term, 1915, of DAVIDSON.

Defendant denied the right to redeem, claiming sole and unencumbered ownership of the property.

There was judgment for plaintiff, and defendant excepted and appealed.

Raper & Raper for plaintiff.

Walser & Walser for defendant.

PER CURIAM. We have carefully examined the record, and find no sufficient reason for disturbing the result of the proceedings below. From a perusal of the pleadings, it appears that plaintiffs are the children and heirs at law of M. L. Morris and his wife, Annie, both of whom are now deceased; that the title to the land, about 30 acres, was in Annie, the wife, and in 1901 the two became indebted to one Harris Nooe in the sum of $23.50 and executed a mortgage on the land to secure the same; that in 1907 Annie died, leaving plaintiffs, then minor

children living with the father, the latter having a life estate in the land as tenant by the curtesy; that in 1903 the creditor assigned the debt and mortgage to defendant R. A. Carroll, and the latter, holding these, on 3 October, 1903, had the land put up for sale, when Morris, the father of plaintiffs, bought it in for a nominal consideration, taking a deed from the mortgagee and immediately conveying the same to defendant, who is in possession, claiming to own the land under said conveyance; that M. L. Morris died in 1910, leaving him surviving the present plaintiffs, who were all minors at the time of the mortgage and sale and still are, except Fletcher Morris, who is now 23 years old, and Z. W., who is now 21.

The Court has very recently held that the principle which prevents a mortgagee in one of these sales *inter partes* from buying at his own sale and renders same ineffective as a foreclosure at the election of the mortgagor or his legal representative, applies and extends to an assignee of the debt and mortgage when the latter took part in the control and conduct of the sale. *Owens v. Mfg. Co.*, 168 N. C., 397.

Defendant admits in his answer that, holding the note and mortgage at the time, he took part in the control and management of the sale. There is no averment that he bought for value and without (763) notice, and it appearing further that the land was bid in by the father, one of the mortgagors and debtors, and transferred immediately to defendant, we concur in his Honor's view that on the face of the record it sufficiently appears that the attempted sale was ineffective as a foreclosure, and that defendant, occupying the land under such a conveyance, held the same subject to redemption and an accounting, at the instance of plaintiffs, the children and heirs at law of Annie, one of the mortgagors and original owners of the land.

We find no error of the disposition of the case, and the judgment below must be

Affirmed.

Cited: Jessup v. Nixon, 199 N.C. 123 (cc); *Roberson v. Matthews,* 200 N.C. 245 (c); *Council v. Bank,* 211 N.C. 265 (c); *Davis v. Doggett,* 212 N.C. 592 (c).

O. M. AND CHARLES NEEDHAM v. SOUTHERN RAILWAY COMPANY.

(Filed 19 April, 1916.)

Railroads—Frightening Horses—Trials—Negligence—Evidence—Verdict, Directing—Appeal and Error.

Where damages are sought in an action for injury to plaintiff's team, and it appears that the injury was caused by the horses becoming frightened at the defendant's train while left unhitched in the field three-fourths of a mile from defendant's railroad crossing, a peremptory instruction to answer the issue of negligence in defendant's favor, if the facts are so found, nothing else appearing, is not erroneous; and where the damages complained of were evidently caused in this manner, an insufficient opening for the passage of the team at the crossing becomes immaterial.

APPEAL by plaintiff from *Cline, J.*, at August Term, 1915, of SURRY.

Action to recover damages for injury to horses belonging to the plaintiffs, alleged to have been caused by the negligence of the defendant.

The issues of negligence were answered in favor of the defendants under a peremptory instruction of his Honor that if the jury believed the evidence, to answer the issues "No," and the plaintiffs excepted.

O. E. Snow and T. W. Kallam for plaintiffs.

W. F. Carter and Manly, Hendren & Womble for defendant.

PER CURIAM. This action is to recover damages for injury to two horses. The horses were hitched to a wagon and were at work in a field about three-fourths of a mile from the defendant's railroad crossing.

The plaintiff, Charles Needham, who had the team in charge, left the team standing unhitched, while he went to the rear of the wagon
(764) to place an empty barrel in it. The horses became frightened and ran away, and in passing over the crossing of the defendant, while running away, were injured.

There is some evidence that the opening upon the crossing was not as wide as it ought to have been, but sufficient space was left for the passage of teams and vehicles, and it is clear that the real cause of the injury was not the condition of the crossing, but the fright and running away of the horses.

In our opinion, there is no error in the instructions given to the jury.

No error.

Cited: Sasser v. R. R., 182 N.C. 470 (cc).

CLEVELAND-AKRON BAG COMPANY v. MESSICK GROCERY COMPANY.

(Filed 19 April, 1916.)

Vendor and Purchaser—Contracts, Written—Parol Evidence—Lost Writing—Search—Subsequent Letters—Admissions.

In this action to recover the purchase price of goods sold and delivered upon written order of the defendant, the plaintiff's evidence of the destruction of the order by fire and its unsuccessful search therefor was sufficient to admit of parol evidence of its contents; and were it otherwise, the acknowledgment of defendant's liability by subsequent letters was a sufficient writing.

ACTION tried before *Cline, J.*, and a jury, at September Term, 1915, of FORSYTH.

This is an action to recover $186.32, the purchase price of certain paper bags which the plaintiff alleges it sold to the A. F. Messick Grocery Company, the defendant in this action, to be shipped to the Yadkin Lime Company. The principal contention of the defendant is that the bags were sold to the lime company and not to the defendant grocery company.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Eller & Stockton for plaintiff.

J. E. Alexander for defendant.

PER CURIAM. The chief exception upon which the defendant relies is that parol evidence was admitted by the court to prove the contents of the original order for the bags.

The plaintiff offered evidence tending to prove that in the course of business orders of that date were destroyed, and that search had been made for the missing order, and it could not be found.

The evidence of loss was sufficient to justify the reception of (765) parol evidence; but if not, the defendant was not prejudiced thereby, because it appears in the record that the defendant wrote the plaintiff on 23 October, 1911, acknowledging the receipt of the bags and saying, among other things, "These were purchased by us," which is a sufficient acknowledgment of the purchase by the defendant, the grocery company, and to charge that company with liability.

It also appears in the record that complaint was made as to the quality of the bags by the grocery company, and that the plaintiff immediately wrote to the defendant, asking that it return any bags that they contended were not of good quality and that it would give the

defendant full credit for all bags returned. The correspondence between the parties also shows that this offer on the part of the plaintiff was repeated several times, and that the defendant refused to return the bags.

We have carefully considered the whole record, and do not find any error of which the defendant can complain.

No error.

Cited: Rudd v. Casualty Co., 202 N.C. 782 (c).

J. T. NEEDHAM *v.* SOUTHERN RAILWAY COMPANY.

(Filed 19 April, 1916.)

1. Carriers of Passengers—Mixed Trains—Assumption of Risk.

The rule of the risks assumed by a passenger on a mixed freight and passenger train, as laid down in *Marable v. R. R.*, 142 N. C., 563, is approved.

2. Appeal and Error—Objections and Exceptions—Assignments of Error.

Matters discussed in briefs filed in the Supreme Court, with exception noted of record or assignment of error, will not be considered.

APPEAL by defendant from *Cline, J.*, at August Term, 1915, of SURRY.

This is an action by the plaintiff, who was a passenger upon a mixed train, to recover damages for personal injury sustained, as he alleges, by the negligence of the defendant in causing a sudden movement of the train.

The jury answered the issue as to negligence in favor of the defendant, and from the judgment rendered thereon the plaintiff appealed.

O. E. Snow, J. C. Buxton, and R. G. Parkes for plaintiff.

W. F. Carter and Manly, Hendren & Womble for defendant.

PER CURIAM. The instructions to the jury, excepted to by the plaintiff, as to the risks assumed by a passenger upon a mixed train,
(766) are in accordance with the principles laid down in *Marable v. R. R.*, 142 N. C., 563, and in many other cases.

The question discussed in the brief as to the correctness of the charge upon the burden of proof as to negligence is not presented by any exception or assignment of error, and therefore cannot be considered.

The correct rule in regard thereto is stated in *Barnes v. R. R.*, 168 N. C., 667.

No error.

A. D. WEAVER v. WAYNE HARDWOOD COMPANY ET AL.

(Filed 5 April, 1916.)

Negligence—Trials—Evidence—Nonsuit.

An experienced inspector of timber for the purchaser on the premises of the seller brought his action to recover from the latter damages for a personal injury received while inspecting the lumber by its falling down upon him; and the evidence tends only to show that he was familiar with the premises and this particular pile of lumber, and was inspecting it in his own way, and could not account for its falling. *Held*, insufficient to take the case to the jury, and a judgment as of nonsuit was proper.

ACTION tried before *Peebles, J.*, and a jury, at October Term, 1915, of WAYNE, to recover damages for personal injury.

The plaintiff was an inspector of lumber, and was in the immediate employ of the Dickson Lumber Company of Norfolk, Va. His employer had made arrangements to purchase some lumber and "dimension stuff" from the Wayne Hardwood Company, located at Goldsboro, N. C. The plaintiff went to the plant of the defendant Wayne Hardwood Company, in Goldsboro, to inspect some lumber and timber and to grade the same, and to see it loaded upon a railway car. The timber which was to be inspected and graded consisted of hardwood squares, varying in size from about 6 x 6 inches to 8 x 8 inches, and in length from 14 to 16 feet. This timber was piled on a platform, 8 feet wide, 34 feet long, and 6 feet in height, near to and beside a spur track of the railway company. A space was left at one end of the platform and the plaintiff was standing upon this space, about 20 x 24 inches in size, having climbed over the pile of timber to reach this space. There was a "cull" piece of timber on the front row or tier of timber next to the railway tracks. This stack of timber or tiers of timber was on the front part of the platform, and was about 2 or 3 feet in height, and 2 to 2½ feet in width, and of timber 14 feet in length. The larger timbers and longer timbers were back from the front of the platform some 2 or 3 feet, and this larger timber was to the side and rear of the plaintiff at the (767) time of the falling of the timber by which he was injured. All this timber, consisting of the 14-foot timber and the 16-foot timber, was piled on the same platform and formed a part of the same lumber and timber which the plaintiff was to inspect and load on the cars. On the front tier, next to the railway, there was a "cull" piece of timber, and the foreman of the defendant requested the plaintiff Weaver to hand this piece down to him, the foreman, to the ground before the railway car reached the point opposite the platform preparatory to loading.

While plaintiff was standing upon this space on the platform, about 24 inches square, the pile of 16-foot timber to his side and rear tumbled

down, threw the plaintiff onto the railway track and ground below, and some of the large timber fell upon him and seriously injured him.

The plaintiff had inspected timber at the same place the day before his injury, and under similar conditions. The timber was placed on the platform as it came from the mill for the purpose of transferring it to the cars.

The plaintiff was a man of experience in the work he was doing, and went to the space on which he was standing of his own choice.

At the conclusion of the evidence his Honor entered judgment of nonsuit, and the plaintiff excepted and appealed.

J. D. Murphey, Guy Weaver, and Jones & Bailey for plaintiff.
Langston, Allen & Taylor and Murray Allen for defendant.

PER CURIAM. The plaintiff was not an employee of the defendant hardwood company, and his contention is that he was upon the premises of the defendant by invitation, and that he was injured by reason of the negligent manner in which the timber which he was required to inspect was piled upon the platform, and upon this allegation of negligence there is an entire failure of proof.

The plaintiff was the only witness who was examined as to the piling of the timber, and was asked these questions:

"You don't know how come the timber to fall?" and he repliel: "No, I don't."

"Did you notice how the timber which fell was piled?" "I do not know how the timber that fell was piled."

We are therefore of opinion that there is no error in entering the judgment of nonsuit.

Affirmed.

(768)

J. S. CAMPBELL v. WASHINGTON LIGHT AND POWER COMPANY.

(Filed 26 April, 1916.)

Trials—Evidence—Conjecture—Questions for Jury.

Evidence, to be sufficient to justify the submission of an issue to the jury, must show more than a mere possibility of the alleged fact, or raise more than a mere conjecture. *Campbell v. Everhart*, 139 N. C., 516, cited and applied.

PETITION to rehear opinion in action, tried before *Whedbee, J.*, at April Term, 1915, of BEAUFORT.

At the conclusion of the evidence a motion to nonsuit was sustained. The plaintiff appealed.

Daniel & Warren, Manning & Kitchin for plaintiff.
Small, McLean, Bragaw & Rodman for defendants.

PER CURIAM. This action was brought by the plaintiff to recover damages for the death of his intestate child upon the ground that the defendant sold water polluted with typhoid germs and that the child drank the water, contracted typhoid fever, and died from the effects. Upon the conclusion of the evidence offered by the plaintiffs the court granted the motion to nonsuit, upon the ground that there was not sufficient evidence to justify a recovery. At September Term, 1915, this Court affirmed the judgment of the Superior Court in a *per curiam* opinion.

The cause comes before us again upon a petition to rehear and to reverse our former decision. In deference to the briefs filed in the cause by the learned counsel for the plaintiff, we have given the original record a reëxamination, and we feel bound to adhere to our original decision, that the evidence introduced is not sufficient in law to justify a recovery, and that his Honor, *Judge Whedbee,* properly sustained the motion to nonsuit. Evidence which shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture, is not sufficient to be left to the jury. *Byrd v. Express Co.,* 139 N. C., 273; *S. v. Vinson,* 63 N. C., 335.

As is said by *Mr. Justice Walker* in *Campbell v. Everhart,* 139 N. C., at p. 516: "The sufficiency of evidence in law to go to the jury does not depend upon the doctrine of chance. However confidently one, in his own affairs, may base his judgment on mere probability as to a past event, when he assumes the burden of establishing such event as a proposition of fact and as a basis for the judgment of a court, he must adduce evidence other than a majority of chances that the fact (769) to be proved does exist. It must be more than sufficient for a mere guess, and must be such as tends to actual proof."

The petition to rehear is

Dismissed.

ANDERSON SMITH ET ALS. v. HARDY HILL.

(Filed 26 April, 1916.)

Slaves — Descent and Distribution — Marriage — Evidence—Tax Deeds—Deeds and Conveyances—Evidence—Nonsuit—Trials.

In an action to recover land by one claiming by descent from a deceased male slave it is at least necessary for the plaintiff to show that

his ancestors lived together and were recognized as man and wife after their emancipation, where the fact of marriage has not been shown; and it being admitted in this case that the defendant had purchased the lands at a tax sale, obtained a deed correct in form, describing the lands, and stating that defendant had complied with all the requirements of the statute, and the evidence tending to show that the plaintiff's male ancestor had only visited his female ancestor, the judgment of nonsuit is sustained.

APPEAL from *Connor, J.*, at November Term, 1915, of LENOIR.

At the conclusion of the evidence the motion to nonsuit was sustained. Plaintiffs excepted and appealed.

Shaw & Powers for plaintiffs.

Rouse & Land for defendants.

PER CURIAM. The plaintiffs claim title under Jordan Smith, who it is admitted was the owner and in possession of the land in controversy at the time of his death. Jordan Smith was a slave living in Greene County, and it is claimed that the plaintiffs are the descendants of Jordan Smith and Everie Rountree, also a slave living in Lenoir County. There is no evidence tending to prove that marriage ceremony was ever performed, and nothing in the evidence tending to show that the plaintiffs were capable of inheriting from Jordan Smith. There is evidence that he visited Everie Rountree, but no evidence that she lived with him and was recognized as his wife after they were emancipated.

In addition to the failure to show inheritable blood upon the part of the plaintiffs, it is admitted that the land in controversy was sold for taxes by the city of Kinston on 1 May, 1905; that certificate of sale was given to the purchaser, which certificate was transferred to the de-

(770) fendant Hardy Hill, and, the land not being redeemed within the time allowed by law, in pursuance of the sale for taxes, the city tax collector, Mewborn on 9 May, 1906, executed a deed in fee to Hardy Hill, the record stating that the said Hardy Hill complied with all the requirements of the statute.

It is further admitted that the said tax deed is in all respects regular and in due form and that it correctly describes the land in controversy by metes and bounds.

Upon these admissions of fact set out in the record, as well as on account of the lack of evidence tending to prove a descent, we are unable to find any error in the ruling of the court sustaining the motion to nonsuit.

Affirmed.

S. A. BEAM, BY HIS NEXT FRIEND, S. R. BEAM, v. C. W. FULLER ET AL.

(Filed 10 May, 1916.)

False Imprisonment—Punitive Damages—Trials—Evidence—Questions for Jury.

In an action to recover damages for arrest and false imprisonment, evidence tending to show that the several defendants, among them being the chief of police of the town and a constable of the township, arrested the plaintiff, a minor, without warrant, carried him through the streets and locked him in the guardhouse for several hours, and then released him without preferring a charge, is sufficient for the consideration of the jury upon the question of punitive damages.

ACTION to recover damages for arrest and false imprisonment, tried before *Webb, J.*, and a jury, at September Term, 1915, of GASTON.

There was evidence tending to show that on 28 June, 1914, plaintiff, a minor, was arrested and confined for some hours in the guardhouse in Bessemer City, N. C.; that the arrest was without warrant or lawful justification and was participated in by several defendants, the parties charged and served, being C. W. Fuller, Clint Jones, and Ped Allen and Aaron Dameron; that C. W. Fuller was chief of police of Bessemer City and defendant Jones was constable of Crowder's Mountain Township. Aaron Dameron was deputy sheriff of the county.

At the close of the plaintiff's testimony, on motion made in apt time, there was judgment dismissing the action as to defendant Fuller, and plaintiff excepted. On issues submitted, there was judgment establishing liability of the other three defendants and assessing nominal damages.

Judgment on the verdict, and plaintiff excepted and appealed, assigning for error:

1. The judgment dismissing the action as to the defendant Fuller.

2. The ruling of his Honor that the facts in evidence did not (771) present a case for an award of punitive damages.

Mangum & Woltz and J. M. Hoyle for plaintiff.

No counsel for defendants.

PER CURIAM. On careful examination of the record, we are of opinion that there are facts in evidence tending to show that defendant Fuller was a participant in the wrongful arrest and detention of plaintiff, and that the order of nonsuit as to said defendant should be set aside. The Court is of opinion, also, that there was error in the ruling that plaintiff, as a matter of law, was not entitled to recover punitive damages. When

there is testimony in a cause permitting an award of punitive damages, the question of whether such damages shall be allowed, and the amount of same, is for the jury. *Billings v. Charlotte Observer,* 150 N. C., 541.

We find in the present record evidence on the part of plaintiff tending to show that in June, 1914, plaintiff was arrested by defendants without warrant, carried through the streets of Bessemer City as a prisoner, and locked up in a guardhouse and detained there for several hours, when he was allowed to go free without any charge having been preferred against him and without any evidence that he was presently or at any other time engaged in any violation of law. There may be facts in evidence or available which would so far explain the conduct of defendant as to justify a jury in refusing to award punitive damages in the case, but with the facts in evidence as indicated, it was reversible error, as stated, to withdraw the question from the jury and decide it adversely to plaintiff as a conclusion of law.

If, on another trial of the case, the question of punitive damages is again presented, the rules applicable will be found discussed in some recent cases of our Reports, among others, *Carmichael v. Telephone Co.,* 162 N. C., 333; *same case,* 157 N. C., 21; *Williams v. R. R.,* 144 N. C., 498, headnote 10; *Ammons v. R. R.,* 140 N. C., 200; *Kelly v. Traction Co.,* 132 N. C., 368.

There is error. The order of nonsuit as to defendant Fuller and the verdict and judgment as to the other defendants will be set aside and a new trial had of the entire case.

New trial.

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(772)

JOHN BALDWIN v. NOAH SMITHERMAN.

(Filed 24 May, 1916.)

Negligence—Automobiles—Res Ipsa Loquitur—Direct Testimony.

In an action to recover damages of the defendant for negligence in running his automobile, resulting in breaking the leg of plaintiff's mule, there was evidence for plaintiff that the automobile was not properly equipped with brakes, and that it struck the mule, which was standing quietly on the side of the road in safety, causing the animal to suddenly back and receive the injury complained of. Evidence for defendant tended to show that the machine was moving under perfect control at the rate of 6 to 7 miles an hour; that plaintiff was on the mule near the middle of the road, and gave him a jerk and he backed into the machine, causing the injury; that the machine was properly equipped with brakes, etc. There was verdict for defendant, under a proper charge upon the issues, and a judgment thereon was proper. The doctrine of *res ipsa loquitur* does not apply, the testimony having been given by witnesses to the fact.

BALDWIN *v.* SMITHERMAN.

ACTION tried before *Lane, J.*, and a jury, at September Term, 1915, of MONTGOMERY.

The action was to recover damages for breaking the leg of plaintiff's mule by alleged negligence of defendant in operating an automobile.

On denial of liability and on the issue as to negligence there was verdict for defendant. Judgment on the verdict for defendant, and plaintiff excepted and appealed.

Dockery & Wildes for plaintiff.

W. A. Cochran for defendant.

PER CURIAM. The evidence on the part of plaintiff tended to show that, in October, 1914, while plaintiff was riding his mule along the public road running from Troy to Biscoe, he was negligently run into by defendant operating an automobile, and that the mule's leg was broken so that it had to be killed. There was also evidence to show that the machine of defendant was without any or without proper brakes, and on this account defendant was unable to control his car, and this was one of the reasons for the occurrence.

The evidence of the defendant tended to show that, on the occasion in question, defendant was running an automobile along the road at 6 to 7 miles an hour; that plaintiff was on his mule at or near the middle of the road, the animal giving no indication of fright, and, as defendant was in the act of passing plaintiff and his mule, plaintiff gave him a jerk, and for this or some other reason the animal suddenly commenced backing towards the machine and backed directly against it, causing the collision and consequent injury; that the machine was well equipped with brakes, etc., and was under perfect control at the time, and defendant made every effort to avoid hurting the mule, but was unable to prevent it by reason of the unexpected movement back towards defendant's machine.

Under a correct and adequate charge, the jury have accepted (773) the account presented by defendant's evidence, and, this being true, it is clear that no recovery is permissible.

The question of *res ipsa loquitur*, which plaintiff desires to have considered, is hardly available on the record, for all the conditions attendant on the occurrence were fully observed and testified to by the witnesses, and the case was properly made to depend upon whether the account of the occurrence given by plaintiff or by defendant's witnesses should prevail.

There is no error, and the judgment for defendant must be affirmed.

No error.

Cited: Springs v. Doll, 197 N.C. 242 (c); *Wilson v. Perkins,* 211 N.C. 111 (c); *Clodfelter v. Wells,* 212 N.C. 828 (c); *Brady v. R. R.,* 222 N.C. 374 (c); *Etheridge v. Etheridge,* 222 N.C. 620 (c).

J. W. WIGGINS ET ALS. v. THE HIAWASSEE VALLEY RAILWAY COMPANY.

(Filed 31 May, 1916.)

Negligence—Blasting—Trials—Evidence—Questions for Jury.

Evidence in this action tending to show that a railroad company, in blasting its right of way for its road, used a charge of dynamite containing 25 pounds on the top of a large rock, 14 feet x 6 or 8 feet, where it had a gap or cavity facing the plaintiff's house, with a high place on the rim on the side opposite, and from the explosion, set off without warning, stones were thrown over plaintiff's house 100 yards away, causing the chimney and other parts in the interior of the house to fall, injuring various members of the plaintiff's family therein, is sufficient to be submitted to the jury upon the issue of defendant's actionable negligence. As to whether negligence is necessary to be shown in trespass of this character, *quære.*

ACTION tried before *Ferguson, J.,* and a jury, at November Term, 1915, of CHEROKEE.

Three actions were begun in the Superior Court of Cherokee County against the defendant; one by J. U. Wiggins and wife, Lillie Wiggins; one by Adeline Wiggins, and one by J. U. Wiggins, to recover damages alleged to have been sustained by the plaintiffs about 13 January, 1915, from blasting operations being conducted by the defendant. The first two actions were to recover for personal injuries sustained by Lillie Wiggins and Adeline Wiggins, respectively, and the third was by the husband of Lillie Wiggins, and father of Adeline Wiggins, to recover damages for loss of service, etc., resulting from the alleged injuries sustained by Lillie Wiggins and Adeline Wiggins.

The consolidated actions were tried before *Ferguson, J.,* at November Term, 1915, of Cherokee Superior Court, upon the following issues:

1. Was the defendant negligent, as alleged in the complaint? (774) "Yes."

2. Was the plaintiff Lillie Wiggins injured by the negligence of the defendant? "Yes."

3. What damage, if any, is the plaintiff Lillie Wiggins entitled to recover? "$500."

4. Was the plaintiff Adeline Wiggins injured by the negligence of the defendant? "Yes."

5. What damage, if any, is the plaintiff Adeline Wiggins entitled to recover? "$400."

6. What damage, if any, is the plaintiff J. U. Wiggins entitled to recover? "$100."

From the judgment rendered the defendant appealed.

Sherrill & Harwood, Dillard & Hill for plaintiffs.

J. D. Mallonee and Martin, Rollins & Wright for defendant.

PER CURIAM. There is evidence tending to prove that the defendant was building a railroad near the dwelling-house of J. U. Wiggins and was blasting out rock. On the day of the injury it placed a charge of dynamite containing 25 pounds or more on the top of a large rock. Prior to that time the defendant had placed a heavy shot in behind this rock which had slid the rock down. This rock was a very large one, about 14 feet long, 6 or 8 feet high, and was broad. The rock had a sort of gap or cavity on top facing the Wiggins house, with a high place or rim on the side opposite the house. The shot complained of was placed in this depression with some mud on top of it.

Plaintiff's house was about 100 yards from the blasting operations. The force of the blast threw pieces of stone over on plaintiff's land and about his house. The wife, Lillie Wiggins, and her 13 year-old daughter were in the house. No one was sent to warn them. The force of the blast jarred the house; jarred off the door casing which had been nailed on with 8-penny nails; knocked a piece off the water shelf; damaged the chimney, jarred one chimney loose from the house; shivered the top of the big chimney; knocked a stove flue loose from the house, shook fruit jars off the shelf and broke them; jarred pictures and stove pans from the walls; broke the window sash and shivered the panes. Mrs. Wiggins was knocked down, rendered unconscious, and permanently injured. The little girl was knocked off the stairway and badly injured. The blast tore the big rock all to pieces; tore a great hole in the bank up to the top of the hill; threw rock beyond the house into the yard; and threw rock too big to handle into the bottom-land.

There are four grounds of negligence alleged in the complaints:

1. Blasting in a negligent manner in disregard of the rights and safety of the plaintiffs.

2. The use of excessively large charges of dynamite.

3. The negligent failure to take proper care against injury or damage by said blasts.

(775) 4. Failure to give proper warning before exploding the blasts alleged to have caused the injury to the plaintiff.

We are of opinion that there is abundant proof of negligence (even if proof of negligence be necessary where such a trespass is committed upon the property and rights of another) to justify the submission of the issues to the jury.

The six assignments of error relating to the admission and exclusion of evidence have received careful examination and are without merit. We find no error in those rulings of the judge which warrants us in ordering another trial. There were no prayers for instruction, and the exceptions to the charge cannot be sustained.

The instructions to the jury were full, clear, and free of error. They presented the questions at issue fairly and correctly.

No error.

Cited: Sparks v. Products Corp., 212 N.C. 213 (c).

J. W. CARTER v. W. E. McGILL.

(Filed 31 May, 1916.)

Fertilizers—Inferior Quality—Damages to Crops—Contracts.

The rule of evidence laid down on the former appeal of this case, relating to damages to crops, etc., alleged to have been received because of the use of inferior fertilizer, is sustained on this rehearing, with suggestions that those in the fertilizer trade may protect themselves from the hazards in respect to the loss of crops by express provisions in their contracts of sale. See *s. c.*, 168 N. C., 507.

PETITION to rehear. Appeal by defendant from *Cooke, J.*, at September Term, 1914, of CUMBERLAND.

Tillett & Guthrie, McIntyre, Lawrence & Proctor for plaintiff.

Rose & Rose for defendant.

PER CURIAM. This is a petition to rehear. The Court, after due consideration, is of the opinion that the former judgment should be affirmed. See *s. c.*, 168 N. C., 507. It appears that the defendant offered to show generally, that is, without indicating the precise nature of the evidence, that the fertilizer was worthless, and this evidence was excluded. As to the other question in the case, the proof as to the yield of crops, it will be difficult, as we know, for the defendant to comply

with the exacting rule we have laid down, and exclude from the evidence offered to show the state of the crops all speculative or conjectural elements. The evidence should not be received unless this is done. We stated at the last term, in *Guano Co. v. Live-stock Co.,* 168 N. C., at 451, referring to *Tomlinson v. Morgan,* 166 N. C., 557, and quoting therefrom, that such evidence should always be handled with great care and examined with scrutiny, in order to see that no harm comes to (776) the dealer or seller by any possible guess that any alleged failure of or diminution in crops was caused by the inferior quality of the fertilizer, and to safeguard against the use of any evidence which is not at least practically certain in its character. In this very case we used this language: "The evidence should be admitted cautiously and with proper and full safeguards, so as, by eliminating the speculative elements, to show clearly the casual connection between the fertilizer used and the loss or diminution of the crop. Unless the foundation for such proof is well laid, it lacks in probative force, as it has not been removed from the realm of speculation, and is only conjectural and, of course, unreliable."

It is proper, in this connection, to suggest that the plaintiff, and others in the fertilizer trade similarly situated, can protect themselves against too great a hazard in respect to the loss of crops by a provision in their contracts to the effect that they are not to be liable for any results from the use of the fertilizer, or for any loss of crops, as was done in the case of the contract which was the subject of the controversy between the parties in *Guano Co. v. Live-stock Co.,* 168 N. C., 442, where we held such a stipulation to be valid.

Our attention has been called to a case recently decided in South Carolina, *Germofert v. Cathcart,* 88 S. E., 535, in which, upon careful examination, we find the Court construed a contract almost identical in language with the one which was under consideration in *Guano Co. v. Live-stock Co.,* 168 N. C., 442, and it held, as we did in the latter case, that the express warranty, and the restrictive clause therein as to nonliability for results, excluded the evidence as to failure of crops. See, also, *Allen v. Young,* 66 Ga., 617, which was cited for that position in *Guano Co. v. Live-stock Co., supra,* at p. 448. In the *Germofert case* the Court said that "The defendant cannot be allowed to avail himself of a method of defense that he has agreed not to use." And again: "The defendant had agreed not to 'hold payee responsible for practical results of said fertilizer on crops.' This evidence and the charge responding to it was in direct violation of the agreement." And so we said substantially in *Guano Co. v. Live-stock Co., supra,* the rule of damages having been fixed by the terms of the contract itself.

While cases must be decided according to the rules of law, as well stated by *Justice Hoke* in *Tomlinson v. Morgan,* 166 N. C., 557, the

strict enforcement of the rule may in some cases bear harshly upon a litigant, and it might do so in this class of cases. It is therefore expedient and proper that the dealer should be allowed to shield himself against possible injustice by adequate provision in the contract of sale. If he acts in good faith, he should not be unfairly dealt with and it is not unusual, as the cases will show, to insert such a clause in contracts of this kind.

Petition dismissed.

Cited: Fertilizer Works v. Aiken, 175 N.C. 401 (c); *Gatlin v. R. R.,* 179 N.C. 435 (c); *Fertilizing Co. v. Thomas,* 181 N.C. 280, 281 (c); *Fertilizer Works v. Simpson,* 183 N.C. 253 (c); *Pearsall v. Eakins,* 184 N.C. 294 (c); *Gulley v. Raynor,* 185 N.C. 98 (d); *Swift & Co. v. Aydlett,* 192 N.C. 338, 343 (c).

(777)

STATE v. DOCK MORSE AND HATTIE TADLOCK.

(Filed 23 February, 1916.)

1. **Fornication and Adultery—Trials—Evidence—Questions for Jury.**

The evidence upon this trial for fornication and adultery, among other things, as to the relation of the man to his codefendant, his conduct with reference to her, his frequent visits to her house, day and night, etc., is sufficient to sustain a conviction.

2. **Fornication and Adultery—Evidence—Character—Instructions—Trials—Appeal and Error.**

A defendant upon trial for a crime has the right to offer evidence of his general good character and have it considered by the jury as substantive evidence, and it is reversible error for the trial judge to refuse a requested prayer for instruction to that effect upon such evidence.

CRIMINAL ACTION, tried before *Cooke, J.,* and a jury, at September Term, 1915, of PASQUOTANK.

Defendants were indicted for fornication and adultery, and the defendant Dock Morse, from the judgment rendered upon a verdict of guilty, appealed to this Court.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

P. W. McMullan and Ward & Thompson for defendants.

WALKER, J. The appellant moved in the court below for a judgment of nonsuit; but we are of the opinion that there was sufficient evidence of his guilt to be submitted to the jury. Whether he is actually guilty or not is for the jury to decide, after weighing the testimony and ascertaining the facts. It is not necessary to state the evidence in detail, but it is quite sufficient to say that appellant's relations with his codefendant, his conduct with reference to her, his frequent visits to her house day and night, and his remaining at her home all night, with other circumstances of more or less significance, are sufficient in law for the consideration of a jury. This motion, therefore, was properly denied.

Several remarks of the court were the subjects of exceptions, and assigned by appellant as error, because they constituted an expression of opinion upon the evidence adverse to him, and injuriously so. Two of them are properly characterized as such expressions of opinion, and the third was calculated to prejudice the defendant; but we need not discuss them, as they will not occur again, and a new trial should be granted for another reason.

The defendant offered evidence of his good character and requested the court to instruct the jury that they should consider it in passing upon his guilt. The court refused to do so, and defendant excepted. We have held repeatedly that a defendant in an indictment for a crime has the right to prove his good character and to have it considered by (778) the jury, but the proof must be restricted to general character. *S. v. Thornton,* 136 N. C., 610. The question was discussed in *S. v. Cloninger,* 149 N. C., 567, and it was there said that "When a defendant introduces evidence himself to prove his good character, it is substantive evidence of the fact, and may be considered by the jury as such." And in *S. v. Hice,* 117 N. C., 782, it was held, the present *Chief Justice* writing the opinion, that in all cases a person accused of a crime, whatever the grade may be, whether a felony or a misdemeanor, has the right to offer, in his defense, testimony of his good character, citing *S. v. Henry,* 50 N. C., 65; *S. v. Johnson,* 60 N. C., 151; *S. v. Laxton,* 76 N. C., 216; 3 A. and E. Enc. of Law, p. 111. It was further said that this right is not dependent upon the defendant having been examined as a witness in his own behalf, and was recognized long before defendants were allowed to testify in their own behalf, but that it is limited to evidence of general character, "and opens the door, which otherwise would be closed to the prosecution, to show the defendant's general bad character, either by cross-examination of him or by other witnesses." Citing *Rex v. Stannard,* 7 Carr. and P., 673; 2 Hawkins P. C., ch. 46, sec. 194. It follows, therefore, that the refusal of the court to submit the evidence of his character to the jury, as requested by the defendant, was error. The fact, as stated in the case, that the court overlooked the defendant's

prayer for the instruction, does not atone for the error and cannot deprive him of the right to another hearing.

New trial.

Cited: S. v. Phillips, 178 N.C. 714 (2d); *In re McKay,* 183 N.C. 228 (2d); *S. v. Moore,* 185 N.C. 640 (2c); *S. v. Jeffreys,* 192 N.C. 321 (2d); *S. v. Colson,* 193 N.C. 238 (2d); *S. v. Nance,* 195 N.C. 49 (2c); *S. v. Roberson,* 197 N.C. 658 (2d); *S. v. Steadman,* 200 N.C. 769 (2d); *S. v. McMahan,* 228 N.C. 294 (2c); *S. v. Davis,* 231 N.C. 665 (2c).

STATE v. ARTHUR LANG.

(Filed 23 February, 1916.)

Seduction — Virtuous Woman — Evidence—Subsequent Conduct—Instructions—Appeal and Error.

Upon trial for seduction under promise of marriage, Revisal, 3354, evidence of familiarities permitted by the prosecutrix after the act, not amounting to incontinency, does not negative the evidence that she was innocent and virtuous prior thereto, though properly considered by the jury with reference to her character and the weight of her evidence; and in this case a further remark of the judge that such conduct "a year after the seduction should not be taken against her for unrighteousness" was a repetition, in scriptural phrase, of what he had already charged.

APPEAL by defendant from *Cooke, J.,* at August Term, 1915, of GATES.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Ward & Grimes and A. P. Godwin for defendant.

(779) CLARK, C. J. The defendant was convicted of seduction under promise of marriage under Revisal, 3354. The evidence was that the offense was committed in June, 1913. Witnesses for the defendant testified to impropriety of conduct, not amounting to unchastity, on the part of the prosecuting witness "some time during the year 1914," from which his counsel contended the jury should find that she was not an innocent and virtuous woman. The judge charged the jury that "If they should find beyond a reasonable doubt from the evidence that the defendant seduced the prosecutrix under and by virtue of a promise of marriage, at the time testified to by her, and that she was at that time an innocent and virtuous woman, as had been previously explained, then

the conduct at the home of the sick person which had been testified to as taking place in 1914 would not negative her being an innocent and virtuous woman; that the question was, Was she an innocent and virtuous woman at the time of the seduction? and the evidence with regard to this conduct, if the jury should find she had been seduced at the time she testified to, was competent simply on her character, and should be considered by the jury in determining what weight they would give her testimony."

These acts of impropriety were fully denied by the evidence of the prosecutrix, and there was also evidence that she was a woman of good repute prior to the seduction, and only some 15 years of age. The defendant was a widower 29 years of age. He did not take the stand in his own behalf and introduced no testimony to prove his good character. The acts of impropriety alleged were testified to by witnesses, one of whom was shown to have been convicted of larceny and the other, according to the testimony, was of bad character and admitted he had been run out of the county for the same offense of seduction.

In *S. v. Malonee,* 154 N. C., 202, *Walker, J.,* said: "The proof of chastity should relate to the time preceding the seduction or the date when it became known, as it is manifest that her reputation in that regard would be injuriously affected by the offense itself when revealed, and the very crime would thus become the means of protecting the criminal, and the more notorious the seduction and the more extensively her shame had been published to the world, the more certain would be the immunity from punishment," citing *People v. Brewer,* 27 Mich., 134.

It is true that in *S. v. Whitley,* 141 N. C., 823, it was held that under an indictment for seduction under promise of marriage, where there was evidence, as here, of familiarities not amounting to incontinency, this could be considered by the jury in passing upon the question whether the prosecutrix was a virtuous woman. An examination of the record in that case on file shows that the conduct there testified to occurred before the alleged seduction, and therefore was competent on the question whether she was an innocent, virtuous woman.

If the alleged impropriety a year subsequent was of any (780) weight, the charge of the court was unexceptionable, for he said: "If the jury should find beyond a reasonable doubt that the prosecutrix was seduced under promise of marriage, and was at that time an innocent and virtuous woman," that then the conduct of the prosecutrix a year later would not negative that fact. The further remark of the court, that such subsequent conduct "a year after the seduction should not be taken against her for unrighteousness," was simply a repetition, in scriptural phrase, of what he had already charged.

No error.

Cited: S. v. Houpe, 207 N.C. 378 (c); *S. v. Wells,* 210 N.C. 738 (c).

STATE v. E. T. BASS.

(Filed 1 March, 1916.)

1. Municipal Corporations — Ordinances — Stables—Nuisances—Common Law.

Stables within the limits of a town are not, at common law, regarded as nuisances *per se*, regardless of the way in which they are kept; but owing to their objectionable character when placed too near a dwelling, an ordinance of a town reasonably regulating their location is a valid one. Its terms include one in course of erection.

2. Same—Equal Protection—Reasonableness—Valid Ordinances—Conviction.

An ordinance of a town regulating the placing of stables with reference to their distance from dwellings, as nuisances, must be reasonable and uniform, affording protection to all citizens alike, and reasonably appropriate for the accomplishment of any legitimate object falling within the police power of the State; and where an ordinance provides a penalty for the erection of a stable closer to the dwelling of a neighbor than to the owner, the ordinance will be declared void and conviction thereunder a nullity.

3. Municipal Corporations — Ordinances—Stables—Nuisances—Questions of Law—Trials.

The question of the validity of an ordinance regulating the distance stables may be placed from dwellings within the corporate limits is a matter of law for the courts to decide.

CLARK, C. J., dissenting.

INDICTMENT, tried at November Term, 1915, of NASH, before *Rountree, J.*, for violating the following ordinance of the town of Nashville:

"No person or persons, firm or corporation shall build or cause to be erected any privy, stables, or stalls nearer to a neighbor's residence than it is to the owner's; and no privy shall be constructed nearer than 25 feet of any public street, under penalty of $25 for each offense. (781) Each day's continuance of such privy, stables, or stalls after notice by the sanitary officer shall constitute a separate offense."

The defendant was convicted, and from the judgment pronounced appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

T. T. Thorne, A. C. Bernard for defendant.

BROWN, J. The defendant was convicted of erecting his stables nearer the house of his neighbor than to his own, the evidence being that they were located 14 feet 7 inches from Mrs. Collins' residence and three times that distance from his own residence.

The contention that the ordinance does not apply to a stable in course of construction cannot be maintained. In *Privett v. Whitaker*, 73 N. C., 554, it was held that a municipal ordinance forbidding the erection of a wooden building within certain limits applied to a building the erection of which had been commenced at the time the ordinance was adopted. Stables are not *per se* nuisances at common law, to be abated regardless of the manner in which they are kept. *Dargan v. Waddill*, 31 N. C., 244. Nevertheless the possibility that they may become nuisances, together with their objectionable character when located very near to dwellings, place them in the category of buildings the location of which may be designated and controlled by reasonable ordinances enacted by the municipality in which they are situated. *St. Louis v. Russell*, 20 L. R. A., 721; McQuillin on Mun. Ord., 450; 29 Cyc., 1171; Dillon, 692.

It is contended that this ordinance is invalid because it is unreasonable and not uniform, in that it does not afford protection to all citizens alike and is not reasonably appropriate for the accomplishment of any legitimate object falling within the police power of the State. 6 Ruling Case Law, sec. 226. The objection is well taken, as the ordinance manifestly fails to accomplish any purpose properly falling within the scope of the police power. *R. R. v. Drainage Comrs.*, 200 U. S., 561; 6 Ruling Case Law, sec. 226, and notes.

Its purpose is presumed to be to improve the health of the inhabitants of the town, as well as to minister to their comfort. It fails conspicuously to accomplish such purpose, as under it stables may be kept with impunity obnoxiously near any number of dwellings if they are equally as near the dwelling of the owner of the stables. Thus it is put within the power of the owner to annoy his neighbor at will if he is willing to endure the same annoyance himself.

An ordinance to be valid must be uniform in its application to all citizens and afford equal protection to all alike. It must not discriminate in favor of one person or class of persons over others. To be valid it must furnish a uniform rule of action. *S. v. Tenant*, 110 N. C., 612. It must operate equally upon all persons, as well as for (782) their equal benefit and protection, who come or live within the

corporate limits. 1 Dillon Mun. Corp., sec. 380; *S. v. Pendergrass,* 106 N. C., 664; *S. v. Summerfield,* 107 N. C., 898.

The learned Attorney-General, with his usual candor, admits that the ordinance is void as a municipal regulation, and in his brief states the legal objections to it so strongly that we quote *in extenso:*

"The consideration that raises a grave doubt about the constitutionality of the ordinance is that the commissioners of the town, who are by statute clothed with the power and duty of exercising their judgment in the enactment of measures for the protection of the public health, have not exercised any judgment at all, and have not declared what, in their opinion, is the shortest distance from a residence a stable should be permitted, but it is left to each citizen to determine that question for himself, with the obligation that when he has determined it he must afford to his neighbor the same protection he does himself. In this view of the case there would seem to be two fatal objections to the validity of the ordinance:

"1. That it is a clear delegation of legislative power to an individual. This Court has held, in *S. v. Tenant,* 110 N. C., 609, that a board of aldermen itself cannot be vested with any discretion in the enforcement of an ordinance, upon the ground that there would be no general or uniform rule of action; and it would seem to follow that it cannot be left to the judgment, taste, or whim of an individual to say how far a stable must be from a residence.

"In *St. Louis v. Russell,* 20 L. R. A., 721, it is held that an ordinance delegating to the owners of one-half the ground in any block the power to determine whether a livery stable may be erected thereon or not is invalid, as an unconstitutional delegation of legislative power. The authorities in support of the proposition are reviewed on pages 727 and 728, *S. v. Tenant, supra,* being among the cases cited."

Again he says: "The second objection to the validity of the ordinance is that it necessarily results in a standard devoid of any element of equality or uniformity, both of which elements are essential to a valid ordinance. The practical result of the enforcement of the ordinance would be a standard as variable as the sizes of the different lots in a town and as the judgment and taste of the individual citizens. Under the ordinance there could be a hundred stables within 50 feet of a residence and none of them be obnoxious to the ordinance, and at the same time there could be a hundred other stables more than a hundred feet from any residence and all of them a violation of the ordinance. The owner of a large lot could build his stable 300 feet from his residence, but if it happened to be within 250 feet of a residence of another he would be subject to indictment; but if he moved up his stable so that

it would be 100 feet from his own residence and 110 feet from a (783) dozen other residences, he would 'clear the law.'

"The proposition that a stable 250 feet from a single residence is a menace to the public health, while the same stable moved to a point within 110 feet of a dozen residences would not be a menace to the public health, has in it elements of unreasonableness worthy of the serious consideration of this Court."

What is so well said by *Clark, J.*, in *S. v. Hord,* 122 N. C., 1094 (sustaining an ordinance prohibiting a resident from keeping a hogpen within 100 yards of his neighbor's residence) is peculiarly applicable to this case: "The object of the ordinance is not to prevent a man from injuring himself by keeping his hogpen too near his own house, for that is a matter he can remedy at will, but to protect the public against a nuisance which they have no power to prevent except through the authority of a town ordinance acting on the offender." The ordinance now under consideration is the converse of that. Under this ordinance one may injure his neighbor, if from necessity or caprice he is willing to endure the same injury himself.

That the reasonableness or validity of a town ordinance is a matter of law for the court and not the jury to decide is well settled. *Small v. Edenton,* 146 N. C., 527; McQuillin, secs. 726-729.

The motion to dismiss is allowed.

Reversed.

CLARK, C. J., dissenting: The ordinance does not provide that "Any one can erect a stable on his lot provided it is not nearer to his neighbor's residence than to his own." If this were the language of the ordinance, then the criticism of it would be in point, that it might be too near his neighbor. But the ordinance provides merely that "No person shall erect a privy, stables, or stalls nearer to a neighbor's residence than to his own."

It does not lie in the defendant's mouth to complain that the ordinance is not more restrictive upon him than it is. If the defendant should erect a stable or other nuisance nearer to his neighbor's residence than it should be, he is liable for a nuisance. *S. v. Wilkes, 170 N. C., 735.* This ordinance does not authorize him under any circumstances to place his stables or other nuisance nearer to a neighbor's residence than it should be.

It is not requisite that the town commissioners shall pass ordinances in the exact wording that this Court would use. Our only jurisdiction is to hold them invalid if unreasonable. There is nothing unreasonable in an ordinance providing that one "shall not place a stable or other nuisance nearer to a neighbor's residence than to his own." This is

merely placing in an ordinance the Golden Rule enunciated in
(784) Galilee long centuries ago. It is nothing against the validity of the ordinance that it does not go further and restrict the defendant as to the distance from a neighbor's residence in which the stables can be placed. This Court cannot by mandamus compel the town authorities to make such ordinance. The ordinance is unobjectionable as far as it goes. It might go further.

In *S. v. Hord,* 122 N. C., 1092, it was held that at common law as well as under the statute the town commissioners could forbid a citizen from keeping a hogpen within 100 yards of the residence of another, without prescribing the distance from his own residence. Certainly, therefore, it cannot be unreasonable to prescribe that he shall not keep a nuisance any nearer to his neighbor than to himself.

In *S. v. Hord, supra,* it was said: "It is an anomaly that the defendant, who had disobeyed the ordinance forbidding him to commit a nuisance upon the public, should be complaining that the town did not go further and forbid him being a nuisance to himself. He could refrain from that without official help." In this case it is equally an anomaly that the defendant, who has disobeyed the ordinance forbidding him from putting his stables nearer a neighbor's residence than his own, should be complaining that the town did not go further and prescribe a definite distance from his neighbor's house within which he could not put the stables, even though it should be an equal distance from his own house. He could refrain from doing that without official help, and if he put it near enough to his neighbor's residence to be a nuisance he would be liable for such nuisance, *S. v. Wilkes, supra;* and this ordinance does not purport to give him authority to do so.

In *S. v. Rice,* 158 N. C., 635, the Court held than an ordinance was not insufficient because it did not go further and prescribe the number of hogs or pigs, the condition or size of the pens, where they are kept. The Court said: "Courts cannot run a race of opinion upon points of right, reason, and expediency against the lawmaking power. No act of the Legislature can be declared void or unconstitutional unless it conflicts with some provision of the Constitution. Nor can any ordinance of any municipal corporation within the power conferred by the Legislature, and not in conflict with the laws and Constitution of the State, be impeached in a court for unreasonableness. A critical examination of cases holding police regulations void, because unreasonable, will disclose that the attempted police regulations violated some constitutional guaranty. The right asserted by some courts to declare municipal ordinances invalid because unreasonable is limited to ordinances passed under the implied or incidental powers of the municipality."

Our people have the inestimable right of *"local self-government."* As this Court has often said, we cannot, "without making ourselves a tyranny of five men," assume supervision over boards of county commissioners or the boards of town commissioners, to set aside (785) their regulations and orders within the powers conferred by the statute unless, as is said above, "the attempted police regulations violate some constitutional guaranty." This ordinance does not violate any constitutional guaranty, and is within the authority conferred upon the town by Revisal, 2929.

The government of Nashville is committed to the commissioners elected by the voters thereof, and not to us. We can interfere only when the town authorities enact an ordinance which violates their authority under the Constitution and statutes, and not merely when the ordinance does not go as far as it might do, as in this instance. As was said in *S. v. Rice,* "It is not our province to review the action of the board of sanitation within the limits of their powers." As was said in *S. v. Hord, supra,* the ordinance is uniform, for it applies to all citizens alike under the same conditions.

On its face there is nothing in this ordinance that violates the Constitution or the statutes or that is beyond the powers conferred upon the town commissioners. There is no evidence that the facts, in this particular case, have made it oppressive to the defendant. It is not the province of the courts to govern, but only to set aside ordinances when shown to be beyond the authority of the town commissioners. When, as in this case, an ordinance which is within their powers does not go as far as we think it might have done, it is for the people of the town of Nashville, and not for us, to procure an addition to the ordinance or to elect a new board that will amend it. The people of the town know local conditions and requirements better than we do, and are competent to govern themselves through their local officials, elected by themselves, to voice their wishes in local matters. As the defendant has violated the ordinance, as it is written, certainly he cannot contend that he is not guilty because the ordinance might have prohibited him further to the protection of his neighbor.

Cited: S. v. Stowe, 190 N.C. 86 (2j); *Bizzell v. Goldsboro,* 192 N.C. 354 (1c); *Bizzell v. Goldsboro,* 192 N.C. 361 (1j); *Angelo v. Winston-Salem,* 193 N.C. 214 (2c); *Wake Forest v. Medlin,* 199 N.C. 85 (1c); *Shuford v. Waynesville,* 214 N.C. 138 (1c); *Ivester v. Winston-Salem,* 215 N.C. 7 (1c); *Clinton v. Ross,* 226 N.C. 689 (1c).

STATE v. YORK T. WHITE ET AL.

(Filed 8 March, 1916.)

1. Evidence—Maps—Trials.

A map may be used by a witness for the purpose of explaining his evidence, and upon a criminal trial for a willful burning of witness's stable and barn, it is held competent for the witness to use a map for the purpose of showing the relative position of his house and outbuildings and the home of the defendants, when relevant to the inquiry.

2. Criminal Law—Fires—Defenses—Instructions—Appeal and Error.

Upon trial for the willful, etc., burning of a barn, etc., defended upon the sole ground that the defendant was elsewhere at the time, and presenting this as the only question, a charge of the court was not erroneous which instructed the jury to convict the defendant should they find he was guilty of burning the barn. *S. v. Millican*, 158 N. C., 617, cited and applied.

(786) INDICTMENT, tried before *Lyon, J.*, and a jury, at Fall Term, 1915, of BERTIE.

The defendants were indicted for willfully, wantonly, and feloniously setting fire to and burning the stables and barn of one J. R. Lawrence.

They were convicted, and appealed from the judgment pronounced upon the verdict.

J. R. Lawrence was introduced as a witness for the State, and upon his examination was handed a map of his plantation and premises where the crime was alleged to have been committed, showing the relative position of the witness's house and outbuildings and of the homes of the defendants, and he was examined with reference to these places. The defendants objected. The court stated to the jury that the map was not introduced as substantive evidence, but merely for the purpose of enabling the witness to explain his testimony.

His Honor, in the first part of the charge, stated that the defendants were indicted for wantonly and feloniously burning the barn and stables of J. R. Lawrence, and after stating fully the contentions of the State and the defendants, he concluded his charge by saying: "You are the sole triers of the facts, and you are to find the facts from the evidence, and if you find that the defendants are guilty of burning the barn it will be your duty to convict them." The defendants excepted.

The evidence is not sent up as a part of the record, but the charge of the court shows that the defendants denied burning the barn and stables, and that they relied upon an alibi.

Attorney-General Bickett and Assistant Attorney-General Calvert, Winston & Matthews, and Gilliam & Davenport for the State.

W. R. Johnson, J. B. Martin and Winborne & Winborne for defendants.

ALLEN, J. It has been held by numerous decisions that it is competent for a witness to use a map upon the trial for the purpose of explaining his evidence, and the first exception of the defendants cannot be sustained. *S. v. Harrison,* 145 N. C., 410; *S. v. Rogers,* 168 N. C., 112, and the cases cited.

The exception to the charge is equally without merit.

The evidence is not made a part of the case on appeal, but it sufficiently appears from the charge of the court that the matter in dispute before the jury was whether the defendants did the burning, and not whether they burned the barn without illegal intent. (787)

The defendants did not contend that they accidentally set fire to the building, but they insisted that they were not there and had nothing to do with it, and the case, therefore, falls directly within the ruling in *S. v. Millican,* 158 N. C., 617.

There is

No error.

Cited: S. v. Vick, 213 N.C. 237 (2c); *S. v. Cade,* 215 N.C. 395 (2c); *S. v. Smith,* 221 N.C. 288 (1c).

STATE v. MELVIN HORNE.

(Filed 5 April, 1916.)

Witnesses, Expert—Homicide—Trials—Courts—Expression of Opinion—Appeal and Error.

It is within the sound discretion of the trial judge to call a medical expert witness, of his own motion, and examine him on the trial for a homicide, without the desire of the parties, exercising care to not prejudice either one; but in this case it is held that the expression of the opinion of the court as to the "admirably lucid" testimony of the witness was stronger than the statute permitted, and constituted reversible error.

INDICTMENT for murder, tried at September Term, 1915, of NEW HANOVER, before *Rountree, J.*

The prisoner was convicted of murder in first degree, and from the sentence of death appeals.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

C. D. Hogue, K. O. Burgwin for the prisoner.

BROWN, J. The prisoner was convicted of the murder of D. L. T. Capps, and sentenced to death. On the trial the court of its own motion called as an expert witness one Dr. Stovall. The witness, after examination, was found by the court to be an expert. The question presented is whether or not a judge is at liberty of his own motion to call expert witnesses who are not desired either by the State or by the defendant.

This is a matter within the sound discretion of the trial judge. He has the right to call to the witness stand and examine any witness who may be able to shed light upon the controversy. He should exercise this right with care and should so conduct the examination as not to prejudice either party.

It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so, and the calling of a witness on his own motion differs from this (788) practice in degree and not in kind. This practice, in the case of ordinary witnesses, has been approved in some instances. *Clark v. Com.*, 90 Va., 633; *Hill v. Com.*, 88 Va., 633; *O'Connor v. Ice Co.*, 121 N. Y., 662; 57 L. R. A., 875, and note.

This practice is especially allowable in the matter of an expert witness, originally regarded as *amicus curiæ* and called, generally, by the court. 3 Chamberlayne on Evidence, secs. 2376 and 2552.

The prisoner excepts to the following charge: "The State relies to a considerable extent upon the testimony of Dr. Stovall, who it appears from the witness stand was selected by the court to make an investigation of this defendant, and to take the stand and testify before you impartially as to his opinion upon the matter. The State calls your attention to the fact that Dr. Stovall gave an admirably lucid account of what he conceived to be and his opinion of the mental condition of the defendant."

The general tone of this commendation of the witness is much warmer and stronger than is consistent with that moderation and reserve of expression which is enjoined upon a trial judge. *Powell v. R. R.*, 68 N. C., 395; *Withers v. Lane*, 144 N. C., 184.

While the learned judge had the right to call the expert witness to the stand, he had no right to throw into the jury box the weight of his own good opinion of the witness.

It was well calculated to weigh heavily against the prisoner.

New trial.

Cited: S. v. Hart, 186 N.C. 588 (c); *S. v. Rhinehart,* 209 N.C. 154 (c); *S. v. Stiwinter,* 211 N.C. 279 (c); *S. v. Benton,* 226 N.C. 748 (c); *S. v. Hedgepeth,* 230 N.C. 36 (c).

STATE v. THOMAS MERRICK.

(Filed 12 April, 1916.)

1. **Homicide—Indictment—Less Offense—Malice—Passion—Cooling Time —Manslaughter.**

Manslaughter is the unlawful killing of another without malice, and may occur in instances where the killing has been done by reason of sudden anger aroused by provocation which the law deems adequate and sufficient to displace malice, and committed so soon after the provocation that a sufficient time has not elapsed for passion to subside and reason return to the accused.

2. **Same—Trials—Matters of Law—Questions for Jury.**

Upon the trial for a homicide, the length of time after the provocation before the killing necessary to reduce the offense to manslaughter is a matter of law for the courts, and only the existence or nonexistence of the facts controlling its application in a given case is for the jury.

3. **Homicide—Manslaughter—Evidence—Instructions—Appeal and Error —Statutes.**

Upon a trial for murder a verdict for a less grade of crime is permitted, and where the indictment is for murder, and there are facts in evidence tending to reduce the crime to manslaughter, it is reversible error for the trial judge not to submit this phase to the jury, under a proper charge, though not requested by the defendant to do so, and although he has offered to submit to a verdict of murder in the second degree, which has been refused. Revisal, sec. 535.

4. **Homicide—Manslaughter—Evidence.**

Upon this trial for a homicide there was evidence tending to show that the prisoner, a lad, was sitting in a "coca-cola plant," with the permission of the proprietors, which was divided midway by a partition with a communicating door, when the deceased, a fine specimen of physical manhood, and an employee, came in, commenced an altercation over a hitching rein, shoved the defendant from a box on which he was sitting and struck him twice; that defendant ran into the back room, returned for his hat, and again returned with a gun he had borrowed to shoot birds with, loaded with No. 6 shot, then cursed the deceased and shot and killed him. There was testimony that the defendant returned with the gun "in no time," and again, from one or two or three minutes, the witnesses not being definite in their statements. *Held,* evidence sufficient to be submitted to the jury upon the question of the offense of manslaughter.

5. Homicide—Submission—Manslaughter—Verdict—Appeal and Error.

Upon a trial for a homicide, the accused offered to submit to a verdict of murder in the second degree, which was refused, and thereafter evidence was developed which tended to reduce the grade of the offense to manslaughter. This phase of the case was not submitted by the judge to the jury, which rendered a verdict of guilty of murder in the first degree. *Held*, the error of the court was not cured by the verdict, and was reversible error.

ALLEN, J., dissenting.

CLARK, C. J., concurring in the dissenting opinion.

(789) INDICTMENT for murder of Leon B. Hudson, deceased, tried before *Daniels, J.*, and a jury, at November Term, 1915, of NEW HANOVER.

The evidence on the part of the State showed that on 31 August, 1915, deceased was killed by a gunshot wound, intentionally inflicted by defendant. There was no testimony offered by defendant, and, on the facts in evidence, the jury rendered a verdict of guilty of murder in the first degree. Sentence imposing the death penalty, and defendant appealed and, pursuant to exceptions duly entered, among other things, made assignments of error in effect as follows:

1. That the court in its charge to the jury entirely failed to present the question of manslaughter, when there were facts in evidence permitting an inference of manslaughter and properly requiring that this view of the case be considered by the jury.

(790) 2. That the court in its charge entirely failed to give any explanation of the question or significance of "cooling time" in reference to its effect on the crime of manslaughter, when there were facts in evidence requiring that such question be referred to and properly explained.

3. That the court in its charge affirmatively restricted the jury to the consideration of the question of murder in the first and second degrees, when there were facts in evidence which permitted and required that the question of manslaughter should be also considered and passed upon.

4. That the court in its charge to the jury presenting the issue, among other things, said: "So, gentlemen, the question for you, and the only question, according to the contentions of the State and defendant, is this: 'Did the defendant commit the act with deliberation and premeditation?" thus confining the deliberations of the jury to the question of murder in the first and second degrees, when there were facts in evidence tending to establish the crime of manslaughter and which should have been also submitted.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

M. J. Bellamy and Burke H. Bridgers for defendant.

HOKE, J. In general terms, manslaughter is said to be the unlawful killing of another without malice, an instance of the crime so defined being where one unlawfully kills another by reason of the anger suddenly aroused by provocation which the law deems adequate; anger naturally aroused from such provocation and the killing being done before time has elapsed for "passion to subside and reason to reassume her sway." In such case the anger so aroused is held to displace malice and will reduce the unlawful homicide to the grade of manslaughter. *S. v. Baldwin,* 152 N. C., 822; *S. v. Hill,* 20 N. C., 629; *Maher v. The People,* 10 Mich., 212. Speaking to this subject in *Maher's case, Christiancy, J.,* delivering the opinion, said: "But if the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition, then the law, out of indulgence to the frailty of human nature, or, rather, in recognition of the laws upon which human nature is constituted, very properly regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter." And again, in same case: "The principle involved in the question, and which I think clearly deducible from the majority of well considered cases, would seem to suggest as the true general rule that reason should, at the time of the act, be disturbed or obscured by passion to an extent which might (791) render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion rather than judgment."

In regard to the time to be allowed in the proper application of the principle, usually termed "cooling time," it is said to be the trend of the more recent decisions to hold that the question should be determined by the jury under the relevant facts of each case, Clark on Criminal Law, p. 228; but in this jurisdiction the rule has thus far prevailed that the question of cooling time is one of law for the courts, and only the existence or nonexistence of the facts controlling its application in a given case is for the jury. *S. v. Moore,* 69 N. C., 267.

These being the positions appertaining to the crime of manslaughter and more directly relevant to the question presented, it has been held with us in numerous cases, and the position is in accord with authorita-

tive decision elsewhere, that where in an indictment for murder the law in this State permitting a verdict for a lesser grade of the crime, if there are facts in evidence tending to reduce the crime to manslaughter, it is the duty of the presiding judge to submit this view of the case to the jury under a correct charge, and his failure to do so will constitute reversible error, though the defendant may have been convicted for the higher offense. *S. v. Clyde Kennedy,* 169 N. C., 289; *S. v. Kendall,* 143 N. C., pp. 659-664; *S. v. White,* 138 N. C., pp. 704-715; *S. v. Foster,* 130 N. C., pp. 666-673; *S. v. Jones,* 79 N. C., 630; *S. v. Matthews,* 148 Mo., 185; *Baker v. The People,* 40 Mich., 411.

In *Kendall's case, supra,* it was held: "It is a principle very generally accepted that on a charge of murder, if there is any evidence to be considered by the jury which tends to reduce the crime to manslaughter, the prisoner, by proper motion, is entitled to have this aspect of the case presented under a correct charge, and if the charge given on this question is incorrect, such a mistake will constitute reversible error, even though the prisoner should be convicted of the graver crime, for it cannot be known whether, if the case had been presented to the jury under a correct charge, they might not have rendered the verdict for the lighter offense."

In *Foster's case, supra,* the present *Chief Justice,* delivering the opinion, said: "If it had been clearly explained to the jury what constituted murder in the second degree, of which, through his counsel, he had admitted himself to be guilty, it may be that the jury would have coincided with that view; but, in the absence of instruction on that offense, with only the issue of murder in the first degree placed before them with instructions only as to that offense, with evidence of the homicide, it may well be that the jury held against the prisoner, that he was guilty, simply because they were not informed as to the constitu-
(792) ent elements of the lesser offense"; and for this omission a new trial was allowed, the prisoner having been convicted of murder in the first degree.

In *S. v. Jones,* a conviction for the capital crime of murder, it was held error to exclude from the jury the view of manslaughter, there being evidence tending to establish such crime.

In the present case there was no claim or suggestion of any previous animosity existent between the prisoner and the deceased, and the facts in evidence on the part of the State tended to show (the defendant offering no testimony) that the homicide occurred on 31 August, 1915, in the city of Wilmington in the front room of the "coca-cola plant" of A. B. Merritt, about 4 o'clock p. m.; that this plant consisted of a house about 30 feet wide and 60 feet long, divided midway by a partition; that a door opened from the front to the back compartment and a large door

led into a back yard, across which was a coal and wood plant operated by the same proprietor; that the defendant was a hand doing work in the wood yard when needed, but on that afternoon there was no work to be given him, and he was over in the coca-cola department, doing nothing, and was sitting on a crate in the front compartment talking with one of the employees. So far as appears, he was there without objection, for the witness Parker, who seems to have had immediate charge, says that he had made no objection to the boy being there, and while the proprietor testifies that "he had given Hudson authority," he does not say authority for what, and immediately adds: "I had intended Parker to keep the boys away from the place, and had told Hudson to use his influence with Parker to keep them away." The boy, then, was there without objection being made known to him, and while sitting down, as stated, talking to one of the hands, deceased, who drove a delivery wagon for the plant, came into the compartment and asked the defendant where his hitching rein was. Defendant replied, "It is my hitching rein." Hudson replied, "It's no such a damn thing," and, starting towards the boy, said: "You get out of here." The boy replied, "Mr. Hudson, you don't own this plant, and you have no right to put me out." Hudson, said to be a fine specimen of manhood, weighing 165 pounds, continued to advance, caught the boy, the defendant, and pushed or shoved him off the box and, two of the witnesses say, struck him twice. The defendant, getting loose, ran into the back room, returned and got his hat, which had fallen off his head; went again into the back room and, returning with a gun, called to Hudson: "You are a G—— d—— son of a bitch!" and fired and killed him; that the boy had borrowed the gun to hunt birds, rice birds or coots, which were killed for eating at that time of year, and had the gun somewhere in the back room; that it was loaded with shot something like No. 6. Four or five of the employees, testifying to the occurrence, said that when the boy went out the first time he stayed three or four minutes, and, returning for his hat, went out and stayed the same length of time before (793) he returned with the gun and fired, killing the deceased. One of these witnesses, however, on cross-examination, said that he would not say definitely that these periods when the boy was out of the room were three or four minutes; it might have been "one minute"; and again: "That it didn't seem like no time." Two others of these eye-witnesses who had testified that the boy was out of the room "two or three minutes each time," when asked on cross-examination if he went out of the building to get the gun, answered: "No, he didn't have time for that."

Upon these, the facts chiefly relevant and controlling on the questions presented by the appeal, we are of opinion that there was prejudicial error committed in excluding from the jury any and all consideration

as to the crime of manslaughter, and restricting their deliberations to the questions of murder in the first and second degrees. If the defendant, on being accused of wrongfully taking the check rein of deceased, then jerked or shoved from the box and struck twice, had immediately fired and killed deceased—killed in the passion then aroused by the assault and battery upon him—the crime would have been reduced to manslaughter, *S. v. Sizemore,* 52 N. C., 206; and if on being so assaulted he had rushed into the back room, returned for his hat, again went out, returning immediately with the gun, and fired and killed the deceased—killed in the anger aroused by the blows he had just received and so immediately thereafter that "there was not sufficient time for passion to subside and reason to reassert its sway"—it would still be manslaughter, and the relevant time that did elapse between the provocation and the homicide is left too indefinite and uncertain by the witnesses for the court to rule as a matter of law that there is no element of manslaughter involved in the case.

We all know how prone witnesses are to inaccurately express themselves when stating the time that has passed in a given case. In an extended experience on the *nisi prius* Bench and at the Bar, the writer has rarely heard a witness give a multiple of time less than a minute. They not infrequently say minutes and mean seconds, and, in the presence of a great tragedy like this, the mind of an average witness is not likely to take due note of time or to express it accurately when testifying at some later period; and when to this is added that fact that one of the principal witnesses has said, on cross-examination, that defendant was out of the room "no time," and two others that he wasn't gone long enough to leave the rear room, we are confirmed in the view that the time that elapsed must be referred to the jury and the ruling as to cooling time made on the facts as they may find them.

It is urged in support of the proceedings below that the jury having convicted the defendant of murder in first degree, they have thereby necessarily excluded any and every view of the evidence tending
(794) to show manslaughter, and therefore the failure to submit the cause in that aspect should not be considered as prejudicial error, and *S. v. Lipscomb,* 134 N. C., 689, and other cases are cited as authority for the position.

As we have endeavored to show, it is an established principle in our criminal procedure that, on conviction of murder, if there are facts in evidence tending to establish a lesser grade of the offense, it is reversible error not to have presented the case to the jury in that aspect, for it cannot be determined how and to what extent it may have influenced the verdict of the jury as rendered; and there is nothing in the decision in *Lipscomb's case* that militates against the position. In that case the

prisoner and deceased were sitting down in the latter's home arguing on the Scriptures, and the prisoner, becoming irritated by the course of the discussion, stepped outside, got his gun, and, returning, shot and killed the deceased as he sat in his chair. In explanation, defendant testified that he was afraid of deceased, and thought he was a conjurer and was using his powers against defendant or his family. The case was submitted on the questions of murder in the first and second degrees, and there was no error in the charge on either question. *Associate Justice Walker,* after upholding the conviction on that ground, and in reference to an exception whether presumption of malice, arising at common law from an intentional killing, had been rebutted, said that "if there was error in this, it could not have prejudiced the prisoner, the jury having found him guilty of willful, premeditated murder." There were no facts in evidence permitting an inference of manslaughter; none to rebut the presumption of malice existent from an intentional killing, and the comment, which was only made by way of suggestion, was not intended nor should it be construed to reverse or trench upon an established position of our criminal law to which the learned and careful judge has often given his full adherence and well considered support. *S. v. Clyde Kennedy,* 169 N. C., 288.

In *S. v. Munn,* 134 N. C., 680, the facts of the case are not stated in the opinion, but, on examination of the original record, it appears that the court charged fully on the question of manslaughter, as favorable to the prisoner certainly as he had any right to ask, and no exceptions were made to the charge in this aspect of the case. And referring to the other cases cited in support of the conviction, in *S. v. Johnson,* 161 N. C., 264, there was no error in the charge as given, and it was held, *Associate Justice Brown* delivering the opinion: "That there was not a scintilla of evidence upon which a verdict of manslaughter could have been based." In *S. v. Teachey,* 138 N. C., 598, the same ruling was made: "That no element of manslaughter was presented." And on the facts in evidence the same position seems to be fully justified in *S. v. Bowman,* 152 N. C., 817. See *S. v. Chavis,* 80 N. C., 353. In none of these cases, therefore, is there direct decision that where the facts of the case present the question of manslaughter a court is (795) justified not only in omitting any and all reference to this feature of the charge, but in effect positively withdrawing its consideration from the jury.

Again, it is insisted for the State that there was not only no prayer for instructions presenting the view of manslaughter, but that a perusal of the record tends to show that the course of the trial, by which the consideration was restricted to the two degrees of murder, was not resisted, but acquiesced in by counsel for the prisoner.

It is held in many well considered cases that the rule denying reversible error for an omission to charge on a given phase of a cause does not prevail to the same extent in criminal as in civil cases, and there is high authority for the position that, in cases of homicide, a judge is required to charge the law correctly, even when contrary to the positions taken by counsel. *S. v. Stonum,* 62 Mo., 597; *Myers v. Commonwealth,* 83 Pa. St., pp. 131-143. In *Stonum's case* it was held, "That in all criminal cases it is the duty of the court to instruct the jury as to the law. If the instructions offered are objectionable, the court should proceed to give such as the law requires"; and in *Myers v. The Commonwealth, Paxson, J.,* concurring, said: "I hold it to be the duty of a judge, trying a man for his life, to charge fully upon the law applicable to the facts, and this without regard to points presented by counsel. The rule that a judge is not to be convicted for error for what he omits to say, unless his attention is called to the subject by a request to charge, is well enough for civil cases, but ought not, in my judgment, to be applied in a capital case. The prisoner has a right to have the jury properly instructed upon every question of law legitimately raised by the evidence. This right he cannot waive, nor can his counsel do so for him." And further, the authorities are at one in holding that, both in criminal and civil causes, a judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect. Charged with the duty of seeing that impartial right is administered, it is a requirement naturally incident to the great office he holds and made imperative with us by statute law. Revisal, 535: "He shall state in a plain and correct manner the evidence in the case and explain the law arising thereon," and a failure to do so, when properly presented, shall be held for error. When a judge has done this, charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it by prayers for instructions or other proper procedure; but, as stated, on the substantive features of the case arising on the evidence, the judge is required to give correct charge con-
(796) cerning it. *S. v. Foster,* 130 N. C., 666; *S. v. Barham,* 82 Mo., 67; *Carleton v. State,* 43 Neb., 373; *Simmons v. Davenport,* 140 N. C., 407.

In *Foster's case* the Court, among other things, held, that "(4) Admissions of counsel made on trial as to any fact or law will not be taken as true where it plainly appears that they are not true. (5) Where a person is convicted of murder in the first degree, it is error if the court failed to instruct as to murder in the second degree, even though counsel

admitted defendant to be guilty of murder in the second degree. (6) On a prosecution for murder it is the duty of the trial judge to instruct as to murder in the second degree, even though no request is made therefor."

In *Barham's case, supra:* "It is the duty of the court to instruct the jury as to all grades of homicide to which the facts in evidence apply."

In *Carleton's case* the principle is very correctly stated as follows: "It is the duty of the court to instruct the jury on the law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the consideration of the jury an essential issue or element of the case is erroneous; but when the jury is instructed generally upon the law, and when the instructions given do not have the effect above stated, then error cannot be predicted upon the failure of the court to charge upon some particular phase of the case, unless a proper instruction was requested by the party complaining" And in *Simmons v. Davenport, supra, Walker, J.,* said: "The rule which requires that a complaining party should ask for specific instructions if he desires a case to be presented to the jury by the court in any particular view does not, of course, dispense with the requirement of the statute that the judge shall state in a plain and correct manner the material portions of the evidence given in the case and explain the law arising thereon. Revisal, sec. 535."

In the case presented and under our statute, on a bill of indictment for murder, there may be a conviction of murder in the first or second degree, or manslaughter, as the facts may appear; and where, as we have seen, there is evidence tending to establish the crime of manslaughter, it is reversible error to exclude its consideration from the jury.

Defendant is entitled to a new trial, that the issue as to his guilt shall be properly submitted on the questions of murder in the first degree or murder in the second degree or of manslaughter.

On the record as it now stands, there are no facts in evidence tending to show self-defense.

In so far as the "tender of the plea of guilty of murder in the second degree is concerned," also urged against the prisoner, "it would seem to be a hard measure of justice that, after rejecting his plea and putting him on trial for his life, his offer should be used to deprive him of the right to have his cause tried according to the law of the land."

New trial.

ALLEN, J., dissenting: The prisoner has been convicted of (797) murder in the first degree, and a new trial is ordered by the majority of the Court upon the ground alone that the evidence presents a phase of manslaughter, and that this was not submitted to the jury.

I cannot agree to this disposition of the case.

The record states that after the conclusion of the evidence, "the defendant, through his counsel, tendered the State a plea of guilty of murder in the second degree," and that the plea was rejected.

His Honor also charged the jury, in the presence of the prisoner and his counsel, and without any suggestion that he was stating the contentions of the parties incorrectly, that "In this case the defendant admits killing with a deadly weapon; that he intentionally shot the deceased with a deadly weapon, and that the deceased died from the wound. He contends that you ought to render a verdict of murder in the second degree. His counsel ask you to convict him of murder in the second degree, but they ask you not to convict him of murder in the first degree, because they contend that there is no evidence which would justify you in finding the killing was done with deliberation and premeditation."

There was no request to charge upon manslaughter.

It therefore appears that the case was tried by the State and the defendant upon the theory that the defendant was guilty of murder in the first or second degree, and that the defendant admitted that he was guilty of murder in the second degree; and, if so, a failure to charge on manslaughter was not prejudicial to the defendant.

The Court says, however, that this is an admission of law, and is not binding on the Court; but to my mind it is an admission of fact.

The distinguishing feature between murder in the second degree and manslaughter is malice, and no one knew so well as the prisoner and his counsel whether the killing was with malice or under passion caused by legal provocation, and as I understand the plea tendered and the admission, it was tantamount to saying that the prisoner killed the deceased maliciously and not from sudden passion; and this is a fact. *Foster's case,* 130 N. C., 666, so far from militating against this position, confirms it.

A new trial was ordered in that case because of the erroneous charge that flight was a circumstance to be considered on the question of premeditation and deliberation.

The admission of counsel that the prisoner was guilty of murder in the second degree is, I think, dealt with as an admission of fact, and binding, and the further error pointed out is not in failing to charge on manslaughter, but on murder in the second degree, which the Court says was necessary in order for the jury to understand the elements entering into murder in the first degree.

(798) Again, I think the prisoner has not been prejudiced by the failure to charge on manslaughter because it is not conceivable that the jury would have convicted of manslaughter under the most

favorable charge when counsel for the prisoner were asking them to convict of murder in the second degree, and when in response to that plea they said they were satisfied beyond a reasonable doubt that the killing was with premeditation and deliberation.

Clark, J., says in *S. v. Munn*, 134 N. C., 681: "The point counsel wishes to present, though not excepted to, that there was error in the charge as to mitigation from murder in the second degree, would not be before us even if it had been excepted to, for the reason that the jury found, upon the very full and careful charge of the court as to the difference between murder in the first and second degree, that beyond all reasonable doubt the prisoner slew the deceased willfully, deliberately, and with premeditation, and was guilty of murder in the first degree. The State has thus satisfied them of facts raising the crime above murder in the second degree, which only was presumed from the killing with a deadly weapon. If there were error in the charge as to mitigation below murder in the second degree, it was therefore immaterial error." *Walker, J.*, in *S. v. Lipscomb*, 134 N. C., 691: "But if there had been error in the instruction to which exception was taken, we do not see how the defendant could have been prejudiced thereby, for the jury found that he killed his victim intentionally and willfully and with premeditation and deliberation, and it could make no difference, with that fact found by the jury from the evidence, whether the presumption of the common law as to malice arising from the use of a deadly weapon had been rebutted or not. Prejudice could not come from such a charge, if erroneous, unless the defendant had been convicted of murder in the second degree and there had been evidence of facts or circumstances in mitigation or excuse of the killing. We have said there was none." *Brown, J.*, in *S. v. Teachey*, 138 N. C., 597: "The prisoner excepts because the court failed to present to the jury in this connection a view of manslaughter. The prisoner was convicted of murder in the first degree, and we do not see how it was prejudicial to him because his Honor failed to charge the jury on the question of manslaughter. *S. v. Munn*, 134 N. C., 680; *S. v. Lipscomb, ibid.*, 689." *Walker, J.*, in *S. v. Bowman*, 152 N. C., 821: "The jury having found the actual facts to be that a conspiracy had been formed between the defendants, they will not be permitted now to aver that they killed the deceased in a heat of passion or upon a legal provocation, or for any other reason which would reduce the crime to the degree of manslaughter. It therefore follows logically that any error which the court may have committed in its charge, as to that offense, upon a hypothetical state of facts, which the jury, by their verdict, have repudiated, is immaterial and harmless, even if such error was committed. *S. v. Munn*, 134 N. C., 680." (799) *Brown, J.*, in *S. v. Johnson*, 161 N. C., 266, speaking of an ex-

ception to a charge on manslaughter: "As the prisoner was convicted of the greater offense of murder in the first degree, this exception is not material."

While it is true that in several of these cases it is said there was no evidence of manslaughter, the excerpts relate to failure to instruct on that degree of homicide, and the opinion of the Court in each is that such error is immaterial when the jury has convicted of the higher crime.

It is also doubtful if there is any evidence of manslaughter. The prisoner was sitting in a building 30 x 60 feet, with a partition about the middle, when the deceased came in. An altercation ensued, and the deceased either struck or shoved the defendant, and caused his cap to fall off. No weapon was used and no serious damage inflicted. The defendant left the front room and went to the rear of the building. He returned immediately, picked up his cap, and said to the deceased, "That's all right. I'll get you." He went to the rear of the building, returned immediately with a gun, and saying to the deceased, "You are a G— d— s— of a b—!" fired the shot which caused the death of the deceased.

CLARK, C. J., concurs in this opinion.

Cited: S. v. Merrick, 172 N.C. 871 *S. c.; Hauser v. Furniture Co.,* 174 N.C., 465 (3p); *S. v. Davis,* 175 N.C. 729 (1d); *S. v. Evans,* 177 N.C. 571 (1c); *S. v. Coble,* 177 N.C. 592 (2c); *Mfg. Co. v. McPhail,* 179 N.C. 388 (3p); *Kimbrought v. Hines,* 180 N.C. 281 (3p); *S. v. Bryant,* 180 N.C. 691 (3c); *S. v. Jones,* 182 N.C. 785 (3c); *S. v. Wingler,* 184 N.C. 750 (3d); *Bank v. Yelverton,* 185 N.C. 320 (3p); *S. v. Miller,* 185 N.C. 684 (3p); *S. v. Williams,* 185 N.C. 687, 691 (3c); *Cherry v. R. R.,* 186 N.C. 266 (3c); *S. v. Allen,* 186 N.C. 309 (3c); *S. v. O'Neal,* 187 N.C. 25 (3p); *S. v. Levy,* 187 N.C. 589 (3d); *S. v. Robinson,* 188 N.C. 786 (3c, 5c); *S. v. Collins,* 189 N.C. 22 (2c); *Stachell v. McNair,* 189 N.C. 476 (3c); *Nichols v. Fibre Co.,* 190 N.C. 7 (3p); *S. v. Kline,* 190 N.C. 179 (3p); *Wilson v. Wilson,* 190 N.C. 821 (3p); *Watson v. Tanning Co.,* 190 N.C. 841 (3c); *S. v. Holt,* 192 N.C. 493 (3c); *S. v. Johnson,* 193 N.C. 703 (3p); *S. v. Graham,* 194 N.C. 467, 468 (3d); *S. v. Dills,* 196 N.C. 459 (1p); *Williams v. Coach Co.,* 197 N.C. 16 (3c); *Oates v. Herrin,* 197 N.C. 174 (3c); *S. v. Parker,* 198 N.C. 634 (1c); *S. v. Casey,* 201 N.C. 209 (3d); *S. v. Herring,* 201 N.C. 550 (3p); *S. v. Ferrell,* 202 N.C. 477 (1c); *S. v. Smith,* 202 N.C. 583 (3p); *S. v. Ellis,* 203 N.C. 840 (3p); *Stein v. Levins,* 205 N.C. 306 (3p); *Bank v. Oil Co.,* 205 N.C. 779 (3p); *S. v. Lee,* 206 N.C. 473 (3c); *S. v. Keaton,* 206 N.C. 684 (3d); *School District v. Alamance County,* 211 N.C. 226 (3p); *S. v. Burnette,* 213 N.C. 155 (3c, 5c);

S. v. Robinson, 213 N.C. 282 (3c); *S. v. Sims,* 213 N.C. 594 (3p); *S. v. Bryant,* 213 N.C. 757 (3c); *Switzerland Co. v. Highway Com.,* 216 N.C. 457, 458 (3j); *S. v. McManus,* 217 N.C. 446 (3c); *Ryals v. Contracting Co.,* 219 N.C. 482, 483 (3c); *Ryals v. Contracting Co.,* 219 N.C. 494 (3j); *Smith v. Kappas,* 219 N.C. 852 (3c); *McNeill v. McNeill,* 223 N.C. 182, 183 (3c); *S. v. DeGraffenreid,* 223 N.C. 464 (3c, 5c); *S. v. Dameron,* 223 N.C. 466 (3p); *S. v. Spruill,* 225 N.C. 358 (3c); *S. v. Perry,* 226 N.C. 534 (3p); *S. v. Thompson,* 226 N.C. 652 (1c); *S. v. Gause,* 227 N.C. 30 (3c); *S. v. Brown,* 227 N.C. 386 (3d); *S. v. Brooks,* 228 N.C. 70 (1d); *Yarn Co. v. Mauney,* 228 N.C. 102 (3c); *S. v. Childress,* 228 N.C. 210 (3c, 5c); *S. v. McNeill,* 229 N.C. 378 (3c, 5c); *S. v. Glatly,* 230 N.C. 178 (3p); *S. v. Bridges,* 231 N.C. 165 (3p).

STATE EX REL. SOLICITOR v. JAMES H. JOHNSON.

(Filed 5 April, 1916.)

1. Attorneys—Disbursement—Statutes—Courts.

Chapter 216, Laws 1871, now Revisal, sec. 211, providing that one duly licensed to practice law as an attorney shall not be disbarred or deprived of his license, permanently or temporarily, unless he shall have been convicted or in open court confessed himself guilty of some criminal offense, etc., takes from the court the common-law power to purge the bar of unfit members except in the specified cases, and in those particular instances wherein the court may exercise its inherent powers in the practical and immediate administration of the law.

2. Statutes—Repealing Acts—Implication.

A later statute will not be construed to repeal a former one by implication if by any reasonable interpretation the two acts can be reconciled and construed together.

3. Attorneys—Disbarment—Statutes—Courts—Intoxicating Liquors.

Construing together chapter 216, Laws 1871, now Revisal, sec. 211, and chapter 941, Laws 1907, it is held that they are consistent and reconcilable with each other, and that the latter act makes it imperative that an attorney convicted of felony be disbarred, and those convicted of the less offense under the former statute may be disbarred if it is found as a fact that the criminal offense, in this case the unlawful selling of intoxicating liquors, is of such character as to render them unfit to practice law.

CRIMINAL ACTION tried before *Daniels, J.,* at January Term, (800) 1916, of CUMBERLAND.

STATE *v.* JOHNSON.

This is a proceeding instituted by the solicitor of the Ninth Judicial District to debar the respondent of his right to practice law. The proceeding was commenced by an affidavit of the solicitor alleging that the respondent, while holding a license to practice law, had in a number of cases, and at different terms of the Superior Court then recently held, been convicted and had confessed guilt on indictment charging him with selling spiritous or vinous liquors.

The respondent filed answer, and, as part thereof, challenged the jurisdiction of the court, and thereupon the following judgment was rendered:

"Upon the petition, affidavit, and answer, the court being of the opinion that under the statutes the court has no power to disbar for the causes set up in the petition and affidavit, the motion of the defendant to dismiss is allowed."

The State and solicitor appealed.

The contention of the respondent is that the act of 1907, ch. 941 (Rev., 211a), repeals the act of 1871 (Rev., 211), and that he cannot be disbarred under the later act because he has not been convicted of a felony, while the State contends that there is no repeal, and that the respondent may be disbarred under the act of 1871 if convicted of any crime, provided the court finds that he is rendered unfit to be trusted in the discharge of the duties of his profession by reason of his conviction.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

No counsel for respondent.

ALLEN, J. The Revisal of 1905, sec. 211, provides: "No person who shall have been duly licensed to practice law as an attorney shall be debarred or deprived of his license and right so to practice law, either permanently or temporarily, unless he shall have been convicted, or in open court confessed himself guilty, of some criminal offense showing him to be unfit to be trusted in the discharge of the duties of his profession, and unless he shall be debarred according to the provisions of this chapter."

This was brought forward from the act of 1871, ch. 216.

The act of 1907, ch. 941 (Revisal, sec. 211 a), in part, provides: "An attorney at law must be debarred and removed for the following causes by the Superior Court: (1) Upon his being convicted of a crime (801) punishable by imprisonment in the penitentiary." The other provisions of the act of 1907 need not be considered, because not material here.

Before the act of 1871 it was held, in *Moore, ex parte,* 63 N. C., 397, and *Biggs, ex parte,* 64 N. C., 202, that the common-law power of the

court could be exerted in the case of an attorney who had shown himself to be an unworthy member of the profession, and it is generally understood that the act of 1871 was passed in consequence of these decisions.

The construction of the act of 1871 is that it "takes from the court this common-law power to purge the bar of unfit members, except in specific cases, and it fails to provide any other power to be used in its place; it is a disabling and not an enabling statute, the whole purpose seeming to be to tie the hands of the court," *Kane v. Haywood,* 66 N. C., 1; but that it does not destroy the inherent powers of the court essential to the administration of justice. *Ex parte Schenck,* 65 N. C., 253; *Kane v. Haywood,* 66 N. C., 1.

The Court said in *Ex Parte Ebbs,* 150 N. C., 44, in reviewing the acts of 1871 and 1907: "We do not entertain any doubt that, notwithstanding the restrictions placed upon the courts by the statute, ample power exists to protect them and their suitors from indignity, fraud, dishonesty, or malpractice on the part of any of its officers in the discharge of their official duties. It is manifest, however, that for the commission of crimes which seriously affect their moral character, but have no direct connection with their practical and immediate relation to the courts, the power to disbar attorneys is restricted by the express language of the statutes to convictions of the class of crimes named in the statutes. To give any other construction to the statute would not only do violence to well settled principles, but might lead to results not contemplated by the Legislature.

"The next step in legislation is the act of 1907, and as the respondent cannot be disbarred under that, as there is no allegation that he has been convicted of a felony, and can be under the act of 1871 if it is in force, having been convicted of a criminal offense, provided it is found as a fact that he is unfit to discharge the duties of his profession, the decision of the appeal depends on the question whether the act of 1907 repeals the act of 1871.

"The later act does not purport to repeal the former, and a repeal by implication will not be adopted if by any reasonable construction the two acts can be reconciled and can stand together.

"Coke says: 'It must be known that forasmuch as acts of Parliament are established with gravity, wisdom, and universal consent of the whole realm for the advancement of the commonwealth, they ought not, by any constrained construction out of the general ambiguous words of a subsequent act, to be abrogated, but ought to be maintained (802) and supported with a benign and favorable construction.' *Dr. Foster's case,* 11 Rep., 63. Sedgwick thus expresses the same idea: 'In this country it has been said that laws are presumed to be passed with

deliberation, and with full knowledge of all existing ones on the same subject; and it is therefore but reasonable to conclude that the Legislature in passing a statute did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable, and hence a repeal by implication is not favored; on the contrary, courts are bound to uphold the prior law if the two acts may well subsist together.'

"Potter's Dwarris on Statutes, 156, 157: 'Every effort must be made to make all the acts stand, and the later act will not operate as a repeal of the earlier one if by any reasonable construction they can be reconciled.'"

These quotations from the authorities are taken from the opinion of *Associate Justice Walker* in *S. v. Perkins,* 141 N. C., 800, where they are approved.

Are, then, the two acts irreconcilable? We think not. They deal with different conditions and act upon different persons and serve purposes that are not the same.

The act of 1871 refers to persons convicted of "some criminal offense," and these cannot be disbarred unless the offense is of such character as to show them to be unfit to discharge the duties of their profession, while the act of 1907 deals only with those convicted of felony, and they *must* be disbarred.

When the two acts are read together, they fit into each other and make one harmonious whole, and, so considered, the legislative intent is that attorneys convicted of a felony must be disbarred, and those convicted of a less offense may be, if it is found as a fact that the criminal offense is of such character as to render them unfit to practice law; and this is the clear intimation in *In re Ebbs,* 150 N. C., 44, where the Court says: "It is insisted that, however this may be in regard to the act of 1907, the respondent may be disbarred by the court under the power conferred in section 211, Revisal. It is suggested that this statute is by implication repealed by the act of 1907. We incline to the opinion that the last statute is not in conflict with sections 211 and 212 of the Revisal."

Reversed.

Cited: Sanatorium v. State Treasurer, 173 N.C. 813 (2c); *McLean v. Johnson,* 174 N.C. 346 *S. c.; Allen v. Reidsville,* 178 N.C. 529 (2c); *S. v. Mull,* 178 N.C. 752 (2c); *Committee on Grievances of Bar Asso. v. Strickland,* 200 N.C. 632 (1c); *In re Parker,* 209 N.C. 695, 696 (1c); *S. v. Calcutt,* 219 N.C. 556 (2c).

(803)

STATE v. THEODORE TURNER.

(Filed 19 April, 1916.)

1. Intoxicating Liquor—Evidence.

Where the evidence on the trial for violating our prohibition law is sufficient for conviction, testimony of a witness that he had on two former occasions found bags of empty jugs, etc., in a woods back of the defendant's dwelling, and some whiskey in the defendant's pantry, will be received as a pregnant circumstance, though in itself it may be insufficient to convict.

2. Criminal Law—Evidence—Defendant Not Testifying—Explanatory Evidence.

Where the defendant is charged with violating our prohibition law, an instruction of the court is not erroneous which, in effect, tells the jury, specifically, that they should not consider the defendant's failure to testify, but if they found that the defendant could have explained the State's incriminating evidence by other witnesses, and failed to do so, they may consider such circumstance against him. *Goodwin v. Sapp*, 102 N. C., 482, cited and applied.

CRIMINAL ACTION, tried before *Allen, J.*, at December Term, 1915, of DURHAM.

Defendant was tried on a warrant charging him with selling liquor and with having liquor in his possession for sale. He was convicted, and appealed to the Superior Court, when he was again convicted and sentenced to two years in jail, to be assigned to work on the public roads. From the sentence of the court the defendant appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Brawley & Gantt, Sandy Graham for defendant.

BROWN, J. The testimony tends to prove that the defendant had a handbag in his buggy on his way to Hayti, a colored settlement in Durham. The witness Walla took the handbag out of Turner's buggy, but was arrested before he reached Hayti. After Walla took the handbag it was not opened until Walla was arrested, when the officer opened it and found four quarts of whiskey in it in quart bottles. There was testimony that there were sacks under the seat of the defendant's buggy with something in them that looked like jugs, and further that the defendant wanted Walla to buy some wine jugs to put wine in.

Another witness testified that he purchased liquor from a colored man at defendant's house and in defendant's presence, and that the liquor was

brought out of the house and delivered to him; that the witness bought liquor at the defendant's house several times.

(804) Another witness testified that he bought whiskey at defendant's four or five times, and that when witness worked for defendant he had whiskey at his home, and that the witness had once unloaded a wagon-load and carried it into the defendant's house.

E. G. Belvin, in reply to a question as to what he knew about the defendant engaging in the business of selling liquor, said: "We have had right much complaint from out there, and went out and searched on two occasions. Sheriff and myself went back of his house a couple of hundred yards in the woods. We found three sacks full of empty one-gallon jugs—both glass and stone jugs—several empty kegs and several larger jugs, barrel recently emptied of whiskey, and ground had recently been trampled around there. We found some whiskey in his pantry, right back of the kitchen."

The defendant excepts to the above testimony. The exception is without merit. While the testimony of Belvin, standing alone, would probably be insufficient to convict the defendant of selling whiskey or of keeping it for sale, yet, taken in connection with all the other evidence in this case, it is a pregnant circumstance.

His Honor instructed the jury as follows: "The defendant is not required to go upon the witness stand. The law permits a party to go on the witness stand. If he feels that the State has offered evidence against him, the law allows him to do it. If he wishes to rely upon the fact that the evidence is not to be believed, and sees fit to stay off the stand, the law says that ought not to be used against him. If there are other facts that could be produced to clear up the matter, and if he failed to do it, then those facts might be used against him. If you can see from the case, from the evidence, that he could have explained his whereabouts, or whether he was with that negro or not, by other witnesses, then he should have offered them; but if you can see he had no opportunity of offering any other witnesses to show he was not with him or had no whiskey, then that would not be considered."

To this charge the defendant excepted.

The court distinctly charged the jury that they should not consider the failure of the defendant to testify, but if they found that the defendant could by other witnesses have explained the incriminating circumstances testified to by the State's witnesses, and failed to do so, the jury might consider the failure of the defendant to introduce such explanatory testimony as a circumstance against him. This was well within the rule stated in the case of *Goodman v. Sapp,* 102 N. C., 482, and cannot fairly be construed as commenting upon the failure of the defendant to

offer himself as a witness in his own behalf. See, also, *Yarborough v. Hughes,* 139 N. C., 209; 16 Cyc., 1062.

We have examined, also, the other exceptions to the charge taken by the learned counsel for the defendant, and have carefully considered the earnest argument in support of them. We are of (805) opinion, nevertheless, that his Honor fairly and fully presented the case to the jury; and that there is no substantial error in the charge which would warrant us in ordering another trial.

No error.

Cited: S. v. Baldwin, 178 N.C. 697 (1c); *Maney v. Greenwood,* 182 N.C. 582 (2c); *S. v. Prince,* 182 N.C. 792 (1e); *S. v. Elder,* 217 N.C. 114 (1c); *S. v. Wood,* 230 N.C. 742 (2c).

STATE v. TONY LITTLE.

(Filed 3 May, 1916.)

1. Intoxicating Liquors—Statutes—Constitutional Law.

Chapter 97, Laws 1915, sec. 1, prohibiting the transportation of intoxicating liquors into North Carolina, except as therein stated, in connection with the Webb-Kenyon Law, is a constitutional and valid enactment.

2. Indictment—Intoxicating Liquors—Persons Unknown.

A charge in a bill of indictment for violating chapter 97, sec. 1, Laws 1915, that the defendant brought into the State intoxicating liquors in a quantity or quantities greater than one quart, etc., "for the purpose of delivery to persons whose names are to the jurors unknown" is not rendered insufficient because the names of the persons to whom liquor was charged to have been delivered were unknown to the jurors or not specified in the bill.

3. Intoxicating Liquors — Statutes — Two Offenses—Indictment—Conviction.

Chapter 97, Laws 1915, sec. 1, creates two offenses: the carrying or transporting into the State for any person, etc., more than one quart of spirituous liquor, in one package or at one and the same time, and transporting any quantity where the liquor for such person is contained in more than one receptacle; and for a conviction of both of these offenses it is necessary that each one be charged in the indictment.

4. Intoxicating Liquors — Statutes — Indictment—Evidence—Verdict, Directing—Courts.

Where a person is charged with violating chapter 97, sec. 1, Laws 1915, in carrying into this State spirituous liquor for delivery to others in

quantities greater than one quart, and it is shown that he had bought four quarts of whiskey in South Carolina, and brought them into this State, one quart for himself and one quart each for the other parties: *Held*, the offense charged in the bill is not proven, and the trial court should direct a verdict of not guilty.

CLARK, C. J., dissenting.

INDICTMENT for unlawfully bringing whiskey into the State contrary to certain sections of the statute, chapter 97, Public Laws 1915, tried before *Justice, J.*, and a jury, at January Term, 1916, of ANSON.

The bill of indictment is as follows: "The jurors for the State, upon their oaths, present that Tony Little, late of the county of Anson, on the 9th day of October, in the year of our Lord 1915, with force and arms, at and in the county aforesaid, did wilfully and unlawfully (806) transport from Florence, South Carolina, and bring into the State of North Carolina, certain spirituous or vinous liquor in a quantity or quantities greater than one quart, the said liquor or a part thereof being for the purpose of delivery to persons whose names are unknown to the jurors, against the form of the statute in such cases made and provided and against the peace and dignity of the State."

On the trial the jury rendered the following special verdict: "The jury impaneled in this cause find the following to be the facts in this case: On the ..... day of November, 1915, the defendant, in Florence, S. C., purchased four quarts of whiskey, one quart of this being for himself and one quart for each of the following persons: B. F. Gulledge, Jr., Mallie Gulledge, and George Gaddy. He got upon the train in Florence, S. C., and came to Wadesboro, Anson County, N. C., with the whiskey, intending to use one quart for himself and deliver one quart to each of the three persons above named, who resided in Anson County. If upon these facts the court is of opinion that the defendant is guilty, we return 'Guilty' to be our verdict; if the court is of the opinion that upon these facts the defendant is not guilty, we return as our verdict 'Not guilty.'"

"The court being of opinion, under the special verdict in this case, that the defendant is guilty under the law, the verdict of guilty is entered."

Judgment on the verdict, and defendant excepted and appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

James A. Lockhart for defendant.

HOKE, J. The validity of the act of Congress, commonly known as the Webb-Kenyon Law, chapter 90, Public Statutes Anno. Supp., 1914,

p. 208, and our State legislation passed in reference thereto, notably chapter 97, Laws 1915, and chapter 44, 1913, has been established in this jurisdiction so far as the question can be settled by State decision. *Glenn v. Express Co.*, 170 N. C., 286; *S. v. R. R.*, 169 N. C., 295, and other like cases.

As a matter of form, in respect to the feature of the charge that the unlawful delivery of the quantity specified was to "a person or persons to the jurors unknown," the bill of indictment has been held sufficient, *S. v. Dowdy*, 145 N. C., 432; *S. v. Tisdale*, 145 N. C., 422; and the principal question presented is whether, on the facts contained in the special verdict, the defendant is guilty of the offense, under the statute, charged against him in the bill. The part of the law more directly relevant to the inquiry, chapter 97, Laws 1915, section 1, is as follows: "That it shall be unlawful for any person, firm, or corporation, or any agent, officer, or employee thereof to ship, transport, carry, or deliver, in any manner or by any means whatsoever for hire or otherwise, in any one package or at any one time, from a point within or without this (807) State, to any person, firm, or corporation in this State, any spirituous or vinous liquor or intoxicating bitters in a quantity greater than one quart or any malt liquors in a quantity greater than five gallons; and it shall be unlawful for any spirituous or vinous liquors or intoxicating bitters so shipped, transported, carried, or delivered in any one package to be contained in more than one receptacle."

From a perusal of this section it appears that the provision creates and was intended to create two offenses:

1. That of carrying or transporting in this State, or from a point within or without the State, by any person, firm, or corporation, to or for any other person, firm, or corporation, in one package or at one and the same time, more than one quart of spirituous liquors.

2. That of so carrying or transporting spirituous or malt liquors in any quantity where the packages for such person are contained in more than one receptacle, that is, each package shall be carried for and go to its owner as a distinct and separate parcel.

The bill of indictment, drawn under the first clause of the section, charges that the defendant unlawfully brought into this State certain spirituous liquors, in quantities greater than one quart, to be delivered to a person or persons to the jurors unknown, and the facts established in the special verdict are that he bought four quarts of whiskey in Florence, S. C., and brought the same into the State, one quart being for himself and one quart each for three other designated persons.

According to these findings, it has not been shown that the defendant has committed the offense against the statute, as charged against him in the bill, of bringing into this State in "any one package or at any one

time," for delivery to another, any spirituous liquors in quantities greater than one quart. Whether, on the facts as they existed, the defendant may have been guilty under the second clause of the section by reason of the manner in which the whiskey was packed and transported or carried by him is not before us. Such an offense is not charged in the bill nor are the facts established relevant to and controlling on such an issue.

On the charge as now made and the facts contained in the verdict, we are of opinion that his Honor should have directed a verdict of not guilty to be entered. This will be certified, that the verdict be entered as indicated and the prisoner discharged.

Reversed.

CLARK, C. J., dissenting: The statute provides that it "shall be unlawful for any person, etc., to transport, carry, *or* deliver in any manner, or by any means whatsoever, for hire or otherwise, . . . *at any one time* from a point within or without this State to any person, etc., in this State any spirituous or vinous liquor, etc., in a quantity greater than one quart."

(808) The indictment charges that the defendant "purchased four quarts of whiskey in Florence, S. C., one quart for himself and one quart for each of the following persons (naming them); that he got upon the train at Florence, S. C., and came to Wadesboro, N. C., with the whiskey, intending to use one quart for himself and to deliver one quart to each of the three persons above named, who resided in Anson County." "Intending to deliver" to them means transporting or carrying for delivery to them.

Upon the charge and the facts found, the judge properly held the defendant guilty, for he transported at one time from a point without the State, for persons in this State, spirituous liquors in a quantity greater than one quart. It is found that he reached Wadesboro with said liquor for the purpose of delivering the same. The fact that he was arrested before the liquor was delivered in no wise condones the offense, prescribed in the statute, of transporting, carrying *or* delivering the whiskey for any person or persons in this State in the forbidden quantity.

The fact that the defendant intended to divide it after he reached here (if it was in one package) into four several parcels does not affect the fact that he brought in more than a quart at one time, for the purpose of delivery.

It is not found as a fact, and there is no presumption, that the defendant brought the whiskey in four several packages, nor would it matter if it had been so found, for the act provides that it shall be unlawful if

spirituous liquors shall be brought in "at any one time" in "quantity greater than a quart." It is the fact of bringing in such quantity at any one time, for a person or persons, that is unlawful, and it is immaterial whether at "any one time" such quantity was in separate packages or in one package.

It is none the less in furtherance of the mischief intended to be remedied that intoxicating liquors shall be brought in in one barrel to be drawn out in quantities of a quart or less for each person, or whether it shall be brought in in 150 bottles, like champagne, for instance, packed in straw or sawdust, with the purpose of delivering a bottle to each of 150 persons. The intent of the law is plain, and an evasion in whatever method is a violation of the purpose and the letter of the law. The law is made to be obeyed. Every purpose and intent thereof is defied by the acts of the defendant herein charged and found as facts.

When a common carrier brings in a number of quart bottles addressed each to a separate consignee, it brings in but one quart at one time to each consignee; but here the defendant is the purchaser of four quarts, which he brings in with merely the "intent" to hand to three other persons, and this is bringing in four quarts at one time, whether they are in one package or in four.

Cited: S. v. Carpenter, 173 N.C. 769 (4d); *S. v. Little,* 178 N.C. 761 (4o); *S. v. Hedgecock,* 185 N.C. 719 (2c); *S. v. Jarrett,* 189 N.C. 519 (2c).

(809)

STATE AND TOWN OF ANDREWS v. J. W. S. DAVIS ET AL.

(Filed 31 May, 1916.)

1. Municipal Corporations—Cities and Towns—Ordinances—Sunday Laws—Discrimination—Constitutional Law.

An ordinance of a town, authorized by statute, imposing a fine of $25 upon drug stores for selling cigars, etc., on Sunday, and a fine of $5 for the same offense upon restaurants, cafés, and lunch stands, declaring the same to be a misdemeanor, relates to distinct and easily severable occupations, and in the absence of any finding that those engaged in them come in competition with each other, the ordinance will not be declared unconstitutional and invalid upon the ground that it is discriminatory against the owners of drug stores.

2. Same—Statutes.

The authority given an incorporated town to make ordinances, rules and regulations for the better government of the town as they may deem best, Revisal, sec. 2923, includes the right to make an ordinance regulating

or prohibiting the sale of cigars and tobacco on Sunday and to declare such sale a misdemeanor punishable by fine, etc., such tending to promote the morals and well-being of society; and it is *Held*, that the ordinance in question is also authorized under its charter provision giving the aldermen the power to make "regulations to cause the due observance of Sunday."

3. Same—Municipal Discretion.

The extent of the authority the General Assembly or a municipal corporation may exercise in the passage of statutes and ordinances regulating the observance of Sunday, when such are constitutional, is for the General Assembly, or for the governing body of the municipality acting under its authority.

CRIMINAL ACTION, tried before *Ferguson, J.*, and a jury, at January Term, 1916, of CHEROKEE.

This is a prosecution for a violation of an ordinance of the town of Andrews, tried in the Superior Court on appeal, where the following special verdict was returned by the jury and judgment was pronounced thereon:

"That the town of Andrews was duly chartered by the General Assembly of North Carolina in the year of 1905; that the mayor of said town is constituted an official court with the power to enforce the ordinances of said town. That the charter of the town of Andrews contains the following powers delegated to the board of aldermen, among others: 'To make regulations to cause the due observance of Sunday.'

"That on 16 July, 1915, the following ordinance was passed, to wit:

" '*The board of aldermen do enact:* That on and after the 24th day of July, 1915, it shall be unlawful for any drug store in the town of Andrews to sell any article of merchandise whatsoever on Sunday,

(810) except as hereinafter provided. That this ordinance shall not be construed so as to apply to the filling of prescriptions, selling of patent medicine, or any article for the relieving of the sick and necessary for such. That any one found guilty of violating the above ordinance shall be guilty of a misdemeanor and shall pay a fine of $25 for each and every offense, and each violation shall constitute a separate and distinct offense.'

"That copy of this ordinance was posted at the postoffice, a public place in said town, within a few days after its passage; and it is not known if it remained posted for thirty days when the same was removed by the postmaster.

"The foregoing ordinance has never been replaced.

"That the defendant J. W. S. Davis and Ewart Davis are proprietors of a drug store in said town, known as Davis Pharmacy; that on Sunday, 28 November, 1915, the defendant sold in this drug store one cigar

to Jess Porter, one package of cigarettes to Wymer Padgett, and one cigar to James Roper; these articles were not used as medicines, nor for the sick, but were among the goods kept for sale in said drug store.

"That a number of stores, two hotels, and several residents in said town kept cigars and cigarettes for sale at the same time.

"That on 25 May, 1915, the aldermen of said town passed the following ordinance:

" '(b) That it shall be unlawful for any restaurant, café, or lunch stand to open its doors on Sunday for the sale of any article whatever, except such restaurants, cafés, or lunch stands that are only of that class and are conducted wholly as restaurant, café, or lunch stand: *Provided further,* that this section shall be construed so as to prohibit restaurant, café, or lunch stand carried on in connection with a grocery store from being permitted to do business on this day. He that shall be guilty of violating this ordinance shall be guilty of a misdemeanor and fined within the discretion of the court, not to exceed $5; and that such sale in violation of this ordinance shall constitute a separate offense, and that the opening of the doors shall be *prima facie* evidence of a sale.'

"On 5 July, 1915, the following amendment to said ordinance was passed at a special meeting of the board of aldermen, to wit:

" 'It is hereby ordered that the following words be added to line seven in paragraph (b), and after the words "grocery store" the following words, "fruit stands, venders of soda water, ice-cream, or any other place of business whatever." '

"That the defendants have duly paid all license taxes required by the law of North Carolina, and are regularly licensed druggists.

"That the foregoing are valid and subsisting ordinances of said town.

" 'A regular meeting of the board of aldermen shall be held at the mayor's office in the town of Andrews on the second Monday in each month, at 7:30 o'clock p. m.

" 'Copies of all ordinances shall, immediately after the ratifica- (811) tion thereof, be published in some newspaper printed in the town of Andrews or posted at one or more public places within said town.

" 'That the foregoing ordinances shall be enforced from and after their ratification.

" 'By the board of aldermen read twice and ratified this the 8th day of September, 1913.'

"If upon the foregoing facts the court is of the opinion that the defendants are guilty, the jury find them guilty; if the court be of opinion that the defendants are not guilty, the jury find them not guilty."

Upon considering the foregoing special verdict, the court is of opinion that the penalty of $25 on one class and $5 on other classes for doing identically the same business in violation of the same ordinance is an

unconstitutional discrimination. It is therefore considered and adjudged that the defendants are not guilty. They are discharged and the town of Andrews is adjudged to pay the cost.

(Signed) G. S. FERGUSON,
Judge Presiding.

To the foregoing judgment the town of Andrews and State excepted and appealed to the Supreme Court.

Attorney-General Bickett and Assistant Attorney-General Calvert for plaintiff.

M. W. Bell for defendants.

ALLEN, J. The question which is very fully discussed in the briefs and upon which his Honor rested his decision, that the two ordinances set out in the verdict, when considered together, operate as an unlawful discrimination between persons engaged in the same business, does not arise, as the first ordinance deals only with keepers of drug stores, and the second with the keepers of restaurants, cafés, and lunch stands.

These are distinct and easily severable occupations, and there is no finding that those engaged in them come in competition with each other.

The ordinance, however, relating to druggists is further attacked upon the ground that the town of Andrews is not authorized to pass Sunday ordinances, and also that the ordinance is within itself an unreasonable classification.

The charter of the town of Andrews specifically authorizes the board of aldermen "to make regulations to cause the due observance of Sunday"; but if this were not sufficient, the Revisal, sec. 2923, gives power to cities and towns "to make ordinances, rules and regulations, for the better government of the town . . . as they may deem best."

This last statute was considered in *S. v. Medlin,* 170 N. C., 682, and in passing on an ordinance adopted by the town of Zebulon the
(812) Court said: "This ordinance, which prohibits keeping open stores and other places of business for the purpose of buying or selling, except ice, drugs and medicines, and permits the drug store to sell soft drinks and tobacco for a limited time in the morning and afternoon, as a convenience to public customs, is not an unreasonable exercise of the police power. Neither does it cover the same ground as Revisal, 2836. Such local regulations are within the powers conferred on town authorities in their exercise of the police power, and if not satisfactory to the community, such regulations will doubtless be changed at the instance of their constituents or by the election of a new board of commissioners. Public sentiment in this regard varies in different lo-

calities, and the power of making these local regulations is simply an exercise of 'home rule,' which is wisely vested in the town commissioners to conform to the sense of public decency and peace and order which is observed by compliance with the sentiments of their constituents."

The ground on which Sunday laws are generally upheld is that the observance of Sunday is promotive of the moral and physical well-being of society, and that such statutes and ordinances are a valid exercise of the police power.

"Statutes prohibiting the pursuit of all occupations generally on Sunday have been uniformly held constitutional. *Frolickstein v. Mobile,* 40 Ala., 725; *Scales v. State,* 47 Ark., 476; *Com. v. Has.,* 122 Mass., 40; *Com. v. Wolf,* 3 S. and R. (Pa), 48; *Specht v. Com.,* 8 Pa. St., 312; *Society, etc., v. Com.,* 53 Pa. St., 125; *Charleston v. Benjamin,* 2 Strobh. L. (S. Car.), 508; *Columbia v. Duke,* 2 Strobh. L. (S. Car.), 530, note; *Parker v. State,* 16 Lea (Tenn.), 476. Where, however, the statute prohibits the following of certain occupations only, or, after a general prohibitory provision, excepts certain occupations and callings from the operation of the statute, the decisions are not always in accord. Such statutes have been attacked as class legislation, but in the greater number of instances have been sustained. *Theisen v. McDavid,* 34 Fla., 440; *People v. Hagan,* (Supr. Ct. Spec. T.), 36 Misc. (N. Y.), 349; *Nashville v. Linck,* 12 Lea (Tenn.), 499. Thus statutes prohibiting barbering on Sunday have been held constitutional. *People v. Bellet,* 99 Mich., 151; *People v. Havnor,* 149 N. Y., 195; *Ex. p. Northrup,* 41 Oregon, 489. And statutes prohibiting the playing of baseball are valid. *S. v. Powell,* 58 Ohio St., 324; *S. v. Goode,* 5 Ohio Dec., 281, 5 Ohio N. P., 179. A statute prohibiting barbering under a heavier penalty than that applied to other prohibited occupations has been upheld on the ground that the tendency to violate the law by that particular occupation may be greater, and that it was, therefore, in the discretion of the Legislature to fix a greater penalty. *Breyer v. State,* 102 Tenn., 103. Similarly, statutes prohibiting the keeping open of any place of business and excepting from its operation certain occupations, such as hotels, boarding-houses, livery stables, retail drug stores, and such manufacturing establishments as are necessarily kept in operation, are (813) held not to be unconstitutional. *Ex. p. Andrews,* 18 Cal., 679; *S. v. Sopher,* 25 Utah. See, also, *S. v. Nichols,* 28 Wash., 628. These statutes may apply to the entire class which they purport to affect. *Ex. p. Northrup,* 41 Oregon, 489." *S. v. Justus,* 1 A. and E. Anno. Cases, 93.

In *Soon Hing v. Crowley,* 113 U. S., 703, a regulation which applied only to those engaged in the laundry business was sustained, and the Court said: "The specific regulation for one kind of business, which may be necessary for the protection of the public, can never be a just

ground for complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."

The general question of the right of classification was very fully considered by this Court in *S. v. Davis,* 157 N. C., 648, and *Smith v. Wilkins,* 164 N. C., 135, and the doctrine was approved that the General Assembly or a municipal corporation has the power to classify the different occupations, provided the classification is not unreasonable and oppressive, and that usually the extent to which the power will be exercised is for the General Assembly or the governing body of the municipality.

We do not think the power has been exceeded in this instance, and the judgment of the Superior Court is therefore reversed.

Judgment should be entered against the defendant upon the special verdict.

Reversed.

Cited: S. v. Kirkpatrick, 179 N.C. 751 (1c); *S. v. Pulliam,* 184 N.C. 687 (1c); *S. v. Weddington,* 188 N.C. 645 (2c); *Bizzell v. Goldsboro,* 192 N.C. 357 (1c, 2c); *S. v. Trantham,* 230 N.C. 643 (2c).

STATE v. HARDY WIGGINS AND MERRITT MILLER.

(Filed 31 May, 1916.)

1. Homicide—Identification—Evidence—Corpus Delicti.

Where upon the trial for murder there is sufficient evidence that it was committed at a certain place on a country road about 7:20 a.m. of a certain day, and the defense is failure of identification, testimony offered on behalf of the defendants that two other men were seen at the place the evening before, without direct evidence connecting them with the *corpus delicti,* is inadmissible.

2. Homicide—Evidence—Impeachment—Accusation.

A question asked a State's witness, on cross-examination, for the purpose of impeachment, if he had not been accused of stealing a hog from a certain person, and not whether he had been convicted thereof, is foreign to the issue, and properly excluded.

3. Evidence—Homicide—Bloodhounds—Corroboration.

Where the testimony on a trial for a homicide tends to show a murder had been committed, and that a bloodhound had been put upon the well-guarded human tracks at the place, which thereby trailed the defendants and identified them, and that the dog was of pure blood, had been trained for such purpose, and the action of the bloodhound is corroborative of the competent dying declaration of the deceased that the defendants had killed him, it is competent, and the question as to whether the trial was properly followed is one for the jury.

4. Homicide—Evidence—Dying Declarations.

Where upon a trial for a homicide there is evidence that the deceased was shot at 7:20 a.m. and when found stated there was no use for a doctor, for he would die, and identified the prisoner, then coming up, as the man who had shot him, and it appears that he died from the wound the evening of the same day, the declarations of the deceased are competent as dying declarations.

5. Homicide—Identification—Verdict—Instructions—Degrees of Murder—Statutes.

Where there is evidence that a murder in the first degree has been committed, and the prisoner on trial relies only upon proving an alibi as his defense, the verdict will be considered in connection with the charge of the court, and where the court has properly instructed the jury to find the prisoner guilty either of murder in the first degree or not guilty, a verdict of guilty necessarily fixes the offense as in the first degree, and is a sufficient compliance with the statute, Revisal, sec. 3271.

APPEAL by prisoners from *Ferguson, J.*, at September Term, (814) 1915, of GRAHAM.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Alley & Leatherwood, Sherrill & Harwood, and Dillard & Hill for prisoners.

CLARK, C. J. The prisoners were indicted for murder, the bill charging that they "willfully, premeditatedly, deliberately, and feloniously, and of their malice aforethought, did kill and murder Phillip L. Phillips."

There was evidence, which the jury believed, that the prisoners lay in wait and killed the deceased from ambush. There was no evidence tending to show any other state of facts, and the sole issue of fact was as to the identity of the prisoners, that is, whether they were the persons who slew the deceased. The jury returned for their verdict that they found "the prisoners at the bar, and both of them, guilty of the murder and felony whereof they stand indicted."

The court had refused to charge the jury, as prayed by the prisoners, that "under the evidence of this case they could return a verdict of guilty of murder in the first degree, or guilty of murder in the second (815) degree, or not guilty." The court properly refused to so charge, for if the jury were satisfied beyond a reasonable doubt that the prisoners slew the deceased in the manner in evidence, they were guilty of murder in the first degree; and if it was not found beyond a reasonable doubt that the deceased was thus slain by the prisoners, then, as the court instructed, the jury should have returned a verdict of not guilty.

The jury found that beyond a reasonable doubt the prisoners slew the deceased, and found them guilty as charged in the indictment.

The deceased was shot about 7:30 a. m., 23 August, 1915, and died about 7 p. m. of the same day.

The evidence is that the deceased left home at 7:20 a. m. that day, riding a mule down the road towards Robbinsville. His son and daughter soon after went to the cow lot to milk, when they heard a gun fire and heard their father call twice quickly. The son got one Buck Campbell to go with them, and, going down the road, found their father sitting with his back against a tree and the mule hitched to the tree. This was about three-fourths of a mile from the place where the deceased said he had been shot, and the tracks of the mule showed that it commenced running at that point. The son asked his father the trouble, and he said that Hardy Wiggins or Merritt Miller had shot him at Hazel Branch, near a big chestnut log; that he saw them as he passed there. When asked if he wanted a doctor, he said, "There is no use." Just at that time the prisoner, Merritt Miller, came up, when the deceased said: "You are the man that shot me." Miller denied this, and the witness says: "Miller was in a trembling way and could not hold his hands still when he walked up to where (witness's) father was. This took place right when Miller walked up."

After the arrival of other people, the deceased was carried home on a stretcher, and in passing the chestnut log he showed them where the two men were when he had passed. He said that one of the men shot after he passed them, the bullet entering about 2 inches to the right of the backbone and coming out at the breast. There was testimony of ill-feeling on the part of the prisoners towards the deceased, and threats by each of them that they would kill him. When the deceased stated that the prisoner shot him, and pointed out where he stood, he said that he would die, and he did die that evening. The judge properly admitted his statements as dying declarations.

Boodhounds were brought from Tennesee, and after being put on the tracks, which had been carefully guarded, around the chestnut log, they trailed until they came to the home of the prisoner Wiggins and

marked him while he stood in the yard. They then followed the track and met the deputy sheriff, who had Miller in custody, whereupon the dogs that were trailing the track ran up to Miller and marked him also. (816)

Exceptions 2, 3, 6, 7, 8, 9, 12, 13, 14, 21, 24, 25, 26, 29, 30, 31, 32, and 33 are not mentioned in the brief of the appellants, and are therefore waived. Rule 34; *S. v. Spivey,* 151 N. C., 676.

Exception 1 is because on objection by the State the court excluded the evidence offered to show that two other men were seen the evening before near the spot where deceased was shot. Testimony tending to show that another than the prisoners committed the crime is inadmissible unless there is direct evidence connecting the other with the *corpus delecti,* which was not the case here. *S. v. Millican,* 158 N. C., 621; *S. v. Lambert,* 93 N. C., 623; *S. v. Beverly,* 88 N. C., 633; *S. v. Baxter,* 82 N. C., 604; *S. v. Bishop,* 73 N. C., 45; *S. v. White,* 68 N. C., 159.

A witness for the State was asked on cross-examination, for the purpose of impeaching him, if he had not been accused of stealing a certain person's hogs. On objection, this was properly excluded. The question was not whether he had been convicted, but whether he had been accused, and it is certainly not competent to ask a question foreign to the issue in order to impugn the credit of the witness. It is not stated what the witness's answer would have been. *Carr v. Smith,* 129 N. C., 232; *S. v. Glisson,* 93 N. C., 508.

Exceptions 5, 10, 11, 15, 16, 17, 18, 19, 20, 22, 23, 27, and 28 relate to the admission of testimony as to the trailing of the prisoners by bloodhounds. This testimony has always been held competent within the limits observed in this case. *S. v. Norman,* 153 N. C., 591; *S. v. Spivey,* 151 N. C., 676; *S. v. Freeman,* 146 N. C., 615; *S. v. Hunter,* 143 N. C., 607; *S. v. Moore,* 129 N. C., 494, and Chamberlayne on Evidence, sec. 1760.

In *S. v. Norman,* 153 N. C., 591, the Court held that in order to render such testimony competent it must not only be shown that the dog is of pure blood and of a stock characterized by acuteness of sense and power of discrimination, but must also be itself possessed of these qualities and have been trained or tested in their exercise in the tracking of human beings. The testimony of the owner and trainer of the dogs fully measured up to these requirements, and need not be discussed.

This having been shown to the satisfaction of the court, the evidence of their action in trailing was properly submitted to the jury. Whether they properly tracked the prisoners and identified them was for the jury, unless the evidence was manifestly insufficient to be submitted to them. In *S. v. Moore,* 129 N. C., 494, relied upon by the prisoners, the dog failed to follow any track. The evidence of the trailing in this case is

very full and the jury found it sufficient. It was used in corroboration of the dying declarations of the deceased. The criticisms of the counsel for prisoners here were directed to the weight to be given this testimony, but that was a matter for the jury, and not a question of law for this Court.

(817) The last exception is to the form of the verdict rendered, upon the ground that the statute requires the jury to say in what degree of murder the prisoners were convicted. The statute, Revisal, 3271, provides: "Nothing contained in this statute dividing murder into degrees shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." The object of this statute is, of course, to place it beyond doubt in what degree of murder the prisoner was convicted. The verdict must be construed according to the charge and the evidence, and when these make it certain beyond question, the law has been complied with. *S. v. Gilchrist,* 113 N. C., 673.

In this case the court instructed the jury that they should find the prisoners "either guilty of murder in the first degree or not guilty." The testimony was that the prisoners waylaid the deceased, and the only defense was an alibi. Upon the evidence for the State, and that for the defense, and the charge, the jury had no alternative but to return a verdict of guilty of murder in the first degree, as charged, or not guilty. Under these circumstances this Court has always sustained a verdict like this.

In *S. v. Spivey,* 151 N. C., 676, the Court held: "When the entire evidence shows, and no other reasonable inference can be fairly drawn therefrom, that the murder was committed either by lying in wait or in an attempt to perpetrate a felony, and the controverted question is the identity of prisoner as the murderer, the trial judge does not commit error in charging the jury to render a verdict of guilty of murder in the first degree or not guilty."

Under this charge, and upon this evidence, the jury had no alternative but to find the prisoners guilty of murder in the first degree or not guilty. If there had been the slightest doubt possible, the prisoners' counsel should, and certainly would, have asked for the jury to be polled and to indicate in what degree of murder each juror found the prisoners, and each of them, guilty. It would be trifling with the most solemn administration of justice to hold that on a trial, especially of this kind, in which every point has been defended, there was any doubt on this charge and evidence as to the finding of the jury.

In *S. v. Gilchrist,* 113 N. C., 673, where the indictment was in the same form as this, and the court charged that the crime was murder or

nothing (as it did in this case), and the jury found the accused guilty of the felony of murder in the manner and form as charged in the bill of indictment (as it did here), the Court held that upon the evidence only a verdict in the first degree was warranted, and that the general verdict was in response to the charge of murder in the first degree and a full compliance with the above statute, the Court saying (citing (818) several cases): "The verdict should be taken in connection with the charge of his Honor and the evidence in the case." This has been cited repeatedly since, see Anno. Ed., especially *S. v. May,* 132 N. C., 1021, and the very recent case of *S. v. Walker,* 170 N. C., 716.

In this last case the foreman responded, "Guilty of murder in the first degree," and the prisoners having called for a poll of the jury, each juror responded simply, "Guilty." The Court held that in that case (as in this) the question being solely as to the identity of the prisoners, and the judge having properly charged the jury upon the evidence to return a verdict of guilty in the first degree or not guilty, the verdict must be construed in connection with the charge and the evidence, and there could be no reasonable intendment that the verdict could have meant anything else than murder in the first degree, "for there was no evidence either of murder in the second degree or of manslaughter, as indeed the court had told them," adding: "Any other interpretation would be a 'refinement' and a miscarriage of justice."

The prisoners rely upon *S. v. Truesdale,* 125 N. C., 696, and *S. v. Jefferson, ib.,* 712. In the former case the record shows that there was question on the trial upon the evidence as to the degree of murder of which the prisoner was guilty, and the jury should have specified the degree. In the latter case a new trial was granted upon the incompetency of the evidence of dying declarations and of other evidence, the Court adding that the verdict should have specified also of what degree of murder the prisoner was guilty.

In this case the entire evidence and charge and trial were directed to the one question as to the identity of the prisoners with the murderer, and the verdict can be construed, reasonably, in no other light than in answer to that issue.

No error.

Cited: S. v. McIver, 176 N.C. 719 (3c); *S. v. Bryant,* 180 N.C. 692 (5c); *S. v. Robinson,* 181 N.C. 518 (3c); *S. v. Maslin,* 195 N.C. 541 (2d); *S. v. McLeod,* 196 N.C. 545 (3c); *S. v. Dalton,* 197 N.C. 126 (2d); *S. v. Smith,* 201 N.C. 497 (5c); *S. v. Mozingo,* 207 N.C. 248 (5p); *S. v. Morris,* 215 N.C. 554, 555 (c); *S. v. Mays,* 225 N.C. 489 (5p).

STATE v. C. A. CARLSON.

(Filed 31 May, 1916.)

1. Trials—Evidence—Criminal Action—Nonsuit.

Upon motion to nonsuit a criminal action, the evidence must be construed in a light most favorable to the State, for the purpose of determining its legal sufficiency to convict, and this being shown, its weight and the credibility of the witnesses are for the determination of the jury.

2. Criminal Law—False Pretense—Evidence—Burden of Proof.

A criminal false pretense is the false representation of a subsisting fact, whether oral or written words, or conduct, which is calculated and intended to, and does in fact, deceive, and by means of which one person obtains value from another without compensation; and, to convict, the State must show beyond a reasonable doubt that the alleged representation was made; that by reason thereof property or something of value had been obtained; that the representation was false, made with intent to defraud, and that it actually deceived and defrauded the person to whom it was made.

3. Same—Certificates of Stock.

Evidence upon a trial for false pretense which tends to show that the defendant had secured an option on all the shares of stock in a corporation for $15,000, and effected a sale of half thereof to F., upon the representation that the two would own the whole concern unincumbered; that the stock could not be bought for less than $20,000, of which he would pay $10,000 cash for half, and F. $10,000 for the other half; that the interest of F. should be kept a secret; that the check for the $10,000 of F. was made to him, from which he paid $7,500 on the purchase price of the stock, and the remainder thereof, $7,500, was represented by a mortgage on the corporate property, all of which was unknown to F.; that the defendant had secured $50 in currency instead of a check from F. to bind the option, so that he might not be known in the transaction: *Held*, sufficient to sustain the charge, and defendant's subsequent conduct in New York, when confronted with the charge by the wife of F., was a circumstance in this case, to be considered by the jury upon the question of his guilt.

4. Criminal Law—False Pretense—Indictment—Probata.

The evidence in this case upon the charge of false pretense being considered, it is *Held*, that the objection that the *allegata* and *probata* did not correspond cannot be sustained.

5. Criminal Law—Indictment—Judgment—Motion in Arrest.

An indictment charging false pretense must be certain to a general intent, stating all the facts and circumstances which constitute the offense with such certainty and precision that the defendant may see whether they constitute an indictable offense, so that he may be informed of the charge, and be protected from another prosecution for the same offense. And it is *Further held*, that a motion in arrest of judgment was properly denied, and that the evidence was sufficient to sustain the conviction.

STATE *v.* CARLSON.

CRIMINAL ACTION, tried before *Adams, J.*, and a jury, at (819) January Term, 1916, of HENDERSON.

Defendant was indicted for obtaining money by false pretense, in that he represented to one Dr. David J. Fuller "that the stock of the Hendersonville Traction Company could be bought for $20,000, and no less," and that "he, the said C. A. Carlson, had $10,000, and that if the said David J. Fuller would furnish the other $10,000, he, said C. A. Carlson, would purchase all of the said stock in said Hendersonville Traction Company, and that they would hold it jointly and unencumbered," which it is alleged in the indictment was false, and which defendant knew to be false, as "he did not have $10,000, or any sum, to use in the purchase of said Hendersonville Traction Company, and that the said C. A. Carlson had at the time of making the representa- (820) tion an option on all of the capital stock of the Hendersonville Traction Company for the sum of $15,000, as he, the said C. A. Carlson, then and there knew." It is further alleged that by color and means of the said false pretense he unlawfully, designedly, and feloniously obtained from David J. Fuller the said amount of $10,000 with intent to cheat and defraud him.

Mrs. David J. Fuller, witness for the State, testified: "I live in Hendersonville; I have lived here for six years. I lived in Brooklyn, N. Y., before coming here. My husband's name was David J. Fuller. He is dead; died on the 18th of last August; his business was that of a retired dentist. He died at the age of 76. I know C. A. Carlson. I met him first in the fall of 1912 at the Kentucky Home Hotel in Hendersonville. Dr. Fuller and a woman that Carlson introduced as his wife were present. This was during the very last days of October, or the early part of November, 1912, I met Mr. Carlson the next day at my own home. Prior to the issuing of the check spoken of here, Carlson was in our home every day, and sometimes twice a day. In regard to the charge that Carlson obtained a check from my husband for $10,000, there was quite a little led up to the signing of the $10,000 check. In the early days of November Mr. Carlson came frequently to our home, and in the living-room of our home one evening, before my husband and myself, he said, addressing my husband by his given name: 'David, we can get this Hendersonville Traction Company for $20,000; we can go into it together and own all the stock jointly. I have my $10,000 ready, if you can get the same amount.' There had been a discussion between the two men prior to this, but this was the first time I heard of it in the presence of both of them. Doctor said to Carlson that he thought he could get his $10,000. Carlson asked him, 'How soon?' and Dr. Fuller said, 'Well, I will have to look into my bank account. I always keep several thousand on hand, but I have not that much in the bank, but

can borrow from the bank, as I have frequently done in the past.' At another time, probably the next day, Carlson came into the house and said that he had been talking to Mr. U. G. Staton and Mr. D. S. Pace further about buying the Traction, and that they were very warm about the subject, and Dr. Fuller said, 'Cannot you get them down to $18,000?' Whereupon Mr. Carlson said, 'No; I have tried that, but it won't do. They won't take less than $20,000.' 'Another thing,' said Mr. Carlson, 'there is a man in town who wants that Traction; he comes from Brooklyn, and he will beat us to it if we don't get it.' 'How soon do you think you will get that $10,000 that you will put in with me?' Dr. Fuller said, 'There is no trouble about my share in the Traction; you can go ahead and do what you can about the deal.' Things went along like that till 15 November, when Mr. Carlson, coming into the
(821) house one day, after talking about things, he said: 'I want to go over and bind that Traction deal with Mr. Pace and Mr. Staton, but I am short of cash. I have no money here. I am expecting letters from New York with money. Can you lend me $50 with which to bind the Traction? I will pay it right back to you.' Dr. Fuller said, 'Yes; I will write you a check.' About the middle of November he asked the doctor for $50 with which to bind the Traction deal, and Dr. Fuller was about to write the check, and Mr. Carlson said, 'No, don't write a check; that will bring you right into it, and they will suspect that you are having something to do with it.'

"Back to the first meeting. I asked Dr. Fuller, in the presence of Carlson, if they had consulted a lawyer about this. Mr. Carlson cut in and said, 'We don't want any lawyer in this. I know all about such affairs. I have had lots of experience. Lawyers eat up a great deal of money.' And Dr. Fuller said, 'Yes, I know they do.' So it was agreed that no lawyer should be brought into the matter; that Mr. Carlson would fix all these things and matters to the satisfaction of Dr. Fuller. When in the middle of November Carlson asked Dr. Fuller for the $50, and Dr. Fuller was about to write the check, the doctor turned to me and asked if I had the money by me. Doctor said he never kept such a large sum on his person. I said I didn't think I had that much. And Mr. Carlson said, 'Why can't you make out the check to yourself, David, and cash it yourself?' Doctor sat deliberating and said, 'Yes, that might do.' I said, 'Birdie,' meaning Mr. Barber, 'is outside and has his wheel, and he can go over to the first bank and cash the check, after you write it, and bring it right back. He would be quicker than you.' After a few minutes Mr. Carlson agreed to it, and I went out and told Barber. Barber came in the house, and Dr. Fuller wrote the check for $50, payable to H. J. Barber. Mr. Barber went over to the bank and got the money, and brought it back, and handed it in my presence and Mr.

Carlson's presence to Dr. Fuller, and Dr. Fuller counted the $50 to Mr. Carlson, and said, 'There, Charles, is the purchase money for the Traction.' Dr. Fuller said, 'Wait a minute, Charles; I'll go with you; wait till I get my coat and hat.' Mr. Carlson said, 'No, don't do that; we want to keep this matter a secret. We don't want them to know anything about it for a few weeks.' Then Dr. Fuller said, 'Yes, I remember; that is all right.' Mr. Carlson said, 'I'll go over and bind the Traction, and tell you about it.' Mr. Carlson went out that morning and came back in the afternoon, and said he had paid over the $50 to bind the Traction. From 15 November up to the first days of December Mr. Carlson was at the house frequently, and spoke of the Traction to Dr. Fuller, in my presence. Dr. Fuller said, 'It is a fine thing to have this right, free and clear.' Carlson said, 'Yes, a great thing to own all the stock together. And what a wonderful thing that we met on the train as we did. What a fine thing that Mrs. Carlson asked you (822) to come to her.' Things went on like that until 1 December, or thereabouts, when Mr. Carlson came to the house one day and said, 'David, I don't want to be inquisitive about your private affairs and bank account, but if you cannot get that $10,000 that you will put in with me to buy the Traction Company by the first of January, I must know about it.' Dr. Fuller said, 'I can get it by the first of January.' Carlson said, 'I don't want to be inquisitive, as I said, but I would like to know just how you are going to make it.' Dr. Fuller said, 'I am not a rich man; my general income is derived from the home I have in Brooklyn, New York, and shares in the American Beet Sugar.' 'Do you own that outright?' asked Carlson. 'Yes, I own it outright,' replied the doctor. 'Oh, man alive!' Mr. Carlson said, 'don't you know that beet sugar is going to be the first thing taxed?' Carlson said, 'There are already rumors that they will tax this beet sugar. You have been asleep at the switch.' And then he came and put his arm around his shoulders, and said, 'Doctor, you have been losing four or five hundred dollars a day by holding that stock. Where is the morning paper?' Carlson then picked up the paper from the table and pointed to the beet sugar stock, and said, 'See, it is now 91. It was 102 last week. It has been dropping down. You want to sell that now, or you won't have anything left at all.' Dr. Fuller sat there deliberating, and finally said, 'I have held that stock since its infancy. I bought it over thirty years ago. It has never failed to pay its dividend. It is paying its dividend now. I don't think I had better sell it.' Mr. Carlson insisted that the stock should be sold. Finally, at Mr. Carlson's request, Dr. Fuller went to the telephone and dictated a telegram, which was sent to his broker in New York, telling him to sell all his holdings, and those I had with him jointly, at 91. Carlson was present. The stock was sold in a day or two for nearly

$27,000 and deposited in Brooklyn bank in the name of Dr. Fuller and myself. On 4 December Dr. Fuller wrote a check for $10,000. I was in the library with him when he wrote the check. I cannot remember that Carlson was present. The check was written payable to Charles A. Carleson for the sum of $10,000. This is the check. (The State here introduced in evidence the check.) The check was drawn 9 December, but was dated ahead. I cannot say positively, but very likely it was dated prior to the 9th, as Dr. Fuller dated his checks ahead. (Check is marked Exhibit A.) The check is indorsed in Carlson's handwriting twice, the first 'Charles A. Carleson' and the second is 'Charles A. Carlson.' It is spelled in the face of the check, 'Charles A. Carleson.'

"It was one year, December, 1913, before I found that this Traction road didn't cost $20,000. I saw Carlson in a few days afterward. I found him in his office in New York City. I went to New York the day after I learned the Traction hadn't cost $20,000. I was deter-
(823) mined to find out what had become of the rest of the money. I went to Mr. Carlson's office, but he was not there. I waited for him, and when he came into his office he was very much taken back to see me, and asked me what I was doing in New York. It was two or three days before Christmas, 1913. I had brought my little daughter to New York with me. I said, 'What would I be doing in New York? I am here doing a little Christmas shopping.' Then he interrupted me. 'How is David?' he said. I said, 'Want to see you about that; doctor is not well.' He expressed his sorrow. I said, 'He is grieved, and I myself have called to know why things are at such a standstill with the Traction Company—where the money has gone. We want a friendly accounting.' Mr. Carlson said immediately, 'That can all be attended to, Mrs. Fuller; all the files are in the possession of C. S. Calvert in Hendersonville. If there is anything out of the way, we will get these files from Calvert. In fact,' he said, 'I will send for them. I have sent for them to come up here. But I will send a telegram, not to send them, but keep them till you return.' 'Well,' I said, 'we can easily account for the first $10,000. The road cost $20,000. You put in $10,000 and doctor $10,000. Is that not so?' 'Yes,' he said; 'the road cost $20,000. I put in $10,000 and doctor put in $10,000.' I said, 'Mr. Carlson, I know to the contrary. I have learned from very good information in Hendersonville that the road only cost $7,500 in cash, with the assumption of a mortgage of $7,500. Where is the rest of the money?' He began to mutter and halt and clear his throat, and to tell me that he had a very bad cold. 'Well,' I said, 'where is the original contract between you, purchasing the Traction Company, with Staton and Pace?' He said, 'That paper is with all the records of the Traction together. You

can have them any time you like. I will let you look at them.' I said, 'I would like to see that paper.' I never saw it. I never have seen it."

The defendant, at the proper time, moved to nonsuit the State, which motion was overruled. There was a verdict of guilty. Defendant then moved in arrest of judgment, which motion also was refused. He took exceptions to both rulings. Judgment, and appeal by defendant.

Defendant contended in this Court that there was a variance between the allegations and the proof.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Smith & Shipman and Winston & Biggs for defendant.

WALKER, J., after stating the case: The motion to nonsuit requires that we should ascertain merely whether there is any evidence to sustain the allegations of the indictment. The same rule applies as in civil cases, and the evidence must receive the most favorable construction in favor of the State for the purpose of determining its legal suf- (824) ficiency to convict, leaving its weight to be passed upon by the jury. *S. v. Carmon,* 145 N. C., 481; *S. v. Walker,* 149 N. C., 527; *S. v. Costner,* 127 N. C., 566. The effect of Laws 1913, ch. 73, allowing a motion for nonsuit in a criminal case, was considered in *S. v. Moore,* 166 N. C., 371; *S. v. Gibson,* 169 N. C., 318. Where the question is whether there is evidence sufficient to warrant a verdict, this Court considers only the testimony favorable to the State, if there is any, discarding that of the prisoner. *S. v. Hart,* 116 N. C., 976. The weight of the evidence and the credibility of the witnesses are matters for the jury to pass upon. *S. v. Utley,* 126 N. C., 997. Applying these familiar principles to the case under consideration, we are constrained to hold that the conviction of the defendant is sustained by the evidence.

A criminal false pretense may be defined to be the false representation of a subsisting fact, whether by oral or written words or conduct, which is calculated to deceive, intended to deceive, and which does in fact deceive, and by means of which one person obtains value from another without compensation. *S. v. Phifer,* 65 N. C., 321; *S. v. Whedbee,* 152 N. C., 770. In order to convict one of this crime the State must satisfy the jury beyond a reasonable doubt (1) that the representation was made as alleged; (2) that property or something of value was obtained by reason of the representation; (3) that the representation was false; (4) that it was made with intent to defraud; (5) that it actually did deceive and defraud the person to whom it was made. *S. v. Whedbee, supra.* There is proof in this case of every element of the crime. Mrs. Fuller's testimony, if true, is of itself sufficient to justify a verdict

of guilty. The representation was that defendant could buy the stock of the railway traction company for $20,000, but for no less. Dr. Fuller did not wish to invest so much in it, his share being one-half, or $10,000, and he asked Carlson if he could not get it for $18,000, to which the latter's reply was, "No; I have tried that, but it won't do. They won't take less than $20,000. Another thing, there is a man in town who wants that Traction; he comes from Brooklyn, and he will beat us to it if we don't get it. How soon do you think you will get that $10,000 that you will put in with me?" Dr. Fuller replied, "There is no trouble about my share in the Traction; you can go ahead and do what you can about the deal." This representation as to price of the stock was false to the knowledge of Carlson. He had already bought it, or taken an option to buy it, for $15,000. At first the owners of the stock, U. G. Staton and Dr. D. S. Pace, offered to sell to him at $17,000, and Carlson then offered $12,000, the parties finally agreeing on $15,000 as the price. Carlson, apparently impecunious, went to see Dr. Fuller and even borrowed from him the $50 with which to make the deposit required "to bind the bargain." There was evidence that he was acting stealth-
(825) ily and with the purpose of concealing the fact that he was negotiating for the purchase for Dr. Fuller, as well as himself. After urging Dr. Fuller, then 73 years old, to pay his part of the purchase money, he finally got him to do so, receiving his check for the $10,000, of which he paid $7,500 to the owners of the stock, kept $2,500 for himself, and left a note and mortgage for $7,500 standing on the property. He never paid any part of his share of $10,000. Without regard to the other evidence of a damaging character, what we have just recited would seem to be a sufficient answer to the motion for a nonsuit. We have proof of the representation of a subsisting and material fact, viz., that he could buy the stock at not less than $20,000, and the falsity of it; that the representation was made with intent to deceive and defraud Dr. Fuller of his money, and that it actually did deceive and defraud him. There can be no question that there is ample evidence to show the false representation, and that it was calculated and intended to deceive Dr. Fuller, and did deceive him, appears when we consider the testimony of Mrs. Fuller that her husband knew nothing as to what had passed between Carlson and the owners of the stock, and was ignorant of the fact that Carlson had actually purchased the stock, under the option, for $5,000 less than he had represented the price to be; that Dr. Fuller wanted to buy it for less than $20,000, and Carlson told him that it could not be done, and that finally Carlson obtained the $50 in cash, and afterwards the check for $10,000. Was he deceived by the representation? Mrs. Fuller testified: "Dr. Fuller said, 'Charles, this is a great thing, that we are getting this Traction together. It will be a great

thing to own this stock with you—just the two of us.' And Mr. Carlson said, 'Yes, and we don't want to let this matter get out in town.' I said, 'For what reason, Mr. Carlson?' He said, 'Why, don't you know that if Dr. Fuller was thought to be in the transaction, they would think I was "putting one over them"?' This was the first time I had ever heard the expression. He said, 'It is all right after a few weeks. We can mention that the doctor is in it; but just at present we won't say anything about it at all." And then he asked me to be very careful about what I said. And he told me later not to let anything get out."

Carlson did not like the idea of the doctor giving him his check for the $50, but insisted that the check should be made payable to some one else who could have it cashed. The jury might well have inferred from all this secrecy and suppression of the facts, and especially of the connection of Dr. Fuller with the transaction, that Carlson feared, if it became known that Dr. Fuller was his copartner, he might find out what had been paid for the property, and the efforts of Carlson to cheat and defraud him might be foiled. That Dr. Fuller was actually deceived and that Carlson obtained the money or the check by reason of the deception, clearly appears from the evidence favorable to the State.

It would be useless to dwell long upon the phases of the evi- (826) dence which tend to establish several elements of the crime and the guilt of the accused, nor is it necessary that we should point out any conflict in the evidence, because we are not permitted to decide as to its weight. To do so would invade the province of the jury. The evidence is quite as strong as in some cases where convictions of crimes have been sustained by this Court. *S. v. Carmon,* 145 N. C., 481; *S. v. Walker, supra,* and cases cited. We refer especially to *S. v. Matthews,* 121 N. C., 604, which was an indictment for cheating by false pretense. This is the syllabus in that case:

"1. If a person by his acts or conduct induces another to believe that a fact is really in existence, when it is not, and thereby obtains money or property, he comes within the scope of the statutes against false pretenses.

"2. Where on the trial of an indictment for obtaining money under false pretenses there was evidence that the defendant obtained money from the deceased husband of the witness to get an Electropoise, which defendant, claiming to be an agent therefor, had agreed to sell to the husband, and which defendant claimed to be in the express office, when there was, in fact, no Electropoise in such office, and that the defendant kept the money so obtained: *Held,* that the evidence was sufficient to be submitted to the jury."

The conduct of defendant when Mrs. Fuller met him in New York at his office, and their conversation, were circumstances which the jury could consider in addition to evidence already commented upon.

There was no substantial variance, if variance at all, between the allegations of the indictment and the proof. There must, of course, be *allegata* and *probata,* and they must correspond. The State cannot by indictment charge a defendant with the commission of one offense and convict him upon proof of another offense. *S. v. Gibson,* 169 N. C., 318. But that is not what has been done in this case. The charge is that defendant represented that they could not buy the stock, not the stock and something else, at less than $20,000, which was knowingly false, in that he had already contracted to buy it at less than that amount. There was evidence to sustain this charge. U. G. Staton testified: "Dr. D. S. Pace and I owned stock in the Hendersonville Traction Company, and sold the same to C. A. Carlson about the first of November, 1912, and Carlson was to pay us $7,500 in cash *when we made the stock over to him.*" Mrs. Fuller testified that in a conversation between Carlson and Dr. Fuller, Carlson said, "David, we can get this Hendersonville Traction Company for $20,000—we can go into it together *and own all the stock jointly.*" Defendant, in his testimony, also referred to the transaction as one for the purchase of the stock of the Traction Company.

His language was: "I said Staton would sell the stock for
(827) $20.000." There is plenary evidence that all the representations were false, as we have shown and as appears from the testimony of Mrs. Fuller. It cannot be successfully contended that there is no evidence that defendant was deceived by the false representation and was thereby induced to part with his money, and that he was greatly impoverished by the conduct of the defendant, not being able to attend his brother's funeral because of the lack of money with which to pay his expenses. This is mentioned to show how easily he became prey of the defendant's duplicity and deceit, if the evidence of Mrs. Fuller is believed. There is much of this evidence that he contradicted, but the jury has settled the conflict of evidence against him.

The motion in arrest of judgment was properly overruled.

The indictment is drawn according to approved precedents. It alleges that the defendant did falsely pretend:

1. That the stock of the Hendersonville Traction Company, a corporation, could be purchased for $20,000, and no less.

2. That he, the said C. A. Carlson, had $10,000, and that if the said David J. Fuller would furnish the other $10,000, he, C. A. Carlson, would purchase all of the stock in the Hendersonville Traction Company and that they would hold it jointly, and unencumbered.

And these representations are thus negatived:

1. That the stock of said Traction Company was not held at $20,000, but that he, the said Carlson, had at the time of making said representa-

tion an option on all of said capital stock of said Hendersonville Traction Company for the sum of $15,000.

2. That he did not have $10,000, or any sum, to use in the purchase of stock in said Hendersonville Traction Company.

It is true that the indictment should negative by special averment the truth of the pretense alleged, 19 Cyc., 426; but there is such an averment in this bill, and the allegation of the representation and its falsity is sufficient, even within the principle stated in the cases cited by the defendant. *S. v. Pickett,* 78 N. C., 458; *S. v. Lambeth,* 80 N. C., 393; *S. v. McWhirter,* 141 N. C., 809, and in *Rex v. Perrott,* 2 Maule & Selwyn, 379.

Every indictment must be certain to a general intent. It must state all the facts and circumstances which constitute the offense with such certainty and precision that the defendant may be enabled to see whether they constitute an indictable offense. The object of an indictment is to inform the prisoner with what he is charged, as well to enable him to make his defense as to protect him from another prosecution for the same criminal act. It should, therefore, be reasonably specific and certain in all its material averments, *S. v. Hill,* 79 N. C., 656; *S. v. Lambeth, supra.* Within this rule, the particulars of the representation and its falsity are plainly stated, so that the defendant must have been (828) apprised of the nature of the crime with which he was charged.

There are some matters called to our attention which are irrelevant to the question involved. The stock without the plant or assets of the company would be valueless, as the former is issued and based upon the latter, and the parties must have supposed that when they were buying stock they were to become the real owners of the company's property to the extent that there was no exception from the transfer. But that is immaterial, as the only question is whether defendant made the representation as to the stock knowing it to be false, and did he thereby deceive Dr. Fuller and obtain his money. This issue was raised by the indictment and the plea, and there was evidence to sustain the verdict. *S. v. Matthews,* 121 N. C., 604.

There is no error in the record, and it will be certified accordingly.

No error.

Cited: S. v. Wilson, 176 N.C. 753 (1c); *S. v. Phillips,* 178 N.C. 714 (1cc); *S. v. Rountree,* 181 N.C. 538 (1c); *S. v. Jenkins,* 182 N.C. 819 (1c); *S. v. Crouse,* 182 N.C. 836 (1c); *S. v. Martin,* 182 N.C. 849 (1c); *S. v. Whisnant,* 185 N.C. 611 (1c); *S. v. Williams,* 185 N.C. 664 (1c); *S. v. Potter,* 185 N.C. 743 (1c); *S. v. Judd,* 188 N.C. 831 (1c); *S. v. Roberts,* 189 N.C. 95 (2c); *S. v. Rideout,* 189 N.C. 160 (1c); *S. v. Sigmon,* 190 N.C. 687 (1c); *S. v. Ballangee,* 191 N.C. 701 (5e); *S. v.*

Montague, 195 N.C. 22 (1j); *S. v. Johnson,* 195 N.C. 507 (2cc); *S. v. King,* 196 N.C. 51 (1c); *S. v. Carr,* 196 N.C. 133 (1c); *S. v. Mayer,* 196 N.C. 456 (2c); *S. v. Lawrence,* 196 N.C. 564 (1c); *S. v. McKinnon,* 197 N.C. 582 (1c); *S. v. McLeod,* 198 N.C. 653 (1c); *S. v. Casey,* 201 N.C. 203 (1c); *S. v. Lea,* 203 N.C. 30 (1c); *S. v. Ammons,* 204 N.C. 757 (1c); *S. v. Satterfield,* 207 N.C. 121 (1c); *S. v. Anderson,* 208 N.C. 782 (1c); *S. v. Landin,* 209 N.C. 22 (1c); *S. v. Eubanks,* 209 N.C. 763 (1c); *S. v. Coal Co.,* 210 N.C. 746 (1c); *S. v. Smoak,* 213 N.C. 90 (1c); *S. v. Hammonds,* 216 N.C. 75 (1c); *S. v. Brown,* 218 N.C. 420 (1c); *S. v. Mann,* 219 N.C. 214 (1c); *S. v. Howley,* 220 N.C. 117 (2c); *S. v. Johnson,* 220 N.C. 775 (1c); *S. v. Law,* 227 N.C. 104 (5c); *S. v. Davenport,* 227 N.C. 495 (2c).

STATE v. CHARLIE DOCKERY.

(Filed 31 May, 1916.)

1. Criminal Law—Affray—Deadly Weapon—Courts—Jurisdiction.

Where one of the parties to an affray has used a deadly weapon, the offense is cognizable in the Superior Court, though the other party had no deadly weapon at the time.

2. Criminal Law—Warrant—Service—Appearance—Waiver.

Where the accused voluntarily appears and defends a criminal charge brought against him in a court having jurisdiction, he waives service of the warrant and the fact that it was not sworn to.

3. Criminal Law—Justice's Court—Collusion—Pleas—Former Conviction—Special Verdict—Appeal and Error.

Where collusion is shown between the court of a justice of the peace, having tried the case, and the defendant accused of a criminal offense, the judgment should be declared void; and where it is shown by special verdict that the uncle of the defendant, at the instance of his father, had sworn out the warrant for an affray, in which the other had used a deadly weapon, and upon this trial no witness was sworn except the uncle, and the justice of the peace had previously agreed to "fix the matter" so that the defendant would not have to go before the Superior Court, it is *Held,* in the Supreme Court, on appeal, that the plea of former conviction was unavailing to the defendant, and judgment should be entered against him in the Superior Court on the special verdict.

APPEAL by the State from *Ferguson, J.,* at November Term, 1915, of CHEROKEE.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State. (829)

No counsel contra.

CLARK, C. J. This is an appeal by the State on a judgment upon a special verdict on an indictment for an affray. The defendant Charlie Dockery and one Lovin were parties to an affray in which a deadly weapon was used by the defendant Lovin.

It appears from the special verdict that the defendant having sworn out a warrant against Lovin for the assault upon him with a pistol, said Lovin waived an examination and was bound over to the Superior Court; that the solicitor sent a bill against both Lovin and Dockery for an affray, which was returned a true bill, to which the defendant Dockery pleaded former conviction. The special verdict further found that at the instance of the father of the defendant Dockery, William Killian, who was an uncle of the defendant, applied to a justice of the peace to know if he could not "fix the matter" so that Dockery would not have to appear in the Superior Court; said justice said he could fix it, and directed Killian and his nephew, the defendant Dockery, to appear the following Monday, at which time, upon an affidavit signed by Killian, the warrant was issued, but not given to any officer, and the defendant, without the examination of any witnesses except said uncle, was fined $2.50.

In the recent case, *S. v. Lancaster,* 169 N. C., 285, the Court said: "In *S. v. Coppersmith,* 88 N. C., 614, it was held that an affray is cognizable in the Superior Court as to both defendants where it appeared that a deadly weapon was used by either. This has been cited and approved in *S. v. Albertson,* 113 N. C., 634. To same effect, *S. v. Ray,* 89 N. C., 587, and cases cited to both cases in the Anno. Ed. If Parker, not having used a deadly weapon, had been convicted or acquitted before a justice of the peace, this would have been a full defense as to him. *S. v. Fagg,* 125 N. C., 609."

The *charge* of an affray, though one of the parties did not use a deadly weapon, confers jurisdiction as to both defendants; but if the one who has not used a deadly weapon has been already tried and convicted, or acquitted, before a justice, the plea of former conviction would be good. The sole question, therefore, is whether the defendant Dockery has been tried in the court of the justice of the peace—for the jury finds that he did not use a deadly weapon—or was there such collusion that the proceeding was a nullity? We think the court should have held the proceeding before the justice invalid.

According to the special verdict, the warrant was issued at the instance of the father and uncle of the defendant, and the defendant appeared

without the warrant having been served. He could have waived
(830) service, and he could also have waived the fact that it does not appear that the warrant, though signed by Killian, was sworn to. It was not necessarily collusion because the warrant was issued at the instance of his father and uncle, though it was certainly not a seemly proceeding. But the verdict finds further that the warrant was issued upon an agreement by the justice that he would "fix the matter so that the defendant would not have to go before the Superior Court," and further that there was no examination of witnesses except said uncle, who had procured this arrangement; and the justice, without other evidence, and, therefore, without any real trial, but in pursuance of the agreement practically with the defendant himself to keep him out of the Superior Court, fined the defendant $2.50. Such proceedings were collusive, and cannot have the effect of a legal conviction that would bar further proceedings in the Superior Court.

Legal proceedings must be, as Cæsar would have his wife, "not only without wrong, but above suspicion." The judgment here was by agreement and for the benefit of the defendant, and was rendered without proper evidence. It cannot be treated as possessing any validity in the eye of the law. Lovin and other witnesses should have been summoned so the justice could have heard both sides.

S. v. Cale, 150 N. C., 805, relied on by the defendant, cannot protect him. In that case it is true that the Court held that a defect in the warrant or arrest or in the deputization of a special officer was waived by the appearance in court of the defendant. But there the affidavit was made by a third party; several eye-witnesses were summoned and examined at the trial, and the assaulted party and his brothers, who were eye-witnesses, were notified of the time of trial, and the court waited for their appearance, though they did not attend the trial. The Court held on those facts that though the defendant himself asked for the warrant to issue, it was issued in fact upon the affidavit of a third party, and the eye-witnesses were summoned and examined, and the opposite party to the affray and his witnesses were summoned. The Court held thereupon that there was a valid trial and disposition of the cause by the justice, and that there was no evidence of collusion.

Upon the facts found in the special verdict there is evidence of an agreement and collusion between the defendant Dockery and his uncle and father on one hand and the justice on the other; no witnesses were examined except defendant's uncle, who had made the agreement with the justice; and the judgment rendered was collusive and a nullity. The court should have so held and rendered judgment accordingly. When the case goes back judgment should be rendered against the defendant

on the plea of former conviction upon the special verdict. *S. v. Moore*, 136 N. C., 581.

Reversed.

(831)

STATE v. WALLACE AGEY.

(Filed 3 May, 1916.)

1. Insurance Laws — Criminal Law — Investment Companies—License—Statutes.

A company organized in another State and having agents here for the purpose of selling small lots of land upon a certain cash payment, the balance payable in a term of years, with obligation on the part of the company to set out and cultivate figs thereon, with guarantee as to quantity of bushes thereon and price of figs at the end of the period, and to convey the land to the purchaser, or his heirs or assigns in the event of his death if the deferred payments are promptly met by him or them according to his obligations, falls within the intent and meaning of our statutes, Revisal, sec. 4805, and the amendatory acts of 1911 and 1913, being section 4805a, Gregory's Supplement, requiring that the company be licensed by the Insurance Commissioner when he is satisfied that the company is safe and solvent and has complied with the laws of this State applicable, etc.

2. Same—Police Powers—Commerce—Constitutional Law.

Where a foreign corporation offers, through its agent here, small lots of land for sale, obligating itself to cultivate the lands under stated terms, and upon the full payment of the purchase price, in installments during a term of years, to make title to the purchaser, etc., the transaction cannot be regarded as commerce, or affected by the Constitution or Federal statutes regulating interstate commerce; and our statutes requiring that to do business here they be licensed are valid as a proper police regulation. Revisal, sec. 4805, amended by Laws 1911, 1913, being section 4805a, Gregory's Supplement.

3. Insurance—Courts—Judicial Notice—Criminal Law—Investment Companies.

The Court, in this case, takes judicial notice that by the United States census Tatnall County, Georgia, is the largest county in that State, covering 1,100 square miles; that much land can be found in that section of comparatively small value, as also the services to be performed by the corporation, in comparison with the price to be paid for the land. On the facts in this case, the failure or refusal of the corporation to comply with the requirements of our statutes to obtain licenses makes the defendant, its agent, guilty of the offense charged. Revisal, sec. 4805, amended by Laws 1911 and 1913, Gregory's Supplement, sec. 4805a.

APPEAL by defendant from *Allen, J.*, at November Term, 1915, of ALAMANCE.

Attorney-General Bickett for the State.

A. Y. Burrows and J. Dolph Long for defendant.

CLARK, C. J. The defendant is indicted under Rev., 4805, and ch. 196, Laws 1911, and ch. 156, Laws 1913, being sec. 4805a of "Gregory's Supplement" (amending said Rev., 4805), know as the "Blue-sky Law."

Upon the special verdict the court was of opinion that the defendant was guilty, and the jury so found, and from the judgment thereon the defendant appealed.

(832) The special verdict finds that the foreign corporation represented by the defendant is authorized under the laws of the State of Tennessee to buy and sell real estate, and that it has bought large tracts of land in Tatnall County, Georgia, which it has divided, and is selling these tracts of land for fig orchards, and, in some instances, is contracting to furnish and set out fig trees on said tracts for a stipulated period of time, and has not obtained a license so to do of our Insurance Commissioner.

The indictment and the special verdict, which are set out in full, present two questions:

1. Whether such contract is within the provisions of the statute.
2. If so, is the statute invalid as a regulation of interstate commerce?

As to the first proposition, ch. 196, Laws 1911: "Before any bond, *investment,* dividend, guarantee, registry, title guarantee, debenture, or such other like company (not strictly an insurance company as defined in this chapter), or any individual, corporation, or copartnership who shall be agents, offer for sale or sell the stocks, bonds, or *obligations of any foreign corporation,* whether organized or to be organized or being promoted, shall be authorized to do business in this State, it must be licensed by the Insurance Commissioner, which the Commissioner is authorized to do when he is satisfied that such company or corporation is safe and solvent and has complied with the laws of this State applicable to fidelity companies and governing their admission and supervision by the Insurance Department. If such company is chartered and organized in this State and has its home office within the State it may, if a stock company, commence business with a capital stock of twenty-five thousand dollars, provided it is solvent to the extent of not less than fifteen thousand dollars. The license issued to such companies and their agents shall be issued and paid for as provided for those of insurance companies."

Gregory's Supplement, sec. 4805a, subsec. 1 (ch. 156, Laws 1913), provides: "Every corporation, company, copartnership or association, all of which are in this act termed company, organized, proposed to be organized, or which shall hereafter be organized without this State,

whether incorporated or unincorporated, which shall in this State sell or negotiate for sale any stocks, bonds, or other *evidences of property,* or interest in itself or any other company, all of which are in this act termed securities, upon which sale or proposed sale the whole or any part of the proceeds are used, or to be used, directly or indirectly, for the payment of any commission or other expenses incidental to the organization or promotion of any such company shall be subject to this act."

The question, therefore, is whether the company represented by the defendant is an *"investment"* company, or whether the defendant was offering for sale the "obligation of any foreign corporation," within the meaning of section 4805, or whether the defendant, as (833) the agent of the foreign corporation, was offering for sale in this State *"evidences of property,* or interest in itself or any other company," within the meaning of section 4805a.

In addition to the parts of the special verdict referred to, it appears from the exhibit, which was made a part of the special verdict, that in an application of a prospective purchaser the following stipulations appear:

"In event of death of purchaser hereof, warranty deed will be delivered to his or her estate, provided payments are not in arrears."

"The company guarantees to scientifically develop, cultivate, prune, and take care of said orchard plot or plots for five years, and, upon completion of the payments as above set forth, to make, execute, and deliver to the purchaser hereof a general warranty deed for the number of plots mentioned above, which shall have at that time 200 living trees thereon." And "The company guarantees the purchaser hereof 3 cents per pound for all fruit grown on said trees delivered at the preserving plant in good condition."

It will be apparent from the facts set out in the special verdict that the contract offered by the defendant for his company comes within at least three provisions of the statute.

It is an *"investment* company" offering to the public an investment in lands and fig orchards in Georgia. It is also offering the "obligations of said corporation" to cultivate said land, and giving its contract to make title on compliance with certain terms; and, lastly, it is offering for sale, within the terms of Laws 1913, ch. 156, such "evidences of property." Under all three of these provisions it is within the scope of the act.

This transaction took place entirely within the State of North Carolina, and is subject to the police power of this State. There can be no interstate commerce unless, as a part of the transaction, there is in contemplation some act of transportation between two or more States. In

this case the defendant was selling to a citizen of this State an obligation to make title to real estate in Georgia, and, upon compliance with the terms therein stated, to make title to a certain small lot of land in Georgia. There is nothing to be transported either from this State to Georgia or from Georgia to this State. There is no element of interstate commerce involved. *Paul v. Virginia,* 75 U. S. (8 Wall.), 168, at p. 183.

The intent of the statute is to protect our people, under the police power, from fraud and imposition by irresponsible nonresident parties.

(834) These instances have been so frequent that the U. S. Postoffice Department has estimated that the people of this country have been losing annually more than one hundred millions of dollars by speculative schemes which have no more substantial basis than so many feet of "blue sky."

To prevent such impositions on its people is an essential duty of government. If there is fraud and imposition in a case of this kind the parties imposed on can rarely go to Georgia and hunt up the guilty party, even if to be found there, and undergo the expense incident thereto. Even if this could be done, there would rarely be any assets which could be applied to the demands of the plaintiff. This State has sought to protect its people, not by forbidding such transactions, but by the very reasonable requirement that when parties, whether incorporated or not, acting under the authority, actual or merely asserted, of another State, propose to do such business in our borders they must submit their statement of assets and the nature of their business to the Insurance Commissioner of this State, who will issue his license to do business here when he "is satisfied that the company or corporation is safe and solvent and has complied with the law of this State applicable to fidelity companies and governing their admission and supervision by the Insurance Department," and making it indictable to transact such business in this State until such license has been obtained. This is a reasonable requirement under the police power of this State.

There is nothing in the Constitution of the United States or in the Constitution of North Carolina which prohibits the people of North Carolina, acting through their Legislature, from making so reasonable and just a regulation for the prevention of fraud and imposition. If the 39 men who signed the Constitution at Philadelphia more than a century and a quarter ago had intended to so cripple the State governments that they could not thus protect their own people, such purpose is not expressed in the Constitution, and if they had so designed they would have earned the execration of the public and not the honorable place which they hold in the hearts of posterity.

Without passing upon the *bona fides* of this particular proposition, there is enough before us to require this supervision and license by the Insurance Commissioner before the defendant's company could proceed with its proposition. The proposition, in brief, is that the defendant's company will sell to the intending purchaser a lot of land 120 x 450 feet (which is about 1¼ acres), for which they require $600 to be paid, *i. e.*, near $500 per acre. Of this $600, $120 must be paid down at signing of the paper and another $120 during the first year, and the company does not agree to set out any fig cuttings till after said $240 is paid. The remainder of the $600 is to be paid in monthly installments during the next five years. The company reserves the title, giving merely its unsecured promise to make title on payment of all the purchase money, and providing that if there is default in any one payment (835) all the deferred payments shall at once become due and payable. The company agrees to "cultivate, prune, and take care of said orchard plot for five years," and, upon final completion of the payments stipulated for ($600 for each of said 1¼-acre lots), to make title to the lot, "which shall have at that time 200 living trees thereon"—which may, or may not, mean "if" they have 200 living trees thereon.

The obligation does not stipulate that the company will set out 200 trees or cuttings thereon, nor that the company shall make title if there should not be 200 trees living thereon at the end of said five years. But taking it that it is intended to obligate the company to set out said fig cuttings (the usual mode) and to obligate further that there shall be 200 fig trees thereon at the end of five years, still there is no assurance that the company now has any assets, nor is there any security to the buyer that at the end of five years and after payment of the said $600 (for about 1¼ acres of land) there will be any means to enforce specific performances or recover damages if the company has or has not set out the 200 fig trees on the land, or there shall or shall not be 200 living trees on the lot at the end of five years, or any guarantee that there will be any assets to which the purchaser can look for damages. The defendant company has failed and refused to lay before the Insurance Commissioner its schedule of assets, the name of its corporators or managers, and to procure the license which the statute of this State requires after investigation by its official of the reliability of the company which offers this scheme to the public.

We can take judicial notice of the fact that by the U. S. census Tatnall County, Georgia, is the largest county in that State, over 1,100 square miles, being larger than Wake County in this State. It is not specified in what part of that large county these lots are to be found, if they are there. We know that the county lies some 60 miles west of Savannah in the coastal region of Georgia, where there are large flat

areas of land known in this State as "pocosins," which a few years ago could be bought at a few cents per acre. Even if the land has been actually bought by this company, of which there is no assurance, for it has refused the required investigation, it is offering the same for sale under the scheme at nearly $500 per acre. If the company really agrees to set out 200 fig trees to the acre (after $240 has been paid on each 1¼-acre lot), it is common knowledge that fig trees are set out by cuttings, and that probably the 200 cuttings could be put on the lot at a cost, including price of land, of not more than $5 per lot.

It is true there is an agreement to prune and cultivate the said trees for five years, but there is no guarantee that this will be done, or as to the manner in which it shall be done, or of damages on failure to do so.

(836) In the meantime the purchaser must have paid his $240 down and is under obligation to make payment of $360 more, which promise to pay may be transferred or assigned to some holder in due course before maturity. In short, the proposition, if honestly complied with, would probably not call for an expenditure of more than a very small fraction of $500 for each lot, including the purchase price of the land (if any is really bought), and including the setting out of 200 fig cuttings, if set out. As to the cultivation, if really made, the cost would probably be more than recouped to the seller in the corn or other crop grown thereon, if the land will produce crops. The defendant's company, however, has declined to lay before the Insurance Commissioner any evidence that it has bought any land, or that it has any assets, and offers merely its anonymous obligation to "prune and cultivate."

The State has a right to require evidence of good faith, of assets, and of responsibility from nonresident parties offering to sell to our people "investments" or "evidences of property" on such contracts as this. The defendant's company has failed to do this, in defiance of our laws, and upon the special verdict he, as its agent, has been properly found guilty.

Some years ago parties offered, upon a somewhat similar scheme, "lots in New York City." When one of the purchasers investigated the matter he found that the lots in question were within the nominal limits of that great city, but were under water altogether, or at least at high tide. In the same manner small pieces of land, a few feet in area, have been capitalized at millions of dollars in copper mining stock, and stock sold to the public when there was no probability of an ounce of copper being on the property, or, if any, at not less than a mile beneath the surface, and the swindlers who sold the stock possessed no assets, and had no probability of any, beyond the cash received from the credulous and confiding public for this fictitious stock sold by unscrupulous manipulators and their agents.

Whether the scheme under which the defendant was acting offers any probability of realizing the promises made for the company, or whether there is any *bona fides,* the outline which has been given does not give much assurance. But, however this may be, the State has a right to require that when such propositions are offered to our people there shall be an investigation as to the reliability of the company, the character of its promoters and managers, and the nature of its business and the amount of its assets, and that it shall not offer its stock, its investments, its "evidence of property," until the Insurance Commissioner has examined into its reliability and assets and issued license to such company to do business in this State. The company which the defendant purports to represent has not done this, and he has been properly found guilty.

No error.

Cited: S. v. Deposit Co., 191 N.C. 645 (c); *Hotel Corp. v. Bell,* 192 N.C. 623 (c); *S. v. Heath,* 199 N.C. 139, 140 (c).

(837)

STATE v. ROBERT CREED.

(Filed 19 April, 1916.)

Criminal Law—Seduction—Marriageable Age—Statutes.

A male, at the marriageable age of 18 years (Revisal, sec. 2082), is indictable for seduction under our statute.

CRIMINAL ACTION tried before *Cline, J.,* and a jury, at October Term, 1915, of SURRY.

This is a criminal action in which the defendant was convicted of the crime of seduction under the statute, and appealed from the judgment pronounced upon the verdict.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

J. H. Folger for the defendant.

PER CURIAM. The principal exception relied on by the defendant is that he was only 18 years of age at the time of the commission of the alleged crime; but the authorities are that, being of marriageable age (Revisal, sec. 2082), he is indictable and responsible for the crime. 35 Cyc., 1335.

The earnestness of counsel for the defendant and his confidence in the innocence of his client impressed us, but there is no error upon the record which will justify us in ordering a new trial.

No error.

PATTON v. W. M. RITTER LUMBER COMPANY.

(Filed 20 December, 1911.)

1. Master and Servant—Injuries to Servant—Negligence—Method of Work.

Defendant's mill sawed cross-ties, which were run out on rollers, from which they fell to a dock a few feet lower, and then dropped 12 or 18 feet to the ground below, where they were loaded on cars. Plaintiff, a foreman in charge of a loading gang, went to the dock to prevent the ties being thrown on his men while a train was being loaded, and asked one of the laborers if any more ties were coming out, and was informed that there would be no more for about thirty minutes. Plaintiff then motioned to his hands to load the ties onto the car, when another tie was rolled out of the mill, fell on the dock, struck plaintiff and seriously injured him. *Held*, that defendant was guilty of actionable negligence in failing to stop this movement of the ties while the car was being loaded.

2. Master and Servant—Fellow-Servants—Negligence.

The negligence of plaintiff's fellow-servant in informing him that no ties would come out of the mill for thirty minutes was not the cause of the injury, and was not material on the question of defendant's liability.

3. Limitation of Actions—Effect of Limitation—What Law Governs.

Since statutes of limitation affect the remedy and not the cause of an action, the statute of the place of the trial or *lex fori* governs.

4. Appeal and Error—Variance—Exceptions.

A variance between the pleadings and the proof will be disregarded, where no exception was taken thereto at the trial.

5. Trial—Experts—Competency—Objections.

Where a physician has been admitted and has testified as an expert, without objection, a question as to his competency as an expert may not thereafter be raised by a general objection to a proper question.

6. Evidence—Mental Condition—Nonexperts.

A person's mental condition may be shown by a nonexpert.

7. Compromise and Settlement—Evidence—Receipt.

Where a receipt is given by an injured employee to his employer, it is only *prima facie* evidence of a settlement, and may be shown to have been intended to apply only to compensation for lost time, and not to constitute an acquittance for the injuries.

APPEAL by defendant from *Lane, J.*, at Spring Term, 1911, of (838) BURKE.

L. C. Bell and Avery & Avery for appellant.
Spainhour & Mull and Avery & Ervin for appellee.

CLARK, C. J. The plaintiff was injured in August, 1907, while acting as foreman of a squad of hands who were loading cross-ties on a car on defendant's railway. The cross-ties were sawed by the defendant's mill, whence they were run out on rollers, from which they fell upon a dock a few feet lower; thence they were dropped 12 to 18 feet to the ground below, from which place they were loaded on the defendant's train. When the train came in, the plaintiff went upon the dock to prevent the ties being thrown down on his men while the train was being loaded. He asked one of the laborers if any more ties were coming out, who replied that there would be no more for about thirty minutes. The plaintiff then motioned his hands to get up the ties and load them on the car. About that time another tie was rolled out from the mill, which fell over on the dock, striking the plaintiff, and seriously injuring him.

The motion for a nonsuit was properly refused. The evidence tended to show that the defendant was guilty of negligence in not furnishing the plaintiff a safe place to work, and it was properly submitted to the jury. It was negligence in the defendant to permit its mill to run out the cross-ties to fall upon the dock and thence 12 to 18 feet to the ground, while the plaintiff and his men were engaged in picking up the ties to place them on the car. It was incumbent upon the company to stop the ties from coming out while the plaintiff and his men were engaged in loading them. The plaintiff was sent there with his (839) men to load the car, and he had no control over the operations of the mill.

The negligence of the fellow-servant in informing the plaintiff that no ties would come out of the mill for one-half hour has no bearing upon the negligence of the defendant. At most, it could only have thrown light upon the question of contributory negligence, and in that aspect it tended to show that the plaintiff acted, not negligently, but prudently. It was therefore immaterial as to whether, under the law of West Virginia, the doctrine of liability for the negligence of a fellow-servant obtained or not.

The statute of limitations of West Virginia need not be considered, for such statutes affect the remedy, and not the cause of action. It follows that the statute of limitations of the place of trial—the *lex fori*—governs. 25 Cyc., 1018, 1020 (3). This action was begun within less than two years after injury was sustained.

It is true, the cause of action set out in the complaint differs in many of the circumstances from the proof, but variance between the pleadings and the proof will be disregarded when there is no exception made at the trial. In *Hendon v. R. R.*, 127 N. C., 114, this Court said: "If the cause had in fact been tried upon a substantially different aspect from that alleged in the complaint, the defendant, after acquiescing in such variance and making no objection to the issue submitted, cannot now be heard to make this objection to vitiate the trial. If necessary, the pleadings would be reformed, even after judgment, as authorized by Code, sec. 273, to conform to the facts proven."

As to the exception to the question asked Dr. Riddle, it was really not answered by him. But if it had been, and he had been admitted and had testified as an expert without objection, a question of his competency as an expert could not be raised by a general objection to a particular question thereafter. *Summerlin v. R. R.*, 133 N. C., 551; *Lumber Co. v. R. R.*, 151 N. C., 220.

The testimony of Patton as to plaintiff's mental condition was competent. It was not necessary to show that he was an expert. *Clary v. Clary*, 24 N. C., 78, and cases cited thereto in the Annotated Edition.

The jury found upon the evidence that the alleged receipt was intended to apply only to compensation for the lost time, and that the plaintiff did not give defendant an acquittance for the injuries received by him. The receipt is only *prima facie*. *Shaw v. Williams*, 100 N. C., 272; *Barbee v. Barbee*, 108 N. C., 584. This was a matter of fact for the jury, and has been determined by them. It is not necessary to consider the other exceptions.

No error.

Cited: Cook v. Mfg. Co., 182 N.C. 209 (1c); *Wise v. Hollowell*, 205 N.C. 290 (3c).

PRESENTATION OF THE PORTRAIT

OF

HON. WILLIAM T. DORTCH

TO THE

SUPREME COURT OF NORTH CAROLINA

BY

HON. H. G. CONNOR

23 MAY, 1916

Judge CONNOR said:

May it please Your Honors: Edmund Burke gave expression to a profound and very practical truth when he declared that "A people will not look forward to posterity who do not look backward to ancestry." As of all human virtues, pride of ancestry becomes a vice—using the word in its correct sense—an element of weakness, enervating character, when made the basis of claim to consideration in the absence of those qualities which have marked a strong, honorable ancestry. When, however, as said by one of North Carolina's wisest and best, who illustrated in his own life and character the truth which he so clearly expressed, "pride of ancestry inspires the exercise of the noblest patriotism, not prompting to empty boasting, but quickening every generous impulse and stirring the purest ambition," it should be stimulated and strengthened, because thereby is preserved and projected into our social and civic life the strongest and most permanent incentive to high endeavor and noble living. The presentation to the State of memorials of citizens who, in public and private station, have rendered service, or illustrated high and noble qualities, we take as an evidence of that generous and ennobling pride of ancestry described by Mr. Davis. Prompted by these sentiments, the children and grandchildren of William T. Dortch have extended to me the privilege of presenting to the Court, with the request that it be appropriately placed in this building, the portrait of their honored ancestor. With the permission of your Honors, I desire to ask your consideration of some thoughts concerning the life and character, the service and example, of this man, honored in his day and generation, whose memory we would perpetuate and whose example we would commend to the present and future generations of North Carolinians. When measured by the standards which, with us, have fixed the position of men, their work and influence among us, he is worthy a place with those whose portraits are placed on the walls of this building erected by the people for the purpose to which it has been dedicated.

William Theophilus Dortch, son of William Dortch and his wife, Drusilla, was born on his father's plantation, situate in Nash County, about 5 miles from the town of Rocky Mount, 3 August, 1824. Surrounded by, and living under, the conditions, existing at that time,

in an agricultural community, in which there was neither large wealth nor poverty, but honest work and plain, healthful manner of life, he attended during the early years of his boyhood the neighboring schools, usually taught by those who believed in thoroughness of training in the elementary preparatory studies and a rigid discipline in morals and manners. At the appropriate age he was sent to the Bingham School, then located at Hillsboro under the superintendence of William J. Bingham, with a board of trustees upon which appear the names of Francis Nash, Francis L. Hawks, James Webb, and others. It is of interest to note that at this time it was said that the increase in number of pupils and growth of the school in the confidence of parents was found "in the thorough mode of teaching, and the consequent scholarship of the pupils; the mild yet strict, energetic, and uniform discipline of the school, the regular and close supervision of the moral deportment of the scholars, as well out of as in school." The system of instruction was based upon the principle "that the rate of progress depends on the age, intellect, and application of each individual. The more active are not retarded, nor are the slow-paced dragged over books without understanding them. That it is better to have a perfect knowledge of a few books than a mere superficial acquaintance with many. . . . Solidity should not be sacrificed to dispatch. A fine superstructure should rest on a solid foundation; it can rest on no other." Many illustrations of the practice of these essential truths have been seen in the lives of those who came from this school, which has, for so many years, and through several generations, rendered invaluable service to this State. After completing the prescribed course of study, Mr. Dortch entered upon the study of law under the direction of the Honorable Bartholomew F. Moore, then living at Halifax, N. C. That he was industrious and diligent in the pursuit of his studies and availed himself of the advantage of having as his perceptor a lawyer of such profound learning is shown by the fact that at the January Term, 1845, he was admitted by the Supreme Court to practice in the Court of Pleas and Quarter Sessions, and one year thereafter, as provided by the rules of the Court, received his license as an attorney and counselor in all of the courts of the State. The ties of friendship formed during this period between preceptor and pupil continued with increasing strength during the life of Mr. Moore, whose memory Mr. Dortch ever held in sacred regard. They were of different political faith, but each entertained for the other perfect esteem and unquestioned confidence. Mr. Dortch settled and spent the first three years of his professional life in Nashville, the county town of his native county—where Mr. Moore had laid the foundation of his long career, ending, at an advanced age, as the acknowledged leader of the State Bar. This, I think, was an

evidence of the wisdom which controlled Mr. Dortch in his later life. The season of preparation was well spent in the quietude of the village, in which there was a fine social life, affording him an opportunity to become accustomed to the practice as conducted in the county courts and forming the acquaintance of the people of the county. The diary of a young lawyer who, in 1843, settled at Nashville discloses that the then Attorney-General, Spier Whitaker, Perrin Busbee, Henry W. Miller, B. F. Moore, R. M. Saunders, and other distinguished lawyers of that time, attended the court at Nashville. An amusing and interesting view of Mr. Moore and his conversational powers is given by the young lawyer. We find in the diary the following entry: "Arrived at Nashville, 13 July, 1843, in company with B. F. Moore, Esq., the great lion of the Bar in these parts. . . . Talked me nearly to death—politics, banks, subtreasury, tariff, bankruptcy laws, *et id omne genus*. He is altogether the most incessant talker I ever saw." The "diary" contains an account of several trials in the county court, with interesting and amusing incidents in which these eminent lawyers appeared.

After three years spent in Nashville, Mr. Dortch, during the year 1848, removed to the new and rapidly growing town of Goldsboro, lately made the county-seat of Wayne County. It was here that he spent the remaining forty years of his life. By reason of its location in the center of a group of large and, for those days, wealthy counties, and later the construction of the North Carolina and the Atlantic and North Carolina Railroads, Goldsboro offered superior opportunities for a lawyer engaged in circuit practice, and of these Mr. Dortch at once took advantage. He attended the courts of Wayne, Johnston, Lenoir, Greene, Edgecombe, Nash, and, upon its formation in 1855, of Wilson counties, building up and retaining a large and leading practice. By heredity, environment, and conviction Mr. Dortch accepted, and was always ready to defend, the principles and policies of the Democratic Party. He was elected to the House of Commons from Wayne County at the Session of 1852, and returned to the Session of 1854, serving as chairman of the Judiciary Committee, thus giving evidence that he had made a favorable impression on his colleagues. Among the men who achieved distinction in the service of the State, members of the Legislature of 1854 were Samuel P. Hill, Speaker, Governor Vance, Daniel M. Barringer, Sam F. Patterson, Jesse G. Shepherd, James M. Leach, John A. Gilmer, John F. Hoke, Asa Biggs, William A. Graham, Samuel F. Phillips, Walter L. Steele, Thomas Settle, William M. Shipp, William Eaton, William A. Jenkins, Giles Mebane, and Josiah Turner. At the Session of 1858 he again represented the county. It was at this session that a debate was had, running through several days, between Governor Morehead and R. R. Bridgers, Samuel J. Person, Dennis Ferebee, and Mr. Dortch,

upon the proposition to enact a charter for a railroad connecting the North Carolina Railroad at Greensboro with Danville, Virginia. It was declared by those who witnessed it to have been one of the most remarkable debates in our Legislative history. The question involved sectional interest and strong political convictions and seriously affected the railroad policy of the State. The bill was defeated by a strict party vote. To meet the military necessities growing out of the conditions existing during the Civil War, the road was built and the connection formed under an act of the Confederate Congress. Probably the only citizen of the State now living who heard the debate says that it was truly a battle of the giants. Judge John Kerr, then a Representative from Caswell, says of the men engaged: "They were strong men and the House felt the shock of the battle while the conflict lasted."

At the Session of 1860 Mr. Dortch was chosen Speaker of the House of Commons. Upon the passage of the Ordinance of Secession, 20 May, 1861, and the ratification of the Constitution of the Confederate States, he was, together with Mr. George Davis, chosen Confederate States Senator. He held this position during the life of the Confederacy, giving to the administration of Mr. Davis his loyal support.

At the age of 41, at the fall of the Confederacy, Mr. Dortch had rendered valuable service to the State and held high and honorable position. By the passing of the issues, and the change in conditions, which had engaged his attention, he was, like others similarly situated, confronted with problems, in his private and public relations, growing out of the results of the war. Like all others who had either favored the course pursued by the majority or "gone with the State" and loyally supported the cause to which she adhered, Mr. Dortch, with that sorrow and regret which came to all sincere Southern men, accepted the result in absolute good faith and conformed to the requirements of the National Government to enable himself to resume his civic relations and the practice of his profession. Such property as he had saved from his practice during the years preceding the war was swept away, his law library was partially destroyed by Federal troops when they entered Goldsboro. He had married early in life, and found himself confronted with the duty of providing for the support and education of a large and growing family. It is not easy, at this day, to understand or appreciate the difficulties and perplexities which confronted those men who, having passed the preparatory period of life, living and working under conditions existing prior to the Civil War, were called upon to act, and counsel others in acting, after four years of war, ending disastrously and revolutionizing the political, social, and industrial life of the South.

Mr. Dortch, like all who had rendered service to his State, prior to and during the war, was politically disfranchised and, until pardoned

pursuant to the plan adopted by the National Government, deprived of the rights of citizenship. With the consciousness of having obeyed the promptings of his best judgment and dictates of his heart, he loyally worked for, and with, the people who had trusted and honored him, cheerfully sharing with them the suffering and hardships which came as the result of defeat of a common cause. He made no concession of mental or moral convictions nor asked any favors for himself which were not accorded to all other citizens of the State with whom he had acted. He gathered the few books which had been saved from the wreck, opened his office and made a new start in his private and professional career. The problems arising out of the conditions following the war, the abolition of slavery, the use, for four years, of a constantly depreciating and ultimately worthless currency, the loss of property and the accumulation of indebtedness by their clients, demanded of the lawyers of those days a resort to first principles in dealing with the questions which they were called upon to solve in giving counsel and directing adjustments involving the present interest and future welfare of their clients. The people, conscious that it was in those who were loyal to them in the days of strife and suffering that in their private business troubles they could safely trust, brought to such men as Mr. Dortch the settlement of their disordered business requiring the counsel and management of learned and experienced lawyers. The adoption of the Code of Procedure, resulting in radical changes in the procedural law, in which the lawyers of the age of Mr. Dortch were trained and with which they were familiar, and other changes in the statute law of the State, imposed upon them the necessity and duty of close application and study.

For twelve years Mr. Dortch devoted his entire time and energies to the practice of his profession, giving to his large clientage his untiring and devoted service. He took a deep interest in, and in such manner as he could, gave to the Democratic Party his aid in its struggle for supremacy in the State and relief from the evils brought upon the people by the reconstruction policy of the dominant party. At the election of 1878 he responded to the call of his party and people to represent the district composed of Wayne and Duplin counties, in the Senate. He was reelected to the Sessions of 1881 and 1883, being chosen President of the Senate at the Session of 1879, and serving as chairman of the Judiciary Committee at the Session of 1883. At the Session of 1881 the necessity for codifying the statute law of the State was manifest. The Revised Code of 1854, with Battle's Revisal of 1875, had become of little practical value by reason of the numerous and radical changes in the statutory law. The Legislature directed that the entire statute law be codified, incorporating such amendments and changes as had been made since the last revisal. For this very important work Mr. Dortch as chairman,

Hon. John Manning, and Hon. John S. Henderson were appointed a commission. No better or wiser selections could have been made. All of the members were lawyers of large experience, accurate learning, and industry. That the work was well done is manifest not only by its acceptance and adoption, without change, by the General Assembly of 1883, but by the judgment of the Bench and Bar of the State. Mr. Dortch gave to the duties of the position his most careful consideration and active service. The Code of 1883 was the authoritative evidence of the statute law of the State for twenty years and until the adoption of the Revisal of 1905. This was the last and crowning public service rendered by him to the State. During his service in the Senate, Mr. Dortch was the author of a number of important public statutes. As a legislator he was conservative, watchful of the public interest, and attentive to the proceedings of the Senate. He was author of the "Dortch Bill" providing for enlarged facilities for the common schools.

Mr. Dortch was named by Governor Vance (1877) on the board of directors of the Western North Carolina Railroad, a work in which the people of the State, especially the west, were deeply interested, and to the building of which by the State the Administration was committed. Its completion was to mark the consummation of the North Carolina system, adopted and begun with the construction of the North Carolina and Atlantic and North Carolina Railroads, and the realization of the vision of the people of the State of a transportation system connecting with the sections, beginning in the mountains and terminating at the ocean—making Beaufort and Wilmington the seaports of the State. The work had been delayed by the war and the lease of the North Carolina Railroad for thirty years, expiring in 1900. The construction of the road from Greensboro to Danville, which Mr. Dortch and other statesmen of the east had so strongly and, prior to the war, successfully opposed, seriously affected the completion of the "system." Mr. Dortch was deeply interested in the completion, by the State, of the Western road, looking to the establishment of the system at the expiration of the lease of the North Carolina Railroad. Many difficulties were encountered, the cost was very large, and the people of the eastern counties, embarrassed by the loss of their property as the result of the war, and suffering from the administration of their local governments, by existing political and industrial conditions, were restless under the burden. These and other causes presented practical and to many it appeared insurmountable difficulties. The wisest and most patriotic men of the State held variant views in regard to the best course to pursue. During the year 1880 a proposition was made to Governor Jarvis by a syndicate of Northern capitalists to purchase the property and complete the construction of the road. The questions which divided the counsel of the

people have ceased to be of practical interest and the actors in the controversy have passed away. That they all desired to promote the interest of the State and secure to the west the long promised and long delayed connection, by a railroad, with the east must be conceded. Governor Jarvis called a special session of the Legislature for the purpose of taking into consideration and accepting or rejecting the proposition to buy the road. Mr. Dortch, as a member of the Senate, strongly opposed the sale, but was overborne by a majority of the Legislature. The sale was made and the road finally completed. It is not my purpose, by so much as suggestion, to open the long closed controversy which at that time divided the opinion and with some the deep convictions of men of that day. Whether the completion of the Western North Carolina Railroad by the State was practicable, or whether, if completed, the maintenance of a State system of transportation operated by the State was possible, under changing and changed transportation systems, must remain an unanswered question, in regard to which, like so many other questions of public policy, there is ample room for difference of opinion, which must, of necessity, be speculative. It is, however, of interest to note several propositions submitted by Mr. Dortch, because illustrative of his wise foresight and practical cast of mind in dealing with questions affecting the public welfare. He proposed to amend the bill authorizing the sale by inserting the provision: "That like total rates of transportation charged over said Western North Carolina Railroad, and other roads with which it may at any time form through lines of traffic to or from or through seaports in adjacent or other States, shall likewise be enjoyed on traffic to or from or through seaports within the State of North Carolina. The Western North Carolina Railroad will neither charge nor participate in higher rates than may be applied on like traffic between points in adjacent States than are of similar distance from the destination thereof, as are charged said points within the State." The proposed amendment was defeated. What effect the protective provision would have had, in the light of Federal control of interstate rates, it is unnecessary to inquire. It was the loyalty of Mr. Dortch to the welfare of the people of the State, and his courageous stand, in the face of defeat, to secure to them the benefits which were expected by those who had labored for the establishment and maintenance of a North Carolina system of transportation, giving to the people of all sections fair and equal rates of traffic, which is of interest in estimating the value of his public service. Mr. Dortch was essentially conservative in his cast of mind—slow to adopt or advocate changes in the laws until convinced by reason and personal investigation; inclined to oppose departures from things fixed. North Carolina has had no more loyal citizen nor one who, in her

councils, served with more wisdom, fidelity, and patriotic devotion to her highest interests.

It is, however, as a man and a lawyer that we find in his character and conduct those qualities which we think upon most pleasantly. Mr. Dortch was not given to speculation or refinement in the practice of the law; he was not a reformer, in the usual and ordinary sense in which that term is used. He found a larger interest in using, in the administration of justice, the methods and procedure which he found in existence than in devising new ones. Trained in the common-law proceedure in force in our courts prior to 1868, he opposed the new Code of Proceedure, as did many others of the lawyers of his age. When, however, it was adopted, he familiarized himself with its principles and provisions and came to recognize its value. To him the definition of the complaint as "a concise statement of the facts" constituting his clients' cause of action and the answer as an equally concise denial, with such matter of defense as he intended to rely upon, was easily adopted. His pleadings were models of conciseness, clearness, and freedom from evidential and irrelevant matter. Neither court nor counsel found difficulty in drawing issues upon them, and, in this, I venture to commend his example to many of our brethren of the Bar.

While Mr. Dortch was a safe and wise counselor, an accurate and well informed lawyer, giving close attention to all interests committed to his care, it was in the courthouse and before the jury that his preëminent ability and finest powers found their fullest expression. From the impaneling of the jury, the reading of the pleadings, until the rendition of the verdict his interest increased, his mind became ever more active and alert—he was at his best. With his case thoroughly prepared, the order of introducing his evidence logically arranged, the weak points in the armour of his adversary anticipated, and exposed by the adroit and skillful cross-examination of witnesses, when the moment came for going to the jury he was master of the situation and, usually, the victor when the verdict was rendered. He wasted no time nor weakened his cause in the mind of the jury in fighting over irrelevant and immaterial preliminaries. He dealt frankly with the court, fairly with counsel, knowing when to make concessions, waive formalities, and preserve the substantial rights of his client. He was always in command of the litigation, securing and retaining the confidence of his client; he did not hesitate to assume responsibility and managed the cause from start to finish as a skillful commander, granting such favors to opposing counsel as he deemed just, making such admissions as in his judgment were proper, and taking the responsibility for the result. He carefully avoided encumbering the record and endangering the verdict which he anticipated by pressing or objecting to evidence of doubtful admissibility. He seldom

asked for special instructions. I recall that when trying cases in which he appeared I would ask him if he wished to present prayers for instruction, he would reply, "No, your Honor will take care of the law and I will look after the facts." The Reports of this Court show but few appeals from judgments obtained by him. No lawyer knew better when the interest of his client was to be served by compromise of a doubtful case or exhibited more courage in so advising his client, and this one of the wisest lawyers and men known to me, or from whose counsel I derived benefit, said was one of the best tests of a safe and wise lawyer.

A former Chief Justice of this Court who lived in the same town, practiced in the same counties, and was more frequently opposed to him in the trial of causes than any other member of the bar, said of Mr. Dortch: "He was attentive and skillful, and gave satisfaction to those who relied upon him to defend their interests. He was true to every one because he was true to himself. He approached the court with a plain statement of his case; his facts were well digested and forcibly presented to the jury. His work was thorough. He was cautious and waited until he was ready, and when he so announced his opponent soon met victory or defeat." One who knew him well, heard him frequently in the trial of causes, and admired no less his great power of mind than the loyalty, integrity, and sterling honesty of his character, correctly and clearly describes his manner in addressing the jury, saying: "He spoke in a smooth conversational tone of voice; but as he would warm with his theme, he would become animated, and his face, radiant, . . . would glow with intellectual beauty. . . . There was no effort at display, or stage effect, or playing to galleries. In none of his speeches did he ever say anything to elicit applause, but he spoke to convince the reason and judgment of men. His favorite gesture was with his index finger, and when he would point it at the jury to give emphasis to some point he was making, or clinch an argument," he was invincible. His use of simple, short words—sentences pregnant with meaning and easily comprehended by the jurors—held their attention and carried conviction to their minds.

But it is neither in that which a man does in public service, honorable and useful though it may be, nor in the field of endeavor in his chosen life work, however successful it may be, that we find expression of the essential qualities of mind and heart, that which impresses itself upon human life with which he comes in contact, that which touches and either blesses or curses, brightens or blights; but it is in the human relationships, the home and its inmates, the friends whom he makes, the associations which he forms, his influence in the community in which he spends the days of his strength and the declining years of his old age,

that we must seek for that which lives after he has in the body passed away—that which does not die. The question is not so much what a man did as what he was. If the statesmen be not something greater and better, the lawyer something more, his work will not survive nor his influence be long felt. Above and beyond all of these things, mankind is ever seeking an answer to the question, What manner of man was he whom you ask us to hold in honored memory, whose character you commend to us for admiration, and example for imitation?

The work of the legislator is at best but tentative, and for a day; of the judge, ever undergoing examination, criticism, and frequently rejection; of the lawyer, evanescent and soon forgotten. But the man —that which for the want of a more accurate description we call the spirit, the soul, the essence—lives forever and is projected into the currents of and affects human life. The questions which we ask of every man, How did he use the opportunities which sucess brings?—if failure and defeat overtake him, how did he bear himself, and with what degree maintain his integrity?—to these questions, applied to the life of Mr. Dortch, a satisfactory answer may be given.

As a citizen, he was obedient to the laws of his State and country, and taught others to be so. That which was said of Archibald Henderson by Judge Murphey may with truth be applied to Mr. Dortch: "As he acknowledged no dominion but that of the laws, he bowed with reverence to their authority and taught obedience no less by his example than his precept. To the humblest officer of justice he was respectful. . . . He considered obedience to the law the first duty of the citizen, and it seemed to be the great object of his professional life to inculcate a sense of this duty, and to give to the administration of the law an impressive character. . . . As he advanced in life, he seemed more and more anxious that the laws should be interpreted and administered by the rules of common sense. He in a great degree lost his reverence for artificial rules. He said that the laws were made for the people and they should be interpreted and administered by rules which they understood whenever it was practicable."

Mr. Dortch was not given to professions of friendship, nor seeking the confidence of others; and yet no man was more strongly attached to those whom he admired, and no man ever doubted his absolute loyalty nor hesitated to confide in his integrity. To his chosen friends, and all who enjoyed his confidence, he was ready to give assistance to promote their welfare and happiness, preferring to do so in his own quiet, unobtrusive manner. Probably for no one, not of his own household, did he have more affectionate regard than for Judge Strong, with whom for many years he held most intimate personal and professional relations: resident of the same town until the latter moved to Raleigh, practicing

at the same courts, differing in temperament and cast of mind, and yet having each for the other a strong, manly affection. Judge Strong wrote of him: "It seems that nature had formed a special place in my heart which he only could fill. . . . He was indeed one of the bravest, truest, best and greatest men that I have ever known."

Judge Howard said: "Dortch held, and deservedly so, a high place among our best men."

Judge Faircloth said of him: "We differed on political questions and met on the stump and were usually in opposition on the docket. It affords me much satisfaction to be able to say that on no occasion was a single offensive word uttered by one to the other. . . . Our personal relations were always pleasant, and I found that those who knew him best were most attached to him." To those who, as your Honors and myself, knew these men, and know that they could, when in opposition, give and take blows, given straight and bravely, these are not words of empty eulogy; they express sentiments honorable to both. No higher test of the qualities of a lawyer who by reason of age, experience, and ability has come to be the acknowledged leader can be applied than to inquire as to the moral, personal, and professional standards of the Bar—the estimation in which he is held by and the influence which he exerts over its younger members. No higher obligation is imposed by eminence and leadership than that he who possesses them shall fix high and in his own life illustrate the standards of professional ethics, personal relations, and civic duties of the Bar. Tried by this test, Mr. Dortch came up to the full measure of its obligation. During the last decade of his life, of which by association and personal experience I am able to speak, no Bar in this or any other State enjoyed or profited in a larger measure by the privilege of association and having daily before them the example of a good man, a wise counselor, and a great lawyer, than those who at the Goldsboro Bar were then entering upon their professional careers. Their achievement, their large success, and honorable service, no less than their personal merit, are written large in the history of the State and are being daily illustrated in the highest judicial positions. The relations existing between their leader and themselves, as I knew it, when holding my first term of court, were inspiring and beautiful. To myself, at this time of danger and doubt, he was as kind as if I had been his son.

While not depreciating that personal, physical courage which every man has who places a correct estimate upon his personal rights and holds himself ready to defend them when invaded, it is moral courage which sustains a man in the hour of disaster and defeat which gives dignity to his character and commands the respect of all good men, which makes him afraid to do wrong and unafraid to do right, which marks a manly

man—a gentleman. It is the man who meets and discharges, without complaint, or losing his sense of proportion, either of his own or the character of others, when overtaken with disaster, who asks only for purity of purpose, clearness of mind, and strength of heart to meet and discharge every obligation which comes to him, who is entitled to our respect when living and whose memory is worthy of preservation and honor when dead. And herein Mr. Dortch is entitled to hold a high position.

He was not, as men count success, a successful man. The most sacred relationships of life brought to him the purest pleasures, accompanied by responsibilities the discharge of which taxed his splendid mental, moral, and physical powers—all of which he wisely conserved that he might devote them to the demands of duty. He placed a proper estimate upon money, seeking to acquire it only as the just reward for honest service, and to use it for the benefit of those to whose welfare and happiness he had devoted his life. He was, in the best sense of the word, a prudent man; his personal habits were those of a man who understood his duty to preserve his health; in nothing did he indulge to excess. He was in all respects a healthy man, in mind and body, and this, as Carlyle says, "is no small matter." Having in all the relationships of life given to those entitled to it the best service of which he was capable, faithfully discharged his duty, he abided results with patience, if not satisfaction. He did not seek ease, but found pleasure in labor. He was an unusually industrious man, having but little patience with those who sought to live without work. Sincere and loyal himself, he had no sympathy with, and but little toleration for, insincerity and disloyalty in others. To those in whom he reposed confidence he was trustful and confiding; with men of devious methods and dishonest ways, either in thought or conduct, he had no sympathy. As with all men of strong character, the currents of his life ran deeply and quietly. There was that in his expression, his manner, his conversation, which impressed others with the feeling that there was in his character a reserve force which manifested itself only when called forth by occasion. His was in all respects a striking, unusual personality, impressing itself upon all with whom it came in contact. While not given to humor, his quiet smile gave unmistakable evidence of appreciation of a good story. His conversation when with friends, in his home, around the fireside on circuit, or on a walk before or after court, was interesting and enlightening. He was not a reader of many books, but well informed in regard to current events. He was more interested in what men did than what they wrote.

Mr. Dortch was of that temperament which we find in quiet, reserved men upon whom the experiences of life make a deep impression. He did not care, nor did he know how, to cast them off. He rather met

them bravely, and carried them to the end. Upon such men the wear and tear of life tells strongly.

While attending a term of court at Nashville, where he began his professional work, the rupture of a small artery admonished his friends, his family, and himself that the time had come to him when rest, mental and physical, could alone prolong his powers for labor. Like too many brave, faithful men, he did not know how to rest. The demands upon him did not permit, nor did his strong, controlling sense of obligation allow him to rest. He continued to draw upon his weakened and overworked resources until the end came, and on 21 November, 1889, at 65 years of age, he passed away; worn and weary, he quietly and with gentle resignation slept.

Twenty-seven years have come and gone since, a few days before his death, I saw him alive for the last time. The impression made upon me as he then appeared has not passed, nor will ever pass away. His features, losing nothing in manly intellectual strength, told of courage and resignation, sustained by the assurance that he had found, in its divinely appointed way, that peace which passeth understanding.

Those who knew Mr. Dortch in the days of his strength have passed away. To those who, as your Honors and myself, knew and admired, he was "a genuine man, which is itself a greater matter. No affectation, fantasticality, or distortion dwelt in him; no shadow of cant. Nay, withal was he not a right brave and strong man"; and, after all, when life's fitful fever is over and the true measure of men's lives are taken, are not these the qualities which mark the highest point and the largest standard of character? Of such men it may be said, as of one of the manliest of men, when he departs, he takes a man's life along with him. Mr. Dortch, in his early manhood, married Miss Elizabeth Pittman of Edgecombe, and to them were born Harrod Pittman Dortch, Isaac Foote Dortch, Miss Corinne Dortch, Mrs. Mary D. Scholfield, William T. Dortch, Mrs. Annie B. Hill, Fitzhugh L. Dortch. His second wife was Miss Hattie Williams of Berryville, Va., and to them were born Dr. Allan W. Dortch, Miss Helen W. Dortch, James Tyson Dortch, and Miss Selene W. Dortch.

In behalf of his family, I request that the excellent portrait, the work of Mrs. Marshall Williams, whose talent is so well illustrated in a number of portraits on these walls, may be placed in company with other North Carolina statesmen, citizens and lawyers, who have served the State and illuminated her history.

ACCEPTANCE BY CHIEF JUSTICE CLARK

The Court is gratified to receive this portrait of Mr. Dortch. Judge Connor's excellent address has so graphically portrayed his career and his character that nothing can be added.

These portraits of the distinguished lawyers of the State shall be constant reminders to stir the emulation of young lawyers for all time. They are like the trophies of Miltiades which would not permit the young Themistocles to sleep.

The profession of law, as compared with the other two learned professions of medicine and theology, is of very recent origin. Medicine and theology date back to the beginning of the human race. There have been judges also from the earlist time, for there have always been controversies to be settled; but law as a profession is comparatively new. Some one has, inadvertently, of course, referred to "the great lawyers who drafted Magna Carta"; but, in fact, at that time there were no lawyers, either great or small, in all England. At that time every one was required to appear in court in his own behalf, both in criminal and civil cases. 1 Pollock & Maitland English Law, 190-196. No one could be represented in court by another until the statute of Merton in 1236, twenty-one years after Magna Carta. Professional lawyers were first authorized in England by the statute of Edward I, in 1291, Ridge's Constitutional Law of England, page 245—more than three-quarters of a century after the barons and bishops met King John at Runnymede. Indeed, counsel were not allowed to address the jury, in felonies in England, on behalf of the prisoner till 600 years later, in 1836, Ridge's Constitutional Law, 249; Century of Law Reform, 50.

For many centuries after the Conquest all the judges in England were ecclesiastics, with rarely, now and then, a layman, never a lawyer. Maitland & Montague, Eng. Legal History (Colby's Ed.), 97. The Lord Chancellors, the highest law position, and next to the King in rank, were all ecclesiastics till Sir Robert Bourchier in 1341. The solitary exception was a woman, Eleanor of Provence, in 1253, whom Lord Campbell in his "Lives of the Lord Chancellors" tells us sat in the *Aula Regis* and personally discharged its duties with vigor. Indeed, lawyers were so scarce that it is not certain that any lawyer was appointed to the Lord Chancellorship till Sir Thomas More in 1529, though among the few appointed to that office, who were not ecclesiastics, were some who had been judges; but the judges were usually laymen or bishops. Lawyers must have been scarce indeed, or they would have found the Lord Chancellorship, though it did not find them.

When the Wat Tyler Insurrection broke out in England, caused by the poll tax, the cry which was then raised (and again a little later in Cade's Rebellion, Shakespeare 2 Henry VI, Act 4, Sc. 2), "Let us kill all the lawyers," was due, it seems, not so much to anything that lawyers had done, as to the fact that, being a new profession, the populace thought that they must be responsible for the imposition of the new and odious tax. 2 Stubbs Constitutional History of England (Oxford Library Ed.), 495. This tax was soon repealed, and, though long afterwards reënacted for a few years, no poll tax has been laid in England for now more than two centuries past.

Sir William Blackstone, in 1758, was the first professor of law in England, and he resigned in 1766 because he could not procure the establishment of a law school, which is a more modern evolution, for the famous "Inns of court" were not law schools, but noncorporate associations of lawyers and law apprentices who gathered in these great hostels and after the lapse of a certain time and on proof of having eaten a certain number of meals the law apprentices were "called to the Bar" by their seniors, Century of Law Reform, 32. In North Carolina, when the Court of Conference, which later developed into our Supreme Court, was continued by the Act of 1801, it was provided: "No attorney shall be allowed to speak or be admitted as counsel in the aforesaid court."

Nor was the profession of law of more ancient origin in other countries. In most of them the profession, as we now understand its duties and rights, took its rise after it did in England. It is true, there were advocates in Rome under the Republic, but they practiced mostly to obtain support for political office and were not allowed to charge for their services, receiving only voluntary gifts, which indeed for a long time was the case in England. In the later Roman Empire there were law schools, but the lawyers graduating therein were rather what were called jurisconsults, that is, they were advisers to the judges, who were often laymen, though there were some who became judges and others who became famous as law writers or codifiers, such as Ulpian, Paul, Papinian, and others. But in many essential respects their position under an arbitrary government was essentially different from the profession to which we belong.

When our Master said, "Woe unto you, ye lawyers," Luke xi:46, he referred to priests and theological students, for the Hebrew law was the old Scriptures, overlaid, it is true, like our law, with comments and traditions. But none the less those whom he addressed as "lawyers" were ecclesiastics, as was also "a certain lawyer who stood up tempting Him, saying." Luke x:25.

Notwithstanding the recent origin of our profession, it has grown rapidly in numbers and influence in all free countries. In these it thrives so well and it is so essentially modern and democratic that in the United States, of the three great departments of the Government—Legislative, Executive, and Judicial—lawyers not only naturally, it might be said necessarily, fill all the higher positions of the judiciary, but on an average lawyers furnish more than 60 per cent of the Governors and Presidents and of members of the State legislatures and of both Houses of Congress—that is to say, a good majority of the other two departments of the Government.

As the judiciary in this country have claimed and exercised the irreviewable power to set aside any action of the Executive and Legislative Departments of the Government, and even to say to the people themselves, as some judges have claimed, "Thus far shalt thou go and no further," no class of men exercise greater, or as great, power in this country than lawyers, and the entire people are interested in their conduct.

It is therefore highly important to keep high and clear the best standards of the profession, and that the life, the example, and the memory of the great lawyers who have led the way of honor and whose influence has been a restraint upon doubtful tendencies, should be ever kept before the profession.

Among the great lawyers to whom North Carolina owes much for his influence for good upon the legal profession was William T. Dortch. Though enjoying a large practice, he did not deem that the pecuniary rewards were the sole object of a lawyer's profession. While successful in public life and attaining, among other honors, the position of Confederate States Senator, he did not permit ambition to swerve him from his duty. His face and figure bespoke power, restrained by moderation. In character, and I might almost say in lineaments, he recalled that ideal of the great race from which he sprung, the first William of Orange, the liberator of Holland, the opponent of Alva and of all intolerance in State and in religion.

Mr. Dortch was a strong man, conscious of his power, but moderate in its use. He achieved with out effort a foremost place at the Bar and in the State. His memory will always be held in veneration by both.

The marshal will hang his portrait in its appropriate place on the walls of the library of the Court.

A TABLE OF CASES OVERRULED IN WHOLE OR IN PART, OR MODIFIED, OR REVERSED BY THE SUPREME COURT OF THE UNITED STATES

PREPARED BY

ASSOCIATE JUSTICE W. R. ALLEN

It is impossible to prepare a complete table of overruled, modified, and reversed cases without an examination of each case in the Reports, and I have not had the time to do this. I have, however, been diligent to make the table complete, and believe it is approximately so.

I hope it will be useful to the Profession, and I remind those who may be disposed to criticise or complain if they find a case has been omitted, that it has cost them nothing, and the printer will leave space under each letter for the insertion of other cases. The Court has directed the publication of the table in the Reports, but without passing on the correctness of the classification of cases.

O opposite the case means Overruled, *M* means Modified, and *R* Reversed.

W. R. ALLEN.

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NOTE.—The reverse index will be found to embrace the distinctive subheads of the decided points, referring by number to the places where the decisions thereon are indicated, and the cases embracing them are cited. It is hoped that in this manner, and by the embodying of the sketch words in *italics* in this index, the practitioner may more readily find whether the point he is looking up has been decided in this volume, and, if so, where.

ABANDONMENT. See Appeal and Error, 23; Railroads, 7, 8.

ABATEMENT. See Deeds and Conveyances, 1.

ACCORD AND SATISFACTION. See Contracts, 11.

ACREAGE. See Deeds and Conveyances, 1.

1. *Actions — Parties — Causes — Statutes — Misjoinder — Motions — Demurrer — Judgments — Appeal and Error.*—Objection for misjoinder of causes should be upon motion to divide the causes (Revisal, sec. 476); and where a demurrer has been sustained setting forth these grounds and, further, that the complaint does not make a plain and concise statement of the cause of action, etc., it will be confined on appeal to the last named objection. *Lee v. Thornton*, 209.

2. *Action—Contract—Usury.*—An action on a contract bearing usurious interest may be maintained in our courts, and the action will not be dismissed because some usurious interest has been charged. *Bank v. Redwine*, 559.

3. *Actions—Damages — Wrongful Injury — Pleadings — Demurrer.*—The defendant had entered suit against the plaintiff, denying its title to lands, the complaint therein constituting a *lis pendens*, and thereafter submitted to a voluntary nonsuit. In the present action the plaintiffs allege that the defendants knew that the title to the lands was in the plaintiff, and instituted the action willfully, wantonly, and intentionally to injure the plaintiff's credit, and the cloud thus cast upon their title to the lands caused them damages in preventing the sale thereof. *Held*, the defendant, in its action, was not privileged to damage the plaintiff, as stated, the matter being between the parties, and a demurrer to the complaint in the present action will be overruled. *Estates v. Bank*, 579.

4. *Same—Cloud Upon Title—Levy—Possession.*—Where it appears that the defendant had cast a cloud on the title to the plaintiff's land by an action wantonly, willfully and wrongfully instituted by it, thereby causing the damages claimed by the plaintiff in the present suit, it is not necessary that the defendant should have seized the property or that attachment should have been levied, when the cloud cast upon the title of the plaintiff caused the damages. *Ibid.*

5. *Actions—Wrongful Injury—Nature of Actions—Demurrer — Appeal and Error.*—Where the complaint sufficiently alleges a cause of action against the defendant for damages to the plaintiff's property by casting a cloud upon its title, in a former action, it is not necessary to decide, in passing upon the sufficiency of the demurrer thereto on appeal, whether the action was one for slander of title, malicious prosecution, or for an abuse of legal process. *Ibid.*

ACTIONS. See Contracts, 2; Counties, 1; Parent and Child, 1; Carriers of Passengers, 6; Pleadings, 4; Injunction, 2; Judgments, 13, 18; Vendor and Purchaser, 10; Parties, 2.

ADJUSTMENT. See Contracts, 20.

ADMISSIONS. See Appeal and Error, 28; Adultery, 1; Marriage, 1; Vendor and Purchaser, 17.

ADULTERY.

Adultery—Marriage—Evidence—Admissions—Statutes — Slaves.—Where title to lands depends upon the legitimacy of the heir born in wedlock a short time after the marriage, evidence of the wife, on the issue of adultery, as to the nonaccess of the husband, is incompetent; and *a fortiori* evidence of her declarations to that effect made after her death. *West v. Redmond*, 742.

ADVERSE POSSESSION. See Deeds and Conveyances, 37, 38.

1. *Adverse Possession—Evidence—Sufficiency.*—Evidence held to sustain a finding that plaintiffs had been in the adverse possession of a strip of land for the statutory period. *Stallings v. Hurdle*, 4.
2. *Adverse Possession—Burden of Proof—Color—Ejectment.*—In ejectment by one claiming by color of title and adverse possession, upon showing color of title, the burden of proof was still on plaintiff to show adverse possession, and not upon defendant to disprove it. *White v. Edenton*, 21.
3. *Adverse Possession—Burden of Proof—Ejectment.*—In ejectment to recover land claimed by adverse possession, which is such possession of another's land as, when accompanied by certain circumstances, will vest title in the possessor, the burden is on plaintiff to show such acts and conduct on his part as tend to prove a continuous assertion of ownership for the requisite time. *Ibid.*

AFFRAY. See Criminal Law, 7.

AGENCY. See Partnership, 3.

AGREEMENT. See Judgments, 19; Appeal and Error, 40.

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APPEAL AND ERROR. See Instructions, 1, 2, 3, 5, 7, 8, 9; Issues, 1, 2, 4; Trials, 1, 4, 6; Vendor and Purchaser, 3; Navigable Waters, 2; Actions, 1, 5; Injunction, 3; Jurors, 2, 3; Railroads, 10, 17; Commerce, 4; Costs, 1, 2; Deeds and Conveyances, 22; Judgments, 9, 10, 13; Automobiles, 3; Courts, 7, 10, 11, 12; Evidence, 11, 17; Witnesses, 1, 2; Receivers, 1; Fornication and Adultery, 2; Seduction, 1; Criminal Law, 1, 9; Homicide, 3, 5.

1. *Appeal and Error—Frivolous Appeals—Motions.*—While ordinarily an appeal lies to the Supreme from the Superior Court as a matter of

APPEAL AND ERROR—*Continued.*

right, it is required that it must be *bona fide* for the purpose of reviewing some alleged error; and when from the record it appears that the appeal is frivolous and made solely for delay, it will, upon due notice to the appellant, be dismissed upon appellee's motion. *Ludwick v. Mining Co.*, 60.

2. *Same—Record—Removal of Causes—Discretion.*—Upon refusal of defendant's motion to transfer a cause for improper venue, the defendant gave notice of appeal which he did not perfect, and at some subsequent term renewed the motion, but upon another ground—for the convenience of witnesses and to promote the ends of justice, etc., under Revisal, sec. 425 (2), and appealed from the refusal of this motion, and perfected it. *Held*, the granting or refusing of the second motion was in the discretion of the trial judge, and upon the record the appeal will be held frivolous by the Supreme Court and dismissed upon appellee's motion therein properly made. *Ibid.*

3. *Appeal and Error—Instructions—Objections and Exceptions.*—Where damages to a car-load shipment of live stock, caused by the negligence of a railroad, with an agreed limited valuation, are to be determined by a jury in accordance with the valuation at the point of shipment, under the bill of lading issued therefor, and it is clearly implied in the charge of the court that the damages should accordingly be determined, and no exception to the charge is taken in this respect, a new trial will not be granted on appeal. *Horse Exchange v. R. R.*, 65.

4. *Appeal and Error—Instructions Requested—Correct in Part.*—It is not reversible error for the trial judge to refuse a special request for an instruction which, though correct in part, is in some respect objectionable. The instruction must be correct as a whole. *Ibid.*

5. *Appeal and Error—Superior Courts—Recorder's Court—Statutes—Certiorari.*—Where the statute establishing a recorder's court does not provide for an appeal the remedy is by application, at the next term of the Superior Court following the trial, for a writ of *certiorari*, requiring, except in very restricted instances, a show of merits by the applicant, upon affidavit; and where a term of the Superior Court commenced more than ten days after the trial, and the complaining party has not caused his appeal to be docketed at the next ensuing term, and without having pursued the remedy prescribed, his appeal will be dismissed. *Taylor v. Johnson*, 184.

6. *Appeal and Error—Superior Courts—Recorder's Court—Statutes—Objections and Exceptions—Court's jurisdiction.*—Where the statute establishing a recorder's court has not provided for an appeal, but an appeal has been entered in the Superior Court without objection, the jurisdiction of the Superior Court will attach, and its disposition of the same will not be disturbed on the ground that an appeal had not been provided by the statute. *Ibid.*

7. *Appeal and Error—Supreme Court—Discretion—Opinion—Appeal Dismissed.*—Where the defendant has appealed from a judgment rendered against him in a recorder's court, and the statute does not provide for one, and the plaintiff moves to dismiss it, the practice is for the plaintiff to except to the refusal of the court to sustain his motion, and continue with the trial; but the Court, on this appeal,

APPEAL AND ERROR—*Continued.*

in its discretion, expresses its opinion upon the merits and dismisses the appeal. *Ibid.*

8. *Appeal and Error—References—Exceptions—Findings—Presumptions.*—Where the trial judge sustained exceptions to a referee's report, made findings and thereon rendered the judgment appealed from, to which judgment the appellant excepted and assigned for error that the court sustained the exceptions, the exceptions thus taken are broadside and too indefinite to be considered on appeal, and it will be presumed that the findings of the judge were based upon sufficient evidence. *Sturtevant v. Cotton Mills*, 119.

9. *Appeal and Error—Assignments of Error—Immaterial Error.*—A new trial will not be ordered on appeal when the assignments of error, considered as a whole, are not regarded of sufficient importance, or so material, as to disturb the verdict, and when, dealt with *seriatim*, there is no technical error. *Carson v. Ins. Co.*, 135.

10. *Same—Insurance, Life—Policy — Assignment — Evidence.* — Where in an action upon a policy of life insurance the plaintiff relies solely on the validity of an assignment thereof made by deceased, and the jury has found that the physical assignment had been made, but that it was procured by fraud, the exclusion of her testimony to the effect that the policy sued on was her property is immaterial. *Ibid.*

11. *Appeal and Error—Insurance, Life—Policy—Assignment—Evidence—Verdict.*—In this action upon a policy of life insurance the only question presented on appeal was whether there was error committed by the jury in rendering a verdict adverse to plaintiff on the issue of whether an assignment of the policy was procured through fraud. *Held*, excluding testimony of plaintiff of negotiations before the assignment was not erroneous, the assignment being in writing and in evidence, and it is further held in this case that the evidence was objectionable, it being of conversation between the plaintiff and her husband, and irrelevant, not bearing upon the issue of fraud. *Ibid.*

12. *Appeal and Error—Questions and Answers—Harmless Error.*—Certain questions asked a witness in this case, involving an issue of fraud in securing an assignment of a life insurance policy, taken together, are held competent, though the first may be objectionable, but this and the second question being preliminary to the third, which was competent and involved them, it is not held as reversible error. *Ibid.*

13. *Appeal and Error—Findings — Contracts — Railroads — Judgments — Evidence.*—In this action to recover of a railroad company upon a contract to construct defendant's road, by agreement the trial judge found the facts, and, as to an item claimed for "overhaul," that the contract was ambiguous, and disallowed the plaintiff's claim upon evidence tending to show that both the plaintiff and defendant by their acts and conduct between themselves and the subcontractors assumed that no such charges were contemplated, and the evidence is held sufficient to sustain the judgment in defendant's favor. *Henefick v. R. R.*, 139.

14. *Same—Excavations.*—In this action to recover upon contract for constructing defendant railroad company's road, the question was presented as a matter of fact, to be found by the judge under the agreement of the parties, whether the measurements could be made

APPEAL AND ERROR—*Continued.*

by measuring the fills or excavations, and the court's finding that from the character of the soil they could be made from the fills was sustained by the evidence. *Ibid.*

15. *Same—Extras.*—Plaintiff offered to construct defendant's railroad at a certain price per cubic foot on a 1 per cent grade, if allowed to manipulate, which was rejected, and the contract sued on was made on a greater maximum grade as per profile furnished by defendant at a less price per cubic foot, with the right of defendant to manipulate the grade, and the grade was afterwards made to conform to the 1 per cent grade. The court found that the defendant was entitled to charge for extra work. *Held*, the evidence afforded by the profile map, and that defendant's engineer told plaintiff to await the completion of the work to ascertain the extras, letters, etc., were sufficient to sustain the judge's finding and the judgment in plaintiff's favor. *Ibid.*

16. *Appeal and Error—Questions Reviewable — Nonsuit — Evidence.* — On appeal from a nonsuit the evidence must be taken as true. *Clark v. Whitehurst*, 1.

17. *Appeal and Error—Questions Reviewable—Questions Not Raised in Trial Court.*—It is too late on appeal to raise a question by exception to the charge, entered after trial, which if made at the time could have been cured by proof, which was not offered owing to an admission of appellant. An exception to a charge, that the court erred in charging that twenty years adverse possession was sufficient, raised for the first time on appeal, is equivalent to an exception after trial that the judge did not charge that the evidence was not sufficient to go to the jury, and cannot be entertained. *Stallings v. Hurdle*, 4.

18. *Appeal and Error—Timber—Interlocutory Orders—Final Judgment.*—An interlocutory order is provisional or preliminary only, and not determinative of the issues joined in the suit; and where it appears in a suit to restrain the cutting of certain timber and to subject it to sale for the satisfaction of plaintiff's judgments, that the determinative issues have been answered by the jury in plaintiff's favor, a decree accordingly entered, and a commissioner appointed to sell the timber and give effect to the decree, the judgment is not interlocutory; and when an appeal therefrom has been lost, the matter will not be afterwards reviewed on an appeal from an order confirming the sale. *Johnson v. Robinson*, 194.

19. *Appeal and Error—Broadside Exceptions—Refusal.*—An exception to the order of the court for that his Honor overruled the appellant's several exceptions to the report of the referee is too general, and will not be considered on appeal. *Ibid.*

20. *Appeal and Error — Premature Appeal — Supreme Court — Merits.* — Upon the record in this cause, *quære* as to whether the plaintiff had taken a voluntary nonsuit and had the right to appeal; but the Court passed upon the merits of the questions raised, to save trouble and expense to the parties. *Robinson v. Daughtry*, 200.

21. *Appeal and Error—Both Sides Appeal—Decision.*—Where both parties to an action appeal to the Supreme Court, and the decision in one makes the other unnecessary, the latter will be dismissed. *Power Co. v. Power Co.*, 248.

APPEAL AND ERROR—*Continued.*

22. *Appeal and Error—Railroads—Rights of Way—Easements—Reverter.*—The question of whether the plaintiff railroad company had abandoned its right of way over the defendant's lands, so that, under the terms of its deed, it had reverted to the grantor thereof, cannot be raised for the first time in the Supreme Court on appeal; and in this case only by requested instruction that there was no sufficient evidence of abandonment, the burden of proof being on the defendant. *R. R. v. McGuire*, 277.

23. *Appeal and Error—Railroads—Rights of Way—Easements—Abandonment—Deeds and Conveyances—Grantor's Intent.*—In an action by a railroad company to restrain the defendant from hindering and molesting the plaintiff's servants in discharging its duty in the prosecution of its business as a common carrier, where the rights of the parties are made to depend upon whether the plaintiff had abandoned its right of way under the provisions of its deed thereto, it is reversible error for the trial judge to make the decision upon the issue of abandonment depend upon the intention and conduct of the plaintiff's grantor. *Ibid.*

24. *Appeal and Error—Objections and Exceptions.*—In an action to recover damages from a railroad company alleged to have been caused by the wrongful failure of the defendant to accept them for shipment, objection to the testimony of the plaintiff as to the price for which he sold them will not be sustained when it appears he had already given this testimony without objection. *Bane v. R. R.*, 328.

25. *Appeal and Error—Assignments of Error — Brief.* — A question not presented by exceptions or assignments of error, but only discussed in appellant's brief, will not be considered on appeal. *Allen v. R. R.*, 339.

26. *Appeal and Error—Superior Courts — Judgments — Second Appeal — Review—Deeds and Conveyances—Reservations.*—Where the question presented on appeal is whether the judgment entered in the Superior Court is in accordance with the former decision on appeal in the same cause of action, the former decision of the Supreme Court will not be reviewed; and on this appeal the judgment of the Superior Court is affirmed, except as to paragraph 6 thereof, which is modified in accordance with the syllabus next preceding this. *Guilford v. Porter*, 356.

27. *Appeal and Error—Costs—Defense Bond—Ejectment—Statutes.*—The defense bond and the sureties thereon, in an action of ejectment, Revisal, sec. 453, are liable to the amount of the bond for the costs in the Supreme Court on appeal as well as those incurred in the Superior Court. *Grimes v. Andrews*, 367.

28. *Appeal and Error—Admissions of Record.*—An admission entered of record in a case on appeal, as having been made on the trial in the Superior Court, that the plaintiff could not recover the lands in dispute if certain deeds in his chain of title were excluded from the evidence, is recognized in the Supreme Court, and binding upon the party making it. *Shingle Mills v. Lumber Co.*, 410.

29. *Appeal and Error—Elections—Reference — Findings — Review — Stock Law—Constitutional Law.*—Where under legislative authority the question of "stock law" or "no stock law" has been submitted to the voters of a county, with a provision authorizing a levy of taxes

APPEAL AND ERROR—*Continued.*

to build and maintain a county fence in the event that, as a result of the election, a free-range territory, etc., were established; and upon the question of whether a majority had voted against the "stock law" (Constitution, Art. VII, sec. 8), it appears by the report of the referee, confirmed by the judge, that the registration books, as revised, showed the requisite majority, it is *Held*, that the Supreme Court may disregard its jurisdiction, if any, to review the findings, especially when it is apparent that the same conclusions will be reached. *Faison v. Comrs.*, 411.

30. *Appeal and Error—Supreme Court—Parties—Motion to Dismiss.*—Where one of several makers of a note has paid it and caused it to be assigned to a trustee, *semble*, the actions to recover from his co-makers are several; but where he sues them all in the same action the remedy is by *demurrer* for misjoinder of parties, and cannot be taken advantage of in the Supreme Court upon motion to dismiss the action, upon the ground that the Superior Court had no jurisdiction because the action arose by contract, and the recovery sought against each defendant, taken separately, was less than $200. *Petree v. Savage*, 437.

31. *Appeal and Error—Evidence — Depositions — Objections and Exceptions—Harmless Error.*—Where a deposition is objected to as immaterial and irrelevant, and not that it was irregularly taken, its admission as evidence is harmless error at most, and not prejudicial to the complaining party. *Ibid.*

32. *Appeal and Error—Theory of Case—Deeds and Conveyances—Frauds.* A case on appeal in the Supreme Court is determined upon the theory on which it was tried in the Superior Court, and where therein a deed was sought to be reformed for fraud, and damages recovered on a breach of covenant and warranty of title in its corrected form, it may not be determined on the question as to whether there had been such breach in the conveyance as actually drawn. *Coble v. Barringer*, 445.

33. *Appeal and Error—Trials—Requested Instructions—Issues.*—It is not erroneous for the trial judge to refuse special requests for instruction not addressed to the issues. *Wooten v. Holleman*, 461.

34. *Appeal and Error — Service of Case — One Exception — Motion to Dismiss.*—Service of appellant's case on appeal is unnecessary when there is only one exception taken and the judgment itself is excepted to; and a motion in the Supreme Court to dismiss for the lack thereof will be denied. *Comrs. v. Scales*, 523.

35. *Appeal and Error—Judgments—Judicial Sales—Tax Liens—Courts—Innocent Purchaser.*—Where a sale of land has been made and a deed executed to the purchaser, at the suit of the county to enforce its lien for taxes thereon, and the deed and the sale subsequently set aside, on motion of the owner of the lands, it is error for the court, at a still subsequent term, to reinstate the deed and declare it valid on the ground that the purchaser was an innocent one for value, the proper procedure in such matters being an appeal to the Supreme Court from the order invalidating the deed. *Ibid.*

36. *Appeal and Error — Tenants in Common — Partition — Betterments — Objections and Exceptions.*—Where proceedings to partition lands are

referred, and it appears in the referee's report that the lands are capable of actual partition, and that the appellee has put valuable improvements thereon; and upon the report judgment has been entered appointing commissioners to divide the land in such manner and proportion as to allow the appellee for betterments (in developing a water power) he has placed thereon, and no appeal was taken from this order, but the appellant insisted upon it: *Held*, the order of the court concluded the right of the appellant to have the question of the good faith of the appellee in putting the improvements on the land inquired into, upon appeal from the confirmation of the report of the commissioners. *Fisher v. Toxaway Co.*, 547.

37. *Appeal and Error — Tenants in Common — Partition — Betterments — Commissioners' Report — Approval.*—The findings of commissioners appointed to partition lands among tenants in common, allowing betterments to one of them, and approved by the trial judge under the circumstances of this case, are not reviewable on appeal. *Ibid.*

38. *Appeal and Error—Objections and Exceptions.*—The appellant is confined in his oral argument in the Supreme Court to the exceptions appearing of record. *Ibid.*

39. *Appeal and Error — In Forma Pauperis — Briefs — Rules of Court.*—Upon appeal to the Supreme Court *in forma pauperis*, the appellant is required to file six typewritten copies of his brief upon penalty of having his case dismissed, and printed briefs must be filed by the appellee for him to be heard on the oral argument. *Ibid.*

40. *Appeal and Error—Agreement—Facts Found by the Court—Evidence.*—The facts found by the court, by agreement of the parties, and supported by the evidence, are conclusive on appeal. *Adickes v. Drewry*, 666.

41. *Appeal and Error—Order at Chambers—Objections and Exceptions.*—An appeal from the order of a judge rendered in a pending action at chambers, and the sole ground of the appeal, does not require the service of a case on appeal by the appellant, and a motion to dismiss in the Supreme Court for that reason will be denied. *Bessemer v. Hardware Co.*, 728.

42. *Same—"Skeleton Case"—Order to Copy Record—Case Complete.*—Where an appeal is taken from an order made in a pending action by the judge at chambers, he has the right to direct the clerk what to copy from his record in the transcript on appeal; and when this has been done, and the record appears to be in full, the appellant's case will not be dismissed on the ground that a "skeleton case" on appeal has been served. *Ibid.*

43. *Appeal and Error—New Trial—Offer of Appellee.*—Upon application in the Supreme Court for a *certiorari*, wherein it appears that the appellant has perfected his case, except that for illness of the trial judge the case has not been settled, and that a new trial, at most, could be obtained; and in view of the uncertainty when the trial judge will be able to settle the case, and to avoid delay, the appellee has served on the appellant an offer that a new trial shall be granted, the Supreme Court will grant his motion, made therein to that effect. *Turner v. Gas Co.*, 750.

APPEAL AND ERROR—*Continued.*

44. *Same—Costs.*—Where the Supreme Court grants appellee's motion made upon his offer for a new trial, the overruling of appellant's motion to nonsuit involves only the costs of appeal, which will be taxed in the discretion of the Court, the costs of the trial in the Superior Court being taxed against the party ultimately losing therein. *Ibid.*

45. *Appeal and Error—Affirmation of Judgment—Lower Courts—Reasons Given.*—The Supreme Court will affirm a judgment appealed from if supported by facts and in accordance with law, although the reasons assigned in its support may not be approved. *King v. McRackan*, 752.

46. *Appeal and Error—Objections and Exceptions—Assignments of Error.*—Matters discussed in briefs filed in the Supreme Court, without exception noted of record or assignment of error, will not be considered. *Needham v. R. R.*, 765.

47. *Appeal and Error—Variance—Exception.*—A variance between the pleadings and the proof will be disregarded, where no exception was taken thereto at the trial. *Patton v. Lumber Co.*, 837.

APPEARANCE. See Courts, 1, 8.

APPEARANCE BOND. See Requisition, 1.

ASSESSMENT. See Taxation, 3.

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ASSIGNMENT. See Appeal and Error, 10, 11; Contracts, 1; Evidence, 2.

ASSIGNMENTS OF ERROR. See Appeal and Error, 9, 25, 46.

ASSUMPTION OF RISKS. See Master and Servant, 5; Contracts, 17; Carriers of Passengers, 14, 15.

ATTORNEY AND CLIENT. See Costs, 1; Judgments, 16.

ATTORNEYS.

1. *Attorneys — Disbursement — Statutes — Courts.*—Chapter 216, Laws 1871, now Revisal, sec. 211, providing that one duly licensed to practice law as an attorney shall not be disbarred or deprived of his license, permanently or temporarily, unless he shall have been convicted or in open court confessed himself guilty of some criminal offense, etc., takes from the court the common-law power to purge the bar of unfit members except in the specified cases, and in those particular instances wherein the court may exercise its inherent powers in the practical and immediate administration of the law. *S. v. Johnson*, 799.

2. *Attorneys—Disbarment — Statutes — Courts — Intoxicating Liquors.*—Construing together chapter 216, Laws 1871, now Revisal, sec. 211, and chapter 941, Laws 1907, it is held that they are consistent and reconcilable with each other, and that the later act makes it imperative that an attorney convicted of felony be disbarred, and those convicted of the less offense under the former statute may be disbarred if it is found as a fact that the criminal offense, in this

ATTORNEYS—*Continued.*

case the unlawful selling of intoxicating liquors, is of such character as to render them unfit to practice law. *Ibid.*

AUTOMOBILES. See Partnership, 4; Pleadings, 6; Negligence, 5, 8.

1. *Automobiles—Carriers of Passengers—Negligence—Rule of Prudent Man.*—Those furnishing automobiles for hire and themselves or others as chauffeurs are held to that degree of care in hauling passengers required of a common carrier, or that which is commensurate with the risks incident to the occupation, according to the rule of the prudent man. *Cates v. Hall*, 360.
2. *Same—Gratuitous Service.*—Those who engage in the occupation of transporting passengers by automobile for hire are not relieved of the duty that their chauffeur shall exercise the full care required of common carriers of passengers, because of the fact that at the time complained of the passenger who received an injury caused by the negligence of their chauffeur was being carried gratuitously, for their liability is the same as if compensation had been paid them. *Ibid.*
3. *Same—Appeal and Error.*—Where one partner, in the business of transporting passengers by automobile for hire, gives, gratuitously, the use of an automobile to the city for a special occasion, and a representative of the city is injured by the negligent driving of the automobile by the other partner while riding therein, it is reversible error for the trial judge, in the suit by the injured party for damages, to make the defendant's liability depend upon an issue as to whether the plaintiff procured the use of the automobile for a valuable consideration. *Ibid.*

BAGGAGE. See Carriers of Passengers, 8, 9.

BAILMENT. See Carriers of Passengers, 9; Issues, 6.

BALLOTS. See Elections, 1, 2, 5, 10; Counties, 4.

BANKRUPTCY. See Corporations, 18; Deeds and Conveyances, 49.

BENEFICIARIES. See Insurance, 5, 7.

BENEFITS. See Trusts, 3.

BETTERMENTS. See Appeal and Error, 36, 37.

BIGAMY. See Insurance, 6.

BILLS OF LADING. See Carriers of Goods, 1.

BILLS AND NOTES. See Instructions, 3, 4; Corporations, 10.

Bills and Notes—Payment—Possession—Right of Action.—The maker of a note who has paid it becomes the owner thereof and is entitled to its possession, as between the immediate parties, and may maintain his action therefor. *Walter v. Earnhardt*, 731.

BLASTING. See Negligence, 9.

BLOODHOUNDS. See Evidence, 21.

"BODILY ISSUE." See Wills, 14.

BONA FIDES. See Corporations, 15.

BOND ISSUES. See Municipal Corporations, 8; Statutes, 5.

BONDS. See Municipal Corporations, 5, 7.

BOUNDARIES. See Deeds and Conveyances, 38.

1. *Boundaries—Evidence—Calls of Older Grants and Deeds.*—Calls of older grants and deeds are admissible in evidence on the issue of boundary, on the same principle that hearsay evidence of common reputation on the issue of private boundary is admissible; but deeds not on their face calling for lines or corners common to them and deeds under which plaintiff in a suit involving boundary claimed are properly excluded. *Lumber Co. v. Hinton*, 27.

2. *Boundaries—Evidence—Admissibility.*—Where in a suit involving a boundary the single issue was as to which of two named lines was the boundary line of plaintiff's land, deeds offered by defendant tending only to show a different line from either were properly excluded. *Ibid.*

BREACH. See Vendor and Purchaser, 4; Contracts, 9.

BRIEF. See Appeal and Error, 25, 39.

BURDEN OF PROOF. See Vendor and Purchaser, 2; Contracts, 1; Telegraphs, 1, 5; Highways, 1; Adverse Possession, 2, 3; Carriers of Passengers, 10; Elections, 7; Water and Water-Courses, 2; Deeds and Conveyances, 37; Vendor and Seller, 1; Criminal Law, 3.

CALLS. See Boundaries, 1.

CANCELLATION. See Claim and Delivery, 2.

CANVASS. See Elections, 6.

CARE OF PASSENGERS. See Railroads, 13.

CARMACK AMENDMENT. See Carriers of Goods, 9.

CARRIERS. See Carriers of Passengers, 1, 2, 3, 4, 5, 6, 7.

CARRIERS OF GOODS. See Commerce, 1; Limitation of Actions, 3; Evidence, 8.

1. *Carriers of Goods—Bills of Lading—Delivery Upon "Order, Notify"—Evidence—Nonsuit—Trials.*—In an action against a railroad company to recover damages for its alleged wrongful failure to deliver a shipment of goods when it appeared from the bill of lading that the goods were to be delivered only upon the order of a certain bank, it is the duty of the plaintiff, having paid the draft to which the bill of lading was attached, to have the latter properly indorsed, or obtain the proper order for the delivery of the goods, and when he has failed to do so a judgment as of nonsuit upon the evidence should be allowed. *Killingsworth v. R. R.*, 47.

2. *Carriers of Goods—Live Stock—Damages—Weather Conditions—Improper Cars—Instructions.*—In an action to recover damages against a railroad company for its negligence in transporting a car-load shipment of live stock, when there is conflicting evidence as to

CARRIERS OF GOODS—*Continued.*

whether the damages were caused by an improper car or by the condition of the weather, an instruction not as full or explicit as it might have been, but which gave the defendant the benefit of any finding that the injury to the animals was not due to its negligence, but solely to the condition of the weather, is not reversible error on defendant's appeal. *Horse Exchange v. R. R.*, 65.

3. *Carriers of Goods—Negligence—Live Stock—Improper Cars—Shipper's Inspection.*—A railroad company is not relieved of its liability for damages arising to a car-load shipment of live stock, caused by the selection of an improper car, because of the fact that the shipper had examined the car and accepted it as suitable and sufficient. *Ibid.*

4. *Carriers of Goods—Live Stock—Negligence—Evidence.*—Where the evidence tends to show that a railroad company had received a car-load shipment of live stock in good condition, and delivered it at destination with the animals in bad condition, the jury may reasonably and fairly infer that the damages were caused by the defendant's negligence. *Ibid.*

5. *Carriers of Goods—Live Stock—Damages—Injury—Written Notice—Waiver.*—The stipulation in a bill of lading issued by the railroad company for the interstate transportation of live stock, requiring that written notice of any claim for damages be given the company before removal of the stock at place of destination, is waived by the actual knowledge of the carrier's agent of the condition of the stock before the removal took place, or such knowledge will be considered as in substitution of the written notice. *Ibid.*

6. *Carriers of Goods—Bills of Lading—Inspection—Rejection of Shipment—Damages.*—Where a bill of lading for a car-load shipment of hay contains a clause prohibiting its inspection unless provided for by law or permission is indorsed on the bill of lading, and there is evidence that the consignee inspected the hay and rejected it for inferiority to that purchased, without evidence that the carrier knew of or permitted the inspection: *Held*, a verdict denying recovery against the carrier will not be disturbed on appeal. In this case *semble*, a circular-letter from the consignor authorizing inspection was sufficient to permit the consignees to do so, and relieve the carrier from liability. *Lumber Co. v. R. R.*, 182.

7. *Carriers of Goods—Title of Goods—Conditions—Constructive Title—Consignor.*—Where a shipment of a car of goods is upon condition that the consignee pay cash for them or wire payment of a draft for the purchase price, which has not been done, the title does not vest in the consignee, and the delivery to the carrier is not a constructive delivery to him. Hence, where the carrier under such circumstances agrees with the consignor in writing, upon the original bill of lading, to change the designation of the shipment and the consignee, and the goods are not delivered accordingly, the consignor may maintain his action against the carrier for damages for their loss. *Myers v. R. R.*, 190.

8. *Same — Reconsignment — Contract — Consignee's Consent.*—Where the nonperformance by a consignee of certain conditions prevents the title to a shipment of goods by a common carrier vesting in him, the consent of the consignee to a reconsignment is not necessary for the consignor

CARRIERS OF GOODS—*Continued.*

to maintain an action against the carrier for the loss of the goods under the second contract of carriage. *Ibid.*

9. *Carriers of Goods — Connecting Lines — Initial Carrier — Carmack Amendment.*—Where a carrier issuing the bill of lading for a shipment of goods over its own and other independent roads agrees in writing before delivery, upon the original bill of lading, to a reconsignment of the goods, it is the initial carrier within the meaning of the Carmack Amendment. *Ibid.*

10. *Carriers of Goods—Express—Refusing to Receive—Shipment—Special Trains—Penalty Statutes—Statutes.*—An express company is not liable for damages, and the statutory penalties of Revisal, secs. 2631 and 2632, for refusing to receive a shipment of thirty crates of strawberries for a certain train not carrying accommodations for shipments of this character, though it had taken, on occasion, a few berries thereon for the plaintiff, when it so advertised, the shipper knew of it, and accommodations on other daily trains were specially provided. *Shaw v. Express Co.*, 216.

11. *Carriers of Goods—Express—Refusing to Receive—Shipment—Tender in Time—Trials—Questions of Law.*—The plaintiff tendered to the defendant thirty crates of strawberries at a small station requiring only one agent to attend to the various duties of express, telegraph, and railroad agent, when the train for which the shipment was intended was seen approaching the depot, and about seven or eight minutes before its arrival there. A charge of the court that it was for the jury to determine whether, under the circumstances, the tender of the shipment for that train was in time was not open to plaintiff's objection. *Semble*, the time was insufficient as a matter of law. Revisal, sec. 2632. *Ibid.*

12. *Carriers of Goods—Penalty Statutes—Tender of Shipment.*—In order for the daily penalty to attach to the carrier for continually refusing to accept freight for shipment under the provisions of Revisal, sec. 2631, it is necessary for actual or constructive tender thereof to be made to the carrier each day; and where cattle are the subject of shipment, evidence that the shipment had been refused and that the shipper kept the cattle near the depot and told the defendant's agent thereof, and that he would deliver them when notified that the company would receive them, is insufficient except as to the first penalty, notwithstanding the shipper would have delivered them for shipment upon being so notified. *Garrison v. R. R.*, 150 N. C., 587, where the shipment was loaded on car and the carrier refused to issue bill of lading, cited and distinguished. *Bane v. R. R.*, 328.

CARRIERS OF PASSENGERS. See Automobiles, 1; Pleadings, 6.

1. *Carriers—Carriage of Passengers—Contract of Carriage—Performance.*—Where a railroad sold transportation between two points, it being necessary for the passenger to change, for the performance of the road's contract, it was necessary that the conductor, after taking up the passenger's ticket, should return it to him before reaching the changing point, or give him something in place thereof that the new conductor would accept for passage to destination. *Sawyer v. R. R.*, 13.

CARRIERS OF PASSENGERS—*Continued.*

2. *Carriers—Carriage of Passengers—Action for Ejection—Contributory Negligence.*—Where passenger bought a ticket to a point to reach which it was necessary to change, if the company, in the passenger's action for ejection from the train because he had no ticket acceptable on the train to which he changed, claimed that the passenger was guilty of contributory negligence in not having demanded the return of his ticket from the conductor on the first train, such charge should have been pleaded as contributory negligence, and issue tendered. *Ibid.*

3. *Carriers—Carriage of Passengers—Ejection—Negligence of Conductor.*—Where plaintiff purchased through transportation to a destination to reach which it was necessary to change, and the conductor on the first train neglected to return his ticket, he having no money, and, when the conductor of the second train asked for his fare, vainly attempted to borrow from men who had been on the first train with him, it was negligence on the conductor's part not to have satisfied himself by inquiring of such men whether plaintiff had been on the train with them before reaching the changing point, before ejecting plaintiff. *Ibid.*

4. *Carriers—Carriage of Passengers—Wrongful Ejection—Payment of Fare—Duty of Passenger.*—Under Revisal 1905, sec. 2611, providing that every railroad corporation shall transport passengers on due payment of the fare legally authorized for the trip, where a passenger is about to be wrongfully ejected from a train, having paid his fare thereon, but being unable to produce his ticket, it is not incumbent on him, by paying money which the conductor has no right to exact, to avoid ejection from the train, as he is not required to buy again his right to remain on the train to his destination. *Ibid.*

5. *Carriers—Carriage of Passengers—Refusal of Double Fare—Right of Parties.*—Where a railroad passenger cannot produce a ticket on the conductor's demand, the road and the passenger can each stand upon their rights. The road can eject the passenger, subject to liability if he has paid a fare and lost the ticket; the passenger to suffer ejection, subject to his right to recover if it was wrongful. *Ibid.*

6. *Carriers—Carriage of Passengers—Wrongful Ejection—Right of Action—Statute.*—Under Revisal 1905, sec. 2611, providing that every railroad shall start and run their cars for the transportation of passengers, and shall take, transport, and discharge such passengers at, from, and to usual stopping places on due payment of the fare legally authorized, and shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises, plaintiff passenger, ejected from train of defendant road for failure to pay again fare which he had paid once upon purchasing ticket, had a right of action. *Ibid.*

7. *Carriers—Carriage of Passengers—Wrongful Ejection—Damages.*—Where a railroad wrongfully ejected a passenger at night in a desolate country, without money or friends, forcing him to walk 30 miles to his destination, he was entitled to recover for the humiliation and wrong done him by his ejection and the damage caused by his enforced walk without food. *Ibid.*

8. *Carriers of Passengers—Baggage—Negligence—Evidence—Questions for Jury.*—Where the complaint alleges that some clothes were stolen

CARRIERS OF PASSENGERS—*Continued.*

from a suitcase, the baggage of the plaintiff, a passenger on the defendant's train, through the latter's negligence, and the evidence tends to show that the baggage had previously been transported by another carrier, under its check, and remained in the union baggage room from 7 p.m. overnight, where several clerks and porters were employed, and then received by the defendant, and that it had been received by the former carrier with the clothes in it and from the latter carrier with the clothes missing, an issue as to defendant's negligence is raised for the jury to determine, and it is reversible error for the judge to assume in his charge that the articles were lost while in the defendant's possession. *Perry v. R. R.*, 158.

9. *Carriers of Passengers—Baggage—Gratuitous Bailment—Negligence.*—At common law and under our statute, Revisal, sec. 2618, the passenger's right to a limited amount of baggage as a part of the consideration for the price of his ticket is upon the condition that the baggage accompany the passenger on the same train; and where without any default on the part of the carrier, its agent, without further charge, has the baggage forwarded on a later train, the carrier's liability is not that of an insurer, but of a gratuitous bailee, under the rule of the prudent man, and attaches only in instances of gross negligence. *Ibid.*

10. *Same—Burden of Proof—Instructions—Trials—Evidence.*—Where the liability of a carrier is that of a gratuitous bailee, and it is shown that the carrier received the subject of the bailment in good condition and delivered it in bad condition, it raises a *prima facie* case of negligence sufficient to be submitted to the jury, but with the instruction that the carrier would be liable only if it failed to exercise the care of a person of ordinary prudence under the circumstances, and as such circumstances rest peculiarly within the carrier's knowledge, it is incumbent upon it to introduce evidence thereof. *Ibid.*

11. *Carriers of Passengers—Separate Accommodations—Race Division—Statutes—Commerce—Constitutional Law.*—Revisal, sec. 2619, requiring separate accommodations for the white and colored races, expressly excludes from its operation, among other things, officers or guards transporting prisoners and prisoners being transported; and where a white sheriff carrying as a prisoner a colored man on the train brings his action upon the sole ground that he was required to ride in the coach provided for colored people, the construction of the statute and its relation to the Federal laws, or those regarding interstate commerce, does not arise. *Huff v. R. R.*, 203.

12. *Same—Equal Accommodation—Rules and Regulations—Conductors—Sheriffs.*—Irrespective of statute, a common carrier of passengers may make and enforce reasonable regulations for governance and well ordering of its trains, and the power extends to a separation of the races on account of color, when equal accommodations are provided for all persons paying the same rate of fare; and upon occasion, the conductor of the train may reasonably act without such rules when the exigency of any particular instance requires it, having due regard for the rights of the passenger more directly concerned and also for the comfort and convenience of the other passengers. Hence, where the conductor of the train requires a white sheriff to go into the coach provided for colored people with

CARRIERS OF PASSENGERS—*Continued.*

a colored prisoner in his custody, traveling with him on the train, without any evidence that he did so in a harsh or abusive manner, or that the accommodations furnished were unequal to those of the other coach, damages sought by the sheriff in his action on that ground alone will be denied as a matter of law. *Ibid.*

13. *Carriers of Passengers—Freight Trains—Sudden Jerks—Negligence—Evidence—Trials.*—A passenger drinking water at the cooler in a coach in defendant railroad company's freight train, was thrown forward by a sudden jerk of the train, and to prevent himself from being projected upon the car's platform, threw out his hand, which came in contact with a tool box hanging perpendicularly at the side of the car door, breaking the glass in the box and inflicting the injury complained of by cutting his hand. There was evidence that the lower end of the box hung loose, but not that it had originally been placed horizontally. *Held*, that the accident was not one that the defendant could reasonably have foreseen or anticipated, and the evidence was insufficient upon the issue of defendant's actionable negligence. *Coon v. R. R.*, 759.

14. *Carriers of Passengers—Freight Trains—Assumption of Risks—Instructions.*—The charge upon the doctrine of assumption of risks of a passenger riding on a freight train was correct in this case. *Marable v. R. R.*, 142 N. C., 557. *Ibid.*

15. *Carriers of Passengers—Mixed Trains—Assumption of Risk.*—The rule of the risks assumed by a passenger on a mixed freight and passenger train, as laid down in *Marable v. R. R.*, 142 N. C., 563, is approved. *Needham v. R. R.*, 765.

CARS. See Carriers of Goods, 2, 3.

CASE. See Appeal and Error, 34.

CAUSES. See Actions, 1.

CERTIFICATES. See Deeds and Conveyances, 25; Corporations, 21.

CERTIFICATES OF STOCK. See Criminal Law, 4.

CERTIORARI. See Appeal and Error, 5.

CHALLENGES. See Jurors, 2, 3.

CHAMBERS. See Judgments, 19; Appeal and Error, 41; Receivers, 1.

CHARACTER. See Fornication and Adultery, 2.

CITIES AND TOWNS. See Injunction, 1; Municipal Corporations, 1, 2, 4, 8, 9, 10, 13, 16; Subrogation, 1.

CLAIM AND DELIVERY.

1. *Claim and Delivery—Mortgage—Mortgagee's Possession—Mortgage Notes.*—Claim and delivery cannot be maintained against a mortgagee in possession of personal property, the subject of the proceedings, when the mortgage was given to secure two or several notes, one of which the mortgagee still owns; and upon conflicting evidence of such ownership, the question is for the determination of the jury. As to whether the proceedings would lie where the mortgage secured

CLAIM AND DELIVERY—*Continued.*

but one note, the title to which had been transferred by indorsement to the plaintiff, *quære. Handle Co. v. Plumbing Co.*, 495.

2. *Claim and Delivery—Notes—Equity—Cancellation.*—A maker of a note who has paid it may sue in equity for its cancellation and delivery, and under our statute, Revisal, sec. 859, he may also maintain claim and delivery if he does not desire to enforce the equity of cancellation. *Walter v. Earnhardt*, 731.

CLERKS. See Deeds and Conveyances, 43.

CLOUD UPON TITLE. See Actions, 4.

CODE. See Parties, 3.

COLLATERAL ATTACK. See Judgments, 5, 20, 22, 23.

COLLATERAL CONTRACTS. See Telegraphs, 7.

COLLISIONS. See Negligence, 4.

COLLUSION. See Criminal Law, 9.

COLOR. See Deeds and Conveyances, 37, 38.

COMMERCE. See Carriers of Passengers, 11; Insurance, 12.

1. *Commerce — Interstate — Carriers of Goods — Live Stock — Limited Valuation—Measure of Damages—Statutes.*—Where a shipment of animals in interstate commerce was made before the enactment of the Cummins amendment (4 March, 1915) under a live-stock bill of lading which stipulates that in consideration of a less rate of freight the value of each animal shall not exceed $100, the valuation to be made at the point of shipment, the measure of damages for injury to the stock caused by the negligence of the defendant must be based upon a valuation not exceeding $100, and the jury should determine to what extent the animals were damaged or their value impaired, assuming $100 to be the limit of value as to each one of them, and assess the damages accordingly, the true value of the animals to be ascertained at the place of shipment, as required in the bill of lading. *Horse Exchange v. R. R.*, 65.

2. *Commerce—Railroads—Live Stock—Damages—Bills of Lading—Written Notice—Waiver.*—Our former decisions are approved, that the stipulations in live-stock bills of lading may be waived which require that written notice of claim for damages be given the carrier before removing the stock from its possession, applicable to interstate as well as intrastate commerce; and it is held that Ruling No. 456 of the Interstate Commerce Commission, as to the form of the written notice, has no application. *Schloss v. R. R.*, 350.

3. *Same—Discrimination—Constitutional Law.*—The principle announced in the decisions of our Supreme Court recognizing that knowledge by the carrier of the damaged condition of live stock under the ordinary bill of lading, before their removal, etc., may be regarded as a waiver of the written notice therein stipulated for, is not objectionable either as discriminatory or as affording additional opportunity for discrimination, contrary to the Federal Commerce Acts. *Ibid.*

COMMERCE—*Continued.*

4. *Instructions—Evidence—Trials—Appeal and Error.*—Proper prayers for instruction must relate to the evidence introduced at the trial, and it is not error for the trial judge to refuse to give them, though stating correct propositions of law, when they are not supported by the evidence. *Schloss v. R. R.*, 350.

COMMISSIONS. See Principal and Agent, 3, 5.

COMMON LAW. See Municipal Corporations, 13.

COMPROMISE. See Contracts, 7; Evidence, 14.

Compromise and Settlement—Evidence—Receipt.—Where a receipt is given by an injured employee to his employer, it is only *prima facie* evidence of a settlement, and may be shown to have been intended to apply only to compensation for lost time, and not to constitute an acquittance for the injuries. *Patton v. Lumber Co.*, 837.

CONDEMNATION. See Water and Water Courses, 1, 2; Costs, 1, 2.

CONDITIONAL SALES. See Mortgages, 3.

CONDITIONS. See Deeds and Conveyances, 54.

CONDUCTORS. See Carriers of Passengers, 12.

CONFIDENTIAL RELATIONS. See Deeds and Conveyances, 53.

CONFLICT OF LAWS.

Conflict of Laws—Issues—Negligence—Evidence—Trials—Questions for Jury.—While the issues in this action for damages against the railroad, alleging a personal injury received through defendant's negligence, are controlled by the laws of Virginia, the question of sufficient evidence of the negligence alleged is determined by the rules of evidence obtaining here, and though circumstantial, it is held sufficient to sustain the verdict in plaintiff's favor; *s. c.*, 168 N. C., 383. *Harrison v. R. R.*, 751.

CONNECTING LINES. See Carriers of Goods, 9.

CONSENT OF COUNSEL. See Courts, 10.

CONSIDERATION. See Deeds and Conveyances, 2, 15; Reformation of Instruments, 1; Statute of Frauds, 2.

CONSTITUTION, State.

ART.

VII, sec. 4. As to whether the Legislature can repeal Revisal, sec. 4115, as to valid expenses incurred thereunder, *quære. Mann v. Allen*, 219.

VII, sec. 7. A county stock-law fence is not a necessary expense. *Keith v. Lockhart*, 451.

VII, sec. 8. Upon the question of an election held on the stock law question, the Supreme Court disregards its jurisdiction to review, especially when it appears that no other result would be reached in a new trial. *Faison v. Commissioners*, 411.

CONSTITUTION, STATE—*Continued.*

ART.

VII, sec. 9. An act excluding levying a tax for stock-law fence on persons in parts of proposed territory is unconstitutional, and where the other parts of the act are valid, the unconstitutional part will be declared void. *Keith v. Lockhart*, 451.

VIII, sec. 1. As to whether the Legislature can repeal Revisal, sec. 4115, as to valid expenses incurred thereunder, *quære*. *Mann v. Allen*, 219.

VIII, sec. 1. A dissolution of a corporation by the court under provision of Revisal, sec. 1196, is a constitutional repeal of its charter. *Stagg v. Land Co.*, 583.

VIII, sec. 4. The requirements of an act that bond issue for necessaries be submitted to popular vote must be followed. *Burwell v. Lillington*, 94; *Bramham v. Durham*, 196.

IX, sec. 5. Where requisition is granted for a fugitive from another State, who then sues out *habeas corpus* and forfeits his bond, the amount goes to school fund. *In re Wiggins*, 372.

CONSTITUTIONAL LAW. See Municipal Corporations, 5, 8, 16; Carriers of Passengers, 11; Taxation, 2, 5, 7; Commerce, 3; Requisition, 1; Contracts, 5; Appeal and Error, 29; Stock Law, 1; Deeds and Conveyances, 43; Corporations, 19; Intoxicating Liquors, 8; Insurance, 12.

1. *Constitutional Law—Statutes—Invalid in Part—Taxation—Stock Law—Counties.*—Where under authority of the statute a county has voted to discontinue the stock law, and to maintain, by special taxation, a line fence between it and a county having the stock law, but with provision that the property in the reserved territory should not be taxed for the maintenance of the county fence, the courts may not decree the proviso invalid, and make effective the levy of the special tax, for such would impose the tax upon the property in the reserved locality, contrary to the intent of the statute; and to divide the county into two districts, stock-law and free-range territory, would impose a tax upon localities contrary to the intent of the statute; and the statute, so far as it provides for the special tax, will be declared unconstitutional. Constitution, Art. VII, sec. 9. *Keith v. Lockhart*, 451.

2. *Same—Several Parts—Vote of the People.*—Where a county, under legislative authority, has voted to repeal an existing stock law and establish a free-range territory, but upon condition that a fence be maintained between it and an adjoining county having a stock law, to be provided for by an unconstitutional special tax (Constitution, Art. VII, sec. 7), or from its public general funds, and it appears that the moneys in its treasury were for other special purposes, and that the general tax for county revenue had already been levied to the constitutional limit, it is *Held*, the valid portions of the law are distinct and severable from the invalid portions, and the vote to establish the free-range policy will be declared valid, and to be put into effect whenever by appropriate and valid legislation the means are provided for building the fence, requiring another vote of the people if they are to be raised by a special tax. *Ibid.*

CONSTRUCTION. See Railroads, 5.

CONTRACT TO CONVEY. See Partnership, 2.

CONTRACTS. See Vendor and Purchaser, 2, 4, 6, 7, 8, 9, 11, 13, 14, 17; Principal and Agent, 1, 4, 5, 8, 9; Appeal and Error, 13; Counties, 3; Parent and Child, 2; Carriers of Passengers, 1; Carriers of Goods, 8; Usury, 1; Judgments, 8; Subrogation, 1; Telegraphs, 6, 9; Insurance, 8; Mechanics' Liens, 1; Actions, 2; Deeds and Conveyances, 46; Partnership, 6; Negligence, 6; Fertilizers, 1.

1. *Contracts — Fraud — Burden of Proof — Insurance—Policies—Assignments.*—In an action involving the issue as to whether an assignment of a life insurance policy had been procured by fraud, the burden of proof is on the party alleging the fraud, when it is shown that the insured had signed the writing. *Carson v. Ins. Co.*, 135.

2. *Contracts — Extras — Railroads—Subcontractors—Releases—Actions.*—In this action upon contract for construction of a railroad it appears that the subcontractors executed releases for the protection of the railroad, the defendant, and the charges for extra work were to be taken from such amount, if any, as the defendant may be due plaintiff. *Held*, the defendants, having accepted the releases upon the conditions named, cannot maintain the position that the subcontractors should have been paid as a prerequisite to the plaintiff's action. *Henefick v. R. R.*, 139.

3. *Contracts—Subcontractors—Railroads—Extras—Evidence.*—It appeared that the president of defendant railroad company, in an action on contract to build its road, agreed with the plaintiff that, in addition to releases executed by the subcontractors of the plaintiff, the plaintiff should give a bond of $40,000 to protect the defendant from claims of subcontractors, provided for under a certain clause of the contract. *Held*, the conclusion of the trial judge, who by agreement found the facts, that the defendant was not entitled to deduct amounts due subcontractors, was sustained by the evidence, and the judgment is sustained on appeal. *Ibid.*

4. *Contracts—Indemnity—Contractor — Liens — Negligence—Torts—Nonsuit.*—An employee of a contractor to build a bridge for a railroad company sued the contractor, the railroad company, and the bonding company for the alleged negligence of the contractor and railroad company in causing a personal injury; and it appearing from the bond set out in the pleadings that it was solely to indemnify the railroad company against liens for labor and material, etc., used in the construction of the bridge, it is *Held*, that no liability could accrue to the railroad company arising out of the tort alleged, and that the motion of the bonding company to nonsuit should not only have been granted as to the plaintiff, but also as to the cross-bill filed by the railroad company, the codefendant. *Gadsden v. Crafts*, 288.

5. *Gaming Contracts—Cotton Futures—Statutes—Constitutional Law.*—Chapter 853, Laws 1909 (Gregory's Supplement, sec. 1689), declaring contracts in cotton futures void, and that no action may be maintained upon them in the courts of this State, is in furtherance of our declared public policy, and our statute is constitutional and valid. *Randolph v. Heath*, 383.

CONTRACTS—*Continued.*

6. *Contracts — Interpretation — Uphold Validity — Favor of Promisee— Advantage of Wronged Party.*—Where the language of a contract renders it of doubtful meaning it should be interpreted so as to uphold the writing, and in a manner most beneficial to the promisee and to prevent the promisor from taking advantage of his own wrong, when such matters are involved and may reasonably be considered as arising from the expressions used. *Torrey v. Cannon*, 519.

7. *Same—Compromise—Terms as to Validity.*—A writing executed in consideration of compromise of an action at law provided that the defendant should pay the plaintiff and her attorneys a certain sum of money each, and a stated sum monthly to the plaintiff for a period of five years, with further provision that should the defendant fail to perform any of the obligations required of him the agreement shall be void. The defendant paid the plaintiff and her attorney two of the monthly payments, and then failed to pay any further, and it is *Held*, that by correct interpretation the contract was contemplated to become void at the option of the plaintiff, the promisee, and was otherwise valid and enforcible by her. *Ibid.*

8. *Contracts—Deeds and Conveyances—Rescinded by Parties—Notes— Interest.*—Where it is established by the verdict of the jury that a deed to lands with mortgage thereon to secure the balance of the purchase price has been rescinded by the parties, the seller is not entitled to interest on the notes given for the deferred payments. *Barnett v. Smith*, 535.

9. *Contracts—Breach—Damages—Diminution — Evidence — Knowledge — Deeds and Conveyances.*—Where it is permitted a party, who has breached his contract, to prove that the other party thereto could have minimized the damages by acquiring like property similarly situated, it is necessary for such party to show that the other had knowledge of the conditions relied upon at the date of his breach. *Wilson v. Scarboro*, 605.

10. *Contracts—Options on Lands—Specific Performance.*—The purchaser of an option on land who in accordance with its terms tenders to the owner of the land the purchase price agreed upon, within the specified time, may maintain his action for specific performance of his contract, upon refusal of the owner to make the contemplated conveyance, and his demand will be enforced if his option is a legally valid one. *Cozad v. Johnson*, 636.

11. *Contracts—Insurance — Renewal Commissions — Accord and Satisfaction.*—The soliciting agent brings his action against the general agent of a life insurance company to recover upon a personal parol contract, 1 per cent renewal commission upon premiums of insurance written by him, for the life of the general agent (or the period of his connection with the company), in addition to what the latter was authorized to pay under his contract with the company. The court found the facts under an agreement between the parties, and his conclusions of law, based thereupon, as to certain modifications of several written contracts between the parties, and that the parol contract has been annulled by an accord and satisfaction, are sustained on appeal. *Adickes v. Drewry*, 666.

12. *Contracts—Written Letters — Statute of Frauds — Ambiguity — Parol Evidence.*—A soliciting agent sued the general agent of a life insur-

CONTRACTS—*Continued.*

ance company upon a parol contract wherein, it was alleged, the general agent had agreed to allow him an extra commission of 1 per cent upon renewal premiums, for the life of the general agent (or the period of his connection with the company). A letter written by the defendant to the plaintiff stating that he would allow 1 per cent commission, as stated in the contract, to continue as long as the policies remained in force and the writer continued with the company, and that he would not offer plaintiff further inducements than allowed him by his contract with the company, and it appears that the company did not permit him to pay the 1 per cent renewals claimed: *Held,* the letter is not such a writing as to exclude parol evidence of the alleged parol contract sued on, it being in no sense contractual in its terms, and, besides, too ambiguous to be complete in itself. *Ibid.*

13. *Contracts—Independent Contractor.*—Where a contractor for the erection of a five-story building enters into a contract with another to construct all the steel and iron work for the building, employing his own artisans and having entire charge of the steel and iron work to be constructed in accordance with the plans and specifications of the architect, the latter is an independent contractor and not an employee of the former. *Vogh v. Geer*, 671.

14. *Same—Contractor Furnishing Implements.*—The relation of independent contractor for the iron and steel work in a building is not affected by the fact that the subcontractor had agreed with the original contractors that the latter will allow him the use of a guy derrick and engine and plank necessary to be used in the erection of the iron and steel work, to be kept in good condition and returned accordingly, the repairs or replacements to be done at the cost and risk of the subcontractor, who assumed all responsibility in the operation and use of this equipment and plank. *Ibid.*

15. *Contracts — Independent Contractor — Negligence—Liability—Dangerous Work.*—The rule that work intrinsically dangerous may not be let out by independent contract so as to avoid responsibility for consequences does not ordinarily apply to the collateral negligence of the contractor; and where the steel and iron work of a building is to be done by an independent contractor, and an employee of the latter is injured by the breaking of a plank furnished for him to stand on while at work, caused by an imperfection or knot hole in the plank, neither the owner nor his contractor is held responsible for the sole negligence of the subcontractor, if established. *Ibid.*

16. *Contracts — Independent Contractor — Negligence—Dangerous Work—Implements—Inspection—Trials—Instructions.*—A contractor to erect a five-story building let out, by independent contract, the steel and iron work therein, and while an employee of the independent contractor was at work, standing on a defective plank furnished for the purpose, the plank broke and he fell and received the injury complained of, and brought his action against the original contractor for his consequent damages. There was evidence tending to show that these planks were furnished at the request of the independent contractor on the order of the contractor upon a reliable manufacturing plant; that they were of average grade and quality; that it was the duty of the independent contractor to have inspected them, and the privilege of the plaintiff to have done so under the rules of an asso-

CONTRACTS—*Continued.*

ciation of which he was a member, and that he helped to place the plank which caused his injury: *Held*, an instruction to the jury was reversible error which made the liability of the defendant contractor to depend solely upon his care in inspecting the plank, leaving out of consideration the duty of the independent contractor and the plaintiff to have done so. *Ibid.*

17. *Same—Fellow-Servant Act—Assumption of Risks.*—In this action to recover damages by an employee of an independent contractor, brought against the original contractor, the defendant's liability being dependent upon the question of whether the duty of inspecting certain defective plank had properly been observed by the independent contractor or the plaintiff, it is *Held*, the doctrine of the fellow-servant act and of assumption of risks does not arise. *Ibid.*

18. *Contracts, Written—Fraud in Procurement—Parol Evidence.*—Where a written contract is sought to be set aside upon parol testimony as to fraud in its procurement, the rule that the writing affords the best evidence of the contract has no application. *Novelty Co. v. Moore*, 703.

19. *Contracts — Breach — Independent Terms — Damages.*—Whether covenants or stipulations of a contract are dependent upon or independent of each other is to be determined by the intention of the parties as gathered from the instrument; and a breach by one party of a term thereof does not necessarily relieve the other party from performance; for the term thus violated, to have this effect, must be vital to the contract, making performance impracticable, as to the other parts of the contract, to accomplish the intended purpose; when it is otherwise, compensation may be demanded for the particular damage thereby caused. *Flour Mill v. Distributing Co.*, 708.

20. *Same — Disputed Items—Adjustment—Vendor and Purchaser.*—In an action to recover damages for a breach of contract for the sale of flour it appeared that the defendant purchased the flour, to be sent out upon his notification and to pay certain "carrying-over charges" if not ordered out by him in stated quantities at certain periods. A dispute arose between the parties as to the amount of certain "carrying-over charges" the defendant should pay, and afterwards plaintiff acceded to his demands and, in accordance with custom, authorized the defendant to deduct the amount from the amount of the next invoice, and gave him credit therefor on the balance then due by him. *Held*, the defendant was not justified in refusing to perform his part of the contract on the ground stated, and was liable for the consequent damages incurred by plaintiff. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See Carriers of Passengers, 2; Railroads, 6, 15.

CONVERSION. See Tenants in Common, 2, 3, 4, 45.

Conversion — Evidence—Mortgages—Registration—Notice.—In an action upon a note and for wrongful conversion of a cow, it appeared that H. bought the cow from the defendant, giving the note with the plaintiff as indorser and a mortgage to the plaintiff to secure him therein, the mortgage not having been registered. H. returned the cow to defendant upon condition that he pay the note and deliver it to him.

CONVERSION—*Continued.*

Held, upon redelivery of the cow, the defendant was a purchaser for value, unaffected with notice of the mortgage lien, and the action for conversion of the cow cannot be maintained against him. *Springs v. Cole*, 418.

CONVICTION. See Municipal Corporations, 14.

CORPORATIONS. See Counties, 3; Water and Water-courses, 1; Vendor and Purchaser, 10; Receivers, 1.

1. *Corporations — Subscriptions—Special Terms—Conditions Precedent—Liability of Subscriber—Stock.*—One who before the enactment of Laws of 1915 gives his subscription note to a corporation for shares to be issued, conditioned that the proposed corporation should do business according to a certain system, the Rochdale system in this case, subscribes thereto on special terms, sometimes called conditions subsequent, and where the corporation has been duly organized, the character of the subscription does not affect the subscriber's liability to take or pay for his shares, but gives him in certain instances a right of action against the corporation for damages upon its failure to perform the conditions. *Semble*, chapters 144 and 115, Laws 1915, do not change the application of this principle. *Coöperative Association v. Boyd*, 184.

2. *Same—Other Stockholders.*—In order for the conditions of a subscription upon special terms to the stock of a corporation to be enforcible, they must not be in contravention of public policy or the provisions of the general law or of the special charter, or in fraud of creditors or the just legal rights of the other stockholders. *Ibid.*

3. *Same—Equal Burdens.*—Where one has subscribed in special terms, or upon conditions subsequent contained in his subscription note, to the stock of a corporation prior to 1915, and it appears that this was unknown to the other subscribers to the stock, who regularly subscribed without such condition, and that the corporation had been organized and the business conducted for which it had been formed upon the plan specified in the note, but subsequently changed to meet business contingencies, and was operating at a loss, though at present its assets exceeded its liabilities: *Held*, such subscriber may not avoid paying for his stock on the ground that the condition of his subscription had not been complied with, as against the rights of the other subscribers who had paid in full, for such would enhance their burdens in violation of the equality of obligation which should prevail amongst those who embark in a common enterprise. *Semble*, chapters 144 and 115, Laws 1915, do not change the application of this principle. *Ibid.*

4. *Corporations — Subscribers — Release.*—Where a corporation has been formed and the obligation of a subscriber to its stock has become absolute, the refusal of its management to presently accept his tender of payment for the shares for which he has subscribed does not release him from his obligation to take and pay for them. *Ibid.*

5. *Corporations—Instructions—Prejudice—Expression of Opinion — Statutes.*—In this action to recover damages from a corporation for its alleged negligence, in inflicting a personal injury, the judge, in his charge, recited the benefits conferred by corporations upon the citi-

CORPORATIONS—*Continued.*

zens, without mentioning the benefits they receive in return, or stressing the duty of the corporations to avoid negligence which might cause death or injury, and intimated that he would not permit a verdict rendered upon "guesswork, conjecture, sympathy, pity, or prejudice," etc. *Held*, the charge was an expression of opinion by the judge upon the evidence forbidden by the statute, Revisal, sec. 535. *Starling v. Cotton Mills*, 222.

6. *Corporations, Quasi-public — Private Powers — Violation — Quo Warranto.*—Where a charter is granted a corporation, conferring *quasi*-public as well as private powers, the corporation may proceed to condemn lands when so empowered, in pursuance of its business of a *quasi*-public nature, and this will not be denied it because it was authorized to conduct a business of a private character; and where the corporation seeks to exercise its powers of a private nature conferred on it, in an unconstitutional or unwarranted manner, the State may restrain it by *quo warranto* or other proper proceedings. *Power Co. v. Power Co.*, 248.

7. *Corporations—Water-power—Charter Provisions—Compliance—Maps—Issues.*—The charter of the plaintiff, a *quasi*-public corporation for the development of water-powers, etc., provided, among other things, that the corporation was empowered to take possession of lands and prosecute the work when the location of the works shall have been determined and a survey of the same deposited in the office of the Superior Court, etc. *Held*, an issue should have been submitted to the determination of the jury, as to whether the survey had been filed and, if so, the time of its having been filed. *Ibid.*

8. *Corporations—Water-powers—Prior Acquisition—Corporate Use.*—The plaintiff and defendant, two *quasi*-public corporations for the development of water-powers, upon the pleadings and conflicting evidence, claim a priority of right in the *locus in quo*. *Held*, the prior right belongs to the company which first defines and marks its route and adopts the same by authoritative corporate action (*Street Ry. v. R. R.*, 142 N. C., 423); and under the circumstances of this case the question depended upon the facts as disclosed by the evidence, to be found by the jury under the instruction of the court as to their legal sufficiency. *Ibid.*

9. *Corporations—Directors—Borrowing Money—Mortgages.*—The authority of a board of directors to borrow money for the corporation's needs impliedly carries with it the power, without a vote of the stockholders, to secure the loan by mortgage on the corporate property, unless specially restrained by the charter or by-laws. *Semble*, this principle is impliedly recognized by statute, Revisal, sec. 1005. *Wall v. Rothrock*, 388.

10. *Same—Loans by Directors—Indorsers—Bills and Notes.*—The directors of a corporation, unless restricted by its charter or by-laws, may cause a valid mortgage on the corporate property to be executed to secure one or more of them, in lending money to or incurring a liability for the present needs of the corporation in pursuance of its authorized business. *Ibid.*

11. *Same—Fiduciaries—Insolvency—Preëxisting Debt.*—The directors of a corporation occupy a fiduciary relation, and are not permitted to se-

CORPORATIONS—*Continued.*

cure themselves against preëxisting liabilities of the corporation upon which they are already bound, or for money they may have already loaned, when the corporation is in declining circumstances and verging on insolvency. *Ibid.*

12. *Same—Issues.*—In an action by a trustee in bankruptcy of an insolvent corporation to set aside a certain mortgage made by the corporation to its directors to secure their indorsements on the corporation's paper, which the indorsers have paid, proper issues should be submitted to the jury determinative of the questions of whether the mortgage was given to secure the directors on a preëxisting debt or liability, and as to whether the corporation was in failing circumstances at the time of its registration. *Ibid.*

13. *Corporations—Directors—Loan by Directors—Mortgages—Registration—Fraud on Creditors—Issues.*—Where the directors of a corporation cause a mortgage on the corporate property to be given to secure the liability of some of its members for indorsing its paper used in the course of its authorized business, and it appears that the mortgage was not registered within eleven months after its execution, and there is evidence tending to show that the corporation was insolvent at the date of its registration, such indorsers are not permitted to withhold their mortgage from registration in order to give the corporation a fictitious credit to those dealing with it between the dates of its execution and registration; and this question is for the determination of the jury upon a proper issue arising from the evidence, and under correct instructions thereon. *Ibid.*

14. *Corporations—Dividends—Guaranty.*—An indorsement on a certificate of preferred stock in a corporation guaranteeing the payment of the stated dividend in whole or in part should be fairly and reasonably interpreted to effectuate the intention of the parties with regard to their objects and purposes as gathered from its language. *Stagg v. Sand Co.*, 583.

15. *Same—Interpretation—Bona Fides.*—A guaranty, written on shares of preferred stock in a corporation, that the indorser binds itself to pay any deficiency in the stated dividend, upon certain notice to it, will not be construed as a guaranty only of the fidelity of the officers of the corporation to pay the dividends from the company, if earned by it, or that they will be unlawfully paid, whether earned or not, but that the guarantor has obligated to pay the dividends or any part thereof to the extent that the company may have failed to earn, declare, and pay them. *Ibid.*

16. *Same—Corporate Existence.*—Where one has indorsed on a certificate of preferred stock in a corporation his obligation to pay the holder any deficiency of payment by the company of the stated dividends, arising from the failure of the corporation to pay, the intention of the parties, nothing else appearing, will be construed as contemplating the continued existence of the corporation as a going concern as the basis of their agreement of guarantee; and the holder may not recover the dividends which the corporation has failed to pay by reason of its having become insolvent and adjudged a bankrupt by the proper court. *Ibid.*

CORPORATIONS—*Continued.*

17. *Same—Corporate Suspension.*—A guaranty that a corporation will pay the preferred dividends on its stock will not be construed without value because of the interpretation that the guaranty will cease should the corporation thereafter become insolvent and its existence as a going concern be legally suspended or terminated. *Ibid.*

18. *Same—Bankruptcy.*—While the adjudication in bankruptcy is not necessarily the legal termination of a corporation, the effect of the adjudication is to suspend it, for the time being, at least, as a going concern; and where one has guaranteed the payment, in whole or in part, of such dividends as it may fail to pay, evidencing the intention that the guaranty was for such period as the company could lawfully pay them, no recovery therefor can be had during this period of suspension in an action brought since the adjudication and before the discharge of the corporation in bankruptcy. *Ibid.*

19. *Same—Statutes—Constitutional Law.*—Legislative charters are under our Constitution, Art. VIII, sec. 1, subject to legislative alteration or repeal; and by our statute, Revisal, sec. 1196, a dissolution under a judgment of a court, as therein prescribed, is valid, among other things, if the corporation become insolvent or suspends its ordinary business for the want of funds, or be in danger of insolvency, or has forfeited its charter rights. The retrospective provisions of Laws 1913, as to their validity, discussed by WALKER, J. *Ibid.*

20. *Corporations—Dividends—Corporation Guarantor—Life of Corporation.* The principle that preferred dividends guaranteed by indorsement on the certificates of stock in a corporation may be construed as upon condition that the corporation remains a going concern is not affected by the fact that the guarantor is a corporation and has agreed that it should be binding during its own life; for the period indicated is only the extreme duration of the guaranty, or that in which it may be enforced, if the condition contemplated continues that long. As to whether the guaranty in this case was *ultra vires*, or otherwise invalid, *quære*. *Ibid.*

21. *Corporations—Receiver's Certificates—Liens—Priorities*—Where a receiver is appointed for an insolvent corporation to continue it in operation as a going concern, and finds that this is necessary to produce the best results for the creditors, the receiver's certificate issued accordingly by order of the court takes priority over the corporation's prior mortgage or other indebtedness; but otherwise if it has been so issued by the receiver without order of court, or without the court's approval. *Armour v. Laundry Co.*, 680.

CORPUS DELICTI. See Homicide, 6.

CORRECTION. See Equity, 2, 3, 7, 8, 10, 12; Deeds and Conveyances, 39.

COSTS. See Appeal and Error, 27, 44.

1. *Costs—Attorney and Client—Attorney's Fees—Condemnation—Statutes—Appeal and Error.*—The losing party in an action may not be taxed with attorney's fees of the successful party (Revisal, sec. 2587) unless authorized by section 2592 of the Revisal, which applies when attorneys are appointed by the court to appear for and protect the right of any party in interest who is unknown or whose residence is not known and who has not appeared by attorney or agent. Hence, in pro-

COSTS—*Continued.*

ceedings for condemnation of land, brought by a city, it is reversible error for the court to allow, as a part of the costs, attorney's fees to the owner of the land, the successful party, who has appeared by an attorney retained by him. *Durham v. Davis*, 305.

2. *Costs—Condemnation — Superior Court — Trials—Appeal and Error—Statutes.*—On appeal by both parties in proceedings to condemn land, to the Superior Court in term, the trial is *de novo;* and where the defendant has substantially recovered damages for the taking of his land, the costs are taxable against the plaintiff, though the recovery is in a smaller sum than the amount theretofore awarded by the appraisers or viewers. Private Laws 1899, sec. 61, and Revisal, sec. 1905, applying to plaintiff's appeal from a justice of the peace, have no application. *Semble*, if the exercise of the judge's discretion was necessary, Revisal, sec. 1279, the result is the same in this case. *Ibid.*

COUNTERCLAIM. See Limitation of Actions, 3; Pleadings, 7.

COUNTIES. See Deeds and Conveyances, 24; Taxation, 5, 6; Stock Law, 1; Constitutional Law, 1; Municipal Corporations, 11.

1. *Counties—Process—Pleadings—Commencement of Actions—Statutes.*—While Revisal, sec. 1310, provides that a county must be sued in its own name, the corporate powers and authority of the county are exercised by its board of commissioners, Revisal, sec. 1309; and where in an action by the county physician to recover for services alleged to have been rendered the county the summons is issued to the board of commissioners of the county (Code, sec. 704), and the cause of action is unmistakably and plainly alleged against the county, and not personally against its individual commissioners, the cause of action will be taken as having commenced from the issuance of the summons. *Semble*, the wording in the summons as to the board of commissioners, preceding the name of the county, will be treated as surplusage. *Fountain v. Pitt*, 113.

2. *Same—Limitation of Actions.*—Where the summons against a county has been issued to the board of commissioners of the county, and the cause of action alleged is against the county, and the judge of the Superior Court has permitted an amendment, and process has been served upon the county by name (Revisal, sec. 1310), but after the time prescribed for bringing the action, the bar of the statute cannot be successfully pleaded if the summons to the commissioners of the named county has been served in time. *Ibid.*

3. *Counties—Corporations — Contracts — Services Requested — Quantum Meruit.*—In plaintiff's action to recover for services alleged to have been rendered the county, the defendant's liability, as in other actions against corporations, depends upon whether an express contract had been made by the parties, stating the compensation, in which event a recovery would depend upon its terms and the facts established; or whether such services had been requested, without stating compensation, in which event it would be upon a *quantum meruit* for their reasonable value, if rendered. *Ibid.*

4. *Counties—Stock Law—Elections—Taxation—Ballots.*—The building of a county-line fence around a free-range territory is not a necessary county expense, and for its building and maintenance a vote of the

COUNTIES—*Continued.*

people of the county is required, and, under the act, the consent of the people that the tax may be levied is sufficiently declared by a majority of ballots cast in favor of a "no stock" law. *Keith v. Lockhart, post,* 451. *Faison v. Comrs.,* 411.

COUNTY COMMISSIONERS. See Municipal Corporations, 12; Statutes, 10.

1. *County Commissioners — Discretionary Powers—Courts—Indictment—Jurisdiction—Duress.*—A request from the judge holding court in a county to the solicitor to draw an indictment against the county commissioners for failing in their duty to provide a proper courthouse and jail cannot alone be regarded as a coercion of the commissioners in regard to their discretionary powers, or duress to invalidate bonds afterwards to be issued by them in pursuance of their resolutions to build a new courthouse and jail upon the sites of the old ones; and such issue of bonds will not be restrained either on that ground or the want of jurisdiction of the judge making the request. *Jackson v. Comrs.,* 379.

2. *County Commissioners—Discretionary Powers—Necessary Expenses—Courthouses — Jails — Courts — Indictments—Defenses.*—It is within the sound discretion of the county commissioners to have the courthouse or jail of the county repaired or to erect new ones on the same sites as a necessary county expense, which will not be reviewed in the courts in the absence of *mala fides;* and should a bill of indictment be drawn by the solicitor, at the request of the judge holding the courts of the county, and a true bill be found by the grand jury thereon, it is open to the commissioners to set up any available defense they may have. *Ibid.*

3. *County Commissioners—Necessary Expenses—Courthouse—Jails—Special Taxes — Interest — Sinking Fund — Statutes.*—While the county commissioners have the authority to repair the county's jail and courthouse and to erect new ones, in its discretion, it is without authority to levy a special tax to provide for the payment of interest on the bonds issued for that purpose, or to create a sinking fund therefor, for this must be provided for by proper legislation, or paid out of the general revenues and income of the county. *Ibid.*

COURTHOUSES. See County Commissioners, 2, 3.

COURTS. See Municipal Corporations, 7; Pardon, 1; Intoxicating Liquors, 1; Deeds and Conveyances, 6; Pleadings, 2; Limitation of Actions, 2, 3; Injunctions, 3; Appeal and Error, 26, 35; County Commissioners, 1, 2; Partition, 1; Trusts, 2; Instructions, 9; Attorneys, 1, 2; Witnesses, 2; Intoxicating Liquors, 10; Criminal Law, 7; Insurance, 13.

1. *Court's Jurisdiction — Irregularities — Appearance — Waiver.*—Where tenants in common have their lands divided into lots and sold at public outcry through a realty company, whereat C. became a purchaser of several lots, paid 10 per cent of his bid to a third person, and afterwards the tenants filed proceedings for partition among themselves to perfect the title, in which C. was not made a party, but in which a commissioner was appointed by the clerk to execute title to the purchasers upon payment of the purchase price, and an order made confirming the sales theretofore made, all of which was afterwards confirmed, and on appeal from the clerk in term, C., upon

COURTS—*Continued.*

notice, was made a party, and filed answer denying title: *Held*, though the proceedings were not had in the due course and practice of the courts, the appearance of C. was a general one, waiving the irregularities, and thereby the Superior Court obtained jurisdiction and properly proceeded with the cause. Revisal, sec. 614. *Wooten v. Cunningham*, 123.

2. *Same—Trial—Questions of Law—Demurrer.*—Where the defendant in a civil action appears and pleads to the merits of the cause, or makes a defense which can only be sustained by the exercise of the court's jurisdiction upon the merits, his appearance is a general one, notwithstanding the view in which he may regard it; and where he has withdrawn his answer going to the merits of the cause, and enters a demurrer with the permission of the court, it cannot change the character of his appearance or make it a special one. The judgment in this case overruling the demurrer is sustained, with leave to plead over. *Ibid.*

3. *Courts—Instructions—Expression of Opinion—Corroboration.*—Under the definition of the verb, to corroborate signifies, (1) to make strong or to give additional strength to; to strengthen; (2) to make more certain; to confirm, etc. Therefore, when the testimony of one witness tends to corroborate another on the trial of a cause, it is reversible error for the judge to instruct the jury that it corroborated his evidence, for it is for the jury to say whether or not it had done so. *Lassiter v. R. R.*, 283.

4. *Courts—Justices of the Peace—Appeal—Recordari—Motions to Dismiss—Statutes.*—A motion to dismiss an appeal from a justice's court, made in the Superior Court several terms after the judgment has been entered, for failure to send up the transcript, should be granted under Revisal, sec. 608, notwithstanding due notice of appeal has been given, when the appellant has not paid the fees required or taken proper steps to perfect the appeal; and his motion for *recordari* should be denied. *Helsabeck v. Grubbs*, 337.

5. *Courts—Pleadings—Amendments—Parties.*—It is within the discretion of the trial judge to permit an amendment to the complaint, after service of summons, by adding other names of the defendant partnership, it appearing that the defendant had notice of the amendment. *Randolph v. Heath*, 383.

6. *Courts—Jurisdiction—Amount Demanded—Pleadings.*—Where an action upon a contract is brought in the Superior Court, and the demand is made in good faith and comes within the jurisdictional amount, a recovery of a less sum will not defeat the court's jurisdiction. Upon the evidence in this case, and from the verdict of the jury, it appears that the demand was made in accordance with the requirements. *Petree v. Savage*, 437.

7. *Courts, Discretion—Issues—Appeal and Error—Harmless Error.*—The discretion of the trial judge in settling and framing the issues is not reviewable on appeal, when the issues submitted present every phase of the controversy, and under them all material and relevant evidence could have been introduced by either party. *Ibid.*

8. *Courts—Jurisdiction—Special Appearance—Waiver.*—A defect of the jurisdiction of the court as to the person may be waived by his mo-

COURTS—*Continued.*

tion asking for relief upon the merits of the case, the practice being for the movant to specially appear and move to dismiss for the lack of the court's jurisdiction, and, if this is denied, except, and then plead to the merits or demur in the trial court. *Comrs. v. Scales*, 523.

9. *Same—Permission to Plead—Merits—Pleadings.*—Where a defendant against whom a judgment has been obtained moves the court to set it aside for want of service upon him, and further states in his motion that it is upon the ground "of irregularities and illegalities," and obtains leave to file an answer to the merits of the cause, he will be deemed to have waived objection to the alleged defect in the jurisdiction of the court. *Ibid.*

10. *Courts—Verdict—Recess of Court—Consent of Counsel—Findings of Court—Appeal and Error.*—The discretionary act of the trial judge in rendering judgment upon a verdict of the jury returned during recess of the court without the consent of counsel will not be reviewed on appeal when it appears from the finding of the court that the jury had not discussed the case before delivering it to the clerk, though several had done so thereafter with appellee's attorney; that the verdict was agreed to before the jurors separated, no improper influence had induced it, and the issues were not recorded until after the verdict was returned to the judge. *Zagier v. Express Co.*, 692.

11. *Court's Discretion—Prosecution Bond—Appeal and Error.*—Where the plaintiff has failed to file a prosecution bond in his action for land, in compliance with an order made at the preceding term of the court, it is within the sound discretion of the trial judge to permit him to file it, and in the absence of abuse of this discretion, his act in allowing it is not reviewable on appeal. *Gainey v. Godwin*, 754.

12. *Courts—Amendments—Summons—Jurisdiction — Venue — Appeal and Error.*—The original summons in this case was directed to the defendant "railroad" company, and it is held that no error was committed by the trial judge in allowing an amendment thereof to correctly issue to the defendant "railway" company, and serving it as an alias summons, and this action is not appealable. *Chancey v. R. R.*, 756.

COURT'S DISCRETION. See Issues, 1.

COVENANTS. See Deeds and Conveyances, 26, 57.

CREDITS. See Vendor and Purchaser, 13.

CRIMINAL ACTION. See Trials, 8.

CRIMINAL LAW. See Insurance, 11, 13.

1. *Criminal Law—Fires—Defenses—Instructions—Appeal and Error.*—Upon trial for the willful, etc., burning of a barn, etc., defended upon the sole ground that the defendant was elsewhere at the time, and presenting this as the only question, a charge of the court was not erroneous which instructed the jury to convict the defendant should they find he was guilty of burning the barn. *S. v. Millican*, 158 N. C., 617, cited and applied. *S. v. White*, 785.

CRIMINAL LAW—*Continued.*

2. *Criminal Law — Evidence — Defendant Not Testifying — Explanatory Evidence.*—Where the defendant is charged with violating our prohibition law, an instruction of the court is not erroneous which, in effect, tells the jury, specifically, that they should not consider the defendant's failure to testify, but if they found that the defendant could have explained the State's incriminating evidence by other witnesses, and failed to do so, they may consider such circumstances against him. *Goodwin v. Sapp,* 102 N. C., 482, cited and applied. *S. v. Turner,* 803.

3. *Criminal Law—False Pretense—Evidence—Burden of Proof.*—A criminal false pretense is the false representation of a subsisting fact, whether oral or written words, or conduct, which is calculated and intended to, and does in fact, deceive, and by means of which one person obtains value from another without compensation; and, to convict, the State must show beyond a reasonable doubt that the alleged representation was made; that by reason thereof property or something of value had been obtained; that the representation was false, made with intent to defraud, and that it actually deceived and defrauded the person to whom it was made. *S. v. Carlson,* 818.

4. *Same—Certificates of Stock.*—Evidence upon a trial for false pretense which tends to show that the defendant had secured an option on all the shares of stock in a corporation for $15,000, and solicited F. to purchase one-half thereof, upon the proposition that the two would own the whole concern unincumbered; that the stock could not be bought for less than $20,000, of which he would pay $10,000 cash for half, and F. $10,000 for the other half; that the interest of F. should be kept a secret; that the check for the $10,000 of F. was made to him, from which he paid $7,500 on the purchase price of the stock, and the remainder thereof, $7,500, was represented by a mortgage on the corporate property, all of which was unknown to F.; that the defendant had secured $50 in currency instead of a check from F. to bind the option, so that he might not be known in the transaction: *Held,* sufficient to sustain the charge, and defendant's subsequent conduct in New York, when confronted with the charge by the wife of F., was a circumstance in this case, to be considered by the jury upon the question of his guilt. *Ibid.*

5. *Criminal Law—False Pretense—Indictment — Probata — Pleadings — Evidence.*—The evidence in this case upon the charge of false pretense being considered, it is *Held,* that the objection that the *allegata* and *probata* did not correspond cannot be sustained. *Ibid.*

6. *Criminal Law—Indictment—Judgment—Motion in Arrest.*—An indictment charging false pretense must be certain to a general intent, stating all the facts and circumstances which constitute the offense with such certainty and precision that the defendant may see whether they constitute an indictable offense, so that he may be informed of the charge, and be protected from another prosecution for the same offense. And it is *Further held,* that a motion in arrest of judgment was properly denied, and that the evidence was sufficient to sustain the conviction. *Ibid.*

7. *Criminal Law — Affray — Deadly Weapon — Courts — Jurisdiction.*— Where one of the parties to an affray has used a deadly weapon, the

CRIMINAL LAW—*Continued.*

offense is cognizable in the Superior Court, though the other party had no deadly weapon at the time. *S. v. Dockery*, 828.

8. *Criminal Law—Warrant—Service—Appearance—Waiver.*—Where the accused voluntarily appears and defends a criminal charge brought against him in a court having jurisdiction, he waives service of the warrant and the fact that it was not sworn to. *Ibid.*

9. *Criminal Law—Justice's Court—Collusion—Pleas—Former Conviction—Special Verdict—Appeal and Error.*—Where collusion is shown between the court of a justice of the peace, having tried the case, and the defendant accused of a criminal offense, the judgment should be declared void; and where it is shown by special verdict that the uncle of the defendant, at the instance of his father, had sworn out the warrant for an affray, in which the other had used a deadly weapon, and upon this trial no witness was sworn except the uncle, and the justice of the peace had previously agreed to "fix the matter" so that the defendant would not have to go before the Superior Court, it is *Held*, in the Supreme Court, on appeal, that the plea of former conviction was unavailing to the defendant, and judgment should be entered against him in the Superior Court on the special verdict. *Ibid.*

10. *Criminal Law—Seduction—Marriageable Age—Statutes.*—A male, at the marriageable age of 18 years (Revisal, sec. 2082), is indictable for seduction under our statute. *S. v. Creed*, 837.

CROSSINGS. See Railroads, 5.

CULVERTS. See Water and Water-courses, 5.

CURTESY. See Mortgages, 4.

CUSTOM. See Vendor and Purchaser, 13.

DAMAGES. See Limitation of Actions, 1; Railroads, 1; Vendor and Purchaser, 4, 8, 9, 14; Carriers of Goods, 2, 5, 6; Commerce, 1, 2; Carriers of Passengers, 7; Telegraphs, 5, 6, 9, 11; Judgments, 8; Water and Water-courses, 4, 6; Actions, 3; Deeds and Conveyances, 45, 46; Contracts, 9, 19; False Imprisonment, 1.

1. *Measure of Damages—Wrongful Death—Earning Capacity—Successful Business—Evidence.*—In an action for damages for the negligent killing of the intestate by a railroad company, it is competent to show, upon the issue of the measure of damages, that the intestate had built up a successful business from a small start; and where the daughter of the intestate has testified thereto from her own knowledge, her testimony, on cross-examination, is not rendered incompetent by her giving, as sources of her knowledge, information she had obtained by conversations with her father and mother, and entries made on his bank book. *Witte v. R. R.*, 309.

2. *Damages—Physical Injuries—Mental Powers—Trials—Evidence.*—Damages for the loss of mental powers arising from a personal injury negligently inflicted are not recoverable when there is no evidence tending to show that such have been sustained therefrom. *Kistler v. R. R.*, 577.

DAMAGES—*Continued.*

3. *Same—Instructions.*—The charge of the trial judge to the jury should be construed as a whole; and where a recovery for mental suffering arising from a personal injury is permissible, and the charge to the jury is that the plaintiff is entitled to reasonable compensation for the loss of both bodily and mental powers, *or* for actual suffering, both of body and mind, which are the immediate and necessary consequences of the injury, the word "or" is used to introduce matter explanatory or interpretative of what immediately precedes it, and not in the disjunctive; and, thus construed, it does not permit a recovery for the loss of mental powers, concerning which there is no evidence. *Ibid.*

4. *Damages—Mental Anguish—Evidence—Trials.*—Evidence tending to show that the plaintiff suffered in consequence of a personal injury inflicted by the defendant, a severe blow just above the kidneys, which resulted in an attack of jaundice, and brought about a condition not infrequently very humiliating to him, is sufficient to be submitted to the jury upon the question of damages for mental suffering, in the event the defendant's liability is established. *Ibid.*

DAMAGES TO CROPS. See Fertilizers, 1.

DANGEROUS EMPLOYMENT. See Master and Servant, 5; Contracts, 15, 16.

DEADLY WEAPONS. See Criminal Law, 7.

DEATH BY EXECUTION. See Insurance, 3.

DECEASED. See Evidence, 1, 2.

DECISION. See Appeal and Error, 21.

DECLARATIONS. See Evidence, 3, 4, 5, 6; Deeds and Conveyances, 23; Principal and Agent, 2.

DEEDS AND CONVEYANCES. See Tenants in Common, 1; Partnership, 1, 2; Pleadings, 5; Appeal and Error, 23, 26, 32; Railroads, 7, 8; Reformation of Instruments, 1; Principal and Agent, 4; Wills, 11, 15; Contracts, 8, 9; Equity, 1, 2, 3, 4, 7, 8, 10, 12; Estates, 2; Mortgages, 4; Descent and Distribution, 1.

1. *Deeds and Conveyances—Tract of Land—Shortage of Acreage—Abatement in Price.*—Where a tract of land is sold as a whole, without representation or warranty as to the number of acres it contains, and in the absence of fraud, the purchaser may not recover an abatement of the price for a shortage of a number of acres the tract was supposed to contain, in this case about 170 acres. *Turner v. Vann,* 127.

2. *Deeds and Conveyances—Consideration—Parol Evidence.*—While the recited consideration in a deed to lands may not be contradicted so as to impair the validity of the conveyance, it may be varied by parol evidence as a receipt of the amount stated; and when such deed recites the consideration to be a certain sum, it may be shown by parol that the conveyance was made upon the further consideration that the grantee should satisfy an outstanding judgment against the mortgagor, so as to prevent him from taking an assignment thereof

DEEDS AND CONVEYANCES—*Continued.*

for his own benefit and thereunder selling the mortgagor's lands. *Price v. Harrington*, 132.

3. *Same—Statute of Frauds.*—A parol agreement in further consideration of that stated in a deed, that the mortgagee should pay off a judgment against the mortgagor, does not fall within the meaning of the statute of frauds. *Ibid.*

4. *Deeds and Conveyances—Options—Specific Performance—Registration—Judgments.*—An option on land is the subject of specific performance; and if when registered the owner sells to another subject thereto, and in suit brought thereunder the defendants deny the tender in accordance with the terms of the option, but allege their readiness to convey the lands excepting one acre, a decree that on payment of the consideration the defendants convey the lands excepting one acre, and requiring the plaintiff to pay the costs, is not open to valid objection by the defendants. *Blalock v. Hodges*, 134.

5. *Deeds and Conveyances—Signing and Delivery—Cross Mark—Request and Consent—Intent.*—The due execution of a deed requires the signing, sealing, and delivery by the grantor with the intent of the grantor that it should operate as his conveyance and pass title to the grantee; and where the grantor's cross mark or other appropriate symbol to the signature of his name is written by another, it must appear to have been done at his request, or with his consent, expressed or implied. *Lee v. Parker*, 144.

6. *Deeds and Conveyances—Signing and Delivery—Cross Mark—Trials—Questions for Jury—Courts—Matters of Law.*—Whether the grantor in a deed adopted the signature thereto made for him by another is an issue of fact for the jury, but the legal sufficiency of the evidence, as well as the valid delivery of the deed thereon, is a matter of law for the court. *Ibid.*

7. *Deeds and Conveyances—Execution—Signing and Delivery—Intent—Evidence—Trials—Questions for Jury.*—Upon a trial of title to lands depending upon the valid execution of a deed made by a daughter to her father, there was evidence tending to show she was at the home of her father at the time, confined to her bed; that her father entered her room with the probate officer, the latter having the deed, and said: "Here is the deed for you to sign;" that the father lifted her hand to the pen, which another person held, and made her cross mark, though she could read and write; that she had expressed herself averse to executing the deed before her father entered with it, saying she was afraid not to do so; that she said nothing at the time or thereafter about making her cross mark. *Held*, it was for the jury to consider the evidence with its surrounding circumstances, and decide whether the grantor had exercised her will and executed the paper with the intent that it should operate as her deed. *Ibid.*

8. *Deeds and Conveyances—Signing and Delivery—Instructions.*—Where upon the trial of an action involving the question of whether a deed in defendant's chain of title had been properly executed, a charge by the court to the jury that if certain facts existed the signature would have been a forgery is not prejudicial to the defendant, if erroneous, the jury having been further and properly instructed how

DEEDS AND CONVEYANCES—*Continued.*

to answer the issue in the event they made such finding, for the charge should be construed as a whole. *Ibid.*

9. *Deeds and Conveyances — Improper Execution — Fraud — Evidence — Duress—Trials—Questions for Jury.*—Where the jury have found from the evidence that a deed in the chain of title to the *locus in quo* under which a party claims is defective for improper execution, the deed can pass no title to the lands, and they need not then consider whether it was procured by fraud or duress, or pass upon the rights of innocent purchasers for value and without notice. *Ibid.*

10. *Deeds and Conveyances—Timber—Remaining Interests—Description.*—One having acquired one-third of the standing timber upon lands to be cut, etc., in ten years, afterwards acquired a deed from the then owner of the entire tract of land, in which the timber conveyed was described as "all the interest of the party of the first part in said timber, one-third of said timber having been conveyed," etc., for a period of twenty years. *Held*, the grantee acquired the full title of his grantor in all of the timber for the stated period of twenty years. *Deaver v. Lumber Co.*, 168.

11. *Deeds and Conveyances—Timber—Defeasible Title.*—The laws of devolution and transfer applicable to realty apply to timber standing and growing thereon, and conveyances of such timber, as ordinarily drawn, convey an estate of absolute ownership in fee, defeasible as to all timber not cut and removed within the specified period. *Timber Co. v. Wells*, 262.

12. *Same—Extension Period—Options—Title—Reversion.* — A stipulation in a deed conveying timber standing and growing upon lands, that at the expiration of the period in which the timber shall be cut and removed the grantee shall acquire a further period for the purpose upon paying a stipulated or ascertainable price, is in the nature of an option; and contracts of this character do not of themselves create any interest in the property, but only amount to an offer to create or convey such an interest when the conditions are performed, and working a forfeiture when not complied with. *Ibid.*

13. *Same—Original Owner of Lands—Subsequent Grantee.*—Where the owner of lands conveys the timber standing and growing thereon, with provision that the time for cutting and removing it will be extended upon payment of a certain sum, and the grantee of the timber avails himself of this right in accordance with his deed, but after this grantor has conveyed the land itself to another, the grantee of the land is entitled to the sum of money paid by the grantee of the timber for the extension of the period of time given for cutting and removing it. *Ibid.*

14. *Deeds and Conveyances—Timber—Extension — Title — Leases — Statutes.*—An option or privilege in a timber deed for an extension of the time for cutting and removing it is a contract attendant upon the title. *Ibid.*

15. *Deeds and Conveyances—Timber—Extension Period—Consideration—Equitable Remedies—Jurisdiction.*—Where the grantee of timber, in the exercise of his option, under his deed, pays the agreed sum for an extension period for cutting and removing the timber, but after the owner of the lands had conveyed the same to another, and the

DEEDS AND CONVEYANCES—*Continued.*

controversy is to ascertain whether the original owner of the lands or his grantee thereof is entitled to receive the sum so paid, the action is in the nature of a bill of interpleader to determine the rights of two adverse claimants to a fund, enforcible in equity, and properly brought in the Superior Court. *Ibid.*

16. *Deeds and Conveyances—Timber—Extension Period—Options—Title—Devolution and Transfer—Executors and Administrators.*—An option to extend the period of time for cutting timber takes effect only when its terms are complied with by the optionee; and where such is done after the death of the grantor, the price so paid goes to the heirs at law, the then owners of the title, and not to the personal representatives of the deceased owner, though in his deed it was provided that the price be paid to himself or his personal representative. It would be otherwise had he conveyed the timber for the additional period. *Ibid.*

17. *Deeds and Conveyances—Registration—Notice.*—No notice, however full and formal, as to the existence of a prior deed will of itself supply the place of registration as required by our statute. *Allen v. R. R.*, 339.

18. *Same—Adjoining Counties—Reference to Former Deeds—Trusts.*—Where a deed conveys a tract of land partly situated in two adjoining counties, the registration thereof in one county has no effect beyond its own borders as against a registered conveyance of the land situate in the adjoining county derived from the same grantor, though subsequently executed; and where the later deed refers to the former one only for a better description, the rule does not obtain that such recitals create an interest or engraft a trust upon the property conveyed, and so protect such interest or estate by the registration of the later instrument; and especially when such instrument referred to is not immediately from the same grantor. *Ibid.*

19. *Deeds and Conveyances—Description—Natural Objects—Ambiguity—Questions for Jury.*—Ordinarily natural objects, properly identified, will control course and distance in the description of lands in a deed; but where there is ambiguity as to what is the natural object called for, so as to require parol evidence of identification, the question must be referred to the determination of the jury. *Gray v. Coleman*, 344.

20. *Deeds and Conveyances — Descriptions — Natural Objects — Private Lines.*—A call in a conveyance of land to the line of another tract, when such line is fixed and established or capable of being so fixed and established by the usual rule of locating land, is to be considered a natural object within the meaning of the principle; and natural objects in strictness, such as creeks or rivers, when they have a distinct and definite identification, are given preference over a call by marked line and artificial corners, unless these last were made for the present purpose of executing a deed and contained in a survey made for that purpose. *Ibid.*

21. *Deeds of Conveyance — Descriptions — Natural Objects — Streams — Ambiguity—Evidence—Trials—Questions for Jury.*—In an action of trespass, involving the true location of the divisional line between two adjoining owners of land, the question was made to depend upon the following description in a former deed in plaintiff's chain

DEEDS AND CONVEYANCES—*Continued.*

of title: "thence N. 86 E. 45 poles to a pawpaw gum on the main run of Deep Creek; thence down the run of said creek by a line of marked trees, S. 2 E. 92 poles to a white oak; thence W. 22 W. 20 poles to a pawpaw on the main run of said creek," etc. There was evidence tending to show that some distance south of the point where the description touched it, Deep Creek divided into two prongs of about equal size, coming together again before reaching the southern terminus, where it is again spoken of as the main channel, and that the trees were marked on the eastern prong, with other evidence of identification, in accordance with plaintiff's contention, the *locus in quo* lying between these two prongs. *Held*, it was for the jury to determine, upon the evidence, which run of Deep Creek was designated by the parties referred to in the deed as "down said run," etc., to a "white oak." *Ibid.*

22. *Deeds and Conveyances—Descriptions—Natural Objects—Streams—Intent—Instructions—Appeal and Error.*—In this action of trespass, involving the true divisional line between two adjoining owners of land, the question was made to depend upon whether the line is with the eastern or western prong of a creek which separates along the line of description and comes together again before reaching the next call in the deed in the plaintiff's chain of title. *Held*, reversible error to the plaintiff's prejudice for the trial judge to instruct the jury that the true location of the line would depend upon "the run of the main creek as it was when this call appeared in plaintiff's original deed," for it should depend upon the intention of the parties in using the terms at the time, to be determined by the jury. *Ibid.*

23. *Deeds and Conveyances—Evidence—Declarations Against Interest.*—A deed in defendant's chain of title, made in 1833, tending to show that the true divisional line in dispute between adjoining owners of land was in accordance with the plaintiff's contention, and against the interest of the grantor therein, is held to be competent evidence in plaintiff's favor under the circumstances of this case. *Ibid.*

24. *Deeds and Conveyances — Counties — Public Square — Reservations—Reëntry—Obstructions—Easements.*—A reservation in a deed of lands to a county, that they shall be used only as a part of a public square, and that the grantors, their heirs and assigns, shall have the right to enter thereon and remove buildings and obstructions placed thereon which are inconsistent with the title conveyed, is not that of an easement retained by the grantor in the lands, but only conservative of the dedication in the conveyance. *Guilford v. Porter*, 356.

25. *Deeds and Conveyances — Foreign Probate — Certificates — Statutes — Evidence.*—Our statute, Revisal, sec. 990, prescribing how deeds may be proven and acknowledgment and privy examination taken in other States as well as in foreign countries, must be followed, or they and the registration thereon will be declared void; and where the probate to a deed is taken by a commissioner of deeds in another State, and the certificate of the clerk of the court of that county is alone to that effect, without indication of authority of the commissioner to act therein for the State of North Carolina, the registration here upon the probate, as well as the probate, are both ineffectual, and will not be received as evidence of title. *Shingle Mills v. Lumber Co.*, 410.

26. *Deeds and Conveyances—Interest Conveyed—Covenants—Warranty.*—A covenant of warranty does not enlarge or curtail the estate granted

DEEDS AND CONVEYANCES—*Continued.*

in the premises of a deed to land, but is intended as an assurance or guaranty of the title conveyed; and where the grantor conveys "all his right, title, and interest" in and to the lands it will not be construed to convey the fee because of a general covenant of warranty of title or hold the grantor liable for its breach upon failure of title. *Coble v. Barringer*, 445.

27. *Same—Interpretation of Deeds.*—A conveyance of all the grantor's "right, title, and interest" in lands, with habendum to the grantee and his heirs forever, and with covenant that the grantor "is seized of the interest conveyed" as evidenced by a certain deed to him; that he has a right to convey such interest in fee simple; that he will warrant and defend the title to the said interest, etc.; and where the deed referred to conveys the "right, title, and interest" of the grantor therein, with full covenants of warranty: *Held*, construing the deed as a whole, the intent of the grantor, and the effect of his deed, was only to convey whatever interest he may have had in the land. *Ibid.*

28. *Deeds and Conveyances—Heirs—Partition—Parties—Res Inter Alios Acta.*—Where a wife is in possession of a tract of land after the death of her husband under a deed he had made to her, proceedings for a division of his lands among his heirs at law, to which she has not been made a party, is *res inter alios acta* as to her, and no title can be thereunder acquired as to her lands so held. *Roberts v. Dale*, 466.

29. *Same—Executors and Administrators—Sales.*—Where the wife remains in possession of lands conveyed to her by her husband, after his death, living thereon with their son, who dies before his mother, the son acquired no title to such lands under a division of his father's lands among the heirs at law, in which his mother was not a party, and a sale thereof by his administrator to make assets to pay his debts is a nullity. *Ibid.*

30. *Deeds and Conveyances—Tenants in Common—Interest Conveyed.*—A conveyance by a tenant in common of the entire tract of land so held can only operate as a conveyance of the interest therein of the tenant in common executing the conveyance. *Ibid.*

31. *Deeds and Conveyances—Interpretation—Intent.*—In construing a deed, the intention of the grantor is gathered from the instrument will control, and will be enforced if not inconsistent with the law. *Springs v. Hopkins*, 486.

32. *Same—Vesting of Estates.*—The rule of interpretation that the law favors the early vesting of estates will not control when the intention of the testator, as gathered from the instrument being construed, is clearly expressed otherwise. *Ibid.*

33. *Deeds and Conveyances—Estates—Limitations—Successive Survivors—Vested and Divested Interests—Tenants in Common.*—A gift of land by deed, in consideration of love and affection, to the wife of a son of the donor for life, then in trust for the use of his children by this or any future wife, until the youngest child shall have become 21 years of age, the share of any child dying without issue to the others of such children surviving and their heirs, with limitation over in the event all of them should die without issue: *Held*, upon arrival of the youngest grandchild at the age of 21 after the falling in of the life estate, each of said grandchildren took a vested interest as tenants in common of the lands, subject to be divested as to each by his

DEEDS AND CONVEYANCES—*Continued.*

or her dying without issue, creating a succession of survivorships. *Ibid.*

34. *Deeds and Conveyances—Interpretation—Intent—Uses and Trusts—Power of Revocation.*—Where it clearly appears in construing a gift by deed to lands that the donor's intention was to create a vested interest therein for her grandchildren as tenants in common, depending upon successive survivorships, a reserved power of revocation, which she had not exercised, will have no effect upon the construction of the instrument. *Ibid.*

35. *Deeds and Conveyances—Perpetuities—Vested Estates—Uses and Trusts.*—The rule against perpetuities refers solely to the vesting of estates, and not to their enjoyment, and does not require that interests must end within specified limits, and the interpretation of the limitations expressed in the deed in this case is held not to violate this rule. *Ibid.*

36. *Deeds and Conveyances — Warranty — Breach — Outstanding Title — Parties.*—In an action to recover damages for breach of covenant and warranty contained in plaintiff's deed to lands, with allegations of outstanding title in another, which had been determined by a court of competent jurisdiction, and, upon making such third person a party to the action, such facts have been established, the retention of the holder of the outstanding title is not necessary to the plaintiff's cause of action, and it should be dismissed as to him. *Coulter v. Wilson*, 537.

37. *Deeds and Conveyances—Color—Adverse Possession—Burden of Proof—Degree of Proof.*—The defendant in an action to recover lands, depending upon adverse possession thereof under color of title, where the plaintiff has proved a perfect chain of paper title, has the burden of proving this defense by the greater weight of the evidence, Revisal, sec. 386; and while an instruction thereon that the defendant must satisfy the jury thereof has been held sufficient, a further charge in connection therewith, that the defendant need not satisfy the jury by the greater weight of the evidence, is in effect a charge that the jury may be satisfied by less than the greater weight of the evidence, and constitutes reversible error. *Land Co. v. Floyd*, 543.

38. *Deeds and Conveyances — Color — Adverse Possession — Constructive Possession—Outer Boundaries.*—Upon the question as to whether defendant's possession of a small strip of land beyond his own line and within that of the plaintiff was sufficient to extend his adverse possession by construction to the boundaries of his deed under which he claims as color, *Green v. Harman*, 15 N. C., 162, is cited and approved. *Ibid.*

39. *Deeds and Conveyances — Equity — Correction — Liens — Conflicting Claimants.*—In construing a mortgage of certain lands and a pledge of certificates of stock, stating in the deed that it was subject to "any existing conveyance of said stock to B., and this only in the event the security, including personal he now holds, when exhausted would not pay off and discharge his existing debt against" the maker, it appeared that through mutual mistake the name of B. had been inserted for the name of a bank of which he was president, and that the maker owed the bank and not B., and had prior, but on the same day, pledged the same certificates to the bank to secure his indebtedness there. The instrument being construed was drawn without the

DEEDS AND CONVEYANCES—*Continued.*

knowledge of the bank, but for the parties to that agreement, and the provision as to exhausting other securities, etc., was not contained in the assignment of the certificates to the bank: *Held*, this provision did not apply to the bank, but to the grantee in the deed, the latter of whom held subject to the lien of the former, and was required to first exhaust the other securities he held. *Bank v. Redwine*, 559.

40. *Deeds and Conveyances—Pledges of Security—Conflicting Claimants—Ambiguity—Third Parties.*—Where the owner of securities has assigned them for a debt to different parties, A. and B., on the same day, and in the assignment to B. there are provisions as to first exhausting other securities, but not contained in that to A., to whom the securities had been prior assigned, and who knew nothing of the subsequent transaction: *Held, the* instrument of B., in case of doubt as to the meaning of the provision, will be construed against him in determining the meaning of the parties. *Ibid.*

41. *Deeds and Conveyances—Intent—Interpretation—Extrinsic Evidence.*—In construing instruments relating to the same subject-matter the courts may regard the surrounding circumstances, the condition of the parties executing same, and the objects they had in view. *Ibid.*

42. *Deeds and Conveyances—Interpretation—Intent—Mala Grammatica.*—The maxim, *Mala grammatica non vitiat chartam*, does not apply in the interpretation of an instrument when it appears that the draftsman was educated and intelligent, and that a grammatical and proper construction will throw light upon its interpretation. *Ibid.*

43. *Deeds and Conveyances—Registration—Probate—Deputy Clerks—Office—Women—Constitutional Law.*—Where the owner of certificates of stock has assigned them to different persons as collateral security to the payment of a separate debt to each, the first of which is registered and the latter is not, and it appears from the latter instrument that the prior assignment was the first lien on the shares, the questions of notice by registration and the validity of probate taken by a female deputy clerk of the court, or whether it may be impeached by parol evidence, do not arise. *Semble*, the position of deputy clerk is an office. *S. v. Knight*, 169 N. C., 333, cited and approved, *obiter dictum*. *Ibid.*

44. *Deeds and Conveyances—Timber—Vested Interests—Divested Interests.*—A conveyance of timber growing upon lands, to be cut and removed within a stated period, vests the title to the timber, subject to be divested if not so cut and removed by the grantee. *Wilson v. Scarboro*, 605.

45. *Deeds and Conveyances—Timber—Breach—Conversion—Damages—Evidence—Diminution.*—Where the grantor breaches a provision of his deed, conveying timber standing upon his lands, by entering thereupon and preventing the grantee from removing, etc., the timber within the stated period, the defendant's act is, in effect, a reconversion of the timber to his use, and he is liable for the damages caused thereby; and evidence introduced solely for the purpose of showing that the grantee could have purchased other timber in the same locality from other parties in lieu of the timber the defendant had sold him, and thus have minimized his damages, is incompetent, though admissible in rebuttal of the plaintiff's testimony upon a different phase of the case, had it been offered for that purpose. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

46. *Deeds and Conveyances — Timber — Contracts — Breach—Measure of Damages.*—Where the grantor has breached the terms of his deed to standing timber by entering upon the lands and preventing the grantee from cutting and removing the timber within the stated period, the rule of damages is the difference between the actual value of the timber and the contract price, and, if the price had been paid, the value of the timber. *Ibid.*

47. *Deeds and Conveyances—Trusts—Delivery by Mail—Trials—Questions of Law.*—Where two purchasers of lands have them conveyed to one of them to be held in trust for both, and the holder of the legal title executes a good and sufficient deed to the other for the latter's interest in the lands, and deposits the deed in the postoffice in an envelope properly addressed, by mailing the deed the grantor parts with his authority and control over it; this passes the title in the property to his grantee, whether the latter was aware of the fact or not, it being assumed that he will accept the title to the lands for which he was paid; and where, in an action involving this question, the evidence of both parties is harmonious, such delivery will be held valid as a matter of law. *Lynch v. Johnson*, 610.

48. *Deeds and Conveyances—Delivery by Mail—Trusts—Title.*—Where the holder of the legal title to lands in trust for himself and another executes and mails to his *cestui que trust* a deed sufficient to pass the title, the trust estate ceases and the grantee holds the legal title to his part of the lands under his deed. *Ibid.*

49. *Same — Bankruptcy — Registration—Laches—Title—Notice.*— Where a valid delivery of a deed to lands is made by mailing the deed to the grantee, which he has not received, and waits for fifteen years after receiving notice of the fact, and three years after his partner has become a bankrupt and the lands sold to a purchaser at the bankruptcy sale, without demanding the reëxecution of the deed or taking legal steps to secure it (Revisal, sec. 336): *Held*, the trustee in bankruptcy, being regarded as a purchaser for value under the amendment to the Bankrupt Act of 1910, acquires a valid title as against the holder of the unregistered deed, under Revisal, sec. 980, which no other formal notice will affect, and which inures to the purchaser at the bankrupt sale. *Ibid.*

50. *Deeds and Conveyances—Delivery by Mail—Return Address.*—The valid delivery of a deed by mail is not affected by the fact that the grantor's return address was given on the envelope, though it appears that in fact the grantee did not receive the conveyance and that it was not returned to the grantor. *Ibid.*

51. *Deeds and Conveyances—Undue Influence—Fraud.*—Undue influence which will invalidate a paper-writing purporting to be a deed need not necessarily consist in active fraud, and it is sufficient if it amounts to coercion produced by importunity, or by a silent and controlling influence of a strong will over a weaker one, destroying free agency and causing the testator to do what he would not otherwise have done if left to himself. *Brown v. Brown*, 648.

52. *Same—Circumstantial Evidence—Trials—Questions for Jury.*—Undue influence over the mind of a testator in making his deed may be inferred by the jury from a number of facts, each of which standing alone may have but little weight, but taken collectively may satisfy a rational mind of its existence. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

53. *Same—Confidential Relations—Presumptions.*—In a suit to set aside a paper-writing purporting to be the deed of the deceased, for undue influence, among his children and heirs at law, there was evidence tending to show that the deceased conveyed the lands in question to two of his sons, who were living with him and had entire control and management of his business and property; that he was old and infirm, drank a great deal, and was generally in no condition to exercise sound judgment, and did not know what he was doing when he made the deed; that there was an inadequacy of consideration: *Held*, sufficient to raise a presumption of undue influence, and the issue should be submitted to the determination of the jury. *Ibid.*

54. *Deeds and Conveyances—Restraint on Alienation—Estates—Conditions Subsequent.*—Where the donor of a life estate forbids the life tenant from selling the same or the proceeds arising therefrom by anticipation or otherwise, he creates a condition subsequent to the vesting of the title, which is void as against public policy, and the estate is held discharged of the condition. *Lee v. Oates*, 717.

55. *Same—Equitable Title.*—The doctrine that invalidates the legal title for restraint upon its alienation applies to equitable title as well. *Ibid.*

56. *Same—Husband and Wife—Trusts and Trustees—Naked Trusts—Statute of Uses.*—An estate to the use of E. for life, free from the debts and control of her husband, with provision that "she shall not have the power to sell her said estate or the profits arising therefrom by anticipation or otherwise"; *Held*, upon the death of the husband the trust created in respect to him terminated, the necessity therefor then having ceased, and the title held by the trustee being a naked one, it was transferred to the use under the statute of uses; and the provision imposing a restraint upon its alienation being void, the complete title vested in E. *Ibid.*

57. *Deeds and Conveyances—Restraint on Alienation in Covenants.*—A covenant which is against public policy is not enforcible. *Ibid.*

58. *Deeds and Conveyances—Trusts and Trustees—Restraint on Alienation—Reservation of Powers—Estoppel.*—A donor of an estate to E. for life, with a void restraint upon its alienation, reserved to herself the right of revocation or change. After the death of the donor it is held that E. is not estopped, equitably or otherwise, because she signed the deed, to convey such estate free from the void provision in the conveyance. *Ibid.*

59. *Deeds and Conveyances—Estates—Contingent Remainders—Vested Interests—Defeasible Estates.*—An estate to the use of E. for life, then to the use of A. and B. or the survivors or their heirs, and should both of them die without issue, then to L., with further contingent limitations. After the death of E. and A., L. conveyed her interest to B. *Held*, that L. acquired an interest or estate subject to the happening of a contingent event, and not a bare possibility, and that though both the interests of B. and L. were contingent, each could make a valid conveyance of their respective estates. *Ibid.*

60. *Deeds and Conveyances—Estates—Contingent Remainders—Nonhappening of Event.*—An estate for life to A., then to B. and C., or the survivor of them and his heirs, and in the event of the death of both without issue, to L. and W. and their heirs; and should either of the latter die without issue, then to the survivor or his or her heirs; and

DEEDS AND CONVEYANCES—*Continued.*

in the event of the death of both in the lifetime of their father, then to D. during her life or widowhood, with remainder to the right heirs of the donor. W., only, died in the lifetime of his father, and it is held that the remainder to D. had been defeated by the nonhappening of the event, *i. e.*, the death of both L. and W. in the lifetime of their father. *Ibid.*

DEFAULT. See Judgments, 10; Principal and Agent, 5.

DEFEASIBLE ESTATES. See Deeds and Conveyances, 59.

DEFENSE BOND. See Appeal and Error, 27.

DEMURRER. See Courts, 2; Actions, 1, 3, 5; Pleadings, 3; Evidence, 16.

"DEPENDENTS." See Insurance, 7.

DEPOSITIONS. See Appeal and Error, 31; Evidence, 12.

DESCENT AND DISTRIBUTION.

Slaves — Descent and Distribution — Marriage — Evidence — Tax Deeds — Deeds and Conveyances—Nonsuit—Trials.—In an action to recover land by one claiming by descent from a deceased male slave it is at least necessary for the plaintiff to show that his ancestors lived together and were recognized as man and wife after their emancipation, where the fact of marriage has not been shown; and it being admitted in this case that the defendant had purchased the lands at a tax sale, obtained a deed correct in form, describing the lands, and stating that defendant had complied with all the requirements of the statute, and the evidence tending to show that the plaintiff's male ancestor had only visited his female ancestor, the judgment of nonsuit is sustained. *Smith v. Hill*, 769.

DESCRIPTION. See Deeds and Conveyances, 19, 20, 21, 22.

DEVISE. See Wills, 7.

DIRECTORS. See Corporations, 9, 13.

DISBARMENT. See Attorneys, 2.

DISBURSEMENT. See Attorneys, 1.

DISCRETION. See Appeal and Error, 2, 7; Municipal Corporations, 18.

DISCRIMINATION. See Municipal Corporations, 16; Commerce, 3.

DISTRICTS. See Taxation, 6.

DRAFTS. See Negotiable Instruments, 1.

DRAFTSMEN. See Equity, 8.

DRAINAGE DISTRICTS. See Statutes, 2.

Drainage Districts — Process — Injunction — Different County—Motions—Notice.—Where a drainage district has been established under a valid statute, an injunction against the assessment provided for may not successfully be prosecuted in an independent action by the owner of the land in the district, on the ground that the statutory notice

DRAINAGE DISTRICTS—*Continued.*

had not been given him, the remedy being by motion in the proceedings instituted in the county for the formation of said district wherein are the records and where a proper reassessment may be had if the same should be lawfully required; and the plaintiff may obtain his restraining order in those proceedings if he is entitled thereto. *Semble*, notice of the motion should be served on the owners of the land in the district as required by the statute. *Banks v. Lane*, 505.

DURESS. See Deeds and Conveyances, 9; County Commissioners, 1.

DWELLING. See Wills, 8.

DYING DECLARATIONS. See Homicide, 8.

EARNINGS. See Parent and Child, 1, 2.

EASEMENTS. See Appeal and Error, 22, 23; Instructions, 2; Railroads, 78; Deeds and Conveyances, 24.

EJECTION. See Carriers of Passengers, 2, 3, 4, 6, 7.

EJECTMENT. See Appeal and Error, 27.

ELECTIONS. See Vendor and Purchaser, 1; Appeal and Error, 29; Counties, 4.

1. *Elections—Ballots—Marking—Statute.*—Under Revisal 1905, sec. 4347, providing that when the election shall be finished the boxes shall be opened and the ballots counted, reading aloud the names appearing on each ticket, and if there shall be two or more tickets rolled together, or if any ticket contains the names of more persons than the elector may vote for, or has a device upon it, such tickets shall not be numbered in taking the ballots, but shall be void, a ballot for one claiming the office of register of deeds, thrown out because containing two unmarked names, instead of one, for the office of recorder of the county, was improperly rejected as a vote for register, the elector's choice for such office being properly indicated, as the statute does not contemplate throwing out the whole ballot for voting one ticket for too many candidates, its language distinguishing between the ballot and the ticket, of several of which (each office voted for being a separate ticket on the same ballot) the ballot is made up. *Bray v. Baxter*, 6.
2. *Elections—Ballots—Marking—Statute.*—A ballot the only defect of which was that it contained unmarked names of four persons for the office of county commissioner, while only three commissioners were to be elected, was likewise improperly rejected. *Ibid.*
3. *Election—Voter's Mistake as to Precinct.*—Where a voter lived in the township in which he voted, but was registered and voted in a different precinct in such township than where he lived, being otherwise a qualified elector, and having voted where he did in good faith, having done so for a long number of years, under the belief that it was the proper precinct, his vote was valid. *Ibid.*
4. *Elections—Vote by Unregistered Voters—Validity.*—Where the registration book for 1914, the year of an election, contained only part of the names of all who voted in a certain precinct, the election having there been regularly and fairly held, all who voted having been actually qualified as voters, and all their names being on the regis-

ELECTIONS—*Continued.*

tration books of 1903 to 1910 or that for 1914, the old registration books for the precinct having either been lost or misplaced, the vote of such precinct was valid. *Ibid.*

5. *Elections—Torn Ballot—Validity.*—Where a voter had simply torn off the top part of a ballot, declining to vote for the first names, but cast the balance of the ballot intact, the vote was valid for the candidates indicated. *Ibid.*

6. *Elections—Canvass—Tie Vote—Statute.*—Under Revisal 1905, sec. 4355, providing that if two or more county candidates having the greatest number of votes shall have an equal number, the county board of elections shall determine which shall be elected, where there was a tie vote for register of deeds, and the county board of elections decided in favor of one candidate, not as their choice under the statute, but on a canvass of ballots erroneously giving such candidate a majority, it was no valid election: the board not having exercised its statutory power. *Ibid.*

7. *Elections, Public Office—Title—Burden of Proof.*—In an action to try title to a local public office, in this case that of mayor of a town, the burden of proof is on the relator, and failing in this, he may not recover the office. *Smith v. Lee*, 260.

8. *Elections—Public Office—Pleadings—Votes Cast—Evidence.*—Where the title to a public office is in controversy, and the answer denies that the plaintiff was elected thereto, but admits that the judges of election counted the same number of ballots for the two candidates, it is competent for the parties to offer evidence of the legality of the votes counted. *Ibid.*

9. *Elections—Public Office—New and Old Registration—Evidence—Trials —Nonsuit.*—Where the relator's title to office depends upon either the validity of a new registration or his election under the old registration book, and it appears that in either view he has failed to show that he received a majority of the votes cast at the election, he may not recover the office. *Ibid.*

10. *Elections—Related Propositions—One Ballot—Statutes—Stock Law.*—Where a legislative enactment authorizes a county to submit to its voters the question of continuing the stock law therein, except as to certain stated and defined portions, and should its discontinuance be voted favorably upon the county should maintain a line fence between it and adjoining counties having the no-fence law, and levy a special tax for the purpose, it is *Held*, that the several propositions are so related as to authorize the Legislature to have them submitted upon the single ballot of "for" or "against" the stock law; and those voting against the stock law will be considered as voting in favor of building and maintaining the fence and issuing a special tax for that purpose. *Keith v. Lockhart*, 451.

EMANCIPATION. See Parent and Child, 3; Statutes, 8; Infants, 1.

EMPLOYEES. See Jurors, 1.

ENTRIES. See Judgments, 21, 22.

EQUITABLE REMEDIES. See Deeds and Conveyances, 15.

EQUITABLE TITLE. See Deeds and Conveyances, 55.

EQUITY. See Injunction, 1; Usury, 1, 2, 3; Subrogation, 1; Deeds and Conveyances, 39; Claim and Delivery, 2.

1. *Equity—Deeds and Conveyances—Mistake of Draftsman—Issues.*—Where a phase of the controversy depends upon the correction of a paper-writing for mutual mistake of the parties, and the issue submitted was at the request of the appellant, he cannot complain that it related to the mistake of the draftsman and not to that of the parties, it appearing that the mistake of the draftsman necessarily involved that of the parties in the presentation of the case as it was constituted. *Bank v. Redwine*, 559.

2. *Equity—Deeds and Conveyances—Correction—Signing Instruments—Mutual Mistake—Rule of Prudent Man.*—The usual rule that equity will not aid one in correcting an instrument which he should have read before signing is not of universal application, and is subject to exceptions, the test being, in the absence of fraud, whether the party seeking the correction acted with ordinary prudence under the circumstances; and it appearing in this case that the draftsman, a man of repute, in the presence and with the consent of the parties, assumed to make the correction when brought to his attention, equity will not bar the complaining party of his right because he failed to reread the paper-writing thereafter before signing it. *Ibid.*

3. *Equity—Deeds and Conveyances—Mutual Mistake—Correction—Original Parties.*—It is held in this case that the equity of correcting an instrument for mutual mistake is not confined to the original parties, approving *Sills v. Ford, post*, 733. *Ibid.*

4. *Equity—Deeds and Conveyances—Mutual Mistake—Mistake of Draftsman.*—When it is shown that a deed or other paper-writing was not drawn by the draftsman in accordance with the prior agreement of the parties thereto, equity will correct it. *Ibid.*

5. *Same—Evidence—Trials—Questions for Jury.*—Evidence tending to show that the maker of a mortgage included among its security certain certificates of stock he had theretofore on the same day pledged with a bank, that the name of the president of the bank was erroneously inserted in the instrument by the draftsman for the name of his corporation, that the maker was indebted to the corporation, and not to its president, is sufficient to be submitted to the jury upon the question of correcting the instrument accordingly on the ground of mutual mistake of the parties. *Ibid.*

6. *Equity—Subrogation—Judgments.*—*Semble*, in this case, if the holder of a junior judgment paid a part of the senior judgment he is entitled to subrogation *pro tanto*, in the absence of some special agreement to the contrary. *Brown v. Harding*, 685.

7. *Equity—Deeds and Conveyances—Correction—Quantum of Proof—Instructions—Trials—Questions for Jury.*—Where there is sufficient evidence of mutual mistake of the parties to a deed sought to be corrected in a suit, it is for the jury to decide whether it is clear, strong, and convincing, under a proper charge from the court. *Sills v. Ford*, 733.

8. *Equity — Deeds and Conveyances — Correction — Mutual Mistake — Draftsman.*—Equity will correct or reform a deed to lands *inter vivos*, where through mutual mistake, or the mistake of one of the parties induced or accompanied by the fraud of the other, it does not, as written, truly express their agreement; and this principle extends

EQUITY—*Continued.*

to the mistake of the draftsman in failing to express the terms of the agreement for the parties thereto, in accordance with their instructions. *Ibid.*

9. *Same—Evidence—Denial of Mistake—Questions for Jury.*—Where the evidence is conflicting as to whether a deed, through mutual mistake, or the mistake of the draftsman, failed to express the intention of the parties, as written, a denial of the mistake by one of the parties will not of itself defeat the equity for correcting the instrument, and the issue is for the determination of the jury, under proper instruction from the court as to the degree of proof required. *Ibid.*

10. *Equity—Deeds and Conveyances—Correction—Privity—Parties.*—The equitable relief of correcting a deed for mutual mistake or fraud will not be afforded one who is not a party to the original transaction, or claiming under or through the parties in privity. *Ibid.*

11. *Same—Registration—Statutes.*—Since the enactment of our registration law, chapter 147, Public Laws 1885, a grantee in a deed to lands acquires title thereto, as against subsequent purchasers for value, from the date of the registration of the instrument (Revisal, secs. 979, 980); and where the grantor conveys the standing timber on land to A., and thereafter the land itself to B., who had his deed registered before that of A., and the former seeks to have B.'s deed corrected for mutual mistake or the mistake of the draftsman, the registration of the deed to B. makes it the first effective deed, and A., claiming title under his timber deed from the grantor of the land, is, consequently, in privity with B., and acquires, under the statute, the equity to have the deed corrected in his suit for that purpose against B., and the common grantor is not a necessary party. Revisal, sec. 980. *Ibid.*

12. *Equity—Deeds and Conveyances—Correction—Laches.*—Where the timber on lands is conveyed to A. for a valuable consideration, and later his grantor conveys the lands to B., and the latter has his conveyance registered first, and A. seeks to have B.'s deed corrected so as to show that by mutual mistake of the parties it included the timber theretofore granted to him, it is held that A.'s right to the enforcement of the equity will not be lost by his failure to have his deed sooner recorded, for if he succeeds in establishing his right it would be unconscionable to permit B. to keep the timber for which he has not paid, and which he knew was not intended to be conveyed to him by the deed. *Ibid.*

ESCROW. See Principal and Agent, 4.

ESTATES. See Wills, 1, 13; Deeds and Conveyances, 32, 33, 35, 54, 59, 60.

1. *Estates—Contingent Remainders—Reinvestments—Trusts and Trustees—Parties—Statutes.*—In proceedings under Revisal, sec. 1590, certain contingent interests in land held in trust were sold and reinvested in other lands in accordance with the terms of the trust in the original deed conveying them. The title acquired, under the original deed in trust, by the trustee had become passive in him, and it is held that as, under the statute of uses, the legal and equitable title had merged in the same person, neither the trustee nor his heirs were necessary parties to the owner's action against a purchaser to enforce his contract of purchase, and especially so when all vested and contingent

ESTATES—*Continued.*

interests were represented by some of the parties to the suit. *Lee v. Oates*, 717.

2. *Estates—Contingent Remainders—Deeds and Conveyances—Technical Expressions—Intent.*—While a rule of law will not ordinarily be allowed to defeat the plainly expressed intention of the donor, technical language used by him will be construed in accordance with its legal significance. *Ibid.*

3. *Estates—Contingent Remainders—Perpetuities—Statutes.*—Under the facts of this case it is held that the rule against perpetuities has not been violated, as a contingent remainder dependent upon the death of a certain donee without issue means, under the terms of our statute, Revisal, sec. 1581, a dying without having issue living at the time of his or her death. *Ibid.*

ESTOPPEL. See Judgment, 1, 6, 25; Parties, 1; Wills, 15; Processioning, 2; Deeds and Conveyances, 58.

EVIDENCE. See Reformation of Instruments, 1; Homicide, 3, 4, 6, 7, 8; Water and Water-courses, 3; Seduction, 1; Instructions, 4; Parent and Child, 4; Issues, 3; Conversion, 1; Principal and Surety, 2; Insurance, 6; Partition, 1; Compromise, 1; Intoxicating Liquors, 7, 10; Pleadings, 7; Witnesses, 1; Municipal Corporations, 10; Estates, 2; Equity, 9; Criminal Law, 2, 3; Adultery, 1; Marriage, 1; Husband and Wife, 1; Conflict of Laws, 1; Descent and Distribution, 1; False Imprisonment, 1; Carriers of Goods, 1, 4; Fish and Oysters, 1; Vendor and Purchaser, 3, 11, 13, 15, 16, 17; Master and Servant, 2, 4; Railroads, 2, 4, 11, 12, 13, 17; Appeal and Error, 10, 11, 13, 16, 31, 40; Contracts, 3, 9, 18; Deeds and Conveyances, 7, 9, 21, 23, 25, 41, 45, 52; Telegraphs, 2, 7; Boundaries, 1, 2; Fornication and Adultery, 1, 2; Adverse Possession, 1; Carriers of Passengers, 8, 10, 13; Negligence, 1, 4, 7, 9; Partnership, 2, 3, 6; Trials, 3, 4, 5, 7, 8; Elections, 8, 9; Processioning, 1; Commerce, 4; Damages, 1, 2, 4; Principal and Agent, 2, 4, 9.

1. *Evidence—Deceased—Transactions—Surety—Interest—Trials.*— In an action involving the validity of an assignment, by the insured, since deceased, of a life insurance policy, testimony of the surety on the plaintiff's prosecution bond as to what occurred at the time is incompetent under the statute, he being interested in the event of the action, and further incompetent when the proposed evidence appears in the writing itself. *Carson v. Ins. Co.*, 135.

2. *Evidence — Deceased—Insurance—Policies—Assignments.* — Where an action upon a policy of life insurance depends upon the validity of an assignment of the policy to the plaintiff, which had been made by the deceased insured, it is competent for the widow of the deceased to testify as to an agreement made in the presence of the plaintiff's husband, also present at the trial, and who was acting for her, that the deceased was to pay back the money and get the policy again. *Ibid.*

3. *Evidence—Hearsay—Declarations.*—Declarations made by a person on a survey, in which he was representing a third person and acting for him in a controversy, not between plaintiff and defendant, or their ancestors in title, but between defendant and the third person, were incompetent, where they were in the interest of the third person. *Stallings v. Hurdle*, 4.

EVIDENCE—*Continued.*

4. *Evidence—Hearsay—Declarations.*—Declarations as to boundary, to be admissible, must have been made before suit brought, and declarant must have been disinterested when declarations were made, and dead when they were offered in evidence. *Lumber Co. v. Hinton*, 27.

5. *Evidence—Hearsay—Declarations.*—Where the summons in an action involving boundary was dated July, 1913, and there was nothing to indicate that the controversy originated for any length of time prior to actual litigation, the testimony of a witness as to declartions made by a third person as to boundary that the declarations were made years before, and that the third person was dead, and that he did not claim any of the land when making the declarations, showed sufficient foundation for the admissibility of the declarations. *Ibid.*

6. *Evidence—Hearsay—Declarations—Admissibility.*—Declarations of a deceased person on pointing out a line that it bound a third person's old field to a party's land around the edge of a hill, a swamp edge, and then on across to an old field to a dead tree were sufficiently definite to be admissible on the issue of boundary. *Ibid.*

7. *Evidence—Photographs—Accuracy.*—Photographs of the subject of the inquiry may be introduced in evidence, when shown to be a true representation by the testimony of witnesses, without the necessity of proving this fact by the photographer who took them. *Bane v. R. R.*, 328.

8. *Evidence—Testimony of Fact—Opinion—Condition of Cattle—Carriers of Goods.*—Where the condition of cattle is the subject of the inquiry on the question of damages for the wrongful failure of the defendant railroad company to accept them, testimony of one who had seen the cattle, that they were in good condition, is held to be a statement of a fact, and not objectionable as a statement of the opinion of the witness. *Ibid.*

9. *Evidence—Witness—Absent from State—Stenographer's Notes.*—The testimony of a witness, stenographically taken at a former trial, who is absent from the State under such circumstances that his return is merely contingent or conjectural, may be received as evidence on a subsequent trial of the same cause of action when its correctness is testified to by the official stenographer who took and transcribed it, and there is no suggestion that the record thereof was not full and entirely accurate. As to whether this will apply when the witness is temporarily absent, *quære*. *Settee v. Electric Ry.*, 440.

10. *Evidence—Release—Fraud—Trials—Questions for Jury.*—Where a release is set up as a defense to an action to recover damages for a personal injury, it is properly admissible as evidence when its execution is shown, and when the question of fraud in its procurement is relied upon by the plaintiff it is for the jury to determine. *Ibid.*

11. *Evidence—Fraud—Inducement—Appeal and Error.*—Fraud in the procurment of a release, relied upon as a defense in an action to recover damages for a personal injury, must have induced the execution of the release, or it will be harmless, and insufficient to invalidate it. *Ibid.*

12. *Evidence—Depositions—Exhibits, Detached—Proof.*—While it is customary, and the better practice, to attach to a deposition a paper-writing therein referred to, or, if there are more than one deposition, to attach it to one and identify it by reference in the others, and in

EVIDENCE—*Continued.*

case the writing is a matter of record or in the custody of the court, over which the parties have no control, to attach an exemplified copy, it is not required by our statute that the writing be so attached, and when this has not been done, the fact of identity may be proved as any other fact in evidence. *In re Clodfelter's Will*, 518.

13. *Same—Wills.*—Depositions were taken in proceedings to caveat a will, referring to a paper-writing which was not attached. *Held*, competent for the commissioner to identify the paper-writing as a part of the deposition. *Ibid.*

14. *Evidence—Compromise—Denials.*—In an action to caveat a will a caveator, a witness in his own behalf, testified that the propounder and devisee had acknowledged that the writing set up as a valid will was not genuine, and offered to compromise the matter. *Held*, competent for the propounder to deny this statement and testify to the full conversation he had had with the caveator relating to the subject-matter, and say that the offer to compromise came from the caveator. *Ibid.*

15. *Evidence—Nonsuit.*—The rule being that upon defendant's motion to nonsuit the evidence will be regarded in the light most favorable to the plaintiff, where there is sufficient evidence, though conflicting, to sustain his contention the motion will be denied without considering the evidence of the defendant in his own favor. *Cone v. Fruit Growers Assn.*, 530.

16. *Evidence—Demurrer—Trials—Nonsuit.*—In an action to recover damages for the breach of a contract, there was evidence tending to show that the plaintiff purchased certain lands from defendant, giving mortgage to secure balance of purchase price, sold certain interests to other parties, and finding that he could not pay the balance of the purchase price, the defendant agreed with the plaintiff to convey the land to another purchaser and repay the plaintiff the amount he had already paid, to wit, $100, less $2 which the plaintiff had received from the purchasers of his interest. There was evidence *per contra* by the same witness, and it is held that defendant's demurrer thereto was properly overruled. *Barnett v. Smith*, 535.

17. *Evidence—Witnesses—Medical Experts—Text-books—Appeal and Error.*—Where the plaintiff contends that he was suffering with locomotor ataxia as a result of an injury he alleged was negligently inflicted upon him by the defendant, and defendant's medical expert witnesses have testified that locomotor ataxia could not result from a wound or personal injury, the testimony of one of these witnesses, brought out on cross-examination, that certain authors in their works on the subject stated it could so result, is substantive testimony of the opinion of such authors introduced without their oath and without subjecting them to cross-examination, and is reversible error. *Tilghman v. R. R.*, 651.

18. *Same—Impeaching Evidence.*—While it is competent, under certain circumstances, to impeach the testimony of a medical expert witness by asking him, on cross-examination, whether text-books from which he informed himself had not given contrary opinion to his own, this does not apply where the witness has not referred to the text-books on his direct examination, and the context is brought out as substantive evidence and is not confined by the court to the purpose of impeachment. *Ibid.*

EVIDENCE—*Continued.*

19. *Trials—Evidence—Conjecture—Questions for Jury.*—Evidence, to be sufficient to justify the submission of an issue to the jury, must show more than a mere possibility of the alleged fact, or raise more than a mere conjecture. *Campbell v. Everhart*, 139 N. C., 516, cited and applied. *Campbell v. Power Co.*, 768.

20. *Evidence—Maps—Trials.*—A map may be used by a witness for the purpose of explaining his evidence, and upon a criminal trial for a willful burning of witness's stable and barn, it is held competent for the witness to use a map for the purpose of showing the relative position of his house and outbuildings and the home of the defendants, when relevant to the inquiry. *S. v. White*, 785.

21. *Evidence—Homicide—Bloodhounds—Corroboration.*—Where the testimony on a trial for a homicide tends to show a murder had been committed, and that a bloodhound had been put upon the well-guarded human tracks at the place, which thereby trailed the defendants and identified them, and that the dog was of pure blood, had been trained for such purpose, and the action of the bloodhound is corroborative of the competent dying declaration of the deceased that the defendants had killed him, it is competent, and the question as to whether the trail was properly followed is one for the jury. *S. v. Wiggins*, 813.

22. *Evidence—Mental Condition—Nonexperts.*—A person's mental condition may be shown by a nonexpert. *Patton v. Lumber Co.*, 837.

EXCEPTIONS. See Appeal and Error, 8, 19, 47.

EXCUSABLE NEGLECT. See Judgments, 10, 11, 15.

EXECUTION. See Deeds and Conveyances, 7, 9.

1. *Execution—Execution Against Person.*—An execution against the person can issue only when the facts alleged entitling the plaintiff thereto have been passed upon and entered into the judgment. *Doyle v. Bush*, 10.

2. *Execution—Execution Against Person—Statutes.*—Under Revisal 1905, sec. 625, providing that an execution may issue against the person if the action be one in which the defendant might have been arrested, and sec. 727, subsec. 1, providing that a defendant may be arrested when the action is for wrongfully taking, detaining, or converting personal property, where defendant cotenant of a race horse converted it by selling the horse while in his (defendant's) possession, such defendant was subject to execution against the person. *Ibid.*

EXECUTIVE. See Requisition, 1.

EXECUTORS AND ADMINISTRATORS. See Deeds and Conveyances, 16, 29.

EXHIBITS. See Evidence, 12.

EXPERTS. See Trials, 9.

EXPRESS. See Carriers of Goods, 10, 11.

EXPRESSION OF OPINION. See Corporations, 5; Negligence, 2.

FACTS ASSUMED. See Issues, 5.

FALSE IMPRISONMENT.

False Imprisonment—Punitive Damages—Trials—Evidence—Questions for Jury.—In an action to recover damages for arrest and false imprisonment, evidence tending to show that the several defendants, among them being the chief of police of the town and a constable of the township, arrested the plaintiff, a minor, without warrant, carried him through the streets and locked him in the guardhouse for several hours, and then released him without preferring a charge, is sufficient for the consideration of the jury upon the question of punitive damages. *Beam v. Fuller*, 770.

FALSE PRETENSE. See Criminal Law, 3, 5.

FALSE REPRESENTATIONS. See Marriage and Divorce, 1; Insurance, 10.

FELLOW-SERVANT ACT. See Contracts, 17; Master and Servant, 10.

FENCES. See Stock Law, 1.

FERTILIZERS.

Fertilizers—Inferior Quality—Damages to Crops—Contracts.—The rule of evidence laid down on the former appeal of this case, relating to damages to crops, etc., alleged to have been received because of the use of inferior fertilizer, is sustained on this rehearing, with suggestion that those in the fertilizer trade may protect themselves from the hazards in respect to the loss of crops by express provisions in their contracts of sale. See *s. c.*, 168, N. C., 507. *Carter v. McGill*, 775.

FIDUCIARIES. See Corporations, 11.

FINDINGS. See Appeal and Error, 8, 13; Judgments, 13.

FINES. See Pardon, 1.

FIRES. See Criminal Law, 1.

FISH AND OYSTERS.

Fish and Oysters—Unsafe Condition—Knowledge—Duty of Packer—Negligence—Evidence—Questions for Jury—Trials—Where the packer of salt fish puts this article of food on the market for sale in a dangerous condition, it is its duty to protect the public from the consequences thereof, when it should have known the danger from the circumstances or is afterwards informed thereof; and where the retail dealer has sold the plaintiff's intestate fish from a shipment from the packer, which had theretofore made its customers in several localities sick, resulting in the death of one of them, of which the packer had been informed, and there is further evidence that there was a delay by the defendant in cleaning and packing the fish for thirty-six hours after they were placed on the wharf in the month of September, and that except for the unreasonable delay of the defendant (packer), in notifying the retailer by telegram or otherwise, the intestate's death might not have resulted, the defendant is liable for negligence. *Ward v. Sea-Food Co.*, 33.

FISHING. See Navigable Waters, 1.

FIXTURES. See Mortgages, 2.

Fixtures, Trade—Landlord and Tenant—Leases—Liens.—Where a written lease of lands permits the lessee to erect poultry houses and inside poultry fences thereon, and to remove the same at the expiration of the lease, the lease is not restrictive, but in recognition of the lessee's right to remove the designated improvements as trade fixtures, whether put thereon and removed by the lessee, his sub-lessee, or by one with his approval or under his direction; and an order restraining to the hearing the removal of such fixtures before the expiration of the lease is improvidently granted. *Stamps v. Cooley*, 91 N. C., 316, where a lien is given by the contract of lease, cited and distinguished. *Causey v. Orton*, 375.

FORECLOSURE. See Mortgages, 4.

FORFEITURES. See Intoxicating Liquors, 1.

FORMER CONVICTION. See Criminal Law, 9.

FORNICATION AND ADULTERY.

1. *Fornication and Adultery—Trials—Evidence—Questions for Jury.*—The evidence upon this trial for fornication and adultery, among other things, as to the relation of the man to his codefendant, his conduct with reference to her, his frequent visits to her house, day and night, etc., is sufficient to sustain a conviction. *S. v. Morse*, 777.
2. *Fornication and Adultery—Evidence—Character—Instruction—Trials—Appeal and Error.*—A defendant upon trial for a crime has the right to offer evidence of his general good character and have it considered by the jury as substantive evidence, and it is reversible error for the trial judge to refuse a requested prayer for instruction to that effect upon such evidence. *Ibid.*

FRATERNAL ORDERS. See Insurance, 1, 5, 6.

FRATERNAL SOCIETIES. See Removal of Causes, 1.

FRAUD. See Contracts, 1, 18; Deeds and Conveyances, 9, 51; Pleadings, 5; Reformation of Instruments, 1; Instructions, 3, 4; Corporations, 13; Trials, 5; Evidence, 10, 11; Appeal and Error, 32; Liens, 1; Vendor and Purchaser, 11.

FREIGHT TRAINS. See Carriers of Passengers, 13, 14.

FUTURES. See Contracts, 5; Judgments, 12.

GRANTS. See Navigable Waters, 1.

GUARANTY. See Corporations, 14, 20.

HABEAS CORPUS. See Requisition, 1.

HARMLESS ERROR. See Instructions, 8; Insurance, 10.

HEARING. See Injunction, 3.

HEARSAY. See Evidence, 4, 5, 6.

HEIRS. See Deeds and Conveyances, 28.

HEIRS AT LAW. See Mortgages, 4.

HIGHWAYS.

Highways—Use by Public—Permissive Character—Burden of Proof.—In ejectment to recover land claimed by defendant town as a public way, where there was evidence that people had been in the habit of using the street, the burden was on plaintiff to show that such user was permissive. *White v. Edenton*, 21.

HOLOGRAPH WILLS. See Wills, 3, 18.

HOMESTEAD. See Limitation of Actions, 4.

HOMICIDE. See Witnesses, 2; Evidence, 21.

1. *Homicide—Indictment—Less Offense—Malice—Passion—Cooling Time—Manslaughter.*—Manslaughter is the unlawful killing of a human being without malice, and may occur in instances where the killing has been done by reason of sudden anger aroused by provocation which the law deems adequate and sufficient to displace malice, and committed so soon after the provocation that a sufficient time has not elapsed for passion to subside and reason return to the accused. *S. v. Merrick*, 788.

2. *Same—Trials—Matters of Law—Questions for Jury.*—Upon the trial for a homicide, the length of time after the provocation before the killing necessary to reduce the offense to manslaughter is a matter of law for the courts, and only the existence or nonexistence of the facts controlling its application in a given case is for the jury. *Ibid.*

3. *Homicide—Manslaughter—Evidence—Instructions—Appeal and Error—Statutes.*—Upon a trial for murder a verdict for a less grade of crime is permitted, and where the indictment is for murder, and there are facts in evidence tending to reduce the crime to manslaughter, it is reversible error for the trial judge not to submit this phase to the jury, under a proper charge, though not requested by the defendant to do so, and although he has offered to submit to a verdict of murder in the second degree, which has been refused. Revisal, sec. 535. *Ibid.*

4. *Homicide—Manslaughter—Evidence.*—Upon this trial for a homicide there was evidence tending to show that the prisoner, a lad, was sitting in a "coca-cola plant," with the permission of the proprietors, which was divided midway by a partition with a communicating door, when the deceased, a fine specimen of physical manhood, and an employee, came in, commenced an altercation over a hitching rein, shoved the defendant from a box on which he was sitting and struck him twice; that defendant ran into the back room, returned for his hat, and again returned with a gun he had borrowed to shoot birds with, loaded with No. 6 shot, then cursed the deceased and shot and killed him. There was testimony that the defendant returned with the gun "in no time," and again, from one to two or three minutes, the witnesses not being definite in their statements. *Held*, evidence sufficient to be submitted to the jury upon the question of the offense of manslaughter. *Ibid.*

5. *Homicide—Submission—Manslaughter—Verdict—Appeal and Error.*—Upon a trial for a homicide, the accused offered to submit to a verdict of murder in the second degree, which was refused, and thereafter evidence was developed which tended to reduce the grade of the offense to manslaughter. This phase of the case was not submitted by

HOMICIDE—*Continued.*

the judge to the jury, which rendered a verdict of guilty of murder in the first degree. *Held*, the error of the court was not cured by the verdict, and was reversible error. *Ibid.*

6. *Homicide—Identification—Evidence—Corpus Delecti.*—Where upon the trial for murder there is sufficient evidence that it was committed at a certain place on a country road about 7:20 a. m. of a certain day, and the defense is failure of identification, testimony offered on behalf of the defendants that two other men were seen at the place the evening before, without direct evidence connecting them with the *corpus delecti*, is inadmissible. *S. v. Wiggins*, 813.

7. *Homicide—Evidence—Impeachment—Accusation.*—A question asked a State's witness, on cross-examination, for the purpose of impeachment, if he had not been accused of stealing a hog from a certain person, and not whether he had been convicted thereof, is foreign to the issue, and properly excluded. *Ibid.*

8. *Homicide—Evidence—Dying Declarations.*—Where upon a trial for a homicide there is evidence that the deceased was shot at 7:20 a. m. and when found stated there was no use for a doctor, for he would die, and identified the prisoner, then coming up, as the man who had shot him, and it appears that he died from the wound the evening of the same day, the declarations of the deceased are competent as dying declarations. *Ibid.*

9. *Homicide—Identification—Verdict—Instructions—Degrees of Murder—Statutes.*—Where there is evidence that a murder in the first degree has been committed, and the prisoner on trial relies only upon proving an alibi as his defense, the verdict will be considered in connection with the charge of the court, and where the court has properly instructed the jury to find the prisoner guilty either of murder in the first degree or not guilty, a verdict of guilty necessarily fixes the offense as in the first degree, and is a sufficient compliance with the statute, Revisal, sec. 3271. *Ibid.*

HUSBAND AND WIFE. See Deeds and Conveyances, 56; Trusts, 4; Mortgages, 4.

Husband and Wife—Wedlock—Children—Legitimacy—Presumption—Evidence—Rebuttal.—The law presumes the legitimacy of a child born in lawful wedlock, though within a short period of time after marriage; but the presumption may be rebutted by facts and circumstances which show that the husband could not have been the father of the child, such as impotency or that he could not have had access to his wife. *West v. Redmond*, 742.

IDENTIFICATION. See Homicde, 6, 9.

IMPEACHMENT. See Homicide, 7.

IMPLICATION. See Statutes, 11.

IMPOUNDING. See Municipal Corporations, 3.

IMPROVEMENTS. See Vendor and Purchaser, 6.

INDEMNITY. See Contracts, 4.

INDEPENDENT CONTRACTORS. See Master and Servant, 8; Contracts, 13, 15, 16; Negligence, 6.

INDICTMENT. See County Commissioners, 1, 2; Homicide, 1; Intoxicating Liquors, 9, 10; Criminal Law, 5, 6.

Indictment—Intoxicating Liquors—Persons Unknown.—A charge in a bill of indictment for violating chapter 97, sec. 1. Laws 1915, that the defendant brought into the State intoxicating liquors in a quantity or quantities greater than one quart, etc., "for the purpose of delivery to persons whose names are to the jurors unknown" is not rendered insufficient because the names of the persons, to whom liquor was charged to have been delivered, were unknown to the jurors or not specified in the bill. *S. v. Little*, 805.

INDORSERS. See Corporations, 10.

INFANTS. See Parties, 78.

Infants—Emancipation, What Constitutes.—That a child is allowed to live away from his parents and receive his wages for work, and pays his expenses therefrom, does not constitute an emancipation, in the absence of a manifest intention of the parent to release his authority and control. *Daniel v. R. R.*, 23.

IN FORMA PAUPERIS. See Appeal and Error, 39.

INJUNCTION. See Usury, 2, 3; Municipal Corporations, 9; Drainage Districts, 1.

1. *Injunction—Municipal Corporations—Cities and Towns—Sewerage—Obstruction—Nuisance—Equity.*—The remedy of a town against the owner of a lot obstructing its drainage ditch where it crosses a portion thereof may either be by indictment or a suit to enjoin its continued obstruction, without recourse to the former remedy. *Roper v. Leary*, 35.

2. *Injunction—Mortgages—Foreclosure—Nonsuit—New Action.*—Where a mortgagee brings suit to foreclose his mortgage he has the right to take a voluntary nonsuit; and where this is done without exception, and the defendant in that suit brings suit to obtain a perpetual injunction against the foreclosure for alleged usury, and foreclosure is not asked by the defendant in the present suit, the defendant may not be regarded as seeking the aid of the court by legal proceedings to foreclose and have his rights adjusted, as in continuation of the former action. *Corey v. Hooker*, 229.

3. *Injunction, Perpetual—Final Hearing—Questions for Jury—Findings by Court—Appeal and Error.*—At the final hearing of a suit to obtain a perpetual injunction the jury alone are to pass upon the issues of fact presented by the pleadings and evidence; and where the trial judge makes further findings upon the evidence than contained in or embraced by the issues answered by the jury, they will be disregarded on appeal, and a clause in the judgment reserving to the appellant the right to have recalled or reviewed "this perpetual injunction" does not relieve the error. *Power Co. v. Power Co.*, 248.

INNOCENT PARTIES. See Intoxicating Liquors, 2.

INQUIRY. See Instructions, 10.

INSPECTION. See Carriers of Goods, 3, 6; Contracts, 16.

INSOLVENCY. See Corporations, 11.

INSTRUCTIONS. See Appeal and Error, 3, 6, 33; Carriers of Goods, 2; Deeds and Conveyances, 8, 22; Carriers of Passengers, 10, 14; Corporations, 5; Negligence, 1, 2; Trials, 3, 5; Courts, 3; Railroads, 10, 17; Issues, 4; Master and Servant, 7; Partitions, 1; Damages, 3; Contracts, 16; Liens, 2; Equity, 7; Fornication and Adultery, 2; Seduction, 1; Criminal Law, 1; Homicide, 3, 9; Witnesses, 2; Commerce, 4.

1. *Instructions, Improper—Appeal and Error.*—Objection to the charge in this case that it was unjudicial, prejudicial to the appellant's rights, and, in effect, coerced the jury to find adversely to him, is without merit, it appearing further that the judge may properly have charged the jury to find adversely to the appellant upon the evidence, if they should believe it. *Roper v. Leary*, 35.

2. *Instructions—Railroads—Easements—Rights of Way—Appeal and Error.*—Where a railroad company seeks to enjoin the interference of the defendant with the conduct of its business, raising the question of plaintiff's abandonment of its right of way under the terms of its deed, it is reversible error for the trial judge to instruct the jury that the company could have acquired but one right of way under its deed, and that the law presumed that it acted thereunder, there being no evidence to the contrary, when such instruction leaves out of consideration the evidence that while the plaintiff had changed its main line of road, it was still using the *locus in quo* for its legitimate railroad purposes, and had a right to acquire other lands for the purpose of its main line. *R. R. v. McGuire*, 277.

3. *Instructions—Erroneous in Part—Construed—Bills and Notes—Fraud—Appeal and Error.*—The correctness of a charge by the judge to the jury, free from objection as a whole, is not affected by the fact that a portion thereof, separately considered, is erroneous; and where there is allegation and evidence that a note sued on has been procured by fraud, and the plaintiff is the holder by indorsement, and the judge in effect charges the jury that the burden was upon the plaintiff to prove that the instrument was complete and regular upon its face; that he became the holder before maturity without notice of the infirmity, in good faith for value; that the instrument was in fact regular upon its face, etc., the instruction will not be held as erroneous because a detached portion thereof seemed to put the burden upon the defendant. *Cochran v. Smith*, 369.

4. *Instructions—Requested Prayers—Bills and Notes—Fraud—Evidence.*—In an action upon a note by an indorsee, where fraud in its procurement is alleged, with evidence tending to support the allegation, it is not error for the trial judge to refuse to give special instructions correct in the abstract as to the circumstances and *bona fides* of plaintiff's purchase, the credibility of the evidence, etc., when such were substantially embodied in the general charge; and it is *Held*, the instructions asked in this case were not proper, there being no evidence that plaintiff purchased under such circumstances as would impliedly give him notice of the infirmity, it appearing from the evidence that he had no actual notice thereof. *Ibid.*

5. *Instructions—Erroneous in Part—Appeal and Error.*—Where a charge, construed as a whole, is correct, it will not be affected by the fact that a part thereof, taken disjointedly, is erroneous. *Holland v. Hartley*, 376.

INSTRUCTIONS—*Continued.*

6. *Instructions—Requested Prayers.*—When a requested instruction is substantially given in the general charge, without weakening its force, this is sufficient. *Coal Co. v. Fain*, 645.

7. *Same—Appeal and Error.*—When a charge by the court to the jury is correct, construed as a whole, apparent error in fragmentary parts thereof, taken disconnectedly, is not reversible error; and when a particular phase of the controversy has been omitted from the general charge, exception must have been taken upon the refusal of a proper prayer covering this phase before it will be considered on appeal. *Ibid.*

8. *Instructions Requested—General Charge—Appeal and Error—Harmless Error—Trials.*—An erroneous prayer for instruction asked by appellant, and substantially given by the judge in his general charge, is harmless error. *Novelty Co. v. Moore*, 703.

9. *Instructions—Remarks of Court—Appeal and Error—Trials.*—Where the trial judge remarks in his charge to the jury that he did not recall any evidence bearing upon a certain phase of the controversy, but they were the sole judges of what the witnesses said and must be guided by their own recollection, the defendant cannot be prejudiced thereby. *Ibid.*

10. *Instructions—Matters Relied on—Inquiry.*—Where the pleadings, evidence, and the issue tendered by the insurer to avoid payment of a life insurance policy for false representations present but one matter, it is not error for the trial judge, in his charge, to confine the consideration of the jury to it. *Ibid.*

INSTRUCTIONS REQUESTED. See Appeal and Error, 4.

INSURANCE. See Appeal and Error, 10, 11; Contracts, 1; Evidence, 2; Subrogation, 1; Contracts, 11.

1. *Insurance—Fraternal Orders—Suits Within Year—Valid Provisions—Statutes.*—Provisions of the constitution and by-laws of a fraternal order of insurance, that suits shall not be brought or maintained for any cause or claim arising out of the benefit certificate of a member unless within one year from the time the right of action accrues, are valid, and not contrary to Revisal, sec. 4809. *Faulk v. Mystic Circle*, 301.

2. *Same—Amendments—Policy Contracts.*—Where a certificate of membership in one insurance order is taken over and continued by another such order, with provision as to each that the holder shall be bound by any changes in the constitution and by-laws, and thereafter the order taking over the certificate amends its constitution and by-laws at a representative meeting so as to bar a suit or action unless brought within a year from the time the cause of action accrued, the amendment is valid and binding upon the holder of the certificate, though no such provision existed at the time he became a member of either order. *Ibid.*

3. *Insurance, Life — Death by Execution — Policy — Interpretation.* — Whether stated in a policy of life insurance sued on or not, the policy itself does not contemplate the risk of loss against the death of the insured administered by the law as the punishment for the commission of a capital felony, for such maturity thereof would be in consequence

INSURANCE—*Continued.*

of an act in contravention of sound principles of public policy as well as good morals. *Scarborough v. Ins. Co.*, 353.

4. *Same—Noncontestable Clause.*—The noncontestable clause in a policy of life insurance refers to the contract entered upon in accordance with its terms, and where the insured has been put to death under sentence of the law the insurer may plead this in defense of payment, notwithstanding the noncontestable clause. *Ibid.*

5. *Insurance—Fraternal Orders—Restricted Beneficiaries.*—A fraternal assessment benefit association having a representative form of government may, by its contract and constitution confine the beneficiaries to certain blood relatives, wife, affianced wife, persons dependent upon the member, etc., in conformity with the laws of the State wherein it has its head organization; and where such beneficiary sues upon a policy, claiming as the wife of the deceased member, and it appears that in fact the marriage was bigamous, she may not recover, though the certificate states she was his wife. *Applebaum v. Commercial Travelers*, 435.

6. *Same—Wife—Bigamy—Evidence—Questions of Law—Trials.*—Where the plaintiff seeks to recover upon a certificate issued by a fraternal assessment benefit association as the wife of the deceased, and it appears that the marriage ceremony was twice performed, but at a time when the deceased had a lawful living wife, and that under the valid terms of the certificate she could not otherwise recover as a beneficiary: *Held*, a recovery will be denied as a matter of law. *Ibid.*

7. *Insurance—Fraternal Orders—Restrictive Beneficiaries—"Dependents."*—Where a certificate of membership in a fraternal assessment benefit association confines the beneficiaries, among others, to a certain class of blood relations, to the wife and to "persons dependent upon the member," it means such persons as are legally dependent and of the same class *ejusdem generis* as the relationship already stated, and may not be extended to include one claiming as a wife, but in fact by a bigamous marriage. *Ibid.*

8. *Insurance, Fire—Policy Contract—Intent—Chattel Mortgages.*—Where a dealer in pianos insures all the pianos in his building not to exceed a stated amount, "whether rented, leased, loaned, or on installment," with provision that "in case a purchaser does not carry insurance the policy is extended to cover such piano," and one of these pianos is destroyed while in the possession of a purchaser under a contract reserving title in the vendor, amounting, in effect, to a mortgage or conditional sale, the relationship between the vendor and purchaser will be regarded as that of mortgagee and mortgagor: and the law, looking to the intent of the parties and not to the form of the policy contract, will construe it to cover the interest of the morgagee in the piano thus destroyed. *Ins. Co. v. Reid*, 513.

9. *Same—Mortgagor and Mortgagee—Insurable Interest—Subrogation—Mortgage.*—Either the mortgagee or the mortgagor may insure his separate interest in the mortgaged property for his own sole benefit; and where the former has done so at his own expense, without imposing any obligation on the mortgagor in that respect, and without reference to the latter's interest, he may collect the insurance to the extent it impairs the value of the mortgage security; and where the mortgagor has assumed the risk of loss or damage, under his contract

INSURANCE—*Continued.*

of purchase, the insurer, having paid the loss, is subrogated to the rights of the mortgagee; and a writing obtained by the insurer from the mortgagee to that effect, and assigning his interest to the insurer, is valid and enforcible. *Ibid.*

10. *Insurance, Life—False Representations—Verdict—Harmless Error.*—Where payment of a policy of life insurance is resisted on the ground that the applicant made false and material representations as to having a certain disease at the time, and the jury have found as a fact that applicant did not have the disease then, the inquiry as to whether she knew she had it becomes immaterial. *Parrish v. Ins. Co.*, 757.

11. *Insurance Laws—Criminal Law—Investment Companies—License—Statutes.*—A company organized in another State and having agents here for the purpose of selling small lots of land upon a certain cash payment, the balance payable in a term of years, with obligation on the part of the company to set out and cultivate figs thereon, with guarantee as to quantity of bushes thereon and price of figs at the end of the period, and to convey the land to the purchaser, or his heirs or assigns in the event of his death if the deferred payments are promptly met by him or them according to his obligations, falls within the intent and meaning of our statutes, Revisal, sec. 4805, and the amendatory acts of 1911 and 1913, being section 4805a, Gregory's Supplement, requiring that the company be licensed by the Insurance Commissioner when he is satisfied that the company is safe and solvent and has complied with the laws of this State applicable, etc. *S. v. Agey*, 831.

12. *Same—Police Powers—Commerce—Constitutional Law.*—Where a foreign corporation offers, through its agent here, small lots of land for sale, obligating itself to cultivate the lands under stated terms, and upon the full payment of the purchase price, in installments during a term of years, to make title to the purchaser, etc., the transaction cannot be regarded as commerce, or affected by the Constitution or Federal statutes regulating interstate commerce; and our statutes requiring that to do business here they be licensed are valid as a proper police regulation. Revisal, sec. 4805, amended by Laws 1911, 1913, being section 4805a, Gregory's Supplement. *Ibid.*

13. *Insurance—Courts—Judicial Notice—Criminal Law—Investment Companies.*—The Court, in this case, takes judicial notice that by the United States census Tatnall County, Georgia, is the largest county in that State, covering 1,100 square miles; that much land can be found in that section of comparatively small value, as also the services to be performed by the corporation, in comparison with the price to be paid for the land; and that from the facts in this case, refusal of the corporation to comply with the requirements of our statutes to obtain license makes the defendant, its agent, guilty of the offense charged. Revisal, sec. 4805, amended by Laws 1911 and 1913, Gregory's Supplement, sec. 4805a. *Ibid.*

INTENT. See Deeds and Conveyances, 5, 7; Estates, 2.

INTEREST. See Municipal Corporations, 6; Deeds and Conveyances, 10; Judgments, 9; County Commissioners, 3; Contracts, 8.

INTERPRETATION. See Wills, 4, 7.

INTERVENING CAUSE. See Railroads, 11.

INTOXICATION LIQUORS. See Attorneys, 2; Indictments, 1.

1. *Intoxicating Liquors—Forfeitures—Police Powers—Courts.*—Chapter 197, Public Laws 1915, requiring the police officer to take into his possession and keep any vessel, carriage, automobile, etc., used in conveying, concealing, etc., spiritous liquors, etc., and keep the same until the innocence or guilt of the defendant has been determined, and upon conviction of a violation of the prohibition law, the "defendant shall lose all right, title, and interest in the property so seized," is a valid exercise of the police power of the State, which is left largely to the discretion of the lawmaking body; and the authority of the courts cannot be invoked unless there is an unnecessary interference with the rights of the citizen, or when there is no reasonable relation between the statute enacted and the end or purpose sought to be accomplished. *Skinner v. Thomas*, 98.

2. *Same—Mortgages—Innocent Parties.*—Statutes providing for forfeitures should be strictly construed and not extended beyond the meaning of the words employed; and chapter 197, Public Laws 1915, providing for a forfeiture of carriages, automobiles, etc., used in conveying or concealing intoxicating liquors in violation of our prohibition law, etc., by its express terms has reference to the right, title, and interest of the person so using them in violation of the law, and does not extend to that of a mortgagee of a conveyance who is an innocent party and in no wise connected with the offense charged. *Ibid.*

3. *Same—Interpretation of Statutes.*—The construction of the first section of chapter 197, Public Laws 1915, providing for a forfeiture of the vehicle wherein intoxicating liquors are conveyed or concealed, under the conditions named, that the forfeiture does not apply to the mortgagee of the vehicle who is a party innocent of the offense, is not varied by the provisions of section 2, as to the sale of the property seized when no person is arrested, or those of section 3, regarding the distribution of the proceeds of the sale. *Ibid.*

4. *Intoxicating Liquors—Vendor and Purchaser—Action for Purchase Price—Public Policy.*—A nonresident seller of intoxicating liquor who made the sale knowing that the liquor was to be received here and sold in violation of our prohibition law cannot recover the purchase price in the courts of this State. *Pfeifer v. Drug Co.*, 214.

5. *Intoxicating Liquors—Revenue License—Effect.*—A license from the United States Internal Revenue Department is no protection to one violating our prohibition law. It is only a receipt showing that defendant has paid the taxes to the Federal Government. *Ibid.*

6. *Intoxicating Liquors—Sheriff's License—Interpretation of Statutes.*—A license from the sheriff to sell intoxicating liquors does not authorize the delivery thereof for the purpose of sale when it does not comply with the requirements of Revisal, secs. 2063, 2064, and 2066, and such license is therefore void. *Ibid.*

7. *Intoxicating Liquor—Evidence.*—Where the evidence on the trial for violating our prohibition law is sufficient for conviction, testimony of a witness that he had on two former occasions found bags of empty jugs, etc., in a woods back of the defendant's dwelling and some whiskey in the defendant's pantry, will be received as a pregnant

INTOXICATING LIQUORS—*Continued.*

circumstance, though in itself it may be insufficient to convict. *S. v. Turner*, 803.

8. *Intoxicating Liquors—Statutes—Constitutional Law.*—Chaper 97, Laws 1915, sec. 1, prohibiting the transportation of intoxicating liquors into North Caroina, except as therein stated, in connection with the Webb-Kenyon Law, is a constitutional and valid enactment. *S. v. Little*, 805.

9. *Intoxicating Liquors—Statutes—Two Offenses—Indictment—Conviction.*—Chapter 97, Laws 1915, sec. 1, creates two offenses: the carrying or transporting into the State for any person, etc., more than one quart of spirituous liquor; in one package or at one and the same time, and transporting any quantity where the liquor for such person is contained in more than one receptacle; and for a conviction of both of these offenses it is necessary that each one be charged in the indictment. *Ibid.*

10. *Intoxicating Liquors—Statutes—Indictment—Evidence—Verdict, Directing—Courts.*—Where a person is charged with violating chapter 97, sec. 1, Laws 1915, in carrying into this State spirituous liquor for delivery to others in quantities greater than one quart, and it is shown that he had bought four quarts of whiskey in South Carolina and brought them into this State, one quart for himself and one quart each for the other parties: *Held*, the offense charged in the bill is not proven, and the trial court should direct a verdict of not guilty. *Ibid.*

INVESTMENT COMPANIES. See Insurance, 11, 13.

INVITATION IMPLIED. See Railroads, 14.

IRREGULARITIES. See Courts, 1.

"ISSUE." See Wills, 12.

ISSUES. See Pleadings, 1, 7; Railroads, 1; Trials, 2; Public Sales, 1; Corporations, 7, 12, 13; Courts, 7; Appeal and Error, 33; Equity, 1; Judgments, 19, 27; Receivers, 1; Conflict of Laws, 1.

1. *Issues—Verdict, Directing—General New Trial—Appeal and Error—Court's Discretion.*—In an action to recover from a railroad company for damages to plaintiff's crop and lands, alleged to have been caused by the negligence of the defendant in failing to keep its culverts under its roadbed open, the trial judge erroneously instructed the jury to answer the issue as to whether the crops had been injured, "Yes," and owing to the connection between this and the other issues, the Supreme Court grants a general new trial, as a matter within its discretion. *Perry v. R. R.*, 38.

2. *Issues—Form—Appeal and Error.*—Issues which submit to the jury all the essential matters or determinative facts in the controversy are held sufficient, the form of the issues being of little or no consequence, as they afford each party a fair chance to present his contention in the case, so far as it is pertinent. *Power Co. v. Power Co.*, 248.

3. *Issues—Negligence—Wantonness—Pleadings—Evidence—Trials.*—In an action against a railroad to recover damages for a personal injury, where there is no allegation or evidence that the act complained of was wantonly done, it is erroneous, to defendant's prejudice, for the

ISSUES—*Continued.*

trial judge to submit an issue as to whether the plaintiff was injured by the defendant's wanton negligence. *Henderson v. R. R.*, 397.

4. *Same—Instructions—Appeal and Error—Harmless Error.*—In an action for damages alleged to have been caused by the defendant's negligence, where there is sufficient evidence of the negligence complained of, the submission of an improper issue as to the defendant's "wanton" negligence places upon the plaintiff an additional burden to show that the act was wanton; and where the trial judge has properly instructed the jury that the plaintiff was only entitled to recover his actual damages, the error is harmless so far as the defendant is concerned. *Ibid.*

5. *Issues—Facts Assumed.*—An issue tendered which assumes the existence of a disputed fact is improper. *Brown v. Harding*, 685.

6. *Issues—Bailment—Gratuitous Bailee—Principal and Agent—Negligence—Veterinary Surgeons.*—Where, at the request of the owner of a mule, the keeper of a stable selects a veterinary surgeon skillful and capable, who operated upon the mule in a stall in the stable, and there is evidence that the mule was injured while being operated upon, by not being properly confined, receiving injury to its back from the top bar, the two lower bars not having been left in place, and the evidence is conflicting as to whether the stable owner received compensation or generally employed the surgeon for profit: *Held*, in an action against the stable keeper and the surgeon, issues relating to the negligence of the defendant stable keeper and as to whether the injury was caused by the surgeon are not determinative of the controversy as to the former; for while there is evidence that the surgeon was negligent, the liability of the stable keeper depends upon whether he was a gratuitous bailee, or employed the surgeon for profit to act as his agent. *Beck v. Henkle*, 698.

JAILS. See County Commissioners, 2, 3.

JUDGMENTS. See Appeal and Error, 13, 18, 26, 35, 45; Deeds and Conveyances, 4; Navigable Waters, 2; Public Sales, 1; Actions, 1; Judicial Sales, 1; Equity, 6; Criminal Law, 6.

1. *Judgment—Estoppel—Former Record.*—The rule under the common-law system that pleas of estoppel by judgment be determined by the inspection of the record alone has been modified under the modern system of pleading where records are somewhat vague and uncertain, but not to the extent of destroying the integrity and conclusiveness of the judgment as to the matters that do appear on the record. *Cropsey v. Markham*, 43.

2. *Same—Parol Evidence—Trials.*—Upon plea of estoppel by former judgment, parol evidence is only permissible in aid of the record when the record is uncertain and does not clearly show the matters adjudicated, and not for the purpose of contradicting it; and the judgment estops as to all issuable matters contained in the pleadings. *Ibid.*

3. *Same—Account—Bill of Particulars.*—Upon the plea of estoppel by the former judgment in an action upon an account for services rendered it appeared that in the former action the defendant asked for a bill of particulars which was furnished by the plaintiff, and included therein the item sued for in the present action: *Held*, that parol evidence in the present action was incompetent to contradict the record

JUDGMENTS—*Continued.*

in the former one, and the judgment therein operated as an estoppel. *Ibid.*

4. *Judgment—Parites—Void Judgment.*—A judgment in an action affecting the vested rights of a citizen, to which he is not a party, is void, and may be treated by him as a nullity whenever it is brought to the attention of the court. *Johnson v. Whilden*, 153.

5. *Same—Record—Collateral Attack.*—While ordinarily a judgment reciting the jurisdiction of the court, or an adjudication of proper sevice, may not be collaterally impeached, the judgment should be construed in connection with the record in the action and with reference to it, and where therein is disclosed the precise and only method by which the jurisdiction is attempted, and such method conclusively shows that no service was had, the principle that the judgment is conclusive unless and until set aside in direct proceedings does not obtain. *Ibid.*

6. *Judgments—Estoppel—Venue—Collateral Notes—Mortgages on Lands—Foreclosure.*—Where under a decree of court a collateral note secured by a mortgage on lands is sold, the lands situated in a different county from that of the venue of the action, the defendant will be precluded from setting up defenses to the note, such as payment and the like, but not from pleading, in the suit to foreclose the mortgage, any proper defense peculiar to the mortgage itself, such as a denial of its validity, fraud in its execution, or lack of privy examination of the wife, etc. *Warren v. Herrington*, 165.

7. *Judgments—Subsequent Terms of Court—Verdict—Effect—Statutes.*—Where a verdict is rendered and entered on the last day of the term, it is proper for the trial judge at the next term to render judgment thereon; but while as between the parties the judgment is entered *nunc pro tunc* as of the former term, as to judgments of third parties it can only be a lien from the docketing, effective, by provision of the statute, from the first day of the term thereof. *Pfeifer v. Drug Co.*, 214.

8. *Judgments—Verdicts—Vendor and Purchaser—Contracts—Warranty—Breach—Damages.*—Where the verdict of the jury upon the issues has established the breach of warranty sued on, and has assessed the amount of the plaintiff's damages, the judgment rendered must be in accordance therewith; and a judgment which requires the defendant to give up a note he has received for the purchase price, and the plaintiff to give up his possession of the horse to defendant, is erroneous. *Winn v. Finch*, 272.

9. *Judgments—Verdict—Interest—Appeal and Error.*—The judgment in an action must correspond with the verdict, and where in condemnation proceedings tried in the Superior Court on appeal the jury have in their verdict ascertained the damages to the owner of the land, the verdict will be presumed to include the element of interest, nothing else appearing, and it is reversible error for the trial judge to allow interest from the time the damages were determined upon by the appraisers and render judgment accordingly. Revisal, sec. 1954, providing for the payment of interest on moneys due by contract, etc., has no application. *Durham v. Davis*, 305.

10. *Judgment—Default—Excusable Neglect—Appeal and Error.*—Where it appears on a motion to set aside a judgment rendered by default

JUDGMENTS—*Continued.*

that the defendant immediately upon the institution of the action employed local attorneys to represent him, who diligently made inquiry and examined the court papers frequently to get the complaint to answer it, but could not find it; that the complaint had never been found, and at last they found the judgment in the court papers, and had to get the notes of the plaintiff's stenographer in order to draft the answer, it is *Held*, that no neglect has been committed, and the action of the trial judge in setting aside the judgment was proper. As to whether a meritorious defense has been shown in this case, *quære*. *Walters v. Walters*, 312.

11. *Judgments—Excusable Neglect.*—A motion by defendant to set aside a judgment rendered by default of an answer, for inadvertence, surprise, mistake, and excusable neglect, will be denied when it appears that the cause was regularly set on the calendar which was advertised, and the judgment rendered at a term of court held after several terms thereof had passed wherein the answer should have been filed. *Randolph v. Heath*, 383.

12. *Same—Void Judgments—Futures.*—A judgment rendered by default of an answer upon notes regular and valid upon their face, but growing out of transactions in cotton futures made void by our statute, which also declares that actions thereon may not be maintained in the courts of our State, will be set aside as utterly void, irrespective of whether it was obtained through excusable neglect, etc. *Ibid.*

13. *Same—Appeal and Error—Findings—Procedure—New Actions.*—Upon motion to set aside a judgment regularly rendered, when it is found as a fact by the trial judge that it was obtained upon notes given in transactions relating to cotton futures, prohibited by our statute (Gregory's Supplment, sec. 1689), the Supreme Court, on appeal, will order the judgment set aside for want of power in the court to render it, and as absolutely invalid, and leave the plaintiff to establish the fact in another action, if he can, that the notes were valid and not arising from the transactions prohibited. *Ibid.*

14. *Judgments, Set Aside—Meritorious Defense.*—Upon a motion to set aside a judgment for excusable neglect, etc., it is only necessary to *prima facie* show a good defense, which is sufficient when it appears that the plaintiff had intervened in an action in another State for the purpose of attaching the debt therein alleged to be due by the defendant, resulting in a judgment which defendant paid into court, and was released from further liability, and thereafter, without further notice, judgment was taken against him. *Schiele v. Ins. Co.*, 426.

15. *Same—Excusable Neglect.*—Where a judgment has been obtained upon a judgment which had been rendered in another State, and upon motion made to set it aside for excusable neglect it appears that plaintiff's attorneys had been informed by the defendant's attorneys that the judgment had been paid, the action was commenced twenty months afterwards, and eight months later the complaint was filed; that after several subsequent terms of the court the plaintiff's attorney indicating he would not set the case for trial, while the bar was setting the calendar for the term, but notified the clerk of the defendant's attorneys he would insist on judgment that day unless answer was filed, was informed by the clerk that he could not communicate with defendant's attorneys and advised plaintiff's attorney to

JUDGMENTS—*Continued.*

do so, which they did not do, this being Wednesday of the third week of the term, on which the judge finished up the business of the court, including signing the said judgment, but left the term to expire by limitation at the end of the week, in which remaining time the defendant filed an answer setting up a meritorious defense: *Held*, excusable neglect is shown, and the action of the trial judge in setting aside the judgment is sustained on appeal. *Ibid.*

16. *Same—Attorney and Client—Laches.*—Where a defendant has employed local attorneys to represent him, and made them aware of his defense to the action, so that there is nothing more for him to do personally to put the action at issue, the neglect of his attorneys in not filing an answer, nothing else appearing, will not be attributable to him; and when he has shown a meritorious defense, the judgment should be set aside without regard to whether his attorneys are solvent. *Ibid.*

17. *Judgments, Vacated—Motions—Notice—Procedure.*—Where under a judgment of court lands have been sold to enforce a lien thereon for taxes and conveyances thereof made to the purchaser, upon motion of the owner of the lands, an order vacating the sale and setting aside his deed without notice to such purchaser is void as to him, and he should properly be notified and the matter thereafter regularly proceeded with under the motion theretofore made. *Comrs. v. Scales*, 523.

18. *Judgments—Mortgages—Payment—Appeal and Error.*—In an action to foreclose a real estate mortgage to secure a note for $300 it appeared that defendant owed other notes secured by chattel mortgage, and it was admitted that on them all the defendant had paid in various sums the amount of $655. Upon proper issues the jury ascertained that half of the amount of the payments should have been applied to the note secured by the real estate mortgage. *Held*, a judgment against defendant for any amount due on the land mortgage was erroneous, and it is set aside on appeal. Judgment is entered that the note has been paid, and taxing plaintiff with costs. *Nance v. Atkins*, 542.

19. *Judgments—Chambers—Issues of Fact—Agreement of Parties.*—A judgment rendered by the court, without a jury, upon issuable facts raised by the pleadings, in the absence of consent of the parties, invades the province of the jury, and is not conclusive; but where such facts are found to be in favor of plaintiff appellant, in accordance with the allegation of the complaint, the objection is not open to him on appeal. *Cozad v. Johnson*, 636.

20. *Judgments, Irregular—Collateral Attack.*—Judgments appearing of record to have been obtained according to the course and practice of the court, with nothing on their face to show invalidity, will not on appeal be set aside or their liens destroyed for mere irregularity. *Brown v. Harding*, 685.

21. *Judgments—Clerk's Entries.*—The entry by the clerk of the court of the word "judgment" on his minutes of the court's proceedings is sufficient for him to make the formal entry of the judgment afterwards upon the record, by stating the amount of the judgment, or the principal, with the date from which interest runs, and the title of the cause, with the costs. *Ibid.*

JUDGMENTS—*Continued.*

22. *Judgments—Irregular Entries—Collateral Attack.*—Objection to the regularity in the entry of judgments by the clerk of the court should be made by motion in the pending proceedings in the county wherein they were had, and not in a separate action, in a different county in a collateral attack on the judgments. *Ibid.*

23. *Judgments—Rights of Parties—Collateral Attack.*—The question as to whether a party to an action may recover under a judgment therein rendered in his favor cannot be raised collaterally in an independent action upon the ground of its irregularity or informality. *Ibid.*

24. *Judgments—Judgment Rolls—Statutes.*—The provisions of Revisal, sec. 572, as to the judgment rolls are directory, though they should be complied with; and where a judgment is otherwise regular in form, it will not be declared invalid because the clerk had not attached the various papers relating thereto. *Ibid.*

25. *Judgments—Estoppel.*—Where judgments rendered in an action declare that the plaintiff is the beneficial owner of one and the sole owner of the other, they may not be collaterally attacked in a separate action by showing the plaintiff was not the owner, or that the relation of attorney and client had theretofore ceased on account of the death of the client. *Ibid.*

26. *Judgments—Payment—Parties.*—In this case, upon paying the amount of the judgment into court the judgment debtor is acquitted of liability thereunder, and he is not concerned with whether certain other parties to the action should have been made. *Ibid.*

27. *Judgments—Partnership—Surviving Partner—Issues.*—In this case it is held proper that an issue should be submitted to ascertain the surviving partners of a partnership alleged to be the beneficial owners of the judgments in question. *Ibid.*

JUDGMENT ROLLS. See Judgments, 24.

JUDICIAL NOTICE. See Insurance, 13.

JUDICIAL SALES.

Judicial Sales—Tax Liens—Foreclosure—Deed Vacated—Pleadings—Judgments—Sales.—Where a sale of lands has been ordered by the court, at the suit of the county, to satisfy a lien thereon for taxes, which has been made and the lands conveyed to the purchaser, and thereafter, on motion of the owner, the sale and the deed have been set aside, but not the order of sale, with leave given the movant to file an answer, it is error for the court at a subsequent term to effectuate the deed because the answer had not been filed in the time prescribed, for the answer would have been unavailing at the time in the face of the order for the sale of the property. *Comrs. v. Scales*, 523.

JURISDICTION. See Appeal and Error, 6; Deeds and Conveyances, 15; County Commissioners, 1; Courts, 6, 8, 12; Criminal Law, 7.

JURORS.

1. *Jurors—Employees—Qualification.*—An employee in the legal department of a corporation, a party to the suit, is not qualified to sit as a juror upon the trial. *Oliphant v. R. R.*, 303.

JURORS—*Continued.*

2. *Jurors—Peremptory Challenges—Qualifications—Prejudicial Error—Appeal and Error.*—Where a party to the litigation has exhausted his last peremptory challenge to a juror under the erroneous ruling of the court that the juror was qualified, and then attempts to challenge peremptorily another juror, which is forbidden by the court upon the ground that he had already exhausted his peremptory challenges, it constitutes reversible and not harmless error. *Ibid.*

3. *Jurors—Peremptory Challenges—Reasons—Prejudicial Error—Appeal and Error.*—A party litigant exercises his right to the peremptory challenges to the jury given him, without being required to state his reason; and where he has been denied this right to his prejudice by the erroneous ruling of the court as to the qualification of a juror, it cannot be maintained by the adversary party that his object was only to test the correctness of the ruling. *Ibid.*

JUSTICE'S COURT. See Criminal Law, 9.

JUSTICES OF THE PEACE. See Courts, 4.

LABORERS. See Liens, 2, 3.

LACHES. See Judgments, 16; Deeds and Conveyances, 49; Equity, 12.

LANDLORD AND TENANT. See Fixtures, 1.

LANDS. See Wills, 8.

LAST CLEAR CHANCE. See Railroads, 15.

LEASES. See Deeds and Conveyances, 14; Railroads, 9; Fixtures, 1.

LEGISLATIVE POWERS. See Municipal Corporations, 5; Taxation, 2.

LEGITIMACY. See Husband and Wife, 1.

LEVY. See Taxation, 1, 3; Actions, 4.

LICENSE. See Intoxicating Liquors, 5, 6; Insurance, 11.

LICENSED CHAUFFEURS. See Negligence, 5.

LICENSEE. See Negligence, 3.

LIENS. See Contracts, 4; Fixtures, 1; Appeal and Error, 35; Judicial Sales, 1; Deeds and Conveyances, 39; Trusts, 3; Corporations, 21.

1. *Liens—Mortgages—Priorities—Fraud—Prior Mortgages.*—The dominant owner and director in a corporation of three obtained its note and mortgage for a preëxisting debt, hypothecated them as collateral to his personal note with R. Bank, and thereafter with M. Bank, for previous loans made by it to the corporation, but subject to the lien of the R. Bank; and subsequently pledged the same security to the corporation's debt to J. Still later he procured the M. Bank to increase its loan to the corporation upon fraudulent representations that the R. Bank should be paid in full, and for this increased amount the corporation gave a direct mortgage on its property to the M. Bank, which thereupon canceled its prior notes: *Held*, the second transaction with the M. Bank did not invalidate its lien under the assigned mortgage, and the corporation having become insolvent,

LIENS—*Continued.*

the receiver should pay out the funds upon the following priorities: first, the debt to R. Bank; second, to the M. Bank to the extent of the amount of the lien under the assigned mortgage, and, third, the debt due to J. *Armour v. Laundry Co.*, 680.

2. *Liens—Laborers—Lumber—Statutes—Trials—Instructions.*—In an action to establish a laborer's lien upon manufactured lumber, under the provisions of chapter 150, sec. 6, Public Laws 1913, the plaintiff must show compliance with the various statutory requisites; and a charge as to notice that the jury should return a verdict for the plaintiff should they find that he attached "the notice to the lumber" on the defendant's yard, is deficient and erroneous in leaving out the question as to whether the defendant had been served with a copy of the claim within five days after filing the lien with the justice of the peace, or that he could not be found. *Bryson v. Lumber Co.*, 700.

3. *Liens—Laborers—Lumber—Statutes—Amount Due by Owner—Subcontractors.*—Where a laborer in the manufacture of lumber employs another laborer to assist him in his work, and the latter seeks to enforce the lien given by chapter 150, sec. 6, Laws 1913, for the value of the work he has done, it must be made to appear that the owner was due his own contractor, for the lien claimed can only be enforced to that extent, the object of the statute being to protect the laborer against any transfer of the lumber by the owner, who while indebted to his contractor, and insolvent, might otherwise pass the title to a *bona fide* purchaser for value, without notice of the lien. *Ibid.*

LIMITATION OF ACTIONS. See Tenants in Common, 1; Counties, 2; Negotiable Instruments, 1.

1. *Limitation of Actions—Railroads—Permanent Damages—Recurrent Damages.*—In an action for damages against a railroad company arising from alleged negligence with respect to its roadbed, it is *Held*, that for injuires arising from the original and permanent construction of the road, properly maintained, the five-year statute of limitation, Revisal, sec. 394, applies; but those arising from the negligent failure of the defendant to properly maintain the road, such as keeping open culverts and the like, actions may be brought from time to time for the three years preceding the institution of the action, as in ordinary cases of recurrent injury. *Perry v. R. R.*, 38.

2. *Limitations of Actions—Pleadings—Amendments—Court's Discretion.*—It is within the reasonable discretion of the trial judge to allow amendments to pleadings when their allegations are germane to the original action, involving substantially the same transaction and presenting no real departure from the demand as originally stated, and when allowed it shall have reference to the original institution of the action. *R. R. v. Dill*, 176.

3. *Same—Magistrates' Courts—Appeal—Carriers of Goods—Counterclaim.*—Where a carrier sues to recover its freight charges on a car-load of flour, before a justice of the peace, it is within the discretionary power of the Superior Court judge, on appeal, to permit the defendant to amend so as to allege damages, by way of counterclaim or offset, to the same shipment of flour, arising from the negligence of the carrier; and when allowed it will shut off the plaintiff's plea of the statute of limitations when the suit, as originally constituted, had been brought in the time specified. *Ibid.*

LIMITATION OF ACTIONS—*Continued.*

4. *Limitation of Actions—Homestead—Judgments—Statutes.*—The statute of presumptions (Rev. Code, ch. 65, sec. 18) has been changed by our statute, Revisal, sec. 391, to one of limitations. *Brown v. Harding*, 685.

5. *Same—Suspension of Statute.*—By its express terms, Revisal, sec. 686, providing that the statute of limitations should run from the date of the sale of a homestead, is not retroactive in effect; and has no application where the sale of the homestead had theretofore been made, except from the date of its enactment, and in such instance the statute of limitations will be suspended during the continuance of the homestead to the extent indicated. *Ibid.*

6. *Limitation of Actions—Effect of Limitation—What Law Governs.*—Since statutes of limitation affect the remedy and not the cause of an action, the statute of the place of the trial or *lex fori* governs. *Patton v. Lumber Co.*, 837.

LIMITATIONS. See Deeds and Conveyances, 33.

LIVE STOCK. See Carriers of Goods, 2, 3, 4, 5; Commerce, 1, 2.

LOANS. See Corporations, 10, 13.

LOOK AND LISTEN. See Railroads, 5, 15.

LUMBER. See Liens, 2, 3.

MAIL. See Deeds and Conveyances, 47, 50.

MALA GRAMMATICA. See Deeds and Conveyances, 42.

MALICE. See Homicide, 1.

MANSLAUGHTER. See Homicide, 1, 3, 4, 5.

MAPS. See Corporations, 7; Evidence, 20.

MARRIAGE. See Adultery, 1; Descent and Distribution, 1.

Marriage—Admissions—Evidence.—Where title to lands in controversy depends upon the legitimacy of a child born shortly after marriage, and the date of the marriage and the birth of the child are admitted, the questions as to the competency and legal effect of the record, and other evidence offered to prove them are immaterial. *West v. Redmond*, 742.

MARRIAGE AND DIVORCE.

Marriage and Divorce—Pregnancy—False Representations—Threats—Pleadings.—Allegations made in the complaint of the husband in a suit for divorce, that the defendant falsely represented herself with child of which he was the father, and through violence from her father and threats of criminal prosecution he had married the defendant, and that afterwards he found that she was not pregnant at the time, are not sufficient to sustain the action. *Bryant v. Bryant*, 746.

MASTER AND SERVANT. See Railroads, 10, 12.

1. *Master and Servant—Ordinary Tools—Negligence—Defective Tools—Knowledge—Safe Appliances.*—The rule which relieves the employer

MASTER AND SERVANT—*Continued.*

from liability for an injury resulting from the use of ordinary or simple tools to be used by his employee in the prosecution of his work does not obtain where the tools thus furnished are unfitted for the work and the defect is readily observable and likely to result in injury, which condition has been brought to the attention of the employer or should reasonably have been observed by him. *Wright v. Thompson*, 88.

2. *Same—Trials—Evidence—Questions for Jury—Nonsuit.*—In an action brought by an employee to recover damages for a personal injury there was evidence tending to show that the plaintiff was employed as a craneman for a dredging company, using a crane and dipper handle, at the end of which was a dipper made of iron and composed of several parts known as lips and ears, fastened together by bolts, which became loose in its operation and fell out; that to replace the bolts it was necessary to get the holes in the ears in line with those in the dipper, and a drive or drift pin was used, which were pieces of tapering steel of various lengths, required to be driven in the holes by a sledge hammer, having one man to supervise and another to do the driving; that the drift pin furnished was burred and battered at the end, and while being driven in by his coemployee under the plaintiff's supervision a piece of steel flew off from the burred end of the drift pin and caused the injury complained of, and that the condition of the drift pin had been called to the attention of the defendant's foreman or superintendent and also under circumstances wherein they should have known of the defects. *Held*, evidence sufficient of defendant's actionable negligence; and the question of assumption of risk was also a question for the jury. *Ibid.*

3. *Master and Servant—Safe Place to Work—Tower Elevators.*—An elevator 60 feet high used for the purpose of elevating and distributing concrete in the construction of a building, at the top of which a servant is required to work, requires the care and supervision of the master, under the principle that the master, in the exercise of ordinary care commensurate with the danger, should furnish his servant a safe place to do his work. *Yarborough v. Geer*, 334.

4. *Same—Trials—Evidence—Negligence.*—Where the evidence tends to show that a servant was required to work at the top of a 60-foot elevator used for the distribution of concrete in the erection of a building, and was injured by stepping on a loose plank, not properly nailed to the platform, and thrown to the first floor, and it appears that it had not been his duty either to aid in the construction of the platform or inspect it, and that he had gone there without knowledge of the defect, to work at the order of a vice-principal: *Held*, the servant had a right to assume that the place was safe, and the evidence is sufficient upon the issue of the master's actionable negligence. *Ibid.*

5. *Master and Servant—Dangerous Employment—Assumption of Risks—Master's Negligence.*—The rule that the servant assumes the risks incident to the nature of a dangerous employment has no application to injuries directly resulting from the negligence of the master in failing in his duty to furnish him a safe place to work, or that of another to whom the master had delegated this duty. *Ibid.*

6. *Master and Servant—Safe Place to Work—Duty of Master—Rule of the Prudent Man.*—The master is not held to the liability of an insurer

MASTER AND SERVANT—*Continued.*

or guarantor of his servant's safety under the rule that it is his duty to furnish the servant a safe place to do the work required of him, but only to exercise ordinary care to provide a place where the servant can do the work with reasonable safety. *Wooten v. Holleman*, 461.

7. *Same—Trials—Instructions.*—A requested instruction, in an action for damages for failure of the defendant to furnish his servant a safe place to work, alleged to have resulted in the injury complained of, that leaves out of consideration the negligence of the defendant under the rule of the prudent man, and makes his liability that of an insurer, is properly refused. *Ibid.*

8. *Same—Concurrent Negligence—Independent Contractors.*—The rule holding the master liable in damages to his servant when the negligence of both concur in inflicting the injury on the latter complained of, depends for its application upon the fact of the master's negligence, either directly or through his subcontractor, and a requested prayer for instruction tendered by the plaintiff which precludes this inquiry upon the evidence is properly refused. *Ibid.*

9. *Master and Servant—Injuries to Servant—Negligence—Method of Work.*—Defendant's mill sawed cross-ties, which were run out on rollers, from which they fell to a dock a few feet lower, and then dropped 12 or 18 feet to the ground below, where they were loaded on cars. Plaintiff, a foreman in charge of a loading gang, went to the dock to prevent the ties being thrown on his men while a train was being loaded, and asked one of the laborers if any more ties were coming out, and was informed that there would be no more for about thirty minutes. Plaintiff then motioned to his hands to load the ties onto the car, when another tie was rolled out of the mill, fell on the dock, struck plaintiff and seriously injured him. *Held*, that defendant was guilty of actionable negligence in failing to stop this movement of the ties while the car was being loaded. *Patton v. Lumber Co.*, 837.

10. *Master and Servant—Fellow-Servants—Negligence.*—The negligence of plaintiff's fellow-servant in informing him that no ties would come out of the mill for thirty minutes was not the cause of the injury, and was not material on the question of defendant's liability. *Ibid.*

MATTERS OF LAW. See Deeds and Conveyances, 6; Homicide, 2.

MECHANIC'S LIENS.

Mechanic's Liens—Municipal Corporations—Contractors' Bonds—Contracts.—Semble, ch. 150, Laws 1913, requiring municipal corporations to take bond from contractors for county buildings, is for the protection of the counties, and subcontractors and materialmen acquire no rights thereunder. *Fore v. Feimster*, 551.

MEDICAL EXPERTS. See Evidence, 17.

MENTAL ANGUISH. See Damages, 4.

MENTAL POWERS. See Damages, 2.

MERITORIOUS DEFENSE. See Judgments, 14.

MESSUAGE. See Wills, 8.

MILLING IN TRANSIT. See Vendor and Purchaser, 13.

MINORS. See Wills, 10.

MISAPPROPRIATION OF FUNDS. See Vendor and Purchaser, 10.

MISJOINDER. See Actions, 1; Parties, 2.

MISTAKE. See Equity, 1, 4, 8, 9.

MIXED TRAINS. See Carriers of Passengers, 15.

MORTGAGES. See Intoxicating Liquors, 2; Judgments, 6, 18; Removal of Causes, 2; Injunction, 2; Corporations, 9, 13; Conversion, 1; Principal and Surety, 1; Claim and Delivery, 1; Insurance, 8, 9; Liens, 1.

1. *Mortgages—Personalty—Registration—Statutes.*—Our statute, Revisal, sec. 982, requires that a mortgage of personal property be registered where the mortgagor resides, and where a mortgage on such property has been registered in the wrong county, and subsequently registered in the right one, but after a mortgage on the same property has been given to another and properly registered, the second mortgage has priority of lien over the first one, and no other notice, however full, will take the place of that of registration required by the statute. *Bank v. Cox*, 76.

2. *Same—Fixtures.*—Where there is nothing to show that a sawmill has been annexed to the land, and a mortgage and a conveyance to the owner thereof describes it as personal property, it will be so regarded, and in order to create a valid lien it must be registered in the county wherein the mortgagor resides; and a recital in the mortgage that it was located on or occupied lands in another county will not be construed in contradiction of the express words of the mortgage describing the property as personalty. *Ibid.*

3. *Mortgages—Conditional Sales—Priorities.*—A contract of conditional sale of personalty retaining title properly registered has a priority over liens by mortgage on corporation property subsequently made and registered. *Armour v. Laundry Co.*, 680.

4. *Mortgages—Foreclosure—Assignee of Mortgage—Purchaser—Heirs at Law, Deeds and Conveyances—Title—Husband and Wife—Curtesy.*—An assignee of a mortgage of lands who has taken part in the control and conduct of the foreclosure sale thereunder cannot acquire an unconditional title to the lands thus sold; and where the lands were owned by the deceased mother of the plaintiffs, her heirs at law, and she and her husband, their father, had executed the mortgage, and at the foreclosure the father, the tenant by the curtesy, became the purchaser and immediately conveyed the lands to the defendant, the assignee of the mortgage, who had taken part in the control and management of the sale, and there is no suggestion that the latter acquired the lands for value and without notice, the plaintiffs may maintain their suit against him for the foreclosure of the mortgage, and have the proceeds of the sale applied to the mortgage debt. *Morris v. Carroll*, 761.

MOTIONS. See Appeal and Error, 1, 34; Actions, 1; Courts, 4; Drainage Districts, 1; Judgments, 17; Parties, 2.

MOTION IN ARREST. See Criminal Law, 6.

MOTION TO DISMISS. See Appeal and Error, 30.

MUNICIPAL CORPORATIONS. See Injunction, 1; Railroads, 2, 3; Statutes, 5; Mechanic's Liens, 1.

1. *Municipal Corporations—Cities and Towns—Sewerage—Prescriptive Rights—Purchaser and Notice.*—Where a well settled community has been in existence for more than thirty years, using a ditch for drainage at a certain place, and then is incorporated into a town and thereafter a purchaser of a lot within the town limits, across which the ditch runs, has been given notice, at the time of his purchase, of the purposes for which the ditch was used by the town, and that it would remain open as it then existed: *Held*, those using the ditch acquired a prescriptive right to do so, of which the purchaser of the lot had full notice; and in a suit by the town to enjoin its obstruction the defendant's motion to nonsuit on the ground that it was the taking of his property without just compensation was properly overruled. *Roper v. Leary*, 35.

2. *Municipal Corporations—Cities and Towns—Animals at Large—Ordinances—Nuisance.*—An ordinance of a town in a county not having the fence law declared the running at large of hogs, etc., within the town limits a nuisance, and provided for impounding them, and imposed a penalty upon the owner, together with a charge for the cost of keeping them. *Held*, the ordinance applied to owners who resided in the county as well as those residing in the town, and is a valid one. *Owen v. Williamston*, 57.

3. *Same—Charge for Impounding—Statutes.*—A town ordinance in a county not having the fence law declared the running at large of hogs, etc., within the town limits a nuisance, and provided for impounding them and collection of the cost of keeping them, as well as a penalty on the owner. The plaintiff lived in the county, and his hogs were taken up in the corporate limits of the town, were impounded, and he was charged the cost for keeping them. *Held*, the law recognizes the difference between imposing a penalty for the violation of the ordinance and a charge for keeping up the hogs. Revisal, secs. 1679, 1682. *Ibid.*

4. *Municipal Corporations—Cities and Towns—Animals at Large—Nuisance—Particular Instances.*—Permitting hogs to run at large within the corporate limits of a town in violation of a town ordinance is a nuisance, and where the ordinance itself so declares, it is unnecessary, in order to convict for a violation thereof, to show that any particular instance amounted to a nuisance. *Ibid.*

5. *Municipal Corporations—Bond Issues—Necessary Expense—Legislative Powers—Constitutional Law—Voters.*—While an incorporated town may issue bonds for necessary expenses without submitting the question of their issuance to its voters, the authority resides in the Legislature to restrict its power so as to prevent abuses in that respect; and where the Legislature has passed an act authorizing a town to issue bonds, provided the proposition is submitted to and approved by its voters, issuance of bonds without meeting this requirement is invalid. Constitution, Art. VIII, sec. 4. *Burwell v. Lillington*, 94.

6. *Same — Statutes — Amendatory Acts — Rate of Interest — Material Changes.*—Where the Legislature has authorized a town to issue bonds for a necessary expense upon the approval of its voters, specifying that the bonds bear interest at a rate not exceeding 5 per cent,

MUNICIPAL CORPORATIONS—*Continued.*

and after such issuance has met the approval of the voters of the town the Legislature authorizes the bonds at 6 per cent interest, the latter act will be construed as amendatory of and incorporated into the first, and the difference between the rates of interest authorized being material, bonds issued at the higher rate are invalid without the required approval of the voters of the town. *Ibid.*

7. *Municipal Corporations—Bonds—Sewerage—Water-works—Local Questions—Courts.*—The validity of bonds for sewerage purposes issued in compliance with a statute requiring the approval of the voters of a town are not affected by the invalidity of bonds issued under a separate and distinct act authorizing the town to issue bonds for water-works and sewerage purposes, passed by another Legislature, the question as to whether the sewerage would be advantageous without a water-works system being one for the local authorities, and resting with the voters of the town or upon subsequent legislation. *Ibid.*

8. *Municipal Corporations—Cities and Towns—Bond Issues—Necessaries—Vote of People—Legislative Control—Constitutional Law.*—The building and repairing of streets and sidewalks are a necessary municipal expense, and the question of issuing bonds therefor by the town is not ordinarily required to be submitted to the voters of the town; but where by the town charter or other special legislation, or both, this is required, it is necessary to the validity of the bonds so issued that the requirement be first observed, the matter being within the exclusive legislative control. Constitution, Art. VIII, sec. 4. *Bramham v. Durham*, 196.

9. *Municipal Corporations—Cities and Towns—Sewerage—Nuisance—Injunction.*—Where a citizen of a town has built his home near the place where the town's sewer emptied into a stream, and there is evidence tending to show that the flow of water was thereafter increased by concrete streets so as to carry offensive matter and germs through the sewer, into the stream, to the injury of the health of his household, a restraining order should be granted to the hearing, it appearing, by agreement, that the town was only restrained from artificially washing its sidewalks until then. *Quickel v. Gastonia*, 404.

10. *Municipal Corporations—Negligence—Streets and Sidewalks—Trials—Evidence—Questions for Jury—Cities and Towns.*—A city is required to keep its streets and sidewalks in a reasonably safe condition by continuous supervision, but it is not held to warrant them at all times to be absolutely safe; and while permitting a hole several inches deep left by the removal of a water meter by its own employees, about 16 or 18 inches in diameter, partly in the concrete sidewalk and partly on a grass plat within the curbing, to remain there for six months, affords evidence of actionable negligence for a personal injury thereby caused, it may not be declared negligence *per se* as a matter of law. *Sehorn v. Charlotte*, 540.

11. *Municipal Corporations—Contractor's Bond—Statutes—Interpretation—In Pari Materia—Counties.*—In an action to enforce individual liability upon the members of the board of county commissioners for failure to take a bond from a contractor for the erection of a county poorhouse required by our statute, ch. 150, Laws 1913, it is *Held*, that the entire body of the law applicable to this subject is *in pari materia* and should be construed as one statute. *Fore v. Feimster*, 551.

MUNICIPAL CORPORATIONS—*Continued.*

12. *Same—County Commissioners—Individual Liability—Penalties.*—Revisal, sec. 1319, declares every county a body politic and corporate, having certain powers enumerated by the statute and those implied by law, and no others, which can only be exercised by the board of commissioners, or in pursuance of a resolution adopted by them, and construing this section with other relevant sections of the Revisal imposing penalties upon the commissioners for failure to perform such duties, or making them indictable, and with reference to sections expressly making the commissioners individually liable when knowingly taking inadequate bonds from sheriffs, tax collectors, etc., it is *Held*, the county commissioners are not individually liable in the failure of their ministerial duty to take the bond required by ch. 150, Laws 1913, from a contractor for the erection of a county home, such not having been expressly declared; and the remedy is by indictment. *Ibid.*

13. *Municipal Corporations — Ordinances — Stables — Nuisances—Common Law—Cities and Towns.*—Stables within the limits of a town are not, at common law, regarded as nuisances *per se*, regardless of the way in which they are kept; but owing to their objectionable character when placed too near a dwelling, an ordinance of a town reasonably regulating their location is a valid one. Its terms include one in course of erection. *S. v. Bass*, 780.

14. *Same—Equal Protection—Reasonableness—Valid Ordinances—Conviction.*—An ordinance of a town regulating the placing of stables with reference to their distance from dwellings, as nuisances, must be reasonable and uniform, affording protection to all citizens alike, and reasonably appropriate for the accomplishment of any legitimate object falling within the police power of the State; and where an ordinance provides a penalty for the erection of a stable closer to the dwelling of a neighbor than to the owner, the ordinance will be declared void and conviction thereunder a nullity. *Ibid.*

15. *Municipal Corporations—Ordinances—Stables — Nuisances — Questions of Law—Trials.*—The question of the validity of an ordinance regulating the distance stables may be placed from dwellings within the corporate limits is a matter of law for the courts to decide. *Ibid.*

16. *Municipal Corporations—Cities and Towns—Ordinances—Sunday Laws —Discrimination—Constitutional Law.*—An ordinance of a town, authorized by statute, imposing a fine of $25 upon drug stores for selling cigars, etc., on Sunday, and a fine of $5 for the same offense upon restaurants, cafés, and lunch stands, declaring the same to be a misdemeanor, relates to distinct and easily severable occupations, and in the absence of any finding that those engaged in them come in competition with each other, the ordinance will not be declared unconstitutional and invalid upon the ground that it is discriminatory against the owners of drug stores. *S. v. Davis*, 809.

17. *Same—Statutes.*—The authority given an incorporated town to make ordinances, rules and regulations for the better government of the town as they may deem best, Revisal, sec. 2923, includes the right to make an ordinance regulating or prohibiting the sale of cigars and tobacco on Sunday and to declare such sale a misdemeanor punishable by fine, etc., such tending to promote the morals and well-being of society; and it is *Held* that the ordinance in question is also au-

MUNICIPAL CORPORATIONS—*Continued.*

thorized under its charter provision giving the aldermen the power to make "regulations to cause the due observance of Sunday." *Ibid.*

18. *Same—Municipal Discretion.*—The extent of the authority the General Assembly or a municipal corporation may exercise in the passage of statutes and ordinances regulating the observance of Sunday, when such are constitutional, is for the General Assembly, or for the governing body of the municipality acting under its authority. *Ibid.*

MURDER. See Homicide, 9.

MUTUAL MISTAKE. See Reformation of Instruments, 1; Equity, 2, 3, 4.

NATURAL OBJECTS. See Deeds and Conveyances, 19, 20, 21, 22.

NAVIGABLE WATERS.

1. *Navigable Waters—Grants—Exclusive Fishing—Statutes.*—A grant of land bordering upon or partly under navigable waters cannot confer upon the grantee the sole or exclusive right of fishing on such waters, nor can such right be acquired by prescriptive use. Revisal, sec. 1693 (1). Revisal, secs. 1698, 2450, 1696, 1697, have no application to the facts of this case, and it was no error for the court to refuse to submit an issue under sections 1698 and 2450. *Bell v. Smith*, 116.

2. *Same—Judgments—Interpretation—Appeal and Error.*—In this action the jury found for their verdict that defendant "had wrongfully fished in front of the plaintiff's lands on navigable waters in such way as to interfere with or prevent the operation of plaintiff's seine from this beach," whereupon a judgment was signed enjoining defendant from wrongfully interfering with or preventing the plaintiff, her agents, etc., in operating a seine from her shore. *Held*, the result of the action is that the final judgment by which, by correct interpretation, is that the defendant was restrained from wrongfully interfering with plaintiff's right in fishing upon navigable waters in common with all persons, and the defendant having appealed, it was for him to show error in the judgment of the lower court. *Ibid.*

3. *Navigable Waters—Water Right—Wharves.*—Under Revisal 1905, sec. 1696, declaring that persons owning lands on any navigable water may, for the purpose of erecting wharves, make entries of the lands covered by water adjacent to their own, the low-water mark in a navigable stream in which the sea tides do not ebb and flow is the boundary of the adjacent land, though the height of the water fluctuated according to the winds. *Shannonhouse v. White*, 16.

NECESSARIES. See Municipal Corporations, 8; Statutes, 5.

NECESSARY EXPENSES. See County Commissioners, 2, 3.

NEGLIGENCE. See Fish and Oysters, 1; Carriers of Goods, 3, 4; Master and Servant, 1, 4, 5, 8, 9, 10; Railroads, 2, 4, 5, 10, 11, 13, 12, 17; Telegraphs, 2, 3, 4, 6, 9, 11; Carriers of Passengers, 3, 8, 9, 13; Contracts, 4, 15, 16; Automobiles, 1; Pleadings, 6; Issues, 3, 6; Municipal Corporations, 10; Principal and Agent, 10; Conflict of Laws, 1; Trials, 7.

1. *Negligence—Trials—Evidence—Instructions — Dangerous Conditions—Licenses.*—Where a cotton mill company did not keep the fence around its reservoir in repair, where the children of its employees

NEGLIGENCE—*Continued.*

were permitted to have their playground, and a 5-year-old child of an employee, the plaintiff's intestate, got through a hole in the fence and was drowned: *Held,* it was reversible error for the judge to charge the jury that the only negligence imputable to the defendant was in permitting the particular hole to be there, for if the whole fence was dilapidated and insecure at this dangerous location, it would be evidence of defendant's negligence in not repairing it. *Starling v. Cotton Mills,* 222.

2. *Negligence—Trials—Instructions—Expression of Opinion.*—Where the trial judge read his notes of the evidence to the jury and instructed them if they found the facts as thus shown it would narrow the inquiry of negligence down to a certain phase, a position taken by him all through the charge, it is held as reversible error, as unduly emphasizing the view the court had taken of the evidence. *Ibid.*

3. *Same—Licensee—Rule of Prudent Man.*—Where a cotton mill company authorized its employees to have a playground at a place rendered dangerous through its own negligence, which caused the death of plaintiff's intestate, a 5-year-old child of an employee, it is reversible error for the trial judge to lay down the rule of the prudent man as a measure of the defendant's responsibility in safeguarding the children of others against being injured by dangers existing on his own land. *Ibid.*

4. *Negligence—Railroads—Collisions—Injury to Pedestrians—Trials—Evidence—Questions for Jury.*—In an action to recover damages of a railroad company for injuring the plaintiff, alleged to have been caused by the defendant's negligence, the evidence is sufficient as to the defendant's negligence, but not of wantonness, which tends to show that the defendant's branch line crossed its main line in town; that the plaintiff was stopped by a freight train at this crossing, and while standing between the two tracks about 35 feet from the track a fast train on the main line crashed into a freight train on the crossing, and a small stick of timber was hurled upon the plaintiff, causing the injury complained of. *Henderson v. R. R.,* 397.

5. *Negligence—Automobile—Licensed Chauffeurs—Unlawful Acts—Causal Connection.*—Where the owner of an automobile is driving her car upon the streets of a city in violation of an ordinance requiring a license, and the machine is injured by the backing of an express wagon onto the street in such negligent manner as to damage the car, without contributory negligence on the owner's part and which the care of a skillful chauffeur would not have avoided, it is *Held,* that the violation of the ordinance will not bar the plaintiff of recovery in her action for damages, there being no causal connection between the unlawful act and the damages sustained. *Zagier v. Express Co.,* 692.

6. *Negligence—Independent Contractor—Contracts.*—Under the facts of this case it is held that the defendant could not avoid the damages sought upon the ground that the property causing the injury was operated at the time by an independent contractor, under the authority of *Thomas v. Lumber Co.,* 153 N. C., 351. *Strickland v. Lumber Co.,* 755.

7. *Negligence—Trial—Evidence—Nonsuit.*—An experienced inspector of timber for the purchaser on the premises of the seller brought his

NEGLIGENCE—*Continued.*

action to recover from the latter damages for a personal injury received while inspecting the lumber by its falling down upon him; and the evidence tends only to show that he was familiar with the premises and this particular pile of lumber, and was inspecting it in his own way, and could not account for its falling. *Held*, insufficient to take the case to the jury, and a judgment as of nonsuit was proper. *Weaver v. Hardwood Co.*, 766.

8. *Negligence—Automobiles—Res Ipsa Loquitur—Direct Testimony.*—In an action to recover damages of the defendant for negligence in running his automobile, resulting in breaking the leg of plaintiff's mule, there was evidence for plaintiff that the automobile was not properly equipped with brakes, and that it struck the mule, which was standing quietly on the side of the road in safety, causing the animal to suddenly back and receive the injury complained of. Evidence for defendant tended to show that the machine was moving under perfect control, at the rate of 6 or 7 miles an hour; that plaintiff was on the mule, near the middle of the road, and gave him a jerk and he backed into the machine, causing the injury; that the machine was properly equipped with brakes, etc. There was verdict for defendant, under a proper charge upon the issues, and a judgment thereon was proper. The doctrine of *res ipsa loquitur* does not apply, the testimony having been given by witnesses to the fact. *Baldwin v. Smitherman*, 772.

9. *Negligence — Blasting — Trials — Evidence—Questions for Jury.*—Evidence in this action tending to show that a railroad company, in blasting its right of way for its road, used a charge of dynamite containing 25 pounds on the top of a large rock, 14 feet x 6 or 8 feet, where it had a gap or cavity facing the plaintiff's house, with a high place on the rim on the side opposite, and from the explosion, set off without warning, stones were thrown over plaintiff's house 100 yards away, causing the chimney and other parts in the interior of the house to fall, injuring various members of the plaintiff's family therein, is sufficient to be submitted to the jury upon the issue of defendant's actionable negligence. As to whether negligence is necessary to be shown in trespass of this character, *quære*. *Wiggins v. R. R.*, 773.

NEGOTIABLE INSTRUMENTS.

Negotiable Instruments—Drafts—Designated Unpaid Funds—Right of Action—Limitation of Actions.—The assignee of certain drafts given to a deputy United States marshal by the United States marshal, upon condition that they were to be paid out of moneys owed the deputy for his fees and expenses as such officer, which were then due but continued to be unpaid, may not maintain his action against the administrator of the deceased drawee until such fees and expenses have been paid to the marshal by the Government, for until then the cause of action does not accrue. *Moore v. Harkins*, 696.

NEWLY DISCOVERED EVIDENCE. See New Trial, 1.

NEW TRIAL. See Issues, 1; Appeal and Error, 43.

New Trial—Newly Discovered Evidence.—In this case defendant's motion for a new trial for newly discovered evidence was properly dis-

NEW TRIAL—*Continued.*

allowed under the authority of *Johnson v. R. R.*, 163 N. C., 453. *Gainey v. Godwin*, 754.

NONEXPERTS. See Evidence, 22.

NONSUIT. See Carriers of Goods, 1; Master and Servant, 2; Appeal and Error, 16; Injunction, 2; Contracts, 4; Elections, 9; Trials, 4, 7, 8; Evidence, 15, 16; Railroads, 12; Negligence, 7; Descent and Distribution, 1.

NOTES. See Judgments, 6; Removal of Causes, 2; Claim and Delivery, 1, 2; Contracts, 8.

NOTICE. See Carrier of Goods, 5; Telegraphs, 5, 7, 8; Commerce, 2; Deeds and Conveyances, 17, 49; Conversion, 1; Principal and Surety, 1; Partnership, 5; Drainage Districts, 1; Judgments, 17.

NUISANCE. See Injunctions, 1; Municipal Corporations, 2, 4, 9, 13, 15.

OBJECTIONS. See Trails, 9.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 3, 6, 24, 31, 36, 38, 41, 46.

OBSTRUCTIONS. See Injunction, 1.

OFFICE HOURS. See Telegraphs, 4.

OFFICERS. See Vendor and Purchaser, 10.

OPINION. See Appeal and Error, 7; Courts, 3; Evidence, 8; Vendor and Purchaser, 15.

OPTIONS. See Deeds and Conveyances, 4, 12, 16; Contracts, 10; Trusts, 3.

"ORDER, NOTIFY." See Carriers of Goods, 1.

ORDERS. See Appeal and Error, 18.

ORDINANCES. See Municipal Corporations, 2, 13, 15, 16; Railroads, 2, 3.

OUSTER. See Tenants in Common, 1.

PARDON.

Pardon—Fines Returned—Courts—Procedure.—Where one convicted of a crime has paid the fine imposed by the court and then has obtained a pardon from the Governor, it is the duty of the court to return the fine upon his application and presenting the pardon, so long as the money remains in its possession and the rights of third persons have not intervened; but where the fine collected has reached its final destination, it is beyond the reach of executive clemency, and may not be recovered. *Bynum v. Turner*, 86.

PARENT AND CHILD. See Statutes, 8.

1. *Parent and Child—Earnings of Child—Actions.*—In an action by a father to recover from his minor son's employer wages earned, an instruction to find a certain sum in favor of plaintiff if the jury believe the evidence was not error, where it did not appear that the father's authority over the son had been destroyed or renounced. *Daniel v. R. R.*, 23.

PARENT AND CHILD—*Continued.*

2. *Parent and Child—Earnings of Child—Contract with Employer.*—Where a father allows his minor son to work for a third party under an agreement whereby the son's wages are to be paid to him, payment to the son will be protected until the agreement is rescinded, whereupon the father is entitled to the wages. *Ibid.*

3. *Parent and Child—Emancipation—Board of Child.*—In an action against the father to recover money for the board of his minor son, and the defense relied upon is that the defendant had emancipated his son, and consequently was not liable, the burden is upon the defendant to prove the fact. *Holland v. Hartley*, 376.

4. *Same—Evidence.*—Evidence tending to prove that the father had agreed with his 18-year-old son that the latter should leave his father's roof, have all his own earnings, and make his own contracts, is sufficient as to the son's emancipation to defeat a recovery against the father for the son's board. *Ibid.*

PAROL AGREEMENT. See Trusts, 1.

PAROL EVIDENCE. See Judgments, 2; Deeds and Conveyances, 2; Contracts, 12.

PAROL SALE. See Vendor and Purchaser, 5.

PARTIES. See Principal and Agent, 1, 4; Judgments, 4, 23, 26; Actions, 1; Pleadings, 5; Courts, 5; Wills, 10; Appeal and Error, 30; Vendor and Purchaser, 10; Deeds and Conveyances, 36; Estates, 1; Trusts, 4; Equity, 10.

1. *Parties—Infants—Partition—Estoppel.*—Where an infant residing with his mother has an interest in lands the subject of proceedings for partition, and was not properly represented therein, but his mother was a party thereto; and in such proceedings a division is made allotting to the mother and himself her share as well as that of the infant; and after becoming of age he joins in the conveyance, or executes a quitclaim deed to certain of the lands allotted to his mother and himself and receives at least his share of the purchase price, he is estopped by his acts and conduct to deny the validity of the judgment entered in the former proceedings, or to question the same in another proceeding for partition brought seven years after he has reached his majority, especially where the rights of innocent parties have intervened. *Vick v. Wooten*, 121.

2. *Parties—Actions—Unnecessary—Misjoinder—Motions.*—Where it is alleged and shown that a certain party defendant is not necessary to the plaintiff's cause of action, and that it cannot be maintained as to him, the question presented is not alone that of misjoinder of parties, where objection should be made by formal written demurrer, or waived by answer filed; and as to such party, the action should be dismissed. *Coulter v. Wilson*, 537.

3. *Same—Code Practice.*—Our Code procedure permitting or requiring parties to an action to litigate matters between themselves is with reference to the plaintiff's demand, and only permitted when the determination of the issues is essential and desirable for a complete determination of the controversy; and does not extend to the retention of a party who, upon the pleadings and evidence, is shown to be an unnecessary one. *Ibid.*

PARTICULARS. See Judgments, 3.

PARTITION. See Parties, 1; Deeds and Conveyances, 28; Appeal and Error, 36, 37.

Partition — Title — Evidence — Instructions — Directing Jury — Courts.— Where, upon issue as to plaintiff's title in partition proceedings the cause is transferred to the trial docket, and it appears on the trial that he and those under whom he claims have been in possession under a chain of title for sixty years preceding the institution of the action, and that the title is not affected by attempted proceedings for division among the heirs at law of the original owner or by an attempted sale to make assets by an administrator of one of them, an instruction is proper that if the jury find the facts to be as testified, to answer the issue "Yes," in plaintiff's favor. *Roberts v. Dale*, 466.

PARTNERSHIP. See Principal and Agent, 6; Judgments, 27.

1. *Partnership—Deeds and Conveyances—Realty—Tenants in Common.*— A conveyance of land to a partnership is valid and vests the full equitable title in the members of the firm as tenants in common. *Robinson v. Daughtry*, 200.

2. *Partnership—Deeds and Conveyances—Realty—Principal and Agent—Parol Evidence—Contract to Convey.*—An agency of partnership does not extend to a valid conveyance of its real property by one of the partners so as to pass the absolute title; but the agency may be shown by parol to be embraced within the scope of the partnership authority, and then the deed will be operative as a contract to convey the land, which does not require a seal, and, as such, is enforcible. *Ibid.*

3. *Same—Nature of Partnership—Agency, Express or Implied.*—It was shown to be within the scope of a certain partnership to sell patent rights that the partnership would receive in payment certain articles of personal property and real estate as well; and it appeared that certain real estate was thus conveyed to the firm, and reconveyed to a third person by a fee-simple deed executed by only one of them. *Held*, the authority of the partners to make the conveyance could be either express or implied from the nature of the business, and his conveyance operated as a valid contract to convey the lands, binding upon the individual members of the firm. *Ibid.*

4. *Partnership—Torts—Individual Liability—Automobiles.*—A partnership is liable for the tort of one of its members committed in the scope and course of the partnership business which proximately causes injury to another, as in this case, where the partnership owned a garage and let out automobiles for hire, to be run by the partners or chauffeurs supplied by them, and a passenger on a car is injured by the negligence of one of the partners acting as chauffeur on the occasion. *Cates v. Hall*, 360.

5. *Partnership—Retiring Partner—Notice.*—For a retiring member of a partnership to escape liability for the subsequent indebtedness of the firm continuing under the same name and doing the same kind of business, it is necessary for notice of his retirement to be expressly or impliedly given in some adequate way to those with whom the partnership has been dealing. *Furniture Co. v. Bussell*, 474.

6. *Partnership, Scope—Contracts—Individual Liability—Trials—Evidence—Questions for Jury.*—A partnership is not ordinarily bound by the contracts of a partner not within the scope of the objects of the

PARTNERSHIP—*Continued.*

partnership, for his own benefit, and where a firm of druggists, not dealing in coal, had ordered a car-load of coal in August, which it had used and paid for, and there is evidence that a member of the firm, on the firm's stationery and in the firm's name, had ordered for his own use a car of coal from the plaintiff for each of the months of September, October, November, and December, without the knowledge of the other partner, and of which neither he nor the partnership business received benefit, it is sufficient to sustain a verdict of the jury exonerating the other partner, and the firm, as such, from liability. *Coal Co. v. Fain*, 645.

PAYMENT. See Usury, 1; Judgments, 18, 26; Bills and Notes, 1.

PEDESTRIANS. See Negligence, 4.

PENALTY. See Carriers of Goods, 12; Municipal Corporations, 12.

PENALTY STATUTES. See Carriers of Goods, 10.

PERFORMANCE. See Carriers of Passengers, 1.

PERPETUITIES. See Deeds and Conveyances, 35; Estates, 3.

PERSON. See Execution, 2.

PERSONALTY. See Mortgage, 1.

PHOTOGRAPHS. See Evidence, 7.

PHYSICAL INJURIES. See Damages, 2.

PLEADINGS. See Counties, 1; Limitation of Actions, 2; Elections, 8; Issues, 3; Courts, 5, 6, 9; Judicial Sales, 1; Actions, 3; Vendor and Purchaser, 15; Marriage and Divorce, 1.

1. *Pleadings—Allegations—Issues.*—All matters alleged on one side and denied on the other are not necessarily at issue in a legal sense, but only such as are necessary to the determination of the controversy; and when the issues submitted by the trial judge are comprehensive and cover every phase of the controversy as set out in the pleadings, giving the objecting party opportunity to offer any pertinent evidence, they are sufficient, the form thereof being of little consequence. *Roper v. Leary*, 35.

2. *Pleadings—Amendments—Court's Discretion—Telegraphs.*—It is within the discretionary power of the trial judge, in an action to recover damages for mental anguish against a telegraph company for negligently failing to promptly deliver a telegram relating to sickness, to allow the plaintiff to amend his complaint so as to allege that he could and would have gone to the bedside of his relative, etc., and such is not reviewable on appeal, in the absence of any evidence that this discretion had been abused. *Johnson v. Tel. Co.*, 130.

3. *Pleadings—Multifarious—Demurrer—Statutes.*—Objection that the complaint in an action is multifarious and contains irrelevant and redundant matter, and is too inartificially drawn for the defendant to answer, should be by motion to make it more definite and certain (Revisal, sec. 474), and a demurrer on that ground is bad. *Lee v. Thornton*, 209.

PLEADINGS—*Continued.*

4. *Same—Cause of Action—Construction.*—A complaint in an action which is not so prolix as to mislead or confuse the defendants or to conceal or obscure, by its elaboration or redundant words, the real cause of action, is sufficient; and if the matters alleged arise out of one and the same transaction, or series of transactions, forming one course of dealings, all tending to one end, narrating the transaction as a whole, the cause stated is not objectionable as multifarious. *Ibid.*

5. *Same—Deeds and Conveyances—Mental Capacity—Parties—Fraud.*—Where the complaint in an action to set aside certain conveyances of land to different persons for fraud and undue influence upon grantor, and for his lack of mental capacity to execute them alleges, in substance, that the grantor executed the deeds when totally deficient in mental capacity, and that he was fraudulently imposed upon and unduly influenced by the defendants, who had conspired together against him to take an unfair and unjust advantage of his mental and physical condition, it states with sufficient clearness a good cause of action, though the pleading may have set forth the matter with some prolixity and unnecessary detail. *Ibid.*

6. *Pleadings—Automobiles—Carriers of Passengers—Gratuitous Service—Negligence.*—Where the complaint in an action to recover damages for a personal injury claimed to have been caused by the negligence of the carrier of passengers by automobiles for hire alleges that the transportation was for a valuable consideration, and, further, that the injury was received through the negligent and reckless driving of the car by a member of the firm furnishing it, the allegations are sufficiently broad to cover either aspect of the demand, and to sustain a verdict, though the services rendered at the particular time were gratuitous. *Cates v. Hall*, 360.

7. *Pleadings—Counterclaim—Evidence—Issues.*—Where a counterclaim in an action has not been pleaded, and there is no evidence to sustain such plea, had it been made, the refusal of an issue relating thereto is proper. *Barnett v. Smith*, 535.

PLEAS. See Criminal Law, 9.

POLICE POWERS. See Intoxicating Liquors, 1; Insurance, 12.

POLICIES. See Contracts, 1.

POLICY CONTRACTS. See Insurance, 2.

POSSESSION. See Tenants in Common, 1; Processioning, 1; Claim and Delivery, 1; Actions, 4; Bills and Notes, 1.

POWERS. See Wills, 10.

PRECINCT. See Elections, 3.

PREJUDICE. See Corporations, 5.

PRESCRIPTIVE RIGHTS. See Municipal Corporations, 1.

PRESUMPTION. See Appeal and Error, 8; Taxation, 6; Railroads, 16; Deeds and Conveyances, 53; Husband and Wife, 1.

PRIMA FACIE CASE. See Telegraphs, 1.

PRINCIPAL AND AGENT. See Partnership, 2; Statute of Frauds, 1; Issues, 6; Telegraphs, 9, 11.

1. *Principal and Agent—Undisclosed Principal—Contract—Breach of Warranty—Parties.*—Where a husband, acting for his wife, executes in his own name a simple contract of purchase of a piano, without disclosing his representative capacity, the wife may maintain an action in her own name for damages on a breach of warranty of the instrument. *Woodward v. Stieff*, 82.

2. *Principal and Agent—Evidence—Declarations—Direct Testimony.*—The principle that excludes declarations of an agent as to his authority to bind his principal by his acts can have no application where the agent himself testifies to the fact, as a witness in the suit. *Allen v. R. R.*, 339.

3. *Principal and Agent—Sale of Lands—Commissions.*—In an action for the alleged breach of a brokerage contract for the sale of lands by the agent to recover his commissions it is necessary for the agent to show he had been successful in procuring a purchaser who not only was able and willing to take the lands in accordance with the terms of the contract, but who would have done so except for the defendant's default. *Crowell v. Parker*, 392.

4. *Same—Deeds and Conveyances—Escrow—Parties—Parol Contracts—Trials—Evidence—Questions for Jury.*—In an action to recover brokerage commissions upon the alleged breach of the contract of a vendor of lands that the purchase price should be a certain sum payable part in cash, the deferred payment to be secured by a mortgage on the lands, there was evidence tending to show a later agreement between the parties and a proposed purchaser that the purchase price should be a less sum, and the defendant delivered the deed in escrow in the form of a receipt from the holder stating that the parties had agreed thereto, but which was not signed by either the vendor or proposed purchaser, and that the deeds were to be delivered upon receipt of part of the purchase price and a mortgage on the lands securing the deferred payment: that the proposed purchaser withdrew from the arrangement and the vendor received back the deed held in escrow and sold the lands to a stranger to the transaction; *Held*, the escrow, as to the vendee, rested in parol and was unenforcible; and upon the entire evidence the question as to whether the plaintiff had procured a purchaser in accordance with the terms of his contract was a question for the jury, under proper instructions, and it was reversible error for the trial judge to direct a verdict thereon in plaintiff's favor as a matter of law. *Ibid.*

5. *Principal and Agent—Sale of Lands—Contracts—Commissions—Default of Principal.*—An agent for the sale of real estate upon commission who finds a purchaser who is ready, able, and willing to purchase it on the authorized terms is entitled to his compensation, if the sale is prevented by default of his principal in refusing to consummate it. *Ibid.*

6. *Principal and Agent—Traveling Salesman—Partnership—Retiring Partner—Scope of Agency—Secret Limitations.*—The question as to whether the principal is impliedly bound with the knowledge of his agent depends upon the scope of the duties of the agent in respect to the particular transaction in which the agent acquired such knowledge, which is not affected by any secret and undisclosed limitations by the prin-

PRINCIPAL AND AGENT—*Continued.*

cipal upon the power of the agent to so act; and where the traveling salesman of a concern is informed of the retirement of a member of a firm to which he had sold goods for his principal, and thereupon sells goods to the new firm, it becomes his duty to inform his principal of the change in the firm, and this knowledge will be imputed to his principal. *Furniture Co. v. Bussell*, 474.

7. *Same—Trials—Questions for Jury—Subagencies—Questions of Law.*—Where a manufacturing concern contracts with another that the latter shall sell its products, upon a commission, through its traveling salesmen, and there is evidence that one of these salesmen had collected accounts and represented the manufacturing concern in extending credit, it is *Held*, that the question as to whether his knowledge would be imputed to his principal in the sale of its goods on credit to the continuing members of a partnership, so as to release the retiring partner from liability, should be submitted to the jury, notwithstanding there was also evidence that the principal alone passed upon such matters. As to whether the principal would be bound by the knowledge of the subagent as a matter of law, *quære*. *Ibid.*

8. *Principal and Agent—Contracts—Implied Authority—General Agents.*—Where the evidence tends to show that the holder of most of the stock in an amusement corporation wired the agent of a theatrical troupe an offer at a certain price per week, which was accepted, but in pursuance thereof the agent visited the town for the purpose of reducing the contract to writing, saw the manager of the place where he was to perform his engagement, and was referred to one held out by the corporation to be its general manager, who drew the contract and instructed the manager to sign, and it was thus entered into by the parties, with a stipulation that it was to terminate upon two weeks previous notive given by either one thereof to the other: *Held*, under the principle that one is bound by the acts of his agent within the apparent scope of the latter's authority, the corporation was bound by the contract, and was responsible for the legal damages the troupe had sustained owing to the failure of the corporation to give the required previous notice to terminate the contract. *Ferguson v. Amusement Co.*, 662.

9. *Principal and Agent—Contracts—Evidence—Knowledge—Ratification.*—Where the corporation, owner of places of amusement, has obtained an acceptance of its offer at a certain price per week for a theatrical troupe to give performances in one of these places, and the troupe has thereafter entered into a written contract with one ostensibly the corporation's general agent, based upon the former's offer, but containing a provision for the termination of the contract upon two weeks previous notice by either party, the duration of the contract being otherwise indefinite, the performance by the troupe in corporation's place of entertainment for two weeks with its knowledge, and evidence that it had endeavored to modify the agreement as to price the troupe was to have been paid, is evidence that the corporation knew of the stipulation as to the previous notice each was to give the other to terminate the contract, and of its ratification of the contract made in its behalf. *Ibid.*

10. *Principal and Agent—Negligence—Veterinary Surgeons.*—Where a mule being operated upon by a veterinary surgeon in a stall of a stable is

PRINCIPAL AND AGENT—*Continued.*

injured by the want of proper confinement in the stall, and during the operation the surgeon has called to his assistance the aid of a hand working in the stable, the surgeon is responsible for the negligent acts of the stable hand which operated to produce the injury. *Beck v. Henkle*, 698.

PRINCIPAL AND SURETY.

1. *Principal and Surety—Statute of Frauds—Original Promise—Mortgages—Registration—Notice.*—The defendant received from H. a note for the purchase price of a cow whereon the plaintiff was an indorser secured by an unrecorded mortgage, of which the defendant had actual knowledge. The defendant received the cow from H. upon condition that he pay off the note then held by a bank. *Held*, the defendant's promise was an original one not falling within the statute of frauds, inuring to the exoneration of the plaintiff as surety, though not made to him, the consideration of the transaction moving to the defendant being the value of the cow, represented by the amount of the note. *Nicholson v. Dover*, 145 N. C., 145; *Springs v. Cole*, 418.
2. *Principal and Surety—Evidence—Statute of Frauds—Questions for Jury.*—It is held in this case that, under the conflicting evidence, the question as to whether the defendant's promise was an original one inuring to the benefit of an indorser on a note given for the purchase of a cow should be submitted to the jury upon appropriate issues. *Ibid.*

PRIVITY. See Equity, 10.

PROBATE. See Deeds and Conveyances, 25, 43.

PROCEDURE. See Judgments, 13.

PROCESS. See Counties, 1.

PROCESSIONING.

1. *Processioning — Amendments—Title—Adverse Possession—Evidence.*—Where in proceedings under the processioning act the line of one of the parties is called for in a deed under which the other claims, and on appeal in the Superior Court an amendment to the pleadings was allowed setting up title by adverse possession under color and otherwise to a certain marked line of division, the effect was to put at issue the title to the strip of land in dispute, and testimony of such possession is competent either on the direct issue as to title or on the issue as to correct location of the present dividing line. *Maultsby v. Braddy*, 300.
2. *Processioning—Title—Estoppel.*—Proceedings for processioning the boundaries between lands of adjoining owners may not put the title in issue, but this may now be done under our statute, Revisal, sec. 717; and a final adjudication thereupon will operate as an estoppel both as to title and the correct location of the disputed line. *Hilliard v. Abenethy*, 643.

PROMISE. See Statutes, 8.

PROOF. See Equity, 7.

PROSECUTION BOND. See Courts, 11.

PROXIMATE CAUSE. See Railroads, 10, 11.

PUBLIC CROSSINGS. See Railroads, 15.

PUBLIC OFFICE. See Elections, 7, 8, 9.

PUBLIC SALES.

Public Sales—Purchaser—Void Judgments—Issues—Verdict.—A purchaser at an execution sale under a judgment which is an absolute nullity can acquire no interest in the lands thus sold, and where in a subsequent action against such purchaser to recover the land the jury have found that the plaintiff is entitled to recover the land, but the defendant is entitled to a certain interest therein, it is proper for the trial judge to set aside the second issue and render judgment on the first issue in plaintiff's favor. *Johnson v. Whilden*, 153.

PURCHASER. See Municipal Corporations, 1; Mortgages, 4.

QUALIFICATION. See Jurors, 1.

QUESTIONS FOR JURY. See Fish and Oysters, 1; Master and Servant, 2; Deeds and Conveyances, 6, 7, 9, 19, 21, 52; Carriers of Passengers, 8; Injunction, 3; Railroads, 11, 13; Principal and Agent, 4, 7; Negligence, 4, 9; Principal and Surety, 2; Municipal Corporations, 10; Evidence, 10, 19; Partnership, 6; Equity, 7, 9; Conflict of Laws, 1; False Imprisonment, 1; Fornication and Adultery, 1; Homicide, 2.

QUESTIONS OF LAW. See Courts, 2; Carriers of Goods, 11; Water and Water Courses, 3; Insurance, 6; Principal and Agent, 7; Deeds and Conveyances, 47; Municipal Corporations, 15.

QUO WARRANTO. See Corporations, 6.

RACE DIVISION. See Carriers of Passengers, 11.

RAILROADS. See Appeal and Error, 13, 22, 23; Contracts, 2, 3; Instructions, 2; Commerce, 2; Limitation of Actions, 1; Water and Water Courses, 5; Negligence, 4.

1. *Railroads—Damages—Land—Crop—Issues.*—Where the damages are sought by the owner of lands, in his action against a railroad company alleged to have been caused to his lands and crops by the defendant's negligent failure to keep open the culverts under its roadbed, it is not necessary to submit the issues as to damages addressed to the crop and lands separately; but, at times, it is desirable to do so in order to present the questions involved, and such a course has been approved by the Supreme Court. *Perry v. R. R.*, 38.

2. *Railroads—Municipal Corporations—Town Ordinances—Speed of Trains—Trials—Evidence—Negligence.*—Where an ordinance of an incorporated town forbids the operation of through trains at a certain crossing within its limits at a greater speed than 4 miles an hour, and requires that a trainman shall go before the train at this place a distance of 50 feet to warn pedestrians, it is reversible error for the trial judge to refuse to instruct the jury that the violation of this ordinance was evidence of negligence on the part of the defendant, and they should answer the issue in plaintiff's favor if they found

RAILROADS—*Continued.*

such was the proximate cause of the personal injury sued on, when there is evidence to sustain the request so to charge. *Dorsett v. R. R.*, 109.

3. *Railroads—Municipal Corporations—Town Ordinances—Through Trains—Local Switching.*—A locomotive from a through train is considered as a part thereof while switching cars therefrom to be left at its local stop, within the meaning of an ordinance of the town requiring that the speed of such trains at a certain crossing within the town shall not exceed a speed of 4 miles an hour, etc. *Ibid.*

4. *Railroads—Right of Way—Foul Conditions—Evidence—Negligence—Trials.*—In order to recover damages of a railroad company for fires caused on its foul right of way, it must be affirmatively shown that the condition of the right of way was foul, and that it was caused by a spark from the defendant's locomotive. *McBee v. R. R.*, 111.

5. *Railroads—Crossings—Negligence—Look and Listen—Track—Improper Construction.*—Where there is evidence that one driving an automobile approached a public crossing of a railroad, where the view of an approaching train was obstructed, with due regard to his safety, looking and listening for the approaching train, which came without signal or warning, and which he could not see before going upon the track; that he was prevented from crossing by a vehicle approaching from the opposite direction, and in endeavoring to back his machine out of danger his engine stopped and, because the track was not properly filled, the rails standing above the level of the ground, his machine could not be made to move, and was struck by the locomotive, causing him to be injured while endeavoring to jump out; that the engineer should, by the exercise of proper care, have seen plaintiff's danger in time to have avoided the injury: *Held*, sufficient upon the question of defendant's actionable negligence to take the case to the jury. *Brown v. R. R.*, 266.

6. *Same—Sudden Peril—Contributory Negligence—Rule of Prudent Man.*—Under the circumstances of this case, it is held that the condition of the defendant railroad company's track at a crossing where its locomotive had a collision with plaintiff's automobile, causing the injury complained of, was evidence of defendant's negligence in not properly filling between the rails, leaving for the determination of the jury whether the plaintiff acted as a man of ordinary prudence and presence of mind would have done when confronted suddenly by the same grave peril, though the care required of him in approaching the track was increased in proportion to the danger in attempting to cross the same where the view was obstructed. *Ibid.*

7. *Railroads—Deeds and Conveyances—Rights of Way—Easements—Abandonment—Unequivocal Acts—Intent.*—An abandonment by a railroad company of its right of way acquired by deed with provision that it would then revert to the grantor, includes both the intention to abandon, in concurrence with the external acts by which such intention is carried into effect, amounting to a relinquishment of the property, which must be positive, unequivocal, and inconsistent with the claim of title. *R. R. v. McGuire*, 277.

8. *Railroads—Deeds and Conveyances—Rights of Way—Easements—Abandonment—Spur or Side Tracks.*—Where a railroad company acquires a right of way over the lands of the owner by deed with pro-

RAILROADS—*Continued.*

vision that it would revert to the owner for nonuser for a stated period, and constructs and operates its main line thereon for a while, and then changes its main line of road to cross other lands, but continues to use the *locus in quo* for spur and side tracks in connection with its freight or other railroad business, the relocation of its main line, as stated, is not an act of abandonment which will forfeit the company's easement under its deed. *Ibid.*

9. *Same—Permissive User—Leases.*—Permissive user or occupancy of a portion of a railroad company's right of way, not then used by the company for railroad purposes, or such portion leased by the company to its patrons in furtherance of its business, does not affect the company's title once acquired, and cannot be construed as an act of abandonment by the company under its deed providing that the title thereto will revert to the grantor in event of abandonment for a specified period. *Ibid.*

10. *Railroads—Master and Servant—Negligence—Proximate Cause—Instructions—Appeal and Error.*—The plaintiff, an employee of the defendant railroad company, was engaged at night in shoveling coal from one part of the tender of a locomotive to another, which was standing still, with evidence tending to show that he was injured while on the step, in leaving the cab, by a jar caused by another locomotive striking the one he was on, which approached without warning. *Held*, the jury might have inferred that the engines were being coupled for the purpose of moving the one he was on, and the question of negligence would then depend upon whether there was a jarring of unusual violence in such instances; or whether the train approached without warning; and while the fact that the jarring caused the plaintiff's injury would be some evidence of defendant's actionable negligence, it would be insufficient to establish as a matter of law; and, further, an instruction to that effect would be reversible error, in leaving out the element of proximate cause. *Lassiter v. R. R.*, 283.

11. *Railroads—Negligence—Escaping Steam—Runaway Horses—Intervening Cause—Proximate Cause—Trials—Evidence—Question for Jury.*—Evidence that the engineer on the locomotive of defendant railroad company carelessly and recklessly let off steam from the engine under a team of horses used in handling freight at its depot, and, seeing the horses frightened, did not desist, and that his conduct caused them to run a way and kill the plaintiff's intestate is sufficient upon the issue of the defendant's actionable negligence to take the case to the jury; and in this case it is held that the question of the intestate's negligence to have ventured there, being deaf, and the intervening negligence of the owner of the team in not providing a proper harness, together with the question of proximate cause, was correctly submitted to the determination of the jury. *Witte v. R. R.*, 309.

12. *Master and Servant—Railroads—Safe Appliances—Negligence—Evidence—Nonsuit.*—The master, a railroad, is not liable to its servant for an injury received while at work on its railroad track, driving a 6-inch spike into a cross-tie, because the face of the hammer had been worn slick, he had been promised a new one, and he was standing at the time on a loose pile of dirt, and was hurried by the foreman for the passage of an expected train, the injury being a sprain in the servant's back; for such could not have reasonably been an-

RAILROADS—*Continued.*

ticipated by the master, does not come within the rule of liability requiring the master to furnish safe tools, etc., and a judgment of nonsuit was proper. *Morris v. R. R.*, 533.

13. *Railroads—Street Railways—Care of Passengers—Guard-rails—Absent Conductor—Negligence—Evidence—Questions for Jury.*—Where a street railway company runs its open car to its amusement park, the car provided with guard-rails held in place only by their own weight, and there is evidence tending to show that these rails are easily lifted by passengers entering or leaving the car, which the presence of the conductor, in looking out for the safety of his passengers, would prevent; that at a time when the car was crowded and a crowd of passengers was expected at the park, the conductor left the car to throw a switch, just before reaching the park platform, and the plaintiff, an old and feeble woman, attempting to get on the car at its regular stop, was injured by the rail, which had been held up by the passengers entering and leaving the car, falling on her head; and that a special man was occasionally employed to throw the switch, but was absent on this occasion: *Held*, evidence of actionable negligence, and it was reversible error for the trial judge to charge the jury that the car was properly equipped, and that the defendant was not liable if the injury to the plaintiff was caused by the rail having been lifted by the other passengers, there being no fastening and no one present charged with the duty to prevent them. *Brown v. Power Co.*, 555.

14. *Railroads—Street Railways—Stopping of Cars—Invitation Implied.*—The stopping of a car at its regular place for the purpose of taking on passengers is an implied invitation for passengers to board the car there. *Ibid.*

15. *Railroads—Contributory Negligence—Public Crossings—Look and Listen—Issues—Last Clear Chance.*—Where the evidence tends to show that the plaintiff's intestate, without looking or listening, attempted, in the daytime, with an unobstructed view, to cross defendant's railroad track in front of a slowly approaching train, heedless of a shout of warning by defendant's employee thereon given to another, when he was 6 feet and the locomotive 10 feet at right angles to the point of contact, but continued to walk forward, and received the injury resulting in his death: *Held*, should the facts be accordingly established, the contributory negligence of the intestate will be regarded as the proximate cause of the resulting injury, and bar recovery, and an issue as to the last clear chance is properly refused. *Davidson v. R. R.*, 633.

16. *Same—Presumptions.*—Where in an action against a railroad company to recover damages for the negligent killing of plaintiff's intestate there is ample circumstantial evidence that his death was proximately caused by his contributory negligence in failing to look and listen, or observe the caution required of him before going upon the track in front of defendant's train, there can be no presumption in his favor that he had previously looked or listened for the approach of the train. *Ibid.*

17. *Railroads — Frightening Horses — Trials—Negligence—Evidence—Verdict, Directing—Appeal and Error—Instruction.*—Where damages are sought in an action for injury to plaintiff's team, and it appears that the injury was caused by the horses becoming frightened at the de-

RAILROADS—*Continued.*

fendant's train, while left unhitched in the field three-fourths of a mile from defendant's railroad crossing, a peremptory instruction to answer the issue of negligence in defendant's favor, if the facts are so found, nothing else appearing, is not erroneous; and where the damages complained of were evidently caused in this manner, an insufficient opening for the passage of the team at the crossing becomes immaterial. *Needham v. R. R.*, 765.

RATIFICATION. See Tenants in Common, 4; Principal and Agent, 9.

REALTY. See Wills, 6.

RECEIPT. See Compromise, 1.

RECEIVERS.

Receivers—Sales—Insolvent Corporations—Issues of Fact—Trial by Jury—Adjudication at Chambers—Appeal and Error.—Where receivers for an insolvent corporation have been appointed and the corporate property ordered to be sold by them and a party enters an interplea claiming prior lien upon certain of its standing timber, upon which issue has been joined, the question presented is for the determination of the jury, unless such trial has been duly waived; and it is reversible error for the judge, at chambers, to adjudicate the fact of lien and the amount; but the order for the receivers to sell will stand, it being their duty to do so to the best advantage, and retain the proceeds subject to the further orders of the court. *Bessemer v. Hardware Co.*, 728.

RECESS OF COURT. See Courts, 10.

RECONVERSION. See Wills, 9, 10, 11.

RECORD. See Appeal and Error, 2, 42; Judgments, 5.

RECORDARI. See Courts, 4.

RECORDER'S COURT. See Appeal and Error, 5, 6.

REFERENCES. See Appeal and Error, 8, 29.

REFORMATION OF INSTRUMENTS.

Reformation of Instruments—Fraud—Mutual Mistake—Inadequate Consideration—Deeds and Conveyances—Trials—Evidence.—In order to successfully invoke the equitable jurisdiction of our courts to correct a deed for mistake, it must be shown that the mistake was mutual, or the mistake of one superinduced by the fraud of the other; and the evidence in this case, tending only to show that the grantor instructed his draftsman to convey the land, reserving the timber, without the knowledge of the grantee, which was not expressed in the deed, and that the price was inadequate for both the timber and land conveyed, is held insufficient both as to the questions of mutual mistake and fraud. *Allen v. R. R.*, 339.

REFUSING TO RECEIVE. See Carriers of Goods, 10, 11.

REGISTRATION. Mortgages, 1; Deeds and Conveyances, 4, 17, 43, 49; Elections, 9; Corporations, 13; Conversion, 1; Principal and Agent, 1; Equity, 11.

RELATIONSHIP. See Telegraphs, 5.

RELEASES. See Contracts, 2; Corporations, 4; Evidence, 10.

REMAINDERS. See Deeds and Conveyances, 59, 60; Estates, 1, 2, 3; Wills, 1.

REMOVAL OF CAUSES. See Appeal and Error, 2.

1. *Removal of Causes—Transference of Causes—Fraternal Societies—Local Lodge—Venue.*—In an action to recover damages alleged to have been received by the plaintiff while being initiated into a fraternal insurance society, in consequence of rough treatment, brought in a different county from that of the residence of the plaintiff and the one wherein the injury was alleged to have been received, it appeared that the defendant, the head lodge, had a local lodge in the county of the venue, in which members were received, the usual business of such lodges transacted, and membership fees collected and remitted to it: *Held*, the transactions of the local lodge were such usual or continuous business as contemplated by the statute, and the cause was improperly transferred to the county in which the plaintiff resided and the injury was alleged to have been received. Revisal, sec. 423. *Ange v. Woodmen*, 40.

2. *Venue—Collateral Notes—Mortgages on Lands—Removal of Causes.*—Where an action is brought upon a note to obtain a personal judgment against the maker and for the sale of the collateral hypothecated, and it appears that among the collateral is a note secured by a mortgage on lands situated in a different county from that of the venue, but no relief by foreclosure of the mortgage is sought, the sale of the collateral does not affect any interest in the land which would require that the action be brought in the county where the land is situated, and a motion to remove the cause on that ground is properly denied. *Warren v. Herrington*, 165.

REPUDIATION. See Vendor and Purchaser, 5.

REVISAL. (See various headings of subjects for greater accuracy.)

SEC.

211. The statute takes from court the power to disbar attorney except in instances specified or in the practical immediate administration of the law. Where statute directs, disbarment is imperative; and for lesser offenses, under former statute, he will be disbarred if they are of such character as to render him unfit to practice law. *S. v. Johnson*, 799.

336. The mailing of a deed, when grantee takes no steps for a long period of time to have it reëxecuted, is a delivery. *Lynch v. Johnson*, 610.

386. One claiming land by adverse possession against a perfect paper title has the burden of proof by the greater weight of the evidence, and the charge in this case is held erroneous as requiring a lesser degree of proof. *Land Co. v. Floyd*, 543.

391. This statute makes the statute of presumption a statute of limitations. *Brown v. Harding*, 685.

394 (2). From a change made in a constructed railroad bed, causing damage to land, the statute of limitations commences to run. *Cardwell v. R. R.*, 365.

REVISAL—*Continued.*

SEC.

394. Section limits the time of bringing action for permanent injury and does not apply to damages caused by failure to properly maintain the roadbed, keeping culverts open, and the like. *Perry v. R. R.*, 38.

423. For damages received from initiation in local lodge of fraternal order, the action is properly brought in county where such are inflicted. *Ange v. Woodmen*, 40.

425. (2). Motion to remove cause to promote ends of justice is addressed to court's discretion, and appeal from court's decision thereon is held frivolous in Supreme Court. *Ludwick v. Mining Co.*, 60.

453. A defense bond, with its sureties, is liable for Supreme Court as well as Superior Court costs. *Grimes v. Andrews*, 367.

474. Objection to multifarious and irrelevant pleadings must be on motion to make them more definite. *Lee v. Thornton*, 209.

476. Objection for misjoinder of causes must be on motion to divide them. *Ibid.*

535. A charge stressing benefits derived from corporations without mentioning the benefits received in return, and the judge saying he would not permit a verdict to stand based upon guesswork, prejudice, etc., is reversible error. *Starling v. Cotton Mills*, 222.

535. Upon a trial for murder with evidence of the offense of manslaughter, the trial judge should submit and instruct upon the lesser offense, though not requested to do so and prisoner has agreed to submit to verdict for murder in second degree. *S. v. Merrick*, 788.

572. The provisions as to judgment rolls are directory, and judgment will not be declared void for reason that clerk has not attached the papers. *Brown v. Harding*, 685.

608. Appeal from justice's court will be dismissed on motion in Superior Court after several terms of court, if not perfected, though the justice's fees were paid him. *Helsabeck v. Grubbs*, 337.

614. A party in interest not served in proceedings to divide lands between tenants in common waives irregularities by an appearance, and is bound. *Wooten v. Cunningham*, 123.

625. Joint owner of horse is liable to arrest for selling the horse and converting proceeds of sale to his own use. *Doyle v. Bush*, 10.

686. The statute of limitations is not retroactive, and may be suspended when homestead has been sold before its operative effect. *Brown v. Harding*, 685.

717. Title to lands may be put in issue, and final judgment estops the parties. *Hilliard v. Abernathy*, 643.

727. Joint owner of horse is liable to arrest for selling the horse and converting proceeds of sale to his own use. *Doyle v. Bush*, 10.

979-80. A grantee in a timber deed is in privity with the subsequent grantee of the land and may, in proper instances, have his deed corrected. *Sills v. Ford*, 733.

980. A trustee in bankruptcy is a purchaser under meaning of this section. *Lynch v. Johnson*, 610.

982. A second mortgage on personalty properly registered is prior to lien of one registered in wrong county and thereafter registered in the right county. *Bank v. Cox*, 76.

REVISAL—*Continued.*

SEC.

990. Certificate of clerk of court without stating the commissioner had authority to take probate of the deed is insufficient for registration. *Shingle Mills v. Lumber Co.*, 410.

1005. Authority from corporation's directors to borrow necessary funds implies authority to mortgage corporate property. *Wall v. Rothrock*, 388.

1129. A special later legislative act repeals a general law, when repugnant, to the extent it is repugnant. *Power Co. v. Power Co.*, 248.

1573. This section, amended by the Laws of 1907, must give way to extent they are repugnant to special legislative charters given *quasi*-public corporations. *Ibid.*

1196. A dissolution of a corporation by court's judgment under this section is constitutional. *Land Co. v. Floyd*, 543.

1309-10. A cause of action alleged against the county and summons served on the commissioners, as such, individually, is against the county, and commences from issuance of summons. *Fountain v. Pitt*, 113.

1378. Where this State grants requisition from another State for fugitive, who takes out *habeas corpus* and forfeits bond, the school fund and not agent of the other State gets the amount of forfeited bond. *In re Wiggins*, 372.

1581. In this case the title to lands depended upon certain contingent interests, and the rule against perpetuities was not violated. *Lee v. Oates*, 717.

1590. In this case the legal title to certain lands held in trust merged with the equitable title, and neither the trustee nor his heirs were necessary parties. *Ibid.*

1679. The difference between imposing a penalty and a violation of an ordinance in a no-fence law territory is recognized by the law. *Owen v. Williamston*, 57.

1682. The difference between imposing a penalty and a violation of an ordinance in a no-fence law territory is recognized by the law. *Ibid.*

1689 (Gregory's Sup.). Contracts in cotton futures are void, and judgment will be set aside in Supreme Court when it appears that the judgment upholds them. *Randolph v. Heath*, 383.

1693 (1). Grant of land under navigable waters cannot confer exclusive right of fishing. *Bell v. Smith*, 116.

1696. The low-water mark on navigable streams not subject to ebb and flow of tide is the boundary for purposes of entry for erecting wharfs. *Shannonhouse v. White*, 16.

1696-7-8. Sections have no application as to exclusive rights of fishing where lands are granted under navigable waters. See 1693 (1). *Bell v. Smith*, 116.

2063-64-66. Delivery of intoxicating liquors for the purpose of sale is not authorized by license from sheriff to sell. *Pfeifer v. Drug Co.*, 214.

2450. Issues as to exclusive rights to fish over lands granted under navigable waters properly refused. *Bell v. Smith*, 116.

2587. A successful litigant in proceedings for condemnation by city, appearing by attorney, is not entitled to recover attorney's fee as part of cost. *Durham v. Davis*, 305.

REVISAL—*Continued.*

SEC.

2592. A successful litigant in proceedings of condemnation by city, appearing by attorney, is not entitled to recover attorney's fee as part of cost. *Ibid.*

2611. A passenger on a train who is ejected for refusing to again pay fare he has theretofore paid is wrongfully ejected, and has cause of action. *Sawyer v. R. R.*, 13.

2619. By express provision, this section does not apply to officers and those in their custody, and sheriff has no right of action for being required to go into colored coach with a colored prisoner. *Huff v. R. R.*, 203.

2631. Actual or constructive tender is necessary to recover daily penalty of carrier refusing to accept freight for shipment. *Bane v. R. R.*, 328.

2631-32. Express company not liable for refusal to ship thirty crates of strawberries on a certain train, not taking such shipments, where other trains were provided, advertised, and shipper knew thereof. *Shaw v. Express Co.*, 216.

2923. Ordinances of a town regulating the sale of cigars, tobacco, etc., on Sunday are authorized by this section. *S. v. Davis*, 809.

3142. A general residuary clause in a will embraces every species of property unless elsewhere restricted. *Faison v. Middleton*, 170.

3271. Where on trial for murder an alibi is relied on, and evidence is as to murder in first degree and court instructs to convict of first degree or acquit, the verdict of guilty is construed with regard to the evidence and instructions, and is sufficient. *S. v. Wiggins*, 813.

3509. Occasional employee liable for death of employer's mule, while in his possession, taken without employer's consent, without evidence of accidental death of mule. *Clark v. Whitehurst*, 1.

4115. A statute repealing this section is of prospective operation, and especially where taxes have been levied for current year and expenses have been contracted thereunder. *Mann v. Allen*, 219.

4347. Elector voting for too many candidates on one ballot for same office does not necessarily render ballot void as to candidates thereon for other offices. There is no valid election where board of canvassers erroneously gives candidate a majority. *Bray v. Baxter*, 6.

4805. A sale of lands in another State, for cultivation of figs, with certain guarantees of crop and profit, title reserved until purchaser performs certain conditions, etc., must be licensed by Insurance Commissioner, is not an attempted regulation of interstate commerce, and a refusal of the corporation principal makes its agent here guilty of a violation of the statute. *S. v. Agey*, 831.

4809. Provisions of fraternal order that suits be brought within a year are valid. *Faulk v. Mystic Circle*, 301.

REQUISITION.

Requisition — Habeas Corpus — Appearance Bond — Forfeiture — School Funds—Statutes—Constitutional Law—Executive.—Where the Governor has granted requisition for a fugitive from justice from another State, to be turned over to the agent of that State here, and the prisoner sued out the writ of *habeas corpus* before a judge of the Superior Court, and pending this proceeding he forfeits his appearance bond, payable to the State of North Carolina: *Held*, the penalty

REQUISITION—*Continued.*

on the bond falls within the provisions of Revisal, sec. 1378, enacted in pursuance of Art. IX, sec. 5, of our Constitution, and goes to the benefit of the public school fund of the county, and not to the agent of the State whose requisition had been honored, especially when he has shown no authority from such State to collect the amount in controversy. *In re Wiggins*, 372.

RESALES. See Telegraphs, 7.

RESERVATIONS. See Deeds and Conveyances, 24.

RES IPSA LOQUITUR. See Negligence, 8.

RESTRAINT ON ALIENATION. See Deeds and Conveyances, 54, 57, 58; Trusts, 4.

REVERSION. See Deeds and Conveyances, 12.

REVERTER. See Appeal and Error, 22.

REVIEW. See Appeal and Error, 26, 29.

REVOCATION. See Deeds and Conveyances, 34.

RIGHT OF ACTION. See Bills and Notes, 1.

RIGHT OF WAY. See Railroads, 4, 7, 8; Appeal and Error, 22, 23; Instructions, 2.

RULES OF COURT. See Appeal and Error, 39.

RULE OF PRUDENT MAN. See Railroads, 6; Automobiles, 1; Master and Servant, 6; Equity, 2.

RULE IN SHELLEY'S CASE. See Wills, 11, 14.

SAFE APPLIANCES. See Master and Servant, 1; Railroads, 12.

SAFE PLACE TO WORK. See Master and Servant, 3, 6.

SALES. See Specific Performance, 1; Principal and Agent, 5; Wills, 9, 10, 11; Deeds and Conveyances, 29; Appeal and Error, 35; Judicial Sales, 1; Receivers, 1.

SALESMAN. See Principal and Agent, 6.

SCHOOL DISTRICTS. See Taxation, 2.

SEDUCTION. See Criminal Law, 10.

Seduction—Virtuous Woman—Evidence—Subsequent Conduct—Instructions—Appeal and Error.—Upon trial for seduction under promise of marriage, Revisal, 3354, evidence of familiarities permitted by the prosecutrix after the act, not amounting to incontinency, does not negative the evidence that she was innocent and virtuous prior thereto, though properly considered by the jury with reference to her character and the weight of her evidence; and in this case a further remark of the judge that such conduct "a year after the seduction should not be taken against her for unrighteousness" was a repetition, in scriptural phrase, of what he had already charged. *S. v. Lang*, 778.

SEPARATE ACCOMMODATIONS. See Carriers of Passengers, 1.

SEPARATE PAPERS. See Wills, 20.

SERVICE. See Criminal Law, 8.

SEWERAGE. See Injunction, 1; Municipal Corporations, 1, 7, 9.

SHERIFFS. See Carriers of Passengers, 12.

SIGNING AND DELIVERY. See Deeds and Conveyances, 7.

SINKING FUND. See County Commissioners, 3.

SKELETON CASE. See Appeal and Error, 42.

SLAVES. See Adultery, 1; Descent and Distribution, 1.

SOLVENT CREDITS. See Taxation, 4; Usury, 3.

SPECIAL STATUTES. See Statutes, 4.

SPECIAL VERDICT. See Criminal Law, 9.

SPECIFIC PERFORMANCE. See Deeds and Conveyances, 4; Contracts, 10.

Specific Performance—Part Performance—Sales of Realty.—The doctrine of enforcing a parol contract to convey land on the ground of part performance does not prevail in North Carolina. *Ballard v. Boyette*, 24.

STABLES. See Municipal Corporations, 13, 15.

STATUTE OF FRAUDS. See Deeds and Conveyances, 3; Principal and Surety, 1, 2; Contracts, 12.

1. *Statute of Frauds—Principal and Agent.*—The principle that a general agent may not bind his principal by his promise to answer for the debt of another does not obtain when made concerning matters within the apparent scope of the agent's authority and induces an agreement to extend credit to another wherein the principal has a direct and beneficial interest. *Handle Co. v. Plumbing Co.*, 495.

2. *Same—Consideration.*—An original promise to pay an obligation founded upon a distinct consideration moving to the promisor at the time, and not simply collateral or superadded to that of the principal obligor, does not fall within the meaning of the statute of frauds, requiring that it must be in writing, etc. *Ibid.*

3. *Same.*—The plaintiff, a manufacturer of handles, contracted with B. to manufacture and furnish it with certain slabs suitable for its business, which necessitated the purchase by B. of an engine to drive the machinery used in making the output. In order to enable B. to get the engine, the general agent of the plaintiff, acting within the ostensible scope of his employment, promised the defendant seller of the engine that the plaintiff would see that the engine should be paid for within a reasonably short time if sold on a credit, and the defendant, acting on this promise, was induced to make the sale accordingly. *Held*, the promise of the agent was binding upon the plaintiff, his principal, and being founded upon a consideration, did not fall within the meaning of the statute of frauds. *Ibid.*

STATUTE OF USES. See Uses and Trusts, 1; Deeds and Conveyances, 56; Trusts, 4.

STATUTES. See County Commissioners, 3; Contracts, 5; Constitutional Law, 1; Limitation of Actions, 4; Liens, 2, 3; Estates, 1, 3; Equity, 11; Adultery, 1; Homicide, 3, 9; Attorneys, 1, 2; Criminal Law, 10; Municipal Corporations, 3, 6, 11, 17; Appeal and Error, 5, 6, 27; Commerce, 1; Mortgages, 1; Intoxicating Liquors, 3, 6, 8, 9, 10; Counties, 1; Navigable Waters, 1; Execution, 2; Elections, 1, 2, 6; Carriers of Passengers, 6, 11; Wills, 6, 16, 17; Carriers of Goods, 10, 12; Corporations, 5, 19; Judgments, 7, 24; Pleadings, 3; Taxation, 1, 3, 6; Deeds and Conveyances, 14, 25; Insurance, 1, 11; Costs, 1, 2; Courts, 4; Water and Water-courses, 2, 5; Requisition, 1.

1. *Statutes—Interpretation—Intent—Amendatory Acts.*—Where a statute refers to a prior legislative enactment, and in the caption and body of the act purports to be amendatory, substituting and amending different sections, the legislative intent cannot be construed to repeal the former act. *Toomey v. Lumber Co.*, 178.

2. *Same—Drainage Districts—Reference to Sections—Mistakes.*—The legislative intent as gathered from chapter 238, Laws 1915, being to amend chapter 442, Laws 1909, relating to the establishment of drainage districts, it is held that section 2 of the latter act, repealing, as printed, section 2 of the former one, should, by correct interpretation, refer to section 11, upon the same subject-matter, *i. e.*, the assessment of damages, and not to section 2 as printed, which sets out in detail the requirements of the petition, the method of obtaining jurisdiction of the parties, and provides for the appointment of viewers and of a drainage engineer, evidently Roman numerals in the later act being mistaken for the figure 11. Hence, the two acts should be construed together, so as not to repeal chapter 442, Laws 1909. *Ibid.*

3. *Statutes—Repugnant Clauses—Interpretation.*—Where there are two acts of the Legislature applicable to the same subject, passed at different times of the same session, their provisions are to be reconciled in their interpretation, if this can be done by fair and reasonable intendment; but to the extent they are necessarily repugnant the latter shall prevail. *Bramham v. Durham*, 196.

4. *Same—Special Statutes.*—Where there is a statute of general application throughout the State, and a statute special to a given locality, passed on the same subject, and the two are necessarily inconsistent, the special statute will prevail, it being usually regarded as an exception to the general rule, and passed with reference to the conditions existing in the restricted territory. *Ibid.*

5. *Same—Municipal Corporations—Bond Issues—Necessaries—Vote of People.*—By chapter 56, Public Laws 1915, ratified 27 February, 1915, the Legislature established a scheme, applicable to all the municipalities in the State, for local improvement therein, including streets and sidewalks, and authorizing the municipal authorities, under certain conditions, to issue bonds to a proportionate extent for payment of principal and interest without requirement that such issuance be submitted to the vote of the people. Thereafter, by special act, a bond issue was authorized by special legislative enactment, for the city of Durham, for such purposes, requiring that they first be passed favorably upon by the electors of the town. *Held*, the local law controlled, and a bond issue without the required approval is a nullity, the local act, to the extent stated, being considered as repealing the general law. *Ibid.*

STATUTES—*Continued.*

6. *Statutes—Repealing Acts—Special Acts.*—Where a later special law, local or restricted in its operation, is positively repugnant to a former law of general application to the subject-matter, and not merely affirmative, cumulative, or auxiliary, it repeals the older law by implication to the extent of such repugnancy. Revisal, sec. 1129. *Power Co. v. Power Co.*, 248.

7. *Same—Water-powers.*—The provisions of Revisal, 1573, amended by Public Laws 1907, that electric companies shall not have power of condemnation to interfere with any mill or power plant actually in process of construction or in operation, and that water-powers, developed or undeveloped, with the necessary land adjacent thereto for their development, shall not be taken, with repeal of laws in conflict therewith, must give way to a charter since granted by the Legislature to a *quasi*-public corporation, which repeals these provisions by necessary implication, especially as to such lands lying dormant. *Ibid.*

8. *Statute of Frauds—Parent and Child—Promise of Father—Emancipation of Child.*—Where recovery in an action for the board of a minor son depends upon the question of whether the father had emancipated him or had promised to pay for the board, and the evidence tends to show that plaintiff surrendered the clothes of the son in her possession, relying upon the promise of the father that he would see that the board was paid if she would continue the son there: *Held*, sufficient as to an original promise on the father's part, supported by a consideration, to take it out of the statute of frauds and make it binding. *Holland v. Hartley*, 376.

9. *Statutes—Pari Materia—Stock Law.*—Statutes passed at the same session of the Legislature, or one at a later session thereof, upon the same subject-matter, being *in pari materia*, should be construed together as the same law; and where by special enactment a county is authorized to submit to the voters thereof the proposition of continuing the stock law in effect, and by a later statute makes provision for the building of a county-line fence between it and an adjoining county having the stock law in effect, and the later act expressly refers to the former one and provides for the levy of a special tax for the purpose, it is *Held*, that the two acts are *in pari materia*, and should be construed together as a whole. *Keith v. Lockhart*, 451.

10. *Statutes—County Commissioners—Individual Liability—Expressio Unius.*—Where the Legislature has created certain duties to be performed by the county comissioners, and has expressly imposed a personal liability upon their failure to perform some of them, but not as to others, such liability only attaches where it is expressly so declared. *Fore v. Feimster*, 551.

11. *Statutes—Repealing Acts—Implication.*—A later statute will not be construed to repeal a former one by implication if by any reasonable interpretation the two acts can be reconciled and construed together. *S. v. Johnson*, 799.

STENOGRAPHER'S NOTES. See Evidence, 9.

STOCK. See Corporations, 1, 2.

STOCK LAW. See Appeal and Error, 29; Counties, 4; Taxation, 6, 7; Statutes, 9; Elections, 10; Constitutional Law, 1.

Stock Law—Counties—Fences—Necessary Expenses—Constitutional Law.—The building of a county fence by a county having the free-range law, between it and an adjoining county having the stock law, is not a necessary expense within the meaning of Art. VII, sec. 7, of the Constitution, prohibiting counties, towns, etc., from "contracting debts, etc., and levying taxes except for its necessary expenses," etc. *Keith v. Lockhart*, 451.

STREET RAILWAYS. See Railroads, 13, 14.

STREETS. See Municipal Corporations, 10.

SUBCONTRACTORS. See Contracts, 2, 3; Liens, 3.

SUBMISSION. See Homicide, 5.

SUBROGATION. See Insurance, 9; Equity, 6.

Insurance, Fire—Cities and Towns—Water Companies—Equity—Subrogation—Contracts.—Where a citizen of a town has brought suit against the receiver of a water company for the alleged negligent failure of the water company to supply water under its contract with the city, by reason of which the plaintiff sustained loss by fire, and the plaintiff has collected moneys due under his policies with certain insurance companies on the same building insufficient to pay the damages he has sustained and it appears that the receiver has sufficient funds. *Held*, the insurance companies are subrogated to the rights of the insured, and in this case the order of the Superior Court is sustained, that the insurance companies have made out a *prima facie* case against the receiver of the insolvent water company, and that they be permitted to sue him, MR. JUSTICE ALLEN writing the opinion of the Court, MR. CHIEF JUSTICE CLARK concurring; MESSRS. JUSTICES BROWN and HOKE not sitting, and MR. JUSTICE WALKER dissenting upon the grounds stated in his dissenting opinion in *Morton v. Power and Light Co.*, 168 N. C., 582. *Powell v. Water Co.*, 290.

SUBSCRIPTIONS. See Corporations, 1, 4.

SUMMONS. See Courts, 12.

SUNDAY LAWS. See Municipal Corporations, 16.

SUPERIOR COURTS. See Appeal and Error, 5, 6.

SUPREME COURT. See Appeal and Error, 7, 20, 30.

SURETY. See Evidence, 1.

SURFACE WATERS. See Water and Water-courses, 4.

SUSPENSION. See Corporations, 71.

TAXATION. See Usury, 3; County Commissioners, 3; Counties, 4; Constitutional Law, 1.

1. *Taxation—Levy—Repealing Statutes—Interpretation of Statutes.*—Interpreting statutes involving chiefly the repeal of a tax, it is *Held*,

TAXATION—*Continued.*

that as to taxes already levied it will be given a prospective effect only, unless the law controlling the matter forbids such construction. *Mann v. Allen*, 219.

2. *Same—School Districts—Legislative Powers—Constitutional Law.*—Where a school district has been established under the provisions of the Revisal, sec. 4115, and in the exercise of the powers therein conferred have annually levied a tax for school purposes, and, accordingly, a tax was levied for the current year, but subsequently and in pursuance of chapter 135, Laws 1911, an election was ordered on the question of revoking the special tax, which was held and carried in favor of the repeal: *Held*, the repeal of the former tax was prospective in its operation, and especially when the authorities had theretofore contracted with teachers and for other necessary expenses to carry on the school work, authorized by the former act, Revisal, sec. 4115. *Quære*, as to whether the Legislature would have the authority to repeal a valid exercise of the power of taxation as to creditors conferred under the former act. Constitution, Art. VII, sec. 4; Art. VIII, sec. 1. *Ibid.*

3. *Taxation—Levy—Assessment—Repealing Statutes.*—While the word "levy," when used with reference to executive officers, usually means the taking of the property levied upon into the possession or control of the officer, this meaning does not apply when it is used with reference to taxation, for then it refers to the imposition of the tax by the Legislature or under proper legislative sanction, or the apportionment of such tax to the individual taxpayer, and placing the same on the official lists preparatory to its collection, which in some instances is said to be the equivalent of an assessment. And where a statute repeals a former act, and a levy of the character stated has thereunder been made, the repealing act will be construed as prospective in its operation. *Ibid.*

4. *Taxation—Solvent Credits—Indebtedness.—Held*, in this case, that sustaining the defendant's exceptions was tantamount to findings in the lower court that the defendant's personal indebtedness exceeded the amount of the taxes on a note secured by mortgage, and the plaintiff's position that he cannot collect the note for failure to list it or foreclose the mortgage cannot be maintained. *Corey v. Hooker*, 229.

5. *Taxation—Uniformity—Benefits—Counties—Constitutional Law.*—A tax may not be levied upon one part or district of a county, without benefit to it, when it clearly appears that such tax is for the exclusive benefit of another part or district. *Faison v. Comrs.*, 411.

6. *Same—Counties—Stock Law—Local Districts—Statutes—Presumptions.*—Where the voters of a county have established a free-range for the county, at an election held under a statute authorizing it, except as to certain portions, said portions then having the "stock law," and providing the levy of a special tax within the excepted territory for building and maintaining its own fence, and also that a special tax be levied for the whole county for the building and maintenance of a county fence: *Held*, the presumption arises that the Legislature had concluded that the excepted "stock-law" territory would receive special benefit from its own as well as the county-line fence, and the courts will not hold the act unconstitutional on the mere presumption that this is not true and that it was not a uniform taxation of property in the "stock-law" territory, without benefit to the residents

TAXATION—*Continued.*

therein. Laws should not be declared unconstitutional and void unless they are clearly and unmistakably so. *Ibid.*

7. *Taxation—Stock Law—Reserved Localities—Constitutional Law.*—Where under legislative authority a county submits to its voters the question, by ballot, of continuing the stock law therein, reserving certain defined localities, and in event the question of its continuance should be negatived the county should maintain a line fence between it and an adjoining county having the stock law, and levy a special tax for that purpose, but with the proviso that the tax shall not be levied on the property of natural persons in the localities reserved: *Held*, the proviso violates the mandate of our Constitution, Art. VII, sec. 9, "That all taxes levied by any county, etc., shall be uniform and *ad valorem* upon all property except property exempt by the Constitution." *Keith v. Lockhart*, 451.

TELEGRAPHS. See Pleadings, 2.

1. *Telegraphs—Delay in Delivery—Prima Facie Case—Burden of Proof.*—A delay of three days by a telegraph company to deliver a message relating to sickness is sufficient evidence of the company's negligence to place the burden on the defendant to rebut the *prima facie* case. *Johnson v. Tel. Co.*, 130.

2. *Telegraphs—Service Message—Negligence—Evidence—Trials.*—On trial of an action against a telegraph company for its alleged negligent failure to deliver, at its desination, a telegram relating to sickness, wherein defendant moved to nonsuit upon plaintiff's evidence, tending to show a diligent search had been made for the addressee at destination but that no service message was sent back to the sending office: *Held*, the failure to send such service message was evidence of defendant's actionable negligence, which could not be rebutted by the assumption of the defendant's agent that no better address could have been given under the circumstances, the addressee living some 12 miles from the town given as his address. *Ibid.*

3. *Telegraphs—Receiving Office—Negligence—Delivery.*—Evidence that a telegraph company received a telegram for transmission to an addressee well known at its delivery point to the people of the town and defendant's agent, at which he had an established place of business, and that the message was received at this place at 8:29 a. m. and if delivered before 9 a. m. the injury complained of would have been avoided, is *Held*, under the circumstances of this case, sufficient for the determination of the jury upon the issue of defendant's actionable negligence, and to sustain a verdict for actual damages. *Lawrence v. Tel. Co.*, 240.

4. *Telegraphs—Office Hours—Negligence.*—A telegraph company will not be held as negligent in the transmission of a telegram when it is shown that its agent received the message about the time the office at its destination had closed, and the relay office had sent a service message back with this advice. *Ibid.*

5. *Telegraphs—Death Message—Notice—Relationship of Parties—Actual Damages—Burden of Proof.*—Where the sendee of a telegram announcing a death sues a telegraph company for its negligent failure to deliver it, and it appears that he was not in any way related to the deceased, there is no presumption that he suffered mental anguish in being prevented by the negligence of the defendant from attending

TELEGRAPHS—*Continued.*

the funeral, but he may show such facts and circumstances upon which the jury may award actual damages, with the burden of proof on the plaintiff. *Ibid.*

6. *Telegraphs—Contract—Breach—Negligence—Commercial Telegrams—Measure of Damages.*—A telegraph company is liable, on breach of its contract to properly transmit and deliver a commercial message, for such damages as were in reasonable contemplation of the parties, which are capable of ascertainment with a reasonable degree of certainty and may extend to those arising from collateral agreements growing out of the telegraph company's contract to transmit and deliver the telegram, when coming within the rule stated. *Gardner v. Tel. Co.*, 405.

7. *Same—Collateral Contracts—Resales—Evidence—Notice.*—Upon the breach of contract of a telegraph company to properly transmit and deliver a message ordering the shipment of goods for resale, and this should reasonably have been known to the company from the course of the sender's dealings with it and the character of the business he carried on at the place, the latter may recover as damages the loss of profits thereby prevented, which may be ascertained by reference to the difference between the contract price and the prices prevailing in the market; and when the goods are bought to be sold again by specific methods and in the regular course of dealings of the purchaser, and these conditions should reasonably have been known to the company, the profits ascertained by the resale made in the manner contemplated affords more accurate data for estimating the damages actually attributable to the breach, and may be shown in the absence of evidence tending to show that they were made at extravagant prices or under unusual conditions. *Ibid.*

8. *Same—Constructive Notice—Dealings.*—A grocer sent a telegram in the month of June to a commission merchant with whom he customarily dealt, reading, "Ship today 150 crates of fancy cabbages, same price or less," with evidence tending to show that the cabbages were not sent, owing to the failure of the defendant to transmit and deliver the message; that his method was to order cabbages by telegraph through the defendant, handling two or three car-loads a week through the spring and summer, and sell them to his customers pending their arrival, and he had sold the whole shipment for delivery on a certain day, by which time it should have been received. There being no evidence that the resales were made under exceptional circumstances, it is *Held*, under the evidence in this case, that the prices obtained at the resale thereof were competent as evidence on the issue of damages. *Ibid.*

9. *Telegraphs—Vendor and Purchaser—Principal and Agent—Contracts—Negligence—Damages.*—Where according to custom between the parties the sendee of a telegram purchased on his own account cotton seed to be shipped to the sender at a price stated in the message, but by reason of an error in its transmission he had purchased to sell at a higher price than that actually authorized, the telegraph company cannot be considered the agent of the sender in making the contract, or bound by the terms of the erroneous telegram when the sender has before shipment ascertained the error in the telegram, and voluntarily pays for the seed at the higher price, and he may not recover, in his action against the company, the difference between

TELEGRAPHS—*Continued.*

the price authorized and that negligently stated in the telegram, but only nominal damages, or the cost of the message. As to whether substantial damages could be recovered had the seed been accepted without knowledge of the error, and such had been sustained by the sender, with no means of recouping his loss, *quære*. *Cotton Oil Co. v. Tel. Co.*, 705

10. *Same—Extra Expense.*—In this action it is *Held*, that the sender of a telegram erroneously transmitted as to the price offered for cotton seed may not recover, as an element of damages, money expended on certain trips taken, as they in no wise referred to the subject of his action, nor were they connected therewith. *Ibid.*

11. *Telegraphs—Vendor and Purchaser—Principal and Agent—Negligence Damages—Duty of Sender.*—It is the duty of the sender of a telegram which has erroneously been transmitted, to his knowledge, to minimize the loss resulting to him, whether arising by contract or in tort; and where the telegram was for the purchase of cotton seed, he may not voluntarily enter into a new contract at the erroneously stated price, when he might have refused to take the seed, and then hold the telegraph company to the payment of his loss. *Ibid.*

TENANTS IN COMMON. See Partnership, 1; Deeds and Conveyances, 30, 33; Appeal and Error, 36, 37.

1. *Tenants in Common—Deeds and Conveyances—Possession—Ouster—Limitations of Actions.*—In order for one tenant in common to acquire the title to lands against the other tenants there must be some act of ouster amounting to disseizin; and where he has acquired an invalid deed from the other tenant, and they both live on the land as theretofore, the deed so acquired is not color of title. *Lee v. Parker*, 144.

2. *Tenancy in Common—Conversion of Personalty.*—A tenant in common of a chattel cannot maintain an action of trover against his cotenant merely on the ground that his demand for the possession of the common property has been refused by the latter, unless he can show the cotenant had subsequently consumed it or placed it beyond recovery by legal process. *Doyle v. Bush*, 10.

3. *Tenancy in Common—Conversion of Personalty.*—Where a tenant in common in possession of chattels withholds them from his cotenant, or takes them from him, exercising dominion thereover, either in direct denial or inconsistent with the latter's rights, trover will lie for the conversion. *Ibid.*

4. *Tenancy in Common—Conversion by Cotenant—Defense—Ratification of Sale of Chattel.*—Where plaintiff, cotenant of a horse, ratified an unauthorized sale thereof by defendant cotenant, such ratification did not preclude plaintiff from recovery for the wrongful conversion of the proceeds of the sale. *Ibid.*

TENDER. See Carriers of Goods, 11; Usury, 3.

TERMS. See Judgments, 7.

TEXT-BOOKS. See Evidence, 17.

THREATS. See Marriage and Divorce, 1.

TIMBER. See Deeds and Conveyances, 10, 11, 14, 15, 16, 44, 45, 46.

TITLE. See Carriers of Goods, 7; Deeds and Conveyances, 11, 12, 14, 16, 36, 48, 49; Elections, 7; Processioning, 1, 2; Partition, 1; Uses and Trusts, 1; Mortgages, 4.

TORTS. See Contracts, 4; Partnership, 4; Water and Water Courses, 6.

TRANSACTIONS. See Evidence, 1.

TRANSFERENCE OF CAUSES. See Removal of Causes, 1.

TRIAL BY JURY. See Receivers, 1.

TRIALS. See Carriers of Goods, 1, 11; Fish and Oysters, 1; Judgments, 2; Vendor and Purchaser, 2, 11, 16; Master and Servant, 2, 4, 7; Railroads, 2, 4, 11, 17; Courts, 2; Deeds and Conveyances, 6, 7, 9, 21, 47 52; Evidence, 1, 10, 16, 20; Telegraphs, 2; Carriers and Passengers, 10, 13; Negligence, 1, 2, 4, 7, 9; Elections, 9; Commerce, 4; Costs, 2; Reformation of Instruments, 1; Water and Water Courses, 3; Principal and Agent, 4, 7; Issues, 3; Insurance, 6; Appeal and Error, 33; Municipal Corporations, 10, 15; Damages, 2, 4; Partnership, 6; Contracts, 16; Liens, 2; Instructions, 8, 9; Equity, 7; Conflict of Laws, 1; Descent and Distribution, 1; False Imprisonment, 1; Fornication and Adultery, 1, 2; Homicide, 2; Witnesses, 2.

1. *Trials—Voluntary Nonsuit—Appeal and Error.*—The plaintiff in an action may, in proper instances, take a voluntary nonsuit at any time before the rendition of the verdict; and where the court has obtained the issues from the jury during their deliberation thereon, in an action upon contract, and the first issues have been answered in the plaintiff's favor and made known to him, but the answers to the issues as to damages are not known to him, and the judge delivers the issues again to the jury with the instruction that they may deliberate upon the issues and make such changes as they may desire, it is reversible error to refuse the plaintiff's motion for a voluntary nonsuit, made as the jury were retiring to again consider the issues. *Oil Co. v. Shore*, 51.

2. *Trials—Issues—Submission.*—The form of issues submitted is of little consequence, if they submit the questions involved, and under them evidence is introduced by both parties presenting their sides of the controversy. *Shannonhouse v. White*, 16.

3. *Trials—Instructions—Evidence—Restrictions.*—It is error for the trial judge to single out the deposition of a particular witness and remind the jury that he was the only eye-witness to the occurrence, and if his testimony was believed, it would restrict them in their inquiry. *Starling v. Cotton Mills*, 222.

4. *Trials—Evidence—Nonsuit—Appeal and Error.*—In this action for damages for a breach of warranty of a horse, brought by the purchaser, it is held that the evidence was sufficient to take the case to the jury, and the defendant's motion to nonsuit was properly denied. *Hodges v. Smith*, 158 N. C., 356, cited and applied. *Winn v. Finch*, 272.

5. *Trials—Evidence—Fraud—Instructions.*—In this action for contribution upon a note paid by a joint maker and assigned to his trustee, there was allegation, in defense, that the note sued on was procured upon the fraudulent representation that the makers thereof should be ten in number and pay their proportionate parts. Upon the entire testimony it is held that there was no evidence of fraud, and

TRIALS—*Continued.*

the instruction of the court in that respect was not erroneous. *Petree v. Savage*, 437.

6. *Trials—Instructions—Interest—Appeal and Error—Harmless Error.*—In this action to recover damages for a personal injury the plaintiff attacks a release given to an agent of defendant for fraud, and the agent's testimony as to the transaction, in defendant's behalf, has been given and received after he had quit the defendant's service: *Held*, the reference by the court, in his charge to the jury, to the plaintiff's interest in the case was not prejudicial to the plaintiff. *Settee v. Electric Ry.*, 440.

7. *Trials—Negligence—Evidence—Nonsuit.*—An employee at defendant's quarry was killed by a shed, under which he had sought shelter from a violent wind and rain storm, having blown down upon him. *Held*, a motion of nonsuit was properly granted, under the evidence. *Jackson v. Granite Corporation*, 758.

8. *Trials—Evidence—Criminal Action—Nonsuit.*—Upon motion to nonsuit a criminal action, the evidence must be construed in a light most favorable to the State, for the purpose of determining its legal sufficiency to convict, and this being shown, its weight and the credibility of the witnesses are for the determination of the jury. *S. v. Carlson*, 818.

9. *Trial—Experts—Competency—Objections.*—Where a physician has been admitted and has testified as an expert, without objection, a question as to his competency as an expert may not thereafter be raised by a general objection to a proper question. *Patton v. Lumber Co.*, 837.

TROVER AND CONVERSION.

Trover and Conversion—Acts Constituting—Liability.—An occasional employee, who took the employer's mule at night and drove it off without the knowledge and consent of the employer, was guilty of a tortious conversion, and an act indictable under Revisal 1905, sec. 3509; and where the mule died in his possession he was liable for its value, at least in the absence of any evidence in support of his claim that the death was accidental. *Clerk v. Whitehurst*, 1.

TRUST FUNDS. See Wills, 1.

TRUSTS. See Deeds and Conveyances, 18, 47, 48, 56, 58; Estates, 1.

1. *Trusts—Parol Agreement—Transferring Land.*—Where there was a verbal agreement between plaintiff, defendant, and the party conveying the land to the plaintiff, that the plaintiff, on payment of the price to him by defendant, should convey to the defendant, there was a valid and enforcible parol trust in defendant's favor. *Ballard v. Boyette*, 24.

2. *Trusts—Trustees—Courts, Delegation of Powers.*—A trustee appointed by the court to sell lands for the benefit of the creditors of the judgment debtor, or other beneficiaries, except by order of court or unless otherwise provided by the instrument under which he acts, may not grant an option on the land subject to the trust, to another, for a protracted and indeterminate period; for his selection as a trustee implies some measure of confidence in his judgment and discretion in the performance of the duties imposed on him at the time of sale, which he is not permitted to refer to another. *Cozad v. Johnson*, 636.

TRUSTS—*Continued.*

3. *Same—Options on Land.—Protracted Litigation—Benefits—Liens.*—A trustee appointed by the court to sell the lands of a judgment creditor is not, by the sole virtue of his appointment and without express authority in the order thereof, empowered to grant an option thereon upon condition that the optionee, at his own expense, bring suit to remove a cloud upon the title of the lands, and, if successful, pay the agreed price within sixty days from the final termination of the suit; but where the optionee, in accordance with the terms of his agreement, has incurred the costs of successful litigation, beneficial to the trust estate, he is entitled to recover such costs, with reasonable attorneys' fees, and the same will constitute a prior lien upon the proceeds of the sale of the land, which must thereafter be made by the trustee and administered in accordance with the authority conferred upon him. As to whether the trustee could give an option on the lands for a short and definite period, with the view of promoting a present and advantageous sale, *quære. Ibid.*

4. *Trusts and Trustees—Passive Trusts—Statute of Uses—Husband and Wife—Restraint on Alienation—Parties.*—Where lands are conveyed in trust for a married woman for life free from the debts or control of her husband, with a restraint on alienation, which is void, and the husband has died and the trust has thereby terminated, and where B., who takes under the deed a vested remainder in fee, defeasible upon his dying without issue, has acquired the interest of the ulterior donee, the three estates created by the deed of gift become vested in B., and the trust created by the deed to preserve any contingent remainder becoming passive, or no longer necessary, the trustee, or his heirs, are not necessary parties to an action by B. against his vendee of the lands to enforce his contract of sale. *Lee v. Oates*, 717.

UNDUE INFLUENCE. See Deeds and Conveyances, 51.

UNIFORMITY. See Taxation, 5.

UNREGISTERED VOTERS. See Elections, 4.

USES AND TRUSTS. See Deeds and Conveyances, 34, 35.

Uses and Trusts—Title—Statute of Uses.—A trust created to the use of the donor's grandchildren in a deed to her lands, to vest, according to the terms of the instrument, when the youngest thereof should reach the age of 21 years: *Held*, upon the arrival of the youngest grandchild at the age of 21, the trust becomes passive and the legal title is transferred to the use by reason of the statute of uses. *Springs v. Hopkins*, 486.

USURY. See Actions, 2.

1. *Usury—Contracts—Equity—Payment—Notes.*—It is necessary, to maintain an action for the penalty of taking usury for a loan, that the usurious interest should have been paid in money or money's worth by the plaintiff, who sues in equity, and the mere giving a note for the usurious amount is insufficient. *Corey v. Hooker*, 229.

2. *Usury—Equity—Injunction—Payment of Legal Interest.*—A suit to perpetually enjoin the foreclosure of a mortgage is one seeking the aid of a court of equity, requiring that the plaintiff return the money

USURY—*Continued.*

actually received, with interest; and where the defendant waives the usurious part of the contract the plaintiff may not maintain the position that the defendant is not entitled to his legal rate of interest, and the relief he thus seeks will be denied. *Ibid.*

3. *Usury—Equity—Injunction—Taxation—Solvent Credits—Listing for Taxes—Tender of Payment.*—In this action to perpetually enjoin the foreclosure of a mortgage alleged to have been made upon an usurious contract the defendant does not seek to recover anything "by action at law or suit in equity," and the plaintiff's position that defendant may not exercise his power of sale for failure to list the note for taxation is untenable, especially when the defendant exercised his right to pay the amount of taxes into court. *Ibid.*

VARIANCE. See Vendor and Purchaser, 15; Appeal and Error, 47.

VENDOR AND PURCHASER. See Intoxicating Liquors, 4; Judgments, 8; Telegraphs, 9, 11; Contracts, 20.

1. *Vendor and Purchaser—Alternate Obligation—Election of Vendor.*—Where an obligation is in the alternative, the selection is usually at the will of the obligor; and where it is provided in a contract of sale of burlap bags that the seller shall not be liable for damages for failure to ship the goods under certain conditions, if imported, the terms specified refer to imported goods at the election of the seller to furnish them. *Winborne v. Cotton Mills*, 62.

2. *Same—Contracts—Limiting Liability—Burden of Proof.*—The defendant contracted to sell and deliver burlap bags to the plaintiff, to be imported at his election, and by its terms excluding liability of the defendant for failure to deliver due to storms, etc., or other causes beyond his control. The failure of the defendant to deliver the goods was admitted. *Held*, the burden of the issue was on the defendant, and its evidence tending only to show that it had elected to supply imported goods for which it had placed its orders in foreign parts; that the goods had been shipped, but the vessel had never arrived in New York, is insufficient, and not meeting the requirement that the defendant show that the vessel was seaworthy or a proper one, or that it had exercised due diligence in performing the obligations of its contract. *Ibid.*

3. *Same—Trials—Evidence—Appeal and Error.*—Where the seller of goods seeks to avoid liability for his failure to deliver them under the terms of the contract, under a stipulation therein that he should not be held responsible for conditions affecting their delivery which were beyond his control, and his evidence is insufficient to shift the burden of the issue placed on him, its rejection by the trial judge is not reversible error, though it is relevant to the inquiry. *Ibid.*

4. *Vendor and Purchaser—Contract—Breach—Measure of Damages.*—Where the seller of goods has wrongfully failed to deliver them in accordance with his contract, the measure of damages is the difference between the contract price and the market value at the time when and the place where they should have been delivered. *Ibid.*

5. *Vendor and Purchaser—Parol Sale—Repudiation—Effect.*—Where the owner of land makes a parol contract to sell it, he cannot repudiate the agreement and retain benefits received, whether money on the

VENDOR AND PURCHASER—*Continued.*

purchase price or the enhanced value of the land by reason of improvements. *Ballard v. Boyette*, 24.

6. *Vendor and Purchaser—Parol Contract of Sale—Recovery for Improvements.*—Where defendant, vendee of land under a parol contract repudiated by the vendor, sought to recover for improvements, seeking relief under the general principles of equity, it was no objection that defendant showed no color of title, as required in a proceeding under Revisal 1905, sec. 652, providing that any defendant against whom a judgment shall be rendered for land may, before execution, petition the court, stating that he, while holding the premises under color of title, made permanent improvements, etc., and that a jury may assess plaintiff's damages and defendant's allowances for improvements. *Ibid.*

7. *Vendor and Purchaser—Contracts—Warranty—Reassurance—Verdict.*—Where the seller warrants a horse to be gentle, and the purchaser carries it back to his stables after seeing the horse was afraid of automobiles, which had caused injury, and the seller assures him that the horse was as represented, and only "feeling good" at the time, and offers to take it back and surrender the note for the purchase price he had received, which the purchaser declines to do, takes the horse back and is convinced of the fact that it was not as warranted, and the jury upon proper instruction from the court finds upon the issue that there had been a breach of the warranty, it is equivalent to finding that the seller renewed his original assurances, upon which the purchaser, in the exercise of ordinary care and prudence, relied. *Winn v. Finch*, 272.

8. *Vendor and Purchaser—Contracts—Warranty—Breach—Damages.*—Upon the breach of warranty of a horse, the purchaser is not bound to accept the seller's offer to rescind the contract, but may keep the horse and maintain an action for damages for the breach. *Ibid.*

9. *Vendor and Purchaser—Contracts—Warranty—Breach—Measure of Damages.*—The measure of damages for a breach of warranty in the sale of a horse is the difference between its actual value and what the value would have been had the animal been as warranted, and damages for a personal injury caused by the horse not being gentle as warranted was properly excluded in this case. *Ibid.*

10. *Vendor and Purchaser—Sales on Commission—Misappropriation of Funds—Corporations—Officers—Parties—Actions, Joint and Several.*—When goods are consigned to a corporation to be sold and properly accounted for, the proceeds are regarded as a trust fund and may be recovered by appropriate action, not only as to the corporation appropriating the same, but as to the officers thereof knowingly participating in the wrong; and in case of liability the action can be maintained against the parties jointly or severally. *Cone v. Fruit Growers' Assn.*, 530.

11. *Vendor and Purchaser—Contracts—Fraud—Trials—Evidence.*—Parol evidence that the plaintiff's salesman procured the written contract for the sale of jewelry sued on by falsely representing that certain named responsible dealers had purchased similar jewelry from him is sufficient to sustain a verdict setting aside the writing for fraud, and the evidence is not objectionable under the statute of frauds. *Novelty Co. v. Moore*, 703.

VENDOR AND PURCHASER—*Continued.*

12. *Same.*—It is not required that the defendant show fraud in the procurement of a written contract for the sale of goods, by clear, strong, and convincing proof, when such fraud is relied upon in defense of an action to recover the contract price. *Ibid.*

13. *Vendor and Purchaser—Price Delivered—Milling in Transit—Custom—Credits—Evidence—Contracts.*—Under a contract for the purchase of a quantity of flour at a price delivered, to be shipped out in carload lots within a stated period as designated by the purchaser, the purchaser was to pay the freight and deduct it from the invoice of the next shipments, but breached his contract by refusing to accept the flour after the first shipment. The seller shipped the flour from a western point to Goldsboro, N. C., under a milling-in-transit arrangement at S., by which the freight for the whole transit was paid by the shipper, and in his action for the price of the flour it is held that the purchaser was not entitled to deduct therefrom the freight from S. to destination, as the contract contemplated actual shipments, and the freight was paid by plaintiff under the milling-in-transit arrangement with the railroad company, and, therefore, no freight was due at Goldsboro. *Flour Mills v. Distributing Co.*, 708.

14. *Vendor and Purchaser—Price Delivered—Contracts—Breach—Measure of Damages.*—In an action by the seller of flour at a certain price delivered, for the breach of defendant's contract to accept it, the measure of damages is the difference between the contract price and the market price at the place of delivery. *Ibid.*

15. *Vendor and Purchaser—Pleadings—Proof—Variance—False Representations—Opinion—Evidence.*—Where it is alleged in an action to recover a sum claimed to be due under plaintiff's contract to furnish cuts to be used by the latter for advertising purposes in a local newspaper, that the agent of the plaintiff induced the defendant to enter therein upon falsely representing that the management of the paper had agreed to use the cuts at the same rate defendant had theretofore been paying, and the proof was that the plaintiff's agent had stated to defendant that it would not cost more, and upon due deliberation the defendant had accepted the offer: *Held*, there was a fatal variance between the allegation and proof, the latter amounting to no more than an expression by the agent of his opinion. *Advertising Co. v. Fain*, 714.

16. *Same—Trials—Evidence.*—Where a business concern has agreed to use, under contract, at a stated price, cuts furnished for advertising purposes, and there is evidence in defense tending to show that the vendor's agent, in making the sale, stated that the manager of a local paper said he would use them at the same advertising rates the defendant had been paying, which he had refused to do, this, of itself, is no evidence of the falsity of the representations. *Ibid.*

17. *Vendor and Purchaser—Contracts, Written—Parol Evidence—Lost Writing—Search—Subsequent Letters—Admissions.*—In this action to recover the purchase price of goods sold and delivered upon written order of the defendant, the plaintiff's evidence of the destruction of the order by fire and its unsuccessful search therefor was sufficient to admit of parol evidence of its contents; and were it otherwise, the acknowledgment of defendant's liability by subsequent letters was a sufficient writing. *Bag Co. v. Grocery Co.*, 764.

VENDOR AND PURCHASER—*Continued.*

18. *Vendor and Purchaser—Burden of Proof—Negligence.*—Upon this petition to rehear, the ruling in the opinion, 168 N. C., 621, putting the burden on defendant of proving he was a purchaser for value, is affirmed, and for the further reason that otherwise it would put the burden on one unacquainted with the facts, to prove a negative. *King v. McRackan*, 752.

VENUE. See Removal of Causes, 1, 2; Judgments, 6; Courts, 12.

VERDICT. See Issues, 1; Appeal and Error, 11; Public Sales, 1; Judgments, 8, 9; Vendor and Purchaser, 7; Water and Water Courses, 3; Courts, 10; Insurance, 10; Homicide, 5, 9.

VERDICT, DIRECTING. See Intoxicating Liquors, 10.

VETERINARY SURGEONS. See Issues, 6; Principal and Agent, 10.

VESTED INTERESTS. See Wills, 11; Deeds and Conveyances, 59.

VOLUNTARY NONSUIT. See Trials, 1.

VOTE OF PEOPLE. See Constitutional Law, 2.

WAIVER. See Carriers of Goods, 5; Courts, 1, 8; Commerce, 2; Criminal Law, 8.

WARRANT. See Criminal Law, 8.

WARRANTY. See Principal and Agent, 1; Judgments, 8; Vendor and Purchaser, 7, 8, 9; Deeds and Conveyances, 26, 36.

WATER COMPANIES. See Subrogation, 1.

WATER POWER. See Corporations, 7, 8; Statutes, 7.

WATER AND WATER-COURSES.

1. *Water and Water-courses—Water-power—Acquisition—Corporations—Condemnation.*—In this action to adjust conflicting claims and water rights and easements between two *quasi*-public corporations for the development of water-power it is *Held*, that an issue as to whether the plaintiff acquired the rights and easements before the bringing of the action is insufficient, as too indefinite. *Power Co. v. Power Co.*, 248.

2. *Water and Water-courses — Condemnation — Statutes — Exceptions—Burden of Proof.*—Water powers are subject to condemnation under our statutes, chapter 302, Laws 1907, amended by chapter 94, Laws 1913, unless the same are "used or held to be used or to be developed for use in connection with or in addition to any power actually used by such persons, firms, or corporations serving the general public"; and where a *quasi*-public corporation brings action for condemnation, and the defendant resists upon the ground that the lands or power sought to be taken are protected by the statute, the burden of proof is upon the defendant to bring the lands or water-power within the provision of the statutes excepting them. *Ry. Co. v. Power Co.*, 314.

3. *Same—Trials—Evidence—Questions of Law—Verdict, Directing.*—Where a *quasi*-public corporation, with the power of condemnation, seeks to condemn a stream of water for water-power, which is jointly

WATER AND WATER-COURSES—*Continued.*

owned by an opposite riparian owner, and the respondent resists the proceedings upon the sole ground that it is to be used in connection with and in addition to its electric power already developed and in use by it, the burden is upon the respondent to bring itself within the exception of the statute; and where its evidence tends solely to show that it could only do so by the use of a wing dam, this would infringe the plaintiff's right to the use of the whole bulk of the stream, undivided and indivisible, presenting insufficient evidence of his contention to be presented to the jury, and the plaintiff's right will be established as a matter of law. *Ibid.*

4. *Water and Water-courses—Surface Waters—Diverting Flow—Damages.*—The upper proprietor is liable to the lower one for the damages caused to the latter's land by changing the direction of the flow of the surface water on his own premises; and where a railroad company thus causes damages to the land of the lower proprietor by changing the location of its culverts, it is liable for the consequent damages, without reference to the question of care or skill in the construction of its roadbed, side ditches, and culverts. *Cardwell v. R. R.*, 365.

5. *Same—Railroads—Change of Culverts—Statutes.*—Where a railroad company has constructed its roads with culverts and ditches, and thereafter makes a change in the culverts so as to divert the flow of surface water, to the damage of the lands of the plaintiff, the lower proprietor, the five-year statute of limitations, Revisal, sec. 394 (2), begins to run only from the time the change was made which caused the damages complained of. *Ibid.*

6. *Same—Torts—Diminution of Damages.*—Where damages sound in tort and do not arise by contract, the rule that the plaintiff is required to reasonably reduce the amount of his damages does not apply: and where a railroad company has wrongfully diverted the flow of water upon the lands of the lower proprietor, the latter is not required to go to the expense of cutting ditches on his land to carry off the water to reduce the amount of damages being caused to his lands. *Ibid.*

WATER-WORKS. See Municipal Corporations, 7.

WHARVES. See Navigable Waters, 3.

WILLS. See Evidence, 13.

1. *Wills—Trust Funds—Life Interest—Contingent Interests—Estates—Remainders.*—An estate devised to M. "during her natural life, free from the control of her husband, and at her death to be paid to such of her children as she may have surviving her, and to the issue of such of her children as may have died in her lifetime leaving issue," the children to take *per stripes: Held*, the children of M. held an estate dependent upon their being alive and filling the description at the time of the death of their mother, the life tenant; but if they died before then without issue, their interest became extinct, and if they so died leaving issue, these last became the owners of the interest of their deceased parent, but holding directly from the testator. *Clark v. Wimberly*, 48.

2. *Same.*—M. held by devise a life interest in a trust fund created under the will, with the remainder to her children, J., L., and A., contingent upon their surviving her, with further limitation over to their sur-

WILLS—*Continued.*

viving children, to take *per stirpes* upon the nonhappening of the contingency stated. The life tenant and her children, J., L., and A., assigned "all our right, title, and interest in and to $800 in value of said fund" to secure a creditor of J., and J. and L. having predeceased their mother, the former leaving children surviving and the latter none, it is *Held*, by the terms of the assignment, the interest of A., having survived her mother, liable to the debt, is one-third of $800, the full amount specified, and not her entire interest in the funds; and this interpretation is not affected by a later clause in the writing of assignment, that the indebtedness be credited "with $800 if the interest of the parties hereto in the trust fund now in the hands of the trustee shall amount to so much." *Ibid.*

3. *Wills, Joint—Holograph Wills—Surplusage.*—A holograph will of a testator signed by him and by his wife also, found among his valuable papers after his death, and duly probated, is valid as to the property disposed of therein by the husband; and the signature of the wife and other extraneous matters therein appearing in the handwriting of another will be disregarded as surplusage. *In re Colt's Will*, 74.

4. *Wills—Residuary Clause—Interpretation.*—No particular mode of expression is necessary to constitute a residuary clause in a will, and while the words "rest," "residue," or "remainder" are commonly used for the purpose, naturally placed at the end of the disposition portion of the will, all that is required is an adequate designation of what has not been otherwise disposed of; and the fact that a provision so operating is not spoken of in the will as the residuary clause is immaterial. *Faison v. Middleton*, 170.

5. *Same—Intent.*—A residuary clause in a will should be construed so as to prevent an intestacy as to any part of the testator's estate, unless there is an apparent intent to the contrary, plainly and unequivocally expressed in the writing. *Ibid.*

6. *Wills, Residuary Clause—Property Devised—Realty—Statutes.*—General words in a residuary clause of a will, "all of the residue," etc., embrace every species of property, whether real or personal, owned by the testator at his death, unless restricted by the context. Revisal, sec. 3142. *Ibid.*

7. *Wills—Residuary Clause—Devise in Blank—Interpretation.*—A devise of land "to my....," without naming the devisee, followed by a residuary clause of the will, "that all of the residue of my estate be sold, and if there should be any surplus over the payment of debts and expenses, that such surplus be equally divided and paid over" to certain named persons: *Held*, the failure to name the devisee brings the devise within the terms of the statute as to void devises, or those incapable of taking effect, and the property devised will go to the residuary legatees, and not to the heirs at law. *Ibid.*

8. *Wills—Devise of Dwelling—Messuage—Lands.*—The devise of a "house," referring to the dwelling of the owner, is equivalent to the word messuage, and, in the absence of some term or clause restrictive of its meaning, conveys the lot on which the dwelling is situate, together with the outbuildings customarily used by the owner as a part of his residence, and this rule of construction is held in this case to apply to the words, "I want my mother to occupy the furnished house

WILLS—*Continued.*

where we live, during her life," etc., it appearing that the house was situate upon a lot of the usual size of those of the town and clearly defined and identified. *Broadhurst v. Mewborn*, 400.

9. *Wills—Power of Sale—Executors and Administrators—Ulterior Devisees—Reconversion.*—Where the testator directs in his will certain lands to be sold and the proceeds divided among certain of his heirs at law, there is no implied power of sale in the executor, and the proceeds of the lands will go to the heirs at law designated, in their converted form, unless the devisees, being *sui generis*, elect to take the lands. *Ibid.*

10. *Wills—Power of Sale—Ulterior Devisees—Reconversion—Minors—Execution of Powers—Parties.*—The doctrine of reconversion by consent of the beneficiaries under a will of lands ordered to be sold after the falling in of a life estate cannot apply when some of the beneficiaries are infants, or there is a difference of opinion among them, for then an appropriate proceeding for the execution of the power of sale is necessary, probably requiring that the heirs at law be made parties thereto. *Ibid.*

11. *Wills—Power of Sale—Reconversion—Proceeds of Sale—Vested Interests—Deeds and Conveyances.*—A devise of land with direction that, upon the death of the life tenant, they be sold and the proceeds be paid in certain proportions to testator's sister and the two nieces, the daughters of another sister: *Held*, whether the lands are reconverted or sold by proper procedure, the ulterior devisees named have a vested interest either in the lands or the proceeds of sale, to the extent of her respective interest, and the deed of either of them given for such interest is valid. *Ibid.*

12. *Wills—Rule in Shelley's Case.*—The application of the *Rule in Shelley's Case* is recognized in North Carolina, with a disposition of our courts to restrict rather than enlarge its operation in order to effectuate, when practicable, the intention of the grantor or testator as gathered from the will or deed. *Ford v. McBrayer*, 420.

13. *Same—"Issue"—Testator's Intent.*—The language of the *Rule in Shelley's case* confines its application to cases where the ancestor takes an estate of freehold with limitation over "to his heirs or the heirs of his body in fee or in fee tail," etc., and the words "issue" or "issue of the body" not being employed, and being more flexible than the word "heirs," this latter expression will ordinarily be construed as meaning children, or particular persons designated to take after the falling in of the life estate, in contradistinction of heirs generally, so as not to extend the rule, but to preserve the intention of the testator or grantor, when nothing appears upon the face of the instrument to show the contrary. *Ibid.*

14. *Same—Estates for Life—Residuary Clause.*—The objection to the application of the *Rule in Shelley's case*, that there is no precedent life estate, is minimized or destroyed in this case, by a residuary clause in the will construed which disposes of all other property of the testator. *Ibid.*

15. *Wills—Rule in Shelley's Case—"Bodily Issue"—Testator's Intent.*—A devise of a certain tract of land to the testator's two children, John and Laura, "to be equally divided between them, the part of Laura

WILLS—*Continued.*

to be hers as long as she lives, and then to her bodily issue; and if she should marry, my son shall see that her husband shall not dispose of her lands." *Held*, the restrictive words as to Laura's estate not being used as to that of John, or elsewhere in the will as to similar devises, she will not be construed to take a fee simple, under the *Rule in Shelley's case*, and the words "her bodily issue" will be construed as meaning "children." *Ibid.*

16. *Same—Deeds and Conveyances—Estoppel—Residuary Devises.*—A devise of land to J. and L., to be divided between them; to J. in fee and to L. for life, with limitation over to her children, the balance of the testator's estate to go to J. and L. and other of the testator's children under a residuary clause in the will. J. and L. divided the land, giving interchangeable deeds with covenants and warranties, and L. died without child, having first conveyed the lands described in her deed from J. to a stranger. *Held*, the deed from J. to L. estopped J. and those claiming under him as against the later grantee of L. and the deed of L., being for her present and future interest, conveyed also all the interest in the land L. may have acquired either by deed, descent, or as a devisee in the residuary clause of the will, in this case there being no difference between the latter two. *Ibid.*

17. *Wills—Statutory Right—Statutes.*—The right to dispose of property by will being exclusively statutory, the heir may not be deprived of his inheritance if the provisions of the statute with regard to the exercise of this right are disregarded. *Alexander v. Johnston*, 468.

18. *Same—Interpretation of Statutes.*—In construing a will, the intent of the testator should be given controlling effect, the efficacy of the instrument as a will being dependent upon the legislative intent gathered from the language of the statute, construed from a consideration of the existing law and the evils to be remedied, so that the remedy may be applied. *Ibid.*

19. *Same—Holograph Wills.*—The purpose of our statute authorizing holograph wills is to enable persons to make valid wills by executing the instrument in their own handwriting, their names appearing therein, when they cannot procure the assistance of others or do not desire the intended disposition of their property to be known; and this without the formal attestation of witnesses. *Ibid.*

20. *Same—Identification.*—The requirement that a holograph will, to be valid, must have been found among the valuable papers of the deceased or deposited with some person for safe keeping is to furnish evidence that the deceased attached importance to the paper as a testamentary disposition and lessen the opportunity for fraud; and that the writing should be that of the testator, with his name therein appearing, is for the purpose of identity and to prevent the possibility of unauthorized alterations, and of furnishing evidence that the paper is a completed instrument. *Ibid.*

21. *Same—Separate Papers—Sealed Envelope—Indorsed Signature.*—A holograph will may be valid if written on different papers and their connection established, if the name of the testator therein appears and the whole is in his handwriting; and where a paper-writing is found among the valuable papers of the deceased after his death,

WILLS—*Continued.*

purporting to be a testamentary disposition of his property, though his name does not therein appear, but it is inclosed in a sealed envelope with the name of the deceased indorsed thereon and immediately thereafter the word "will," and all is shown to be in the handwriting of the deceased, it is held sufficient in this respect to establish the writing as his holograph will. *Ibid.*

WITNESSES. See Evidence, 9, 17.

1. *Witnesses—Impeaching Evidence—Appeal and Error—Harmless Error.*—If evidence is erroneously admitted to impeach the testimony of a witness, it will not be regarded as reversible error when it appears that it could not have had any appreciable influence upon the verdict rendered. *Barnett v. Smith*, 535.
2. *Witnesses, Expert—Homicide—Trials—Courts—Instructions—Expression of Opinion—Appeal and Error.*—It is within the sound discretion of the trial judge to call a medical expert witness, of his own motion, and examine him on the trial for a homicide, without the desire of the parties, exercising care to not prejudice either one; but in this case it is held that the expression of the opinion of the court as to the "admirably lucid" testimony of the witness was stronger than the statute permitted, and constituted reversible error. *S. v. Horne*, 787

WOMEN. See Deeds and Conveyances, 43.