NORTH CAROLINA REPORTS

VOL. 173

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1917

ROBERT C. STRONG
REPORTER

ANNOTATED THROUGH VOL. 238

RALEIGH
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1955

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4 Jones Law	"	49	"
5 Jones Law	"	50	"
6 Jones Law	"	51	"
7 Jones Law	"	52	"
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SPRING TERM, 1917.

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John H. Kerr	Third	Warren.
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O. H. Allen	Sixth	Lenoir.
T. H. Calvert	Seventh	Wake.
W. P. Stacy	Eighth	New Hanover.
C. C. Lyon	Ninth	Bladen.
W. A. Devin	Tenth	Granville.

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B. F. Long	Fifteenth	Iredell.
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M. H. Justice	Eighteenth	Rutherford.
Frank Carter	Nineteenth	Buncombe.
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G. L. Jones	Twentieth	Macon.

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SPRING TERM, 1917.

The following were licensed to practice law by the Supreme Court, August Term, 1916:

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CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE SPRING OF 1918

SUPREME COURT

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of 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:

SPRING TERM, 1918

First District	February 5
Second District	February 12
Third and Fourth Districts	February 19
Fifth District	February 27
Sixth District	March 5
Seventh District	March 12
Eighth and Ninth Districts	March 19
Tenth District	March 26
Eleventh District	April 2
Twelfth District	April 9
Thirteenth District	April 16
Fourteenth District	April 23
Fifteenth and Sixteenth Districts	April 30
Seventeenth and Eighteenth Districts	May 7
Nineteenth District	May 14
Twentieth District	May 21

SUPERIOR COURTS, SPRING TERM, 1918

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

SPRING TERM, 1918—*Judge Connor*

Pasquotank—Dec. 31† (2); Feb. 11† (1); Mar. 18 (1).
Washington—Jan. 14 (1); June 3 (2).
Perquimans—Jan. 21 (1); April 15 (1).
Currituck—Jan. 28† (1); Mar. 4 (1).
Beaufort—Feb. 18† (2); April 8† (1); May 6 (1); May 13† (1).
Camden—Mar. 11 (1).
Gates—Mar. 25 (1).
Chowan—April 1 (1).
Tyrrell—April 22 (1); April 29† (1).
Hyde—May 20 (1).
Dare—May 27 (1).

SECOND JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Kerr.*

Wilson—Jan. 14 (1); Feb. 4 (1); Feb. 11† (1); May 13 (1); May 20† (1); June 24† (1).
Nash—Jan. 21 (1); Feb. 25† (1); Mar. 11 (1); April 29* (1); May 6† (1); May 27† (1).
Edgecombe—Mar. 4 (1); April 1† (2); June 3 (2).
Martin—Mar. 18 (2); June 17 (1).

THIRD JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Daniels.*

Warren—Jan. 14 (2); May 20 (2).
Halifax—Jan. 28 (2); Mar. 18 (2); June 3 (2).
Bertie—Feb. 11 (1); May 6 (2).
Hertford—Feb. 25 (1); April 15 (2).
Vance—Mar. 4 (2); June 17 (2).
Northampton—April 1 (2).

FOURTH JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Whedbee.*

Harnett—Jan. 7 (1); Feb. 4† (2); May 20 (1).
Chatham—Jan. 14 (1); Mar. 18† (1); May 13 (1).
Wayne—Jan. 21 (2); April 8† (2); May 27 (2).
Johnston—Feb. 18† (2); Mar. 11 (1); April 22† (2).
Lee—Mar. 25 (2); May 6 (1).

FIFTH JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Allen.*

Craven—Jan. 7* (1); Feb. 4† (2); April 8‡ (1); May 13† (1); June 3* (1).
Pitt—Jan. 14† (1); Jan. 21 (1); Mar. 18 (2); April 15† (1); April 22 (1); May 20† (2).
Greene—Feb. 25 (2); June 24 (1).
Carteret—Mar. 11 (1); June 10 (2).
Jones—April 1 (1).
Pamlico—April 29 (2).

SIXTH JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Calvert.*

Duplin—Jan. 7† (2); Jan. 28* (1); Mar. 25† (2).
Lenoir—Jan. 21* (1); Feb. 18† (2); April 8 (1); May 20* (1); June 10† (2).
Sampson—Feb. 4 (2); Mar. 11† (2); April 29 (2).
Onslow—Mar. 4 (1); April 15† (2).

SEVENTH JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Stacy.*

Wake—Jan. 7* (1); Jan. 28† (3); Mar. 4* (1); Mar. 11† (2); April 1† (3); April 22* (1); April 29† (2); May 20† (2); June 10† (3).
Franklin—Jan. 14 (2); Feb. 18† (2); May 13 (1).

EIGHTH JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Lyon.*

New Hanover—Jan. 14* (1); Feb. 4† (2); April 1* (1); April 8† (2); May 6 (1); May 20† (2); June 24* (1).
Pender—Jan. 21 (1); Mar. 4† (2); June 3 (1).
Columbus—Jan. 28 (1); Feb. 18† (2); April 22 (2).
Brunswick—Mar. 18 (1); June 17† (1).

NINTH JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Devin.*

Bladen—Jan. 7‡ (1); Mar. 11* (1); April 22† (1).
Cumberland—Jan. 14* (1); Feb. 11† (2); Mar. 18† (2); April 29† (2); May 27* (1).
Hoke—Jan. 21 (1); April 15 (1).
Robeson—Jan. 28* (1); Feb. 4† (1); Feb. 25† (2); April 1† (2); May 13† (2).

TENTH JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Bond.*

Durham—Jan. 7† (2); Feb. 25* (1); Mar. 11† (2); April 29† (1); May 20* (1); June 17† (1).
Alamance—Jan. 21† (1); Mar. 4* (1); May 27† (2).
Person—Feb. 4 (1); April 22 (1).
Granville—Feb. 11 (2); April 8 (2).
Orange—April 1 (1); May 6† (1).

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Shaw.*

Forsyth—Dec. 31† (1); Jan. 7† (2); Feb. 11† (2); Mar. 11† (2); Mar. 25* (1); May 20† (3).

Rockingham—Jan. 21* (1); Feb. 25† (2); May 13 (1); June 17† (2).

Surry—Feb. 4 (1); April 22 (2).

Caswell—April 1 (1).

Ashe—April 8 (2).

Alleghany—May 6 (1).

TWELFTH JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Adams.*

Guilford—Jan. 14† (2); Jan. 28* (1); Feb. 11† (2); Mar. 11† (3); April 15† (2); April 29* (1); May 13† (2); June 10† (1); June 17* (1).

Davidson—Feb. 25 (2); May 6† (1); May 27 (2).

Stokes—April 1* (1); April 8† (1).

THIRTEENTH JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Harding.*

Richmond—Jan. 7* (1); Mar. 18† (1); April 8* (1); May 27† (1); June 17† (1).

Anson—Jan. 14* (1); Mar. 4† (1); April 15 (1); April 22† (1); June 10† (1).

Moore—Jan. 21* (1); Feb. 11† (1); May 20† (1).

Union—Jan. 28 (1); Feb. 18† (2); Mar. 25 (1); May 6† (1).

Stanly—Feb. 4† (1); April 1 (1); May 13† (1).

Scotland—Mar. 11† (1); April 29* (1); June 3 (1).

FOURTEENTH JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Long.*

Mecklenburg—Jan. 7* (2); Feb. 4† (2); Feb. 18* (1); Feb. 25† (3); Mar. 25* (1); April 1† (2); April 29† (2); May 13* (1); May 27† (2); June 10* (1); June 17† (1).

Gaston—Jan. 21 (2); Mar. 18* (1); April 15† (2); May 20* (1).

FIFTEENTH JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Webb.*

Cabarrus—Jan. 7 (2); April 22 (2).

Montgomery—Jan. 21* (1); April 8† (2).

Iredell—Jan. 28 (2); May 20 (2).

Rowan—Feb. 11 (2); Mar. 11† (1); May 6 (2).

Davie—Feb. 25 (2).

Randolph—Mar. 18† (2); April 1* (1).

SIXTEENTH JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Cline.*

Lincoln—Jan. 28 (1).

Caldwell—Feb. 25 (2); May 20† (2).

Burke—Mar. 11 (2).

Cleveland—Mar. 25 (2).

Polk—April 15 (2).

SEVENTEENTH JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Justice.*

Wilkes—Jan. 21† (2); Mar. 11 (2).

Catawba—Feb. 4 (2); May 6† (2).

Alexander—Feb. 18 (1).

Yadkin—Mar. 4 (1).

Watauga—Mar. 25 (2).

Mitchell—April 8 (2).

Avery—April 22 (2).

EIGHTEENTH JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Carter.*

McDowell—Jan. 21† (2); Feb. 18 (2).

Rutherford—Feb. 4† (2); April 29 (2).

Henderson—Mar. 4* (2); May 27† (2).

Yancey—Mar. 25 (2).

Transylvania—April 15 (2).

NINETEENTH JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Ferguson.*

Buncombe—Jan. 14 (3); Feb. 4† (3); Mar. 4 (3); April 1† (1); April 15† (1); May 6 (3); June 3† (3).

Madison—Feb. 25 (1); Mar. 25 (1); April 22 (1); May 27 (1).

TWENTIETH JUDICIAL DISTRICT

SPRING TERM, 1918—*Judge Lane.*

Haywood—Jan. 7† (2); Feb. 4 (2); May 6† (2).

Cherokee—Jan. 21 (2); April 1 (2).

Jackson—Feb. 18 (2); May 27† (2).

Swain—Mar. 4 (2).

Graham—Mar. 18 (2).

Clay—April 15 (1).

Macon—April 22 (2).

*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 fourth Monday in April and October. Civil Terms: First Monday in March and September. LEO. D. HEARTT, Clerk.

Elizabeth City, second Monday in April and October. J. P. THOMPSON, 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. T. M. TURRENTINE, Deputy Clerk, Wilmington.

Laurinburg, last Monday in March and September.

Wilson, first Monday in April and October.

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.

LEO D. HEARTT, Clerk United States District Court at Raleigh for the Eastern District of North Carolina, Raleigh.

WESTERN DISTRICT

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

Greensboro, first Monday in June and December.

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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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH.

SPRING TERM, 1917.

GEORGE L. SWINDELL v. TOWN OF BELHAVEN.

(Filed 21 February, 1917.)

1. Municipal Corporations—Contracts—Debts—Necessary Expenses—Constitutional Law—Statutes.

Our Constitution, Art. VII, sec. 7, authorizes municipal corporations to contract debts for their necessary expenses, and to make provision therefor without the approval of the voters therein, subject, however, to legislative control.

2. Same—Electric Lights—Water-works—Sewerage—Bond Issues—Special Statutes.

The right given by the Constitution to municipalities to contract debts for their necessary expenses without the approval of the voters therein has been construed by our Supreme Court to include within the meaning of such words, expenses for acquiring and installing electric lights, water-works, and sewerage; and by the adoption of the same words in the act of 1915, ch. 131, sec. 1, it will be presumed that the Legislature was aware of the former decisions and had adopted the same meaning, and bonds issued by a municipality for such purposes are regarded as for necessary purposes, and their validity does not depend upon the approval of the voters, unless required by its charter or other special or local legislation.

3. Statutes—Interpretation—Repealing Statutes—Electric Lights—Water-works—Sewerage—Municipal Corporations—Cities and Towns.

The provision in chapter 131, section 1, Laws 1915, permitting municipalities to issue bonds for necessary expenses without the approval of their voters, that the act shall not be construed to repeal or supersede any other statutes, refers to acts of only local application; and the act of 1911, ch. 86, sec. 1, subdivisions (a) and (b), requiring the approval by the voters of the proposition of acquiring and installing electric lights, water, and sewer-

age by a municipality, is inconsistent with the later act, which in this respect repeals the former one.

(2) APPEAL from restraining order rendered by *Whedbee, J.*, at chambers, 23 November, 1916; from BEAUFORT.

This action is brought to enjoin the defendant town and its commissioners from issuing $60,000 in bonds for the establishment of a system of electric lights, water-works, and sewerage. The defendant town has a population of 3,500 persons, and according to the findings of the board of commissioners it has no sufficient light system, so that it is frequently left in total darkness; it has no water supply system, in consequence of which its citizens suffer great loss and inconvenience; and the health of its citizens is seriously menaced for want of a sewerage system. It is found that such things are a necessary expense without which the municipality is seriously embarrassed in its health and comfort, as well as greatly retarded in its development.

Upon the final hearing of the restraining order, *Whedbee, J.*, on 23 November, 1916, rendered the following judgment:

"It is found as a fact by the court that the systems of electric lights, water-works, and sewerage proposed to be installed in the town of Belhaven by the defendants, in the manner set out in the resolutions of the board of aldermen of the town of Belhaven, are necessary expenses for the said town; it is found as a fact that the bonds, in the sum of $60,000, proposed to be issued by the defendant town are to be issued for the purpose of providing the necessary and proper funds for the acquiring and installing the said systems of electric lights, water-works, and sewerage; it is found as a fact that the present assessed value of real and personal property in the said town of Belhaven is as alleged in the complaint and admitted in the answer, and that the present taxes imposed by the said town are as alleged in the complaint and admitted in the answer; it is found as a fact that the present bonded indebtedness of said town is $15,000; (it is found as a fact that said town has no floating indebtedness that will not be paid off by taxes now due said town; it is found as a fact that the present population of said town is about 3,500); it is found as a fact that the issuance of said $60,000 of bonds of the said town has been duly and regularly authorized by the board of aldermen of said town, and that the said bonds, when issued in accordance with the resolutions of the defendant town, or board of aldermen thereof, will constitute valid and binding obligations of the said town."

Thereupon his Honor dissolved the restraining order and dismissed the action. Plaintiff appealed.

Small, McLean, Bragaw & Rodman for plaintiff. (3)
John G. Tooly, Harry McMullan for defendants.

BROWN, J. It is contended that there is no constitutional or statutory authority for the issue of the bonds. We think there is both. It is well settled that under Art. VII, section 7, of the Constitution, counties, cities, and towns and other municipal corporations are given authority to contract debts for the necessary expenses thereof, without the sanction of a majority of the qualified voters. That section indirectly, but explicitly, permits the exercise by municipal corporations of the power of making provision for necessary expenses, free from the restraints imposed in other cases. Connor and Cheshire on Const., 315; *Gardner v. New Bern,* 98 N. C., 228; *Jones v. New Bern,* 152 N. C., 64.

It is not necessary to submit the question to the qualified voters. *Smathers v. Comrs.,* 125 N. C., 487; *Evans v. Comrs.,* 89 N. C., 154; *McKethan v. Comrs.,* 92 N. C., 243; *Swinson v. Mount Olive,* 147 N. C., 611.

But the section does not confer unlimited power upon municipalities to contract debts *ad libitum* independent of the control of the General Assembly. *Wharton v. Greensboro,* 146 N. C., 356; *Burgin v. Smith,* 151 N. C., 561.

Not only is there constitutional authority for the contemplated issue of bonds, but there is direct legislative sanction. Chapter 131, section 1, of the Public Laws of North Carolina, 1915, provides: "That for the purpose of securing money for any purpose or purposes involving a necessary expense, including the funding or refunding of obligations theretofore issued for any such purpose, the board of commissioners, council, or other governing body of any city or town is hereby authorized to issue bonds of such municipality to such an amount as said board of commissioners, council, or other governing body shall by resolution direct, said bonds to be of such form and tenor and denomination, and to bear interest at such rate, not exceeding 6 per centum per annum, and the principal thereof to be payable at such time or times, not exceeding thirty years from the date thereof, and such interest and principal to be payable at such place or places within or without this State as said board of commissioners, council, or other governing body shall by resolution direct."

There is no requirement that a debt to be contracted for necessary expenses be approved by a majority of the qualified voters. That no such restriction was intended is made perfectly manifest by section 2 of the statute, wherein it is provided, "that in order to secure money for *any other municipal purpose* or purposes, including the funding or

refunding of obligations issued for *any other municipal purpose,"* bonds may be issued, provided the issuance be approved by the majority of the qualified voters.

(4) In the charter of Belhaven there are no restrictions upon the power to contract debts for necessary municipal expenses and no requirement that the proposition be approved by the qualified voters. Therefore, the principle that where there is a statute of general application throughout the State, and another special to a given locality, passed on the same subject, and the two are necessarily inconsistent, the special statute will prevail, has no application here. *Branham v. Durham,* 171 N. C., 196.

But it is contended that the words "necessary expenses" in the act of 1915 refer only to the current annual expenses of conducting the municipal government and do not embrace such expenditures as those made for electric lights, water-works, and sewerage, these being mere luxuries. They might have been so regarded many years ago, in their incipiency, but the luxuries of one generation have become the necessities of another. What would have sufficed for our ancestors would not begin to meet the needs of the twentieth century. These things naturally follow in the wake of an advancing civilization.

This contention of the plaintiff is conclusively answered by the fact that the words "necessary expenses" used in the statute of 1915 are identical with those in the Constitution, Art. VII, section 7, and are used in the same connection and in similar purport. These words have been construed and applied by this Court in a great many unanimous decisions, and the meaning given to them was well known to the General Assembly. It must be, therefore, conclusively presumed that the words were used as interpreted and applied by this Court.

The decisions are too numerous to cite, but may be found in the valuable work of Connor and Cheshire on the Constitution, page 318. The substance of all of them is to the effect that necessary expenses do not mean expenses incurred for purposes absolutely necessary to the existence of the municipality, and that answers the plaintiff's contention as to the meaning of the statute. Without extended citation, it is proper to note that the very things provided for in the resolution of the board of commissioners have all been declared legitimate necessary expenses of cities and towns. Water-works and electric lights: *Fawcett v. Mount Airy,* 134 N. C., 125, overruling *Edgerton v. Water Co.,* 126 N. C., 93; *Mayo v. Washington,* 122 N. C., 5; *Charlotte v. Shepard,* 120 N. C., 412; *Thrift v. Elizabeth City,* 122 N. C., 31; *Davis v. Fremont,* 135 N. C., 538; *Bain v. Goldsboro,* 164 N. C., 103. Water-works plant and

sewerage system: *Greensboro v. Scott,* 138 N. C., 181; *Bradshaw v. High Point,* 151 N. C., 517; *Underwood v. Asheboro,* 152 N. C., 641.

These decisions have been cited and approved so frequently that they have become a part of the warp and woof of our jurisprudence.

It is further contended that the act of 1911 authorizes the establishment by municipalities of water-works and sewerage, electric lights and gas plants, but requires that the debt contracted therefor be approved by popular vote (Pub. Laws 1911, ch. 86, sec. 1, subdiv. (5) a and b), and that this statute is not repealed or modified by the act of 1915. It is true, there is such statute, but the contention that it is not modified by the act of 1915 is untenable.

It is true that the act of 1915 declares, "This act shall be in addition to any and all other statutes authorizing or permitting the issuance of bonds, and shall not be construed to repeal or supersede any of such statutes."

It is evident that the statutes referred to in the section are those "special statutes" applicable to particular cities and towns, referred to in *Branham v. Durham, supra,* wherein it is held that such special statutes applicable to a given locality are not repealed by a statute of general application throughout the State solely because the two are inconsistent.

If it was not intended that the act of 1915 should supersede that of 1911 then there was no use in enacting it, for both acts cover exactly the same ground. It is evident that for some good reason the Legislature of 1915 saw fit to eliminate these important municipal necessities, as defined by this Court, from the effect of the act of 1911. That act makes no distinction between debts contracted for necessary expenses and those contracted for other purposes.

The act of 1915 makes that distinction very plainly. Section 1 provides that bonds may be issued for necessary expenses without approval by a majority of the qualified voters, and fixes rate of interest and the maturity of the bonds.

Section 2 provides for issuing bonds for "any other municipal purpose" and requires the proposition to be submitted for approval to the qualified voters.

The contention that the "necessary expenses" in the act of 1915 refer only to the current annual expense of running the municipal government is refuted by the fact that the act provides for issuing thirty-year bonds for the necessary expenses, and no municipal authorities would issue thirty-year bonds to tide over a mere temporary stringency, which is generally relieved when the taxes are paid into the treasury.

Long-term bonds are issued for permanent and substantial acquisitions and not to supply mere temporary wants. That the two statutes are utterly inconsistent in their leading features and cannot stand together is manifest from a cursory reading. The act of 1915 draws a distinction between bonds for necessary expenses and those for other purposes, while that of 1911 does not. The act of 1915 provides for bonds, the maturity of which must not exceed thirty years, while the limit in the act of 1911 is fifty years. The act of 1915 provides for public advertisement and competitive bidding and that the
(6) bonded debt shall not exceed 10 per cent of assessed valuation of real and personal property. The act of 1911 contains neither of these valuable safeguards.

There are other differences which it is unnecessary to point out.

The two statutes, being utterly inconsistent, cannot stand together. That being so, the last enactment must prevail to the extent that they are repugnant. This is true of acts passed at same session of the General Assembly. *Branham v. Durham, supra.* But conceding that the two statutes may stand together, then the commissioners of Belhaven could proceed under either statute and the bonds would be valid. The decision we have arrived at, in our opinion, is not only supported by reason and overwhelming authority, but tends to maintain the credit of the municipalities of the State. We have no doubt that many of them have issued bonds for necessary expenses under the authority of the act of 1915, without submitting the matter to a vote. The authorities that issued the bonds, as well as the purchasers who bought them, had a right to conclude that the words "necessary expenses" meant what we have so often said they did in innumerable decisions of this Court. They had a right to rely on these decisions, and to overrule them now would inflict a deadly blow to the credit of all municipal governments in this State.

The judgment is

Affirmed.

Cited: Lucas v. Belhaven, 175 N.C. 127; *Davis v. Lenoir,* 178 N.C. 670; *McNeill v. Whiteville,* 186 N.C. 164; *Henderson v. Wilmington,* 191 N.C. 280; *Lamb v. Randleman,* 206 N.C. 839; *Williamson v. High Point,* 213 N.C. 103.

O. B. RAWLS AND J. H. CLARK v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 21 February, 1917.)

Carriers of Goods—Negligence—Measure of Damages—Arrival of Shipment —Misstatement of Agent—Cost of Output—Parties.

The owner of a sawmill ordered repairs therefor which would reduce the cost of output and eliminate employment of an extra man, and sold the mill under contract that the repairs would be made, turned over the bill of lading to his vendee, who, upon notification by the railroad of their arrival, sent for them and was informed by the agent that the repairs were there and he would find them. The vendee told the agent what the repairs were and why they were needed, and continued to operate the mill at a loss for about a month, when he applied again, and was then told that the repairs were not there and he would have to sue the railroad. The repairs were then reordered, and in an action by the original owner and his vendee against the railroad, *Held*, that the loss occasioned by decreased output of the mill was recoverable by the vendee.

APPEAL by plaintiff from *Whedbee, J.*, at October Term, 1916, of BEAUFORT.

Ward & Grimes for plaintiffs. (7)
Small, MacLean, Bragaw & Rodman for defendant.

CLARK, C. J. In September, 1914, the plaintiff Rawls, who was engaged in the sawmill business, ordered some repairs for his plant from Salem, N. C., which was promptly shipped. He testified that before the break in the machinery which this order was to repair he was cutting 7,000 to 8,000 feet of lumber per day, but after the break he could only get 3,000 feet per day and was, besides, at the expense of an extra man to work on the carriage, at the cost of $1.50 per day. The bill of lading reached the Bank of Washington with draft attached and he paid the same and was notified by the defendant by postal card that the shipment had arrived. On that day or the next he sold out his mill to the other plaintiff, Clark, to whom he turned over the bill of lading, and the latter sent down to get the shipment which the defendant had notified them was there. Not getting it, in a few days he went down himself to see the agent, and "told him what the stuff was and why he needed it, and that he could not operate the sawmill without it." The agent said that it was around there somewhere, and he would look it up. After waiting some thirty or forty days longer, during which time he tried to operate the mill without it, but at considerable loss, both

the plaintiffs, Clark and Rawls, went to the agent, who then said that "He could not find the damn stuff, and the plaintiff would have to sue the damn railroad." Clark then at once wired for another shipment.

This action is brought to recover for the loss occasioned by the negligence of the railroad company in notifying the plaintiffs both by card and especially in person that the shipment was there, and for such loss up to the time when, on notification that the shipment could not be found, the plaintiff Clark ordered other repairs to replace that which had been lost.

It was gross negligence in the defendant to notify the plaintiffs, when personal application was made, with notice of the nature of the shipment and its necessity, that the shipment was there and could be found, and the defendant is liable for the direct loss resulting from such misstatement up to the time it finally notified the plaintiffs that the machinery could not be found, or at least for a reasonable time after he had been notified that the machinery was there and until he should have come to the conclusion that the information was incorrect. The plaintiffs could not be expected to order new machinery, after notification that it was there, until notified that it was not, or at least until there had been reasonable time to justify them in ordering new machinery by reason of the nonarrival.

The plaintiff Clark testified that when he called for the shipment he told the defendant's representative "what the stuff was and what I
(8) wanted with it, and said I could not operate without it. . . . I said there has got to be something done about it; that I have run without that machinery as long as I can." He testified that the agent promised then and afterwards to make diligent search and immediate delivery, and that by reason of that express promise, and only on that account he continued to operate the mill in its defective condition until finally he was driven to wire for a new shipment by express.

It was in evidence for the plaintiffs that by reason of the defective condition of the machinery, owing to the lack of these repairs, the daily output of the mill was greatly reduced and that they were at the expense of an extra man.

This action is brought to recover the cost of the shipment, which the court allowed, and the damages for the diminished output and extra labor and such other tangible, calculable, and reasonably certain damages as resulted directly from the representation, relied on by Clark, that the shipment had been received and would be delivered, up to the receipt of the substituted shipment. This last item the court instructed the jury to disallow.

The plaintiffs are not seeking to recover the profits which the mill would have made, but the direct, tangible damages under the ruling in *Furniture Co. v. Express Co.*, 148 N. C., 87; *s. c.*, 30 L. R. A. (N. S.), 486 and notes; *Lumber Co. v. R. R.*, 151 N. C., 23; *Peanut Co. v. R. R.*, 155 N. C., 148. The precise measure of damages is not before us, because the court below instructed the jury to allow no damages except the value of the shipment, with interest thereon and the freight they had paid. In this there was error.

The defendant's brief states that the court so ruled because the plaintiff Rawls could not recover because he had sold out the mill to Clark before the shipment arrived, and that Clark could not recover for the reason that he had not made the contract with the railroad company.

When, as Cervantes tells us, the illustrious Sancho Panza was Governor of Barataria, the following question was submitted to him for judgment. There was a bridge as to which the lord of the river had made a regulation that whoever would pass over the bridge should "upon his oath declare his purpose in crossing it. If he swore the truth, he could pass on; but if he swore false, he should be instantly hanged. One day a certain traveler declared on his oath that he had come to be hanged on the gallows. The predicament was thus presented that if he swore the truth, he could not be hanged; yet if he was not hanged, he had not sworn the truth." It is not necessary to give the wise decision then made. The defendant evidently thinks that the plaintiffs are in the same dilemma; that the plaintiff Rawls cannot recover because he did not own the mill when the damage was done, and that the plaintiff Clark cannot recover because he did not make the contract of (9) shipment.

But such dilemma does not exist here. The defendant falsely represented to Clark that the machinery was there, and thereby delayed him, who, as it knew, was then the assignee of the bill of lading and also the owner of the mill, from ordering a new shipment, whereby Clark was injured in the operation of the mill.

Clark also testified: "I knew this stuff had been ordered; knew it would be according to our bargain. I bought the mill with the understanding that the stuff ordered was to be a part of it."

The plaintiff Clark was entitled to recover, as he did, the value of the shipment as assignee of the bill of lading and the freight he had paid thereon, and he was also entitled to recover for the negligence and misrepresentation of the defendant's agent in representing that the shipment was there and that it would be looked up and delivered to him, and the defendant was liable to him for the tangible direct loss sustained by Clark, who, relying upon said representation, was induced to

delay ordering another shipment of these needed repairs. The defendant by its negligence and misstatement caused damage and loss in the operation of the mill, if the jury believed the evidence. This loss was sustained either by Rawls or Clark, and it is immaterial, so far as the defendant is concerned, which, for both are parties plaintiff and the judgment will be a protection against any further action for the damage it has caused.

The court seems to have misconceived the ground of the plaintiff's action, and in his instruction to the jury there was

Error.

Cited: Pendergraph v. Express Co., 178 N.C. 346; *Thompson v. Express Co.*, 180 N.C. 44; *Builders v. Gadd*, 183 N.C. 449; *Barrow v. R. R.*, 184 N.C. 204; *Iron Works v. Cotton Oil Co.*, 192 N.C. 445, 446.

LUCY S. JARVIS v. J. D. SWAIN.

(Filed 21 February, 1917.)

1. Deeds and Conveyances—Description—Reverse Calls.

In this action involving title to land, the controversy depended upon the location of certain land described in defendant's deed, involving the location of a call from a stake, the beginning call therein, by reversing the calls, etc., and it is *Held*, that the case was correctly tried in the court below under instructions free from error.

2. Same—Instructions—Contentions—Expression of Opinion—Courts.

Where in stating the contention of a party to a controversy involving the title to lands, the court tells the jury that the party contends that the jury should begin at a certain point and reverse the calls, etc., it is not objectionable as an instruction that they must do so.

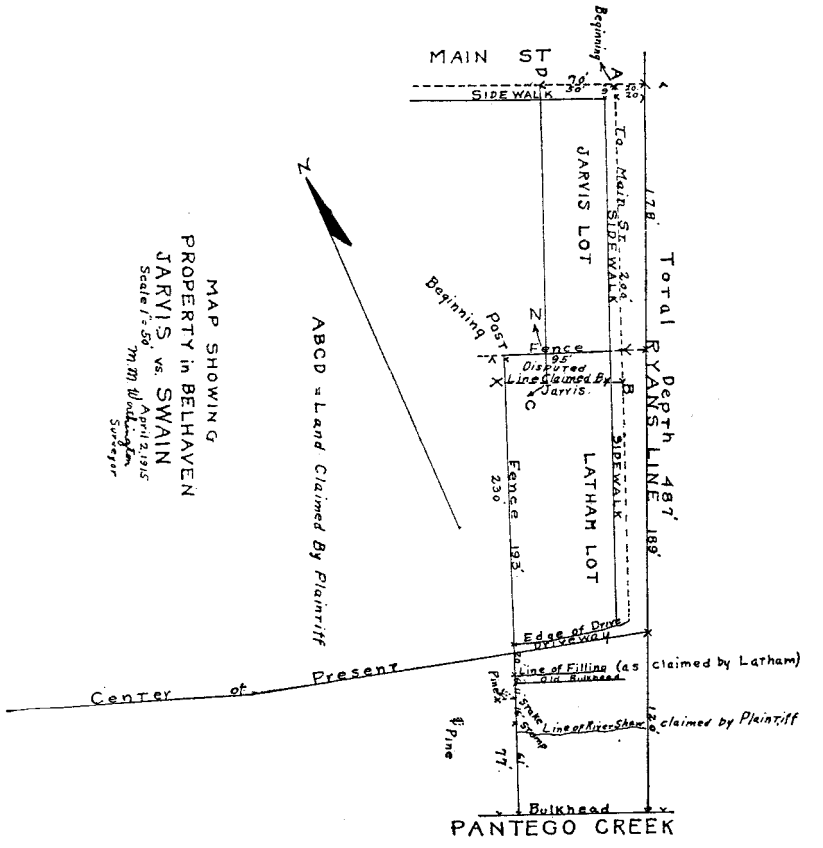
3. Deeds and Conveyances—Descriptions—Stake—Uncertain Beginning—Reverse Calls.

Where in an action involving the title to land it is necessary to locate it within the descriptions contained in a deed, which recites the beginning point as a stake which is unknown or uncertain, and the second corner is known and established, the first line may be reversed in order to find the beginning; and the same rule prevails as to the other corners and lines.

(10) CIVIL ACTION tried before *Whedbee, J.*, and a jury, at October Term, 1916, at BEAUFORT.

This is an action to try the title to a small piece of land claimed under a common source. The plaintiff claims under a deed calling for defendant's line. The defendant claims under one Latham. The description in the deed to Latham is as follows:

"Beginning at a stake ninety-five (95) feet west of H. Ryan's line, and running south twenty (20) west about two hundred thirty (230)



feet to Pantego Creek; thence east twenty (20) south with said (11) creek seventy-five (75) feet to a stake; thence north twenty (20) east about two hundred thirty (230) feet (or so far that a line running west 20 north 75 feet will strike the beginning); thence west twenty (20) north seventy-five (75) feet to the beginning, containing seventeen thousand two hundred fifty (17,250) square feet, more or less.

The court charged the jury that the burden rested on the plaintiff to locate the line of that deed.

His Honor, after reading the Latham deed, further charged the jury, among other things, as follows:

("Now, the plaintiff in this action contends that that stake was an imaginary point; that it is impossible to locate it; that it is no fixed object that anybody, that there isn't any object which you could possibly locate, and therefore you ought to go to the next call to ascertain where it is, which is thence south 20 west about 230 feet to Pantego Creek. The plaintiff contends that you should go down to Pantego Creek, and I charge you as a matter of law that the point called for as Pantego Creek is where Pantego Creek was on the 1st day of January, 1899, that is, the date of the deed. He says if you will go to where Pantego Creek was in 1899, it would be about 4 feet south of that stump, and that reversing that call and running it would put you about the line X, and that running back to the Ryan line it would be about 95 feet, and he says that ought to satisfy you; that they have shown you evidence that there was a stump situated there about 4 feet from the edge of the water; that they have shown by the plaintiff's son that he sat on that stump and caught crabs, and that there has been erosions, and that that stump was a natural object, and that you ought to go back there and reverse that call, and that would show you where that line was, and that you ought to find it at the point X and not at the post, and, running that distance, the plaintiff says it will give you 230 feet, or approximately 230 feet, and that you ought to find that to be the place, and that it will also run 200 feet in the deed calling from A back to B, and that you ought, therefore, to locate that line, and that the Latham line is the point X-B.")

To that part of the charge in parentheses the defendant excepted.

"The defendant, on the other hand, contends that you ought not to so find. First, the defendant contends that you ought to find that at the time this land was sold that a stake was actually stuck there and that he ran his entire line, and that within a short time thereafter he actually stuck this post 1 inch inside of the line both ways, upon which he afterwards placed a fence, and that the true line as actually marked out and called for in that deed was from the post to the point Y, and that you ought to find from that evidence that the true location of that line in 1899 and at the date of the deed of 1905 or the deed to Jones, which
(12) was further back than that, was at the point, the post P-Y. The defendant further says that even if you should take the river shore and go back and mark from that, that the river shore was not at that time down at the stump, but at the post, and that soon after he got the land he built the breakwater, and that the true line was at the point

marked post, and that if you start at the point marked post and run from that 230 feet back, you will go back to the post up there which he claims is on the line Y, to the post; he contends that you ought to find that he would not have built a breakwater there soon afterwards except within close proximity to the shore to keep his land from washing away, and that you ought to find that the true location of the shore was not down at the stump in 1899, and that you ought to find that the true shore line was at the point marked post just south of the old bulkhead.

("How do you find? You cannot say how it was by answering that no, because the burden is on the plaintiff; the burden is to find the actual line as it was run and marked just at that time, don't make any difference who it helps or who it hurts, the burden being upon the plaintiff, if he has satisfied you where it was, answer it.")

To that part of the charge in parentheses the defendant excepted.

"Wherever you begin or wherever you don't begin, your work is to try to locate the line exactly as it was in that deed as made, that is, what you find the line to be in the deed when made. If that fence was on the line that was in actual contemplation of the parties and recognized as such at the time the deed was made, that is the line."

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

John G. Tooly and Harry McMullan for plaintiff.

Small, MacLean, Bragaw & Rodman for defendant.

ALLEN, J. The determination of the controversy between the plaintiff and the defendant depends on the location of the Latham deed, and this has been found by the jury in accordance with the contention of the plaintiff under instructions free from error.

The principal exception relied on is upon the ground that his Honor charged the jury that the proper way to locate the Latham deed was to begin at Pantego Creek and reverse the call, but an examination of the record fails to disclose that he so charged.

He did state, as one of the contentions of the plaintiff, that as the beginning of the deed was a stake, it could be located by measuring from the creek, and he followed this with a full statement of the contentions of the defendant.

If, however, he had told the jury that they could begin at the creek, as it was when the deed was made and reverse the line to aid them in locating the beginning corner, it would not have been erroneous.

The rule is, in running the calls of a deed, to begin at the (13) beginning corner if it is known or established, and to follow the

calls in their regular order, and it is said in *Harry v. Graham,* 18 N. C., 76, and approved in *Gunter v. Mfg. Co.,* 166 N. C., 166, that there is no case in our reports where the Court has given its sanction to the correctness of a survey made by reversing the lines from a *known* beginning corner; but it is equally well established that if the beginning corner is uncertain and the second corner is known or established, that the first line may be reversed in order to find the beginning; and the same rule prevails as to the other corners and lines. *Dobson v. Finley,* 53 N. C., 495; *Norwood v. Crawford,* 114 N. C., 513; *Clark v. Moore,* 126 N. C., 1; *Hanstein v. Ferrall,* 149 N. C., 240.

In *Dobson v. Finley,* which has been frequently cited and approved, the beginning was at two pines on the south side of a hill, and the second corner was a pine, Thomas Young's corner. The two pines at the beginning had disappeared and the beginning corner could not be found, but the pine at Young's corner was found and established, and the judge of the Superior Court permitted the jury to reverse the first line to find the beginning corner.

This rule was approved by the Supreme Court, the Court saying: "Supposing the pine to be established as the second corner, could the first, a beginning corner, be located by reversing the course and measuring the distance called for, from the pine back—that is, on the reversed course? His Honor ruled that the beginning corner could be fixed in this way. We agree with him. If the second corner is fixed, it is clear, to mathematical certainty, that by reversing the course and measuring the distance you reach the first corner; so there is no question about overruling either course or distance by measuring the line, and the object is to find the corner by observing both course and distance."

This authority is directly in point, except that the facts in this record are more favorable to the contention of the plaintiff than in the *Finley case* because here the beginning corner is at a stake, an imaginary point, while in the *Finley case* it was at two pines.

There is

No error.

Cited: Bradley v. Mfg. Co., 177 N.C. 155; *Thomas v. Hipp,* 223 N.C. 519; *Cornelison v. Hammond,* 224 N.C. 759; *Belhaven v. Hodges,* 226 N.C. 490, 491; *Goodwin v. Greene,* 237 N.C. 251.

(14)

JOHN SEIP ET AL. v. J. O. WRIGHT.

(Filed 21 February, 1917.)

1. Injunction—Issues of Fact.

Semble, where judgment has been rendered that defendant deliver to plaintiff certain certificates of stock of original issue of a corporation or pay their par value, a tender of certificates not of the original issue would be insufficient; and where upon alleged default of defendant to deliver the certificates an execution for the payment of the money has been enjoined upon plea of tender, the injunctive remedy being the main issue, the injunction should be continued to the hearing so that the controverted fact of tender of the original certificates may be first determined by the jury.

2. Same—Probable Cause.

An injunction will be continued to the final hearing when a serious issue of fact is raised, or where no harm will be done to the defendant and great harm may be caused to the plaintiff, or it is reasonably necessary to protect his rights; or he has shown probable cause or that it can reasonably be seen that he will be able to make out his case at the final hearing.

3. Injunction—Appeal and Error—Evidence—Findings.

Where on appeal in injunction proceedings it does not appear whether a material matter affecting the relief sought has not been presented to the lower court, or that it had been decided there adversely to the appellant, the Supreme Court may pass upon the question originally; but should it have been decided below the Supreme Court will not be disposed to change the ruling, in matters of fact, though it may do so in proper cases.

4. Judgments, Consent—Out of Term—Computation of Time.

Where a consent judgment is entered out of court and out of term, as of the previous term, requiring the defendant to deliver to the plaintiff certain certificates of stock "within sixty days after final judgment," and if not done the plaintiff should recover the par value, the time within which the certificates are required to be delivered should be counted from the actual signing of the judgment, and not from the former term or the record entry of the judgment.

CIVIL ACTION from Currituck, tried before *Whedbee, J.,* upon a motion for an injunction against proceeding under an execution issued upon a judgment in a former action, entitled *Wright v. Seip,* which motion was heard in December, 1916. The injunction was granted and the defendant, J. O. Wright, appealed.

The former judgment directed that J. O. Wright, plaintiff therein, recover from the Provident Land Company, one of the defendants therein, seventy-five shares of the original issue of $150,000 of its

(15) capital stock, of the par value of $100 per share, and that defendant deliver the stock to the plaintiffs, and in the event that the defendant failed to deliver the stock "within sixty days after final judgment in said case, the plaintiff should recover of the said defendant and its codefendants in that case the sum of $7,500, the value of the stock as assessed by the jury. Costs were also adjudged against the defendants. By consent of the parties, "the judgment was signed out of the county and out of term, but was to be recorded and filed as of September Term, 1916." The court adjourned for the term on 8 September, 1916, and the judgment was signed on 29 September, 1916, and sent to the clerk of the court of Currituck County and was filed by him in the papers in the case on 30 September, 1916. It further appears that on 10 November, 1916, defendants in that action tendered to the plaintiffs therein certificate of stock No. 55 in the Provident Land Company for seventy-five shares, valued at $7,500, which tender was rejected by the plaintiff J. O. Wright, upon the ground that the tender was not made in time, that is, within sixty days after judgment. This action was then brought by the defendants in that suit to restrain the plaintiffs (defendant herein) from proceeding under an execution which the clerk had issued, at his request, upon the judgment in the former case. The court held that as the stock was tendered by the plaintiffs herein, the time of the tender was immaterial, and continued the restraining order to the hearing. Defendant appealed.

Aydlett & Simpson for plaintiffs.

Ehringhaus & Small and Thomas Ruffin for defendant.

WALKER, J., after stating the case: The defendant contended in this Court, at the hearing, that the certificate of stock tendered by the plaintiffs in this suit under the judgment in the other case was not for shares of the original issue of $150,000, described in the agreement of the parties to the judgment. If this position is open to the defendants, in the present state of the pleadings, proofs, findings, and judgment of the court, we would hold against him, in the absence of further proof showing that it was not a part of that issue of stock, for we think that the proof, as it now stands, tends to show that the stock is of that character. But if there is any doubt of it, the most that we can say for the defendant is that it is a controverted question and one for the jury to decide, upon the evidence, at the final hearing, the usual rule being that in such a case the injunction, if it is the main relief demanded, will be continued to the hearing, when the truth of the matter can be ascertained and justice more certainly and fully administered. Where it will not harm the

defendant to continue the injunction, and may cause great injury to the plaintiff, if it is dissolved, the court generally will restrain the party until the hearing. *McCorkle v. Brem,* 76 N. C., 407; (16) where serious questions were raised, *Harrington v. Rawls,* 131 N. C., 40; or where reasonably necessary to protect plaintiff's rights, *Heilig v. Stokes,* 63 N. C., 612. The Court said, by *Justice Hoke,* in *Tise v. Whitaker,* 144 N. C., 508: "It is the rule with us that in actions of this character, the main purpose of which is to obtain a permanent injunction, if the evidence raises serious question as to the existence of facts which make for plaintiff's right, and sufficient to establish it, a preliminary restraining order will be continued to the hearing." *Hyatt v. DeHart,* 140 N. C., 270; *Harrington v. Rawls,* 131 N. C., 39; *Whittaker v. Hill,* 96 N. C., 2; *Marshall v. Comrs.,* 89 N. C., 103. If the plaintiff has shown probable cause or it can reasonably be seen that he will be able to make out his case at the final hearing, the injunction will be continued, is another way of stating the rule. *Cobb v. Clegg,* 137 N. C., 153; *Moore v. Fowle,* 139 N. C., 51; *Bynum v. Wicker,* 141 N. C., 95; *Craycroff v. Morehead,* 67 N. C., 422; *Erwin v. Morris,* 137 N. C., 48. The judge held either that the question was not raised before him as to the character of the stock tendered by the plaintiff in this action, or that it was a part of the original issue of stock. If he did so decide, we would not be disposed to change his ruling upon this record, although we have the power to do so, or to find the facts originally in cases like this one. On a similar question, in *Hyatt v. DeHart,* 140 N. C., 270, the *Chief Justice* said: "Ordinarily, the findings of fact by the judge below are conclusive on appeal. While this is not true as to injunction cases, in which we look into and review the evidence on appeal, still there is the presumption always that the judgment and proceedings below are correct, and the burden is upon the appellant to assign and show error; and looking into the affidavits in this case, we cannot say there was error below. The general rule is that when the injunctive relief sought is not merely ancillary to the principal relief demanded in the action, but is itself the main relief, the court will not dissolve the injunction, but will continue it to the hearing," citing *Marshall v. Comrs.,* 89 N. C., 103. What we have said here will not prevent the defendant from having this question passed upon at the final hearing, if there is any dispute about the fact.

As to the other matter, we are of the opinion that the time within which the delivery or tender of the stock was required to be made should be counted, at the earliest, from the signing of the judgment. That was plainly the intention of the parties. The provision is that the stock should be issued to the defendant in this action "within sixty days after

final judgment," and if not done, he should recover the $7,500. There was no final judgment until the judge signed it under the agreement of the parties, although it was to be filed and recorded as of Sep-
(17) tember term. This is usually inserted in such judgments, but it was not intended thereby to shorten the time within which the tender could be made. The time elapsing between 8 September and 29 September, 1916, cannot be counted against the plaintiffs herein, because there was no judgment during that time, but merely an agreement that a judgment should be entered after the court had adjourned, the terms of which were not even fixed. If the judge had signed the judgment on the sixtieth day after the adjournment, there would have been, under defendant's contention, no time left for the tender, and it cannot be supposed that it was the purpose to destroy the plaintiffs' right of tender by the mere fiction of having the judgment filed and recorded as of the term. Besides, the provision for the delivery of the stock was inserted in the judgment signed on 29 September, 1916, and it would not be a reasonable view that it was intended to deduct twenty-three days already past from the sixty days then allowed in the judgment. It was easy to say that the tender should be made within sixty days after the adjournment of court, if that was the agreement, and the other expression was used to indicate that the running time should start from the actual date of signing the judgment instead of the fictitious date by relation to the September term of court. This is the fair and equitable view, we think, and is the natural and reasonable construction of the stipulation in the judgment. The object in having the judgment filed and recorded as of the term was to give it the form of regularity, rather than to curtail the stipulated time for tendering the stock. "The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and verdict, the entry of it being a ministerial act which consists in spreading it upon the record." 23 Cyc., 835. The distinction between the rendition of a final judgment and the recording of it is clearly stated and applied in *Uhe v. R. R.,* 57 N. W. Rep., 484, 489, and in *Blatchford v. Newberry,* 100 Ill., at p. 489. The clause in the judgment under consideration, as to the time of delivering the stock, refers to the date when the judgment was actually rendered, and not to the date of recording it. It is difficult to conclude that the parties intended otherwise and that the time expired, before the judgment was given, should be counted.

The result is that there was no error in the decision of the court.

Affirmed.

Cited: Sanders v. Ins. Co., 183 N.C. 68; *Proctor v. Fertilizer Works,* 183 N.C. 157; *Byrd v. Hicks,* 184 N.C. 629; *Tobacco Asso. v. Battle,* 187 N.C. 262; *Brinkley v. Norman,* 190 N.C. 851; *Wentz v. Land Co.,* 193 N.C. 34; *Land Co. v. Cole,* 197 N.C. 455; *Cullins v. State College,* 198 N.C. 339; *Parker Co. v. Bank,* 200 N.C. 443; *Thomason v. Swenson,* 204 N.C. 762, 764; *Hopkins v. Swain,* 206 N.C. 443; *Troutman v. Shuford,* 206 N.C. 909; *Boushiar v. Willis,* 207 N.C. 512; *Porter v. Ins. Co.,* 207 N.C. 648; *Little v. Trust Co.,* 208 N.C. 728; *Huskins v. Hospital,* 238 N.C. 361; *Lance v. Cogdill,* 238 N.C. 503, 504.

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(18)

MIDGETTE ET AL. v. W. H. BASNIGHT.

(Filed 21 February, 1917.)

1. Bills and Notes—Indorsement—Evidence.

An indorsement on a negotiable instrument must be made thereon, or some paper attached thereto, by the indorser himself or by his duly authorized agent; and in an action thereon such indorsement does not prove itself, but the fact must be established by proper testimony. Revisal, secs. 2179, 689a, 2168.

2. Same—Partnership.

In an action upon a draft cashed by the plaintiff, on which the defendant's name appears as an indorser, and which was duly protested for nonpayment, there was evidence in plaintiff's behalf tending to show that the defendant introduced the drawer to the plaintiff, saying he was all right, and to let him have any goods they might wish to purchase, and on that occasion advanced for the purpose two checks and some money; that the drawer presented the draft in controversy to the plaintiff within a week or two, with a note appearing to be from the defendant, requesting the plaintiff to cash the draft and retain for him the moneys he had advanced on the former occasion, which was done, and the moneys retained afterwards paid to the defendant; that the drawer told the defendant the plaintiffs were to cash the draft and to write the plaintiffs to retain the moneys he had advanced, and the defendant asked the drawer to write the note for him. There was evidence *per contra*, and on motion to nonsuit upon the evidence it is *Held*, it was sufficient to sustain the inference by the jury that the indorsement was made by the defendant's authority, and the motion was properly disallowed.

CIVIL ACTION tried on appeal from a justice's court before *Whedbee, J.*, and a jury, at October Term, 1916, of DARE.

The action was to recover $75, the amount of a draft which plaintiff firm had advanced on an instrument, in terms as follows:

"MANTEO, 9 September, 1914.

At sight pay to order of W. H. Basnight $75, value received, and charge same to account of W. C. Weir.

(Signed) W. C. WEIR.

To J. L. TREADWAY,
Chatham, Va."

On back draft, as presented by plaintiff at the trial, appeared the following indorsements: "W. H. Basnight, Midgette & Daniels, First National Bank, Durham, N. C., Bank of Manteo, N. C.," and same duly protested for nonpayment by a notary public at Chatham, Va., and attested by his notarial seal.

Verdict and judgment for plaintiffs. Defendant excepted and appealed, assigning for error a refusal of defendant's motion for nonsuit.

(19) *B. G. Crisp for plaintiffs.*
W. A. Worth and S. L. Dosher for defendant.

HOKE, J. The facts in evidence in support of plaintiff's claim tend to show that in September, 1914, one W. C. Weir, drawer of this instrument, was in and around Manteo, engaged in inspecting timber; that about the time of his first coming Basnight had introduced him to M. L. Daniels, a member of plaintiff firm, stating he was all right and to let him have any goods they might wish to purchase, and advanced for them on that occasion to be used in buying goods two checks and $5 in money, making an indebtedness to himself of $27.60. That a week or so later Weir came to plaintiffs' store with the draft in question for $75, purporting to be indorsed by W. H. Basnight, defendant, and having also a note purporting to be signed by Basnight, asking plaintiffs to cash the draft and retain for him the $27.60, which was done, and, a day or so after, this $27.60 was paid to W. H. Basnight by M. H. Daniels for the firm. It further appeared that at the time the draft was drawn, W. C. Weir, being at the home of defendant, told the latter that plaintiffs were going to cash a draft for him for $75, and asked defendant to write a note requesting that plaintiffs retain out of the amount the $27.60 due from Weir to defendant; that defendant, not having his glasses, told Weir to write the note, which he then did, in defendant's presence, and later defendant received the $27.60 from plaintiffs, as stated.

Accepting this testimony as true, and considering the same in the light most favorable to plaintiffs, the established rule on a motion to nonsuit, we think that the judgment of the lower court, in denial of

such motion, is clearly correct. True, our statute on negotiable instruments provides that in order to be a valid indorsement the name must be written on the instrument itself or upon some paper attached thereto. Revisal, ch. 54, sec. 2179. Daniel on Neg. Instruments (Calvert), sec. 689a, and our decisions on the subject are to the effect that such indorsement does not prove itself, but the fact must be established by "proper testimony." *Mayers v. McRimmon,* 140 N. C., 640; *Tyson v. Joyner,* 139 N. C., 69. But the statute also provides (sec. 2168), and both provisions are in expression and affirmance of the better considered decisions on the subject, that an indorsement may be made by an agent duly authorized thereto. Revisal, ch. 54, sec. 2168. And from the facts in evidence, as heretofore stated, we think it a clearly permissible inference that the indorsement in question was made by authority of defendant and that the motion for nonsuit was, therefore, properly overruled. True, defendant denies that he indorsed the draft or authorized any one to do so for him, and he denies, also, that he wrote the note requesting payment, or that he authorized the same; but this is evidence coming from defendant and tending to support his position, and (20) may not be considered on the exceptions as presented.

We find no error in the trial. The judgment for plaintiffs is, therefore,

Affirmed.

Cited: Security Co. v. Pharmacy, 174 N.C. 656; *Woody v. Spruce Co.,* 175 N.C. 547; *Critcher v. Ballard,* 180 N.C. 115; *Whitman v. York,* 192 N.C. 93.

JULIA MANN v. T. A. MANN ET ALS., EXECUTORS.

(Filed 21 February, 1917.)

Executors and Administrators—Year's Support—Statutes.

The assignment of a year's provisions to the widow under Revisal, sec. 3098, is made at a time when the value of the decedent's estate may not be known, and does not preclude her right to an increase thereof under Revisal, sec. 3103, when it appears that the personal estate exceeds the value of the $2,000 prescribed, and her petition states the value of the allowances already made and the value of the articles consumed by her.

SPECIAL PROCEEDING by plaintiff for an increased allowance for year's provision under section 3104, Revisal, heard upon appeal from the clerk by *Whedbee, J.,* at Fall Term, 1916, of HYDE.

Upon the hearing the court rendered judgment in favor of plaintiff, from which defendants appealed.

Spencer & Spencer, Harding & Pierce for plaintiff.
Manning & Kitchin, S. S. Mann for defendants.

BROWN, J. It appears from the findings of fact that plaintiff, widow of J. A. Mann, was assigned a year's provision of $300 on 12 September, 1916, by his executors in accordance with section 3098 of Revisal. It is contended that such assignment is a bar to any subsequent petition for an increased allowance under section 3103 *et sequitur*. This contention cannot be sustained. The statute, taken as a whole, plainly indicates that the year's provision of $300 is intended for the immediate and pressing needs of the widow. It may or may not be all that she can receive, depending entirely upon the value of the estate. If the estate shall turn out to be insolvent or does not exceed $2,000, the allowance for the support of the widow shall not in any case exceed the amounts named in section 3092, and, in the language of the statute, section 3103, "The allowance made to her as above prescribed shall preclude her from any *further allowance.*"

In her petition for such "further allowance" the widow is required to state the value of any allowance already assigned to her, as well as
(21) the value of articles consumed by her. The very language of the statute plainly indicates that the widow may have a further allowance in addition to the first, if the estate exceeds $2,000.

The reason the widow is not estopped by the assignment of $300 (which is generally made by the personal representative immediately after the death of her husband for her immediate needs) is because neither she nor the personal representative is supposed at that time to know the value of the personal estate, and it would be unjust to hold the widow bound by an allotment of $300 when, as in this case, the estate turns out to be worth more than the $2,000 prescribed by the statute.

Affirmed.

W. H. GALLOP AND I. W. FISHER, PARTNERS, v. THE NORFOLK SOUTHERN RAILROAD COMPANY AND THE NORTH RIVER LINE.

(Filed 21 February, 1917.)

1. Carriers of Goods—Connecting Lines—Commerce—Negligence—Unreasonable Delay—Perishable Goods.

Where a water transportation company and a railroad company have traffic arrangements for shipment of goods beyond the terminal of the former company, which accordingly accepted car-load shipments of potatoes and had delivered the same at the latter's depot, with notification thereof, the latter company is responsible for damage to the potatoes caused by its unreasonable delay in furnishing cars and transporting the potatoes, and leaving goods of such perishable quality exposed to the sun and weather upon its wharves for several days.

2. Same—Through Bills of Lading—Carmack Amendment.

Where a connecting carrier has accepted an interstate shipment of goods for transportation on a through bill of lading from the initial carrier, and by its negligent delay to forward the same the shipment has become damaged, it cannot avoid liability to the consignor on the ground that the initial carrier had no authority from it to issue the through bill of lading. This principle is not affected by the Carmack amendment.

3. Carriers of Goods—Commerce—Connecting Lines—Unlawful Rates—Negligence.

A forbidden rate made for carriage by connecting roads in interstate shipment of goods does not affect the question of the carrier's liability for damages caused to the shipment by its negligent act, but only the rate charged.

APPEAL by defendants from *Whedbee, J.*, at November Term, 1916, of PASQUOTANK.

Aydlett & Simpson for plaintiffs. (22)

William B. Rodman and J. Kenyon Wilson for Norfolk Southern Railroad Company.

Ehringhaus & Small for North River Line.

CLARK, C. J. The plaintiffs, residing at Jarvisburg, Currituck County, N. C., shipped their produce by the North River Line and the Norfolk Southern Railroad to northern markets. The North River Line operates its steamers from Jarvisburg and other near-by points to Elizabeth City, where it has a traffic arrangement with the Norfolk Southern to carry the freight brought by said line to northern markets, sharing in the freight.

In June, 1915, the North River Line, in accordance with this standing arrangement, which began in 1911, delivered at Elizabeth City several hundred barrels of Irish potatoes, which required prompt shipment, as the railroad company well knew. On this occasion there was a failure to furnish the cars on application, so that the wharves of the defendant railroad company became congested and the potatoes were left for several days exposed to the sun and weather, causing the plaintiffs serious damage, which the jury have found was caused by the negligent delay of the defendant in not furnishing cars and not shipping the potatoes within a reasonable time after they were placed on the wharves of railroad company and notified that the potatoes should be shipped.

There was evidence to support the above facts, and the court properly refused a motion to nonsuit. It appears that 300 barrels were received there in the early morning of 8 June, none of which left Elizabeth City until 10 June; that 300 barrels were received on the 9th and the remainder on the morning of the 10th, and that the defendant railroad could have shipped these in time and avoided the damage to plaintiffs' potatoes, if it had had the cars.

The defendant contends that though the North River Line gave a through bill of lading for these potatoes, it had no authority to do so at that time. This defense cannot avail, both because the defendant did accept and ship these potatoes on such through bills of lading, and, further, treating the shipments as delivered on their wharves at Elizabeth City as local shipments from that point, the liability of the defendant railroad for the delay is the same. The only difference would be as to the rate in such case, or the division of it between the North River Line and the railroad company, as to which no point is made and which in nowise affects the liability of the railroad company for the damage caused by its negligent delay in shipping. We have examined with care all the exceptions, and do not find that they require any discussion. The only serious question was one of fact, whether there was negligent delay on the part of the defendant in shipping these
(23) potatoes after they were placed on their wharves in Elizabeth City, and the amount of the damages thereby sustained by the plaintiffs.

The Carmack Act provides: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State *shall issue a receipt or bill of lading* therefor, and it shall be liable to the lawful owner for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass."

The same act further provides that "The holder of such receipt or bill of lading shall not be deprived of any remedy or right of action which he had under the existing laws." This question is fully discussed in *R. R. v. Riverside Mills,* 31 L. R. A. (N. S.), 28, and does not require repetition. The defendant is liable to this action, though not the initial carrier.

The point the defendant attempts to raise in this case is decided in *Kissenger v. R.R.,* 152 N. C., 248, which holds that, "If a rate of freight on an interstate shipment is forbidden by the United States statutes, this does not render the contract of carriage void, but the forbidden rate may be set aside." The defendant's contention, that if there was an illegal discrimination in the rate it would defeat the shipper from recovering damages for the negligence of the carrier, cannot be sustained either on reason or precedent.

No error.

Cited: Paper Box Co. v. R.R., 177 N.C. 352; *Moore v. R.R.,* 183 N.C. 221.

ROBERSON-RUFFIN COMPANY v. J. J. SPAIN AND J. E. BULLUCK.

(Filed 21 February, 1917.)

1. Bills and Notes—Release—Burden of Proof.

Joint makers upon the face of a negotiable instrument are deemed to be primarily liable thereon, Revisal, sec. 2342; and in an action upon the note the burden is upon the defendants to prove any matter in release, if brought within three years.

2. Same—Extension of Time—Notice—Statutes.

In an action upon a negotiable instrument the defendants on its face being joint makers, the mere fact that the plaintiff had told one of the defendants, without the knowledge of the other, "that he would take up and carry the note until fall," is not an extension of payment for a "fixed and definite" period, which would operate as a release to such other from liability (Revisal, sec. 2270); whose remedy is by *quia timet* notice under Revisal, sec. 2846.

3. Bills and Notes—Principal and Surety—Release—Trials—Evidence—Instructions.

When in an action upon a negotiable instrument a defendant claims that he was in fact a surety, though he thereon appears to have signed as coprincipal, and contends that he has been released from liability thereon by reason of an extension of time given his principal by the holder, and fails to introduce evidence that he, in fact, signed as surety, it is proper for the court to instruct the jury to answer the issue for the plaintiff if they believe the evidence.

(24) APPEAL by defendant Bulluck from *Whedbee, J.*, at Special July Term of EDGECOMBE, 1916.

W. O. Howard for plaintiff.

G. M. T. Fountain & Son for appellant.

CLARK, C. J. There were two civil actions on notes, respectively for $275 and $240, begun in the recorder's court and tried on appeal in the Superior Court, where, by consent, the actions were consolidated. These notes were signed by the defendants J. J. Spain and J. E. Bulluck and were executed to Winslow Brothers for certain mules bought of them. The defendant Bulluck signed these notes as surety for Spain, but the suretyship does not appear on the face of the note. The defendant Bulluck contended that said notes were assigned by the payees to the plaintiff in pursuance of a contract between it and the defendant Spain that the notes would be held by the plaintiff until the succeeding fall, such agreement being without the knowledge or consent of the defendant Bulluck. Both Spain and Bulluck are primarily liable on said notes under our Negotiable Instruments Law. Rev., 2342; *Rouse v. Wooten,* 140 N. C., 557. The defendant Bulluck having admitted the execution and nonpayment of the notes, the court correctly held that the burden was upon him to prove any matter in release. The action was brought within three years and the statute of limitations is not pleaded.

There is no evidence of any act on the part of the plaintiff company which would release the defendant Bulluck from the notes. The defendant Spain testified that the only agreement of the plaintiff was to "take up and carry the note till the fall." There was no evidence of any binding agreement not to sue on the note for any definite period, nor that Bulluck was misled by the plaintiff and thus prevented from asserting his rights by a *quia timet* notice under Revisal, 2846. There was an expression of an intention not to force collection till the fall. There was no payment of interest in advance for a stated time, which would have been an implied promise. *Revell v. Thrash,* 132 N. C., 803. There was no express promise to release Bulluck and no agreement of
(25) extension for a "fixed and definite" period. The additional security taken by the plaintiff inured to the benefit of Bulluck and could not be to his detriment. On the face of the notes the defendant Bulluck was primarily liable, and an extension of time to Spain would not release him, in the absence of proof that he was surety. Even if Bulluck was only secondarily liable, to the knowledge of the plaintiff, he could be discharged only in one of the ways provided in Revisal, 2270, *i. e.*, by the discharge of the instrument; by the cancellation of his signa-

ture by the holder; by the discharge of the principal by the valid tender of payment by the principal; by a release of the principal, without reserving the right of recourse against the surety, or by an agreement binding upon the holder to extend the time of payment, or to postpone the holder's right for enforcement, without the assent of the surety and not reserving the right of recourse against him. The claim of Bulluck is under the last provision and is not sustained by proof, and the court properly instructed the jury if they believed the evidence to answer the issue in favor of the plaintiff.

The mere fact that the plaintiff stated that he would "take up and carry the notes," without any agreement to do so for a definite and fixed period, did not prevent the plaintiff from bringing an action nor debar the defendant Bulluck from giving a *quia timet* notice under Revisal, 2846, which was his remedy unless he chose to pay the note himself and sue the principal, Revisal, 2271. The intention thus expressed to "carry the note" was no part of the assignment by Winslow to plaintiff, but the statement of a benign purpose on the part of the assignee towards Spain for no "fixed and definite" period. The witness testified that Ruffin, for plaintiff, said "he would let me off until next fall, he reckoned. No distinct time was mentioned."

No error.

Cited: McInturff v. Gahagan, 193 N.C. 149; *Fertilizer Co. v. Eason,* 194 N.C. 249; *Trust Co. v. Black,* 198 N.C. 221; *Taft v. Covington,* 199 N.C. 56, 57; *Trust Co. v. York,* 199 N.C. 627.

EDGAR RHODES v. JOE ANGE ET AL.

(Filed 21 February, 1917.)

1. Processioning—Title—Issue—Pleadings—Evidence.

While in proceedings to procession land the title thereto is not directly involved, it may become incidentally one of the questions or issues in the case raised by the pleadings or the facts therein which must be decided before the main issue as to the location of the true dividing line can be determined.

2. Same—Adverse Possession.

In proceedings to procession land, where the defendant claims he has been in adverse possession up to the location of the line he claims, with supporting evidence, which the plaintiff disputes, an instruction is proper that the jury consider the possession of the respective parties, with respect

to the disputed line, as evidence to determine its location; and if the defendant's adverse possession for twenty years or more up to that line was sufficient, it should be found in accordance with his contention.

3. Processioning—Surveyor—Conduct of Parties—Evidence.

Testimony of the surveyors and the conduct of the parties as to the location of the disputed line between adjoining owners in proceedings to procession it does not necessarily establish it, but is only evidence thereof.

(26) CIVIL ACTION, tried before *Allen, J.*, and a jury, at September Term, 1916, of MARTIN.

This is a proceeding brought to procession land and to determine the dividing line between lands of the parties, under Revisal, ch. 101, and it is so designated in the pleadings.

There was a verdict for the plaintiff, and from the judgment therein the defendant Ange appealed.

A. R. Dunning for plaintiff.
S. J. Everett for defendant.

WALKER, J. The nature of a processioning proceeding has frequently been considered and decided by this Court. Its primary and leading purpose is to settle boundaries as between adjoining proprietors of land; but while this is the main object, the title to land may necessarily become the subject of inquiry, in order to ascertain the ultimate fact as to the true location of the boundary. In such proceedings, unless perhaps both parties claim under a paper title, it will be difficult if not impossible to confine the investigation required to the mere location of the dividing line. When both parties claim by right of possession, or one by a paper title and the other by adverse possession, it will become necessary in the large majority, if not all, of the cases to ascertain the nature and extent of the possession, and, even in the case of a claim under a paper title, the true location of corners and of boundaries, as preliminary to the location of the dividing line which is in dispute. So that it may, speaking generally, be safely said that the title to the land is not involved in such a proceeding; but that means that it is not directly involved, for in many cases, as we have already shown, it may become incidentally one of the questions or issues in the case, which must be decided before the main issue as to the location of the dividing line can be determined. The case of partition proceedings is a similar one and illustrates the point, as shown in *Woody v. Fountain*, 143 N. C., at p. 69. There the question of title is not necessarily involved, but it may become necessary upon a plea of sole
(27) seizin to determine, first, how the parties stand with reference to the title before deciding whether they are tenants in common and

entitled to partition. It is a preliminary question which must be settled before the relief prayed can be granted.

A partition proceeding will very often run into an action of ejectment, and the same may be said of a processioning proceeding. In the latter case the ownership of the land on either side of the alleged disputed line, which is a prerequisite to the right of having the land processioned, cannot always be determined by mere occupancy, but often will require an investigation of the title, as in other cases where the issue is not primarily involved. The failure to note this distinction between a proceeding where the location of a line is solely involved and one where the title may incidentally arise has caused the question in this appeal to be presented and the Court to be misunderstood. We have held in numerous decisions that the question of title may be raised by the pleadings or by the facts of the particular case. *Parker v. Taylor,* 133 N. C., 103; *Hill v. Dalton,* 136 N. C., 339; *s. c.,* 140 N. C., 9; *Smith v. Johnson,* 137 N. C., 43; *Stanaland v. Rabon,* 140 N. C., 202; *Davis v. Wall,* 142 N. C., 450; *Woody v. Fountain,* 143 N. C., 66; *Green v. Williams,* 144 N. C., 60; *Brown v. Hutchinson,* 155 N. C., 205. It was said in *Green v. Williams, supra:* "Our processioning act is similar in some respects to the 'writ of perambulation' at common law, which was sued out by consent of both parties when they were in doubt as to the bounds of their respective estates, and was directed to the sheriff, who was commanded to make the 'perambulation' with a jury, and to set the bounds and limits between them in certainty. Fitz. Nat. Brev., 133. There it was done by consent of the parties, and when there was no dispute as to the title and none as to the right to occupy the adjoining tenements, while with us either of the adjoining proprietors, where a dispute as to the true dividing boundary has arisen, is entitled to have the land processioned, without the other's consent, and even when the question of title may become incidentally involved, and then all controverted matters, where there has been an appeal, are settled by the jury under the guidance of the court." In this case the judge instructed the jury that they could consider the possession of the respective parties, with respect to the disputed line, as evidence to determine where the true line is located, but that mere possession did not of itself fix the line, it being only an evidential circumstance upon the question as to where it is. But he also told them that "if the defendant, and those under whom he claims, had been in possession of the land in question up to the lane for twenty years, or longer, prior to the beginning of this action," they would answer the issue according to the defendant's contention, that is, "beginning at the stake in the road and running along the lane a straight line by the poplar to the swamp." This instruction was given at defend- (28) ant's request. The addition to it was correct, as adverse possession

cannot confer title beyond its limits. When the charge is read as a whole, as it should be, it is clearly seen that the defendant got the full benefit of his adverse possession in locating the line as he contended it should be. The only issue submitted (without objection) was: "What is the true dividing line between the lands of the plaintiff and those of the defendant?" The question in controversy was whether the line ran from A to B or from A to C. But notwithstanding the form of the issue, the court allowed the jury to consider the defendant's possession, and his title accruing therefrom, in locating the true line. If it be conceded that the pleadings put the title in issue, the issue did not do so directly, and even if it did, the defendant has been given the full benefit of his possession. The jury evidently found that the defendant had no such possession as established the line at A. C.

The judge was also correct in stating that the testimony of the surveyor as to the true line did not necessarily establish it, but was only evidence of it, and the same is true as to the conduct of the parties with reference to the lane.

There is no error that we can find in the case which warrants a new trial.

No error.

Cited: Exum v. Chase, 180 N.C. 96; *Geddie v. Williams,* 189 N.C. 339; *McCanless v. Ballard,* 222 N.C. 703; *Carswell v. Morganton,* 236 N.C. 377.

L. H. SUMNER v. ASHEVILLE TELEPHONE AND TELEGRAPH COMPANY AND HENDERSONVILLE POWER AND LIGHT COMPANY.

(Filed 21 February, 1917.)

1. Master and Servant—Employer and Employee—Trials—Evidence—Negligence—Nonsuit.

Where an employee of a telephone company is engaged in attaching its cables to a messenger wire, 20 feet from the ground, and the proximity of a high-power wire from another company has made it dangerous for him to work between a "span" of poles, to which he has called the attention of his foreman, who instructs him to leave that "span" and work beyond, necessitating his working around a pole of the power company which does not appear to him to be dangerous to do, and there is evidence that the foreman knew of the danger at this pole at the time: in his action against the telephone company for damages he received at the power company's pole, it is *Held,* that a judgment of nonsuit was properly disallowed, the negligence of the foreman in failing to warn the

employee being that of a vice-principal of the defendant company and attributable to it.

2. Same—Trespasser.

Where a telephone and power company are sued for damages by an employee of the former arising from an injury from a shock of electricity occasioned by the latter's imperfectly insulated wires, and received by the employee of the telephone company while acting under the instruction of his foreman, in attempting to get around the pole of the power company while hanging his principal's cable on a messenger wire 20 feet above the ground: *Held*, both the telephone company and its employee were trespassers upon the pole of the power company, and the latter company being only liable for injuries willfully or wrongfully inflicted, a judgment of nonsuit upon the evidence in this case should have been rendered as to that company.

CIVIL ACTION to recover damages for alleged negligence resulting (29) in serious physical injuries, tried before *Harding, J.*, and a jury, at June Term, 1916, of BUNCOMBE.

There was evidence on the part of plaintiff tending to show that in August, 1915, the defendant, the Telephone and Telegraph Company, was putting up a line of poles and wires on Eighth Avenue in Hendersonville, N. C., and that plaintiff, an employee of said company, was engaged in attaching the cable to the messenger wire along said defendant's poles and in close proximity to and, in places, touching the poles of its codefendant, the power company, which also had its line along said street; that in doing his work plaintiff was using safety belt and strap, the seat being about twenty feet from the ground and eighteen inches below the messenger wire, and as plaintiff would attach or clip the cable to the messenger wire he would push his seat along this wire as his work progressed; that the wires of the telephone company were not charged with electricity at the time, and when they were, did not, under ordinary conditions, carry sufficient current to cause serious injury; but the wires of the power company, which were at points very near the telephone company's wire, usually carried a current of high voltage and importing serious menace when not properly insulated; that on the day in question, while plaintiff was performing his work, he came to a "span" (the distance between two poles) where the wire of the power company had sagged so as to be threateningly near the telephone company's messenger wire, and he called the attention of his foreman or boss to this condition and was directed by him to leave that span and go to another ahead where there appeared to plaintiff to be no danger existent or threatened; that in the endeavor to carry out the order he passed around and necessarily touched a pole of the power company which was wet and had become charged with electricity of dangerous voltage by

reason of a defective or leaky transformer attached to a cross-arm on the pole; that in the effort to pass around this pole and go on with his work, he received an electric shock, rendering him for a time unconscious and causing serious and painful injuries; that the foreman or
(30) boss who gave the plaintiff the order to go to another span was aware of the defect of the transformer and of the threatening conditions incident to it, but did not communicate such knowledge to plaintiff or in any way warn him of the danger, and plaintiff did not know or have opportunity to know that an injury was likely.

There was denial of liability on the part of both defendants, with evidence in support of their positions, and there were facts in evidence tending to show that the boss fully communicated to plaintiff all he knew of the transformer and the dangers incident to its condition, and that plaintiff acted throughout in full assumption of any and all risks incident to the work and to his manner of doing it.

On issues submitted, the jury rendered the following verdict:

1. Was the plaintiff injured by the negligence of the defendant, the Asheville Telephone and Telegraph Company, as alleged in the complaint? Answer: "Yes."

2. Was the plaintiff injured by the negligence of the defendant, the Hendersonville Light and Power Company? Answer: "Yes."

3. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer of the defendants? Answer: "No."

4. What damages, if any, is the plaintiff entitled to recover? Answer: "$2,000."

Judgment on the verdict, and defendants excepted and appealed.

Jones & Williams for plaintiff.

B. J. Clay and A. Hall Johnston for defendant Telephone Company.

Merrimon, Adams & Adams for defendant Power Company.

HOKE, J., after stating the case: We have carefully considered the record and exceptions and find no error therein which gives the telegraph and telephone company any just ground of complaint. The positions insisted on by the defendant were substantially recognized and approved by the court either in the general charge or in response to prayers for instructions presented by defendant, except the motion that the case be nonsuited and the prayer that the judge charge the jury that, on the evidence, if believed, no liability should attach. But these exceptions could not be sustained in view of evidence on the part of plaintiff tending to show that the plaintiff's foreman or boss knew of the defect in the transformer and gave the plaintiff the order to pro-

ceed with his work without telling him of conditions or in any way informing him of the danger incident to the work under conditions as they actually prevailed.

Under our authorities, and on the facts in evidence as they have been accepted by the jury, this foreman or boss stood towards the plaintiff in the position of vice-principal, rendering the company responsible for his negligent default in failing to properly warn the plaintiff (31) of the defects in the transformer on the poles of the power company and of the dangers incident to existent conditions. *Beal v. Fibre Co.*, 154 N.C., pp. 147-155; *Chesson v. Walker and Myers*, 146 N. C., 511; *Turner v. Power Co.*, 119 N. C., 387. And there is nothing, either in the conduct of plaintiff or in his contract of employment, that, as a matter of law, operates to protect said defendant from such liability. *Mobile Electric Co. v. Sauges*, 169 Ala. 341; *Speight v. Rocky Mount Telephone Co.*, 26 Utah, 483; *Coöperant Telephone Co. v. St. Clair*, 168 Fed., 645; *Raab v. Hudson River Telephone Co.*, 123 N. Y. Supp., 1037.

In reference to the other defendant, the light and power company, we do not see that any recovery can be sustained. There is nothing to show that there was any contract or agreement which gave either the plaintiff or his employers the right to be upon the power company's poles. On the facts in evidence, and as to that company, they were both trespassers, and, on authority, there has been no breach of duty toward plaintiff which gives him any right to relief. *Heskill v. Auburn Light Co.*, 209 N. Y., 86; *Sias v. Lowell, etc., Co.*, 179 Mass., 343; *Railway Co. v. Andrews*, 89 Ga. 653; 9 R. C. L., title, "Electricity," p. 1207; Curtis on Electricity, sec. 462.

In this last citation it is said: "The well established principle in the law of negligence, that there is no liability to trespassers except for injuries willfully or wantonly inflicted, is applicable to electric companies and electric appliances. Though an electric company may have been guilty of some neglect in the case of its appointees, it is not liable for injury to one who is a trespasser as against the company unless the injury is willfully inflicted." And our decisions are in approval of the general principle. *Vassor v. R. R.*, 142 N. C., 68.

We are of opinion, therefore, that on the record the judgment against the telephone and telegraph company be affirmed, and, as against the power company, the judgment is reversed and motion for nonsuit be allowed.

Affirmed as to telephone and telegraph company.

Reversed as to power company.

(32)

E. C. WHITE v. TOWN OF EDENTON.

(Filed 28 February, 1917.)

1. Appeal and Error—Cities and Towns—Streets—Adverse Possession—Evidence—Trials.

Title to land used by a town for street purposes cannot be acquired by adverse possession, and the question as to whether the *locus in quo* was ever made a public street and so claimed and used by the town, when it arises in the controversy, is important, rendering the admission of incompetent evidence as to such matter reversible error.

2. Cities and Towns—Streets—Adverse Possession—Maps — Trials — Evidence.

Testimony that a map of a town had hung for thirty years or more in the office of the register of deeds of the county and generally used, without evidence as to who had made it, by what authority, or that the town had recognized it as official, is incompetent to show, by omission, that the street had not been made and used by the town, in an action against the town wherein a citizen claims title by adverse possession.

CIVIL ACTION, tried at September Term, 1916, of CHOWAN, before *Whedbee, J.* From judgment for plaintiff, defendant appeals.

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

Pruden & Pruden, S. B. Shepherd for defendant.

BROWN, J. This is a controversy in respect to the title to a piece of land in the town of Edenton. The *locus in quo* is claimed by the plaintiff by deed constituting color and adverse possession and by defendant as a public street of the town. The case was before us at a former term, and is reported in 171 N. C., 21, which is referred to for issues.

It is well settled, as stated by the learned judge in his charge, that once a public street is legally established, adverse possession by a claimant will not bar the municipality. It, therefore, is an important fact in controversy in this case as to whether the *locus in quo* ever was made a public street and so claimed and used by defendant. There was much evidence on both sides.

For the purpose of showing that this land never was a public street or claimed as such, plaintiff was permitted to introduce what purported to be a map of Edenton upon which no such street is shown. The only evidence offered or relied upon to identify the map as an official map of the town is that of witness Byrum, who testified: "That map has been in the register's office at least twenty-five years, to my knowing. It was recognized by everybody as a plat of the town. Everybody that went

in asked me what that plat was, and I told them a plat of the town; that was whenever they wanted to locate a lot. This plat was in the office before we moved to Edenton, and my father used to send me there when Mr. Small was then register. It struck me and I asked (33) Mr. Small what it was. I do not think I make any mistake if I say it had been on exhibition more than thirty years."

The admission of the map upon such evidence was an error well calculated to prejudice defendant. It was not identified in any manner as an official map of the town and was not found in its possession, nor was it exhibited in its municipal office as a map of the town, but was found in the office of the register of deeds of the county. There is no evidence showing who made it or by what authority or that defendant has ever recognized it as an official map. The proof of its official character is entirely wanting.

This is not near so strong as a Virginia case in which the map was rejected. In *Harris v. Commonwealth,* 20 Grattan, 833, that Court held: "A map of a city, though made by a former city surveyor and found in the office of the register of the city, in a book labeled 'Plans and Charts,' but not appearing to have been made by authority of the city government or adopted by it, is not admissible in evidence to prove the location of a street."

New trial.

JESSE ANGE v. THE WOODMEN OF THE WORLD.

(Filed 28 February, 1917.)

1. Corporations—Torts—Principal and Agent—Respondeat Superior.

Corporations are held liable for negligent or malicious torts committed by their agents in the course or scope of their employment, or therein directed to be done; and when such conduct constitutes an actionable wrong, the corporation principal, as in other cases of principal and agent, is liable, not only for the act itself, but for the ways and means in the performance thereof by the agent.

2. Same—Insurance—Fraternal Orders—Initiation—Rituals—Damages.

Where an incorporated fraternal order does an insurance business as a principal or controlling feature, with branch or subordinate lodges through which members are admitted under an initiation or ceremony as prescribed by a ritual from the sovereign lodge, the latter is regarded as a principal, nothing else appearing, operating through the subordinate lodges, as its agents; and where, as a part of this initiation ceremony, an applicant for membership is led blindfolded in a room, and told that as a test of his strength, he must pull upon a lever of a certain machine upon which he is placed, which results in his serious damage from a shock of electricity,

throwing him upon the floor, etc.: *Held*, the tort of the subordinate lodge will be imputed to the sovereign one, and the latter will be held answerable for the damage proximately caused.

3. Same—Trials—Evidence—Burden of Proof.

Where it is made to appear that a sovereign lodge is liable for the negligence or malicious torts of a subordinate lodge, causing serious damage to an applicant for membership while undergoing a prescribed ritual, evidence which takes the case from without the rule, or tends to show that they were not prescribed by the ritual, or consent given, or of which the defendant has peculiar knowledge, and relevant to the defense, should be shown by it.

4. Criminal Law—Consent—Damages.

No consent of the party injured will bar a prosecution or prevent a civil recovery for acts causing damage which involve a breach of the criminal law.

(34) CIVIL ACTION, tried before *Whedbee, J.*, and a jury, at August Term, 1916, of WASHINGTON.

The action was to recover damages for physical injuries received when plaintiff was being initiated into a subordinate lodge of defendant, the Sovereign Camp of the Order.

At the close of plaintiff's testimony, on motion, there was judgment of nonsuit, and plaintiff excepted and appealed.

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

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

HOKE, J. From the testimony introduced by plaintiff and the admissions in the pleadings, it appeared, or there were facts in evidence tending to show, that the defendant, the Sovereign Camp of the Woodmen of the World, was a corporation duly organized and doing an insurance business on the fraternal plan as a principal or controlling feature, and that the Jamesville Lodge was a branch or subordinate lodge of defendant through which, with others of like kind, individuals were admitted as members of defendant lodge under an initiation or ceremony as prescribed by a ritual prescribed and issued by the defendant, the sovereign lodge, to its subordinates or branches; that on the.....day of June, 1915, plaintiff, having applied for admission as member in defendant lodge, was being initiated by the local lodge at Jamesville and, as a part of the ceremony then exercised, plaintiff was blindfolded and carried into a room, was placed on a machine similar to a pair of platform scales and told to pull a certain lever which would register his strength, as this was required by the lodge and by the defendant, the Sovereign Camp; that plaintiff thereupon pulled the lever as directed

and immediately received a severe shock of electricity which threw him out on the floor and caused him serious and painful injuries; "that plaintiff was then carried to his room, was confined to his bed for some time, had several fits, has suffered serious and permanent injuries, and has since been unable to work." It was further shown that another (35) individual had been admitted as member of defendant lodge a short time before the night in question, and that he, too, was placed on said machine and received an electric shock similar to that described by plaintiff. A number of witnesses testified to the good health of plaintiff prior to his initiation and that, since then, he has been under the care and attention of various doctors; that he had had fits and been unable to perform his work, etc. Upon this the evidence chiefly relevant to the issue as the case is now presented, we are of opinion that plaintiff's exception to his Honor's judgment of nonsuit must be sustained.

It is now fully established that corporations may be held liable for negligent and malicious torts, and that responsibility will be imputed whenever such wrongs are committed by their employees, and agents, in the course of their employment and within its scope. *Moore v. R. R.*, 165 N. C., 439; *Huffman v. R. R.*, 163 N. C., 171; *Seward v. R. R.*, 159 N. C., 241; *Marlowe v. Bland*, 154 N. C., 140; *Sawyer v. R. R.*, 142 N. C., 1; *Jackson v. Telegraph Co.*, 139 N. C., 347; *Daniel v. R. R.*, 136 N. C., 517; *Denver, etc., R. R. v. Harris,*, 122 U. S., 601; *Levi v. Brooks*, 121 Mass., 501.

In many of the cases, and in reliable text-books, the term "course of employment" is stated and considered as sufficiently inclusive; but, whether one or the other descriptive term is used, they have the same significance in importing liability on the part of the principal when the agent is engaged in the work that his principal has employed or directed him to do and the conduct of the agent complained of occurs in the effort or endeavor to accomplish it. When such conduct comes within the description and constitutes an actionable wrong, the corporation principal, as in other cases of principal and agent, is liable not only for "the act itself, but for the ways and means employed in the performance thereof."

In Reinhardt on Agency, sec. 335, the position and the reason for it is very well stated as follows: "If a legal wrong is committed by an accountable being, the party injured may obtain redress therefor in damages. If the wrong was committed by his authorized agent or servant, the result is the same. By 'authorized agent' it is not meant to imply that the wrongful act itself must be authorized by the principal or master; or that any presumption of that nature must be indulged before the principal can be held responsible; it is sufficient if the agent was authorized to perform the act in the performance of which the wrong

was committed; for the principal is responsible, not only for the act itself, but for the ways and means employed in the performance thereof.

(36) The principal may be perfectly innocent of any actual wrong or of any complicity therein, but this will not excuse him, for the party who was injured by the wrongful act is also innocent; and the doctrine is that where one of two or more innocent parties must suffer loss by the wrongful act of another, it is more reasonable and just that he should suffer it who has placed the real wrong-doer in a position which enabled him to commit the wrongful act, rather than the one who had nothing whatever to do with setting in motion the cause of such act. 'In such cases,' says Story, 'the rule applies (*respondeat superior*), and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency.' " And again, in the same work, section 336, the author says: "Of course, if the master or principal authorized or ratified the tort, or participated in it himself, he will be liable for the damages occasioned by it. But if he did not authorize or ratify it he will still be liable if it was done in the course of the agent's or servant's employment; and this is so even if the master or principal had actually forbidden the act to be done. The test is, whether the tort was committed in the course of the employment of the servant or agent; if the wrongful act complained of was outside of the course of such employment, the master or principal is not liable, unless it was subsequently ratified."

It will thus be noted that if the wrong complained of is committed within the course of the agent's employment and within its scope, the principal may be held liable, though it went beyond his express direction and even contrary thereto. Applying these recognized principles to the facts in evidence, as they now appear, it is the fairly permissible inference that this plaintiff, while being admitted to membership in the defendant, the sovereign lodge, through an initiation carried on by a local lodge as its agent and for which the defendant had prescribed a ritual, has received serious if not permanent injuries by reason of a violent electric shock, used as and purporting to be a part of the ceremonial. And if these facts are accepted by the jury, and they further find that injuries of that character were received as the proximate result of the agent's conduct in conducting the initiation to membership, the defendant would be properly held liable as for a negligent wrong and must respond in damages to the sufferer. According to our

interpretation of the present record, the position is in accord with the authorities heretofore cited and is fully supported by well considered cases bearing more directly on the question. *Thompson v. Supreme Tent,* 189 N. Y., 294; *Mitchell v. Leach,* 69 S. C., 419; *Kinver v. Phœnix Lodge,* 7 Ont., 377; *Grand Temple and Tabernacle of* (37) *Knights of Tabernacle v. Johnson,* (Texas Civ. App.), 171 S. W., 490. This last case seems to have been carried, by writ of error, to the Supreme Court of the United States, and we do not find that the same has, as yet, been reported or acted on, but the general principles, as stated in the opinions of the State courts, are in accord with the other cases we have cited on the subject. Neither the ritual nor constitution or by-laws of defendant or of the local lodge, if any such exist, were offered in evidence by either party on the trial, and it does not appear whether plaintiff had access to them or not. The case has been disposed of on the general evidence as to the authority and conduct of the local lodge as set out in the preliminary statement. Whether in the further development of the cause there may be facts available tending to show that the local lodge is not the agent of the defendant in the matter of admission to membership in the defendant, the sovereign lodge; whether, in the ritual prescribed by defendant, the authority of the local lodge is so regulated and controlled that the act of initiation could in no sense be held as coming within the course of the agency of the local lodge, and whether, in the ultimate issue, the plaintiff may be held to have knowingly consented to the ceremony as carried out, and how far this may affect his right to recover, these are matters that may be relevant on the question of the company's defense, and some of them, being more particularly within defendant's knowledge, the proof or the offering of it would more properly come from the company. *Furniture Co. v. Express Co.,* 144 N. C., 639; *Meredith v. R. R.,* 137 N. C., 478; *Mitchell v. R. R.,* 124 N. C., 236; Lawson on Presumptive Evidence, Rule 5. And in reference to the effect of plaintiff's consent, if there was any knowingly given, it may be well to note the decisions in this jurisdiction to the effect that no consent will bar a prosecution nor prevent a civil recovery for acts causing damage which involve a breach of the criminal law. *S. v. Williams,* 75 N. C., 134; *Bell v. Hansley,* 48 N. C., 131.

Defendant cited and greatly relied upon the case of *Juniper Sov. Camp v. Woodmen of the World,* reported in 127 Federal, 635, as in contravention of our present disposition of the cause. In that case the Court in its opinion refers to a ritual offered in evidence and tending to show that the injuries received were entirely outside of any part of the ceremony as therein contained, and, further, to a position, as sup-

ported by the testimony or contended for by defendant, to the effect that the particular act causing the injury was not a part of the ceremony of initiation at all, but occurred after and when the claimant had become a member of the local lodge. Neither the ritual nor any provision of the same nor any evidence of the kind suggested was offered on the
(38) present trial, and we do not consider it permissible—assuredly it is not desirable—to indicate, by anticipation, what effect such restrictive evidence, if it existed, might have on the plaintiff's right of action. Apart from this, the case relied on, in its general aspects, does not seem to be in accord with the principles of imputed responsibility for the torts of an agent as it prevails in this jurisdiction.

On the record as it now stands, we must hold and direct that the judgment of nonsuit be set aside and the cause, on proper issues, be referred to the decision of the jury.

Reversed.

Cited: Munick v. Durham, 181 N.C. 193; *Speas v. Bank,* 188 N.C. 529; *Hunt v. Eure,* 189 N.C. 489; *Elmore v. R. R.,* 189 N.C. 672; *Kelly v. Shoe Co.,* 190 N.C. 411; *Johnson v. Hospital,* 196 N.C. 612; *Ferguson v. Spinning Co.,* 196 N.C. 616; *Dickerson v. Refining Co.,* 201 N.C. 98; *Robertson v. Power Co.,* 204 N.C. 361; *Long v. Eagle Store Co.,* 214 N.C. 150; *Robinson v. McAlhaney,* 214 N.C. 182; *Daniel v. Packing Co.,* 215 N.C. 764.

EULA B. SATTERWAITE ET AL. v. W. H. WILKINSON.

(Filed 28 February, 1917.)

1. Wills—Interpretation—Intent.

The object in construing a will is to give effect to the testator's intent as gathered from the language of the entire instrument, rejecting no words or language if a meaning can be given them, and, if possible, reconciling seeming repugnancies between its different provisions.

2. Same—Estates—Contingent Limitations—Powers of Disposition—Deeds and Conveyances.

A devise to the wife of testator's property, including lands, with power to dispose thereof for her maintenance and for the support of a named son, and for his education, but if his widow die before the son, the latter to be the "entire heir of the remaining property" upon certain conditions, then with contingent limitation over; and if the son live to be 21 years of age, etc., the property "is to be at his own disposal." After the death of the widow and upon the arrival of the son at the age of 21 and the fulfillment of the conditions, it is *Held,* construing the will to effectuate

the intention of the testator as gathered from the whole thereof, the son took a defeasible fee, with general power of disposition, and his deed to the land conveyed a good fee-simple title to the purchaser.

CIVIL ACTION, tried before *Whedbee, J.*, at December Term, 1916, of BEAUFORT.

This is an action to recover a tract of land, and both parties claim under the will of Seth H. Tyson, in which the property in controversy was devised as follows:

"It is my will and desire to lend unto my wife, Annie Tyson, during her natural life, all the balance of my estate, both real and personal, of whatever may be found, consisting of hogs, cattle, sheep, horses, poultry, household and kitchen furniture, farming utensils, land, negroes, cash, notes, accounts, etc., after the payment of all my (39) just and lawful debts. I further leave it my will and desire that my wife, Annie Tyson, shall take care of, raise and educate our son, George T. Tyson, and that she shall be at liberty at any time to sell or dispose of any part or parcels of the remaining property for to live upon herself and enable her to raise and educate our son, George T. Tyson, with land and negroes, except those are not to be sold, but may be rented or hired out if she chooses.

"Should my wife, Annie Tyson, die before her son, George T. Tyson, it is my will and desire that our son, George T. Tyson, should be the entire heir of the remaining property upon the following condition, viz.: Should he die leaving neither wife nor lawful bodily begotten heirs, it is my will and desire that brothers John O. Tyson and Thomas O. Tyson be the final heirs for the remaining property, to be equally divided between them.

"N. B.—Should our son, George T. Tyson, live to be 21 years old and of sound mind, the property is to be at his own disposal; but should he not be of sound mind, leaving neither wife nor lawful bodily begotten heirs, for brothers John O. and Thomas O. Tyson to be the heirs as above described. But should our son, George T. Tyson, at his death (being of any age) leave wife or heirs as above described, they are to be the heirs."

Annie Tyson died leaving surviving her George T. Tyson, who, after he became 21 years of age, and being of sound mind, conveyed the land in controversy by deed in due form to convey a fee simple, under which the defendant Wilkinson claims.

That the said George T. Tyson died in July, 1916, leaving surviving him his widow and five children, who are the plaintiffs in this action.

His Honor held, upon these facts, and so adjudged, that George T. Tyson had the power under the will of Seth Tyson to convey the land

in controversy, and that the defendant was the owner thereof, and the plaintiffs excepted and appealed.

Daniel & Warren for plaintiffs.
Small, MacLean, Bragaw & Rodman for defendant.

ALLEN, J. The object of construction in passing upon the provisions of a will is to discover and effectuate the intent of the testator.

It is presumed that every part of the will "expresses an intelligible intent, *i. e.,* means something" (*Wooten v. Hobbs,* 170 N. C., 214), and this intent is not only to be "gathered from the language used, if possible" (*Freeman v. Freeman,* 141 N. C., 99), "but in seeking for his intention we must not pass by the language he has used. If we do, we shall make the will and not expound it." *Alexander v. Alexander,* 41 N. C., 231, approved in *McCallum v. McCallum,* 167 N. C., 311.

(40) It is also a rule of construction that "Every part of a will is to be considered in its construction, and no words ought to be rejected, if any meaning can possibly be put upon them. Every string should give its sound" (*Edens v. Williams,* 7 N. C., 31), or, as expressed by *Gaston, J.,* in *Dalton v. Scales,* 37 N. C., 523, "In the interpretation of wills it is the clear duty of the court to give effect to each and every part of the instrument, and, if it be possible, to reconcile all seeming repugnances between its different provisions. As the instrument is an entire act, intended to operate altogether and at the same moment, it is not to be admitted, unless the conclusion be irresistible that the testator had two inconsistent intents, and has left a declaration of both these inconsistent intents as constituting a law for the disposition of his property"; and also: "When language is used having a clearly defined legal signification, there is no room for construction to ascertain the intent; it must be given its legal meaning and effect." *Campbell v. Cronly,* 150 N. C., 469.

We must then examine the whole will; must reconcile, if possible, apparently conflicting provisions; must assume that all language used means something, and give proper effect to words having a definite legal meaning, in the absence of a contrary intent, clearly expressed.

When these principles are applied to the terms of the will before us, we find that the testator devises the land in controversy to his son, George T. Tyson, in language which the plaintiffs do not contend, standing alone, would not confer a fee-simple estate, and he then provides that if his son is of sound mind when he reaches 21 years of age (and both facts are found to exist), "the property is to be at his own disposal."

The ordinary meaning of "property at his own disposal" is that it is property which he can dispose of; get rid of; part with; relinquish;

alienate; effectually transfer (3 Words and Phrases, p. 214), and this is the interpretation put on similar language in *Parks v. Robinson,* 138 N. C., 269, in which it was held that "Where a testator died, leaving a widow and minor children, and by his will gave to his wife 'during her natural life and at her disposal, all the rest, residue, and remainder of his real and personal estate,' that the wife was given an estate for life, with a power to dispose of the property in fee." This authority is approved in *Mabry v. Brown,* 162 N. C., 221; *Griffin v. Commander,* 163 N. C., 232, and in other cases.

We have, then, an express power in the son to dispose of, to convey, without restriction and without qualification that it should not be exercised if he married and had children born to him, and we cannot refuse to give effect to this important provision unless irreconcilable with other parts of the will, and we do not think it is so.

The son was not of age, was unmarried, and had no children, (41) when the will was made, and he and the wife of the testator were the only persons living to whom was due a moral or legal obligation, and they were the principal objects of his bounty.

He gives his wife a life estate in real and personal property, with power to dispose of any of it except land and negroes. He then provides that upon the death of the wife the son shall be the "entire heir," but that if he dies leaving neither wife nor children, the property shall belong to two brothers of the testator, and that if he leaves wife and children they are to be the "heirs"; but he also says: "N. B.—Should our son, George T. Tyson, live to be 21 years old and of sound mind, the property is to be at his own disposal."

If this does not mean the full and unqualified power to convey after he became 21, it means nothing, as he must die leaving wife and children or having none, and in one event the wife and children would say you cannot convey because there is a limitation over to us, and in the other the two brothers would take the same position because of his death without wife or child, and no condition could arise in which he could dispose of the property.

We are therefore of opinion that this provision of the will must stand, and that full effect may be given to all parts of the will by adopting the construction that George T. Tyson took a defeasible fee, with a general power of disposition, and it follows that the defendant acquired title under the conveyance.

Affirmed.

Cited: Darden v. Matthews, 173 N.C. 188; *Hinson v. Hinson,* 176 N.C. 614; *Reid v. Neal,* 182 N.C. 198; *Pilley v. Sullivan,* 182 N.C. 496;

Ledbetter v. Culberson, 184 N.C. 490; *Williams v. Best,* 195 N.C. 326; *Smith v. Mears,* 218 N.C. 197; *Williams v. Rand,* 223 N.C. 737.

RILEY W. EDWARDS v. H. H. PROCTOR ET ALS.
H. H. PROCTOR ET ALS. v. RILEY W. EDWARDS.

(Filed 28 February, 1917.)

1. Contracts, Executory—Implied Promise—Mutual Rights.

Parties to an executory contract for the performance of some act to be done in the future impliedly promise not to do anything to the harm or the prejudice of the other inconsistent with their contractual relations; and the promisee has an inchoate right to the enforcement of his bargain, which becomes complete when the time for such performance arrives and the promisor prevents it.

2. Same—Renunciation—Rights of Action.

Where the promisor of an executory contract announces to the promisee that he will not perform the conditions or pay the agreed consideration for the promisee's performance of his part thereunder assumed, and the renunciation is positive, distinct, and unequivocal, the promisee may regard the contract as breached and immediately bring suit for damages therefrom arising.

3. Same—Trials—Evidence—Nonsuit.

In an action for damages arising from defendants' alleged renunciation of their contract, whereunder the plaintiff was to cut their timber at a stipulated price, evidence is insufficient of an unequivocal renunciation which tends only to show that the defendants instructed the plaintiff to stop cutting the timber, which plaintiff refused to do, and was then told to shut down cutting for a few days, until they returned and let him know; that the plaintiff did so, and not hearing again from the defendants, began sawing for other parties. In this case it appears that plaintiff was operating at a loss and was indebted to the defendants at the time of the alleged breach.

4. Contracts, Executory—Cutting Timber—Renunciation—Options — Evidence.

An option given on defendants' lands whereon the plaintiff was cutting their timber under a contract with them is not of itself a renunciation by the defendants of their contract that will justify the plaintiff in stopping the performance of his obligation thereunder and sue for damages he claims to have sustained by reason of the alleged breach thereof by the defendants, unless it appears that the optionee has availed him of the privilege of purchase, has acquired the title, or in some way the plaintiff has been thereby prevented from performance of his part of the contract.

EDWARDS *v.* PROCTOR; PROCTOR *v.* EDWARDS.

CIVIL ACTION, tried before *Whedbee, J.*, and a jury, at October (42) Term, 1916, of BEAUFORT.

Plaintiff Riley W. Edwards brought an action in the Superior Court of Beaufort County against H. H. Proctor and L. Y. Holliday to recover damages for a breach of a contract by which they employed him to cut timber on their land, and they brought an action in Pitt County against him to recover a balance due on said contract to them by Edwards. The two cases were consolidated, and by agreement tried together in Beaufort County, and the following verdict rendered under the instructions of the court:

1. Did the plaintiffs and defendants enter into a contract for the cutting and manufacture of lumber, as alleged in the complaint in Edwards v. Proctor et al.? Answer: "Yes."

2. Did Proctor and Holliday wrongfully breach said contract, as alleged by Edwards? Answer: "No."

3. If so, what damage is Edwards entitled to recover? Answer: "None."

4. Did Edwards wrongfully breach said contract with Proctor and Holliday, as alleged? No answer.

5. If so, what damages are Proctor and Holliday entitled to recover on account of said breach? No answer.

6. In what amount, if any, is Edwards indebted to Proctor and Holliday for money advanced over and above the value of the lumber delivered and other offsets? Answer: "$278.50."

Plaintiff Edwards alleged that Proctor and Holliday had com- (43) mitted a breach of contract, by ordering him to stop operations at the mill, which entitled him to sue at once for his damages. The evidence of plaintiff was that Holliday told him "to saw the logs he had already cut and not to saw any more," to which Edwards replied that he would not stop, or could not stop, until Mr. Proctor told him to do so, and that he would have to come down, and then both tell him to stop the cutting of timber. Holliday said he would send Proctor, and Proctor did go to the mill and told Edwards "that he wanted him to shut down," to which Edwards replied "that he was not going to shut down until Proctor had paid him for the timber," and Proctor said, "Well, go on and cut the timber." When he walked off he remarked: "Shut down for a few days, and I will come back and let you know." He did not come back and tell Edwards what to do. Proctor and Holliday did not state why they wanted Edwards to stop the mill, but did say that they had given an option on the land.

William Smith, plaintiff's witness, testified that Holliday had told him that he had just gone to Riley Edwards to see if he would shut

down the mill and stop cutting the timber, and that he thought Edwards would do so. He also stated that Riley Edwards had said to him that Holliday wanted him to stop, but that he had told Holliday he would not do it until Proctor said so. Edwards stopped the mill, except a few days, when he sawed for some other parties.

The court held that the evidence did not show such a breach by Proctor and Holliday as entitled plaintiff to sue, and instructed the jury accordingly, directing the answers to the issues, the amount of recovery, $278.50, being agreed upon by the parties. Plaintiff Edwards appealed.

Harry McMullan for plaintiffs.
Ward & Grimes for defendant.

WALKER, J., after stating the case: When parties enter into a contract for the performance of some act in the future, they impliedly promise that, in the meantime, neither will do anything to the harm or prejudice of the other inconsistent with the contractual relation they have assumed. The promisee, it also has been said (and this seems to be the better reason), has an inchoate right to the performance of the bargain, which becomes complete when the time for such performance has arrived, and, meanwhile, he has a right to have the contract kept open as a subsisting and effective one, as its unimpaired and unimpeached efficacy may be essential to his interests. Clark on Contracts (1904), p. 445, 447; *Frost v. Knight,* L. R. 7 Exch., 111. It has, therefore, been held (the Massachusetts court dissenting from this view (44) in *Daniels v. Newton,* 114 Mass., 530; 19 Am. Rep., 384) that if one party to the contract renounces it, the other may treat the renunciation as a breach and sue for his damages at once, provided the renunciation covers the entire performance to which the contract binds the promisor. 9 Cyc., 635, 636, and notes. The authorities do not seem to be fully agreed as to the precise ground upon which the principle should rest, although it is almost universally considered, and held, that it does exist. We need not stop to inquire as to the exact reason for the principle, but may well content ourselves with a general statement of it. A full discussion of it will be found in 9 Cyc., 635 *et seq.,* and notes to the text; 6 Ruling Case Law, sec. 385, and in the cases hereinafter cited. It is said in Ruling Case Law, *supra* (omitting immaterial matter): "When the promisee adopts the latter course, treating the contract as broken and himself as discharged from his obligations under it, he resolves his right into a mere cause of action for damages. His rights acquired under it may be dealt with in various ways for his benefit and

advantage. Of all such advantages the repudiation of the contract by the other party, and the announcement that it will never be fulfilled, must of course deprive him. It is, therefore, quite right to hold that such an announcement amounts to a violation of the contract *in omnibus,* and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract and bring his action accordingly." In order to justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute, although the renunciation need not necessarily be made at the place of performance named in the contract. It may be observed, however, that the renunciation itself does not *ipso facto* constitute a breach. It is not a breach of the contract unless it is treated as such by the adverse party. Upon such a repudiation of an executory agreement by one party, the other may make his choice between the two courses open to him, but can neither confuse them nor take both." We have not considered the measure of damages, as if there were a cause of action, for the reason that there was a nonsuit below, and it is, therefore, not relevant to the discussion. The law is well settled that the renunciation must be a positive, distinct, unequivocal, and absolute refusal to perform the contract in order to justify a suit at once for a breach and a recovery of damages therefor, 9 Cyc., at p. 637; *Smoot's case,* 82 U. S. (15 Wall.), 36, 48; *Hosmer v. Wilson,* 7 Mich., 294; *Vittum v. Estey,* 67 Vt., 158; *Zuck v. McClure,* 98 Pa. St., 541. It is said in *Vittum v. Estey, supra:* "As to a breach by renunciation, it is settled law in England and many jurisdictions here that when one party to a bilateral contract, before the time of performance on his part has arrived, repudiates the entire contract, or a part (45) of it that goes to the whole consideration, and declares that he will no longer be bound by it, the other party may, if he pleases, act upon the declaration and treat the contract as thereby broken and at an end for all purposes except for bringing a suit upon it, which he may bring at once without waiting for the time of performance. Or, to put it as *Lord Blackburn* does in *Mersey Steel and Iron Co. v. Naylon, Bensir & Co.,* 9 Appeal Cases, 434, 442, the other party may say: 'You have given me distinct notice that you will not perform the contract. I will not wait till you have broken it, but will treat you as having put an end to it, and if necessary will sue you for damages; but, at all events, I will not go on with the contract.' But declarations that do not amount to an absolute and unequivocal refusal to perform the contract cannot be treated as a renunciation of it," citing *Dingley v. Oler, supra,* and *Johnston v. Milling,* L. R. 16 Q. B. D., 460. If we examine the proof in this case,

no positive and absolute renunciation appears which gave the plaintiff a right to sue upon the contract for damages, as for a present breach of it. Holliday, it is true, had ordered the plaintiff Edwards to stop the mill after he had sawed the logs on hand or already cut. If the evidence had stopped here, the case might have been quite different from what we hold it is. But that is not all of it. Edwards refused positively to obey the order, or to consider it as a renunciation of the contract and a breach thereof. He insisted that the order must come from both of the parties, Holliday and Proctor, and that the former should send Proctor to see him, which was assented to and done. When Proctor came, he also told Edwards "to shut down," but this Edwards declined to do until he was paid for what he had already done. Proctor then told him "to go on and cut the timber," and then added, as he walked away: "Shut down for a few days, and I will come back and let you know." This left the matter open for an agreement as to what should be done, a few days being allowed for reflection; but never afterwards was there any positive, unequivocal, or unqualified order to quit. If Edwards wanted the matter settled by a distinct understanding as to what he should do, "go on or stop," it was easy for him to have inquired of the defendants and got an answer about which there could be no doubt or uncertainty. Instead of pursuing this course, being, as suggested, "behind with the defendants," he preferred to end the contract and sue for damages upon the theory that there had been a breach. He acted prematurely and inconsiderately in supposing that the time had arrived for him to proceed by suit to vindicate his supposed rights. The declarations of Proctor were not stronger or more unequivocal than those of defendant in *Dingley v. Oler,* 117 U. S., 490, a case much cited on this question, and where the language was: "We cannot, therefore, comply with your request to deliver to you the ice claimed, and
(46) respectfully submit that you ought not to ask this of us in view of the fact stated herein." This was written in reply to a peremptory demand from plaintiff for a delivery of ice immediately, under a contract for the same. The defendant had promised to deliver later, if the price changed, and expressed the hope that a more favorable view would be taken, upon reflection. The Court said as to these facts: "This, we think, is very far from being a positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time. In view of the consequences sought to be deduced and claimed as a matter of law to follow, the defendants have a right to insist that their expressions, sought to be converted into a renunciation of the contract, shall not be enlarged by constructions beyond their strict meaning." The Court also said that the implied request by the defend-

ant in that case for further consideration, based upon the peremptory demand by the defendant, left the matter open. And so we think in this case, that when Proctor had said, "You may go on and cut," or used words to that effect, and there was no further order to shut down permanently, there was no such positive, absolute and unequivocal renunciation of the contract and refusal to be further bound by it as constituted a breach entitling plaintiff Edwards to sue for his damages at once, and the matter was at that time left open for future agreement. The giving of an option for the sale of the lands to another which, so far as appears, was not accepted, and never passed any title to the land, did not constitute such a breach upon the facts of this case. It seems to be conceded that a sale under it was never consummated. There is, at least, no evidence that it was. There may be, first, a sale of lands; second, an agreement to sell land; and, third, what is popularly called an option. The first is the actual transfer of title from grantor to grantee by an appropriate instrument of conveyance. The second is a contract to be performed in the future, and, if fulfilled, results in a sale. It is a preliminary to a sale, and is not the sale. Breaches, rescission, or release may occur, by which the contemplated sale never takes place. The third, an option, originally is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property (real estate being the species we are now discussing) agrees with another person that he shall have the right to buy his property, at a fixed price, within a time certain. He does not sell his land; he does not agree to sell it. He only transfers the right, or privilege, to buy at the election of the other party. The second party gets no land *in praesenti,* nor an agreement that he shall have land, but merely the right to call for and receive land if he elects to do so. An option is unilateral, depending upon the will or choice of one of the parties for its conversion into a sale or even an agreement to sell. *Winders v. Kenan,* 161 N. C., 628. The cases relied on by plaintiff do not apply. The decisions in them (47) were based upon different facts.

The plaintiff might have enjoyed the full benefit of his contract if he had not stopped cutting the timber when he did. He had been overpaid for what he had done, and he risked nothing in suspending a few days. The jury found, without any serious contest between the parties as to the amount, that defendant owed a balance of $278.50. The case shows that he had been advanced the sum of $974.50, and from this was deducted "$600 for the contract price of cutting 100,000 feet of timber; $25 for building a house on premises; $51 for cutting out a right of way, and $20 for piling timber, leaving balance of $278.50," the amount allowed by the jury under the instructions of the court. It seems, there-

fore, that plaintiff was engaged in a losing business, but if there was a prospect of its being profitable, he should not have thrown up the contract, but gone on with it to the end and reaped the profit. So far as we can see from the facts as they now appear, he would not have been interrupted in his work.

We think the case was correctly submitted to the jury.

No error.

Cited: Trust Co. v. Ins. Co., 173 N.C. 566; *University v. Ogburn,* 174 N.C. 430; *Highway Com. v. Rand,* 195 N.C. 805; *Pappas v. Crist,* 223 N.C. 268.

J. J. SANDERS AND WIFE v. A. F. MAY AND W. R. GRIFFIN, ADMINISTRATORS, ETC.

(Filed 28 February, 1917.)

1. **Mortgages—Sales—Agreements to Purchase—Statute of Frauds—Res Judicata—Estoppel—Intervenor—Subsequent Encumbrance.**

Where a mortgagor of lands has attempted to carry out an alleged arrangement with another that he will bid in a part of the land at a price sufficient to pay off the lien, and it appears that there was no writing to bind such other person to the alleged transaction, and it results in his denying the right of such other to bid in the land for him, which the court sustains without appeal taken, resulting in a resale of the land to pay the mortgage debt; thereafter a second encumbrancer may not intervene and set up the same matter, contending that the first mortgage had been satisfied, and ask that the junior mortgage and the sale thereunder be accordingly set aside.

2. **Judgments Final.**

A judgment is final which decides the case upon its merits without reservation for other and future directions of the court.

3. **Mortgage Sales—Proceeds—Judicial Sales—In Custodia Legis.**

The proceeds of a sale of lands under a power thereof contained in a mortgage are not in *custodia legis,* or subject to its control, as in judicial sales.

(48) CIVIL ACTION pending in Superior Court of NASH County and heard by *Stacy, J.,* May Term, 1916, upon motion by B. E. Morgan for leave to intervene. His Honor denied the motion and also dismissed the action without prejudice to the right of said Morgan to proceed otherwise as he may be advised. From said judgment the petitioner Morgan and the plaintiffs appealed.

Jacob Battle for plaintiffs and petitioner.

O. B. Moss, F. S. Spruill for defendants.

BROWN, J. It appears from the pleadings and affidavits in the record that on 25 January, 1908, plaintiffs borrowed from the defendant bank $2,000 and gave to secure it a deed of trust to W. H. Griffin, trustee, conveying three lots or parcels of land in Spring Hope, described in the pleadings. W. H. Griffin, trustee, died before the foreclosure of the deed of trust and A. F. May and another qualified as his executors. The plaintiffs kept the interest paid up on said loan until on or about 19 April, 1913, at which time the bank demanded its money, no part of which, except the interest, had been paid and all of which was long since due.

There were negotiations between plaintiff and one H. L. Griffin for the purchase of one of the lots conveyed in the deed in trust, viz.: Lot No. 112, Block 2, in the plat of Spring Hope.

At request of the plaintiff, this lot alone was sold under the power contained in the deed to make title, and, according to affidavit of Attorney Moss, he bid it off at $2,000, at plaintiff's request, for Griffin, who, as plaintiff stated to Moss, had agreed to buy the property at that price. Griffin refused to take the property and we find no legal contract binding him to do so. The bank afterwards had the three lots advertised at foreclosure sale to realize on its debt.

This action was brought by plaintiffs to enjoin perpetually any foreclosure and to cancel the deed in trust upon the ground that the debt was discharged by the first sale. We see nothing to support that claim, but in any event the matter was heard by Carter, J., on 25 June, 1915, who rendered judgment passing upon all the contentions of the parties to the action, and dissolved the injunction. This judgment is set out in the record and appears to dispose of the rights of all parties to the action. No appeal was taken.

The three lots were duly advertised and sold under the deed in trust and it appears that Morgan, the intervenor, was present and participated in the bidding.

After said sale, on 1 May, 1916, Morgan, trustee, in a subsequent encumbrance, filed his petition asking leave to intervene and that the sale be set aside and the first deed in trust canceled. The petition presents practically the same grounds asserted by plaintiff and dis- (49) posed of by the Carter decree.

The matter was heard by Stacy, J., at May Term, 1916, who denied the petition and dismissed the action without prejudice to Morgan's right to bring an independent action, if so advised.

We think his Honor was correct in his view of the case. The judgment of Judge Carter had already disposed of the case and had been acquiesced in by all parties to the action.

"A judgment is final which decides the case upon its merits, without any reservation for other and future directions of the court, so that it is not necessary to bring the case again before the court." *Bunker v. Bunker,* 140 N. C., 18.

No intervenor should at that late day be permitted to come in and have the same controversy heard and determined for the second time. The lots were duly sold under the deed in trust. The sale was not a judicial sale made under a decree of court, and the proceeds of the sale are not in *custodia legis.*

We agree with the learned judge below that if the intervenor, Morgan, is advised that he has a cause of action against the defendants, he should assert his rights in an independent action.

The judgment of the Superior Court is

Affirmed.

Cited: Land Co. v. Cole, 187 N.C. 456; *Bank v. Lewis,* 203 N.C. 645; *Veasey v. Durham,* 231 N.C. 362; *Russ v. Woodard,* 232 N.C. 41; *Washburn v. Washburn,* 234 N.C. 373.

W. P. MERCER v. FRANK HITCH LUMBER COMPANY.

(Filed 28 February, 1917.)

1. Appeal and Error—Appellant—Burden of Proof—Admissions.

Where the controversy is over a disputed account in the settlement with the plaintiff for timber cut by him upon the defendant's land, and the defendant offers to introduce in evidence a memoranda his agent had made of lumber it received, on the appeal of the latter, it is incumbent upon him to show error in the exclusion of this evidence, which does not appear when the plaintiff has admitted the delivery of timber to the extent accounted for on defendant's books and claims he should be paid a further sum for additional lumber cut and delivered under this contract.

2. Evidence—Memoranda of Transactions.

Memoranda of entries made as to receipt of lumber under a contract to cut and deliver it, if in strictness it is not a part of the *res gestæ,* can only be admitted as substantive evidence in an action to recover under a contract for payment when the person making them is dead at the time of trial or unavailable as a witness, and he made them in the line of his duties, or custom, contemporaneously with the act to be proved, and he

had knowledge of the relevant facts which they purport to contain; and the evidence in this case, not falling within the rule, was properly excluded.

3. Accord and Satisfaction—Compromise — Intent — Trials — Evidence — Questions for Jury.

In applying the rule that accepting a check in full for a disputed account will conclude the party, the intent of the party as ascertained by the jury will control when the evidence is conflicting, and more than one inference can be drawn therefrom, as, in this case, where the check did not refer to the particular account or express itself to be in full settlement thereof, and had been refused as such a year or two previous, and then transmitted in the course of dealings between the parties relating to other transactions, and the evidence was conflicting as to whether a statement to that effect had been sent or received with the check, or whether the debtor had indorsed the check supposing it was in the general course of settlement for other matters.

CIVIL ACTION, tried before *Allen, J.*, and a jury, at November (50) Term, 1916, of EDGECOMBE.

The action was to recover a balance claimed to be due on a sale of timber, which defendant contended had been fully paid for.

On the trial there was evidence on the part of plaintiff tending to show, among other things, that in May, 1909, he sold to defendant the timber to be cut from a tract of land in said county, containing 75 to 100 acres; that the timber in question was very large, long-straw pine and was to be paid for at $3 per thousand, and the amount of timber had been estimated by witness at 500,000 feet; that the timber was cut and hauled off the land by defendant, and thereafter defendant sent plaintiff a statement showing the amount at 212,500 feet; that plaintiff knew that there was a mistake, and had same carefully measured on the stump, getting the number of cuts to the log plainly marked by sawdust as each stock was sawed, and the amount was 430,000 feet, and, for the difference, plaintiff had never been paid. The persons employed by plaintiff to take these measurements testified as to the amount and to the care with which same had been ascertained. A witness by the name of Dupree, whom defendant alleged they had employed to measure the timber as it was taken off the ground, stated that this was not done as to all the timber cut; that he knew of 2½ trains of 40 cars each, 1,800 to 2,000 feet per car; that he had supposed another man was measuring it, but, after that time, he measured the timber and sent statements to each of the parties.

It appeared, also, that plaintiff had sold defendant timber off of several other tracts of land in the county, about which there seems to have been no dispute, the issue between them being as to this tract of 100 acres adjoining H. T. Hinton *et al.*

(51) A witness, Frank Hitch, testifying for defendant company, said, among other things, that he did not have personal knowledge of the timber or the measurements; that the company had employed a man named Dupree to measure the timber as it was sent to the Atlantic Coast Line Railway station, and they had also the record of measurements of the timber at the defendant's mill where it was unloaded by the railroad company. These were made by a man named Howard, who was dead at the time of the trial; that the books showed the amount of timber in dispute to be 212,558 feet at $3 per thousand. The witness further testified that he had a statement made out by his bookkeeper, showing the account between plaintiff and the company, covering different transactions from 1904 down to and including this deal, and showing a balance due from defendant company on account of $35.75; that part of this statement had been furnished by the witness Dupree; that in February, 1910, when plaintiff was in Norfolk, witness had showed him the statement, putting the amount from this disputed item at 212,558 feet, and plaintiff objected to the amount as insufficient, and witness then offered him a check for the balance, as shown, which he declined to take; that witness took the check back to the office and put it in the safe, and, a year or so after, when they had some transaction about timber in another section of the county and in settling, the witness inclosed him this check and called attention to it as being the check made out to him last year. This came back through the bank as paid. The statement of account did not accompany this check when it was sent, and was just the check for the amount of $35.75.

The plaintiff in his testimony denied that any such account was ever shown him or that any claim was made that the $35.75 was or purported to be any settlement for an alleged balance; that witness received the check in the mail with some other checks for timber, but no statement of what it was for and no attention was called to it; that witness supposed it was a check payable on account, and so indorsed it; that he had sold defendant several other tracts of timber after the timber in dispute was cut; that witness, in indorsing the check, did not intend or agree to take same in full.

On this, the evidence chiefly revelant, offered by the parties, the cause was submitted to the jury, who rendered a verdict for plaintiff.

Judgment on the verdict, and defendant appealed, assigning errors.

F. S. Spruill and W. O. Howard for plaintiff.
John L. Bridgers for defendant.

HOKE, J. Objection is made to the validity of the trial for that the court excluded the written memoranda of Howard, deceased, pur-

porting to be a measurement of logs hauled from the land in (52) controversy and left at defendant's mill by the railroad company, the memoranda described and referred to by the witness Frank Hitch. It does not clearly appear from the record the exact amount of timber that these memoranda would have disclosed, but, in any event, we think they were properly excluded. If they included the same or a less quantity than defendant's books showed, they were without practical significance on the issue, for plaintiff admitted that such amount had been fully accounted for and he had deducted it from his claim. On that ground the objection should be overruled, for the burden is on the defendant to establish reversible error. But if it be assumed that the memoranda as made by Howard would show an amount greater than that as contained in defendant's statement, but less than plaintiff claimed, we think his Honor made correct ruling concerning them. It is well understood that written entries or memoranda, shown to have been made by a third person in the regular course of business, when otherwise revelant, may be admitted in evidence on the trial of an issue and as substantive testimony, but in order to their proper reception in this jurisdiction, and unless in strictness a part of the *res gestæ,* it must be made to appear that the person making them, sometimes styled the entrant, is dead at the time of trial or unavailable as a witness; that the entries were made in the line of some duty or custom pursued in the course of entrant's business; that they are contemporaneous with the act to be proved; and that the entrant had knowledge of the relevant facts which they purport to contain. *Ray v. Castle,* 79 N. C., 580; *Chaffee v. U. S.,* 85 U. S., 516; *N. J. Zinc Co. v. Lehigh Zinc Co.,* 59 N. J. Law, 189; Jones on Evidence (2d. Ed.), p. 401, sec. 319 (original sec. 323); 4 Chamberlain Modern Law of Evidence, secs. 2884-85-95 *et seq.*

Applying the principles, it does not sufficiently appear at what time these memoranda were made by Howard, nor does it at all appear that he had any knowledge of the facts which alone would give his act of measurement significance, to wit, that the logs he measured were those that came off the tract of land in controversy; nor does it appear that this was otherwise established. The witness Hitch testifies that he himself had no personal knowledge of the relevant facts, but "naturally supposed" that the amount as given in and shown by his books was correct. On the record and accompanying facts, as they now appear, all that Howard's entries could possibly show was that, at some time not stated, he measured a certain lot of logs delivered by the railroad at defendant's mill and which some one had reported to him had come from a tract of land of plaintiff. Unless this was satisfactorily established,

the pile of logs measured by Howard was not a relevant fact.
(53) On the question, therefore, really in dispute between these parties, to wit, whether the amount of timber which defendant company had cut and removed from this particular tract of land of 75 acres exceeded the amount as shown on defendant's books, the memoranda would have afforded no aid to the jury, and were properly excluded. In this aspect of the matter, the case is not unlike one of the authorities just cited, of *Chaffee v. U. S.* That was an action against distillers for selling whiskey on which no tax had been paid, and which was supposed to have been shipped from their distillery along the Miami Canal in Ohio, and as evidence tending to show that the defendants had shipped whiskey in excess of the quantity they had paid taxes on, the Government offered the books of the collector of tolls in the canal and entries therein in the handwriting of deceased clerks, purporting to have been made from the reports of captains of boats as to their cargo, etc. In holding that the admission of these entries constituted reversible error, *Field, J.*, in reference to them, said: "They were not competent evidence as declarations of the collectors, for the collectors had no personal knowledge of the matters stated; they derived all their information either from the bills of lading or verbal statements of the captains; nor were the books competent evidence as declarations of the captains, because it does not appear that the bills of lading were prepared by them or that they had personal knowledge of their correctness, or that their verbal statements, when the bills of lading were not produced, were founded upon personal knowledge; and, besides, many of the certificates were admitted without calling the captains who signed them, and without proof of their death or inaccessibility."

It was objected, further, that on the facts in evidence the court refused the defendant's prayer for instruction in terms as follows: "If you find from the evidence the fact to be that the defendant prepared a statement of all the business between the defendant and the plaintiff, showing the balance of $35.75 by the defendant to the plaintiff, and offered payment of the amount of balance; that plaintiff excepted to the statement, and stated to the defendant that it was not enough; that some time afterwards the plaintiff accepted and cashed a check for the balance due, as shown in said statement; then the court instructs that the payment to and acceptance by the plaintiff was in law a settlement, and you will answer the issue as to indebtedness 'No.'"

It is the well recognized principle here and elsewhere that when a dispute exists between two parties as to the amount of an account, and one sends another a check or makes a payment clearly purporting to be in full settlement of the claim, and the other knowingly accepts

it, this will amount to an adjustment, and further action thereon (54) is precluded. It is a question, however, of the intent of the parties, as expressed in their acts and statements at the time, and unless, on the facts in evidence, this intent is so clear that there could be no disagreement about it among men of fair minds, the issue must be decided by the jury. *Rosser v. Bynum,* 168 N. C., 342; *Aydlett v. Brown,* 153 N. C., 334; *Armstrong v. Lonon,* 149 N. C., 435; *Kerr v. Sanders,* 122 N. C., 635, etc.

In *Rosser's case, supra,* the position as it prevails in this jurisdiction is stated as follows: "It is well recognized that when, in case of a disputed account between parties, a check is given and received clearly purporting to be in full, or when such a check is given and from the facts and attendant circumstances it clearly appears that it is to be received in full of all indebtedness of a given character or all indebtedness to date, the courts will allow to such a payment the effect contended for. The position is very well stated in *Aydlett v. Brown,* 153 N. C., 334, as follows: 'That when a creditor receives and collects a check sent by his debtor on condition that it shall be in full for a disputed account, he may not thereafter repudiate the conditions annexed to the acceptance,' and is upheld and approved in numerous decisions of the Court," (citing authorities). And further: "A proper consideration of this and other cases on the subject will disclose that such a settlement is referred to the principles of accord and satisfaction, and unless the language and the effect of it is clear and explicit it is usually a question of intent, to be determined by the jury."

Under the principle so stated, the judge could not have given the instruction as prayed for, which amounts to direction that the receipt of the check, under the conditions suggested, as a matter of law, would conclude the plaintiff. The statement showing that it was a balance due did not accompany the check when sent. It was remitted a "year or so after the statement had been exhibited." There was nothing on the face of the check to show it was intended to be in full and, according to defendant's own version of the matter, it was sent in a batch or with several other checks making payments for timber, arising from transactions entirely distinct. Plaintiff denies that any such statement ever was exhibited showing the check was for a balance due and including an account for the timber in controversy; but, taking defendant's own version of it to be true, or such parts of it as appear in the prayer, the intent with which plaintiff received and cashed the check for $35.75 was a question of fact, and properly referred by his Honor to the jury.

We find no error in the record, and the judgment for plaintiff is affirmed.

No error.

Cited: Supply Co. v. Watt, 181 N.C. 433; *Blanchard v. Peanut Co.,* 182 N.C. 21, 22; *Walker v. Burt,* 182 N.C. 329; *DeLoache v. DeLoache,* 189 N.C. 399; *Perry v. Surety Co.,* 190 N.C. 292; *Shuford v. Brown,* 201 N.C. 25; *Alligood v. Shelton,* 224 N.C. 757; *Moore v. Greene,* 237 N.C. 616.

(55)

VAN SMITH BUILDING MATERIAL COMPANY v. JOHN R. PENDER, TRADING AS TARBORO HARDWARE COMPANY.

(Filed 28 February, 1917.)

1. Justices' Courts—Pleadings—Verified Statements—Oral Pleadings.

The requirements of Revisal, sec. 488, that pleadings filed subsequent to a verified pleading, excepting demurrer, shall likewise be verified, applies only to courts of record, and has no application to pleadings in a justice's court, which is not a court of record, and as to which the statute, Revisal, sec. 488, provides that they may be "written or oral."

2. Same—Appeal—Superior Court—Trials—Evidence—Questions for Jury.

A paper-writing introduced before a justice of the peace, purporting upon its face only to be a verified account upon which judgment is sought, lacking the requisites of a complaint, under the provisions of Revisal, 467, in failing to state the title of the cause, the name of the county and parties, will not be considered as a verified complaint on the trial in the Superior Court, requiring the answer there to be verified; and upon an oral answer denying the liability and raising the issue, the question is for the determination of the jury under proper evidence.

CIVIL ACTION, tried before *Allen, J.,* at October Term, 1916, of EDGECOMBE.

This is an action, commenced before a justice of the peace, to recover $165.

The plaintiff filed the following paper before the justice of the peace:

"COMPLAINT.

VAN SMITH BUILDING MATERIAL COMPANY.

DEALERS IN

Lime, Cement, Plaster, and All Building Material.

CHARLESTON, S. C., February 4, 1915.

Car No. 31516 Atlantic Coast Line.

Sold to Tarboro Hardware Company, Tarboro, N. C.

150 bbls. (600 sks.) Dexter Cement. Price, $1.10. $165.

STATE OF SOUTH CAROLINA,
COUNTY OF CHARLESTON.

Personally appeared before me, Van Smith, who, being duly sworn, says that of his own knowledge the foregoing account is just and correct, and that no part thereof has been paid, and said Tarboro Hardware Company is now justly due Van Smith Building Material Company the sum of $165, with interest from sixty days from date of invoice, which is 5 April, 1915, date of invoice being 4 February, 1915.

D. VAN SMITH.

Subscribed and sworn to before me this 14th day of June, 1916. (56)
Given under my hand and notarial seal.

E. P. CAMPBELL,
[Notary Seal] *Notary Public for S. C.*

My commission expires.....

And the defendant in person, in open court, orally denied liability."

The action was tried before the justice, and the statement of the pleadings in the return is as follows:

"Plaintiff complained as per verified account filed. Defendant denies liability."

The justice rendered judgment in favor of the plaintiff for $120.50 and costs, from which the defendant appealed.

In the Superior Court the plaintiff moved the court to require the defendant to file an answer to the verified complaint of plaintiff, setting up any defense he may have to such action. Motion refused. Plaintiff excepted.

The plaintiff then tendered judgment in his favor for $165, with interest from 5 April, 1915, and for costs, which his Honor refused to sign, and he excepted and appealed.

James M. Norfleet for plaintiff.
No counsel for defendant.

ALLEN, J. The motions of the plaintiff are predicated upon the idea that a verified complaint has been filed and that the defendant must, therefore, file a verified answer.

The statute (Rev., sec. 488), which provides that when "Any pleading is verified every subsequent pleading except a demurrer must be verified," applies by its terms only to courts of record, and a court of a justice of the peace is not only not a court of record (*Reeves v. Davis*, 80 N. C., 209; *Williams v. Bowling*, 111 N. C., 296), but it is expressly

provided that the pleadings in that court may be "written or oral." Revised, sec. 1488.

If, however, it be conceded, as the plaintiff contends, that the statute (Rev., sec. 488) applies and that a verified answer must be filed in all cases when the complaint is verified, he cannot take advantage of the position, because he has not filed a verified complaint.

The paper called a complaint does not state the title of the cause, the name of the court, the name of the county, or the names of the parties, as required in complaints by section 467 of the Revisal, and is properly designated by the justice in his return as a "verified account," which may be used as evidence under Revisal, sec. 1625. Nor is it verified as a complaint. Pell's Revisal, sec. 489, and cases cited.

It follows that the oral plea of the defendant denying liability
(57) raised an issue which could only be determined by a jury, and that the plaintiff was not entitled to have an additional pleading filed, nor to judgment.

Affirmed.

JOHN A. MEEDER v. SEABOARD AIR LINE RAILWAY COMPANY

(Filed 28 February, 1917.)

1. Carriers of Passengers—Through Trains—Local Station—Rules of Company.

Railroad companies, in the regulation of their passenger traffic, may make reasonable rules as to their trains not stopping at local stations, where they have otherwise provided for local travel; and where a passenger has brought his action for damages in being carried on a through train by a local station at which, under such regulations, the train did not stop, it must appear that the local travel at such station had not been sufficiently provided for, in order for him to recover solely on that account.

2. Same—Punitive Damages—Trials—Evidence.

Evidence is insufficient upon which to base a recovery for punitive damages for the conduct of the conductor on a through train towards a passenger thereon while carrying him past a station where, under the reasonable regulations of the company, such stop was not made, when it tends only to show that the passenger was informed that the train would not stop there, repeatedly insisted that his ticket was to that place and the conductor should stop it there or put him off, whereupon the conductor, "in a rash and unbecoming manner," said he would have to get off at a certain station, and told the passenger that he would pay his 10-cent fare to the station beyond, a regular stopping place for the train, if the plaintiff "was that kind of a man."

MEEDER *v.* R. R.

CIVIL ACTION, tried at January Term, 1916, of WARREN, before *Stacy, J.*, upon these issues:

Did the defendant maliciously or willfully, wantonly, and rudely mistreat and humiliate plaintiff while a passenger on its train? Answer: "Yes."

What, if any, damage, is the plaintiff entitled to recover? Answer: "$200."

From the judgment rendered, defendant appealed.

Pittman and Williams for plaintiff.

Murray Allen for defendant.

BROWN, J. The plaintiff sues to recover damages as a passenger because he was wrongfully carried by Ridgeway to Norlina, and for punitive damages because of insulting and humiliating conduct towards plaintiff by the conductor of the train.

His Honor charged the jury: "Plaintiff having been given (58) actual notice that the train on which he was riding would not stop at Ridgeway, the court charges you that the conductor would have been within his rights to have put him off at Henderson, and that plaintiff wasn't entitled to insist upon riding upon that train and stop at Ridgeway; and under that rule you will not consider any damages and not any inconveniences which the plaintiff suffered by reason of being put off at Norlina, and by reason of going home in the rain, or any sickness he may have contracted in consequence of such.

"Our Court has held (140 N. C., p. 126, *Hutchinson v. Railroad*) that a railroad has a right to make regulations that certain trains shall not stop at all stations, provided there are enough to serve local travel, and it does not appear that there was not; and plaintiff having knowledge of that fact, it was his duty to obey the instructions of the conductor and have gotten off No. 4 and taken No. 20.

("There is only one question for you to consider, whether the conduct of the conductor towards the plaintiff was such as to humiliate him on the train, or to bring him into ridicule in the presence of passengers on that train. Understanding that fact, the court charges you that though the train did not stop at Ridgeway, yet he was entitled to courteous treatment; if the defendant *discussed* his rights on that train and humiliated and mistreated him, the defendant would be liable for such conduct, and punitive damages may be allowed therefor.")

To the foregoing charge in parentheses defendant excepts.

The Court correctly charged that the plaintiff was not entitled to recover actual damages because he was carried by Ridgeway to Norlina.

We think, however, the court erred in submitting the question of punitive damages to the jury, but should have granted the defendant's motion.

The plaintiff testified: "The conductor took my ticket and said: 'This train does not stop at Ridgeway and you will have to get off at Henderson.' He said it in a rash and unbecoming manner. I told him that train did stop at Ridgeway. . . . The conductor gave me my ticket back and said: 'You will have to get off at Henderson.' I told him my ticket carried me to Ridgeway. He told me if I did not get off he would have me put off at Henderson. Coach was crowded that day; those in front and behind me heard what he said. After we got to Raleigh he said: 'Your stop is at Henderson.' After we left Raleigh he came through the car again and said my stop was at Henderson. I said: 'If you want me to get off—if you do not want to carry me to Ridgeway—then you can put me off.' I told him my ticket called for Ridgeway and I did not want to get off anywhere else. I refused to pay my fare to Norlina. He then said: 'If you are that kind of a man, I will give you 10 cents
(59) to pay your fare to Norlina.' I got off at Norlina when the train stopped."

On cross-examination plaintiff testified: "I told the conductor my ticket was for Ridgeway and I was determined to get off there. Don't know that I said that I was not going to get off anywhere else. I said that my ticket did not call for Henderson. Conductor did not say anything about a local train. I knew there was a local that came about 7 o'clock; No. 4 was a through train. Don't know the names of any conductors except Gibson. I asked him his name. I wanted to know the name of the man that carried me by. I told him that I was going to make a test case of it; I told him he was going to hear from me again. I thought about bringing a suit. Don't know whether I told Gibson or not that I was going to bring a suit."

On redirect examination he testified: "A local train passed Henderson about 7 o'clock; that was the first train I could have gotten home on. Decided to sue the railroad company because I thought the conductor treated me with ridicule and humiliated me."

In *Rose v. R. R.*, 106 N. C., 168, the conductor discovered soon after taking charge of the train that the plaintiff and his wife did not have proper tickets, and he said, "in a brusque, decided manner" (addressing the husband): "This is Halifax, if you are going to get off." The husband replied: "I have no intention of getting off unless you order me to get off." The conductor then said, very decidedly, rudely, and quickly: "Then, I order you off." The husband and wife got off, but came immediately back and paid their fare. The Court held that the right of the plaintiffs to recover punitive damages was erroneously sub-

mitted to the jury. The Court said: "A railway company cannot be held liable to answer in damages because its servant, who is required to collect fares and protect it against imposition by expelling those who have not paid in the time that elapses between stations that are often but a short distance apart, informs a husband in a brusque manner, in the presence of his wife, whose head is resting on a pillow, that they must pay or get off, and, after waiting until the train reaches the next station, says in a decided or rude tone that they must get off. The language was certainly such as it was the right—if not the duty of the conductor to use, and the defendant cannot be held responsible for his failure, in the hurry of the moment, to modulate his voice so as to make it soft or gentle, especially when he was giving a command in the line of his duty, which the plaintiffs had shown themselves loath to obey. Conductors ought to be, and we hope generally are, gentlemen, and can, therefore, discharge a disagreeable duty in a considerate manner where it affects female passengers."

In *Ammons v. R. R.*, 140 N. C., 196, this Court held that "To entitle a passenger to such damages, his wrongful expulsion from the train must be attended by such circumstances as tend to show (60) rudeness, insult, aggravating circumstances calculated to humiliate the passenger," citing *Holmes v. R. R.*, 94 N. C., 318; *Rose v. R. R.*, 106 N. C., 170; *Knowles v. R. R.*, 102 N. C., 59.

The same rule applies where the conductor acts rightfully, but in a rude and insulting manner. The evidence of plaintiff does not come up to the standard. In the case of *Tomlinson v. R. R.*, 107 N. C., 327, the facts are very similar to this, and punitive damages were denied. *Smith v. R. R.*, 130 N. C., 304, is very pertinent authority sustaining defendant's contention in this case.

We are of opinion that the motion to nonsuit should have been allowed. Reversed.

Cited: Tripp v. Tobacco Co., 193 N.C. 616.

JOHN PALMER ET ALS. v. J. E. LATHAM.

(Filed 28 February, 1917.)

1. Mortgages—Sales—Place of Sales—Contracts—Statutes.

The requirement of Revisal, sec. 641, refers to sales under a foreclosure of a mortgage by order of court, and when made solely under the power of sale directed by the mortgage, the place of the sale therein designated

controls; nor is this affected by Revisal, sec. 1042, which omits any requirements as to the place of sale, but provides for the advertisement at the courthouse door of the county wherein the land is situated, and is directory only.

2. Same—New Counties.

Where before the creation of a new county a mortgage is given on lands directing that the sale under the power thereof, be made, on default, at the courthouse door of that county, and the lands fall within a new county thereafter created, objection to the validity of the sale merely because it was made at the designated place cannot be sustained.

3. Mortgages—Place of Sale—Subsequent Statutes.

Statutes changing the place of sale of lands under a mortgage cannot apply to mortgages or deeds of trust executed prior to the enactment.

APPEAL by plaintiffs from *Bond, J.*, at January (Special) Term, 1917, of LEE.

Hoyle & Hoyle for plaintiffs.
Seawell & Milliken for defendant.

CLARK, C. J. The only question presented is the validity of a sale of land at the courthouse door in Moore County under a mortgage which provided that in case of default it should be sold "at the court house door in Moore." At the time the mortgage was executed (in 1906) the land lay in Moore County, but prior to the time of sale (in 1915) (61) it had been placed in the new county of Lee. There is no allegation of bad faith, the sole contention of plaintiff being that the land should have been advertised and sold at the courthouse door in Lee.

In *McIver v. Smith,* 118 N. C., 73, the Court held that the place designated for the sale under the power of sale in a mortgage controls. The appellant contends that mortgage sales are now governed in this respect by Revisal, 641, which has been enacted since that decision, but that section of the Revisal is under the head of "Execution Sales" in the chapter on Civil Procedure, and evidently refers to sales under the foreclosure of a mortgage by order of court, and other judicial sales. Revisal, 1042, providing for "mortgage sales," specifies that such sales should be advertised at the courthouse door in the county where the land lies, but does not require that the sale shall be made at that place, the object evidently being to give notice to creditors and to those in the neighborhood who would be most likely to purchase. This section further prescribes the length of notice, "unless a shorter time be expressed in the contract," showing that the parties can stipulate as to the time. By the omission of any requirement therein as to place of sale, that also is

left open to contract. The presumption is that such sale was properly advertised, *Cawfield v. Owens,* 129 N. C., 288. Requirements as to advertising are directory only, *Shaffer v. Bledsoe,* 118 N. C., 279; but requirements as to time and place of sale are mandatory, *Wortham v. Basket,* 99 N. C., 70.

In *Eubanks v. Becton,* 158 N. C., 236, the Court quotes with approval from Perry on Trusts, sec. 602: "If the power contains the details, the parties have made them important, and no change can be made even if the mortgagor would be benefited thereby, nor if a statute provides a different manner."

In *McIver v. Smith,* 118 N. C., 73, the Court says: "A mortgage is a contract, and the parties may affix such terms and conditions as they see fit, provided creditors or others interested at the time are not affected thereby."

"If the power provides that the sale is to be made on the premises, or names any other place, of course the sale must be notified for that place, and it must be made at that place." Perry on Trusts, sec. 602r. If a mortgage or deed of trust specifies the place where the sale is to be made, it must be strictly obeyed. 27 Cyc., 1476.

In *McConneaughey v. Bogardus,* 106 Ill., 231; *White v. Malcom,* 15 Md., 529, it was held that a statute changing the place of sale cannot apply to mortgages or deeds of trust executed before the enactment. In *Durrell v. Farwell* (Tex. Civ. Ap.), 27 S. W., 795, it is held: "When a deed of trust provides that the property shall be sold at the county-seat of a certain county, and the county is afterwards subdivided, a sale made at the county-seat of one of the *new counties is void.*"

It not being denied that this sale under the mortgage was in all (62) respects regular and fair; that there was a balance due on the note secured by the mortgage, and that the land was sold in exact accordance with the terms of the power of sale and at the place designated, the judgment is

Affirmed.

Cited: Hogan v. Utter, 175 N.C. 335; *Douglas v. Rhodes,* 188 N.C. 585.

LULA R. MILLER ET AL. v. ROBERT P. JOHNSTON ET AL.

(Filed 28 February, 1917.)

1. Deeds and Conveyances—Boundaries—Courts—Trials—Matters of Law—Questions for Jury.

What are the termini or boundaries in a deed or grant is a matter of law, and upon conflicting evidence, it is for the jury to determine where these termini or boundaries are; but where the court declares what the boundaries are, and this is not disputed, the whole resolves itself into a question of law.

2. Same—Admitted Lines—Further Specifications.

In a controversy over lands, a fixed and established line is dealt with as a natural object and will control course and distance; and descriptive specifications cannot prevail against a known and controlling call, nor will the addition of further description defeat a full and perfect description which fully identifies and ascertains the property conveyed or devised.

3. Same—Wills — Devises — Codicils — Variant Descriptions — Residuary Clause.

A testator devised certain part of his lots to his wife with description calling for certain known and established lines, and by codicil he referred to the death of his wife, and devised the lands to his daughter, under whom the plaintiff claims, but terminating with a known and admitted line within that specified in the description of the lands devised to the wife. The will contained a residuary clause. The court, after pointing out the difference in the description in the devise in the will and that in the codicil, held that by knowingly using a different designation of the known boundaries, the intent of the devisor was that the codicil pass to the daughter a smaller acreage than devised to the wife, or he would have given the same description; and the boundaries or objects in both descriptions being admitted, the defendants were entitled to recover as a matter of law; and a particular description as to the location of an orchard, as affecting the line claimed by the plaintiff, must give way to the boundary admitted to be that designated.

4. Same—"Including."

Where a testator owned more than five lots along a street, and devised some of them by description beginning at a fixed point and running south along the street to the northern boundary of the fifth lot, his intent is construed to include only the five lots from the beginning point and the northern boundary of the fifth lot, and under the facts in this case it is held that those claiming under the devise could not go beyond the northern line of the fifth lot.

5. Appeal and Error—Harmless Error—Evidence—Instructions.

Where evidence as to the recital in certain deeds with relation to a controversy concerning lands is erroneously admitted, an instruction to the jury that they must not consider the recital renders the error harmless.

MILLER *v.* JOHNSTON.

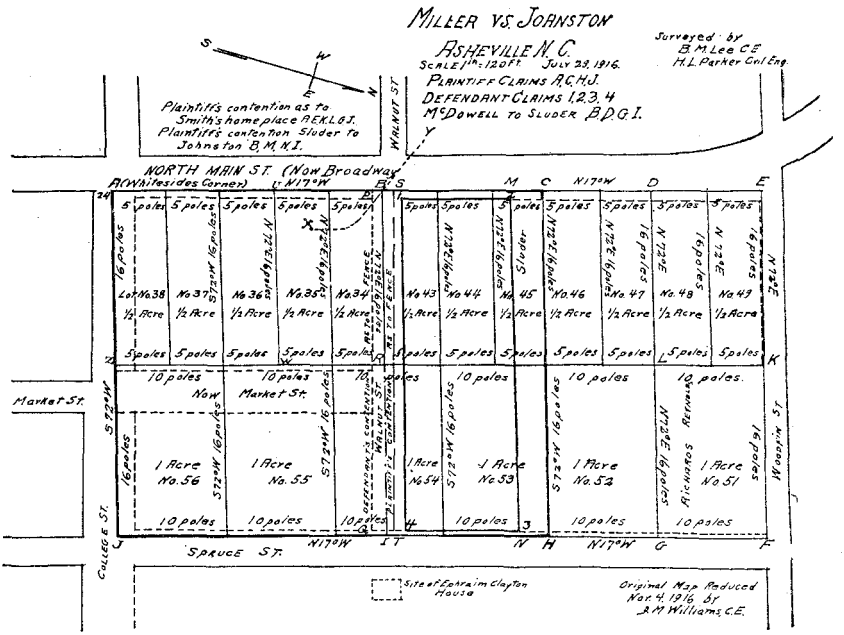
6. Evidence—Issues—Trials—Wills.

In an action concerning the boundary to lands devised, testimony which has no bearing upon the issue, but is at most an expression of doubt as to the construction of the will, is properly disallowed.

CIVIL ACTION, tried before *Adams, J.*, at August Term, 1916, of (63) BUNCOMBE.

This is an action to recover a lot of land in the city of Asheville, the controversy being as to the ownership of the land on the plat, which is copied below, between the lines B, M, N, I, or as reduced by the widening of Main Street and the opening of Walnut Street between the lines 1, 2, 3, 4.

The plaintiffs are children and grandchildren of Elizabeth A. Gudger, who died in 1912, and they claim under the will of James M. Smith, who acquired lots 38, 37, and 36 in 1816, and all of the other land covered by the plat, except lot No. 51, in 1840. James M. Smith made his will



in 1850, and in addition to giving certain property to different (64) children, he devised certain lands to his wife, Pollie, for life and certain other lands to her absolutely.

In 1854 he added a codicil to his will in which he recites that his wife had died, and he disposes of the property devised to her, describing it as "the property in said will, real and personal, given to her for life and that property given to her absolutely."

In 1856 he made changes in his will and added another codicil in which is the devise under which the plaintiffs claim, and as the plaintiffs contend that the devise to Elizabeth A. Gudger covers the same land as that devised to the wife, Pollie, as far as the land covered by the plat is concerned, the two devises are given in parallel columns in order that the similarity and differences in description may be seen the better:

February 9, 1850.	*February 8, 1856.*
1. I give and devise to my beloved wife Polly	1. I give and devise to her the said Elizabeth A. Gudger
2. the house and lots in which I now live in the Town of Asheville	2. the house and lots in which I live
3. including the tavern and adjoining buildings, Garden, orchard, and ADJOINING LOTS	3. including the tavern and outbuildings contiguous on the east side of the main street
4. Beginning at Mr. Summey's line on the main street near my house	4. Beginning on the street and J. B. Whiteside's corner south of the tavern house.
5. then with the main street a north course	5. and running with the main street, INCLUDING THE FIVE FRONT HALF-ACRE LOTS
6. (a) CROSSING THE HOLLOW (b) TO THE LINE OF the southern half acre lot hereinafter devised to my daughters ANN CATHERINE CROOK and RUTH W. RIPLEY	6. PASSING BELOW THE FENCE NORTH OF THE WELL
7. (a) THEN WITH THAT LINE and (b) *the line of the lot east of it an east course*	7. (a) and running with the LOWER OR NORTH LINE OF THE LOWER OR FIFTH LOT EASTWARD BY THE EAST CORNER THEREOF (b) *and the same course*
8. to the new street running by EPHRIAM CLAYTONS,	8. to the street NEAR EPHRAIM CLAYTONS
9. and with that street a south course to the cross street	9. & south with that street to the corner near Z. B. Vance's office,
10. and with that and Mr. Summey's line to the beginning.	10. then with the cross street and south line of my lot to the beginning including the orchard
11. . . . for and during her natural life and no longer	11. . . . for and during her natural life with remainder to such children as she may leave her surviving and those representing the interests of any that may die leaving children

There was also a residuary clause in the will of the said Smith (65) which is as follows:

"All the rest and residue of my estate, real, personal, and mixed, I direct to be sold by my executors at public or private sale as they may deem best. . . .

"The property, real and personal, herein left to my wife for life is intended to be embraced in the direction on this page to sell the residue of my estate and divide the proceeds amongst my daughters. . . ."

It was admitted that the devise to the wife of the testator, copied above, began at the letter A on the plat and ran to G, then to H, then to J, and back to A.

It was also admitted that the devise to Elizabeth A. Gudger and her children begins at A and runs north with Main Street, the plaintiffs contending that the northern line of the devise was the line G, H, and the defendants claiming that the northern line was the line B, I.

The tavern, in which James M. Smith lived was located on lots 38 and 37 and in part on lot 36.

It was admitted that the line B, I was the northern line of the fifth half-acre lot counting from A, and that the line G, H was the northern line of the eighth half-acre lot counting from A, and of the fifth counting from the northern line of lot 36, the third lot on which the tavern was situate.

There was no dispute between the parties as to the location of any object referred to in the devise to the wife of the testator, or in the devise to Elizabeth A. Gudger and children, except the fence and the orchard.

The plaintiffs offered evidence tending to prove that the fence was on the line S, T, and the defendants that it was on the line P, Q.

The plaintiffs also offered evidence tending to prove that the orchard extended north of the line B, I, and the defendant that it was between the lines A, J and B, I.

The jury returned a verdict in favor of defendants, and from the judgment rendered thereon the plaintiffs appealed.

Jones & Williams for plaintiffs.

Merrimon, Adams & Johnston, Martin, Rollins & Wright, W. R. Whitson, and Mark W. Brown for defendants.

ALLEN, J., after stating the case: The plaintiffs claim under the will of James M. Smith, and they cannot recover unless the land in controversy is a part of the land devised to Elizabeth A. Gudger and her children.

The plaintiffs contend that the court ought to have held as matter of law that the devise included the three half-acre lots, Nos. 38, 37, and 36,

as the lots on which James M. Smith lived, and in addition the five
(66) half-acre lots, Nos. 35, 34, 43, 44, 45, and that, if this is not so, that the location of the land is a question for the jury, and that error was committed on the trial of the issues.

The defendants contend, on the contrary, that there was no question for the jury; that the northern boundary of the plaintiffs is the line B, I, and that while this ought to have been held by the court, it has been correctly decided by the jury under proper instructions.

It has been settled since the case of *Doe on dem. Tatem v. Paine,* 11 N. C., 64, that *what* are the termini or boundaries of a grant or deed is matter of law, to be determined by the court, and *where* these termini are is a fact to be left to the jury, when the location is in dispute (*Jones v. Bunker,* 83 N. C., 324; *Redmond v. Stepp,* 100 N. C., 212; *Lumber Co. v. Bernhardt,* 162 N. C., 464); but if the court declares what the boundary is, and the location of this boundary is admitted, the whole resolves itself into a question of law.

It is also a rule of construction that a line called for in a description, which is fixed and established, is dealt with as a natural object, and controls course and distance (*Fincannon v. Sudderth,* 140 N. C., 246; *L. Co. v. Hutton,* 159 N. C., 445; *L. Co. v. Bernhardt,* 162 N. C., 464) and that descriptive specifications, while useful when the location is in doubt, cannot prevail against a known and controlling call (8 R. C. L., 1086; *L. Co. v. L. Co.,* 169 N. C., 94), nor will the addition of a further description be permitted to defeat a full and perfect description which fully identifies and ascertains the property conveyed or devised. *Mayo v. Blount,* 23 N. C., 283; *L. Co. v. L. Co.,* 169 N. C., 94.

Applying these principles, it is clear that the line "running with the lower or north line of the lower or fifth lot eastward by the east corner thereof and the same course to the street near Ephraim Clayton's," whether the line B, I, or G, H, is the northern boundary of the land devised to Elizabeth Gudger and her children.

Is the northern boundary on the line B, I, or on the line G, H?

The evidence to be gathered from the will, including the codicils, is conclusive and satisfactory that it was not the intention of the testator to give to his daughter and her children the land formerly devised to his wife, and, therefore, that he did not intend to establish the line G, H, which is the northern line of the devise to the wife, as the northern boundary of the devise to the daughter.

In the first place, if it was his purpose to give to his daughter and her children the same property devised to his wife, he could have done so by describing it as the land on the east side of Main Street formerly devised to his wife, and the inference that he would have done so if this

was his intention is reasonable when it is remembered that he was familiar with this mode of description, as he adopted it in the first codicil, after the death of his wife, in which he disposes of "the property (67) in said will, real and personal, given to her for life, and that property given to her absolutely."

Again, the testator had devised certain lots to his daughters Catherine Crook and Ruth Ripley, and the lines of these lots were known, established, and beyond dispute. In the devise to his wife he begins at A and runs north with Main Street to the lines of the lots devised to Catherine Crook and Ruth Ripley, while in the devise to Elizabeth Gudger and her children he begins at A and runs north with Main Street to the north line of the fifth lot.

Why this change in phraseology, and why this substitution of a line, which has raised the present controversy, for a line established by the testator and used by him in the former description, if it was intended that the two devises should cover the same property?

A comparison of the descriptions in the two devises shows marked and irreconcilable differences. In the general description in the devise to his wife he disposes of "the house and lots in which I now live in the town of Asheville, including the tavern and adjoining buildings, garden, orchard, and adjoining lots," and in the devise to his daughter of "the house and lots in which I live, including the tavern and outbuildings contiguous on the east side of Main Street."

If these two descriptions stood alone it could not be contended that the devise to the wife did not include *lots adjoining* the tavern lot, which are not mentioned in the devise to the daughter, and the particular description leads to the same conclusion.

Both devises begin at the letter A and run north with Main Street. The devise to the wife runs to the line of the lot devised to Catherine Crook and Ruth Ripley, which is at H, while that to Elizabeth Gudger and her children runs to the northern line of the fifth half-acre lot, which, counting from A, is at M.

The devise to the wife runs from H with the line of Catherine Crook and Ruth Ripley and with the line of the lot east of the Crook and Ripley lot (lot 52) to Spruce Street, giving a well-known and identified line from Main Street to Spruce Street, while the line in the devise to Elizabeth Gudger and her daughter runs with the northern line of the fifth lot eastward by the east corner thereof, which, if the line begins at B, would take it to R, and then to Spruce Street, and not with any other line, but following *the same course* as from B to R, indicating that there was no known line from R to Spruce Street, and the line from B to R, extended to Spruce Street, divides lot No. 54, an acre lot on Spruce Street.

If a line of another lot had run from the east corner of the fifth lot to Spruce Street the testator would have called for it as he did in
(68) the devise to his wife, but if there was no line, his only recourse was to follow the "same course" as he did in the devise to the daughter.

The devise to the wife calls for Spruce Street *running by Ephraim Clayton's,* and the devise to the daughter Elizabeth for the Street *near Ephraim Clayton's,* and Ephraim Clayton's is opposite the terminus of the line from B to R extended to Spruce Street, and the calls for the orchard and the fence are merely descriptive and cannot control the line called for.

The presumption that a testator intends to dispose of all his property cannot affect the construction of the devise, for the reason that there was property of the testator which he did not dispose of specifically, and there is a residuary clause in the will.

We are, therefore, of opinion that the devise to Elizabeth Gudger and her children does not cover the same property devised to his wife, and this practically establishes the line of the devise at the line B, I, because there are only two possible contentions upon the record, and that is whether the line H, G or the line B, I is the northern boundary of the devise under which the plaintiffs claim.

If, however, we confined ourselves not to a comparison of the two descriptions, but to a consideration of the devise to the plaintiff alone, we would come to the same conclusion.

As we have heretofore shown, the general description in the devise to the plaintiffs contains nothing that would permit the extension of the line beyond the three lots on which the testator lived, and but for the language in the particular description, "including the five front half-acre lots," we would be compelled to say that the fifth lot means what it says, and that counting from A the line B, I would be this boundary; and we do not think the language quoted changes this construction of the devise, and that, on the contrary, it confirms it.

When the description begins at A and includes the five front half-acre lots running to the northern boundary of the fifth lot, the natural construction is that these five lots are between the beginning point and the northern boundary of the fifth lot, and as there is nothing in the devise to show a purpose upon the part of the testator to begin the count of the five lots at any other place than the beginning point, and there are eight half-acre lots on Main Street from A to H, and the fifth lot has for its northern boundary the line B, I, this is the line called for in the devise to the plaintiffs, beyond which they cannot claim.

This is also the construction placed on the devise by the parties, as it appears that the will of James M. Smith was probated in July, 1856; that Elizabeth Gudger lived on a lot adjoining that in controversy until her death in 1912, a period of fifty-six years, and that this action was not commenced until 1914.

The Century Dictionary defines "include," "to confine within (69) something; to inclose; to contain; to comprise"; and this definition is accepted by the courts.

" 'Include' is defined as 'to confine within, to hold, to attain, to shut up'; and synonyms are 'contain,' 'inclose,' 'comprise,' 'comprehend,' 'embrace,' and 'involve.' Webst. Dict. So that, as used in Comp. Laws S. D., Par. 1409, providing that the sheriff shall be entitled to certain fees for summoning jurors, including mileage, the sheriff is not entitled to the mileage in addition to the fee." *Neher v. McCook Co.,* 78 N. W., 998, 999, 11 S. D., 422.

The use of the word "including," in a legacy of $100, including money trusteed to a certain bank, cannot be construed as meaning in addition to, and, therefore, the devisee is not entitled to the sum of $100 in addition to the sum trusteed at the bank, but only $100, including such sum. *Brainard v. Darling,* 132 Mass., 218, 219.

A bequest of $14,000, including certain notes, etc., is to be construed as embracing or constituting the notes as a part of the $14,000, and not to mean that the notes are to pass in addition to that sum. *Henry's Ex'r. v. Henry's Ex'r.,* 81 Ky., 342, 344. 4 Words and Phrases, p. 3499.

We, therefore, conclude that his Honor should have held as matter of law that the devise to the plaintiffs did not cover the land in controversy; but as the jury has found in accordance with this contention, it does not constitute reversible error to refuse to so hold. *Johnson v. Ray,* 72 N. C., 273.

We have, however, examined the exceptions relied on by the plaintiffs, and if we were of opinion that it was a question for the decision of a jury, we would hold that there was no error upon the trial. The only exception which would appear to be tenable is to the admission of the recitals in a certain deed, but it appears that his Honor instructed the jury carefully that they could not consider the recitals.

The evidence excluded, as to the declarations of Mr. Johnson, had no bearing on the issue involving the boundary, and at most was an expression of doubt as to the construction of the will.

No error.

Cited: Pace v. McAden, 191 N.C. 139; *Benton v. Lumber Co.,* 195 N.C. 365; *McCanless v. Ballard,* 222 N.C. 703; *Brown v. Hodges,* 232 N.C. 541; *James v. R. R.,* 233 N.C. 597.

(70)

MEEDER & CO. v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 7 March, 1917.)

1. Carriers of Goods—Live Stock—Facilities—Unloading—Negligence.

A carrier of goods, handling live stock for transportation, owes the consignee the duty to provide proper facilities for transportation and for unloading them at destination; and where, having been warned of the lack of such facilities, the carrier transports a carload of sheep and goats, and upon the refusal of the consignee to unload them for the reason stated, the agent attempts to do so by means of a plank, and the animals, attempting to leave the car upon its being opened, rush out, injuring some of them in jumping or falling to the ground, actionable negligence is established for which the carrier is liable.

2. Carriers of Goods—Live Stock—Damages—Evidence.

Where the carrier has failed to provide proper facilities for unloading a carload of goats and sheep, resulting in injury to them in jumping 10 feet from the car to the ground, admission of testimony that, in consequence, lambs were born dead next morning, was proper; and that it was harmful for such animals carrying young to jump this distance, was not prejudicial to the defendant, it being common knowledge to persons of intelligence.

Clark, C. J., concurring.

CIVIL ACTION, tried before *Stacy, J.*, at January Term, 1916, of WARREN.

This is an action to recover damages to a car-load of sheep and goats shipped over the road of the defendant from Artesia, N. C., to Ridgeway, N. C.

The action was commenced in the recorder's court of Warren County and was tried in the Superior Court on appeal.

The allegation of negligence relied on by the plaintiff was that the defendant failed to provide proper and adequate facilities for unloading.

The plaintiff's evidence tended to show that the car-load of sheep and goats, containing 230 animals, were gathered together at Artesia for Meeder & Co. at Ridgeway, N. C. J. A. Meeder, manager of Meeder & Co., testified that he went to the agent of the defendant at Ridgeway and told him that he expected a car-load of sheep and goats and wanted him to take the matter up with the company of building a cattle chute for unloading these animals. The agent informed him that he had written the defendant about the matter and had been advised that it would be too expensive and take too long to get the material for the construction of the chute. Plaintiff then told the agent of the defendant that

(71) he would do the work and furnish the material for $7.50. This

was two weeks before the shipment arrived. On the arrival of the car, Meeder refused to accept shipment because there were no facilities for unloading the animals. The defendant's agent then attempted to unload the sheep by putting a plank up so that they could get out. As soon as the door of the car was opened all of the animals attempted to come out at the same time and a number of them fell from the plank to the ground and were injured. Four sheep were found dead in the car and numbers of goats and sheep died after they were taken to the plaintiff's farm.

His Honor charged the jury, among other things, as follows: "When freight is shipped in car-load lots the duty is imposed upon the consignee to unload, that is, take it out of the car. . . . Had nothing been said by plaintiff to defendant in respect to this expected shipment, then defendant would have been justified in carrying the car-load of sheep and goats or animals to Ridgeway without making any preparation for its unloading. But if you should find from the evidence, and by its greater weight, that plaintiff notified defendant that he expected a shipment of live stock consigned to him at Ridgeway; that he requested the defendant to provide facilities for unloading that stock, and defendant having received such notice, and if you find that defendant received such notice from the plaintiff, then it was the duty of the defendant to make such facilities, and it was the duty of the railroad to provide the proper facilities. . . . (If you find from the evidence that defendant company did not have sufficient facilities at Ridgeway for unloading live stock, and you should further find that it was notified by plaintiff that he was to receive it over that line, and you should find that sufficient time elapsed and defendant failed to provide such facilities, it is negligence on the part of the company, and the plaintiff should have the second issue answered in his favor. If you do not so find, you are to answer the second issue 'No.' ")

The defendant excepted to part in parenthesis. The defendant also excepted to the evidence of one of the witnesses for the plaintiff that some of the goats and sheep were born dead the next morning after they were taken from the car.

This same witness testified, without objection, that in his opinion the treatment received by falling out of the car was the cause of being born dead.

The defendant also excepted to the evidence of another witness for the plaintiff who testified that the result of allowing animals to jump 10 feet from a car while with kids and lambs would be harmful.

There was a verdict and judgment for the plaintiff and the defendant excepted and appealed.

(72) *Pittman & Williams for plaintiff.*
Murray Allen for defendant.

ALLEN, J. The charge of his Honor to the jury was favorable to the defendant.

The only authority cited in the brief (*Covington's Stock Yard Co. v. Keith,* 139 U. S., 133) states the rule to be that "The railroad company, holding itself out as a common carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered it for shipment over its roads and connections, as well as for discharging such stock after it reaches the place to which it is consigned," and this is in accord with the decision of this Court in *Cogdell v. R. R.,* 124 N. C., 306, and in other cases.

The evidence of the witness that kids and lambs were born dead the next morning as a result of the failure to provide proper facilities for unloading was clearly competent, and the opinion of the other witness that it would be harmful for goats and sheep, carrying young, to jump 10 feet from a car, could not have affected the result, as any one of sufficient intelligence to act as a juror would know this without the testimony of a witness.

No error.

CLARK, C. J., concurring: I concur in all that is so well said in the opinion of the Court, but it would seem there was negligence not only in the manner of discharging the stock at the place of destination, but also in carrying sheep and goats promiscuously without putting any division between them. The difference between the two classes of stock required this, and the failure to do this doubtless caused some of the loss.

We know on the best authority that a shepherd "divideth his sheep from the goats." Matthew XXV, v. 32.

RUFUS HAM v. W. R. PERSON AND S. H. FINCH.

(Filed 7 March, 1917.)

Excusable Neglect—Judgments—Employment of Counsel.

Excusable neglect to set aside a judgment regularly rendered by default of an answer is not shown by the facts that the defendant employed to represent him an attorney of another county, who did not regularly

attend the courts or practice in the county of the venue, or promise to go there specifically, but who informed the defendant that it was unnecessary; nor by the further fact that the defendant did not know the date of the term to which the action was returnable when he had been served regularly with summons, stating the time. *Lumber Co. v. Lumber Co.*, 172 N. C., cited and distinguished.

APPEAL by defendant Finch from *Lyon, J.*, at May Term, (73) 1916, of WAYNE.

M. T. Dickinson for plaintiff.
Butler & Herring for defendant.

CLARK, C. J. This is an appeal from the refusal of a motion to set aside a judgment on the ground of excusable neglect. The action was brought by the surety to recover money paid by him for the defendants, who were principals in the note. The defendant Person did not set up any defense to the action. The other defendant wishes to set aside the judgment to plead the statute of limitations.

The court found as facts that after service of summons on the defendant Finch, who resides in Sampson, he employed counsel residing in Clinton to represent him in this action which was returnable to Wayne, where the plaintiff and the other defendant reside. The counsel employed by Finch were not "counsel regularly attending the court" in which the action was pending, nor did they "engage to go there especially to attend to the matter." Finch, therefore, was chargeable with inexcusable neglect. The case of *Osborn v. Leach*, 133 N. C., 428, presents, in all material respects, the identical state of facts as in this case. That case cites many others exactly on all-fours, among them, *Manning v. R. R.*, 122 N. C., 828, which cites many others to the same effect, and has been repeatedly cited since with approval. See Anno. Ed. In that case it was said: "Our laws do not recognize this leisurely and dilettante manner of attending to legal proceedings at long range. What would be left of the statute if every defendant demanded the same privileges of answering at his own convenience, or by his own system? . . . As the answer was not filed at the first term, the plaintiff was under the law entitled to his judgment," as against any other defendant.

Indeed, our decisions are uniform and without any exception that courts cannot be run upon any plan which requires that the summons of the court to appear and answer the complaint at the time specified shall be disregarded if not convenient to the counsel to attend, but clients must at least employ counsel "regularly attending the court where the case is pending or who shall engage to go there especially to attend the

matter." In such case, if the counsel does not attend to the matter, the client will have a cause of action against him for neglect to do so. But in this case counsel did not attend that court and did not engage
(74) to go there specially. The neglect was that of the client in not securing counsel who by his implied contract, by reason of his regular attendance at such court, or by special agreement to go there, gave him assurance that the matter would be attended to. On the contrary, the judge finds that counsel, instead of agreeing to attend the court where the cause was pending, told Finch that it would "not be necessary for him to go," and that he would not go. Finch, therefore, had the precept and order of the court to attend "or that judgment would be rendered against him," but he preferred to take the statement of counsel that it would "not be necessary" for him to do so. The courts are for the dispatch of public business, and those who have business therein must either pay attention to it or abide any judgment rendered in the regular and ordinary course of procedure. The cost of the courts is heavy and they cannot be run for the convenience of counsel, or of suitors, contrary to the statutes in such cases made and provided.

The judgment of his Honor is supported by the unbroken precedents in this Court. The decision in *Seawell Co. v. Lumber Co.*, 172 N. C., 320, relied on by the defendant, in no respect resembles this case, for there the defendant's counsel assured him that he had employed local counsel in the court where the cause was pending and that the client "reasonably and honestly relied upon such assurance." In this case the counsel did not regularly attend the court, did not undertake to employ resident counsel, and did not engage to attend himself. Counsel alleges that he made a mistake as to the time when court in Wayne would be held. The summons on its face notified defendant when the term of court would begin; besides, "ignorance of law excuses no one," and this Court has said: "The vicarious ignorance of counsel has no greater value." *Allen v. McPherson,* 168 N. C., 437; *Barber v. Justice,* 138 N. C., 21; *S. v. McLean,* 121 N. C., 601; *S. v. Downs,* 116 N. C., 1066.

Judgment was taken for want of an answer on Thursday of the second week of the term. The plaintiff was entitled to take judgment by the terms of the statute, by the notice in the summons served on him, and "according to the regular course and practice of the courts." *Williams v. R. R.,* 110 N. C., 466, was expressly overruled in *Manning v. R. R., supra.*

The judgment of the court below is

Affirmed.

(75)

J. M. ARCHER ET AL. v. W. H. JOYNER ET AL.

(Filed 7 March, 1917.)

1. Statutes—Stock Law—Assessments—Necessaries — Fences — Constitutional Law.

A statute which creates stock law territory for certain townships of a county, and authorizes the county commissioners to make assessment for erection of fences on the township lines, without submitting the question of assessments to the approval of the voters, is void as to the assessment, Constitution, Art. VIII, Sec. 7, such not being for a necessary expense; and it is also unconstitutional upon a further ground, when it permits assessments to be made for the building the fences, etc., upon real and personal property not within the territory prescribed, and receiving no benefit from the erection thereof. *Harper v. Comrs.*, 133 N. C., 106, cited and applied.

2. Statutes—Stock Law—Independent Provisions—Constitutional Law.

Where there are distinct and valid provisions of a statute for creating stock-law territory in certain townships of a county, with unconstitutional provisions for assessments to be made for the erection of fences on its lines, the valid provisions may be enforced, the two portions of the law being separate and it appearing from a perusal of the statute that the Legislature intended the valid portion to be effective independently of the invalid part.

3. Injunction—Statutes—Stock Law—Bills of Peace—Equity.

Where citizens and residents of a township are about to enforce the provisions of a stock-law statute alleged to be unconstitutional in its controlling provisions, as to whether, in proper cases, residents of adjoining townships, liable to injury, can maintain an action in the nature of a bill of peace, and procure an injunction for their protection, *quœre.*

CIVIL ACTION, from NORTHAMPTON, heard, on return to preliminary restraining order, before *Cooke, J.*, holding courts of the Third Judicial District, on 16 November, 1916.

There was judgment dissolving the restraining order and dismissing the action as to plaintiff's right to recover, and plaintiffs excepted and appealed.

Peebles & Harris for plaintiff.

W. E. Daniel and Gay & Midyette for defendant.

HOKE, J. On the hearing it appeared, among other things, that the State Legislature of 1915 passed an act putting seven townships in Northampton County under the stock law, the same being chapter 448, Public Laws 1915, and designated by common consent as the "Mason

law," after the distinguished author of the bill, then a repre-
(76) sentative of said county. By a subsequent act, chapter 768, Public-Local Laws 1915, the township of Roanoke was withdrawn from the provisions of the first statute. The act declares that the townships included shall be under the provisions of the stock law as therein contained, on and after 1 January, 1916; makes minute provision for the impounding of stock that trespasses on lands situate in the townships, etc.; further, that the county commissioners are authorized and empowered, whenever they "shall deem it necessary to do so, to erect such fences as the board may deem sufficient between the township lines named and adjacent townships," and to defray the expense of same; shall levy and collect an assessment, not to exceed 10 cents on the $100 valuation of the property returned for taxation in said county. Provision is also made that any one or more citizens in said townships named or in those adjacent thereto may construct, at their own expense, a line fence, erect gates, etc., when it may be considered necessary for their proper protection, and authority is conferred to condemn land 20 feet in width, on which to place the fence, the damages therefor to be assessed by a justice of the peace and two disinterested freeholders, etc.

The present action is prosecuted by citizens and residents of the adjacent townships against the defendants, certain citizens and residents of the stock-law territory, to restrain the latter from putting in force and carrying out the provisions of the Mason act and of impounding plaintiff's stock thereunder, on the ground, chiefly, that the Mason act should be declared unconstitutional for the reason that the tax provided for, not being for a necessary expense, cannot be imposed without a vote of the people, pursuant to Article VII, sec. 7, of the Constitution.

The county commissioners are not made parties defendant, and it appears, further, that there is no present purpose to build the fence or lay the tax referred to in the statute, and it may be that this action could, in no event, be maintained because the probability of injury is too uncertain and remote to warrant the exercise of the injunctive powers of the court, but if it be conceded that the action lies as one in the nature of a bill of peace to prevent multiplicity of suits, a course sometimes permissible when the action is in the assertion of rights common to all the parties and dependent upon exactly similar facts and the same principles of law, 10 R. C. L., pp. 282, 283, we are of opinion that the present action must fail because the statute in question, in establishing the stock law and in the features which threaten the apprehended injury, is a valid statute, and defendants are in the exercise of their lawful rights in acting under it in the matters complained of. It is true that the provision in the statute for an imposition of a 10 per cent assessment

cannot be upheld; not as a tax, because the fence not being a necessary expense, it must first receive the approval of the popular (77) vote, which it has not had, *Keith v. Lockhart,* 171 N. C., 451; *Faison v. Comrs.,* 171 N. C., 411; not as an assessment, because it is imposed on both real and personal property, and, as to a portion of it, in territory to receive no benefits from the erection of the fence, *Harper v. Comrs.,* 133 N. C., 106.

It is true, also, that when a part of a statute is unconstitutional and the valid and invalid provisions of the law are "so interpendent one upon the other that it cannot be supposed that the General Assembly would have enacted the law with the invalid features eliminated," in such case the entire law will be avoided. *Keith v. Lockhart, supra; Harper v. Comrs.,* 133 N. C., 113. But we are of opinion that these recognized principles do not uphold plaintiff's position in the present case where it appears that the two portions of the law are separate and distinct and it is perfectly clear, from a perusal of the statute, that the Legislature intended the valid portion to be effective, "whether the other was upheld or not." Recurring to the statute, as heretofore stated, there is definite, positive provision that in the six townships named the stock law shall prevail on and after 1 January, 1916. The question of whether such a statute or policy should be put in force, with or without a fence, is entirely for the Legislature. *Jones v. Duncan,* 127 N. C., 118; *Aydlett v. Elizabeth City,* 121 N. C., 4; *S. v. Tweedy,* 115 N. C., 704. That body has not made the existence of the legislation dependent, in express terms, on the building of the fence, the case presented in *Keith v. Lockhart.* They have not made the building of the fence mandatory on the commissioners, in which case the invalid provision might be held to affect the entire statute, as in *Harper v. Comrs.,* but the enactment is that the law shall be in force on and after the specified date, with power in the commissioners entirely discretionary to build the fence or not, and with permission, also, that the adjacent landowners may build at their own expense if they see proper, and it is the evident purpose of the General Assembly that, as to the establishment of the stock law, the statute shall, in any event, prevail, and this being within its power, the will of the Legislature must be enforced.

There is no error, and the judgment of the Court is

Affirmed.

Cited: Marshburn v. Jones, 176 N.C. 523.

(78)

JOHN A. WILLIAMS v. BENJAMIN MAY AND A. P. ORENDORFF.

(Filed 7 March, 1917.)

1. Appeal and Error—Trials—Issues.

The refusal of the court to submit issues tendered by a party to the action will not be held as reversible error when the issues submitted present every contention raised by the pleadings therein.

2. Pleadings—Amendments—Allegations — Independent Cause — Original Cause—Courts—Automobiles.

In an action to recover damages alleged to have been caused by the negligent running of defendant's automobile, stated in the original complaint as that of the defendant's driver and daughter, an amendment allowed by the court, setting out that the driver, the co-defendant, was at the time employed to instruct and teach the defendant's minor daughter, and that he was negligent and reckless in permitting the automobile to run into the plaintiff's buggy, does not constitute a new cause of action, but is practically the same as that originally stated, and its allowance is not reversible error.

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

On appeal from a disallowance of defendant's motion to non-suit upon the evidence, the evidence introduced for plaintiff must be taken as true, and that for the defendant not considered.

4. Automobiles—Negligence—Evidence—Nonsuit.

In an action to recover damages for the alleged negligent running of the defendant's automobile, evidence tending to show that defendant owned the automobile for family use, and has employed another as his agent to teach his minor daughter to run it, and that the injury resulted in the latter's negligence, is sufficient to take the case to the jury upon the issue of defendant's actionable negligence, and a motion to non-suit thereon was properly overruled. *Linville v. Nissen*, 162 N. C., 95, cited and distinguished.

CIVIL ACTION, tried at August Term, 1916, of CHATHAM, before *Stacy, J.*, upon these issues:

1. Was the plaintiff injured by the negligence of the defendant Benjamin May, 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. What damages, if any, is the plaintiff entitled to recover? Answer: "$500."

From the judgment rendered, defendant May appealed.

H. A. London & Son, Fred W. Bynum for plaintiff.

Hoyle & Hoyle, Hayes & Gibbs for defendant.

BROWN, J. The evidence tends to prove that an automobile (79) owned by the defendant May was being operated by his daughter Mary May, assisted by one Orendorff, a party defendant upon whom no summons has been served. The machine ran into the plaintiff's vehicle, in consequence of which he was seriously injured. The defendant excepted to the issues submitted by the court and tendered other issues which the court refused to submit. The issues submitted are in the usual form in cases of this character and present every contention that is raised by the pleadings. They are similar to those approved by this Court in *Clark v. Wright,* 167 N. C., 646.

The defendant excepts because the court allowed the plaintiff to amend his complaint, contending that the amendment allowed constituted a new cause of action. The original cause of action is that the plaintiff was injured by the negligence of Orendorff and the minor daughter of the defendant May. The amendment alleges that at the time of the injury the defendant Orendorff was in the employ of the codefendant, Benjamin May, for the purpose of instructing and teaching his minor daughter to drive the automobile, and that the said agent or employee, Orendorff, was negligent and reckless in permitting the automobile to run against the buggy of the plaintiff.

We think that this is the same cause of action practically as is set out in the original complaint. The amendment seems to have been unnecessary, and is, therefore, harmless. Upon the facts in evidence, established to the satisfaction of the jury, the plaintiff was entitled to recover upon the cause of action set out in the original complaint.

The defendant moved to nonsuit at the close of the evidence and also asked the court to charge the jury that there is no evidence for the consideration of the jury that the defendant Orendoff was the agent of the defendant May. The motion to nonsuit was properly denied. The evidence introduced for the plaintiff must be taken as true upon this motion, and that offered by the defendant must not be considered. If in any view of the evidence offered for the plaintiff the jury may have reasonably inferred that the plaintiff was injured by the negligence of the defendant's agent, acting within the scope of his duty, then the motion was properly overruled.

There is evidence that the car belonged to the defendant May; that he had purchased it for the use of his family; that he permitted Orendorff to operate the car upon the public streets of Sanford for the purpose of teaching his daughter to run the car. At the time when the injury occurred his daughter was driving the car, after only a few days' experience, and Orendorff had his hand on the wheel. The plaintiff was in his buggy, to which a mule was hitched, resting under the shade of

some trees on the right-hand side of Hawkins Avenue, in the center
(80) of the town of Sanford. The car of the defendant turned suddenly into Hawkins Avenue from Carthage Street. The plaintiff beckoned to the car and hollered to them to go back, but the signal was not obeyed. The car continued coming directly towards the plaintiff and on the wrong side of the street until it struck the buggy wheel, turned the buggy over, and threw the plaintiff to the ground with great violence, in consequence of which he was painfully and permanently injured.

The evidence tends to prove that Orendorff, an employee of the Cadillac Company, was teaching the defendant's daughter to operate the machine by and with the consent of the defendant; that the defendant had purchased the machine for the use of his family. Taking all the facts offered by the plaintiff to be true, we think the jury may have reasonably inferred that the machine was being operated with the consent of the defendant and that his daughter was being taught to operate it for the convenience of the family, and that the practice in operating the car was being conducted upon the public streets of the town by his daughter with the assistance of Orendorff.

The case, we think, differs very materially from *Linville v. Nissen,* 162 N. C., 95. In that case it was in evidence that the son of the defendant took the machine of his father out of the garage not only without the latter's consent, but against his express orders, and used it for a pleasure ride, without his father's knowledge, and that the son was an experienced chauffeur. In this case, according to the evidence, Orendorff was using this machine to teach the defendant's daughter and was acting for the defendant and within the scope of his duties, and while in pursuance of them the plaintiff was injured by his negligence. The evidence justifies these inferences, and consequently we think his Honor very properly denied the defendant's motion. We think the charge of the court is free from error and clearly and properly presented the case to the jury.

No error.

Cited: Patterson v. Lumber Co., 175 N.C. 93; *Bilyeu v. Beck,* 178 N.C. 483; *Robertson v. Aldridge,* 185 N.C. 296; *Wallace v. Squires,* 186 N.C. 342; *Allen v. Garibaldi,* 187 N.C. 799; *Freeman v. Ramsey,* 189 N.C. 797; *Watts v. Lefler,* 190 N.C. 724; *Grier v. Woodside,* 200 N.C. 761.

two trials going over essentially the same ground. But when, as in this case, the plea in bar is of a settlement in full, under the circumstances of this case it is a matter totally distinct from and unconnected with the issues on the merits, and it is a saving of time and expense to have such plea disposed of before a trial on the merits, since in the case of an affirmative finding in regard to the settlement it will become unnecessary to try the controversy upon the issues presented in the original pleadings. Indeed, the general rule is to dispose of the plea in bar, whether it is an issue of law or of fact, before proceeding further. *Comrs. v. White,* 123 N. C., 534.

This is a matter which will depend very much upon the circumstances of each particular case, and in the absence of an abuse of such
(82) discretion this Court will not disturb the action of the judge. In this case, in view of the finding of the jury that the full settlement was made, it is very clear that it would have been a needless consumption of time to have tried the issues upon the merits of the cause, for such matters became irrelevant and unnecessary for decision after the settlement between parties.

The defendant testified that he had paid into court the entire amount, $55 and the cost of the action, as agreed upon, and had been ready, willing, and able at all times to pay the same, and that the plaintiff had wrongfully refused to accept the same. Judge Bond told the jury that the defendant Sloan "introduced a letter of certain date and a receipt, which they contend the evidence shows was signed by Miss Campbell, the office deputy or clerk of Mr. Campbell" (printed record, p. 44). The clerk of the court testified, also, that the money had been paid in, and the jury so found.

On examination of the exceptions we are unable to find any error. The controversy was one of fact, and the jury has found the same, upon competent testimony, in favor of the defendant. There seems to have been a small amount due for witness ticket to plaintiff of $1.16 which was not taxed in the bill of costs when the defendant paid into the clerk's office the amount due by the compromise and the costs. The plaintiff refused to receive his witness ticket for that amount, and this is not a sufficient basis for a claim that the compromise was not affected by a compliance with its terms. Having refused, he cannot take advantage of a lack of tender. *Smith v. B. and L. Assn.,* 119 N. C., 257.

Judgment was properly entered on the verdict that the $55 in the clerk's office, without interest, should be paid to plaintiff; that the cost up to the compromise should be paid by the defendant, and the cost of the last trial should be paid by the plaintiff.

No error.

ALLEN, J., concurring: I concur in the opinion of the Court, except in the statement of fact that Miss Campbell signed the letter and receipt, and this is not material to the decision, and is referred to in order that it may not hereafter be cited as a precedent upon the right of a woman to hold the office of deputy clerk.

Miss Campbell did not sign the letter or the receipt, nor does it appear that she was deputy clerk, as is manifest from the evidence of K. R. Hoyle, who testified as follows: "The signature to the paper shown me—a letter—is the handwriting of T. N. Campbell, clerk of the court. The other paper, a receipt for $5, part of this is in the handwriting of Miss Tannie Campbell, who is Mr. Campbell's office deputy. It is signed T. N. Campbell, but it is in her handwriting. The other (83) paper is a receipt for $63, in the handwriting of the same lady."

She was simply an employee in the office, who wrote the letter and receipt for the clerk to sign.

Cited: DeLoache v. DeLoache, 189 N.C. 400; *Bank v. Evans,* 191 N.C. 538; *Bright v. Hood, Comr. of Banks,* 214 N.C. 419; *Finance Corp. v. Lane,* 221 N.C. 197.

BINA H. LESTER ET AL. v. J. H. HARWARD ET AL.

(Filed 7 March, 1917.)

1. Tenants in Common—Issues—Pleadings—Sole Seisin.

Where the pleadings raise the issue as to whether the plaintiff and defendants, in proceedings originally instituted to partition lands, are tenants in common, as heirs at law of a common ancestor, it is not sufficient to submit but one issue as to sole seisin claimed by defendants, for if answered in the negative it would not be determinative or support a judgment.

2. Tenants in Common—Sole Seisin—Burden of Proof—Nonsuit.

Where the defendants plead sole seisin in proceedings to partition lands, the burden of proof is with the plaintiff, which will devolve upon the defendant to establish adverse possession, when relied upon for title, after a *prima facie* case of tenancy in common is made out, and a motion for judgment of nonsuit on such defense cannot be allowed.

3. Tenants in Common—Title—Adverse Possession—Limitation of Actions.

Where the plaintiff and defendants claim the land sought to be partitioned among them as tenants in common, as heirs at law of the deceased owner, the latter as grandchildren, and it appears that one of the

defendants had lived on the land with her father, who continuously occupied and exclusively used it as sole owner during her life, and thereafter it was so continuously used by the other defendants, covering altogether a period of twenty years: *Held*, such adverse possession ripens the title to the lands in the defendants. *Dobbins v. Dobbins*, 141 N. C., 216, cited and applied.

CIVIL ACTION, tried before *Stacy, J.*, at August Term, 1916, of CHATHAM.

This is a proceeding for the sale of land for partition, tried in the Superior Court upon the defendants' plea of sole seisin.

It was admitted in this Court that W. B. Harward, the father of the *feme* plaintiff, and the grandfather of the defendants, was originally the owner of the land in controversy, and that the plaintiff and the defendants are his heirs at law.

The defendants claimed that they were the owners of the land by adverse possession, held by their father, Needham B. Harward, and themselves.

(84) At the conclusion of the evidence his Honor ruled that there was no evidence of adverse possession to be submitted to the jury, and the defendants excepted.

Judgment was rendered in favor of the plaintiff, and the defendants excepted and appealed.

Fred W. Bynum and Hayes & Gibbs for plaintiff.

L. L. Tilley for defendants.

ALLEN, J. The case on appeal, which was not settled by the judge, and the record show several irregularities.

The complaint and answer raise the issue as to whether the plaintiff and defendants are tenants in common of the land described in the complaint, while the issue submitted to the jury was as to the sole seisin of the defendants, which, in the absence of admissions by the parties, would not be determinative, nor sufficient to support the verdict.

It does not follow that the plaintiff and defendants are tenants in common because the defendants are not sole seized, unless there is an admission to this effect.

Again, the burden of proof was placed on the defendants, and at the close of the evidence a motion for judgment as of nonsuit on the defendants' evidence was allowed.

The burden of proof is on the plaintiff when sole seisin is pleaded (*Huneycutt v. Brooks*, 116 N. C., 793), although it will devolve on the defendant to establish adverse possession after a prima facie case of a

W. R. McAULEY v. E. G. SLOAN.

(Filed 7 March, 1917.)

1. Plea in Bar—Accord and Satisfaction—Statutes—Issues—Court's Discretion.

Where, among other defenses to an action, the defendant pleads accord and satisfaction, Revisal, 859, the discretionary power of the trial judge in submitting this issue to the jury before submitting the other issues upon the merits will not be reversed on appeal.

2. Accord and Satisfaction—Tender—Court Costs.

Where a plea in accord and satisfaction, Revisal, sec. 859, has been made in bar to an action that defendant had paid an agreed amount and costs into the clerk's office, the fact that a witness ticket of a small amount, which the plaintiff had refused to receive, was not taxed in the costs, will not affect the validity of the tender.

ALLEN, J., concurring.

APPEAL by plaintiff from *Bond, J.*, at January (Special) Term, (81) 1917, of LEE.

Williams & Williams for plaintiff.
Edwin L. Gavin for defendant.

CLARK, C. J. While the motion was pending to set aside the verdict (it having been agreed that the court should take the papers and render his decision out of the county), the plaintiff and defendant compromised the case, as is found by the jury, the defendant to pay $55 and costs. The judge thereafter set aside the verdict. The defendant paid the $55 and bill of costs, as taxed by the clerk, into court. The plaintiff declined to accept.

The only question presented is as to the action of the court in submitting an issue upon the plea in bar of accord and satisfaction under Revisal, 859, and reserving the other issues until such plea in bar was passed upon by the jury. In so doing we think the judge acted within his powers. In *Jones v. Beaman*, 117 N. C., 261, the Court held that where there is a plea in bar, such as release, accord and satisfaction, and the like, the plea in bar should be passed upon first to avoid what might prove an expensive and useless trial on the merits, with loss of time to witnesses.

There are cases where the judge, in the exercise of a wise discretion, should try a plea in bar, as the statute of limitations, or other pleas in bar, along with the issues on the merits of the controversy, so as to avoid

tenancy in common is made out, and there is no precedent for a judgment of nonsuit of a defense.

It is probable the case on appeal does not state accurately the action of the court (and our knowledge of the learned judge before whom the trial was had leads to this conclusion), and that his ruling was that the defendants had not offered sufficient evidence of adverse possession to justify submitting it to a jury, and we will so treat it.

The plaintiff testified that she had never received any rents from the land; that her father, the common source of title, died between 1861 and 1865, and that the father of the defendants, N. B. Harward, was in possession of the land until his death, three or four years ago.

One of the defendants also testified that she was a daughter of N. B. Harward and was 28 years of age; that she was born and reared on the land, and lived on it until her father died, and that she and the other defendants had been in possession and had collected the rents since the death of her father.

This furnishes evidence of an exclusive possession for twenty years in the defendants and those under whom they claim, and under our decisions such possession by one tenant in common raises a (85) presumption of an ouster and, unexplained, will bar the other tenants.

"The possession of one tenant in common is in law the possession of all his cotenants, because they claim by one common right. When, however, that possession has been continued for a great number of years, without any claim from another who has a right, and is under no disability to assert it, it will be considered evidence of title to such sole possession; and where it has so continued for twenty years, the law raises a presumption that it is rightful, and will protect it. This it will do as well from public policy, to prevent stale demands, as to protect possessors from the loss of evidence from lapse of time. Possession, then, for twenty years under the above circumstances will amount to a disseisin or ouster of the cotenant, and furnishes a legal presumption of the fact necessary to uphold an exclusive possession—as that the possession was adverse in its commencement, and tolls the entry of the tenant not in possession." *Black v. Lindsay,* 44 N. C., 467.

This authority was approved in *Dobbins v. Dobbins,* 141 N. C., 216, where the principle is fully discussed and the cases collected.

It was, therefore, error to refuse to submit the evidence of adverse possession to the jury.

We have not considered the effect of the coverture of the plaintiff, as it does not appear when she was married.

New trial.

Cited: Nowell v. Basnight, 185 N.C. 147; *Battle v. Mercer,* 187 N.C. 448; *Bank v. Finance Co.,* 192 N.C. 79; *Crews v. Crews,* 192 N.C. 686; *Lewis v. Lewis,* 194 N.C. 407; *Mewborn v. Smith,* 200 N.C. 534; *Stephens v. Clark,* 211 N.C. 89; *Gibbs v. Higgins,* 215 N.C. 204; *Bailey v. Hayman,* 220 N.C. 405; *Winstead v. Woolard,* 223 N.C. 817; *Buford v. Mochy,* 224 N.C. 240; *Jernigan v. Jernigan,* 226 N.C. 207; *Johnson v. Johnson,* 229 N.C. 545.

MARY J. GINN ET AL. v. B. G. EDMUNDSON.

(Filed 7 March, 1917.)

Wills—Husband and Wife—Joint Wills—Repudiation by Survivor—Title.

A husband and wife holding lands by entireties may make a valid will, jointly, devising the lands to their children or to others; but upon the death of either of them the property will go to the survivor, who may repudiate the paper-writing as his or her will, as the case may be, nothing, else appearing, and convey the title to a purchaser.

CIVIL ACTION, tried before *Cox, J.,* at January Term, 1917, of WAYNE.

This is an action to recover the purchase price of a tract of land which the plaintiff, Mary J. Ginn, has contracted to sell to the defendant.

The defendant refused to pay the purchase money and to accept the deed, upon the ground that the plaintiff has not a good title to the land.

On 30 September, 1909, John B. Exum and wife conveyed the
(86) land in controversy by deed to J. Hiram Ginn and his wife, the plaintiff Mary J. Ginn.

In April, 1910, the said J. Hiram Ginn died leaving the plaintiff Mary J. Ginn surviving him, but prior to his death he and his wife executed jointly a will in which the land in controversy was devised to several children of the said Hiram Ginn and wife, and in which nothing was devised to the said Mary J. Ginn or to the said J. Hiram Ginn.

After the death of the said J. Hiram Ginn the said Mary J. Ginn refused to abide by said will, repudiated the same, and contracted to sell the land devised therein to the defendant and has tendered him a deed which he has refused to accept, because, as he alleges, the plaintiff has no title.

There was judgment in favor of the plaintiff, and the defendant excepted and appealed.

W. T. Dortch for plaintiff.

Dickinson & Land for defendant.

ALLEN, J. The deed to J. Hiram Ginn and his wife, Mary, conveyed an estate by the entireties, with the right of survivorship (*Motley v. Whitemore,* 19 N. C., 537; *Bruce v. Nicholson,* 109 N. C., 204), and the plaintiff Mary J. Ginn, being the survivor, is the owner of the land in controversy and can convey a good title to the defendant unless prevented from doing so by the signing of the joint will with her husband.

A joint or conjoint will is 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, and a mutual or reciprocal will is one in which two or more persons make mutual or reciprocal provisions in favor of each other.

In many of the early cases it was held that there could not be a valid joint or mutual will, but "it is now well settled by the overwhelming weight of authority, both in England and the United States, that such wills may be valid and may be admitted to probate like any other will unless revoked." 40 Cyc., 2110 *et seq.*

In *Clayton v. Liverman,* 19 N. C., 558, our Court adhered to the earlier authorities, but this case was overruled in the *Davis will case,* 120 N. C., 9, which was approved at the last term in the *Cole will case,* 171 N. C., 74, and joint and mutual wills are now recognized in this State as valid testimentary dispositions of property.

It is also now the general doctrine of the text-books and of the decided cases that, in the absence of contract based upon consideration, such wills may be revoked at pleasure. *In re Davis,* 120 N. C., (87) 9; *In re Cole,* 171 N. C., 74; *Gardner on Wills,* pp. 88 and 89; Theobald on Wills, p. 12; 40 Cyc., 2115; 30 A. and E., 621; Note 38, L. R. A., 291.

The author says in the citation from Theobald on Wills: "Persons may make joint wills, which are, however, revocable at any time by either of them or by the survivor," and in the note to the *Davis case,* which is reported in 38 L. R. A., 291, the editor says: "The cases generally agree that either of the comakers can at any time revoke his part of the will."

The will before us belongs to the class of joint or conjoint wills, as it is a disposition of the property owned by the husband and wife by the entireties to third persons, and there is no reason why the wife could not, after the death of her husband, revoke the will and dispose of the property as if it had not been signed by her.

As was said in the *Davis case,* "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."

We are, therefore, of opinion that the plaintiff had the power to repudiate the paper-writing as her will, and that the contract of sale is binding upon her and the defendant, and that her deed will convey to him a good title to the land in controversy, and he must accept it and pay the purchase price.

Affirmed.

McPHERSON DRUG COMPANY v. NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 7 March, 1917.)

Constitutional Law—Courts—Appeal—Acquiescence—Certiorari.

Where the statute establishing a recorder's court does not provide for an appeal, the remedy to obtain trial in the Superior Court is by *certiorari;* but where the case has been duly docketed therein and regularly set on the trial calendar for several succeeding terms with appellee's consent, he will lose his right to dismiss it by his delay and acquiescence.

APPEAL by defendant from judgment in the recorder's court of Harnett County to the Superior Court and heard by *Stacy, J.,* on motion to dismiss at November Term, 1916. His Honor dismissed the appeal and defendant excepted and appealed to the Supreme Court.

(88) *Baggett & Baggett for plaintiff.*

R. N. Simms, D. H. McLean & Son for defendant.

BROWN, J. Judgment was rendered against defendant in the recorder's court 5 December, 1914, and an appeal was taken and duly docketed in the Superior Court before next ensuing term, 5 February, 1915. The case has stood for trial on the civil-issue docket at every term of the Superior Court until November Term, 1916, when the motion to dismiss was first made.

It appears in the case on appeal that it has appeared regularly on the calendar of cases set for trial with the knowledge and consent of plaintiff's attorneys.

His Honor dismissed the appeal because the statute establishing the recorder's court failed to provide for an appeal and that defendant should have applied for a *certiorari* at first succeeding term of the

Superior Court. It is true the statute does not provide for an appeal and that *certiorari* is the only remedy.

This case differs, however, from *Taylor v. Johnson,* 171 N. C., 84. In that case the appeal was not docketed in Superior Court and no *certiorari* was applied for at next term of that court.

In this case the appeal was docketed at the next succeeding term in February, 1915, and the case was duly calendared by consent at every trial term since, and no motion to dismiss was made until November Term, 1916.

In the case cited it is held that when the appeal is taken and duly docketed in the Superior Court, without objection, the jurisdiction of that court will attach notwithstanding the failure of the statute to provide for an appeal.

In this case the appeal was docketed at February Term, 1915, and duly calendared by consent at each succeeding term, and no motion to dismiss was made until November Term, 1916; consequently the plaintiff has lost his right to dismiss by delay and long acquiescence.

The motion was made too late, and should have been denied.

Reversed.

Cited: S. v. King, 222 N.C. 140; *Russ v. Board of Education,* 232 N.C. 132.

M. R. UPCHURCH ET AL. v. G. W. UPCHURCH ET AL.

(Filed 7 March, 1917.)

1. Judicial Sales—Confirmation—Court's Discretion—Statutes.

The highest bidder at a sale of lands under decree of court is a preferred proposer, acquiring no independent rights in the property or suit until confirmation, which rests within the sound legal discretion of the court until he moves therefor, the statutory requirement that the sale be confirmed "if no exception thereto is filed within twenty days," being for the convenience of the parties in not requiring them, as before the enactment of the law, to give notice, etc., of the motion whereon the court may act and conclude them. Revisal, Sec. 2513.

2. Same—Advanced Bid—Amount.

While it has been in accord with the practice in this State to refuse to confirm a judicial sale unless there has been an advanced bid from a responsible bidder, this is but to afford evidence as to the inadequacy of the price, which the court, in the exercise of its discretion to confirm or set aside the sale, may regard or disregard; and while a bid of 10 per cent will customarily be considered, so may, also, an advanced bid in a

less sum, when the amount is large, a distinction also recognized by our statute, ch. 146, Laws 1915, as to sales under decree of foreclosure, etc., making 5 per cent sufficient when the bid is more than $500.

3. Judicial Sales—Confirmation—Fraud and Mistake—Motion in Cause—Statutes.

After confirmation by the court of a judicial sale of lands, the purchaser is regarded as the equitable owner, and the sale, as it affects his interest, can only be set aside for "mistake, fraud, or collusion," established on petition regularly filed in the cause. Revisal, sec. 2513.

(89) CAUSE heard on appeal from judgment of clerk of Superior Court of CHATHAM, before *Cox, J.*, presiding and holding the courts of the Fourth Judicial District, February 7-10, 1917.

The judgment of the clerk was one refusing to confirm a sale of lands had pursuant to a decree by him duly entered, and the facts pertinent to the present appeal are very well epitomized in the judgment of Judge Cox, as follows: "It appearing to the court, and the court finding as a fact, that the sale of the lands and timber described in the complaint filed in the cause, made by the commissioners herein on 5 January, 1917, was in all respects regular; that there were numerous bidders at the sale and the bidding was spirited; that W. T. Hunt of W. T. Hunt & Brother was present and bidding; that W. L Nevins and L. B. Flournoy, trading as Nevins & Flournoy, became the last and highest bidders at said sale for the land and timber at the price of $26,000; that said bid was a fair and reasonable price for said land and timber; that the commissioners made report of the sale without recommendation, on 6 January, 1917; that an advanced bid of $1,500 was filed by W. T. Hunt and S. L. Hunt, trading as W. T. Hunt & Brother, with Hon. James L. Griffin, clerk of the Superior Court of Chatham County, on 27 January, 1917; that before the filing of the advanced bid no exception had been made to the report of the commissioners and no confirmation of the sale had been made by the court; that on 29 January, 1917, W. L. Nevins of
(90) Nevins & Flournoy appeared in person and with counsel before said clerk of the Superior Court of Chatham County and moved the court for judgment confirming said sale to Nevins & Flournoy, and for an order requiring the commissioners to make and deliver to said Nevins & Flournoy a good and sufficient deed to said land and timber on payment of the purchase price; that said clerk of the Superior Court of Chatham County, in the exercise of his sound discretion, refused to confirm said sale; that from such refusal to confirm, the said Nevins & Flournoy excepted and appealed to this court."

Upon these facts, his Honor, being of opinion that the clerk was acting within his authority in refusing to confirm the sale, entered a decree

confirming the judgment, and Nevins & Flournoy, the bidders at the sale, having duly excepted, appealed.

Fred W. Bynum for plaintiff.
Percy J. Olive and J. C. Little for appellant.

HOKE, J. The statute bearing more particularly on the question presented, Revisal, sec. 2513, is as follows: "The court may authorize any officer thereof, or any other competent person, to be designated in the decree of sale, to sell the real estate under this proceeding; but no clerk of any court shall appoint himself or his deputy to make sale of real property or other property in any proceeding before him. Such officer or person shall file his report of sale, giving full particulars thereof, within ten days after the sale, in the office of the clerk of the Superior Court, and if no exception thereto is filed within twenty days, the same shall be confirmed: *Provided,* that any party after the confirmation shall be allowed to impeach the proceedings and decrees for mistake, fraud, or collusion, by petition in the cause: *Provided further,* that innocent purchasers for full value and without notice shall not be affected thereby." And it is contended for defendants that by virtue of the clause in the section, "and if no exception thereto is filed within twenty days, the same shall be confirmed," they are entitled to have the sale confirmed as of right and notwithstanding the increased bid of $1,500.

Prior to the enactment of this clause, and so far as the rights of a bidder at a judicial sale was concerned, the court, before confirmation, had well-nigh unlimited discretion as to the acceptance of the bid. Such a bidder acquired thereby no independent right in the property or in the suit. His offer was considered only as a proposition to buy at the price named, the court reserving the right to accept or reject the bid, as it might decree best. *Harrell v. Blythe,* 140 N. C., 415; Rorer on Judicial sales (2d Ed.), sec. 108. In *Harrell's case, Walker, J.,* delivering the opinion, said: "Where land is sold under a decree of court, the purchaser acquires no independent right. He is re- (91) garded as a mere preferred proposer until confirmation, which is the judicial sanction or acceptance of the court, and, until it is obtained, the bargain is not complete." And, in Rorer, sec. 108, it is said: "The court is clothed with an unlimited discretion to confirm a judicial sale or not, as it may seem wise or just. Confirmation is final consent, and the court being the vendor, it may consent or not, in its discretion." True, this author, in a subsequent section, says that the matter of confirmation rests in the sound legal discretion of the court, and the same may

be reviewed on appeal, but this, except on motion to relieve a bidder from a proposal superinduced by fraud or excusable mistake, must be understood to refer rather to the question as it affects the rights or interests of the parties which are already involved in the suit, and not to the bidder, who as yet has acquired no standing or interest therein. *Harrell v. Blythe, supra; Joyner v. Futrell,* 136 N. C., 302; *Hall v. Taylor,* 133 Ga., 606; Rorer Judicial Sales, sec. 110. On the matter of confirmation, in that aspect of the case it has not been in accord with the practice in this State to refuse to confirm a sale for inadequacy of price unless there has been an advanced bid and by a responsible bidder, and on average or lesser values, an increased bid of 10 per cent has usually been regarded as sufficient to justify the court in reopening the biddings. Where amounts are large, the advance per cent need not be so much. A distinction recognized by statute as to sales under decree of foreclosure, etc., by chapter 146, Laws 1915, making 5 per cent sufficient when the amount of bid is over $500. But, while these rules are usually observed, they are not absolutely imperative, and the question of confirming a sale is referred, as stated, to the sound legal discretion of the court, and, in the proper exercise of such discretion, the court, under certain conditions, may reject an increased bid and confirm a sale when it appears from the relevant facts and circumstances that such a course is wise and just and for the best interests of all parties whose rights are being dealt with in the suit. *Thompson v. Rospigliosi,* 162 N. C., 145; *Uzzle v. Weil,* 151 N. C., 132; *Dula v. Seagle,* 98 N. C., 458; *Wood v. Parker,* 63 N. C., 379. After confirmation, the power of the court is much more restricted. The purchaser is then regarded as the equitable owner, and the sale, as it affects him or his interests, can only be set aside for "mistake, fraud, or collusion" established on petitions regularly filed in the cause. Revisal, sec. 2513. *Ashbee v. Cowell,* 45 N. C., 158; *Kampman v. Nicewaner,* 60 Neb., 208; *Va. Ins. Co. v. Cottrell,* 85 Va., 857.

Considering this legislation in view of these recognized powers of the court in the case of judicial sales, we are of opinion that, on the facts as embodied in his Honor's judgment, appellant's position cannot
(92) be maintained. So far as we are aware, the clause relied upon appears for the first time in the Code of 1883, sec. 1906. Prior to that, these sales were confirmed on motion and after notice, Laws 1868-9, ch. 122, secs. 5 and 15; and the primary purpose of the amendment was to relieve the parties and the proposed purchaser of the delays and uncertainties incident to this requirement for further notice, etc. In causes having numerous parties, in many instances widely scattered and at times nonresident, this requirement for further notice might and fre-

quently did present a real obstacle in the successful conduct of such sales, both in the matter of time and cost, and the law was enacted to enable the court to proceed to judgment on the record as it stood, after twenty days, and to shut off all right of exceptions for irregularities, lack of notice, or even inequalities as between the parties to the record, and it was never intended to deprive the court of the power to regulate and control a sale by reason of advanced bids made and entered before the purchaser appeared and moved that his bid be accepted and sale confirmed. This right the statute confers upon him and, under its provisions, he can appear at the end of the twenty days or after, and if an increased bid has not been made at the time of motion entered, he is entitled to have the same allowed, and on the record as it then appears. Until such move is made on his part, the powers of the court in reference to confirming the sale for inadequacy of price may be determined in its legal discretion. This increase of bid is not in strictness an exception by the parties, the objection more directly contemplated by the statute, but a recognized method of affording information to the court that the property has not brought a fair price, and, as stated, these facts may be considered and acted on if presented before the purchaser has appeared and moved for confirmation of sale.

This, in our opinion, being the proper construction of the law, his Honor has made correct ruling on the matter presented. In a sale, to an amount greatly in excess of the average, $26,000, there has been an advance bid by responsible parties of $1,500. True, this was made one day after the expiration of the time limit, but it was made before the bidder had appeared to insist on his rights, and, under the facts of the record, the clerk was right and certainly acting within his powers in refusing to confirm the sale. We have been referred by counsel to the case of *Floyd v. Rook,* 128 N. C., 10, as an authority against our disposition of the appeal. That was a case of actual partition and in which exceptions from some of the parties of record, filed after twenty days, were disallowed for that reason. It does not distinctly appear in that appeal what was the nature of these exceptions. Doubtless they were for some irregularities in the proceedings or because of some inequitable adjustment. In either case they were known to the (93) parties at the time the partition was made or when the report was filed, and such objections come more nearly within the express terms and purpose of the statute. In our view, the case is not in necessary conflict with our present decision, to the effect that the statute does not and was not intended to impair the power of the court as to confirmation of judicial sales for inadequacy of price, evidenced by an increased and sufficient bid made before the proposed purchaser has appeared and

moved for an acceptance of his bid, as he can now do under the law after twenty days.

There is no error, and the judgment of the court is

Affirmed.

Cited: Sutton v. Craddock, 174 N.C. 276; *Perry v. Perry,* 179 N.C. 448; *In re Serman's Land,* 182 N.C. 127; *Crocker v. Vann,* 192 N.C. 428; *McCormick v. Patterson,* 194 N.C. 219; *Cherry v. Gilliam,* 195 N.C. 235; *Vance v. Vance,* 203 N.C. 669; *Creech v. Wilder,* 212 N.C. 165.

W. D. ALLEN v. T. T. GOODING.

(Filed 7 March, 1917.)

1. Parol Trusts—Lands—Options—Deeds and Conveyances—Grantor.

Where the plaintiff has been put to trouble and expense in securing an option to himself on lands of nonresident under parol agreement that he and the defendant were to buy them jointly, which option he assigns to the defendant, who subsequently, and without his knowledge, exercises his right and takes title to himself, and thereafter repeatedly promises to conform to his agreement and convey the plaintiff his part, which he since refused to do: *Held,* an option does not transfer title to the lands, and the plaintiff is entitled to enforce the parol trust in his favor, the principle that a grantor of lands cannot enforce a parol trust therein in his favor (*Gaylord v. Gaylord,* 150 N. C., 222) not applying.

2. Limitation of Actions—Parol Trusts—Deeds and Conveyances.

This suit upon a parol agreement made in 1911, and brought in 1916, to enforce a parol trust in land thereunder is held not to be barred by the statute of limitations.

APPEAL by defendant from *Lyon, J.,* at October Term, 1916, of CARTERET.

Moore & Dunn for plaintiff.

D. L. Ward, Abernethy & Davis, and R. E. Whitehurst for defendant.

CLARK, C. J. The plaintiff and defendant had been engaged for some time in business, trading as partners, when in 1910 or 1911 the plaintiff informed the defendant that he had discovered some property owned by nonresidents. Defendant said to the plaintiff that he had already
(94) tried to buy it, but had been unable to do so. Finally they agreed, after discussion, to buy it jointly and the plaintiff was to have

one-half interest in the land if he would procure the title thereto, and pursuant to this agreement the plaintiff at his own cost went to Alabama in May, 1911, and located the heirs for the two tracts of land. He ascertained at what price the land could be bought, but, not having sufficient money, he returned to this State and reported to the defendant, giving him the family history showing the heirs to whom the property belonged. It was then agreed that they would buy the Abner Neal tract and the Jones or Borden tract, and in pursuance of such agreement the plaintiff returned to Alabama in June, 1911. Just before going he received from the defendant two deeds to be executed by the Borden heirs in which the defendant alone was named as grantee, but with them was a note from the defendant saying: "You take the deeds in my name and I will deed you your half when you come back home." With these deeds and letter there was a check for $200 in part payment of expenses, and the purchase price. Pursuant to the agreement, the plaintiff went to Alabama and had these deeds executed, and further in pursuance of the understanding and agreement that the defendant would convey plaintiff's one-half interest, secured options on the other tract of land, as he alleges.

On his return the plaintiff delivered to the defendant the deeds and the options. Later, finding that the deeds executed upon these options had been taken in the defendant's name alone, he spoke to the defendant of the matter, who stated to him that he would make him a deed for his one-half interest as soon as the pending lawsuit between the Defiance Box Company and himself had been determined, and to all subsequent requests that the defendant should execute a conveyance of one-half the land the defendant had always replied: "Wait until the suit with the Defiance Box Company is settled." That suit was settled in January, 1916, and the defendant then said that he would make the conveyance as soon as the controversy with the Roper Lumber Company and himself was settled.

After this and other controversies were settled, the defendant still delaying to make the agreed conveyance, the plaintiff brought this action to enforce the trust and to compel defendant to execute conveyance for one-half interest in the land, as per the written agreement as to the Borden land above referred to and the oral agreement as to the other tract. It is in evidence that the consideration agreed upon had been paid, and that the plaintiff had spent time and trouble in procuring the deeds and options under the agreement. The defendant disputed the allegations of fact to some extent, but the jury have found that "The defendant agreed with the plaintiff to join with him in buying the lands described in the complaint for their joint benefit and to (95) take the title to the same, one-half interest therein each for the

plaintiff and defendant, as alleged in the complaint, but that the defendant thereafter caused the title to said land to be made to himself and refused to convey any part thereof to the plaintiff." This was a matter of fact upon the evidence.

The jury also found, under the instructions of the court, that the plaintiff's cause of action was not barred by the statute of limitations, which was correct.

There is scarcely need for any discussion as to the Borden land, as to which the written agreement was in testimony. But the defendant earnestly insists that he cannot be forced to execute the trust as to the Abner Neal tract. It is well settled in this State that such trust is enforcible, even though there was no writing concerning such agreement, and there are facts and circumstances here which justified the jury in finding with the plaintiff as to the oral agreement in regard to the Neal tract. *Owens v. Williams,* 130 N. C., 168; *Cobb v. Edwards,* 117 N. C., 252; *Shields v. Whitaker,* 82 N. C., 522.

In *Avery v. Stewart,* 136 N. C., 435, *Walker, J.,* says: "More accurately considered, constructive trusts have no element of fraud in them, but the court merely uses the machinery of a trust for the purpose of affording redress in cases of fraud and of working out the equity of the complainant. The party guilty of the fraud is said, in such cases, to be a trustee *ex maleficio,* and will be decreed to hold the legal title for the use and benefit of the injured party and to convey the same when necessary for his protection, as when one has acquired the legal title to property by unfair means. The jurisdiction is exercised distinctly upon the ground of the fraud practiced by the party against whom relief is prayed," citing Bispham Equity, 125, 126, 143; *Wood v. Cherry,* 73 N. C., 110. Such trusts are, of course, not affected by the statute of frauds. *Gorrell v. Alspaugh,* 120 N. C., 362. "Where one party has by his promise to buy, hold, or dispose of real property for the benefit of another induced action or forbearance by reliance upon such promise, it would be a fraud that the promise should not be enforced." Bispham on Equity, sec. 218.

In *Glass v. Hulbert,* 102 Mass., 39, it is said: "When a party acquires property by conveyance or devise secured to himself under assurance that he will transfer the property to or hold and appropriate it for the use and benefit of another, a trust for the benefit of such other person is charged upon the property, not by reason merely of the oral promise, but because of the fact that by means of such promise he had induced the transfer of the property to himself."

The whole subject has, however, been too fully discussed by *Mr.* (96) *Justice Walker* in *Avery v. Stewart, supra,* and the principles are

too well settled to need any further consideration by us. But the defendant insists, however, strenuously that as to the Neal tract of land he cannot be decreed to execute title to the plaintiff for one-half under his oral trust, as found by the jury, because it was held in *Gaylord v. Gaylord,* 150 N. C., 222, that when a deed has been executed the grantor cannot allege that there was an oral trust which he could enforce against the trustee, because this would be to contradict the deed. This principle is well settled and has been repeatedly cited and approved, *Trust Co. v. Sterchie,* 169 N. C., 22, and cases there cited; *Campbell v. Sigmon,* 170 N. C., 351. It has no application, however, in this case. Here the title was not in the plaintiff, but in pursuance of the agreement between himself and the defendant, and by his efforts in procuring the owners to give options and deeds and upon payment of the money and rendition of services, the deeds and options were executed to the defendant upon an agreement that he would execute conveyance for one-half thereof to the plaintiff. This is not annexing a trust to a conveyance by the plaintiff to the defendant, but the procuring of a title from the owners of the land to the defendant upon an agreement that he would hold the same jointly in trust for himself and the plaintiff. There was testimony of this agreement and of the repeated promises of the defendant from time to time to execute the trust by making the conveyance as soon as pending litigation was terminated.

It is true that the "options" (for the Neal land) were taken in the name of the plaintiff and were assigned by him to the defendant, but the deeds therefor were executed direct to the defendant by the owners, and, as the jury find, in pursuance of the oral agreement between the plaintiff and the defendant. The defendant well says in his brief: "The plaintiff never had title to the land in controversy." The doctrine in *Gaylord v. Gaylord, supra,* could, therefore, have no application.

The jury have found the facts in accordance with the plaintiff's contention, and in accordance with the well settled principles of law the court decreed that the defendant should execute the trust by conveying one-half interest in both tracts to the plaintiff.

It is not necessary to discuss all the exceptions in detail. After considering all the exceptions we find

No error.

Cited: McFarland v. Harrington, 178 N.C. 192; *Chatham v. Realty Co.,* 180 N.C. 505; *Lefkowitz v. Silver,* 182 N.C. 349; *Thomas v. Carteret,* 182 N.C. 380; *McNinch v. Trust Co.,* 183 N.C. 40; *Williams v. McRackan,* 186 N.C. 384; *Pridgen v. Pridgen,* 190 N.C. 106; *Hare v. Weil,* 213 N.C. 487, 488; *Atkinson v. Atkinson,* 225 N.C. 133.

(97)

H. M. HUX BY HIS NEXT FRIEND v. THE REFLECTOR COMPANY.

(Filed 7 March, 1917.)

1. **Negligence—Evidence—Opinion—Facts—Expert Evidence.**

Where there is evidence tending to show that the plaintiff, defendant's employee, was injured while engaged in the course of his employment by reason of an old and defective printing press, and he testified that the press was not such as was in general use at the time; that it was out of date, not equipped, old and worn: *Held*, competent as a statement of fact, and this applies to an expert witness who testifies with knowledge of such facts.

2. **Appeal and Error—Evidence—Objections—Motions to Strike Out.**

Evidence admitted without objection or subsequent motion to strike it out will not be considered for error on appeal.

3. **Master and Servant—Evidence — Negligence — Approved Machinery — Trials—Nonsuit.**

Where the plaintiff, employed to operate and care for defendant's printing press, has been injured by his hand having been caught into its cog-wheels, while removing paper caught therein, and which it was his duty to do, and there is evidence tending to show that the press was antiquated and the cogs should have been shielded and the machine supplied with a safety lever, either of which would have avoided the injury: *Held*, sufficient upon the issue of defendant's actionable negligence, and motion to nonsuit was properly overruled.

4. **Negligence—Assumption of Risks—Master and Servant.**

The doctrine of assumption of risk applies only to machinery in good condition, and not where an employee is injured by the negligence of his employer in not so keeping it.

5. **Instructions—Contributory Negligence—Assumption of Risks—Appeal and Error.**

Where in an action for damages for a personal injury the defendant's liability depends upon the issues of negligence and contributory negligence, it is not error for the court to refuse to submit an issue as to assumption of risk; and were it otherwise, the error was cured, under the facts of this case, by his charging upon this doctrine under the issue as to contributory negligence.

APPEAL by defendant from *Lyon, J.*, at September Term, 1916, of PITT.

Julius Brown and H. S. Ward for plaintiff.
Harry Skinner and L. G. Cooper for defendant.

CLARK, C. J. This is an action for personal injuries in the cutting off of the plaintiff's right hand. The plaintiff was operating a job

press for the defendant company. There was evidence that there (98) were two presses working side by side, but that the plaintiff, a boy of 17, was in charge of both, and the one at which he was not immediately working became clogged, whereupon the plaintiff, under his duty of supervision, attempted to unclog it, but by reason of the cog wheels not being shielded, or boxed, his hand was caught between the two cog wheels, and there being no lever by pulling which the gearing could be thrown out, or the machine stopped, he lost his hand.

The first exception was to a question asked the plaintiff: "State, in your opinion, if the press at which you were hurt was such a press as was adopted and in general use at that time." There was no exception to the answer, or motion to strike out, but plaintiff answered: "No, sir. It was out of date and not equipped; it was old and worn and was a machine about forty years old. It was not equipped with lever, and there was no shield to cover the cogs; the machine was made in 1870 or something." This was competent as a statement of fact.

The second exception is to the question asked another witness: "If the jury should find from the evidence that in the machine at which Mr. Hux was working and in which he was injured the cog wheels were not shielded or boxed and had no lever for throwing the machine out of gear, or throwing the belt off of the shaft, in your opinion, was that such a machine as was adopted and in general use at that time?" There was no objection to the answer, or motion to strike out, and the witness answered: "No, sir; not in general use at that time so far as my observation goes. The cogs in this machine were not boxed or shielded when I left there; I was not there when it happened. I was there before, but I was not working on the press." These witnesses had qualified as experts and this evidence was competent. *Cotton Mills v. Assurance Corporation,* 161 N. C., 562; *Morrisett v. Cotton Mills,* 151 N. C., 31. Besides, this evidence was further competent on account of the special knowledge the witness had of this piece of machinery. *Morrisett v. Cotton Mills, supra; Wilkinson v. Dunbar,* 149 N. C., 20; *Britt v. R. R.,* 148 N. C., 41; *Ives v. Lumber Co.,* 147 N. C., 306.

The plaintiff testified that he was in charge of these two job presses and was 17 years of age at the time of the injury. He was running one of the presses and noticed that the other did not have a sufficient amount of ink. He inked it and as he turned to leave he heard a noise in the press—a jumping sound—and found some paper lodged in the cogs. He took out about 5 inches of paper and reached over to pull out more, and as he did the arm of the press caught him and shoved his arm into the press. He had no lever to stop it. The movement of the arm of the press which rolled the cogs shoved his hand between them

(99) and held it fast. These cogs were not shielded or covered in any way, and the machine did not have a safety lever, or any lever, for throwing it out of gear or stopping it. If it had, he could have stopped it, and gotten the paper out without injuring his hand. He added that the only method of stopping the machine was to get something to throw the belt off the shaft at the ceiling or to go to the other end of the house to cut the motor off. He further testified that the press was out of date, as did three other witnesses.

Upon the above synopsis of the evidence the judge properly refused to nonsuit the case. The machine at which the plaintiff was injured was thirty-five or forty years old; the cogs were exposed and not boxed in any way; there was no safety lever or any other kind of lever to stop the machine. The machine was more dangerous than new machines, and it was not in general use. The plaintiff was doing his duty at the time he was injured; and the defendant's general manager and floor boss both knew the defective condition of the machine and had seen it at work. The case was properly submitted to the jury. *Ainsley v. Lumber Co.*, 165 N. C., 122; *Steeley v. Lumber Co.*, 165 N. C., 27; *Kiger v. Scales Co.*, 162 N. C., 133.

In *Creech v. Cotton Mills*, 135 N. C., 680, where the plaintiff was operating four looms, she went to get the necessary filling in a box in a passageway in front of certain unboxed cog-wheels, and in bending down her clothing was caught in the cog-wheels and she was injured. This court sustained the refusal to nonsuit.

In *Sibbert v. Cotton Mills*, 145 N. C., 308, the plaintiff was injured by unboxed cog-wheels and the safety lever was out of fix, and the court in setting aside the nonsuit held that it was the duty of the defendant to use reasonable care by proper construction and frequent inspection to keep the safety levers (which it had) in good condition, and it was liable if the plaintiff was injured by its failure to do so.

In the *Creech case, supra,* there were unboxed cogs, and in the *Sibbert case, supra,* the safety lever was out of fix, and the court held that both these cases should have gone to the jury. In the present case there were both these defects. The plaintiff was injured by being caught in the cog-wheels which were not boxed, and the machine had no safety lever to throw the machine out of gear.

It was not error for the court to refuse to submit an issue as to assumption of risk, for the issue of contributory negligence was submitted—which was really the defense, for the plaintiff relied upon the defective machinery, and the court charged the jury: "If you find by the greater weight of the evidence that a reasonably prudent man would not have attempted to take the paper from the cog-wheels while the machine was

in motion, and you will find that the plaintiff did that, he would be guilty of contributory negligence and should not recover, and (100) you will answer that issue 'Yes'; or if you find that the situation there was apparently dangerous and that a man of ordinary prudence would not have put his hand there to take out or put in paper if the plaintiff did so, then you should find that the plaintiff was guilty of contributory negligence and should not recover." This charge gave the defendant all which he is entitled to, whether it is called contributory negligence or assumption of risk. *Harvell v. Lumber Co.*, 154 N. C., 260. Assumption of risk is the assumption by the employee of the risks of the vocation or employment properly managed and with machinery in good condition. But even if the defendant was entitled to have his plea of assumption of risk submitted to the jury, this was sufficiently done in the charge above quoted. *Goins v. Training School,* 169 N. C., 733; *Zollicoffer v. Zollicoffer,* 168 N. C., 326; *Hinton v. Hall,* 166 N. C., 477; *Irvin v. R. R.,* 164 N. C., 5; *Horton v. R. R.,* 162 N. C., 428; *Garrison v. Machine Co.,* 159 N. C., 285; *Roberts v. Baldwin,* 155 N. C., 276. There is no exception to the charge of the court.

It is passing strange that in view of the repeated decisions of this Court and the spirit of the age which demands care and humanity on the part of employers in protecting employees from avoidable injuries, that cog-wheels should still be unboxed or necessary safety levers omitted to the infliction of mutilation upon those who are earning their daily bread by the sweat of their brows. We find

No error.

Cited: Lynch v. Dewey, 175 N.C. 159; *Richardson v. Woodruff,* 178 N.C. 51; *Marshall v. Telephone Co.,* 181 N.C. 298.

B. M. LEWIS ET AL. v. IDA MAY ET AL.

(Filed 7 March, 1917.)

1. Contracts—Written—Interpretation—Intent.

The courts will consider a written contract as a whole, where the writing admits of interpretation, in order to arrive at the intent of the parties, and will give every part thereof its legitimate effect.

2. Same—Drainage Districts—Petitioner—"Dismissed."

Where in view of establishing a drainage district under the statute, the petitioners enter into a written contract with a surveyor, for his services

required thereunder, that he should be paid "out of the first proceeds from the sale of drainage bonds," but that should the action to establish the district be "dismissed," a certain less sum should be paid out of the funds of the petitioners, and the proceedings are regularly prosecuted, but dismissed by the clerk, from which no appeal was taken: *Held*, the use of the word "dismissed," without qualification, includes within its intent the dismissal thereof by the clerk; and the amount stipulated in that event only is recoverable against the petitioners and the sureties on their bond.

3. Appeal and Error—Reference—Findings.

Findings of fact by the referee, approved by the judge, upon supporting evidence, are not reviewable on appeal, especially in this case, where the parties have agreed that they should be conclusive.

4. Judgments—Collateral Attack—Contracts—Drainage Districts.

Where the liability of petitioners to lay off a drainage district depends, according to their contract with the defendants, upon the "dismissal" of the proceedings, and it appears that the proceedings were regularly had in conformity with the statute and dismissed by the clerk, from whose judgment no appeal was taken, the judgment of the clerk cannot be collaterally attacked in an action against the petitioners upon the contract.

(101) SPECIAL PROCEEDING, heard by *Whedbee, J.*, upon the report of Junius D. Grimes, Esq., referee, at May Term, 1916, of PITT.

The proceeding was brought for the purpose of establishing a drainage district, and on 7 April, 1914, a petition was filed before the clerk for the establishment of such a district along Little Contentnea Creek. On 13 July, 1914, a petition was filed by certain landowners asking that additional territory along Middle Swamp be added, and on 2 July, 1914, a petition was filed asking that additional territory along Sandy Run be included. Process has been duly served on all the defendants. At the hearing of the original petition, 12 May, 1914, an order was entered appointing viewers, among whom was A. S. Goss, a civil engineer and drainage engineer. A like order was entered upon the filing of the petitions for the inclusion of additional territory. From time to time the viewers filed requests for extensions of time under the statute, and finally the preliminary report was filed, as to the whole territory described in the various petitions, on 22 August, 1914, and proper orders were made for a hearing thereon, proper notices given, and affidavits made as to the giving of the notices; protests of various parties were heard, and on 12 September, 1914, the date fixed therefor, the preliminary report was heard and passed on by the clerk, and after finding the facts as required by the statute, Pitt County Drainage District, No. 1, was established, and under another order, entered on the same date, the preliminary report was referred back to the board of viewers to make to the court a complete

report, maps or surveys, plans, specifications, etc., on or before 12 October, 1914. The record will disclose that the proceedings were correctly and properly conducted, and in accordance with the statute.

On 12 October, 1914, the final report of the board of viewers (102) was filed in accordance with the statute, and attached thereto were a schedule of the landowners, acreage, classifications, etc., and maps and profiles, as required by the statute. Objections were filed by persons included in the district, and heard, as appears from the record, none of which, however, has anything to do with this controversy. The hearing of the final report was continued from time to time by regular order entered in the cause, all of which appear in the record, until 26 January, 1915, when a final judgment was entered in the case, dismissing the same.

Thereafter the Brett Engineering and Contracting Company, as assignee of A. S. Goss, filed their claim before the clerk of the court for the sum of $3,350 for services, and moved that the petitioners and their bondsmen be taxed with said amount. To this motion the petitioners filed an answer, and the clerk of the court, on 30 April, 1915, signed a judgment denying the motion and dismissing same, to which the Brett Engineering and Contracting Company excepted and appealed.

At the August Term, 1915, of the Superior Court, *Judge Bond* presiding, upon motion of the Brett Engineering and Contracting Company, the judgment of the clerk, upon the motion of the Engineering Company, was reversed, and all matters in controversy referred to J. D. Grimes, this reference being ordered on motion of said company. Mr. Grimes heard the matter, returned his report, stating his findings of fact and conclusions of law, which was confirmed by *Judge Whedbee* at May Term, 1916, of the Superior Court, after overruling exceptions to said report filed by the Brett Engineering and Contracting Company.

As the decision of the case turns upon the construction of the contract between the Brett Engineering Company and B. M. Lewis and McD. Horton, and a similar contract between that company and R. L. Davis, it will be necessary to a proper understanding of the matter that one of those contracts, with identical terms, be set forth, as follows: "For that portion of the Pitt County Drainage District lying along little Contentnea Creek and extending from about Beaver Dam Hole to about Adams Bridge, we propose to act as engineer, make all necessary surveys, prepare plans, estimates, etc., for the sum of $1,500; this $1,500 to be paid out of the first proceeds from the sale. In case the action to establish the drainage district is dismissed by the clerk of the court, our fee for the services rendered up to and including the preliminary report will be $400, to be paid in cash out of the bond of the petitioners within thirty days after dismissal by the court."

The proposal of the engineering company was accepted by the
(103) parties, B. M. Lewis and McD. Horton, and constitutes their contract, and the other proposal was likewise accepted by R. L. Davis, and this forms his contract. The reference was ordered at the request of the Brett Engineering Company, with the consent of the other parties, and provides that the findings of fact shall be conclusive.

The court entered judgment, upon the referee's report, against the plaintiffs and their sureties for the sums set forth therein, and the Brett Engineering Company, claiming that it is entitled to a larger amount under its contracts, appealed to this Court.

F. G. James & Son for plaintiff.

H. G. Connor, Jr., and Skinner & Cooper for defendant.

WALKER, J., after stating the case: The decisive question in this case is, what is the meaning of the contract? The object of all rules of interpretation is to arrive at the intention of the parties, and where the terms of the agreement have been reduced to writing, so that there is no dispute as to what they are, and they are so framed as to admit of construction, the intent must be gathered from a consideration of the entire instrument, the problem being, not what any part of the contract taken separately may mean, but what is the meaning of the contract when every part is given its legitimate effect. *R. R. v. R. R.*, 147 N. C., 382; *Simmons v. Groom*, 167 N. C., 271; *Spencer v. Jones*, 168 N. C., 291. We think that there is but one meaning to be deduced from the words of this contract, which is, that it was intended to provide for two contingencies. The first was that the proceeding should be conducted to its end, as contemplated by the statute, so that the drainage district would be fully established and the proceeding terminated in a final adjudication, or decree of confirmation, upon which depended the issuance of the bonds. If this event occurred, the engineering company should receive $1,500 for its services, under the Lewis and Horton contract, and $900 and $700 under the R. L. Davis contract. The second contingency was that the proceeding might stop short of a final decree, by a dismissal, in which event it was provided that petitioners and their sureties would be bound to pay the sum of $400 (or $250 by the other contract), within the time specified, for services rendered up to and including the preliminary report. The engineering company assumed the risk of the proceeding being stopped before reaching its final stage, when the bonds would be issued. It seems evidently to have been the purpose that the $1,500 and $900 should be paid out of "the first proceeds from the sale of drainage bonds," and not by the petitioners. The learned counsel who argued the

case so well in this court for the engineering company suggested that the requirement that the first payment should come out of the bonds is not conclusive as to the intent, and this may be so, and we are (104) so treating it, but it is the strongest kind of evidence as to what was the true meaning of the parties. The proposal was that the company, or its assignor, would do the whole work for the specified amount and rely for compensation on the proceeds of the sale of bonds, and this offer was accepted by the petitioners. This part of the contract was clearly intended to exclude the idea of any personal responsibility of the petitioners for so large an amount, and there was no good reason why they should assume it. If the event upon the happening of which it was provided that the money should be paid and in a particular way had taken place, the money would have been paid out of the fund designated for that purpose. But it failed to occur, because the proceedings were dismissed, and the other event had happened, which fixed the liability of the petitioners at the smaller sums, or $400 and $250. If the enterprise succeeded throughout as designed at the beginning of it, the district would take the burden of paying for the work out of its bonds, but if it failed, by reason of a dismissal and before the final conclusion of the matter, the petitioners thought it fair, as there was no other way of payment, that they should undertake to pay for the preliminary work; and this is all of their obligation, in this view of the case. Whether the petitioners were liable for the reasonable value of the services performed after the preliminary report was filed, we need not decide, as the company has received a judgment upon the theory that it was so entitled to recover, and the petitioners have not appealed.

The terms of the contract are broadly stated, viz.: "In case the action to establish the drainage district is dismissed by the clerk of the court, the $400 (and $250 in the second contract) should be paid out of the fund of the petitioners." While in the other, or first event named, the $1,500 (and $900 in the other contract) should be paid "out of the first proceeds from the sale of drainage bonds." When we compare, or contrast, the two clauses, it appears clearly, we think, that the method of payment was intended to indicate who should be liable for the different amounts. The use of the word "dismissed," without qualification, and in a general sense, shows that dismissal of any kind was intended. In other words, if the proceedings failed of their purpose, and were dismissed for any cause, the petitioners should pay $400 and $250, and their bondsmen should be liable with them. The proceedings were dismissed, and there has been no reversal of that judgment. If it was erroneous in law, it could be attacked only by an appeal, and, if irregularly entered, by a motion to set it aside. It is not contended that it was void, so that it

can be assailed collaterally. When the clerk denied the motion of the engineering company to tax petitioners and their sureties with the amount of their claim ($3,350), his judgment was reversed, and the order (105) of reference made. This had nothing to do with the prior dismissal of the proceedings, but supervened, and was based upon the judgment of dismissal.

The appellant has excepted to the referee's finding of fact, but they have been approved and confirmed by the judge upon evidence, and we do not in such case review the finding. *Cooper v. Middleton,* 94 N. C., 86; *Harris v. Smith,* 144 N. C., 440; *McCullers v. Cheatham,* 163 N. C., 63. Besides, the order of reference was by consent and at appellant's request, and it was stated therein that the findings of fact should be conclusive.

In discussing the case, we have not referred specifically to the contract for the drainage of District No. 1 along Middle Swamp, but the contracts are all alike in substance, and we selected the two contracts first mentioned in the case. The same reasoning extends to all of them, and our conclusion as to each is, therefore, the same.

There are numerous exceptions and assignments of error, but we need not refer to any but those already considered. The main question in the case involves the construction of the contract, and a decision as to this sufficiently covers the case. We have kept within the limits of the appellant's brief, as we are required to do by the rule of this court. The statutes relating to the subject of drainage have been kept constantly in view, but we do not think that any of their provisions should induce us to give a different meaning to the contract.

Affirmed.

Cited: King v. Davis, 190 N.C. 741; *Jones v. Casstevens,* 222 N.C. 413.

C. D. HOLTON v. ASA W. LEE.

(Filed 7 March, 1917.)

1. Malicious Prosecution—Trials—Malice—Burden of Proof.

The plaintiff, in his action for malicious prosecution, must show malice of the defendant in having prosecuted the criminal action against him, and where the lack of probable cause is admitted, testimony, in the civil action, of the magistrate before whom the criminal case had been tried, "that said prosecution was frivolous and malicious, and he taxed the plaintiff with cost," is incompetent, and its admission constituted reversible error to the defendant's prejudice.

2. Appeal and Error—Record—Issues—Mistake—Remanding Case.

Where in the record on appeal in an action for malicious prosecution the issues set out therein are: (1) "Did the defendant cause the arrest and prosecution of the plaintiff?" (2) "Was the same done without probable cause?" (3) "Was the same done without malice?" to each of which it appears that the jury has responded in the affirmative; upon which the defendant moved for judgment in the Supreme Court, but the plaintiff (appellee) contends there had been error in copying the third issue, and that in fact it was submitted as to whether the act was done "with" malice; and it further appears that the charge referred to the issue in conformity with appellee's contention, and the issues submitted had been lost and cannot be supplied: *Held*, the case is remanded for the Superior Court to ascertain the fact as to the issue, upon proper evidence, correct its record, and enter judgment in accordance with its findings.

CIVIL ACTION, tried before *Lyon, J.*, and a jury, at October (106) Term, 1916, of PAMLICO. The following verdict was rendered:

1. Did the defendant Asa W. Lee cause the arrest and prosecution of the plaintiff Church D. Holton, as alleged? Answer: "Yes."
2. Was the same done without probable cause? Answer: "Yes."
3. Was the same done without malice? Answer: "Yes."
4. Has the criminal action terminated? Answer: "Yes."
5. What damage, if any, has plaintiff sustained thereby? Answer: "$500."

Defendant appealed from the judgment thereon.

Z. V. Rawls for plaintiff.
Brinson & Brinson and C. R. Thomas for defendant.

WALKER, J. The plaintiff brought this action to recover damages for malicious prosecution. It appears that the defendant had prosecuted the plaintiff before a justice of peace for the larceny of money and at the trial the defendant was discharged for the lack of evidence to show probable cause. It is substantially admitted in the pleadings that the criminal proceedings had terminated unfavorably to the prosecutor (defendant in this action), as the justice found that there was no probable cause upon which to bind the defendant (plaintiff herein) to court. The justice was called as a witness for the plaintiff and was permitted by the court to testify as to the contents of the record of his proceedings, from which it appeared that he had discharged the defendant (plaintiff in this action), as the evidence was insufficient to show probable cause, and that "the court was further of the opinion that said prosecution was frivolous and malicious, and taxed the prosecutor (defendant in this action) with the costs." The defendant objected to this

evidence and excepted to its admission. This exception is sustained. It was admitted that this plaintiff had been discharged in the criminal proceedings, because there was no probable cause, so far as shown by the evidence, and, therefore, it was not necessary to prove it. The only other fact contained in this record was the finding by the justice that "the prosecution was frivolous and malicious" and his order taxing (107) him with the costs because it was so. The objection, therefore, was directed to this evidence, as being incompetent to prove malice, and we are of the opinion that it was inadmissible, and we have so held in similar cases. *Coble v. Huffines,* 133 N. C., 422, citing *Casey v. Sevatson,* 30 Minn., 615, where the subject is fully discussed, and the reasons which have induced the courts to reject such evidence are clearly stated. It was necessary to show malice, as it was one of the material elements of the cause of action. "The burden of showing that the prosecution complained of was instituted maliciously and without probable or reasonable cause is, as we have seen, upon the plaintiff, and both of these elements must concur or the suit will fail; for if the prosecution were malicious and unfounded in matters of fact, but yet there was probable cause, the action for malicious prosecution cannot be maintained." Newell on Malicious Prosecution (1892), p. 473, sec. 12; *Stanford v. Grocery Co.,* 143 N. C., 419; *Downing v. Stone,* 152 N. C., 525; *Motsinger v. Sink,* 168 N. C., 548. Before punitive damages can be recovered express or particular malice must be shown. *Stanford v. Grocery Co.* and the other cases above cited.

There is another question in the case. The record shows that the jury found, by their answer to the third issue, that the plaintiff was prosecuted by the defendant without malice. If this be the true verdict, the defendant would be entitled to judgment; but plaintiff has applied for a writ of *certiorari* upon the ground that the issue submitted was, "Was the same done with malice?" to which the jury answered "Yes"; that the original issues, upon which the judgment was given, have been lost, and those in this record are not correctly copied in the particular indicated, and the mistake was not discovered until the argument of the case here, when for the first time the defendant claimed that he was entitled to a judgment upon the verdict. The form of the verdict becomes material for the purpose of deciding whether we shall grant the defendant a judgment or a new trial. There is no necessary conflict appearing in the record itself, but there is a conflict between the record and the case, as the judge, in his charge, refers to the issue as being in this form, "Was the same done with malice?" Where there is a conflict between the record and the case, the former controls. *Threadgill v. Comrs.,* 116 N. C., 616. The second issue is, "Was the same done without probable

cause?" and in form the two issues are alike, one containing the inquiry whether the prosecution was without probable cause and the other whether it was without malice. It may be, therefore, that the issues as they now appear in the record are correctly drawn. The court below has the power to correct its own records and make them speak the truth. Instead of retaining the case and issuing a writ of *certiorari,* we direct that the court ascertain what the truth is in regard to this controversy. If the third issue is correctly stated, judgment will be (108) entered on the verdict for the defendant, but if it is not correctly stated, and the jury really answered it in favor of the plaintiff, then the court will amend the record accordingly, and grant a new trial for the error in admitting evidence as above shown. The court may hear such evidence as is competent and pertinent to the inquiry, including that of the judge who presided at the trial.

Error.

Cited: McDonald v. McLendon, 173 N.C. 175; *Harris v. Singletary,* 193 N.C. 587, 588, 589.

W. L. HALL & CO. v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 7 March, 1917.)

Carriers of Goods — Order, Notify — Care of Another Carrier — Officious Transportation—Penalty Statutes—Appeal and Error.

Where a carrier by water transports a shipment past its destination under an "order, notify" bill of lading, "care of" A., etc., railroad operating at that point, and delivers it to another railroad, N., etc., the latter company should deliver the cotton to the consignor upon demand and exhibition of the bill of lading (*Myers v. R. R.,* 171 N. C., 193); and when it refuses to do so, but carries it to the original destination at additional charges for carriage, which the consignor has been obliged to pay, he may recover, of the carriers thus acting, the additional charges so paid; and a judgment as of nonsuit should not be granted.

APPEAL by plaintiffs from *Stacy, J.,* at January Term, 1917, of PITT.

W. F. Evans for plaintiff.

F. G. James & Son for defendant.

CLARK, C. J. The plaintiff on 26 February, 1913, shipped 72 bales of cotton over the "Daniels Roanoke River Line" of steamers (one of defendants), consigned on the face of the bill of lading to "W. L. Hall,

Plymouth, N. C.," order, notify, "care of Atlantic Coast Line Railroad Company." This cotton was delivered to said company at Jones' Landing on Roanoke River about 35 miles above Plymouth. The Daniels Roanoke River Line carried this cotton down Roanoke River, but instead of stopping at Plymouth, which is located on that river, where both the Norfolk Southern and Atlantic Coast Line have wharves, carried the cotton on 35 miles further to Edenton, N. C., and there delivered it to the other defendant, the Norfolk Southern Railway Company, which hauled it back over their tracks to Plymouth and switched it to the track of the Atlantic Coast Line Railroad, charging the plaintiff $72 in freight and $4 switching charges, which the plaintiff had to pay, besides
(109) surrendering the bill of lading, before he could have the cotton delivered to the Atlantic Coast Line Railroad.

While there was no tariff rate, shown in the bill of lading, from Jones' Landing to Plymouth, by the tariff rates which the defendants contend were in effect the rate on a bale of cotton from Jones' Landing to Edenton, which is 25 miles beyond Plymouth, was 50 cents per bale. When the witness learned that the cotton had been carried by Plymouth to Edenton, he went to the latter town and, finding the cotton in the hands of the Norfolk Southern Railroad Company, presented his bill of lading and demanded that it be turned over to him there. This was refused, and subsequently the cotton was shipped back over the Norfolk Southern, and at that point he paid the agent as above 50 cents per bale from Jones Landing to Edenton and another 50 cents from Edenton back to Plymouth, and $4 extra charges, making $76.

According to the law of this State, the Daniels Roanoke River Line could not have charged more from Jones Landing to Plymouth than to Edenton, and there was nothing in the bill of lading which authorized the cotton to be shipped via Edenton. It was the duty of the Daniels Roanoke River Line to have delivered this cotton to the Atlantic Coast Line Railroad, at Plymouth, which is a well known shipping point and where the record states that the Atlantic Coast Line, in whose care this cotton was shipped, had a wharf. It was an entirely officious act to carry the cotton on to Edenton, and for this no charge could have been made; and, having done so, it was the duty of said company to have brought the cotton back to Plymouth at its own expense.

This cotton was shipped "order, notify"—that is, the shipper retained the control over it; and, as was held in *Myers v. Railroad,* 171 N. C., 193, quoting 2 Hutchison Carriers, sec. 660, "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." This

doctrine is fully settled by the other authorities cited in *Myers' case.* Besides, in this case the shipper had not even consigned the goods by Edenton nor over the Norfolk Southern Railroad Company, whose agency was not necessary in shipping goods from Jones Landing to Plymouth. It may be that the Norfolk Southern Railroad Company was the "friend" of the Daniels Roanoke River Line, and the Atlantic Coast Line Railroad was not, probably for the reason that the latter parallels the Daniels River Line from Williamston to Plymouth, and is to some extent a competitor; but if the Daniels River Line wished to give a job to its friend of hauling back the cotton from Edenton to Plymouth, and carried it on from Plymouth to Edenton for that purpose, it should have done so at its own expense and not have doubled, or more, the mileage charged against the shipper. The unneces- (110) sary transportation from Plymouth to Edenton and back to Plymouth was 50 miles, being considerably more than the mileage from Jones Landing to Plymouth, where it should have delivered the cotton on the wharf which the record states the Atlantic Coast Line had at Plymouth. The law will not tolerate such doubling of charges against the shipper.

On the facts in evidence the judge was in error in directing a nonsuit against the plaintiff, who seeks to recover the overcharge against him. The plaintiff also joins a charge for the penalty in exacting the overcharge. This penalty is prescribed by statute to prevent imposition on shippers and consignees who have to pay the charges of carriers before they can get their goods, as the plaintiff had to do on this occasion. *Tilley v. R. R.,* 172 N. C., 363. We do not, however, pass upon the right of the plaintiff to recover the penalty, but leave that matter open until the facts are developed at the trial on the merits.

The judgment of nonsuit is

Reversed.

R. E. HARRIS v. THE NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 14 March, 1917.)

1. Carriers of Goods — Warehousemen — Act of God — Concurring Negligence—Proximate Cause.

While a wind and rainstorm of such unusual violence that it could not reasonably have been anticipated, and which solely caused damage to goods stored in the warehouse of a common carrier, is regarded as an act of God, for which the carrier may not be held responsible, the carrier may not escape liability when its own negligence, in regard to improper

construction or ill-repair of its warehouse concurred as a proximate cause of the loss or damage sustained, or without which it would not have occurred.

2. Appeal and Error—Issues Tendered.

The refusal of the court to submit issues tendered is not erroneous, when those submitted are fully sufficient to present adequately and properly every matter involved in the controversy.

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

The rejection of evidence on the trial of the cause which could not have had any appreciable effect on the result will not be held for reversible error.

BROWN, J., dissenting.

(111) CIVIL ACTION to recover value or damage for the loss of two shipments of goods over defendant railroad, consigned to plaintiff, the owner, at Washington, N. C., tried before *Lyon, J.*, and a jury, at September Term, 1916, of PITT.

There was evidence on part of plaintiff tending to show that the goods, to the value of about $1,000, on 2 and 3 September, 1913, were held by defendants as common carriers, and were at the time in a warehouse of the company situate on and over the river at Washington, N. C., awaiting reshipment to plaintiff, who was doing business at Falkland, and that the same had never been delivered to plaintiff or to any one for him.

Defendants resisted recovery on the ground, chiefly, that on 3 September, 1913, the goods and the warehouse in which the same were held were destroyed by a storm of wind and rain of such unexpected and unusual extent and violence that defendant company was relieved of liability for the loss, and offered much evidence tending to support its position.

Plaintiff replied, and there was some evidence tending to show, that the warehouse on the river was improperly and unsafely built and that its destruction was due to this fact rather than to the storm, as defendant contended, and, further, that after defendant had warning of the storm and its nature and with facilities at hand for removing the goods from the exposed position, it did not make proper efforts to do so.

On issues submitted, the jury rendered the following verdict:

1. Were the goods damaged and destroyed by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

2. If so, what damage is plaintiff entitled to recover? Answer: "946.15".

Judgment, and defendant excepted and appealed.

Skinner & Cooper for plaintiff.

L. J. Moore for defendant.

HOKE, J. The position is fully recognized here and elsewhere that a wind and rain storm of unusual extent and violence, one "so far outside of the ordinary range of human experience that the duty of exercising ordinary care does not require that it be anticipated or provided against," is an act of God, within the meaning of the principle which ordinarily relieves a common carrier of liability in such cases. 29 Cyc., p. 441. And it is further held that, in order to its proper application, the negligence of the carrier must not have concurred as a proximate cause of the loss complained of. Under a charge of the court below, in full recognition of these principles, the jury have answered the issues for the plaintiff, and we find no error in the case on appeal and exceptions noted which justify us in disturbing the results of (112) the trial.

In Shearman and Redfield on Negligence, 1613 (6th Ed.), it is said: "The rule is the same when the act of God or accident combines or concurs with the negligence of the defendant to produce the injury as when any other efficient cause combines or concurs. The defendant is liable if the injury would not have resulted but for his own wrongful act or omission." In Barrows on Negligence, p. 23, the position is stated thus: "When a negligent or wrongful act is followed by an extraordinary natural occurrence which connects the act with consequent injury, the wrongdoer is still liable, and this is true even if the original negligent act without the occurrence of the natural phenomenon would not in itself have produced harm," and Moore on Carriers (2d Ed.), p. 308, is to the same effect. The principle as stated in these authorities has been approved by decisions in our own Court (*Ridge v. R. R.*, 167 N. C., pp. 510-527; *Ferebee v. R. R.*, 163 N. C., pp. 351-54), and are in accord with doctrine very generally prevailing on the subject. The refusal to submit certain issues tendered by defendant, directed more specifically to the character and effects of the storm, cannot be sustained, those submitted being fully sufficient to enable the parties to present adequately and properly every "matter involved in the controversy." *Zollicoffer v. Zollicoffer,* 168 N. C., 327; *Barefoot v. Lee,* 168 N. C., 89.

The objections to the rulings of the court on questions of evidence are without merit and could have had no appreciable effect on the result. We find no reversible error in the record, and the judgment for plaintiff is

Affirmed.

BROWN, J., dissents.

Cited: Perry v. Mfg. Co., 176 N.C. 72; *Lawrence v. Power Co.,* 190 N.C. 670.

J. B. TAYLOR v. NEUSE LUMBER COMPANY.

(Filed 14 March, 1917.)

1. Master and Servant—Safe Place to Work—Approved Instrumentalities—Negligence—Evidence.

Upon evidence tending to show that the defendant had employed the plaintiff, a skillful and experienced mechanic, to look after and keep in repair his piping, engines, boilers, and other machinery, and that the plaintiff had informed him that a certain joint, L, made of cast-iron, was unsafe for the purpose for which it was used; that it should be malleable iron or brass, which the defendant disregarded, and it resulted in the injury complained of and received by the plaintiff in the discharge of his duties, it is sufficient to be submitted to the jury upon the issue of defendant's actionable negligence, though the L joint and other instrumentalities used in connection therewith are shown to be those which were known, approved, and in general use for like purposes at the time.

2. Same—Independent Cause—Proximate Cause—Contributory Negligence.

While employed by the defendant to look after its engines, pipes, boilers, etc., the plaintiff was working at the back of a boiler, and hearing an explosion, he went to investigate. He was prevented from seeing his way by the escape of steam occasioned by the defendant's negligent use of an improper elbow in the piping in front of the boiler, and he stepped or slipped into the boiler pit, in which hot water had accumulated from the escaping steam, which he could not see for the steam, resulting in the injury complained of. *Held*, the slipping of plaintiff's foot was not an independent cause, relevant in this case only to the issue of contributory negligence; and the negligent use of the elbow, resulting in the escape of the steam, was a continuing cause and proximate to the injury.

(113) CIVIL ACTION, tried before *Lyon, J.*, at October Term, 1916, of CRAVEN.

This is an action to recover damages for personal injury caused by falling in boiling water, which had escaped from a steam pipe which burst in a mill of the defendant, and at the close of the testimony the defendant moved for a judgment of nonsuit, which was refused, and the defendant excepted.

The plaintiff was employed to look after and keep in repair the piping, boilers and engines, and his duty required him to be in the boiler and engine room. At the time of the explosion he was in back of the boiler engaged in rolling tubes, and when he came out of the boiler the explosion occurred. He then went around in front of the boiler and the fire room and went forward to look at the inspirator to see if that was all right, and stepped or slipped in the pit in front of the boiler, where boiling water had accumulated from the pipe which exploded.

The allegation of negligence is that the elbow was defective in that it was made of cast-iron when it ought to have been malleable iron or brass.

The jury returned the following verdict:

1. Was plaintiff injured by the negligence of the defendant, as alleged in the complaint? "Yes."

2. If so, did plaintiff by his own negligence contribute to his injury? "No."

3. What damage, if any, is plaintiff entitled to recover? "$2,000."

Judgment was entered upon the verdict in favor of the plaintiff, and the defendant appealed.

D. L. Ward and E. M. Green for plaintiff. (114)

Moore & Dunn and Guion & Guion for defendant.

ALLEN, J. The appeal presents two questions for decision: (1) Is there evidence of negligence? (2) If so, is there evidence that this negligence was the proximate cause of the injury to the plaintiff?

In considering the evidence of negligence we must keep in mind the duty imposed upon the defendant, because negligence is the breach of a legal duty, and it is only when we have a clear conception of the duty that we can properly appreciate evidence bearing upon its breach.

It is conceded by the defendant that it was under a legal obligation to provide the plaintiff a reasonably safe place to work and reasonably safe machinery and appliances, but it contends that it has shown that it furnished machinery and appliances, approved and in general use, and that this is a full performance of its duty.

This is not, however, a final test; and if it was defective and unsafe machinery could be used by all doing a like business, and the larger the number using such machinery the stronger would be the evidence of its being approved and in general use, and the greater the freedom from liability.

The rule, as applicable to the facts in this record, is correctly stated by *Justice Hoke* in *Ainsley v. Lumber Co.*, 165 N. C., 122: "An employer owes it as a duty to his employee working at machines driven by mechanical power and more or less dangerous and intricate, to supply him with appliances, etc., which are reasonably safe and suitable, and to exercise the care of a prudent man in looking after his safety; and this duty may not always be fully discharged by furnishing him such implements and appliances as are 'known, approved, and in general use' "; and by *Justice Walker* in *Dunn v. Lumber Co.*, 172 N. C., 129: "It is not always a full performance of the master's duty to provide merely for his servant implements and appliances which are known, approved, and in general use.

He will still be liable for any injury proximately resulting from a failure to perform that duty in any other respect. He is not permitted to put defective machines or appliances in the hands of his servant with which to do the work, even though they may be of the requisite model, or type, and if he is negligent in so doing, and thereby causes injury to the servant, he must answer in damages for the wrong. *Ainsley v. Lumber Co.*, 165 N. C., 122, 81 S. E., 4; *Kiger v. Scales Co.*, 162 N. C., 133, 78 S. E., 76. This rule has frequently been recognized by us in negligence cases. It is a part of his obligation to furnish appliances "which are known, approved, and in general use," but not necessarily all of it; and if he complies with that part of it and is otherwise negligent in not supplying a reasonably safe place for the work to be done, or reasonably safe
(115) machinery, tools, and appliances with which to do it, he falls short of the legal measure of his duty.

Is there evidence of a breach of this duty in that the defendant furnished unsafe machinery?

The plaintiff was employed by the defendant to look after and keep in repair the piping, engines, boilers, and other machinery, and there is no evidence that he was not competent.

He was, therefore, recognized by the defendant as a skillful, experienced mechanic, whose opinion could be accepted as to the safety of machinery, and he testified that the elbow, called an L, in which the explosion occurred and from which the boiling water came, was made of cast-iron, and that "Before that 'L' was put in there that blew out, I had a conversation with Mr. Walker about its being safe to put it in there. I told him it wasn't safe to put a cast-iron in the fire like that; it ought to be malleable iron or brass."

This evidence, while in the form of a conversation with the superintendent of the defendant, is in effect a statement that the elbow was unsafe, and the fact that it was not objected to gives indication that the witness was known to be an expert.

Gabe Whitfield, another witness for the plaintiff, testified: "I remember the occasion when this elbow was put in. I don't know who brought it there. Mr. Walker furnished it to Mr. Taylor and Mr. Taylor told him it would be best to put in malleable iron because that boiler had high pressure and it would not stand the pressure, and Mr. Walker told him to put it in, and he put it in. I was engineer at that time."

The explosion, occurring as it did at the precise point of danger indicated by the plaintiff, is also strong corroboration of his opinion.

There is, therefore, evidence that the defendant furnished unsafe machinery, and that it had knowledge of the danger, and this would be a breach of duty and negligence.

Is there evidence that this negligence of the defendant was the proximate cause of the injury to the plaintiff?

As was said in *Paul v. R. R.*, 170 N. C., 232, "Much of the difficulty in the application of the doctrine of proximate cause arises from the effort on the part of the courts to give legal definition to what is essentially a fact, and in most cases for the determination of a jury."

The rule generally adopted and approved is as stated by *Mr. Justice Strong* in *R. R. v. Kellog,* 94 U. S., 469. He says: "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of (116) a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or, as in the oft-cited case of the squib thrown in the market place. 2 Bl. Rep., 892. The question always is, Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? . . . We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. . . . In the nature of things there is in every transaction a succession of events more or less dependent upon those preceding, and it is the province of the jury to look at this succession of events or facts and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

Again, the same judge says in *Ins. Co. v. Boone,* 95 U. S., 117: "The proximate cause is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in time and place. The inquiry must always be whether there was an intermediate cause disconnected *from the primary fault* and self-operating, which produced the injury."

In *Harvell v. Lumber Co.*, 154 N. C., 261, this statement of the law was approved, the Court saying: "Proximate cause means the dominant efficient cause, the cause without which the injury would not have occurred; and if the negligence of the defendant continues up to the time of the injury, and the injury would not have occurred but for such negligence, it is not made remote because some act, not within the control of the defendant, and not amounting to contributory negligence on the part of the plaintiff, concurs in causing the injury."

Applying these principles to the evidence, the question of proximate cause was for the jury.

The plaintiff, according to his evidence, which must be accepted on a motion for judgment of nonsuit, was where he had a right to be in
(117) the performance of a duty; the steam, as he says, prevented him from seeing the boiling water, and he has been absolved from the charge of contributory negligence by the jury.

The motion for nonsuit does not rest on the ground of contributory negligence, and there is no exception directed to the second issue, and the jury might well say that there was "a continuous succession of events so linked together as to make a natural whole," from the defective elbow to the plaintiff's injury.

The fact that the foot of the plaintiff slipped, throwing him into the water, is not an intervening cause, and is only relevant on the question of contributory negligence, as is held in *Aiken v. Mfg. Co.*, 146 N. C., 324; *West v. Tanning Co.*, 154 N. C., 48; *Lynch v. Veneer Co.*, 169 N. C., 170, in all of which cases recoveries were sustained because of the negligence of the defendant, although the plaintiff in each would not have been injured if his foot had not slipped.

The case of *Nelson v. R. R.*, 170 N. C., 170, is not in point. There was in that case no evidence of negligence, and it was correctly stated that the immediate cause of the *accident* was the slipping of the foot.

We are, therefore, of opinion that the motion for judgment of nonsuit was properly denied.

No error.

Cited: Hassell v. Daniels, 176 N.C. 101; *Cook v. Mfg. Co.,* 182 N.C. 209; *Moore v. Iron Works,* 183 N.C. 440; *Lacey v. Hosiery Co.,* 184 N.C. 22; *Hinnant v. Power Co.,* 187 N.C. 293, 296; *Campbell v. Laundry,* 190 N.C. 654; *Kepley v. Kirk,* 191 N.C. 695; *Inge v. R.R.,* 192 N.C. 530; *Lowe v. Taylor,* 196 N.C. 278; *Dickey v. R.R.,* 196 N.C. 728; *Godfrey v. Coach Co.,* 201 N.C. 266; *Poplin v. Adickes,* 203 N.C. 727.

THE DOVER LUMBER COMPANY v. BOARD OF COMMISSIONERS OF MOSELEY CREEK DRAINAGE DISTRICT ET ALS.

(Filed 14 March, 1917.)

1. **Drainage Districts—Assessments — Summons — Parties — Injunction—Statutes—Mortgages.**

   The provision of our drainage law that summons be served on defendant landowners within a proposed drainage district is mandatory, and when it appears that one of them, having an interest within the meaning of the statute, has not been served, and it does not appear that he was an apparent party, an order laying an assessment on his property is void, and the proceedings as they relate to him are a nullity, and the assessment may be restrained. *Banks v. Lane*, 170 N. C., 14, holding a mortgagee not a necessary party, cited and distinguished.

2. **Drainage Districts—Timber Deeds—Assessments—Standing Timber—Personalty.**

   With regard to our drainage statutes, a conveyance of the timber, under the usual deed, providing for its cutting and removal from the land within a stated period, is regarded as a severance thereof from the land, and the grantee in the deed is not liable for an assessment for drainage purposes laid thereon; though theretofore, and for the purposes of the conveyance, it is regarded as realty, while standing.

CLARK, C. J., concurring in part; ALLEN, J., concurring.

ACTION to enjoin an annual assessment of $1,992.50 each year (118) for five years made against plaintiff's timber by defendants. The cause was heard by *Lyon, J.*, at November Term, 1916, of CRAVEN, upon an agreed state of facts. His Honor held that the assessment was valid and came within the terms of the drainage laws, and dissolved the injunction. Plaintiff appealed.

D. L. Ward, Moore & Dunn for plaintiff.
Guion & Guion for defendants.

BROWN, J. The case agreed substantially sets forth these facts: The Dover Lumber Company, a corporation, owned certain rights to cut standing timber upon the lands of the West estate, situated within the Moseley Creek Drainage District. The timber was conveyed to plaintiff, with the privilege of removing it within a stipulated period, prior to the formation of the drainage district.

When the district was formed the plaintiff was not made a party nor served with summons, neither was the particular timber or the plaintiff referred to anywhere in the proceedings. No summons was issued against the plaintiff, and there was no apparent service upon it.

The owner of the land known as the West estate was a party and an assessment was levied against the land. The grounds upon which plaintiff asks injunctive relief are: (1) That plaintiff has had no notice of and is no party to the drainage proceeding; (2) that standing timber, the title to which has been severed from the land by conveyance, is not the subject of assessment under the statute. It is contended that injunction is not the proper remedy.

The plaintiff was not only not served with summons or other notice in the drainage proceedings, but was not an apparent party. The judgment was, therefore, absolutely void as to it, and could be attacked collaterally. Had plaintiff been an apparent party and had there been apparent service on it, then the remedy would be by motion in the cause. Where it appears on the face of a legal proceeding that a party against whom execution is issued has not been made a party, and that there has been no service of summons, the judgment is void as to him and its enforcement will be restrained. *Bowman v. Ward,* 152 N. C., 602.

Our drainage statute is mandatory in requiring a "summons to be served on all the defendant landowners who have not joined in the petition and whose lands are included in the proposed drainage district." The drainage laws of North Carolina have been largely copied from the acts in Indiana and Illinois, and following the construction of
(119) these acts in these and other States for the long period of time the acts have been in force, it is essential that notice of summons in all such proceedings be given to all parties who will be affected thereby. *Sites v. Miller,* 120 Ind., 19, citing numerous authorities; *Kinney v. Ball,* 68 Mich., 625; *Curram v. Sidney Co.,* 47 Minn., 313; *Baltimore, etc., R. R. v. Wagner,* 43 Ohio State, 75. In those States it is held that where the mandate of the statute is that notice shall be given in the manner and for the time therein prescribed, before the time fixed for the hearing of the petition, failure to give this notice as required will render invalid any assessment against a person who is not so notified. *Yolo Co. Reclamation District v. Burger,* 122 Cal., 442; *Craig v. People,* 188 Ill., 416; *McMullen v. State,* 105 Ind., 334.

In the Supreme Court of the United States it has been held in the enforcement of a drainage assessment, the question of due process of law does arise where the defense goes to the validity of the service. *Hager v. Reclamation District,* 111 U. S., 701.

The case of *Banks v. Lane,* 170 N. C., 14, differs materially from this. In that case it was held that where the landowner had been made a party and the land duly assessed, a mortgagee need not be made a party, as the proceeding is one *in rem,* and the draining of the land inured to his

benefit as well as to that of the mortgagor; hence the mortgagee could not restrain the collection of the assessment.

Upon rehearing, 171 N. C., 505, there were two concurring opinions, with one justice dissenting *in toto*. *Mr. Justice Walker* concurred in the decision that the remedy was by motion in the original proceedings, upon the ground that it did not appear affirmatively on the face of the Craven judgment that there was no service of the summons. The writer concurred upon the same ground, and further, that it did appear that the lands belonging to Mrs. Spivey were set out and embraced in the drainage proceedings and were duly assessed in her name as one of the landowners within the drainage district.

One of the essentials of a proceeding *in rem* is that the property sought to be charged shall be identified by description in the proceedings. Nothing of the sort appears in this drainage proceeding. The owner of the timber lease had no right to assume that his timber would be separately assessed because the owner of the land upon which it grew had been made a party. The assessment of the timber lease appears to have been an afterthought of the viewers, and does not appear to have been contemplated when the proceeding was first initiated.

The second position of plaintiff is that a timber lease does not come within the letter or spirit of the statute and is not assessable for drainage purposes. It appears to us that that proposition is (120) undoubtedly correct.

When standing timber is severed by conveyance from the land, with the right to cut and remove within a given period all timber of a certain size, it is no longer a part of the land. The owner of the timber is not a freeholder or landowner from the mere fact of owning a timber lease. It is true, we have held that timber is to be considered as land for purposes of conveyancing, but it does not follow the land after it has been so conveyed and is no longer a part and parcel of it.

The statute provides for issuing drainage bonds to be paid in annual installments by assessments on the lands. These assessments "shall constitute the first and paramount lien, second only to county and State taxes."

If the standing timber is assessable separate from the land, and if the assessment is a lien on the timber, the owner of the bond can restrain the cutting of the timber until the bonds are paid, and if the term for cutting is less than ten years, the owner of the timber would lose all of it, as he could not cut within the ten years and the timber not cut within that time would belong to the owner of the land.

The statute requires only *landowners* to be made parties in such drainage proceedings, and that the proceeding shall be initiated only by a

majority of the *"resident landowners."* It provides that for purposes of assessment the lands shall be divided into five classes, and that "the degree of wetness of the lands, its proximity to the ditch or a natural outlet, and the fertility of the soil shall be considered in determining the amount of benefit it will receive by the construction of the ditch." It is useless to quote further from the act. It is sufficient to say that its entire context plainly indicates that timber leases, such as the one held by plaintiff, do not come within its purview, and that its purpose is to facilitate the drainage of lands for agriculture.

It was well known to the General Assembly that much of the standing timber upon the lands of this State has been sold, with the right to cut and remove it limited, as in this case, to a few years. Had it been intended by the statute to embrace such leases within its terms, the Legislature would have said so and doubtless have provided a method of assessment measured by the benefit, if any, accruing to the timber exclusively during the actual existence of the lease, and not, as in this case, amounting to practical confiscation.

The judgment is reversed and the cause remanded to the Superior Court of Craven County with direction to enter judgment for plaintiff in accordance with this opinion.

Reversed.

(121) CLARK, C. J., concurs on the first ground, that the plaintiff, owner of the timber interest in the land, was not made a party in the drainage proceeding and has had no day in court. In *Banks v. Lane,* 170 N. C., 14; *s. c.,* 171 N. C., 505, the landowner had been made a party, and was duly assessed. The Court held that such proceeding was *in rem* and that the notice to the owner was sufficient, for the mortgage was only an encumbrance, and it was also to be presumed that the mortgagee was benefited by the enhancement of the value of the land, which was security for the debt.

I dissent, however, as to the second point, which, besides, is merely an *obiter dictum,* since the proposition cannot arise after holding that the plaintiff has not been made a party and that the whole proceeding was void as to it. If the plaintiff had been made a party, of course, it would be bound by any judgment or assessment from which it did not appeal. Moreover, the conveyance of the timber right has been often held by this Court to be a conveyance of the realty. *Timber Co. v. Wells,* 171 N. C., 264, and cases cited. If the timber had not been conveyed at the time of the judgment in this drainage proceeding, the land with the timber on it would have been assessed its due share for the payment of the bonds and the expenses of the proceeding. The owner, having parted

with the valuable timber interests, would not be assessed for the same valuation on the land as he would have been before such conveyance. If the valuation assessed against his land was reduced by the value of the conveyance of the timber, of course, the owner of such timber right would be assessed for the value of such timber as was standing and uncut at the time the assessment and valuation were made. It is true, the conveyance may be called a lease, but it is not a lease in the ordinary sense of a lease of a house or farm, which takes nothing from the value of the realty, but it is a conveyance of an interest for years in the land. Till the timber is cut the land cannot be used for any other purpose, and the gradual cutting of the timber will impair the value of the tract.

Whatever the value of this conveyance for years is at any given time, it is liable for taxation, Revisal, 5225; Laws 1915, ch. 286, sec. 32, which provide that when any "mineral, quarry, or timber right" is owned by other than the owner of the fee, such right shall be listed and taxed in the name of its owner, such right and the fee being assessed separately. Of course, therefore, it is liable for an assessment of its value in forming a drainage district. There are thousands of acres of timber held by lumber companies which are very valuable, and to hold that such timber rights are not liable to taxation, or for an assessment in the drainage district which may embrace them, would be to exempt a very great property, many millions of dollars, from liability either to taxation or (122) assessment for any local purpose. If liable to taxation as realty, they must be equally subject to local assessments.

In laying a local assessment, whether it is for paving or for fencing or for a drainage district or other purpose, the question is not whether the particular property is benefited, but what is its valuation. There is some modification under the terms of the statute in proceedings for drainage, having regard to the benefit to each tract; but when the tract is assessed and the timber interest is sold off, whether before or after the assessment, such timber interest should be assessed in the proportion that the timber right bears to the value of the whole tract.

ALLEN, J., concurring: Standing timber is real property for the purpose of devolution and transfer, but the owner of the timber does not own the soil. He has merely the right to the support of the soil for his timber during his term, and has no right to cut ditches at pleasure, and if so, it would not seem that he could impose this burden on the owner of the soil.

Nor are the assessments based on a valuation of the property, as taxes are, but on the amount of benefit to the property assessed. "The foundation of the right to levy assessments is the particular benefit received

by the land assessed," and "There can be no assessment in excess of the benefit received" or "where there is no benefit." 9 R. C. L., 953. "The benefit must be certain." 9 R. C. L., 954.

The last principle seems to have been violated by the assessors, as it is not within the bounds of probability that the gum timber of the plaintiff could be benefited by the proposed drainage in the amount of $9,962.50, the assessment laid on the plaintiff's timber, during five years, to which time its right to cut is limited.

A brief summary of parts of the drainage act also demonstrates, I think, that the assessment of timber was not within the contemplation of the General Assembly.

Section 1: The drainage districts are formed "for the purpose of draining and reclaiming wet, swamp, or overflowed lands."

This shows that the main purpose of the act is agricultural. The owner of the timber has no wet, swamp, or overflowed lands to be drained or reclaimed. He owns nothing except the timber.

Section 2: The petition for the establishment of a district may be filed by a majority of the resident landowners, or by the owners of three-fifths of the land.

Suppose four nonresidents own all the land in the proposed district, and they sell different parts of the timber to five nonresidents. Could these five file a petition against the will of those who own the soil,
(123) or could they by refusing to join in the petition prevent the other four, who own the soil, from the possibility of establishing a district. If they are landowners within the meaning of the statute, they have this right.

Section 12: In making assessments the appraisers must consider "degree of wetness" of land, "its proximity to the ditch," and "the fertility of the soil," "in determining the amount of benefit *it* will receive by the construction of the ditch."

"It" evidently refers to "soil."

Section 19: The three drainage commissioners are to be appointed from those receiving the vote of a majority of the owners of land.

If there are four owners of the soil and five owners of timber, can the five elect the commissioners? They can if they are owners of land within the meaning of the statute.

Section 31: The assessments are against "the several tracts of land." Is a timber holding ever referred to as a tract of land?

The amount shall be assessed against "the several tracts of land" according to "the benefit received."

Does gum timber receive any appreciable benefit within five years?

Section 32: Provides for bond issue for construction of the improvement.

Section 34: These bonds are to be paid in ten annual installments out of the assessments, which "shall constitute the first and paramount lien, second only to county and State taxes."

If the standing timber is assessable separate from the land, and if the assessment is a lien on the timber, the owner of the bonds can restrain the cutting of the timber until the bonds are paid, and if the term for cutting is less than ten years, as in this case, the owner of the timber would lose all of it, as he could not cut within the ten years because to permit him to do so would decrease the security of the bondholder and the timber not cut within that time would belong to the owner of the soil.

Section 37: This act is "to promote the leveeing, ditching, draining, and reclamation of wet and overflowed lands." The owner of the timber has no "wet and overflowed lands."

It is urged, however, that if this construction prevails, it will enable the owner of the land to sell his timber, thereby depreciating the value of his land, and that this will have the effect of decreasing his assessment and of increasing the assessment of his neighbor; but this position is upon the erroneous idea that the assessments are based on values and not benefits.

I think no instance can be found of the establishment of a drainage district except for the purpose of reclaiming lands for cultivation, and as the timber must be cut and removed before the proposed (124) improvement is complete, the sale of the timber with a limited time for its removal would rather increase the value of the land than decrease it for the purpose of the act, which is for cultivation.

Cited: Taylor v. Comrs., 176 N.C. 225; *Daugherty v. Comrs.*, 183 N.C. 151; *Wood v. Hughes*, 185 N.C. 186.

DOREMUS L. SMITH v. SUSAN E. SMITH ET AL.

(Filed 14 March, 1917.)

1. Equity—Cloud on Title—Wills—Devise—Remaindermen—Statutes.

A court of equity may entertain a suit to remove a cloud upon the title of one claiming lands in fee simple under a devise, against those who assert that he had only a life estate, with remainder to themselves, under a proper construction of the will. Revisal, sec. 1589.

2. Wills—Devise—Loan—Estates for Life—Rule in Shelley's Case.

The word "loan," used in connection with a testamentary disposition of lands for life, bears the same interpretation as the words "give" or

"devise," unless a contrary intent appears, and a "loan" to testator's son, S., of certain lands "to have during his life, at his death to his bodily heirs, and to his wife her lifetime or widowhood," is of the fee simple to S., subject to the life estate of his wife, or until she remarry; and the precedent life estate in her does not affect the operation of the rule in *Shelley's case*, so far as the heirs are concerned.

CIVIL ACTION to remove a cloud from plaintiff's title, heard on facts admitted in the pleadings before *Lyon, J.*, at November Term, 1916, of PITT.

There was judgment for plaintiff, and defendants excepted and appealed.

Harding & Pierce for plaintiff.
F. M. Wooten for defendants.

HOKE, J. Plaintiff's title to the land, the subject-matter of this litigation, is dependent on the will of his father, Joshua W. Smith, deceased, the devise to plaintiff being in terms as follows:

"I loan to my son, D. L. Smith, two tracts of land (describing same), to have during his life, at his death to his bodily heirs and to his wife her lifetime or widowhood," etc., and charging the devisee with payment of certain small amounts in money to persons designated.

The plaintiff, contending that he owns the land in fee, under the rule in *Shelley's case,* subject to a life estate in his widow, brings this
(125) action against his minor children, alleging that they contend and claim that plaintiff has, under the will, only a life estate in the property, and, by reason of such claim, he is unable to sell or encumber his interests or otherwise enjoy the rights of ownership to which his estate entitles him.

Defendants, summoned and duly represented by guardian *ad litem,* answer, admitting the allegations in the complaint except as to nature and extent of plaintiff's estate, and aver that under the will plaintiff had only an estate for life. Under our statute, Revisal, sec. 1589, by which the powers formerly exercised in cases of this character have been much enlarged, the court had undoubted and full jurisdiction to determine the question presented. *Little v. Efird,* 170 N. C., 187; *Christman v. Hilliard,* 167 N. C., pp. 4-8; *Campbell v. Cronley,* 150 N. C., 457. And we concur in his Honor's judgment that the will of Joshua Smith conveys and devises to plaintiff a fee-simple interest in the property, subject to the estate to his wife during her lifetime or widowhood, this, by correct interpretation, being a life estate in her unless sooner terminated by her marriage. *Kratz v. Kratz,* 189 Ill., 276, and in remainder after the interest for life first devised to the husband, the plaintiff.

We have held in several of the more recent cases that the word "lend" or "loan," in a will, will be taken to pass the property to which it applies in the same manner as "give" or "devise," unless it is manifest that the testator otherwise intended. *Robeson v. Moore,* 168 N. C., 388; *Sessoms v. Sessoms,* 144 N. C., pp. 121-124, and, under this instrument, by correct construction, the estate was devised to the son, the plaintiff, for life, remainder to his wife for her lifetime or widowhood, remainder to the bodily heirs of the son. In *Nichols v. Gladden,* 117 N. C., pp. 497-500, the rule in *Shelley's case,* as it appears in First Coke, 104, is given as follows: "That when an ancestor, by any gift or conveyance, Taketh an estate of freehold and, in the same gift or conveyance, an estate is limited either mediately or immediately to his heirs in fee or in tail, the word heirs is a word of limitation of the estate and not of purchase." The rule as given in Preston on Estates, appearing in *Robeson v. Moore, supra,* and other cases, will serve to throw light on the words "mediately or immediately," if explanation were at all needed. Thus, "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is limitation by way of remainder, *either with or without the interposition of another estate,* of an interest of the same legal or equitable quality, to his heirs of his body as a class of persons to take in succession from generation to generation," etc. Thus, by the very terms of the rule, and as explained and applied in numerous and well considered opinions, the interposition of a life estate in another does not interfere with the operation of the (126) rule so far as the heirs are concerned. When the estate comes to them, if it ever does, they take by descent and not by purchase, and the ancestor or first taker, in this and like cases, has full power of control over the property and may sell or encumber as a full owner may, subject only to estate in remainder to the wife during her life or widowhood and the rights incident to it. *Cotten v. Moseley,* 159 N. C., 1; *Edgerton v. Aycock,* 123 N. C., 134; *Kiser v. Kiser,* 55 N. C., 28; *Quick v. Quick,* 21 N. J. Eq., 13.

On the facts admitted, the plaintiff is entitled to the relief awarded him, and the judgment below is

Affirmed.

Cited: Cohoon v. Upton, 174 N.C. 89; *Daniel v. Harrison,* 175 N.C. 121; *Byrd v. Byrd,* 176 N.C. 115; *Radford v. Rose,* 178 N.C. 290; *Stokes v. Dixon,* 182 N.C. 325; *Hartman v. Flynn,* 189 N.C. 454, 455; *Welch v. Gibson,* 193 N.C. 686; *Waddell v. Aycock,* 195 N.C. 269; *Waller v. Brown,* 197 N.C. 510; *Alexander v. Alexander,* 210 N.C. 282; *Rose v. Rose,* 219 N.C. 22; *Rawls v. Roebuck,* 228 N.C. 539; *Ratley v. Oliver,* 229 N.C. 121; *Weathers v. Bell,* 232 N.C. 563.

R. D. LUPTON ET AL. v. NATHAN SPENCER ET AL.

(Filed 14 March, 1917.)

1. Jurors—Talesmen—Selection—Call from Outside—Sheriffs — Courts—Statutes.

The primary duty of selecting tales jurors for the trial of a cause is with sheriffs, and their deputies acting for them, under the control and supervision of the court; permitting these executive officers so acting to go outside for the purpose or notify them in advance when such course is best promotive of the ends of justice. Revisal, sec. 1967.

2. Jurors—Sheriffs—Relationship to Parties—Interest.

Whenever it is made to appear that the sheriff has an interest, direct or indirect, in the cause of action for the trial of which tales jurors are to be called, or bears such a relation to the parties thereto as to render him an improper or unsuitable person to perform this duty, the court may designate another for the purpose. Revisal, sec. 1968.

3. Same—Appeal and Error—Objections and Exceptions—Laches—New Trials—Impartial Panel.

Where objection has been made to the sheriff's calling in tales jurors for the trial of a cause on the grounds that he is a cousin of one of the parties, and that the action involved title to lands, which his brother had warranted, and the court designates his deputy for the purpose, who reads the names of jurors from a list, informing counsel, in reply to his question, that he, the deputy, has made it; and the jury being selected, the trial proceeds to verdict, after which the sheriff, in the presence of the court, counsel, and parties, states that he had made the list of jurors, whereupon the injured party insists upon his right to an impartial panel, it is *Held*, under the facts stated, he was not guilty of laches, and his motion to set aside the verdict, and for a new trial, should be sustained as a matter of right. *S. v. Maultsby*, 130 N. C., 664, cited and distinguished.

(127) SPECIAL PROCEEDING to establish a divisional line, instituted before the clerk of Pamlico County. The pleadings having raised the question of title, the cause was duly transferred to the civil-issue docket of said county and tried as an action to recover land, before *Lyon, J.*, and a jury, at Fall Term, 1916, of PAMLICO.

There was verdict for plaintiffs, judgment thereon, and defendants excepted and appealed.

Moore & Dunn for plaintiffs.
Ward & Ward and H. L. Gibbs for defendants.

HOKE, J. Defendants, among many other exceptions, object to the validity of the trial by reason of the manner in which the jury was selected, a number of them being talesmen, and the ground of his objec-

tion is very correctly set forth in his assignment of error, taken from the record, as follows: "When the jury was being selected the defendants objected to the sheriff's summoning the talesmen, there being a deficiency of several of the regular jury, on the ground that the plaintiffs were first cousins of the sheriff. His Honor ordered the deputy sheriff to summon the talesmen. In summoning the talesmen the deputy sheriff began reading from a list which he had in a book. Counsel for the defendants made inquiry as to the origin of this list, and the deputy sheriff said he had gotten them up himself. Nothing further was said about the matter at this stage."

"During introduction of the evidence it appeared that F. A. Lupton, together with his wife, Rena Lupton, had warranted the title to the plaintiffs to the land in controversy, and that said F. A. Lupton was the brother of the sheriff. After the verdict the sheriff stated, in the presence of his Honor and counsel for defendants, that he had selected the talesmen, constituting the list that his deputy read from in naming the talesmen selected on the jury to try this cause, two or three days before the trial of the cause. It appeared also that this cause had been set regularly on the calendar for trial at this term."

Under our law, a litigant has the legal right to have his cause tried before an impartial jury, selected according to the forms of law, and if he has not waived his objection nor been guilty of laches in insisting upon it, it is the duty of the court to see that this right is awarded him. To this end the power to summons talesmen is given the court inherent and approved with us by statutes, Revisal, sec. 1967, and, although the primary meaning of the term would imply that they are to be selected from the bystanders, it is the practice and within the powers of the court and of the executive officers, acting under its orders, to go outside for the purpose or to notify them in advance when such a course is best promotive of the ends of justice. *S. v. McDowell and Hart-* (128) *ness,* 123 N. C., 764. Under our system of procedure the executive duty of selecting these talesmen is primarily with the sheriff, or his deputies acting for him, but this matter is under the control and supervision of the court, and whenever it is made to appear that the sheriff has such an interest in the cause, direct or indirect, or bears such a relation to the parties thereto as to render him an improper or unsuitable person to perform this duty, the court may designate some other for the purpose. This power, too, has been expressly confirmed with us by statute. Revisal, sec. 1968, in terms as follows: "In the trial of any action before a jury, where the sheriff of the county in which the cause is to be tried is a party to, or has any interest in the action, or where the presiding judge shall find upon investigation that the sheriff of the

county is not a suitable person, on account of indirect interest in or relative to the cause of action, to be entrusted with the summoning of the tales jurors in any particular case pending, such judge shall appoint some suitable person to summon the jurors in place of the sheriff."

Recurring to the record, it appears that the rights of defendants, in the respects suggested, have not been sufficiently regarded in the present case, and we are of opinion that his objection to the validity of the trial, on that ground, must be sustained. Knowing that the sheriff was closely related to the parties plaintiff, defendants in apt time objected to his selection of the talesmen, and the court, after investigating the matter, decided that the sheriff was not a suitable person to act, and directed the deputy to select them. When the latter proceeded to do this from a list, counsel at once made inquiry, and was informed that the deputy had made out the list. In the further development of the case it appeared that, in addition to the sheriff being a first cousin of the parties, his own brother had conveyed the land in question to plaintiffs by deed, with covenants of warranty, etc.; that he had made out this jury list at the beginning of the term, and with this cause on the calendar for trial. On these facts, not controverted in the record, we are of opinion that defendants, as of right, are entitled to have the verdict set aside and the cause tried before another jury.

We are not inadvertent to decisions of our court holding that a verdict will not be set aside as a matter of right by reason of the partiality or natural bias of a juror when the objection is made for the first time after the verdict is rendered. *S. v. Maultsby,* 130 N. C., 664; *Baxter v. Wilson,* 95 N. C., 137; *Spicer v. Fulghum,* 67 N. C., 18. These were instances of individual jurors whose positions might or might not have affected the result, and an examination of the cases will disclose, too, that much stress is laid on the fact that the objection was made for the first time after verdict rendered and with an intimation that the
(129) litigant had not been sufficiently alert in ascertaining the conditions complained of. To our minds these authorities do not apply to the facts of this record where it appears that the defendants moved in apt time, insisted on their objection throughout, and this objection is made, not to the individual juror, but to the action of the executive officer in selecting a large number of the panel and by whose representations both the parties and the court were imposed upon.

Under the principles approved and applied in the well considered case of *Boyer v. Teague,* 106 N. C., 571, we are of opinion, as stated, that the verdict should be set aside and a new trial had.

Venire de novo.

Cited: S. v. Anderson, 208 N.C. 783.

THOMAS H. BOWEN v. W. A. POLLARD & CO., ET AL.

(Filed 14 March, 1917.)

1. Malicious Prosecution—Probable Cause—Burden of Proof—Trials—Evidence—Nonsuit.

In an action for damages for malicious prosecution the burden is on the plaintiff to show the institution and termination of the criminal action, that it was without probable cause and with malice, and that the defendant participated therein; and if there is evidence in plaintiff's behalf which, taken in the light most favorable to him, tends to establish the requisite facts, a judgment of nonsuit should not be granted.

2. Malicious Prosecution—Probable Cause—Evidence—Prima Facie Case.

Probable cause, in an action for malicious prosecution, is *prima facie* established by the fact that the committing magistrate in the criminal action required a bond for the appearance of the defendant therein at the Superior Court, and there the grand jury found a true bill against him, which the defendant may rebut by his own evidence in his action for malicious prosecution.

3. Malicious Prosecution—Probable Cause—Criminal Action—Evidence—Prosecutors.

Where a plaintiff in an action for damages for malicious prosecution has been arrested for using a part of a crop under attachment, and there is evidence tending to show that he owed defendants nothing, or had replevied the crop, or that the officer had not taken possession, but left it exposed for several weeks, when the plaintiff's wife, without his knowledge, had it housed and fed some to his team; that the officer who swore out the criminal warrant knew of these facts, offered to take $5 for the damages, which was agreed to by the lienee, etc., who, after conviction by the magistrate, refused to go on plaintiff's bond, with statement, he would not do this and prosecute him, too: *Held*, sufficient upon the question of want of probable cause in the criminal case, and that both the officer and lienee, defendants in the civil action, participated therein.

4. Malice—Probable Cause—Evidence.

Malice in prosecuting a criminal action may be inferred by the jury from a want of probable cause, in an action for damages for malicious prosecution.

5. Malicious Prosecution—Partnership—Knowledge.

A partner who is not aware of a criminal prosecution by the other, and was absent and did not know thereof until after its termination, is not liable, by the mere fact of partnership, in an action for damages for malicious prosecution.

CIVIL ACTION, tried before *Stacy, J.*, at January Term, 1917, (130) of PITT.

This is an action to recover damages for malicious prosecution, the evidence tending to prove the following facts: The plaintiff was living on his wife's land in Pitt County, and went to Pollard & Co. to obtain advancements for the year 1910 to the amount of $400. In accordance with the agreement made, Bowen executed a crop lien to Pollard & Co. on 25 January, 1910. About five weeks thereafter the defendant Pollard approached the plaintiff and requested, as the title to the land had been found to be in plaintiff's wife, that plaintiff and his wife sign the crop lien. This the plaintiff agreed to do, and in accordance with the desire of Pollard & Co., plaintiff and wife executed a new crop lien to the said defendants. At the time this was done, Mrs. Bowen, wife of the plaintiff, refused at first to sign unless one-third of the crop was excepted, as she was in debt for the land. Finally it was agreed that 5 acres should be excepted, and the exception of "5 acres in tobacco" was written in the mortgage.

Mrs. Bowen planted peas in the tobacco when it was laid by.

There is no definite evidence in the record as to how much the account of the Bowens amounted to for the year, but it was about $600.

The plaintiff introduced in evidence receipts to the amount of $590, which were admitted to be correct.

When the harvesting season came on Pollard & Co. received all of the plaintiff's crop and certain personal property.

This cause of action grew out of the efforts of Pollard & Co. to obtain the hay raised on Mrs. Bowen's 5 acres of tobacco excepted in the crop lien. They began an action against the plaintiff and his wife for the hay before a magistrate of Farmville Township, in which action papers in claim and delivery were issued.

When the claim and delivery papers were served upon the Bowens, the hay was not actually seized, but remained in the yard of plaintiff Bowen, with a statement of the officer not to move it before trial. An examination of the officer's return upon the fiat, in the record,
(131) shows that the officer states "The defendant having executed a good and sufficient undertaking as required by law, the said property was delivered back to the defendant."

After the trial the hay in question remained in the stack in the yard for several weeks, exposed to the weather and the depredations of stock, until finally Mrs. Bowen had her boys remove it and place it under shelter. She then used up about 300 pounds of the hay in feeding the team; but plaintiff testifies he had nothing whatever to do with this or the removal of the hay.

Some time after this the defendant Flanagan went to the home of the plaintiff and asked for the hay. He was the constable of Farmville

Township and the one who served the claim and delivery papers. According to his statement, there was as much as 1,000 pounds of the hay used, and he demanded pay for it, and says that Bowen promised to pay $5 for what was used, and that Bowen did not do what was promised; that he told Pollard about this, and Pollard said that $5 would be all right. Flanagan further states that he informed Pollard that the $5 was not paid.

Immediately afterwards Flanagan swore out the criminal warrant. Before the arrest Flanagan resigned and Bowling took his place, and made the arrest.

The new constable arrested Bowen and carried him under custody to Farmville. Upon arriving there, Bowen was taken to the store of Pollard & Co., and Pollard offered, upon the payment of $10 for the hay, to let Bowen go. Bowen did not have the money, and he was put in the town guardhouse for the night. The next morning he was taken out and tried before R. E. Belcher, a brother-in-law of the defendant Flanagan. At this trial Bowen was bound over to the Superior Court under $200 bond. Bowen endeavored to get the constable to carry him by the home of one Bill Elks, who lives on one of the roads running from Farmville to Greenville, where Bowen could have given bond, but the constable would not do this. The plaintiff was put back in the guardhouse and kept all that day and night, and was carried to Greenville next day.

After the trial of the case before the magistrate, Bowen was again carried to Pollard, and he asked Pollard to stand his bond. This Pollard refused to do, with a statement that he would not stand his bond after prosecuting him for the hay.

When the case was brought to trial in the Superior Court, the grand jury found a true bill, but upon the trial the presiding judge directed a verdict of not guilty.

It is in evidence that the defendants Pollard & Co. never ad- (132) vertised and sold the produce and chattels taken from the plaintiff, as required by law, but credited them at the price fixed by themselves.

There was other evidence, which is referred to in the opinion.

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

S. J. Everett and W. F. Evans for plaintiff.

F. G. James & Son and Skinner & Cooper for defendants.

ALLEN, J. The action is to recover damages for a malicious prosecution, and the burden is on the plaintiff to prove:

(1) The institution and termination of a criminal charge against him.
(2) That the prosecution was without probable cause.
(3) That it was with malice.
(4) That the defendants participated in the prosecution.

If, however, he has furnished evidence of these facts, giving to the evidence the most favorable construction for the plaintiff, as we are required to do on appeals from judgments of nonsuit, there is error.

It is not denied that a criminal prosecution was instituted against the plaintiff, and that it terminated by a verdict of not guilty before this action was commenced; but the defendants contend that probable cause is shown by the evidence of the plaintiff, and that there is no evidence of malice, or that the defendants took part in the prosecution.

"What is probable cause is a question of law, to be decided by the court upon the facts as they may be found by the jury." *Beale v. Robinson,* 29 N. C., 280; *Vickers v. Logan,* 44 N. C., 393. As a guide to the court, it is defined to be "the existence of circumstances and facts sufficiently strong to excite in a reasonable mind suspicion that the person charged with having been guilty was guilty. It is a case of apparent guilt as contradistinguished from real guilt. It is not essential that there should be positive evidence at the time the action is commenced, but the guilt should be so apparent at the time as would be sufficient ground to induce a rational and prudent man, who duly regards the rights of others as well as his own, to institute a prosecution; not that he knows the facts necessary to insure a conviction, but that there are known to him sufficient grounds to suspect that the person he charges was guilty of the offense." *Smith v. Deaver,* 49 N. C., 515, approved in *Wilkinson v. Wilkinson,* 159 N. C., 265.

The fact that the committing magistrate required the plaintiff to enter into bond for his appearance at court, and that a grand jury returned a true bill against him, establish probable cause *prima*
(133) *facie,* but not conclusively, and it was still open to the plaintiff to prove there was no probable cause. *Stanford v. Grocery Co.,* 143 N. C., 426.

Let us apply these principles to the evidence.

The charge in the warrant is that the plaintiff did "move and make way with hay after being attached," and it appears that the hay was not attached, but that it was seized in proceedings in claim and delivery.

The defendant Flanagan who served the papers in the claim and delivery proceedings and who made the affidavit for the warrant, does not testify that after the seizure of the hay he left it in charge of the plaintiff as his agent, if this could be done legally, nor does it appear that he made any effort to remove it.

He left it where it was on the land of the plaintiff's wife, and made return: "The defendant (the plaintiff in this action) having executed a good and sufficient undertaking, as required by law, the said property was delivered back to the defendant."

The plaintiff testified that the hay remained in the field more than a month after the papers in claim and delivery were served, when it was removed to a shelter by his wife and children in his absence, to protect it from stock, and that although about 300 pounds of the hay was used in feeding horses, on which the defendants Pollard & Joyner held a mortgage, and which were afterwards delivered to them, he had nothing to do with it, and so told Flanagan before the warrant was issued.

He also offered evidence tending to prove that the supplies furnished by Pollard & Co. amounted to about $600, and he produced receipts showing payments of $590, and, in addition, that he had delivered 15 bushels of cotton seed, and that the stock turned over to Pollard & Co. was not advertised and sold, and was credited at less than its value.

The wife of the plaintiff also testified "that instead of them owing Pollard (meaning Pollard & Co.), that Pollard was owing them."

If this evidence is true, and the jury alone had the right to pass on its credibility, the warrant was issued on the affidavit of the defendant Flanagan for unlawfully removing the hay, when there was nothing due Pollard & Co., which Pollard & Co. knew or ought to have known, and when the hay had been left with the plaintiff after he had given his bond for the return of the property, and when the plaintiff had told Flanagan he had nothing to do with the use or removal of the hay; and this is evidence of a want of probable cause, and malice may be inferred from a want of probable cause. *Humphries v. Edwards,* 164 N. C., 156.

The distinction between malice which is necessary to sustain the action and proof of malice which will justify awarding punitive damages is clearly stated and discussed by *Justice Hoke* in *Stanford v. Grocery Co.,* 143 N. C., 422.

There is, however, some evidence of actual malice in the evi- (134) dence of the plaintiff, in addition to the malice which may be inferred from the want of probable cause, and which alone is sufficient to sustain this element in the cause of action, which we will not discuss, as the action is to be tried again.

We have, then, evidence of malice and of a want of probable cause, and the remaining question is whether there is any evidence that the defendants or either of them participated in the prosecution.

Flanagan made the affidavit upon which the warrant issued, and the plaintiff testified that after his arrest he was carried to the store of

Pollard & Co. and that the defendant Pollard told him before the trial that if he would pay him $10 he would let him go back, and again after the trial that he would release him if he would pay him $10 for the hay; and when asked to stand his bond for his appearance at court, Pollard said: "You know I would not stand your bond after prosecuting you for the hay"; and this is evidence that these two defendants took part in the prosecution.

We find no evidence against the defendant Joyner.

He was absent from home when the prosecution was begun, and knew nothing about it, so far as the evidence discloses, until after its termination, and the mere fact that he was a partner of Pollard, without evidence, direct or circumstantial, of at least his knowledge, approval, or consent, would not be sufficient to connect him with the prosecution. *Gilbert v. Emmons,* 89 A. D., 412; *Rosankrans v. Barker,* 56 N. R., 169; *Noblett v. Bartsch,* 96 A. S. R., 886.

The judgment of nonsuit must, therefore, be set aside as to the defendants Flanagan and Pollard and sustained as to Joyner.

Reversed as to Pollard and Flanagan.

Affirmed as to Joyner.

Cited: Stancill v. Underwood, 188 N.C. 478; *Young v. Hardwood Co.,* 200 N.C. 312; *Dickerson v. Refining Co.,* 201 N.C., 93, 96; *Mitchem v. Weaving Co.,* 210 N.C. 735; *Mooney v. Mull,* 216 N.C. 413; *Miller v. Greenwood,* 218 N.C. 151; *Taylor v. Hodge,* 229 N.C. 560.

JOHN E. ODOM v. CANFIELD LUMBER COMPANY.

(Filed 14 March, 1917.)

1. Master and Servant—Dangerous Employment—Negligence—Assumption of Risks.

The fact that an employee engaged in helping to load a skidder on defendant's train, in the course of his employment, was aware of the danger of such work does not preclude his recovery for an injury resulting from the negligent and unexpected movement of the train, without the signal or warning customarily given under the circumstances. The instructions of this case upon the questions of negligence and proximate cause approved. *Pritchard v. R. R.,* 157 N. C., 102; *Mule Co. v. R. R.,* 160 N. C., 221.

2. Damages—Evidence—Mortuary Tables.

In an action to recover damages for a personal injury, the expectation of life tables, Revisal, 1626, are not conclusive, but merely evidential on the issue as to damages.

3. Master and Servant—Negligence—Scope of Employment—Orders—Volunteer.

The plaintiff, an employee of the defendant, while engaged, in the course of his employment, in loading a skidder upon a logging train, attempted to get a chisel for his superior, under his order, and was injured by the negligent movement of the train without signal or warning. *Held*, he was not a volunteer in so acting; and, if otherwise, the defendant had no right to negligently injure him.

4. Appeal and Error—Newly Discovered Evidence—Opinion—Discussion.

Upon motion in the Supreme Court to set aside the judgment appealed from for newly discovered evidence, the Court will grant or refuse the motion without discussion. *Johnson v. R. R.*, 163 N. C., 453, cited as decisive of this appeal.

ALLEN, J., dissenting; WALKER, J., concurring in dissent.

APPEAL by defendant from *Devin, J.*, at December Term, 1916, (135) of ONSLOW.

Duffy & Day and G. V. Cowper for plaintiff.

Frank Thompson, E. M. Koonce, Langston, Allen & Taylor, and Charles L. Abernethy for defendant.

CLARK, C. J. The plaintiff was an employee of the defendant, cutting wood, rafting logs, driving the loading horse, and working on the railroad. It was the custom, known to the company and employees, that the men rode to and from their work on defendant's log train, and a whistle always sounded a short time before the engine started to give them notice that the engine was ready to move.

On this occasion the skidder was being jacked up on the car by the usual method of jacking it up, letting the car go under it and then lowering the skidder down upon the car. The plaintiff was assisting in this work when Fred Garner, in charge of the skidder, told him to jump up on the engine and hand him down a cold chisel, and as he turned around to get off, the train started and made a hitch, and as plaintiff grasped the bracket block it gave way, throwing the plaintiff off, and the engine ran over his left foot. Joe Lockie testified that he was foreman, but Garner was in charge of the skidder; that he "was in charge of the whole business, but Garner was particularly in charge of the skidder." The plaintiff testified that no whistle was sounded or other warning given

after he was sent upon the engine to get the chisel. He also said: "The morning I was hurt I did not have that warning of the train (136) starting. It had never failed to give warning. That was the first time it failed to blow at that time, that I know of." He was corroborated by the witness Ed. Jones, and his father and mother, Mr. and Mrs. Odom, testified that foreman Lockie admitted to them soon after the injury that the whistle did not blow. Lockie himself says that it was current among the employees at the time that if the whistle had been blown the plaintiff would not have been hurt.

The defendant demurred in this Court for the first time that the complaint did not state a cause of action, but we cannot sustain the demurrer. The exceptions to the evidence and the charge have been considered, but we do not think they can be sustained, or that they need discussion. The case was almost entirely one of fact, and the jury have found the facts against the defendant. The definitions of negligence and of proximate cause were given practically as set out in *Pritchett v. R. R.*, 157 N. C., 102; *Mule Co. v. R. R.*, 160 N. C., 221. The charge as to proximate cause is in accordance with what was said in *Ward v. R. R.*, 161 N. C., 184; *Alexander v. Statesville*, 165 N. C., 532. The defendant contends that such charge conflicts with *Drum v. Miller*, 135 N. C., 204. But we do not see any conflict between these cases.

Exceptions 3, 4, 6, 7, 8, and 9 require no discussion. As to the fifth exception, the fact that the plaintiff was an employee and knew the dangers incident to operating the skidder did not relieve the defendant of giving usual notice by blowing the whistle. *Noble v. Lumber Co.*, 151 N. C., 78, and cases there cited. Exceptions 10 and 11 were to the statement of plaintiff's contentions, and the defendant made no exception at the time. The court told the jury that the mortuary tables in the Revisal were not conclusive, but merely evidential. *Sledge v. Lumber Co.*, 140 N. C., 461.

Exception 12 cannot be sustained, for there is no evidence that the plaintiff volunteered to hand the chisel to Garner. The plaintiff testified that he was directed by Garner to jump up on the engine and get the chisel, while the defendant's contention was that there was no chisel, and that plaintiff was not sent for it. Moreover, if he had volunteered to help Garner, being a workman under him, this would not have given defendant the right to negligently injure him.

There was also a motion in this Court to set aside the judgment and verdict on the ground of newly discovered testimony. This Court, in *Brown v. Mitchell*, 102 N. C., 374, stated: "This Court will, as a rule, in future grant or refuse such motions without discussing the facts embodied in the petitions or affidavits, as we cannot see that any good will

be accomplished by contributing another to the volumes that have been written upon the exercise of legal discretion" in such cases. This has been cited and approved in many cases, especially in *Herndon v. R. R.*, 121 N. C., 499, where the Court prescribed the practice in such cases and held that we would not hear oral argument on such (137) motions. This has been followed ever since, in *Crenshaw v. R. R.*, 140 N. C., 193; *Murdock v. R. R.*, 159 N. C., 132, and other cases. It may be well, however, to call attention to the summary of the rules as to the grounds of a valid motion as given by *Mr. Justice Walker* in *Johnson v. R. R.*, 163 N. C., 453. It does not appear in this case that the testimony of two witnesses which is now chiefly desired could not have been had if subpœnaed promptly, for they were both in the employ of the defendant company, and, moreover, their testimony would only have been cumulative.

No error.

ALLEN, J., dissenting: I am of opinion there ought to be a new trial on the issue of damages on account of the failure of his honor to restrict the recovery of prospective damages to their present value.

He nowhere told the jury that this was the rule for their guidance, and does not refer to present value, except in one place, when stating the contention of a party, and in this I think there is error. *Fry v. R. R.*, 159 N. C., 362.

WALKER, J., concurs in this opinion.

Cited: Cook v. Mfg. Co., 182 N.C. 209; *Taylor v. Construction Co.*, 193 N.C. 779; *Young v. Wood*, 196 N.C. 437; *Hubbard v. R.R.*, 203 N.C. 683; *Hancock v. Wilson*, 211 N.C. 135; *McClamroch v. Ice Co.*, 217 N.C. 110; *Starnes v. Tyson*, 226 N.C. 397; *Hunt v. Wooten*, 238 N.C. 47.

A. J. BRINSON ET ALS. v. DUPLIN COUNTY AND COUNTY COMMISSIONERS.

(Filed 14 March, 1917.)

Abatement—Statutes—Supreme Court—Counties.

A county and its commissioners having been ordered by the court, in mandamus, to build certain fences and borrow the necessary funds to pay for them (Revisal, 1310, 1), appealed to the Supreme Court, pending which an act was passed repealing the statute upon which the order was made. *Held*, the action abates in the Supreme Court upon presentation of a certi-

fied copy of the act. The costs of the Superior Court will be paid by defendant and those of the appeal equally divided between the parties.

APPEAL by defendants from *Lyon, J.*, January Term, 1917, of DUPLIN.

R. D. Johnson for plaintiffs.
L. A. Beasley for defendants.

CLARK, C. J. This is a mandamus against Duplin County (Revisal, 1310 (1); *Fountain v. Pitt,* 171 N. C., 114), and its commission-
(138) ers to compel the building of fences around the county, and around certain territories therein, and to borrow necessary funds to pay for the same, under the authority of chapter 512, Laws 1915. The court gave judgment in favor of the plaintiffs.

Pending the appeal by the defendants the General Assembly of 1917 has passed House Bill 919, Senate Bill 1305, to authorize Duplin County to issue bonds to build fences around said county and said territories therein, provided that a bond issue for $100,000 for said purpose shall be ratified by a vote of the people, and repealing chapter 512, Laws 1915, under which this proceeding was instituted.

The defendants' counsel present the certified copy of said act and move that this proceeding be abated. The motion must be allowed, *Wikel v. Comrs.,* 120 N. C., 451, and in accordance with the ruling therein, "the judgment for costs below is affirmed, and each party will pay his own costs in this Court, as the repealing statute was enacted before judgment here." To the same effect, *Herring v. Pugh,* 125 N. C., 437.

Abates.

Cited: Refining Co. v. McKernan, 179 N.C. 318; *Comrs. v. Blue,* 190 N.C. 643.

JOHN L. COTTRELL ON BEHALF OF HIMSELF AND OTHER TAXPAYERS, ETC., v. TOWN OF LENOIR.

(Filed 14 March, 1917.)

1. Constitutional Law—Statutes—Conditions—Vote of People—Municipalities.

A statute which authorizes a municipality to pledge its faith and credit or issue bonds for street improvements, requiring the approval of the voters, is constitutional, and becomes effective and existent only when the voters have regularly and affirmatively passed thereon.

2. Constitutional Law—Municipal Corporations—Faith and Credit—Bonds—Several Readings—Necessaries.

A legislative enactment authorizing a municipality to pledge its faith and credit, or issue bonds for improvements therein, is required by our Constitution, Art. II, sec. 14, to have been read three several times in each branch of the Legislature, on three different days, whether for necessaries or otherwise, and a statute passed for such purpose without meeting these requirements is invalid.

3. Constitutional Law — Statutes — Municipal Corporations — Faith and Credit—Bonds—Assessments—Collateral Bonds.

Where a municipality is authorized by statute to issue bonds for street improvements and to hypothecate therewith assessment bonds from the adjoining property owners, made a lien on their lands, and assessed in certain proportions, the bonds of the municipality are regarded as its separate and independent bonds, although they may ultimately be paid out of the proceeds of the collateral or assessment bonds.

4. Constitutional Law—Statutes—Invalid Amendments—Municipalities—Faith and Credit.

Where a valid charter of a municipality authorizing the issuance of its bonds has been subsequently amended with regard thereto, but upon condition that the proposition be submitted to the voters, which was never done, and the Legislature attempts to pass a still later law amending the former act, but which has not been done in accordance with the requirements of Article II, sec. 14, of our Constitution, the later acts are of no effect, leaving the charter of the town as to these provisions open, under the terms of which the bonds may yet be issued.

CIVIL ACTION, from CALDWELL, heard by *Cline, J.*, at Cham- (139) bers, in January, 1917, upon a motion for an injunction.

The plaintiff sued on behalf of himself and all other taxpayers of the town of Lenoir, similarly situated, who will come in and make themselves parties. The case grows out of the construction and operation of certain legislation in regard to paving and improving the streets and sidewalks of said town, as contained in its charter (Private Laws 1909, ch. 37); Private Laws 1915, ch. 202, amendatory thereof, and an act passed at the present session of the General Assembly and ratified on 9 January, 1917, and Public Laws 1915, ch. 56, entitled "An act relating to local improvements in municipalities" of the State. The original charter required the streets, bridges, and sidewalks of the town to be kept in repair in the manner and to the extent deemed best by the commissioners, who are vested with the power "to cause owners of lots to make and keep in good repair, at their own expense, sidewalks around their lots and to make rules, regulations, and orders" for this purpose. If the owners, after notice, fail to construct sidewalks or repair the same in such manner and out of such materials as the commissioners may direct, then the latter may cause the same to be done and apportion the cost

thereof between the town and such lot owners "in such ratio" as the commissioners may consider to be just and reasonable, the part of the cost and expense assessed against each owner on account of benefits received to be a lien on his lot along or in front of which such sidewalk is laid, and to be collected as are taxes.

Private Laws 1915, ch. 202, amended the town charter by providing for laying out avenues, streets, alleys, blocks, and lots, and for establishing districts or sections of streets and sidewalks for the purpose of assessment for the permanent improvement of the same. The assessments on adjoining or abutting property for the cost of the improvements are made liens on such property. It requires that the town shall improve the street intersections and pay therefor out of its general fund, and for the improvement of the streets it shall pay one-third of the cost and expense and one-half of the cost of improving the sidewalks, also out of its general fund. The court-house square is consti-
(140) tuted a separate taxing district for the improvement of which the town pays one-half and the abutting owners the other half. Provision is made for equalizing the assessments, for notice to the owners of the amounts assessed against each of them or their lots, and for payment of the same by the owner, and if not made, then for the collection of the same by the tax collector by sale. It is provided further that the town's share of the expense of all improvements made by contract or otherwise shall be paid out of the general fund, and not otherwise. The last section of this statute provides that it shall not take effect, or be in force, until its provisions have been approved by a majority of the people at an election to be held as therein prescribed, at which the question shall be "For change of charter" or "Against change of charter," and that if a majority vote against the change of the charter, the statute shall be void.

The statute of 1917 amends chapter 202 of Private Laws of 1915 by striking out all the provisions as to the payment of the city's share of the cost and expense of improvement "out of the general fund," as they appear in article 1 of the act, and by changing the mode of paying the assessments against property and by striking out all of article 3, which provides for the election. It then declares that "The provisions of sections 12, 14, 15, 16 and 17 of chapter 56 of the Public Laws of North Carolina, Session of 1915, be and they are hereby declared to be applicable to the said town of Lenoir as fully to all intents and purposes as though the said sections were set forth herein." Section 12 of the Public Laws of 1915, ch. 56, mentioned in the act of 1917, provides that the authorities of a town "may by resolution authorize its treasurer to borrow money to the extent required to pay the cost of any such (local) improvement or to repay any money borrowed under this section, with

interest thereon," and "provide for the issue of notes or certificates of indebtedness of the municipality, or both, payable either on demand or at a fixed time, not more than six months from the date thereof and bearing interest not exceeding 6 per centum per annum," which may be sold publicly or privately, or pledged as security for temporary loans, as may be directed by resolution of the governing body, and, further, that "any temporary indebtedness incurred hereunder, and interest, may be paid out of moneys raised by the issue and sale of local improvement bonds, or assessment bonds, or both, to be issued and sold as hereinafter provided, or may be included in the annual tax levy." Section 15 authorizes the issuing of assessment bonds by the town to pay in advance the cost of the improvement to the amount of the assessment against abutting property; and, further: "All moneys derived from the collection of assessments upon which assessment bonds are predicated, collected after the passage of the resolution authorizing such bonds, shall be placed in a special fund, to be used only for the payment (141) of the principal and interest of assessment bonds issued under this act; and if at the time of the annual tax levy for any year in such municipality it shall appear that such fund will be for any cause insufficient to meet the principal and interest of such bonds maturing in such year, the amount of the deficiency shall be included in such tax levy. The amount of the assessments for two or more improvements may be included in a single issue of assessment bonds." Section 16 prescribes the form and mode of execution of the assessment bonds, with the date of payment, and it and section 17 thus provide: "The bonds may be sold at public or private sale, but for not less than their par value. They shall recite that they are issued pursuant to the authority of this act and of the resolution authorizing the issuance thereof, which shall be conclusive evidence of their validity and of the regularity of their issuance. The full faith and credit of a municipality shall be pledged for the payment of the principal and interest of all of its local improvement bonds, assessment bonds, notes, and other obligations issued under this act. For the purpose of paying such principal and interest the governing body shall have power to levy sufficient taxes upon all the taxable property in the municipality and to borrow money temporarily upon notes of the municipality in anticipation of taxes of the same or the succeeding fiscal year." Section 2 and section 4 of chapter 56 of the Public Laws of 1915 read as follows:

"SEC. 2. This act shall apply to all municipalities. It shall not, however, repeal any special or local law or affect any proceeding under any special or local law, for the making of street, sidewalk, or other improvements hereby authorized, or for the raising of funds therefor,

but shall be deemed to be additional and independent legislation for such purposes and to provide an alternative method of procedure for such purposes, and to be a complete act, not subject to any limitation or restriction contained in any other public or private law or laws, except as herein otherwise provided."

"SEC. 4. Every municipality shall have power, by resolution of its governing body, upon petition made as provided in the next succeeding section, to cause local improvements to be made and to defray the expense of such improvements by local assessment, by general taxation, and by borrowing, as herein provided. No petition shall be necessary, however, for the ordering or making of private water, sewer, and gas connections as hereinafter provided. Nor shall a petition be necessary for the making of sidewalk improvements in those municipalities in which by other law or laws sidewalk improvements are authorized to be made without petition."

(142) It is admitted that Public Laws 1915, ch. 56; Private Laws 1909, ch. 37, and Private Laws 1915, ch. 202, were passed, as roll-call bills, in accordance with Constitution, Art. II, sec. 14, and that the act of 1917 was not so passed.

Plaintiff alleges in his complaint:

"7. Since the passage of said act of 9 January, 1917, the commissioners of the defendant town of Lenoir have ordered that the public square from its intersections with North, East, South, and West Main streets in said town, be permanently improved by paving same with concrete or other suitable material, in compliance with the provisions of said act of 9 January, 1917, and have given notice in a newspaper published in the town of Lenoir of such order, as set forth in chapter 202, Private Laws 1915, and have authorized the issuance of notes of said town to pay for the cost of said paving and advertising and offering to sell said notes to an amount not to exceed $50,000, and have by ordinance provided for the levy of a tax for the payment of said notes.

"8. Plaintiff is a citizen and taxpayer of said town, and complains as well for himself as for other taxpayers similarly situated, and is likewise a property owner in said town, having a lot which abuts upon the public square of said town and also on Mulberry Street, and said commissioners now propose to pave said public square under the provisions of said chapter 202, Private Laws 1915, as reënacted by the act of 9 January, 1917.

"9. By the ordinance adopted by defendant town under color of the acts above mentioned, plaintiff, if required to comply therewith, will be obliged to lay out and expend large sums of money in payment for such paving and will likewise be required to pay large sums of money as taxes

for the payment of the notes that will be issued for the payment of the principal and interest due upon said notes so proposed to be issued for the payment thereof, and the bonds thereafter to be issued for the funding of said notes. That the total indebtedness of the said town, after the issuing of the said notes or bonds in the sum of $50,000, will exceed the sum of 10 per cent of the assessed taxable property within said town.

"Plaintiff further alleges that the said action of said board in ordering said improvement was not based upon a petition of the property owners abutting on said public square, as provided in chapter 56, Public Laws 1915."

The allegations are admitted in the answer to be true.

The plaintiff alleges that the action of the defendant will be illegal, for the following reasons: (*a*) Chapter 202, Private Laws 1915, was passed as a 'roll-call bill,' and cannot be revived or reënacted by one not passed in the same manner. (*b*) The levying of an assess- (143) ment upon plaintiff's property to pay for the improvements contemplated by defendant on the public square or streets abutting his property, under the provisions of chapter 202, Private Laws 1915, as attempted to be revived by the act of 9 January, 1917, is the levying of a tax by defendant town, and since said act of 9 January, 1917, was not passed as a 'roll-call bill,' the said assessment is and will be invalid. (*c*) By reason of the act of 9 January, 1917, not being a 'roll-call bill,' any tax levied to pay notes issued by said town for the payment of its portion of the costs of improvement, or the bonds to be issued for the retirement of said notes, is and will be unauthorized, illegal, and void. (*e*) That the proposed increase of municipal indebtedness of defendant in an additional sum of $50,000 for the purposes hereinbefore set forth is for a special purpose and will increase the limit of defendant's indebtedness beyond that fixed by section 2977 of the Revisal, and such indebtedness will, therefore, be unauthorized."

The prayer is: "That defendant town of Lenoir be permanently enjoined and restrained from acting or attempting to act under the provisions of the said chapter 202, Private Laws 1915, and from selling or attempting to sell any bonds or issuing any notes for the payment of obligations incurred for street paving, or from acting or attempting to act under the provisions of the act of 9 January, 1917, and for general relief."

The judge, at the hearing, refused to grant the injunction, and plaintiff appealed.

S. A. Richardson for plaintiff.

Squires & Whisnant for defendant.

WALKER, J., after stating the case: The first questions are whether chapter 202 of the Private Laws of 1915 was in force when the act of 1917 was passed, and whether the last named statute was properly passed and is a valid enactment for the purposes therein set forth. It appears from the above recital of the several statutes, or the substance of them, that the provisions of chapter 202 were required to be submitted to the people for their approval or disapproval, and that it was not to have any force or effect until this was done and a majority of the voters cast their ballots in favor of their adoption and thereby authorized the change in the charter proposed to be made by them. It is not open to question now that the Legislature may provide that a statute shall not take effect or be in force until approved by the people at an election to be held for the purpose of ascertaining their will in respect thereto. That this can be done has been settled by nu-
(144) merous decisions of this Court, whatever may be the rule in other jurisdictions. This question was fully considered by the Court in *Manly v. City of Raleigh,* 57 N. C., 370, and the Legislature's power to pass such a statute was clearly demonstrated by *Chief Justice Pearson* in an exhaustive opinion, and it was said that *Thompson v. Floyd,* 47 N. C., 313, directly supports the conclusion reached by the Court. In *Cain v. Comrs.,* 86 N. C., 8, at p. 13, *Chief Justice Smith* says: "It has not been seriously questioned that the Legislature may make an enactment to take effect only upon the happening of a contingent event; but it has been earnestly maintained that when the event is the expression of the popular will, ascertained by an election, it is in effect a transfer of legislative power to the voters. In reference to this distinction, *Redfield, C. J.,* in an elaborate opinion delivered in *S. v. Parker,* 26 Vt., 357, says that 'The distinction attempted between the contingency of a popular vote and other future contingencies is without all just foundation in sound policy and sound reasoning.' Whatever differences may be found in the adjudications elsewhere, it is settled by the decision in *Manly v. Raleigh,* 57 N. C., 370, that such power may be exercised by the Legislature, and it is declared that 'When it is provided that a law shall not take effect unless a majority of the people vote for it, or it is accepted by a corporation, the provision is in effect a declaration that in the opinion of the Legislature the law is not expedient unless it be so voted (or accepted).' This principle underlies all 'local option' legislation and is fully recognized and established in this State," citing *Caldwell v. Justices,* 57 N. C., 323. The same learned judge said in *Evans v. Comrs.,* 89 N. C., 154, at p. 158: "This provision leaves the Legislature free to confer upon municipal organizations, the power to create debts and issue public securities in order to raise funds to meet those

'necessary expenses' when it may be deemed expedient, and the legislation may be made dependent on the result of a popular vote for its efficacy," citing *Manly v. City of Raleigh, supra; Newsom v. Earnheart,* 86 N. C., 391; *Hill v. Comrs.,* 67 N. C., 367. There having been no election as provided for in chapter 202 of the Private Laws of 1915, that statute is not in force, and has not been since its enactment, except for the purpose of holding an election, as therein required, to ascertain if the people approved it. A favorable vote of the people was the condition upon which its provisions should take effect, and this condition has not been complied with. That act being out of the way, we come to the next question, Has the act of 1917 any validity? It was evidently intended to operate as a whole, as a scheme for making improvements in the town, and contracting debts, and levying taxes, when necessary, or expedient, to execute the intention and purpose of the act. Authority is expressly given to do so, and the town authorities (145) actually intend to contract a debt and to levy taxes. The act of 1917 incorporates certain sections of chapter 56 of Public Laws of 1915, which confer broad and almost unlimited power to borrow money, issue bonds or notes, with interest, to be paid by the proceeds of the sale of "local improvement bonds or assessment bonds, or by an annual tax levy." The fact that this indebtedness may, perhaps, be ultimately discharged from the sale or collection of assessment bonds does not change or alter its character as an independent indebtedness of the town. We so held in *Charlotte v. Trust Co.,* 159 N. C., 388. The act expressly provides that the governing body "may issue notes or certificates of indebtedness of the municipality." These obligations, therefore, are those of the town, however they may be secured by collaterals or paid at maturity. In the case just cited it is said: "The act directs the board of aldermen to issue bonds of the city and sell them. The use of the word bond *ex vi termini* implies that the city is bound. As said by the United States Supreme Court in *Davenport v. County of Dodge,* 105 U. S., 237 (26:1018), a 'Bond implies an obligor bound to do what is agreed shall be done.' Also, in *Morrison v. Township of Bernards,* 25 N. J. Law, 219, *Chief Justice Beasley,* speaking of the force and effect of a direction in the statute that the township issue 'bonds,' says: 'A similar implication, but one of greater force, arises from the direction that bonds are to be given under the hands and seals of the commissioners, for an instrument of that kind cannot be created without the presence of an obligor; and, indeed, it seems like a solecism to say that the statute calls for the making of a bond, but that nobody is to be bound by it.' Not only that, but it is also held by the authorities that when the word 'bond' is used in connection with municipal obligations, designating what is commonly

called 'municipal bonds,' then this means negotiable bonds. This is expressly held in *Nalle v. City of Austin,* 22 S. W., 668. See, also, *McCless v. Meekins,* 117 N. C., 34; *Charlotte v. Shepard,* 122 N. C., 602." The act of 1917 is, therefore, clearly within the requirement of Constitution, Art. II, sec. 14, that "No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal." The section was construed in *Cotton Mills v. Waxhaw,*
(146) 130 N. C., 293, where the Court held: "This section of the Constitution makes no distinction whatever between 'necessary expenses' and unnecessary or extraordinary expenses, and we have no power to create any such distinction by judicial construction. Such a distinction is made only in Article VII, sec. 7, which is as follows: 'No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein.' We are, therefore, compelled to hold that no city or town can levy any tax or incur any debt for any purpose whatever unless the act authorizing such tax or debt is passed in accordance with the provisions of Article II, sec. 14, of the Constitution. Therefore, the charter of the town of Waxhaw, not having been so passed, confers no power of taxation."

The object in referring to certain sections of the public act of 1915 by their numbers was to incorporate them with the act of 1917 as a part of it, and to avoid the necessity of setting them out at full length or even extensively.

Our conclusion, therefore, is that chapter 202 of Private Laws of 1915 had never been in force and effect, and that the act of 1917 is within that class of statutes which are required to be read and passed in accordance with Constitution, Art. II, sec. 14, and this not having been done, it is not valid. Its character as a valid or invalid statute was not affected by the fact that chapter 56 of the Public Laws of 1915 was passed in compliance with Constitution, Art. II, sec. 14. The result is that the town of Lenoir may fall back upon its original charter of 1909, or it may, and we are inclined to the opinion that it can, proceed under chapter 56 of the Public Laws of 1915, if it chooses, in making

its local improvements; but it must comply with the provisions of that act in doing so.

As chapter 202 of the Private Laws of 1915 has had no vitality except for the purpose above indicated, it is apparent that the cases cited by the defendant's counsel (*Robinson v. Goldsboro,* 122 N. C., 214; *Lutterloh v. Fayetteville,* 149 N. C., 66) have no application to the question. In those cases the original statutes were in full force and effect in all their parts, and were not dependent for their operation upon any vote of the people or other condition. They were in force for all purposes designated in them from the day that they were ratified.

Counsel argued that the legislative will could not be defeated by the failure of the town officers to order and hold an election as required by the private act of 1915. This is not the question. The fact is that the election has never been held, and the Legislature had the power to declare, and did declare, that the act should have no force or effect (147) until ratified by the people at the polls. If it be said that the Legislature could strike out the provision as to the election, by the amendment of 1917, the answer is that it would be then undertaking to confer a new and *unconditional* power to contract debts and levy taxes, which was not done by the private act of 1915, and the act of 1917 for this reason should have been passed according to the requirements of Constitution, Art. II, sec. 14, and especially so when it originally granted a very broad power of contracting debts and levying taxes by adopting the sections of Public Laws of 1915, ch. 56, specified therein. We may also state that Public Laws of 1915, ch. 56, not only authorizes the contracting of a debt, the issuing of notes and bonds, and the levying of taxes, but by section 17 the full faith and credit of the town are pledged for the payment of all bonds, notes, and other obligations under the act. The amendment of 1917 created an absolute and unqualified power to tax and contract debts not given by the private act of 1915, which was a conditional one. Whether the town can proceed under Private Laws of 1915, ch. 202, to order an election is not before us, as it has not done so heretofore, and the act is not in force without it.

In any view of the case, we think the result we have reached is correct. There was error in refusing the injunction.

Error.

Cited: Guire v. Comrs. of Caldwell, 177 N.C. 518; *Penland v. Bryson City,* 199 N.C. 146.

THE BOARD OF COMMISSIONERS OF CALDWELL COUNTY v. SIDNEY SPITZER & CO.

(Filed 14 March, 1917.)

Municipalities—Counties — Bonds — Poor House — Necessaries—Constitutional Law.

The building of a county home is for a class of citizens without a place of residence, and beneficent provision for whom is recommended by our Constitution, Art. XI, sec. 7, "as one of the first duties of a civilized and Christian State"; therefore, providing for such a home being included in the idea of their support, a county may pledge its faith and credit and issue valid bonds for that purpose, as a necessary expense, without the approval of its voters.

CIVIL ACTION from CALDWELL, heard upon case agreed before *Webb, J.*, at Chambers, 13 February, 1917.

This is a controversy without action between the board of commissioners for the county of Caldwell and the defendant Sidney Spitzer & Co., to determine the validity of bonds issued by authority of an (148) act of the General Assembly, ratified 9 January, 1917. By that act the said commissioners were empowered to issue bonds, among other things, for the purpose "of securing site for and building a new county home for said county." These bonds were directed to be issued without a vote of the people. The defendant made a proposition for the purchase of the said bonds which the plaintiff board accepted. This proposition was made dependent upon the legality of the issue. Defendant, under the advice of its attorney, declined to complete the purchase, upon the ground that the said bonds to be issued under said act, $12,000 in amount, were not for a necessary expense of the said county, and that, therefore, a majority of the qualified voters of Caldwell County were required to sanction the issue to make said bonds legal under the provisions of Article VII, section 7, of the Constitution of North Carolina. The only question presented is the one as to whether the procuring a site for and building a new county home is a necessary expense of the county of Caldwell.

Judgment was rendered in favor of the plaintiff, declaring said bonds valid and adjudging the recovery of the purchase price thereof, and the defendant excepted and appealed.

Squires & Whisnant for plaintiff.
B. F. Williams for defendant.

ALLEN, J. It is declared in Article XI, section 7, of the Constitution that "Beneficent provision for the poor, the unfortunate, and orphan"

is "one of the first duties of a civilized and Christian State," and in accordance with this spirit, which pervades the Constitution, it was held in *Jones v. Comrs.*, 137 N. C., 579, and affirmed in *Keith v. Lockhart*, 171 N. C., 451, that the "support of the aged and infirm," which is the designation given by statute to the poor of the county (Revisal, sec. 1327; *Copple v. Comrs.*, 138 N. C., 132), is a necessary expense.

The word "support" has a variety of meanings and does not necessarily include the building of a home; but when considered in connection with the class to be benefited, many of whom are without a place of residence, and the policy of the State to maintain the poor at some permanent and established place, support includes shelter, a place to live, and this makes it necessary to build a county home, without which the duty enjoined upon the commissioners could not be performed.

It follows that the bonds in controversy are valid and that the defendant must accept and pay for them.

Affirmed.

Cited: Caldwell County v. George, 176 N.C. 604; *Slayton v. Comrs.*, 186 N.C. 701, 702; *Goodman v. Comrs.*, 196 N.C. 258; *Martin v. Comrs., of Wake*, 208 N.C. 366; *Board of Managers v. Wilmington*, 237 N.C. 189.

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MARGARET EVANS v. M. F. BRENDLE.

(Filed 14 March, 1917.)

1. Judgments—Decrees—Middle Names—Correction.

Where a decree, in a proper action, converts a deed absolute upon its face into a mortgage or deed in trust to secure borrowed money, and it is ascertained that therein the money has been paid, and the mortgagor, holding the equitable title with the naked legal title outstanding, has directed the decree to be made to his wife, but whose middle initial has therein been incorrectly stated by mistake, but her identity as the one intended established as a fact: *Held*, the variation in the middle letter of the name is immaterial, the law recognizing only one Christian name, and it is not required that suit be first brought to correct the decree.

2. Same—Naked Legal Title—Transferee of Title—Parties.

As to whether the decree in this case had the effect of vesting the legal title in the holder of the equitable title, not declaring in conformity with the requirements of Revisal, secs. 566, 567, that "it shall be regarded as a deed of conveyance," *quære;* but it appearing from the decree that a mere naked title was outstanding in a mortgagee, and that the mortgage debt had been paid: *Held*, the mortgagor, the owner of the equitable title, had

a right to demand the conveyance of the legal one, or that it be decreed to himself or to such other as he might designate, in this case his wife, though she had not been made a party to the suit, and their deed would pass a complete title to their purchaser.

3. Judgments—Equity—Trusts—Estates—Rights—Execution—Deeds and Conveyances.

Where it is shown on the face of the writing that one person holds the legal title to lands in trust for another, in whole or in part, the latter has an equitable estate, which is subject to execution under judgment against him, though it may be necessary for him to enforce his claim in equity; but where there is no declaration of the trust appearing in the instrument, and the holder of the legal title denies the equitable one, requiring a decree to enforce it, the latter, until the decree is entered in his favor, has a mere right, and no estate subject to execution.

4. Same—Purchaser.

Where pending a contested suit to declare a deed absolute upon its face into a mortgage, a judgment has been obtained against the one asserting his right, and the lands sold under execution, and thereafter the equity sought in the suit has been established by decree of court: *Held*, the purchaser at the execution sale, or his grantee, acquired no title to the lands, as the judgment debtor had no estate in the lands at the time of the sale.

CLARK, C. J., dissenting; BROWN, J., concurring in the dissenting opinion.

CIVIL ACTION, tried before *Cline, J.*, at Spring Term, 1915, of SWAIN.

(150) This is an action to recover land, both parties claiming title under Lee Fuller.

On 28 January, 1896, Lee Fuller executed a deed to H. T. Jenkins purporting to convey said land to him in fee.

In the spring of 1898 he commenced an action, to which his wife, S. J. Fuller, was not a party, alleging that the deed of 28 January, was intended as a security for a debt, and that certain clauses had been omitted by mistake, and at July Term, 1902, of Swain Superior Court the following judgment was rendered in said action:

LEE FULLER *v.* HENRY T. JENKINS.

This cause coming on to be heard on motion of the plaintiff for judgment in accordance with the judgment and opinion of the Supreme Court in this action:

It is ordered, adjudged, and decreed by the court that it appearing and having been made to appear that the plaintiff paid into the office of the clerk of the Superior Court of Swain County the sum of $9.95 the amount which was required to be paid by the opinion of the Su-

preme Court; that the defendant H. T. Jenkins shall execute and deliver to S. H. Fuller, her heirs, a deed conveying the title to the land, which is described as follows:

"Beginning on a stone in the ford of the branch, it being the Jones corner, and runs south 49½ west 22 poles to a stake with pointers; thence south 32 east 12 poles to a small black oak; thence south 32 east with Charles Jenkins' line 26 poles to a stake on the north side of a large gully; thence north 83 east . . . poles to a stake in the branch; thence north 15 west 23 poles to a stake in the branch; thence down the branch as it meanders to the beginning, containing 11½ acres, situated in Swain County, Charleston Township."

It is further ordered, adjudged, and decreed by the court that the title to the said tract of land be and the same is hereby divested out of the defendant, H. T. Jenkins, and that the title to the same is hereby vested by this decree in said S. H. Fuller and her heirs. It is further ordered and adjudged by the court that the plaintiff have and recover of the defendant H. T. Jenkins, and his surety of his defense bond, Charles Jenkins, the cost incurred in this action, to be taxed by the clerk.

(Signed) M. H. JUSTICE.

On 15 January, 1903, Lee Fuller and wife, S. J. Fuller, executed a deed to the plaintiff purporting to convey said land in fee.

The judge finds as a fact that Lee Fuller directed his counsel who drew the decree at July Term, 1902, to convey this land to Fuller's wife, S. J. Fuller, but by mistake he named S. H. Fuller in the (151) decree. The judge also finds that the person intended was Josephine Fuller, the wife of Lee Fuller, who had by name of Josephine Fuller joined in the conveyance to Henry T. Jenkins on 28 January, 1896, and that the intention was to convey the land to her by this decree, and that S. J. Fuller and Josephine Fuller are one and the same person and that she is the person who by mistake was named as S. H. Fuller in said decree, and that she has never been known as S. H. Fuller, but by mistake in drawing the decree she was designated S. H. Fuller instead of S. J. Fuller.

In the meantime judgment had been obtained 9 January, 1900, in the Federal Court against Lee Fuller on a distiller's bond, which judgment was docketed in Swain, 21 February, 1900. This tract of land was sold under execution on said judgment on 7 May, 1900, at which sale the United States became the last and highest bidder and the deed was made accordingly, 23 May, 1900, and duly registered. On 11 March, 1900, under proceedings in accordance with law, the Commis-

sioner of Internal Revenue conveyed said tract to the defendant M. F. Brendle.

On these facts judgment was rendered in favor of the plaintiff, and the defendant excepted and appealed.

Frye & Frye for plaintiff.

A. J. Franklin and Bryson & Black for defendant.

ALLEN, J. It was contended before us that the decree in the action of *Lee Fuller v. Jenkins* did not carry the title to S. J. Fuller, because of the mistake in the second initial, and that it would first be necessary to bring an action to correct the decree. This is unnecessary under our system of procedure, combining legal and equitable remedies. As it is found as a fact that S. J. Fuller was intended when by mistake S. H. Fuller was named, and that S. J. Fuller, the party named, is Josephine Fuller, the wife of Lee Fuller, who joined in the conveyance to Jenkins in 1896, and who, with her husband, made the subsequent deed to the plaintiff in January, 1903, this is sufficient if the grantee (by whatever name) obtained the title under such decree. The name used is merely a designation to identify the party, and when that identity is established a variation in name, and especially a difference in the middle letter, as S. H. Fuller instead of S. J. Fuller, is immaterial.

In Words and Phrases (Second Series), under the title "Name," it is said: "The common law recognizes but one Christian name, and a middle initial may be dropped or changed at pleasure." It is further said: "In law the name of a person consists of one given name and one surname."

(152) The plaintiff in her amended complaint sets out the decree of 1902 as a part of her title, and alleges that it had the effect of passing to the wife of Lee Fuller a perfect equitable title, if not a legal title, and to these allegations the defendant makes no answer, nor does he allege that the direction in the decree to make the title to the wife was fraudulent.

There is also no evidence of an adverse possession by the defendant and those under whom he claims prior to 1909, about five years before suit brought; so that there is no evidence of seven years adverse possession under color.

There are, therefore, two questions, which are determinative of the appeal:

(1) Did the wife of Lee Fuller acquire a legal or equitable title to the land in controversy under the decree of 1902?

(2) Did the sale by the marshal of the United States, under which the defendant claims, pass a legal or equitable title to the purchaser?

The plaintiff may maintain her action against the defendant upon an equitable title (*Watkins v. Mfg. Co.,* 131 N. C., 537, and cases cited), and if the decree vested such a title in her grantor, and it was not divested by the sale by the marshal, which has the legal effect of a sale under execution, she is entitled to recover; and, on the other hand, if the grantor of the plaintiff acquired no title, legal or equitable, under the decree, or if there was such title and it was divested by the sale, she cannot recover.

It is doubtful if the decree had the effect of vesting the legal title in the wife of Lee Fuller under the statute (Revisal, secs. 566-7), because of the failure to declare that it "shall be regarded as a deed of conveyance" (*Morris v. White,* 96 N. C., 93), although the authority cited appears to give a narrow construction to the statute, and to attach more importance to the section declaring the effect of the decree than to the one prescribing its form; but however this may be, it appears from the record in the action of *Fuller v. Jenkins* that Jenkins, by force of the decree, held the legal title in trust to secure an amount due him, and then in trust for Lee Fuller, and that the amount due was paid, and this left the bare legal title in Jenkins and the beneficial interest and equitable estate in Lee Fuller, which he had the right to direct should be vested in his wife, although she was not a party. *Testerman v. Poe,* 19 N. C., 103; *Campbell v. Baker,* 51 N. C., 256; *Ward v. Lowndes,* 96 N. C., 381.

The last case cited was that of a purchase at a judicial sale by the husband, and a direction by him to make title to his wife, who was not a party, and the Court says: "The purchaser of the land, Lowndes, directed the deed for it to be made to his wife, and the administrator did so make it. This is made a ground of objection by the (153) plaintiffs. It seems to us to be wholly without merit. The purchase money was paid as required by the order of the court, and the administrator was directed to make title to the purchaser. Why might he not make it to such person as the purchaser directed—to his wife? His power to convey to the purchaser was complete; the purchaser was entitled to have the deed made to him. Why not to have it made to such person as he might indicate? We can see no legal reason why he was not." The fact that the deed was not executed only affects the legal and not the equitable title.

We are, therefore, of opinion that the decree vested the equitable title in the wife of Lee Fuller; but if this was not so, the equitable title was in Lee Fuller and passed to the plaintiff under the deed of Lee Fuller and wife.

Did the purchaser at the sale by the marshal acquire a legal or equitable title? and this depends on whether Lee Fuller had at that time, two years before the decree in *Fuller v. Jenkins,* an estate in the land subject to sale under execution, or a mere right.

The distinction between a right to have an equity established and enforced, which is not the subject of sale under execution, and an equitable estate, which may be sold, if "simple and unmixed," that is, one which entitles the owner to call for the legal title, is well established. *Thompson v. Thompson,* 46 N. C., 38; *Bond v. Hilton,* 51 N. C., 181; *Nelson v. Hughes,* 55 N. C., 36; *Taylor v. Dawson,* 56 N. C., 91; *Hinsdale v. Thornton,* 75 N. C., 383; *Henley v. Wilson,* 77 N. C., 218; *Cedar Works v. Lumber Co.,* 168 N. C., 396.

The Court says in the first of these cases: "The ground of distinction consists in the difference between a trust created by the act of the parties, where he who has the legal estate consents to hold it in trust for the other, and there is no adverse possession or conflict of claims, and a trust created by the act of a court of equity, where there is a conflict of claims, and the party having the legal estate holds adversely and does not become a trustee until he is converted into one by a decree founded on fraud, or the like. In the former the *cestui que trust* has an estate; in the latter there is a mere right"; in the second, "In equity, where the trust is by agreement of the parties, we say the *cestui que trust* has the *estate;* but where a decree is necessary, in order to convert one into a trustee against his consent, the party has a mere *right";* in the third, "'A right' to property is not subject to execution at common law; the debtor must have an 'estate'; consequently, 'a right' to have one declared a trustee is not subject to execution under the statute; the debtor must have a subsisting trust—an 'estate'—as distinguished from a mere 'right in
(154) equity'"; in the fourth, "All trusts are either *by agreement of the parties,* as where there is a declaration to that effect, or where a trust is implied or presumed, as a resulting trust, or where one buys land and has the title made to a third person; or *against the assent of the party who has the legal title.* . . . In the former there is no adverse holding or conflict of claim between the trustee and *cestui que trust;* the one holds by agreement the legal title for the other, who has the *estate in equity.* In the latter there is an adverse holding and conflict of claim; the one holds the legal title for himself or some third person, who has a privity, or is in collusion with him (as in our case), and the other has but a right in equity or chose in action"; in the fifth, "Where one has only a *right in equity* to convert the holder of the legal estate into a trustee, and call for a conveyance, the idea that this is a *trust estate,* subject to sale under *fi. fa.,* is new to us. True, his right to call for the

legal estate is not subject to any further consideration than proof of the facts alleged in support of his right, but there is no *trust estate* until the decree declares the facts and the court declares its opinion to be that the one party shall be converted into a trustee for the other. It follows that the party has no estate subject to execution sale until the decree has vested an equitable estate in him," and the other cases cited are to the same effect.

The principle clearly deducible from these authorities is that if it appears on the face of the writings that the legal title is in one, but that it is held in whole or in part for the benefit of or in trust for another, the latter has an estate, although he may have to go into a court of equity to enforce his claim; but if there is no declaration of the trust, and the holder of the legal title denies the right, and the one claiming a beneficial interest is compelled to invoke the aid of a court of equity to establish the facts upon which his right depends, he has no estate until the decree is entered in his favor.

We repeat here the language of *Pearson, C. J.*, in *Bond v. Hilton,* that "When a decree is necessary in order to convert one into a trustee against his consent, the party has a mere right," and in *Hinsdale v. Thornton,* "There is no *trust estate* until the decree declares the facts and the court declares the opinion to be that the one party shall be converted into a trustee for the other. It follows that the party has no estate subject to execution sale until the decree has vested an equitable estate in him."

At the time of the sale by the marshal the title was in Jenkins, who held under a deed, in which there was no declaration of a trust or other evidence of an equity, and who denied that he held the title as a security; a decree was necessary to establish the facts upon which the right of Lee Fuller rested; the sale was two years before the entry of the decree, and it follows that Fuller had at that time a mere (155) right, which was not subject to sale, not an estate, and that the purchaser acquired no title; and this is in line with the policy of our law which discourages the sale of uncertain and speculative interests.

The title was in Jenkins under a deed absolute, and there was nothing on the record to suggest that Fuller had either right, title, interest, or equity in the land. An action was pending in which Fuller alleged that the clause of defeasance had been omitted from the deed to Jenkins by mistake and that it was intended as a security for debt, and this was denied by Jenkins. It was under these conditions the sale was made, when Fuller had nothing for sale except a lawsuit, and it is not surprising that the purchase price was $1, which is less than 9 cents per acre for the land in controversy.

We, therefore, hold that the plaintiff has at least an equitable estate, and that as the defendant acquired no title under the sale by the marshal, she is entitled to recover.

There is much authority in support of the position that if Fuller had an equitable estate it was not one subject to sale under execution, because not a simple equity (*Gillis v. McKoy,* 15 N. C., 174; *McGee v. Hussey,* 27 N. C., 258; *Battle v. Petway,* 27 N. C., 578; *Williams v. Council,* 49 N. C., 214; *Tally v. Reid,* 72 N. C., 337; *Love v. Smathers,* 82 N. C., 373; *Mayo v. Staton,* 137 N. C., 685), and there is also authority that the act of 1812 includes all equities of redemption (*Thorpe v. Ricks,* 21 N. C., 618; *Davis v. Evans,* 27 N. C., 534; *Doak v. Bank,* 28 N. C., 330; *Frost v. Reynolds,* 39 N. C., 498), although these cases are based on *Thorpe v. Ricks* in which the right to redeem was in writing; but it is not necessary to discuss this question, as there was no *estate* in Fuller at the time of the sale.

Affirmed.

CLARK, C. J., dissenting: This was an action of ejectment. The parties waived a jury trial and agreed that the judge should find the facts and apply the law thereto and render judgment. It was conceded that both parties claimed title under Lee Fuller as the common source. The defendant admitted that he was in possession, holding adversely to the plaintiff.

In 1896 Lee Fuller was the owner in fee of the *locus in quo* (11½ acres of land). On 28 January, 1896, he executed to H. T. Jenkins a deed which upon its face purported to be in fee, conveying to him the said tract, which deed was duly registered. To Spring Term, 1898, of Swain he brought an action against Jenkins to have the said deed declared a mortgage. Judgment was rendered in favor of defendant at July Term, 1901, of Swain, but on appeal this Court held, in
(156) *Fuller v. Jenkins,* 130 N. C., 554, opinion filed 27 May, 1902, that said deed, upon the facts found, was a mortgage. When the opinion went down, by arrangement between the parties the debt was settled, and a judgment was entered at July Term, 1902, of Swain, conveying the title to the wife of Lee Fuller, who was not a party to the action, and, so far as it appears, without any consideration. The decree did not direct that it should be recorded as a conveyance, and, besides, Revisal, 566, 567, authorizes such decree only as to a party or *cestui que trust,* and Lee Fuller's wife was neither.

In the meantime judgment had been obtained, 9 January, 1900, in the Federal court against Lee Fuller on a distiller's bond, which judgment was docketed in Swain 21 February, 1900, and was a lien from that date.

Revisal, 576. This tract of land was also levied upon 27 March under execution from the Federal court on that judgment, and after due advertisement was sold on 7 May, 1900, at which sale the United States became the last and highest bidder and the deed was made accordingly 23 May, 1900, and duly registered 11 June, 1900. On 11 March, 1909, under proceedings in accordance with law, the Commissioner of Internal Revenue conveyed said tract to the defendant M. F. Brendle, which deed was duly recorded in Swain 2 April, 1909. The levy and return of sale merely mentions the "11½ acres of land, the property of Lee Fuller." But docketing the judgment gave the lien without describing any property, and the conveyance by the United States marshal to the United States and the later conveyance to the defendant sufficiently described the property, which is admitted to be the *locus in quo,* and both these deeds were duly registered.

The judge finds as a fact that Lee Fuller directed his counsel who drew the decree at July Term, 1902, to convey this land to Fuller's wife, S. J. Fuller, but by mistake he named S. H. Fuller as the grantee. The judge finds as a fact that the person intended was Josephine Fuller, the wife of Lee Fuller, who had by name of Josephine Fuller joined in the conveyance to Henry T. Jenkins on 28 January, 1896, to release her dower, and that the intention was to convey it to her by this decree, and that S. J. Fuller and Josephine Fuller are one and the same person, and that she is the person who by mistake was named as S. H. Fuller in said decree, and that she has never been known as S. H. Fuller, but by mistake in drawing the deed she was designated S. H. Fuller instead of S. J. Fuller.

On 15 January, 1903, Lee Fuller and wife, S. J. Fuller, conveyed said tract of land to plaintiff Margaret Evans, which was duly recorded in Swain.

It was earnestly contended before us that the decree conveying the property to S. H. Fuller, even though S. J. Fuller was intended, did not carry the title, and that it would first be necessary to (157) bring an action to correct the deed. This is unnecessary under our system of procedure combining legal and equitable remedies. As it is found as a fact that S. J. Fuller was intended when by mistake S. H. Fuller was named, and that S. J. Fuller, the party named, is Josephine Fuller, the wife of Lee Fuller, who joined in the conveyance to Jenkins in 1896, and who made the subsequent deed, her husband being joined, to the plaintiff in January, 1903, this is sufficient if the grantee (by whatever name) obtained the title under such decree. The name used is merely a designation to identify the party, and when that identity is

established a variation in name, and especially a difference in the middle letter, as S. H. Fuller instead of S. J. Fuller, is immaterial.

In Words and Phrases (second series), under the title "Name," it is said: "The common law recognizes but one Christian name, and a middle initial may be dropped or changed at pleasure." It is further said: "In law the name of a person consists of one given name and one surname."

In this State our statutes have indicated the comparative unimportance of an exact identity in name when the identity of the person is shown. For instance, it is provided that if the name of a payee is wrong, yet he may endorse the bill in that name or in his own. Revisal, 2192; or if a defendant in a civil action is erroneously named, this may be corrected by amendment, Revisal, 510; and in criminal actions, if the defendant is wrongly named, upon his making a plea to that effect, instead of quashing the indictment the court will change the name to accord with the defendant's plea. There are many other instances showing that the question depends upon the identity of the person and not the accuracy in naming the person. When a woman marries she changes her surname in this and many other countries (though not in Spain and other Spanish-speaking countries), and usually substitutes the initial of her maiden name for the former middle initial. In England when a man is raised to the peerage his name is changed, as when John Churchill became Duke of Marlborough, or John Scott became Lord Eldon. A pope on his election always changes his name.

A young man who obtained his license to practice law and was elected to the Legislature as Thomas Carter Ruffin became Chief Justice of this Court as Thomas Ruffin. In the same way Stephen G. Cleveland became Governor of New York and President as Grover Cleveland. He who graduated at college as Thomas W. Wilson became Governor of New Jersey and President of the United States as Woodrow Wilson, and Hiram U. Grant, having been accidentally misnamed in his appointment to West Point as Ulysses S. Grant, bore that name as commander in chief of the armies and President of the United States. Under his
(158) *non de plume* Mark Twain became famous, but was comparatively unknown as Samuel L. Clemens; so Voltaire's real name was Arouet, and Moliere's true name was Poquelin. Among numerous other instances was the private soldier, Victor Perrin, who became Marshal Victor, and another of Napoleon's marshals, Jean Baptiste Jules Bernadotte, ascended the throne of Sweden and Norway as Charles XIV, John. These and numerous other cases instance the correctness of the common-law rule that it is the identity of the person and not the

identity of the name which governs. The finding of the judge settles that it was Josephine Fuller who was intended as grantee, instead of S. H. Fuller, in the decree of the court at July Term, 1902.

The decree, however, attempting to convey title to the wife of Lee Fuller did not have any effect, for it is not authorized by the statute, Revisal, 566, 567, because of the failure to declare that it "shall be regarded as a deed of conveyance." *Morris v. White,* 96 N. C., 93, which holds that a decree does not operate as a conveyance unless it expressly declares that it shall be so regarded. In that case it is said: "It is essential that it shall so declare to give it the full effect of a proper conveyance of the land. It seems probable that the court intended that it should have such effect, but it is not sufficient for that purpose. Such statutory provisions must always be strictly observed as to their essential provision."

The plaintiff must recover upon the strength of her own title; and this alleged conveyance by virtue of the decree of the court is invalid for the further reason that it has not been registered in the manner required by Revisal, 568, which provides: "The party desiring registration of such judgment shall produce to the register a copy thereof, certified by the clerk of the court in which it is enrolled under the seal of the court, and the register shall record both the judgment and certificate." The attempted certificate of the clerk upon which his attempted registration was had shows that there was no compliance with the language of the statute, Revisal, 568, and it was error to admit it in evidence. There is no seal of the court attached, and the certificate does not certify that it is made "under the seal of the court," but only "Witness my hand and official signature." The judgment not having been properly recorded would not avail the plaintiff, even if color of title, *Janney v. Robbins,* 141 N. C., 400; and the plaintiff cannot allege color of title, for she has shown no possession at any time in herself or in S. J. Fuller. Even if the court had been authorized to render such judgment, it had no authority to do so, for two distinct reasons: There were only two parties to the action in which this judgment was rendered, Lee Fuller and H. T. Jenkins, and the purpose of that action was to have a certain deed, which was upon its face a conveyance in fee, declared a mortgage and a reconveyance to plaintiff ordered. (159) On reference to the decision of this Court in *Fuller v. Jenkins,* 130 N. C., 554, it will be seen that judgment was rendered for defendant in the court below, which was reversed here, with a direction that "The defendant (Jenkins) should reconvey, and in default of payment by plaintiff (Lee Fuller) of balance due by a day named, there should be a foreclosure. Upon the certificate of this judgment of this Court nothing

remained to be done by the Superior Court but to enter judgment in accordance with this opinion. Instead of complying, the lower court attempted to adjudicate and vest the title in one S. H. Fuller, who was not a party to the action nor had, in so far as it is shown, any right or interest therein. Such action was not authorized and was not color of title, even if the plaintiff had shown possession.

Moreover, such judgment decreeing title to be conveyed to one not a party to the action is unwarranted by the statute, Revisal, 586, which provides that the court may enter such judgment only as to "parties to the action unless the property is to be held in trust for another."

This method of ordering a decree of court to operate as a conveyance of the legal title as if by deed is purely statutory, and, as said in *Morris v. White, supra,* there is no validity in cases provided by the statute, Revisal, 566, even when its terms are strictly complied with, which was not done here, for the decree does not provide that it "shall be regarded as a deed of conveyance," nor was it certified and registered as required by the statute, nor was it made in favor of a party to the action.

The wife of Lee Fuller was not a party to the action nor was the title directed to be conveyed to her in trust for another. This statute was passed in consequence of an instance in Hertford County where the court having ordered a defendant to execute a deed, he refused to obey and lay in jail under an attachment for contempt until this statute was passed. It was enacted to provide for such cases and for cases in which the parties directed to pass the title are out of the jurisdiction of the court or are minors or *non compos.* The party to whom such title could be made under such decree of the court was specified to be "parties to the suit," or one who is named as trustee for such person. The wife of Lee Fuller, therefore, was not one in whose favor such decree could direct the title to be conveyed.

Besides, the absolute invalidity, for the reasons given, of the decree to put the title in S. H. Fuller, the judgment of this Court which held that a conveyance by Lee Fuller to H. T. Jenkins, 28 January, 1896, was a mortgage necessarily decreed that it was a mortgage on the date of its execution, for it was not based on anything occurring thereafter,

(160) and, therefore, when the judgment of the Federal court was docketed in Swain County and this tract of land was sold thereunder 7 May, 1900, Lee Fuller held the land subject to the mortgage of $30 by virtue of the agreement made at the time the deed was executed, as held by this Court. The interest of Lee Fuller was, therefore, not a mere right in equity, but an equity of redemption, which this Court held entitled him to reconveyance upon payment of the $30 with interest from the date of the deed. Such equity of redemption was

subject to sale and was conveyed by the deed to the United States for such property. Revisal, 629 (3); *Davis v. Evans,* 27 N. C., 525; *Mayo v. Staton,* 137 N. C., 670. The only legal effect of the judgment entered at July Term, 1902, of the court below upon the certificate from this Court was an acknowledgment by Fuller and Jenkins that the encumbrance had been paid off. The equity of redemption which passed by the execution sale against him thereupon became the unencumbered title which later passed to the defendant by the deed from the Commissioner of Internal Revenue under the authority of the United States when the defendant took possession, which he still holds. By the decision of this Court Fuller had the right to call upon Jenkins, at the very time the sale was made under execution, to reconvey this property upon payment of the $30 and interest.

The whole subject is fully discussed in *Mayo v. Staton,* 137 N. C., 670, which holds that while a mixed trust cannot be sold under execution, "an equity of redemption, whether created by mortgage deed to the creditor or to a third person, with or without power of sale, may be sold under execution." This Court, in *Fuller v. Jenkins,* 130 N. C., 555, held that though the mortgage clause had been omitted this was a mortgage *ab initio,* and this made the interest of Fuller subject to sale, for the court did not create the relation of mortgagor and mortgagee by its decree, but held that it was a mortgage by virtue of the agreement of the parties at the time of the execution of the conveyance of Fuller to Jenkins, 28 January, 1896.

The defective decree at July Term, 1902, which attempted to convey the property to Lee Fuller's wife, was evidently procured and arranged with the intent by that unauthorized and irregular proceeding to head off the title which the United States Government had obtained by the purchase of Lee Fuller's interest at the execution sale in May, 1900, for Josephine Fuller was not a party to the action in which the decree was rendered and is not shown to have paid the $30 and interest or any other consideration, if, indeed, she could have purchased the property from her husband against the superior title already acquired by the United States as purchaser at such sale.

For the above reasons the judgment ought to be reversed.

BROWN, J., concurs in dissenting opinion.

Cited: Chinnis v. Cobb, 210 N.C. 109.

(161)

SAMUEL F. OLDS ET AL. v. RICHMOND CEDAR WORKS.

(Filed 21 March, 1917.)

1. Deeds and Conveyances—Title—Evidence—Mortgages—Payment—Presumptions.

Where the plaintiff, in an action to recover lands, has to rely exclusively upon his paper chain of title, a writing therein which acknowledges an indebtedness of the maker, and to be void if it should be paid without evidence that the debt had not been paid, and which shows that the title to the lands described was in others, is insufficient. In this case the presumption of payment arose from the long lapse of time.

2. Deeds and Conveyances—Warranty—Rebutter — Estoppel — Burden of Proof.

Where in an action to recover lands the plaintiff claims by paper title to his ancestor, without claim of possession, and it appears that his ancestor has conveyed the land to a stranger with full covenants and warranty of title prior to his having acquired it: *Held*, the burden of proof is on the plaintiff to establish his title, and he cannot recover, for his ancestor's deed to the stranger, with covenant and warranty, destroys his right of action by rebutter, and passes the title to the grantee by estoppel. *Lumber Co. v. Price*, 144 N. C., 53, cited and distinguished. *Semble*, this would apply to a deed without covenant and warranty.

3. Judgment—Partition—Tenants in Common—Title—Estoppel.

Judgment in proceedings to partition lands will not operate to estop the parties from denying that the several tenants in common had an estate in fee, when the question of title was not therein involved or put at issue. *Weston v. Lumber Co.*, 162 N. C., 165; *s. c.*, 169 N. C., 399, cited as controlling.

CIVIL ACTION, tried before *Whedbee, J.*, at November Term, 1916, of CAMDEN.

This is an action to recover a lot of land known as lot No. 7 of the New Lebanon Estate, the plaintiffs being the heirs of Hollowell Old and Wiley McPherson.

The plaintiffs claim under three chains of title:

(1) A grant from the State and a connected chain of title to Richard Morris, and a deed from Richard Morris to the ancestor of the plaintiffs, dated 3 June, 1812, purporting to convey a one-sixteenth interest in the estate. In this chain of title is the deed referred to in *Weston v. Lumber Co.*, 169 N. C., 403.

(2) A grant from the State and a connected chain of title to Samuel Payne and a deed from Payne to the ancestor of the plaintiffs, dated 2 June, 1815, purporting to convey a one-thirty-second interest in

(162) said estate. In this chain of title is the paper relied on by the

plaintiffs to show title in Payne, the grantor of the plaintiff's ancestor, which reads as follows:

"I Benjamine Jones of Camden State of North Carolina being justly indebted to Samuel Paine, of Richmond, Virginia, in a certain sum of money by bond, bearing date July, 1802 & being disposed to secure & pay the same, do hereby grant, bargain & sell to him Two full Sixteenths of the New Lebanon Estate, being the same that Charles Grice bought under execution against me, and the other is held now by Little in Edenton, And I hereby bind myself my heirs, exors and assigns, to make to said Paine in his heirs exors, and assigns, good & complete titles to said two Sixteenths of said New Lebanon Estate, as soon as possible, but on this condition, that if I pay to said Paine, on or before the First day of January, 1807, the sum of Three Thousand Dollars, which sum is to be endorsed on my Bond to him, Then the above to be Void.

IN WITNESS WHEREOF I have hereunto set my hand & seal this twenty sixth day of June 1805.

The word "exors" in the 8th line & the word "then the above to be void," was inserted (?) in the original before signed.

B. JONES. (Seal)."

(3) A grant from the State and a connected chain of title to Exum Newby and a deed from Newby to the ancestor of the plaintiffs, dated 17 June, 1815, purporting to convey a one-thirty-second interest.

The defendant contends that the deed from Isaac Lamb, sheriff, to Richard Morris, one of the links in the first chain of title, is void, and that the paper set forth as a part of the Payne title is neither a conveyance nor a contract to convey, and that, therefore, these two chains of title must be eliminated.

The defendant then offered in evidence a deed from the ancestors of the plaintiffs to Samuel Weston, dated 10 June, 1812, conveying to said Weston and his heirs one-thirty-second of said estate, and containing a general warranty.

The defendant contends that as the ancestor of the plaintiffs had no title at the time of the conveyance to Weston, with warranty, that this deed operates as a rebutter and destroys the right of action of the plaintiffs under the deed from Newby subsequently acquired.

The plaintiffs also offered in evidence the partition proceeding of the New Lebanon Estate, showing, among other things, that three-fourths of a share (a share being one-sixteenth of the whole) was allotted to McPherson and Old of the timber part of the land, and that lot No. 1 of the untimbered part, consisting of 400 acres, was allotted to Mills (163)

and Josiah Riddick, and then offered in evidence a connected chain of title from Mills and Josiah Riddick to the defendant.

No evidence was introduced tending to prove from whom Mills and Josiah Riddick acquired title, nor as to the extent of their estate.

There was no evidence that the plaintiffs had ever been in possession of the land or had paid taxes thereon or had exercised ownership or claimed any interest therein for one hundred years.

At the close of the evidence his Honor entered judgment of nonsuit, and the plaintiffs excepted and appealed.

Aydlett & Simpson, W. A. Worth, W. I. Halstead, and J. Kenyon Wilson for plaintiffs.

D. H. Tillett, W. W. Starke, Winston & Biggs, and Ward & Thompson for defendant.

ALLEN, J., after stating the case: The plaintiffs claim the land in controversy as the heirs of Hollowell Old and Wiley McPherson, and as no possession has been shown in the plaintiffs or in those under whom they claim, they must rely on a connected chain of title from the State, or on an estoppel growing out of the proceedings for the partition of the New Lebanon Estate.

The Morris title, relied on by the plaintiffs, may be eliminated at once, as one of the links in this chain of title is the deed from Isaac Lamb, sheriff, to Richard Morris, which was declared invalid by the unanimous opinion of the Court in *Weston v. Lumber Co.*, 169 N. C., 403, and no additional facts appear which would cause us to change the conclusion then reached.

We are also of opinion that the ancestors of the plaintiffs acquired no title from Payne, because the paper relied on to show title in Payne is neither a conveyance nor a contract to convey land then owned. The paper is an acknowledgment of an indebtedness of $3,000 to Samuel Payne, and an agreement to convey two-sixteenths of the Lebanon Estate as security as soon as possible, and as the paper shows itself that the title was then in others, this must mean that he would convey when he acquired the title, and the paper also provides that it shall be void when the indebtedness is paid, and there is no evidence that the maker of the paper ever acquired the title, or that the indebtedness has not been paid, and the presumption of payment arises from the long lapse of time.

This, therefore, leaves for consideration the Newby title, and as to that, the plaintiffs have shown a connected chain of title from the State ending with the deed from Newby to their ancestors in 1815, and
(164) upon this title they may maintain this action, unless the after-

acquired title is in Weston, or the right of action has been lost by reason of the fact that their ancestors, when they had no title, conveyed to Samuel Weston in 1812, with warranty, the same interest in the Lebanon Estate conveyed in the deed by Newby of 1815, under which the plaintiffs claim.

The defendant contends that the deed of 1812, with warranty, operates to destroy the right of action of the heirs of the grantors to the after-acquired estate by rebutter, or that it has the effect of passing the title to this estate to the grantee by estoppel.

The distinction between an estoppel, which may exist without a covenant of warranty, and a rebutter, which is dependent upon a warranty (*Weeks v. Wilkins,* 139 N. C., 217), while questioned in some jurisdictions, has been recognized and established with us since the case of *Taylor v. Shufford,* 11 N. C., 127, in which *Henderson, J.,* says: "The estoppel arises entirely out of the affirmations of matters of fact made in the deed. He (counsel for defendant) has confounded estoppels and rebutters; things essentially different in their nature, although frequently producing the same results. A rebutter operates on *the right of action to the estate.* It operates as to strangers, as well as between parties and privies, which is a consequence flowing from its operation on the *right to the estate.* An estoppel operates entirely as to *facts;* its effect is to conclude the parties from making, and of course proving, the facts to be otherwise than they are stated or acknowledged to be in the deed or other transaction out of which the estoppel arises. My collateral ancestor deprives me of my estate, and makes a feoffment in fee to a stranger, with warranty, and dies; the warranty descends on me as his heir (and this is done under such circumstances as that it does not amount to what is called a warranty commencing by disseisin). In any controversy which I may have with *any* one in regard to the lands, after the warranty has descended on me, this feoffment and warranty will bar my right of action to the estate."

This authority has been frequently approved, notably in *Southerland v. Stout,* 68 N. C., 448; *Bell v. Adams,* 81 N. C., 122; *Weeks v. Wilkins,* 139 N. C., 217.

The authorities are also to the effect, where there is a covenant of warranty, that the deed not only destroys the right of action in the grantor and his heirs to the after-acquired estate by rebutter, but that it also passes the title to the grantee by estoppel by warranty.

Mr. Mordecai in his instructive and valuable law lectures, volume 2, p. 858, says: "I shall take 'Estoppel by Warranty' to mean the effect which such covenants have in passing, so to speak, any title to the land which the bargainor in a deed may acquire after the execution of

(165) the deed; and 'Rebutter by Warranty,' to mean the effect which such modern covenants have in barring, estopping, or rebutting the heirs of the covenantor, should they assert title to the land conveyed by the covenanting ancestor."

The language in *Wellborn v. Finley,* 52 N. C., 237, is "transfers the estate"; in *Hallyburton v. Slagle,* 130 N. C., 487, that the after-acquired title "inures to her benefit" (the grantee in the first deed); in *Buchanan v. Harrington,* 141 N. C., 41, that the after-acquired title "would, by way of estoppel or rebutter, inure to the use and benefit of the defendant, and thereby vest one-half of the entire estate in him"; and in *Cooley v. Lee,* 170 N. C., 22, that the after-acquired estate "should inure to the benefit of her grantee to pass this interest to him by way of estoppel or rebutter."

If, therefore, the deed of the ancestors of the plaintiffs, being with warranty, has the effect of destroying the right of action of the heirs as to the after-acquired title by rebutter, or of passing this estate to the grantee and vesting the title in him by estoppel, in either event the plaintiffs cannot recover against the defendant, although it is neither a party nor a privy to the deed of 1812, because of the rule that the burden is on the plaintiffs to prove title in themselves, and in one case there is no right of action, and in the other there is no title in the plaintiffs as it has vested in the grantee in the deed with warranty.

Note that we are dealing with a claim *by the heir,* and with a deed which purports to convey the land, and not with one conveying the right, title, and interest of the grantor, as to which a different rule prevails. *Lumber Co. v. Price,* 144 N. C., 53; *Coble v. Barringer,* 171 N. C., 448.

There is also authority for the position that a deed without warranty, which purports *to convey the land,* passes an after-acquired title to the grantee; but it is not necessary to decide that question, as there is a warranty in the deed before us.

In *Eddleman v. Carpenter,* 52 N. C., 618, in which it does not appear there was a warranty, the Court says: "Afterwards, in 1838, when he acquired title by the deed of Abernathy to him, the estoppel was fed so as by the *act of law* to vest the title in Carpenter in the same manner as if Eddleman had owned the land in 1832"; in *Benick v. Bowman,* 56 N. C., 315, that a similar deed "took effect (as to after-acquired title), so as to pass the title of the property by way of estoppel"; and in *Hallyburton v. Slagle,* 132 N. C., 950, "When by his deed the grantor conveys without any of the usual covenants of title, or when by the form or nature of the conveyance he affirms, either expressly or impliedly, that he has a good and perfect title to the land, though, in fact, he has a defective or imperfect title, and he subsequently acquires a good title thereto, such after-acquired title will inure to the benefit of his

grantee by estoppel. *Van Renselear v. Carney,* 11 Howard 297; (166) *Ryan v. U. S.,* 136 U. S., 68; 11 Am. and Eng. Enc. (2 Ed.), p. 403; *Hagensick v. Castor,* 53 Neb., 495; *French v. Spencer,* 21 Howard, 240."

It is also held that a deed which purports to convey the land transfers the estate as by a fine (*Wellborn v. Finley,* 52 N. C., 237); that under our registration acts all deeds are put on the same footing as a feoffment (*Bryan v. Eason,* 147 N. C., 292), and Mr. Rawle in his work on Covenants, sec. 243, in discussing the effect of an estoppel by deed without warranty, says: "Now, it must be carefully observed that by the common law there were two classes of cases in which an estate thus actually *passes* by estoppel, and two only. The first was where the mode of assurance was a feoffment, a fine, or a common recovery. Such was their solemnity and high character that they always passed an actual estate, by right or by wrong, and, as against the feoffor or conusor and his heirs, not only divested them of what they then had, but of every estate which they might thereafter by possibility acquire, and this doctrine has been applied in modern times. The second was where the assurance was by lease, under which, it will be remembered, estates could take effect *in futuro;* and the estoppel seems to have been put upon the ground of such having been the contract or agreement between the parties."

If this position is sound—and we would we inclined to so hold if the question was before us—if there was no warranty, the heirs of the grantor could not recover the land under title claimed by descent as against a stranger, for the reason that the after-acquired title would pass to the grantor in the deed by estoppel, and as the heirs would not be the owners of the after-acquired title, they could not recover on it.

It follows, as the ancestor of the plaintiffs had no title at the time of the conveyance to Weston in 1812 with full covenant of warranty, and as this had the effect by way of rebutter of extinguishing the right of action of their heirs under the after-acquired title of 1815, or of passing this title to the grantee in the deed of 1812 by estoppel, the plaintiffs cannot maintain their action under the Newby title, and they must rely upon the proceeding in partition as an estoppel on the defendant.

When we come to consider the effect of the partition proceeding we are confronted by the fact that the plaintiffs have failed to show any estate of inheritance in their ancestors at the time the proceeding was instituted, nor have they shown that Mills and Josiah Riddick, under whom the defendant claims, had an estate of inheritance, and in the absence of proof of these facts the decision in *Weston v. Lumber Co.,* 162 N. C., 165, and *Weston v. Lumber Co.,* 169 N. C., 399, in (167) which the same partition proceeding was considered, and in which

it was held that it did not operate to estop the parties from denying that the several tenants in common had an estate in fee, is conclusive against the plaintiffs.

We are, therefore, of opinion that there was no error in the judgment of his Honor dismissing the action at the close of the evidence.

Affirmed.

Cited: Baker v. Austin, 174 N.C. 435; *Bailey v. Mitchell,* 179 N.C. 103; *Crawley v. Stearns,* 194 N.C. 17; *Woody v. Cates,* 213 N.C. 794; *Turpine v. Jackson County,* 225 N.C. 391.

LESTER B. HIPP v. T. E. FERRALL ET AL.

(Filed 21 March, 1917.)

1. Public Officers—Highway Commissioners—Bridges—Negligence — Individual Liability—Statutes.

Public officers in the performance of their official and governmental duties involving the exercise of judgment and discretion may not be held liable as individuals for breach of such duties unless they act corruptly and of malice.

2. Public Officers—Ministerial Duty—Public Duties—Individual Liability—Statutes.

Where public officials are charged with a plainly ministerial duty, they may not be held individually liable for a negligent breach thereof, when they are of a public nature and imposed entirely for the public benefit, unless the statute creating the office or imposing the duties makes provision for such liability.

3. Public Officers — Discretionary Duties — Highway Commissioners — Bridges—Negligence.

Where it appears from the entire testimony that defendants, members of the highway commission of Lee County, had taken charge of the approach to a county-line bridge, if at all, not as mere administrative agents, but in pursuance of their public duties in administering the road laws of the county, imposed upon them for the public benefit, and, further, that the duties they had assumed in reference to the bridge, required the exercise of judgment and discretion both in reference to the kind of approach to be constructed (the engineer having advised a steel structure) and also as to whether there were funds available for the purpose, having proper regard to the bad condition of the roads in other parts of the county, there was no error to plaintiff's prejudice in submitting the issue of liability to the jury, and on such facts the court could not have sustained a motion to nonsuit.

HIPP *v.* FERRALL.

CIVIL ACTION, tried before *Stacy, J.*, and a jury, at July Term, 1916, of LEE.

The action was to recover damages for physical injuries caused by the alleged negligence of defendants, as individual members of the highway commission of Lee County, in failing to repair a certain (168) bridge on the line of Lee and Chatham counties and known as the Lockville bridge, and by reason of which plaintiff, driving a wagon over same, was caused to fall with his team some 15 feet and thereby receive serious injuries. On denial of liability, issues were submitted to the jury as to neglient default and damages incident thereto, and, on the issue as to negligence, there was verdict for defendants. Judgment, and plaintiff excepted and appealed.

The cause was before the court on a former appeal and will be found reported in 169 N. C., 551.

Williams & Williams and Clarkson & Taliaferro for plaintiff.

Seawell & Milliken, Hoyle & Hoyle, and R. H. Hayes for defendants.

HOKE, J. On the former appeal the cause was presented on demurrer of defendants, and it was thereby admitted, as alleged in the complaint, that defendants were members of the highway commission of Lee County; that Lockville bridge, constituting a part of the public highways of said county, was under the exclusive care and control of said defendants; that for fifty-two days prior to the occurrence, and with "means and resources" sufficient to repair it, they had "negligently and carelessly" allowed said bridge to remain in an "unsafe and dangerous condition," by reason of which the injuries complained of were received, and, further, that full and formal notice had been given defendants of the condition of the bridge at a meeting held in Sanford, 6 October, 1914, prior to the injury which was received on 17 November, following. It will be noted that these averments, admitted to be true by the demurrer, are very broad and inclusive in their terms, and while they could have been construed as meaning that the defaults charged against defendants were in the performance of their public duties as highway commissioners and for the public benefit, they also permitted the inference that the defendants, as they might have done under the provisions of the act controlling in the matter, Laws 1911, ch. 586, with or without an arrangement with the county commissioners, had taken personal charge of the upkeep and repair of the bridge and were dealing with the same purely as administrative officials, likening their duties to that of overseer of public roads, who, under our decisions, may at times be held liable for negligent default in the performance of their duties. *Hathaway v. Hinton*, 46 N. C., 243. Under admissions

thus capable of two constructions the court did not consider it proper to make final determination of the rights of the parties, but overruled the demurrer that the relevant facts might be more fully and definitely ascertained.

(169) This opinion having been certified down, a trial was had on appropriate issues, wherein it appeared that this was a county-line bridge, primarily under the control of the county commissioners in conjunction with the commissioners of the adjoining county, Revisal, sec. 2696; that the defendants had not undertaken the repair or upkeep of the bridge as a physical proposition, either under an arrangement with the county commissioners or in the exercise of any authority claimed by themselves, but their default, if any existed, was in a negligent performance of the duties imposed upon them by statute, as a governmental board having general charge and supervision of the highways of the county; defendants' evidence tending strongly to show that the roads in the county where they lately took charge were in bad condition; that the calls upon them for funds were exacting and general throughout the county, and that, while they received notice of the condition of the bridge, they then had no funds available for its proper repair; that they had been advised by a competent engineer that the approach to the bridge should be of steel, and with this in view they had endeavored to arrange for temporary repairs by a reliable and competent contractor, but the bridge had fallen in before it could be done.

Upon this evidence there was no error—to plaintiff's prejudice, certainly—in submitting the question of individual liability to the deliberations of the jury, and his Honor might well have charged the jury that no such liability would attach. It is held in this State that public officers, in the performance of their official and governmental duties, involving the exercise of judgment and discretion, may not be held liable as individuals for breach of such duty unless they act corruptly and of malice. *Templeton v. Beard,* 159 N. C., 63; *Baker v. State,* 27 Ind., 485.

It is also the recognized principle here, and the position is sustained by the great weight of authority elsewhere, that in case of duties plainly ministerial in character the individual liability of such officers for negligent breach of duty should not attach where the duties are of a public nature, imposed entirely for the public benefit, unless the statute creating the office or imposing the duties makes provision for such liability, and this principle was approved and applied here in the case of *Hudson v. McArthur,* 152 N. C., 445, opinion by *Associate Justice Manning,* and is in accord with the great weight of authority in other jurisdictions. *McConnell v. Dewey,* 5 Neb., 385; *Bates v. Horner,* 65 Vt., 471, reported with full note by the editor in 22 L. R. A., p. 824; *S. v. Harris,* 89 N. E.,

169. The full application of this principle is apparently modified in case of subordinate officials having physical charge of public work and where a negligent breach of duty may be clearly recognized as the proximate cause of an injury to a claimant. In such instances, though at times technically officers, they can scarcely be considered as being (170) in the exercise of governmental duties at all, but are rather administrative agents, and are held for breach of duty, the proximate cause of the injury, whether such duties are incident to the office they have undertaken or arise by virtue of a contract to perform them. Instances of this modification appear in *Hathaway v. Hinton,* 46 N. C., heretofore cited, where a road overseer was held liable for negligent failure to repair a small bridge on the public highway, within his means, by reason of which a stage coach and horses, traveling the highway, had been injured, and *Adsit v. Brady,* 4 Hill, 630, where the superintendent of a canal, charged with the duty, was held liable for negligent breach of such duty in failing to keep the canal free from physical obstruction likely to cause the injury which resulted. *Robinson v. Chamberlain,* 34 N. Y., 389, may be referred to the same principle. True, a broader rule of individual liability is laid down in that case, but the element of liability, by reason of having taken physical charge of a canal, part of the public highway, under a contract to keep the same in proper repair, was also present. The modification here suggested is approved with us, also, in the case of *Kinsey v. Magistrates of Jones,* 53 N. C., 186, where it was held that the magistrates of a county, in the exercise of their duties as a governmental board, could not be held individually liable for the defective condition of roads and bridges, and *Manly, J.,* delivering the opinion, said: "The justices can't be held responsible for deficiencies in the public highway's bridges. They are charged with certain duties concerning them, but, when these are performed, their office ceases and the overseers and contractors are responsible to the officers and citizens." Again, it is the accepted rule that when a public officer, though exercising governmental functions, is charged with an imperative and plainly ministerial duty for the benefit of an individual, or when the public duty imposed involves also a special duty to the individual, he may be held personally liable to such individual for negligent breach, causing damage, unless the legislation applicable to and controlling the question gives clear indication that no such liability should attach. *Holt v. McLean,* 75 N. C., 347; *Gage v. Springer,* 211 Ill., 200; Cooley on Torts (3 Ed.), p. 757. It has been said that this rule applies more generally to administrative officers who receive their fees from individuals for performing the services, as in the case of sheriffs in the execution of writs, etc., but this payment of fees is not all the test, and, as a matter of fact,

these administrative officers are now being more and more compensated by salary, the fees being paid into the public treasury. The application of the principle depends rather on the nature of the duty imposed. (171) Is it a duty special to the individual, or, although a public duty in some respects, does it involve also a special duty to an individual and which has been breached to his injury? In such case, an individual liability will, in general, attach, unless, as stated, the legislation applicable otherwise provides. To this rule may be referred suits by individual claimants where a clerk, required to index docketed judgments, fails in his duty or a register of deeds negligently fails to properly record a mortgage and loss is sustained. Although these duties are in some respects public in their nature, they involve also a duty special to the person injured, and in such case individual liability will generally attach.

The same principle was also present in the case of *Amy v. Barkholder,* 78 U. S., 136, sometimes cited in support of a more exacting rule of liability. That was a suit by a creditor against the supervisors of a county in Iowa who had neglected or failed to levy a tax in obedience to a mandamus issued in the particular case. While the language of the opinion would certainly uphold a much more extended responsibility, the breach of duty was one special to the individual who obtained the judgment, and, on these facts, the claim was upheld. Recurring to the position that in these cases individual liability of officials does not attach, where the legislation applicable otherwise provides, an instance appears in our recent decision of *Fore v. Feimster,* 171 N. C., 551. In that case it was held that although the duty imposed was a ministerial one, and primarily for the benefit of individuals, persons furnishing material for a public building, liability did not attach to the individuals composing the board of county commissioners, for the reason that the duty imposed was in terms a corporate duty and the legislation applicable to the subject gave clear indication that no liability should be enforced against the commissioners as individuals.

It may be well to note that we speak throughout of the action of public officers within the course and scope of their official duties, and have in no way considered the effect of their conduct when they act in excess of authority and without warrant of law.

Applying these principles to the case before us, on the full disclosure of the facts, the Court could well have charged that no cause of action had been established. While there is no general legislation protecting these defendants from personal liability, as in the *Fore* and *Feimster* cases, the testimony all tends to show that said defendants had not taken any physical charge of the repairing of this bridge either by arrange-

ment with the county commissioners or otherwise, but the breach of duty, if any existed, was in their failure to perform their public duties involving the exercise of judgment and discretion, and, further, (172) that these duties were of a public nature and imposed upon them entirely for the public benefit.

On careful consideration of the record, we find no error to plaintiff's prejudice, and the judgment on the verdict is affirmed.

No error.

Cited: Marshall v. Hastings, 174 N.C. 481; *Howland v. Asheville,* 174 N.C. 751; *Spruill v. Davenport,* 178 N.C. 365, 366; *Carpenter v. R. R.,* 184 N.C. 406; *Noland Co. v. Trustees,* 190 N.C. 254; *Hyder v. Henderson County,* 190 N.C. 664; *Latham v. Highway Com.,* 191 N.C. 142; *Lowman v. Comrs.,* 191 N.C. 152; *Holmes v. Upton,* 192 N.C. 179; *Lassiter v. Adams,* 196 N.C. 712; *Betts v. Jones,* 203 N.C. 591; *Moffitt v. Davis,* 205 N.C. 569; *Moore v. Lambeth,* 207 N.C. 26; *Moye v. McLawhorn,* 208 N.C. 814; *Old Fort v. Harmon,* 219 N.C. 243, 247; *Wilkins v. Burton,* 220 N.C. 15; *S. v. Swanson,* 223 N.C. 445; *Miller v. Jones,* 224 N.C. 787, 789; *Smith v. Hefner,* 235 N.C. 7.

MARY McDONALD, FANNIE BYRD, ET ALS. v. ELLA J. McLENDON ET ALS.

(Filed 21 March, 1917.)

1. Appeal and Error—Court's Discretion—Recall of Witness—Consent.

Where a party has rested his case it is within the unreviewable discretion of the trial judge, in the absence of abuse thereof, to permit him to recall a witness to testify as to certain facts, which had been ruled out on objection and again offered.

2. Appeal and Error—Court's Discretion—Presumptions.

Where there is doubt whether the trial judge refused to permit a witness, after the party introducing him had rested his case, from again going on the stand, in his discretion or as a matter of law, the remedy is by *certiorari* or remand; to have the doubt reversed. The Court finds in this case that the judge did exercise his discretion.

3. Wills—Devisavit Vel Non—Mental Capacity—Undue Influence—Beneficiaries—Declarations.

Upon a trial of *devisavit vel non* of a will, naming two or more beneficiaries, wherein the issues, submitted without objection, and the contentions of the parties relate solely to its validity as a whole, declarations of one of the devisees in favor of the caveator, as to the mental capacity of

the testator, or undue influence practiced upon him, would be prejudicial to the rights of the other beneficiary or beneficiaries, and incompetent.

4. Appeal and Error—Conflict—Record—Recall of Witness—Court's Discretion.

Where in an action of *devisavit vel non* it is contended, on appeal, that a certain witness was a caveator in the action and should have been permitted to testify after the propounder had rested his case, and that the refusal of the trial judge was not in his discretion in permitting the propounder to recall him to the stand after he had already testified, and it is suggested incidentally in the appeal bond, case on appeal, and brief that the witness was a caveator, but it otherwise appears in the record, the record will control.

5. Appeal and Error—Wills—Devisavit Vel Non—Single Issue—Objections and Exceptions.

Where an action *devisavit vel non* has been tried without objection, as to the validity of the will as a whole, the Supreme Court will not order another trial upon separate issues as to the validity or invalidity of several devises.

6. Wills—Undue Influence—Evidence—Instructions.

Held, in this action of *devisavit vel non*, old age, bad health, and weakness of mind were circumstances to be considered by the jury upon the question of undue influence by the son of the testator, but practically afforded no evidence of fraud; and the charge of the court, construed as a whole, was not erroneous.

(173) CIVIL ACTION, tried before *Bond, J.*, and a jury, at January Special Term, 1917, of LEE.

This is a caveat to the will of M. C. Talbert, which was executed 1 September, 1916. Issues were submitted to the jury and answered, as follows:

1. Was the paper-writing propounded, dated 1 September, 1916, executed by M. C. Talbert according to the formalities of law required to make a valid last will and testament?

2. At the time of signing and executing said paper-writing, did said M. C. Talbert have sufficient mental capacity to make and execute a valid last will and testament?

3. Was the execution of said paper-writing propounded in this case procured by undue influence, as alleged?

4. Is the said paper-writing, referred to in issue 1, propounded in this case, the last will and testament of M. C. Talbert, deceased?

And the jury having answered the first issue "Yes"; the second issue, "Yes"; the third issue "No," and the fourth issue, "Yes."

The caveators proposed to ask their witness, W. A. McDonald, the following questions:

"1. Did you ever hear McLendon (husband of devisee, Mrs. McLendon) say anything about Mr. Talbert's mind?

"2. Did you ever hear Mrs. McLendon, the daughter of Mr. Talbert, say anything about the old man's (M. C. Talbert's) mental condition while the old man was living?

"3. What did you hear Mrs. McLendon, his daughter and chief beneficiary under the will, say in regard to his mental condition?"

The court sustained objections of the propounders to the questions, and caveators excepted.

There were only two beneficiaries named in the will, Mrs. Fannie Byrd and her sister, Mrs. McLendon, they being the daughters of the testator. He gave Mrs. Byrd $500 and to Mrs. McLendon he gave the residue of his estate, reciting in the will that he had theretofore given to Mrs. Byrd $500 and to each of his children, Thomas Talbert, Mrs. Mary McDonald, and Mrs. McLendon, $1,000. It is further stated that he had given Mrs. McLendon the largest share of the estate because she had lived with him at his home "and provided for his personal needs." At the close of the testimony of the propounders offered in rebuttal of that of the caveators, the latter introduced their witness, W. A. McDonald, (174) and proposed to ask him the same questions which had already been excluded by the court, Mrs. Byrd stating in open court, through her counsel, that "she waived all objection to the evidence," which was offered by the caveators, as above set forth, and excluded by the court, and agreed that it might be introduced as affecting the validity of the will, and caveators asked that they be permitted to recall the witness, W. A. McDonald, in order that this evidence might be heard. The court refused to do so, and caveators excepted.

There was an exception to the charge which will be noticed hereafter.

Judgment was entered upon the verdict, and the caveators appealed.

Manning, Kitchin & Gavin for plaintiffs.

Seawell & Milliken for defendants.

WALKER, J., after stating the case: Whether the judge would allow the witness, W. A. McDonald, to be recalled, was a matter entirely within his discretion and when it is exercised, without any gross abuse, which is not even suggested here, we will not review it. The propounders opened the case by introducing their evidence, or so much as they thought sufficient to sustain their side of the issues. The caveators were then given ample opportunity to put in their evidence and all of it, including that which they afterwards proposed to introduce. The propounders then introduced evidence in rebuttal and closed their case. The privilege, at

this stage of the trial of recalling a witness for the purpose of offering testimony could not be exercised without the consent of the judge, which he might grant or withold at his discretion. The case of *In re Will of Andrew Abee,* 146 N. C., 273, is so directly applicable that we content ourselves with this single citation. That was a contest as to the validity of a will, and the caveators requested of the court that they be permitted to recall a witness for further examination. The request was denied, and this Court said in affirming the ruling: "Our decisions are to the effect that this matter of recalling witnesses for further examination is in the discretion of the judge presiding at the trial, and his action in this respect is not open to review. *Sutton v. Walters,* 118 N. C., 495; *Olive v. Olive,* 95 N. C., 485." This record shows that the judge merely refused to call the witness, W. A. McDonald, to the stand for the purpose of reopening a closed case and reversing his former ruling by allowing the questions to be answered. If there was any doubt or obscurity as to the reason for his ruling, the proper method would have been to make the matter clear by a *certiorari* or remand, so that the judge could state the fact, that is, whether he exercised his discretion merely, or
(175) decided as he did for want of power to rule otherwise. *Holton v. Lee, ante,* p. 105. It appears that the judge thought the caveators had sufficient opportunity to make their request before they closed their case, and that it was too late then for it to be considered, or for the case to be reopened for any purpose; but whatever may have been his reason, as he was merely exercising his discretion, his ruling must be left as he made it.

It is hardly to be supposed, after so many decisions to the contrary and after the law has been so thoroughly settled in that respect, that the judge would decide he had no power to recall the witness. If, therefore, any fair doubt existed as to the nature of the ruling, we would still incline to the view that the judge exercised his discretion. If he had said that he denied the motion for a want of power, a different question would arise.

Pannell v. Scoggin, 53 N. C., 408, merely holds that where an executor was made competent as a witness in a will contest, it makes no difference whether he appears on the record as plaintiff or defendant. It has no bearing on this case. Mrs. Byrd was not the witness, but McDonald was. The question here is, was she a beneficiary at the time the first questions were asked, and a respondent? whether her name appears in the record on one side of the case or the other.

This brings us to the other question of evidence, whether the testimony of W. A. McDonald was competent. There were two devisees or legatees in the will, Mrs. Byrd and Mrs. McLendon. The offer was to prove that

Mrs. McLendon had once said that her father's mind had weakened, or failed, from the use of medicine, and that he could hardly recollect anything. It appears, therefore, that the effort was to attack the whole will and to invalidate it as a whole. This could not be done under the decision in *Linebarger v. Linebarger,* 143 N. C., 229, and *In re Fowler,* 156 N. C., 340, as the declaration of Mrs. McLendon would, of course, affect the other beneficiary, and, as said in those cases, this would be manifestly unjust. The issues here were so drawn as to present the single question as to the validity of the will, as a whole, and not as to the validity of the gift to Mrs. McLendon.

It is suggested, incidentally, in the appeal bond, case on appeal, and brief, that Mrs. Byrd is a caveator; but this must be an inadvertence, as the record shows clearly that she was not, Mr. and Mrs. McDonald being the only caveators, and this was the state of the record when the issues were made up and the case tried. There is no order of the court making her a party to the caveat, nor does any application for that purpose appear in the record. On the contrary, she is described as a respondent, the citation having issued against Ella J. McLendon, Fannie Byrd, and T. W. Talbert, at the request of the caveators of the will of Mrs. M. C. Talbert. It is apparent that she was not a party (176) when this evidence was first offered, and if she became a party afterwards, or at any stage of the proceedings, it should appear in the record. The motion of the caveators, after the evidence was closed, to recall the witness W. A. McDonald implies that she was not a caveator when the first questions were asked. When the record and case conflict, the former controls. *Threadgill v. Comrs.,* 116 N. C., 616, 625. If the evidence, as offered in this case, was competent at all, under the principles stated and discussed, with citation of authority, in *Linebarger v. Linebarger, supra,* it is certainly not competent, under the circumstances, as, when it was tendered, it would, on its face, have been prejudicial to the legatee other than Mrs. McLendon. If the waiver of Mrs. Byrd made the evidence competent, it should have been entered in apt time and regular order.

It was suggested at the hearing in this Court that the evidence was competent on the question of undue influence, but that can invalidate a will as a whole just as much as a want of mental capacity, and it was submitted in that way to the jury. It is also suggested that the legacy to Mrs. McLendon might have been considered as a separate gift and set aside upon the ground of undue influence or fraud practiced by her, without annulling the entire will. The answer is, that this view, if allowable, was not suggested or properly raised, and the issues, submitted without objection, did not present any such aspect of the case,

and there is no such exception; but the inquiry was as to the validity of the whole will. *Gash v. Johnson,* 28 N. C., 289. The judge could have submitted the general issue *devisavit vel non,* or a special issue, so that the jury might pass upon the validity of the whole will or of any part of it. It was said in *Gash v. Johnson, supra,* at p. 291: "The court ordered an issue of *devisavit vel non* to be made up and submitted to a jury. The issue which was made up under the order of the court was probably framed in such a manner as to confine the response of the jury (will or no will) to the said paper *in toto,* whereas the court might have directed the issue to have been drawn up specially for the jury to find whether the paper-writing propounded as the last will of Reuben Johnson, deceased, was in fact his will, or any part of it, and which part. Frequently this special mode of framing the issue will be found most advisable. Then the jury may respond that one or more of the legacies or devises mentioned in the paper is or are not any part of the last will; and that the residue of the paper-writing is the last will of the supposed testator," citing *Trembistown v. Alton,* 1 Dow and Clark, N. T., 95. And finally it is argued that a separate issue should be ordered as to the undue influence exerted by Mrs. McLendon in obtaining her own legacy, as was done in *Linebarger's case.* This is answered by what we
(177) have already said, viz: that there was no such request made, and, besides, in the *Linebarger case* there was a new trial, and the court did not order such a separate issue, but merely stated that "it could see no reason why a special issue might not be submitted to the jury as to the interest of Hosea." It was left to the judge to do so on the next trial.

We cannot sustain the exception to the charge. When the instruction to which exception was taken is read in connection with the others given, several of them at the request of caveators, there was no error in stating the law of the case to the jury. The charge was perhaps not as strong as it might have been for the propounders. In the case of *In re Abee, supra,* where it was contended that there was no evidence of undue influence, *Judge Hoke* said: "It is established with us that in order to avoid a will on this ground the influence complained of must be controlling and partake to some extent of the nature of fraud. *Marshall v. Flinn,* 49 N. C., 199; *Wright v. Howe,* 52 N. C., 412; *Paine v. Roberts,* 82 N. C., 451. As held in *Wright v. Howe, supra:* 'The influence which destroys the validity of a will is a fraudulent influence, controlling the mind of the testator so as to induce him to make a will which he would not otherwise have made.' It would serve no good purpose to go into any extended or detailed statement of the testimony. We have carefully read and considered it as given in the case on appeal, and we

fully concur with the trial judge that there is no evidence tending to show undue influence, and are of opinion that the judgment establishing the validity of the will should be affirmed." The record does not purport to set out all of the evidence; but if that which was omitted is no stronger in character than the part inserted, there was, perhaps, enough to carry the case to the jury; but it did not furnish any clear, or decisive, indication of undue influence. Old age, bad health, and weakness of mind are circumstances to be considered upon such an issue, but there is practically no evidence of actual fraud or that Mrs. McLendon took advantage of her father's condition to unduly overcome his will or subject it to her own. The case would hardly have been any stronger with her declaration as to his mental condition super-added, as there already was full evidence on this phase of the case.

We find no error in the record.

No error.

Cited: Howard v. Wright, 173 N.C. 345; *In re Will of Yelverton,* 198 N.C. 749; *In re Will of Beale,* 202 N.C. 622; *Moyle v. Hopkins,* 222 N.C. 35; *In re Will of Cassada,* 228 N.C. 552; *In re Will of Morrow,* 234 N.C. 368.

(178)

ELIJA HICKMAN v. O. M. RUTLEDGE & CO.

(Filed 21 March, 1917.)

Master and Servant—Negligence—Assumption of Risks—Evidence—Trials—Questions for Jury.

In an action for damages to an employee sustained while loading, in the course of his employment, logs upon a truck with skid poles, etc., the evidence tending to show that his superior officer was directing the work and did not furnish skid poles flattened at the end, and nail them down in the customary or usual manner, but furnished those which were round at the end, and not fastened, and the injury complained of resulted: *Held,* sufficient upon the issue of defendant's actionable negligence, and that the doctrine of assumption of risk is inapplicable, the injury having been caused by the defendant's own and independent negligence.

CIVIL ACTION, tried at November Term, 1916, of CRAVEN, before *Lyon, J.,* upon these issues:

1. Was plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

2. Did the plaintiff, by his own negligence, contribute to his injury? Answer: "No."

3. What damage is plaintiff entitled to recover? Answer: "$310.30." From the judgment rendered, defendant appealed.

D. L. Ward for plaintiff.

Rouse & Rouse, E. M. Land, William T. Joyner, R. H. Rouse for defendant.

BROWN, J. The motion to nonsuit was properly overruled. The evidence, taken in its most favorable light for plaintiff, as is proper upon such motions, tends to establish these facts:

The plaintiff was employed by the defendant on 7 August, 1915, and was engaged in loading logs on a truck by means of two skid poles, one end of the log on the truck and the other end on the ground, with a chain around the log attached to the harness of a mule, which pulled the logs upon the truck while he and another man, one at each end of the log, were guiding the log up the skid poles, keeping it straight. When the log got halfway up the skid pole it became crooked, and, as was his duty, plaintiff was trying to keep the log straight, and while he was trying to do this, so it would run up the skid pole evenly, the skid pole rolled and caused the log to fall on his leg and break it. The skid poles were round and not flattened at the ends and were not secured to the truck by nails or spikes, as the evidence tends to prove was cus-
(179) tomary in order to prevent them from slipping off the truck or rolling over. The superintendent, Mills, was standing by directing the work. The skid poles were furnished and put in place by the foreman.

These facts tend strongly to prove negligence upon the part of defendant. The work was being done under the immediate supervision of the superintendent. It was his duty to see that the skid poles were securely fastened. Had the plaintiff undertaken to have prepared and fastened the poles himself, a different case would be presented. *Brown v. Foundry Co.,* 170 N. C., 38.

The rule which relieves an employer from liability for an injury resulting from the use of ordinary or simple tools has no application to the facts of this case. *Wright v. Thompson,* 171 N. C., 88. The method of loading the logs on the trucks by means of round poles not flattened or fastened at either end was not according to custom as well as the dictates of ordinary prudence.

The defendant requested the court to charge the jury that "If the jury believe all of the evidence they will find that the plaintiff assumed the risk of his employment, and particularly of the work in which he was engaged at the time of the accident, and they will answer the second issue "Yes."

This prayer could not have been properly given under the evidence in this case. The servant, as a rule, does not assume risks arising out of the master's own negligence. The superintendent, Mr. Mills, was standing in a few feet of the plaintiff, directing the work, and the foreman, Thomas Moore, was also present. The foreman brought the skids there and put them at the place for use by the employees.

The contention that plaintiff assumed the risk cannot be maintained in view of the fact that the superintendent and foreman were present, both supervising and directing the work.

In this respect the case is like *Smith v. R. R.*, 170 N. C., 185, where it is said: "But in our opinion defendant's position cannot be maintained in view of the fact that the representative of the company, the foreman in charge and control, was present; that the platform was arranged and plaintiff put to work on it by his direction, and of the evidence tending to show that the plank prepared for the work was unfitted for its purpose and was insecurely placed."

There are no assignments of error directed to the evidence, and the charge is a very clear and correct summing up of the evidence as well as a correct statement of the law as settled by numerous decisions of this Court.

No error.

(180)

MRS. M. S. MOORE v. GREENVILLE BANKING AND TRUST COMPANY.

(Filed 21 March, 1917.)

1. Judgments—Pleadings—Evidence.

When judgment is rendered against a litigant upon the pleadings, the averments in his favor will be taken as true and interpreted in a light most favorable to his claim.

2. Banks and Banking—Deposits—Set-offs—Equity—Fraud—Insolvency.

While ordinarily the requirements at common law, or under statutes applicable, forbid a debt due by a partnership to a bank, or by a principal on a note, to be set off by the bank against a deposit of one of the partners, or of a surety, this doctrine is modified in equity when by reason of the insolvency of the parties the question is reduced, as a matter of fact, to one of mutual indebtedness between the bank and its depositor, and it is necessary to allow the set-off to the bank, in whole or in part, to prevent a palpable miscarriage of justice.

3. Same—Partnership—Husband and Wife.

Where a husband has deposited his own money in a bank in his wife's name, and accepted by the latter without knowledge of the fact, and he and another, as partners, have become indebted to the bank on a partnership note, signed by each as sureties, and the partnership and the indi-

vidual members are insolvent, in an action brought against the bank to recover the deposit, it is *Held*, that the defendant may off-set the indebtedness due to it on the note; and were the same not strictly permitted as a set-off, such defense will be considered as a bill in the nature of an equitable *fi. fa.* as property not available to creditors under ordinary legal process.

4. Banks and Banking—Deposits—Fraudulent Gifts—Husband and Wife—Statutes.

Where the wife participates in her husband's depositing his money in her name at a bank for the purpose of defrauding his creditors, the attempted appropriation is void by our statute to prevent fraudulent gifts, Revisal, secs. 960-962; and in an appropriate action the deposit will be considered and dealt with as if it stood in the name of the husband.

CIVIL ACTION, heard before *Lyon, J.*, and a jury, at November Term, 1916, of PITT.

Issues were submitted, and the jury having failed to agree upon a verdict, they were discharged from further consideration of the case, and thereupon, on motion, his Honor gave judgment for plaintiff on facts as admitted in the pleadings, and defendant, the bank, excepted and appealed.

W. F. Evans and F. G. James & Son for plaintiff.
Albion Dunn and Skinner & Cooper for defendant.

(181) HOKE, J. The action was instituted by plaintiff against the Banking and Trust Company, to recover the balance of a deposit standing in her name on the books of defendant bank. On facts set forth in the answer defendant prayed that it might offset against this claim, or a portion of it, an indebtedness due the bank from plaintiff's husband, W. M. Moore, and the partnership of Hall & Moore, of which he was a member. On motion, said W. M. Moore has been duly made a party and filed an answer in denial of the right claimed by the defendant bank.

On issues submitted the jury failed to agree, and, having been duly discharged, as stated, from further consideration of the case, judgment was entered for plaintiff on the facts admitted in the pleadings.

From these facts, taken from the admissions and averments of defendant bank more directly relevant to the question presented, it appears that in the fall of 1915 the husband made a deposit in the bank in his wife's name to the amount of $6,000, and this deposit was recognized by the bank and plaintiff allowed to check thereon, reducing the same, on 2 February, 1916, to $3,744.38; that during this year, 1915, after 2 February, 1916, the firm of Hall & Moore, composed of W. M. Moore, now a defendant, and W. L. Hall, carrying on a mercantile and insur-

ance business, in the course of said business, had continued dealing with defendant bank, and, to secure any indebtedness which might be due to defendant, executed the demand note of the firm to the bank in the sum of $2,000, said note being also executed by said W. L. Hall and W. M. Moore, the individual members of the firm; that in the fall of 1915, the firm being indebted for as much or more than the amount of said note, demand was made for payment of same and was told by Moore that he would never pay the debt, and "to get it out of him if they could"; that thereupon defendant began an investigation into the affairs of the firm and its members, and ascertained that said firm was insolvent; that Hall was also insolvent, and that defendant W. M. Moore had no property whatever available to creditors except his interest in the deposit in question, now standing in the name of his wife, the *feme* plaintiff. Averment is made, further, that this deposit and claim is in fact and in truth the property of said W. M. Moore, the bank's debtor, and was made by him in his wife's name, without valuable consideration moving from her, with intent to withdraw his property from the reach of his creditors and to avoid payment of his debt due to plaintiffs and others; that the plaintiff was knowingly a participant in the fraudulent act and purpose of her husband, and if defendant is not allowed to appropriate the indebtedness as prayed, he will be without relief in the premises and lose entirely the value of his debt and claim against said W. M. Moore.

These allegations of ownership on the part of the husband and (182) of unlawful and fraudulent act or intent on his part are all fully denied by plaintiff and by her husband, but, assuming the averments of defendant bank to be true, and giving them the interpretation most favorable to its claim, the rule which should prevail when a judgment is entered against a litigant on the pleadings, we are of opinion that the defendant is entitled to have the cause submitted to the jury on appropriate issues.

This right of a bank to appropriate a debt in payment of a deposit is referable to the principle of set-off, dependent, in a court of law, on the construction of the different statutes applicable, but existent, also, as an equitable principle independent of positive statute when necessary to prevent a miscarriage of right. In 3 Ruling Case Law, p. 591, title "Banks," and sec. 219, it is said to obtain "between persons occupying the relation of debtor and creditor and between whom there exist mutual demands, and it is familiar law that mutuality is essential to the validity of a set-off, and, in order that one demand may be set off against another, both must mutually exist between the same parties."

It is held here and in other jurisdictions that this requirement of mutuality ordinarily forbids that the debt of a partnership may be set

up against the claim of an individual partner who is a depositor. *Hodgin v. Bank,* 124 N. C., 540; *Adams v. Bank,* 113 N. C., 332. And the same principle usually prevails in a suit by a surety for his individual deposit. The bank may not apply, in satisfaction of such a claim, the amount of a note in which he is only a surety. *Lamb v. Morris,* 118 Ind., 179; Morse on Banking, sec. 326. But these strict applications of the principle of set-off, as it prevails at law, may be and are properly modified when by reason of the insolvency of the parties the question has been reduced as a matter of fact to one of mutual indebtedness between the bank and the claimant and it is necessary to allow an appropriation of the debt to prevent a palpable miscarriage of justice. *Sloan v. McDowell,* 71 N. C., 356; *March v. Thomas,* 63 N. C., 87; *Rolling Mill Co. v. Ore and Steel Co.,* 152 U. S., pp. 596-615; *Barnes v. McMullins,* 78 Mo., pp. 260-271; 2 Story's Eq. Jur., sec. 1437a; 3 Ruling Case Law, pp. 591-592.

In the citation to Story the position is stated as follows: "The authorities upon this question are considerably examined, and the following results arrived at, in a late case. The general rule, in equity as well as at law, is that joint and separate debts cannot be set off against each other. But while at law the rule admits of no exceptions, and the parties to the record only will be regarded, a court of equity will, in a case of insolvency, regard the real parties—those ultimately to be affected by the decree—and allow a set-off of demands in reality mutual, (183) although prosecuted in the name of others nominally interested. Courts of equity exercised a jurisdiction over the subject of set-off previous to the enactment of the statutes upon the subject; and their jurisdiction does not in any manner depend upon these statutes."

And in *Rolling Mill v. Ore and Steel Co., supra, Associate Justice Jackson,* delivering the opinion, said: "The adjustment of demands by counterclaim or set-off, rather than by independent suit, is favored and encouraged by the law to avoid circuity of action and injustice (citing *Ry. Co. v. Smith,* 21 Wall., 255). By the decided weight of authority it is settled that the insolvency of the parties against whom the set-off is claimed is a sufficient ground for equitable interference," citing numerous authorities, and further: "In *Schuler v. Israel,* 120 U. S., 506, 510, it was said by *Mr. Justice Miller,* speaking for the Court, that "While it may be true that in a suit brought by Israel against the bank it could in an ordinary action at law only make plea of set-off of so much of Israel's debt to the bank as was then due, it could, by filing a bill in chancery in such case, alleging Israel's insolvency, and that if it was compelled to pay its own debt to Israel the debt which Israel owed it but which was not due would be lost, be relieved by a proper decree

in equity; and as a garnishee is only compelled to be responsible for that which, both in law and equity, ought to have gone to pay the principal defendant in the main suit, he can set up all the defenses in this proceeding which he would have in either a court of law or a court of equity."

In the present instance, as we have seen, the claim of the defendant bank is against both the partnership and the individual members who indorsed its note as sureties, and, under the doctrine recognized and approved by these and like authorities on the subject, if the facts should be established as alleged and contended for by defendant bank, the right of appropriation, to the extent required to satisfy the claim, would arise to the bank, and the defendant is therefore entitled, as stated, to have the questions determined on proper issues. And the principle is in no way affected by the fact that the deposit now stands in the name of the plaintiff, the bank having taken it in ignorance of the true conditions affecting its rights. If, as defendant avers, it was in fact and truth the husband's property, and placed in the wife's name with intent to defraud creditors and the husband being insolvent, she was a volunteer, or if she participated in the fraudulent purpose, in such case the attempted appropriation is avoided by our statute to prevent fraudulent gifts and conveyances, Revisal, secs. 960-962, and the question can, for the purposes of this defense, be considered and dealt with as if the deposit stood in the name of the husband, a course pursued with (184) approval in *Citizens Bank v. Garnett,* 21 Kan., 354, an apt authority for the disposition we make of the present appeal.

Even if the doctrine of equitable set-off did not, in strictness, apply on the facts alleged in the answer, the defendant would be entitled to have its defense considered as a bill in the nature of an equitable *fi. fa.,* the property in question not being available to creditors under ordinary legal process. *Mebane v. Layton,* 86 N. C., 572; *Bank v. Harris,* 84 N. C., 206; *Tabb v. Williams,* 57 N. C., 352; *Harrison v. Battle,* 16 N. C., 541. We have disposed of the present appeal on the issuable facts alleged by the defendant, that this deposit was the property of the husband placed in the name of the wife with intent to defraud the husband's creditors, and have purposely refrained from discussing the evidential facts also appearing in the pleadings, that the deposit in question was part of the proceeds from the sale of a piece of property held by the husband and the wife as an estate by entireties. What may have been the nature of the original investment in this property, and what the effect of the subsequent sale and any agreement that may have been made by the parties concerning it or the proceeds from it can best be determined when the evidence has been more fully disclosed on the trial of the issue.

There is error, and this will be certified that the cause may be submitted to the jury.

Reversed.

Cited: Moore v. Trust Co., 178 N.C. 120; *Sewing Machine Co. v. Burger,* 181 N.C. 253; *Grocery Co. v. Newman,* 184 N.C. 374, 375; *Graham v. Warehouse,* 189 N.C. 535; *Trust Co. v. Trust Co.,* 190 N.C. 470; *Trust Co. v. Spencer,* 193 N.C. 746; *Coburn v. Carstarphen,* 194 N.C. 369; *Indemnity Co. v. Corp. Com.,* 197 N.C. 565; *Munday v. Bank,* 211 N.C. 278; *Erickson v. Starling,* 235 N.C. 658.

NEW BERN COTTON OIL AND FERTILIZER COMPANY v. M. D. AND J. W. LANE, FORT BARNWELL AGRICULTURAL AND DEVELOPMENT COMPANY, AND J. D. FARRIOR.

(Filed 21 March, 1917.)

Deeds and Conveyances—Registration—Notice—Corporations—Set-off.

Where the owner of lands, subject to an unrecorded mortgage, has conveyed the same by deed to a corporation, which he and another practically owned, and to whom he afterwards sold his remaining shares, and subsequently became manager, and then the mortgage is recorded, it is *Held,* that the corporation were purchasers for value without notice of the unrecorded instrument, and the evidence was insufficient upon the question of fraud; and, further, a debt due the corporation from the mortgagees could not be allowed as a set-off to the mortgage debt.

CIVIL ACTION, tried at November Term, 1916, of CRAVEN, before *Lyon, J.*

(185) The court sustained a motion to nonsuit plaintiff on its cause of action and directed a verdict for the Fort Barnwell Company on its counterclaim. From the judgment rendered, the plaintiff appealed.

Moore & Dunn for plaintiff.

Ward & Ward for defendants.

BROWN, J. The plaintiff sues to foreclose a mortgage executed by defendant M. D. Lane, 12 July, 1911, to secure $3,500, evidenced by seven notes of $500 each, indorsed by J. W. Lane, three of which remain due and unpaid. The mortgage was recorded 24 April, 1915. Some time prior to the registration of the mortgage the lands secured therein were conveyed to the defendant the Fort Barnwell Company for the

recited consideration of $5,000. At that date the property conveyed was subject to several outstanding incumbrances. The deed was recorded 8 May, 1913. It appears in the evidence that at the time of the organization of the Fort Barnwell Company the defendant M. D. Lane was the owner of the stock in said corporation and sold to defendant Farrior one-half of the capital stock for cash under an agreement that the money was to be applied to the payment of prior encumbrances on the property, which was done. Farrior purchased the remainder of the stock in November, 1914. M. D. Lane testified substantially that no stock was issued when company was first organized for purpose of selling stock; that the property consisted of several farms, live stock, equipment, etc., belonging to him. Stock issued about 1 June, 1913, he and Farrior being officers; that he knew plaintiff's mortgage existed partly unpaid; that he was secretary-treasurer up to 1 December, 1914, afterwards general manager, employed by Farrior. Witness owned some stock up to December, 1914; that he did not tell Farrior about plaintiff's mortgage; could not say Farrior knew of its existence; had no ground to think so; never mentioned it. Farrior had no interest there except in the corporation; that he never told Ives, president of plaintiff; Farrior knew about the mortgage; that he agreed to sell Farrior half of the stock, among other things, and agreed to convey to the corporation the particular property in plaintiff's mortgage as a part of the transaction; that he told Farrior the land to be conveyed, and this was part of it, and part of the basis of the value of the stock.

The plaintiff asked witness Lane: "Did you not tell Ives on two occasions that Farrior knew all about that mortgage when he took over the property?" This question was properly excluded. It is well settled that in the absence of fraud actual notice of a prior unregistered deed or mortgage executed since 1 December, 1885, cannot affect the rights of subsequent purchasers whose deed or mortgage has been (186) duly recorded. No notice of a prior mortgage, however full and formal, will supply notice by registration. *Wood v. Lewey,* 153 N. C., 401; *Harris v. Lumber Co.,* 147 N. C., 631.

The court rendered judgment, for want of an answer, against M. D. Lane and J. W. Lane, and refused to enter a decree of foreclosure against the other defendants. In this there was no error. The stock issued by the Fort Barnwell Company was sold for value and the proceeds applied to prior incumbrances on the lands.

There is no evidence of fraud, and upon all the evidence the court properly held that said corporation, as well as Farrior, were bona fide purchasers for value prior to registration of plaintiff's mortgage.

The defendant's counterclaim is based on goods and merchandise sold by it to plaintiff and for which there is an admitted balance due of $274.77.

The plaintiff claimed the right to apply this to the Lane notes. The manager and president of plaintiff testified that the money was due unless it could be charged up as an offset against the Lane notes. His Honor properly held it was not a set-off, and directed a verdict on the counterclaim for defendant.

No error.

Cited: Dye v. Morrison, 181 N.C. 311; *Blacknall v. Hancock,* 182 N.C. 372; *Door Co. v. Joyner,* 182 N.C. 521; *Roberts v. Massey,* 185 N.C. 166; *Bank v. Smith,* 186 N.C. 641; *Davis v. Robinson,* 189 N.C. 601; *Cowan v. Dale,* 189 N.C. 687; *Dameron v. Carpenter,* 190 N.C. 589; *Bender v. Telegraph Co.,* 201 N.C. 356; *Lowery v. Wilson,* 214 N.C. 804; *Turner v. Glenn,* 220 N.C. 625.

J. T. DARDEN v. DR. D. E. MATTHEWS.

(Filed 21 March, 1917.)

1. Wills—Codicils—Interpretation.

A codicil to a will is a part thereof, expressing the testator's afterthought or amended intention, and should be construed with the will itself as one instrument.

2. Same—Estates—Powers of Sale.

A devise of lands for life, with certain limitations, etc., by the will, and a codicil thereto confers upon the first taker "full power and authority to sell and convey" the same, and "to make title to the purchaser after my death." *Held,* the life estate is not enlarged by the codicil; but the life tenant is given authority to exercise the power to sell the lands, and upon his doing so he may convey the fee-simple title to the purchaser by a good and sufficient deed, but is only entitled to the value of his life estate out of the proceeds of sale.

CIVIL ACTION, tried before *Lyon, J.,* at February Term, 1917, of SAMPSON.

This is a controversy submitted without action.

(187) Mary J. Darden, who was the owner of the land in controversy, died without issue, leaving a will, which has been duly probated and recorded, the material parts of which are as follows:

"Second. I give and devise and bequeath to my beloved husband, J. T. Darden, all of my real and personal property, of every kind and description, to have, possess, and use during his natural life, and upon his death all of said real and personal property shall go to my husband's brother, J. M. Darden, if he shall then be living, and upon his death, to my grandchild, Thomas Carr Hollingsworth, in fee simple forever; and if my husband, J. T. Darden, shall survive his brother, J. M. Darden, then upon the death of my husband, J. T. Darden, all of my real and personal property of every description, as aforesaid, shall go to and vest in my grandson, Thomas Carr Hollingsworth; and if my said grandson, Thomas Carr Hollingsworth, shall die without any issue of his body, said lands and property shall go to and vest in the children of Dr. J. H. Darden, namely, Henry Darden, Jimmie Darden, and Mary Bell, to be divided equally between them."

After the execution of said will she added a codicil thereto, which has been duly probated and recorded as a part of the will, in which there is the following provision:

"First. I give and confer upon my said husband, J. T. Darden, full power and authority to sell and convey any part of the foregoing property, and to make title to the purchaser after my death."

The said J. T. Darden has agreed to sell to the defendant all of the lands and premises belonging to the said Margaret J. Darden, situate in Sampson County, and set out in said will, for the sum of $5,200, and the defendant has agreed to purchase said premises and pay for the same at the price above named, provided the plaintiff has authority, under said will, to convey to him a good and indefeasible title to said lands.

In accordance with the contract and agreement referred to, the plaintiff has made, executed, and tendered to the defendant a deed to said lands in fee simple, with full covenants of warranty and seisin, and has demanded of the defendant the purchase price agreed upon.

The defendant has refused to accept said deed or to pay any part of the purchase price agreed upon until said title shall have been passed upon by the courts, the defendant claiming that under the last will and testament of Margaret J. Darden, hereinbefore referred to, the plaintiff is without power to convey said lands to him in fee simple, as he has attempted to do in the deed above referred to.

Judgment was rendered against the plaintiff, adjudging that he has no power to sell and convey said lands, and he excepted and appealed.

Butler & Herring for plaintiff.

No counsel for defendant.

(188) ALLEN, J. A codicil is a part of a will, but with the peculiar function annexed of expressing the testator's afterthought or amended intention. It should be construed with the will itself, and the two should be dealt with as one instrument (1 Shouler Wills and Ex., sec. 487; *Green v. Lane,* 45 N. C., 113), and when so considered the land in controversy is devised to the plaintiff "during his natural life," with "full power and authority to sell and convey" it.

Language, annexed to a life estate, much less direct and explicit than that contained in the codicil, has been held to confer a general power of disposition.

In *Parks v. Robinson,* 138 N. C., 269, the devise was to the wife during her natural life and "at her disposal"; in *Chewning v. Mason,* 158 N. C., 578, to "Martha Chewning, during her natural life, and then to dispose of as she sees proper"; in *Satterthwaite v. Wilkinson, ante,* p. 38, to George T. Tyson in fee, with a limitation over in the event of his death, leaving neither wife nor children, but should he live to be 21, "to be at his own disposal"; and in each it was held that the first taker had the power to sell and convey in fee.

We are, therefore, of opinion that the plaintiff can sell and convey the land in controversy in fee to the defendant; but it does not follow that he owns the land in fee.

The Court said in *Patrick v. Morehead,* 85 N. C., 65: "It has been settled upon unquestionable authority that if an estate be given by will to a person generally, with a power of disposition or appointment, it carries the fee; but if it be given to one for life only, and there is annexed to it such a power, it does not enlarge his estate, but gives him only an estate for life," and this was approved in *Chewning v. Mason,* 158 N. C., 580; *Griffin v. Commander,* 163 N. C., 232; *Fellowes v. Durfey,* 163 N. C., 311.

In *Chewning v. Mason, supra,* the distinction between property and the power to dispose of it, and the effect of annexing a power of disposition to a life estate, are stated as follows: "There is a marked distinction between property and power. The estate devised to Mrs. Chewning is property, the power of disposal a mere authority which she could exercise or not, in her discretion. She had a general power annexed to the life estate, which she derived from the testator under the will. If she had exercised the power by selling the land, the title of the purchasers would have been derived, not from her, who merely executed the power, but from the testator or the donor of the power, 'The appointer is merely an instrument; the appointee is in by the original deed. The appointee takes in the same manner as if his name had been inserted in the power, or as if the power and instrument executing the power had been ex-

pressed in that giving the power. He does not take from the donee as his assignee, 2 Wash. R. P. 320; 1 Sugden on Powers, (189) 242; 2 Sugden on Powers, 22; *Doolittle v. Lewis,* 7 Johns Ch. 45. In the execution of a power there is no contract between the donee of the power and the appointee. The donee is the mere instrument by which the estate is passed from the donor to the appointee, and when the appointment is made, the appointee at once takes the estate from the donor as if it had been conveyed directly to him.' *Norfleet v. Hawkins,* 93 N. C., 392. It does not follow, because she could sell and convey the land under the power, that she thereby became the owner in fee. . . . The doctrine was clearly expressed by *Chancellor Kent:* 'If an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only and annexes to it a power of disposition of the reversion. In that case the express limitation for life will control the operation of the power and prevent it from enlarging the estate to a fee.' 4 Kent Com., 520; *Jackson v. Robins,* 16 Johns, 537."

It follows, therefore, that the plaintiff owns a life estate in the land in controversy, with the power to sell and convey, and that when he sells he is only entitled, out of the proceeds, to what belongs to him, the value of his life estate.

Reversed.

Cited: White v. White, 189 N.C. 237; *Roane v. Robinson,* 189 N.C. 632; *Bolling v. Barbee,* 193 N.C. 790; *Cagle v. Hampton,* 196 N.C. 471, 472; *Fletcher v. Bray,* 201 N.C. 766, 768; *Buncombe County v. Wood,* 216 N.C. 227; *Smith v. Mears,* 218 N.C. 197, 198, 199; *Hardee v. Rivers,* 228 N.C. 68; *Langston v. Barfield,* 231 N.C. 596; *Armstrong v. Armstrong,* 235 N.C. 735; *Voncannon v. Hudson Belk Co.,* 236 N.C. 711.

VINSON, JONES & FINCH v. J. H. PUGH ET ALS.

(Filed 21 March, 1917.)

1. Contracts — Parol Evidence — Deeds and Conveyances — Principal and Agent—Escrow—Statute of Frauds.

Where the vendor of lands has executed a deed reciting the consideration and expressed in conformity with a parol contract of sale theretofore made, and has given the deed to his agent to be delivered upon payment of the agreed purchase price, it is a sufficient writing within the meaning of the statute of frauds.

2. Principal and Agent—Deeds and Conveyances—Dual Agencies—Issues.

Where the evidence is conflicting as to whether the agent of the vendor of lands to whom the deed had been given for delivery to the vendee had only the authority to receive cash therefor, and not extend the time for payment, which he had done, and that the agent acted in collusion with the vendee, received a commission from him without the knowledge of the vendor, his principal, and on account of the confidence placed in him had induced the vendor to sell at a price much less than he could have obtained from others, and the evidence was in conformity with the pleadings: *Held*, if the agent had no authority to change the terms of the sale, the vendee could not recover by reason of his failure to perform the contract on his part, and it was reversible error for the trial judge to refuse the vendor's appropriate issues tendered in apt time, or other suitable ones on this and the other controverted matters.

3. Principal and Agent—Dual Agent—Knowledge—Contracts—Fraud.

Where the agent for a vendor for the sale of lands has accepted benefits from or is acting for the other party, unknown to his principal, and accordingly the contract of sale has been made, it is avoidable at the option of the principal as being against public policy, and to prevent fraud which may arise in such dual agencies, without the necessity of showing actual fraud in the transaction.

(190) CIVIL ACTION, tried at January Special Term, 1917, of SAMPSON, before *Whedbee, J.*, upon these issues:

1. What amount, if anything, is the plaintiff entitled to recover of the defendant, J. Frank Wooten? Answer: "$100, with 6 per cent interest from 15 July, 1914."

2. Did the defendant J. H. Pugh contract and agree to sell and convey to the plaintiff the timber, rights, and privileges for the sum of $6,000, as alleged in the complaint, upon the lands described in the complaint? Answer: "Yes."

3. Did the defendant J. H. Pugh fail and refuse to comply with his said contract and agreement? Answer: "Yes."

4. Did the plaintiff comply with their part of said agreement and tender the purchase price in accordance with said agreement? Answer: "Yes."

5. What damages, if any, is plaintiff entitled to recover of defendant J. H. Pugh? Answer: "$2,000."

The defendant Pugh excepted to the issues submitted and tendered the following:

1. Was the defendant Wooten the duly authorized agent of his co-defendant, Pugh, to make sale of the timber referred to in the complaint?

2. Was it agreed at the time of the execution of the timber deed that the plaintiff should have thirty days in which to pay for the same?

3. Was the $250 referred to in the complaint paid to the defendant Wooten without the knowledge or consent of the defendant Pugh?

4. Was said sum of $250 paid to the defendant Wooten by the plaintiff for his services in procuring the execution of said timber deed from his uncle and codefendant, J. H. Pugh?

His Honor refused to submit either of said issues, and to this ruling the defendant Pugh excepted. In apt time said defendant moved to nonsuit, which motion was denied, and defendant excepted. The defendant Pugh appealed from the judgment rendered.

Butler & Herring for plaintiffs. (191)
A. McL. Graham for defendant.

BROWN, J. This action is brought to recover damages for breach of contract in the sale of timber. The plaintiffs allege that defendant Pugh contracted to sell and convey to them the standing timber on certain lands near the town of Clinton, owned by defendant, for the sum of $6,000; that plaintiffs complied with the contract on their part, but defendant wrongfully refused to perform the contract on his part, to plaintiff's damage $10,000.

The defendant denies that he entered into a valid contract to convey the timber to plaintiffs, and pleads the statute of frauds. The defendant further avers that he entrusted the sale of the timber to his nephew, J. Frank Wooten, the codefendant, who agreed to negotiate the sale of it at the best obtainable price; that "this defendant had full faith and confidence in the integrity of his said nephew, and thereupon directed the said J. Frank Wooten to seek a purchaser for said timber, and to submit to this defendant a reasonable price for the same; that the plaintiff, having been advised that this defendant was willing to sell his timber, and being also aware of the fact that the said J. Frank Wooten was the nephew of this defendant, and that this defendant had confidence in him, approached the said Wooten and made a proposition to him, under the terms of which the said Wooten, for a valuable consideration, obligated to secure the signature of this defendant to a deed conveying said timber to the plaintiff; that this defendant had no knowledge whatever concerning the covinous and fraudulent contract, made and entered into between the plaintiff and the said J. Frank Wooten; and notwithstanding this fact, and notwithstanding the fact that the plaintiff knew that said timber was worth more than $6,000, and notwithstanding the fact that both the plaintiff and the said J. Frank Wooten knew that there were other parties in and around the town of Clinton who would have willingly paid more than $6,000 for said timber, the said J. Frank Wooten, acting as the secret agent and attorney of the plaintiff, falsely and fraudulently represented to this defendant that he

had sold said timber to the plaintiff for its full value and at the highest figure that the market would afford."

The defendant further avers that, relying upon his said agent, he executed the deed and delivered same to him with instructions to deliver it at once upon payment in cash of the $6,000 purchase price. Defendant denies that he gave his said agent any authority to take the deed with him to Jacksonville or to extend time of payment of the purchase money.

It is contended that there is no valid binding contract for the sale of the timber evidenced by any memorandum in writing signed
(192) by the defendant that will take the transaction out of the protection of the statute of frauds.

It is admitted that a deed was duly executed by defendant and deposited with the codefendant, Wooten, with instructions to deliver it according to agreement with plaintiffs upon payment of the purchase money. This deed recited the true consideration and contained a full description of the land upon which the timber stood and in all respects contained the contract of the parties as originally made.

It has been held that if a person who has made a parol agreement to sell land sign a deed therefor to the vendee, and deliver it in escrow, if the instrument contain the terms of the parol agreement substantially, including a recital of the consideration, it is a sufficient compliance with the statute of frauds.

Browne, in his work on the Statute of Frauds, says that this is opposed by the great weight of authority (p. 483, sec. 354-B), and to same effect are the notes to *Halsell v. Renfrow,* 50 U. S. Supreme Court (Law Ed.), 1032. It is admitted, however, that there is a sharp conflict between the authorities upon the question.

But this Court has decided, along with other courts of respectability, that the undelivered deed under such circumstances will satisfy the statute. In *Magee v. Blankenship* there was a definite contract for an exchange of lands between the parties, and an undelivered deed was allowed as written evidence satisfying the requirements of the statute. 95 N. C., 563, citing *Blacknall v. Parish,* 59 N. C., 70. Referring to this question in *Flowe v. Hartwick,* 167 N. C., 452, *Mr. Justice Hoke* says: "While this has been said to be against the great weight of authority, our own Court in *Magee v. Blankenship* seems to have approved the position." The learned judge of the Superior Court properly followed the decisions of this Court and denied the motion to nonsuit.

It is contended that the plaintiffs failed to pay cash for the timber, as they had contracted to do, and therefore failed to perform the contract upon their part. The plaintiffs contend that the time for payment

of the purchase money was extended, and offer in evidence the following paper-writing:

I, J. F. Wooten, having in my possession a certain timber deed, executed by James H. Pugh to Vinson, Jones & Finch, left with me by said James H. Pugh, as his agent, do hereby agree to deliver said deed to said grantee at any time within thirty days from date hereof, upon their payment to me of the full sum of $....., the purchase price agreed upon for said timber.

This 11 July, 1914. J. F. WOOTEN.

Attest: HENRY A. GRADY.

The evidence is conflicting upon this allegation, and it was for (193) the purpose of finding the fact that issues were tendered by defendant. We think the court should have submitted the issues, or some other suitable issues, so that the controverted fact might be determined.

If the jury should find that the terms of sale were cash and that the defendant Wooten had no authority to change the terms and extend time for payment, then the plaintiffs did not perform the contract on their part, and cannot recover.

It is contended that the defendant Wooten was acting in bad faith towards his codefendant and that while acting as his agent, without his knowledge or consent, received $250 from plaintiffs for his services in negotiating the sale of the timber. The third and fourth issues tendered by defendant present this question for the determination of the jury, and should have been submitted. These issues are distinctly raised by the pleadings and there is evidence sufficient to require the submission of the matter to the jury.

There is evidence that Wooten was the agent of defendant Pugh in making the sale; that he had agreed to secure the best obtainable price; that there were others, beside plaintiffs, in and near Clinton who were willing to buy the timber at a much larger price; that the timber was sold shortly thereafter for $8,000, and according to plaintiff's present contention was worth much more. There is evidence that Wooten demanded of plaintiff $500 for his service in the matter and received $250. It is in evidence that defendant Pugh knew nothing whatever of this, and that he relied entirely on the judgment and fidelity of Wooten in negotiating the sale of the timber.

It is contended that this $250 was allowed as the expenses of inspecting the timber by a timber inspector. There is no evidence that the timber inspector received $250 or any other sum from Wooten for his services.

It is well settled that an agent may, with their full knowledge and consent, represent both parties to a contract, and his contracts under

these circumstances bind each within the scope of his authority; but where the agent, without the full knowledge and consent of his principal, represents the adverse party in the transaction, his contracts relating thereto are voidable at the option of the principal.

But an agent cannot serve the opposing party without the knowledge and consent of his principal, though he acts in good faith and no harm results to the principal. 2. Corp. Jur., 838, sec. 520; *Trueslow v. Bridge Co.*, 61 W. Va., 628; *Winter v. Carey*, 127 Mo. Ap., 601.

(194) It is not necessary that either principal should show injury to himself. Without showing such injury, he may avoid a contract made by a dual agent without his knowledge of such dual agency. *Guthrie v. Chair Co.*, 76 S. E., 795.

The payment of a secret commission or fee to an agent of another entrusted with the execution of a contract entitles the principal to avoid it. 2 Corp. Jur., 839, and notes.

This rule is founded in sound public policy, and in referring to it, it is said in *Winter v. Carey, supra:* "The law recognizes that, in general, human nature is too weak to assume faithful service for an agent serving opposite parties without their knowledge and consent, and has absolutely forbidden such dual position, and if taken the agent is denied any redress. Good faith on the agent's part and lack of harm to his principal will not prevent an application of the rule, for it is founded on public policy and is *preventive* rather than *remedial.*"

In *Ferguson v. Gooch,* 94 Va., 1, it is held that "a man cannot be the agent of both the buyer and seller in the same transaction, without the intelligent consent of both parties. . . . All such transactions are voidable and may be repudiated by the principal without proof of injury on his part."

In *Donovan v. Campion,* 85 Fed., 73, *Judge Stanborn* well says: "It is too well settled to admit of discussion that no sale where any substantial advantage has been taken can be sustained when he who actively promoted it acted as the ostensible agent for the vendor, when he was in reality the secret agent of the purchaser. It inaugurates so dangerous a conflict between duty and self-interest to allow the agent of a vendor to become interested as the purchaser, or the agent of a purchaser, in the subject-matter of his agency, that the law wisely and peremptorily prohibits it."

It is not necessary to establish fraud upon the part of the agent. The rule of law is a preventive remedy and intended to prevent the possibility of fraud. It is not so much that fraud has been committed, as that it might be committed, that the law frowns upon dual agencies.

New trial.

Cited: Pope v. McPhail, 173 N.C. 240; *Harper v. Battle,* 180 N.C. 376; *Oxendine v. Stephenson,* 195 N.C. 239; *Austin v. McCollum,* 210 N.C. 818.

(195)

GULF STATES STEEL COMPANY v. E. S. FORD.

(Filed 21 March, 1917.)

1. Corporations—Evidence of Incorporation.

Testimony of a witness to the fact of incorporation of a party to the action is *prima facie* evidence of such fact, and sufficient.

2. Evidence—Depositions—Objections—Trials—Incorporations.

Where a witness in his depositions has testified to the fact of incorporation of a party, evidence thereof may not for the first time be objected to on the trial, when the depositions have theretofore remained in the clerk's office a sufficient time for the purpose.

3. Bills and Notes—Negotiable Instruments—Presumptions — Statutes — Due Course—Equities.

The admission by the maker of a promissory note that it had been indorsed to the plaintiff in due course raises the presumption *prima facie* that he is a holder in due course, acquired the instrument before maturity, without notice of any equity; that he is the owner and is entitled to sue thereon (Pell's Rev., secs. 2201, 2208); and the *prima facie* case is not rebutted by a denial in the pleadings.

APPEAL by defendant from *Bond, J.,* at November Term, 1916, of FRANKLIN.

William W. Boddie for plaintiff.

Yarborough & Beam and Ben T. Holden for defendant.

CLARK, C. J. The defendant executed his promissory note to the Hardware Company of Louisburg, N. C., who indorsed it to the plaintiff. The plaintiff alleged that it was a corporation doing business under the laws of the State of Alabama. In the answer the defendant admitted the execution and delivery of the note, but denied the incorporation of the plaintiff and the assignment to it of the note. On the trial the defendant introduced no evidence, but objected to the deposition of A. R. Forsyth, who testified that he was vice president and treasurer of the plaintiff, that it is a corporation under the laws of Delaware, with its principal offices at Birmingham, Alabama, where it is engaged in mining coal and ores and manufacturing coke, pig iron, steel, nails, and wire,

and that the note sued on had been transferred to it by the payee, the Hardware Company, in payment of its account. The defendant objected to this evidence.

The existence or nonexistence of a corporation is a fact and may be proved as other facts. In *Bank v. Carr,* 130 N. C., 479, a witness, in a deposition, testified that a certain bank was a corporation, and the Court held that this was *prima facie* evidence of the fact.

(196) The existence of the corporation may be proved by reputation. 10 Cyc., 241. In *R. R. v. Saunders,* 48 N. C., 127, the Court held that the organization of a corporation may be proved by a witness who saw the alleged corporation acting as such.

In a criminal action it is not necessary to produce the charter of a corporation, but it is sufficient to prove that it carried on business in the name set out in the indictment and was well known by that designation. *S. v. Grant,* 104 N. C., 910.

In *Stanly v. R. R.,* 89 N. C., 332, it is held difficult to assign any good reason why a corporation suing or being sued should be designated by any other description than its corporate name, just as with a natural person, the only purpose in either case being to point out the party to the action. Here the note was indorsed to the plaintiff under its alleged corporate name, and the assignment and that the plaintiff was doing business under such corporate name are shown, and there is no evidence to the contrary.

Besides this, the deposition was on file in the clerk's office and there was no objection taken to the testimony of Forsyth until the trial. In *Morgan v. Fraternal Assn.,* 170 N. C., 81, where a deposition was open and on file before the trial, on an objection to the deposition being taken for the first time on the trial, it was held that the objection could not be sustained, citing *Ivey v. Cotton Mills,* 143 N. C., 189, 197; *Bank v. Burgwyn,* 116 N. C., 122, 124. In *Carroll v. Hodges,* 98 N. C., 419, it was held that a deposition will not be quashed or rejected either in whole or in part on motion made for the first time at the trial, when it has been on file long enough before the trial for the objection to be made.

The defendant admits the execution and delivery of the note to the Hardware Company. Its indorsement in blank is proven by the witness Allsbrook, and its transfer to the plaintiff in due course is proven by the deposition of Forsyth. The law presumes that the holder of a note indorsed in blank is its holder in due course; that he took it for value before maturity and without notice of any equity; that he is the owner and has the right to bring suit to enforce collection. There is no evidence in this case to overcome these presumptions. Every holder is deemed a holder in due course, and upon the execution of the instrument being

proven every holder is deemed *prima facie* a holder in due course. Pell's Revisal, secs. 2201, 2208; *Mfg. Co. v. Summers,* 143 N. C., 109. Such *prima facie* case is not rebutted by a denial in the answer of the ownership of the plaintiff. *Causey v. Snow,* 120 N. C., 279.

No error.

Cited: Bank v. Felton, 188 N.C. 387; *Bixler v. Britton,* 192 N.C. 202.

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(197)

W. L. DOWELL, ADMINISTRATOR, v. CITY OF RALEIGH.

(Filed 21 March, 1917.)

1. Municipal Corporations — Cities and Towns — Negligence — Defective Streets—Instructions—Appeal and Error.

In an action against a municipality for the alleged negligent killing of an intestate, who was thrown from his falling wagon, caused by a defective street, indefinite evidence was admitted, without objection, tending to show other defects in the street. *Held,* it should be confined to similar defective conditions in the immediate vicinity of the occurrence as tending to show the existence of the particular defect causing the injury, and actual or constructive notice thereof to the municipal authority; but an instruction that entirely excludes such evidence, which was admitted without objection, from the consideration of the jury is reversible error to the plaintiff's prejudice.

2. Evidence—Declarations—Wrongful Death—Negligence—Executors and Administrators—Trusts and Trustees—Statutes.

While the statute requires the personal representatives of the deceased to bring action for damages for his negligent killing, he acts in such respect in the nature of a trustee for the beneficiaries under the statute, the right of action depending entirely upon the statute, operating after the death, in which the decedent can have no interest; therefore, his declarations made as to the character or cause of the occurrence are inadmissible as substantive evidence.

3. Municipal Corporations—Negligence—Defective Streets—Notice.

A municipality is not liable in damages caused by a defective condition of its street unless it is shown that it had actual or constructive notice thereof. *Fitzgerald v. Concord,* 140 N. C., 110.

4. Same—Contributory Negligence—Burden of Proof.

In an action against a municipality to recover damages for an alleged negligent death of an intestate, where there is supporting evidence, the jury must find that there was a dangerous defect in the street, thereby reason of defendant's negligence, or its failure to repair, after actual or constructive notice, and that it, and not the defective wagon, from which

the intestate was thrown, if such was defective, was the proximate cause; the burden being upon plaintiff to show negligence, and upon defendant to show contributory negligence.

CIVIL ACTION, tried before *Connor, J.,* and a jury, at June Term, 1916, of WAKE, and brought for the recovery of damages for the wrongful death of the plaintiff's intestate, alleged to have been caused by the defendant's negligence in failing to keep one of its streets in a reasonably safe condition. It appears that in the morning of 22 March, 1914, R. L. Johnson, plaintiff's intestate, was driving along South Street in the city of Raleigh, in a milk wagon drawn by a horse; that the kingbolt was broken and the body of the wagon was detached and fell,
(198) and Johnson, who was then sitting in the wagon, was thrown through the glass front of his wagon to the ground. He was taken up in an unconscious condition and in a few moments thereafter died. There was evidence on the part of the plaintiff that in South Street at the point where the wagon fell to the ground there were three ditches, or excavations, across the street on the south side thereof, not far apart, and that when a vehicle ran into and across the ditches, or excavations, the front wheels would enter one about the time the rear wheels entered another; that this caused very violent and successive jerks of the wagon; that the first excavation to the south was from 6 to 8 inches in depth; the second excavation from 8 to 10 inches in depth, and a third, at the place where the wagon body fell to the ground, was from 8 to 10 inches in depth. On the morning in question the street was covered with a light snow, which had been blown into the ditches and excavations, completely covering the same and leaving the street, to all appearances, safe for travel. There was also evidence tending to show that South Street was one of the much traveled streets of the city, and that at other points in the street there were holes and excavations which rendered the same unsafe. There was a policeman's call-box near the holes or excavations where Johnson was killed which required policemen of the city to come to the place at short intervals of time. The defendant denied all negligence and introduced evidence tending to show that the holes in question were of slight depth and that the street at this particular place was in a reasonably safe condition for travel. The usual issues in actions for negligence were submitted to the jury.

The judge instructed the jury in part as follows: "You will exclude from your consideration any and all testimony as to the condition of South Street or any part of it other than the place where it is admitted that the wagon fell, for, notwithstanding that the street may have been in bad condition elsewhere and that the defendant may have been negligent as to the condition elsewhere, that would not make the defendant

liable to the plaintiff in this case. So your inquiry will be, first, What was the condition of the street immediately at the point at which the wagon fell? Were there defects in the street? Were these defects such as to render passage over the street unsafe?" In this connection it may be stated that there was evidence that South Street was in worse condition at other places than it was at the place where the intestate's injuries were received.

The jury answered the first issue "No," that is, that there was no negligence. Judgment was entered for the defendant, and plaintiff appealed.

Douglass & Douglass and R. N. Simms for plaintiff.

No counsel for defendant.

WALKER, J., after stating the case: There are two questions to (199) be considered in this case:

1. As to the condition of the street at places other than the one where the accident occurred. The court admitted the proof, or rather it seems to have been let in without any objection. It may be that in its present form it was not competent, as it extends to the entire lengh of the street and is not restricted to that part of it near the place where the intestate was killed. We find this stated in one of the authorities: "For the purpose of proving or disproving negligence with respect to the particular defect or obstruction which caused the injury, evidence of similar defects, obstructions, or conditions existing at other places, or of like conditions, obstructions, or methods in other cities, is ordinarily inadmissible. But evidence of similar defects, obstructions, or conditions in the immediate vicinity under like conditions is admissible as tending to show the existence of the particular defect or obstruction, or to fix constructive notice thereof on the municipality. Thus such evidence is generally held admissible where the accident or injury occurs on a sidewalk of uniform construction and material for considerable length, and the other defects or condition offered in evidence were in the same walk and vicinity." Nor does it appear to what extent the other portions of the street were defective, nor whether the alleged defects were near to or remote from the one in question. We need not pass upon the admissibility of this evidence, because there was no objection to it, and, therefore, express no opinion in regard to it. But plaintiff excepted to the instruction of the court relating to it, and we must ascertain if the benefit of it was taken away from him by the charge. The learned judge was right in stating that a defect at any other place in the street would not create a liability unless they found that by reason of defendant's

negligence there was a defect at the place where intestate was thrown from the wagon, and that his death was proximately caused by it; but the language of the court went beyond this, as we think, and excluded the evidence from the consideration of the jury. It is likely that it was not so intended, but that is the fair construction of it.

2. The declaration of the intestate as to the condition of the wagon was incompetent. It was not a declaration against interest, as at that time he had no interest to serve or disserve. He had no cause of action himself, as his death was instantaneous, nor did he even have any interest in this cause of action. It is one not known to the common law, but created by the statute, and the beneficiaries take, not by any inheritance or succession from him, but solely because they are named in the statute as the recipients of the fund recovered for the death caused by the defendant's negligent or wrongful act. The cause of action
(200) never arose until the death of the intestate, and then not to him, but to those who are designated by the statute to take the fund recovered. They acquire their right by the statute alone, and not because of any privity with the intestate, for none such exists between them, in any proper sense of that term. This is well settled by our decisions. *Baker v. R. R.,* 91 N. C., 308; *Taylor v. Cranberry Co.,* 94 N. C., 526; *Best v. Kinston,* 106 N. C., 205; *Killian v. R. R.,* 128 N. C., 261; *Hartness v. Pharr,* 133 N. C., 571; *Bolick v. R. R.,* 138 N. C., 371; *Gulledge v. R. R.,* 147 N. C., 234; *Hall v. R. R.,* 146 N. C., 345; *Bennett v. R. R.,* 159 N. C., 345; *Broadnax v. Broadnax,* 160 N. C., 432; *Hood v. Tel. Co.,* 162 N. C., 92; *Hartis v. Electric Railway Co., ibid.,* 236. In *Hood v. Tel. Co., supra,* the Court said: "The right of action for wrongful death, being conferred by statute at death, never belonged to the deceased, and the recovery is not assets in the usual acceptation of this term." And in *Hartness v. Pharr, supra,* we said: "Whatever the varying forms of the satutes may be, the cause of action given by them, and also by the original English statute, was in no sense one which belonged to the deceased person, or in which he ever had any interest, and the beneficiaries under the law do not claim by, through, or under him; and this is so although the personal representative may be designated as the person to bring the action. The latter does not derive any right, title, or authority from his intestate, but sustains more the relation of a trustee in respect to the fund he may recover for the benefit of those entitled eventually to receive it, and he will hold it, when recovered, actually in that capacity, though in his name as executor or administrator, and though in his capacity as personal representative he may perhaps be liable on his bond for its proper administration." This passage was quoted recently with approval in *Broadnax v. Broadnax,*

supra, as was the following from *Baker v. R. R.,* 91 N. C., 310: "The administrator thus occupies the place of trustee, for a special purpose, of such fund as he may obtain by the suit, holding it, when recovered, solely for the use of those who are entitled under the statute." Our statute prescribes the method of paying out the fund, but the latter is free from the claims of legatees and creditors. The beneficiaries derive their right, therefore, as we have said, not from the intestate, but under the statute. These views are sustained by other courts, which hold that the cause of action created by statute for death caused by negligence is independent of any right of action the deceased may have had, or would have had if he had survived the injury. *C. and O. R. R. Co. v. Dixon,* 179 U. S., 754; *Dennick v. C. R. Co.,* 103 U. S., 11; *I. C. R. Co. v. Barrow,* 15 Wall., 90. Upon the subject of admissions or declarations of the deceased before or after the accident which caused his death, Tiffany on Death by Wrongful Act (2 Ed.), sec. 194, says: "The declarations of the deceased, although made under such circum- (201) stances as would, upon an indictment for homicide, render them inadmissible as dying declarations, are inadmissible on that ground. Whether the declarations of the deceased are admissible in favor of the plaintiff will depend upon whether they were made under such circumstances as to form part of the *res gestæ.* It would seem that such declarations, if not admissible as part of the *res gestæ,* are not admissible in favor of the defendant as admissions, since the plaintiff in such case does not claim in the right of the deceased, but upon a new cause of action." This is the prevailing opinion, though he admits that there are some cases to the contrary, but when they are examined it will be found that they rest upon the principle (or are largely influenced by it) that the declarations, by reason of the fact that they were made at the very time of the injury, or of their being concomitant therewith in some degree, and explanatory thereof, became *pars rei gestæ.* The following cases treat them as inadmissible: *Ohio and C. R. Co. v. Hammersley,* 28 Ind., 371; *Johnston v. Oregon, etc., R. Co.,* 23 Ore., 94; *Louisville, etc., R. Co. v. Berry,* 35 N. E., 565 (app. 28 Ind., 714); *L. and N. R. Co. v. Stacker,* 86 Tenn., 737; *Fitzgerald v. Town of Weston,* 52 Wis., 354 (9 N. W., 13). In the case last cited the Court held that where the widow brought an action to recover for the death of her husband, which was alleged to have been caused by defendant's negligence, any declarations she had made during the life of her husband after the accident were competent only to contradict her as a witness at the trial for herself, but were not competent as declarations against interest, even against herself as plaintiff in the action, to be used as substantive testimony, and the Court said: "Nor do we think they were admissible as being made by a party in

interest, within the meaning of the rule. When the plaintiff made these declarations she had no interest in the cause of action against the town by reason of the injury to her husband, caused by a defective highway. It is only in consequence of his death, subsequent to such declarations, that she has the right of action under the statute. But, as we understand the rule, the declarations, to be admissible, must be against the interest of the person making them at the time when they were made. 1 Greenl. Ev., sec. 147." And to the same effect is *L., etc., R. Co. v. Berry, supra,* (35 N. E. at p. 566). "In the case at bar," said the Court, "the injury sued for was originally and primarily inflicted upon the appellee, and no part of the damages described in the complaint and awarded by the jury could have been recovered by the deceased had he survived the injury. *Mayhew v. Burns,* 103 Ind., 328, 2 N. E., 793. His services during his minority belonged to the appellee, as his lawful right, and it was not within the power of the deceased son to have legally
(202) defeated this right. Consequently, upon the clearest principles of law, the admissions of the deceased could not bind the appellee. As bearing somewhat upon this question, see *Ins. Co. v. Wiler,* 100 Ind., 92; Lawson, Rights, Rem. and Pr., sec. 1108. Appellant assails the correctness of the statement above quoted in so far as it declares 'that the admissions of the deceased could not bind the appellee,' and insists that the authorities cited do not sustain it. The assault is not well founded. The word 'admission' is here used in the sense of a declaration against interest. As in the nature of things it was not possible for the deceased to have any interest in the subject-matter of this controversy, his declaration could not admit away a right he did not possess." The court held that the evidence was competent as part of the *res gestæ,* and could be considered, therefore, on the motion to reverse upon the evidence—a very different question. In *Hartis v. Electric Ry. Co.,* 162 N. C., 236, a deposition taken in a suit by the injured party was permitted to be read in a subsequent action by his administrator after his death; but this was allowed upon the ground that the questions under investigation in the two suits were substantially the same and there had been full opportunity to cross-examine in the first case, and that the administrator was plaintiff in both actions. The principle now applied in this case was fully recognized there.

We conclude, therefore, that the court should not have admitted the declaration against plaintiff's objection.

But the city cannot be held liable unless it had or should have had notice of the defect, if one existed. "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. Code, sec. 3803; *Bunch v. Edenton,* 90 N. C., 431; *Russell v. Monroe,* 116 N. C., 720. 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 existed 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 the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated. It will be observed that actual notice of a dangerous condition or defective structure is not required, but notice may be implied from circumstances, and will be imputed to the town if its officers could have (203) discovered the defect by the exercise of proper diligence." *Fitzgerald v. Concord,* 140 N. C., 110 (citing and quoting 1 Sh. and Redf. Neg., sec. 369).

Before a case of actionable negligence is made out, the jury must find, that there was a dangerous defect in the street; that it was there by reason of defendant's negligence, or its failure to repair, after actual or constructive notice of it; that it—and not the defective wagon, if the latter was defective—was the proximate cause of the intestate's death, the burden being on the plaintiff to show negligence and on the defendant as to any contributory negligence.

There will be a new trial for the error above indicated.

New trial.

Cited: Tyree v. Tudor, 183 N.C. 350, 351; *Graham v. Charlotte,* 186 N.C. 664; *Avery v. Brantley,* 191 N.C. 399; *Willis v. New Bern,* 191 N.C. 513; *Michaux v. Rocky Mount,* 193 N.C. 551; *Holmes v. Wharton,* 194 N.C. 474, 475; *Wall v. Asheville,* 219 N.C. 169; *Hanks v. R. R.,* 230 N.C. 185.

R. N. BOWDEN AND WIFE ET AL. v. E. L. LYNCH AND WIFE ET AL.

(Filed 28 March, 1917.)

1. Wills—Interpretation.

A will should be interpreted from the perusal of the entire instrument, giving meaning, when possible, to the words or expressions therein used to ascertain and effectuate the testator's intent, having reference to those who are evidently the objects of his care, when the language of the will indicates them.

2. Same—"Children"—Successive Survivorships—Termination.

Where a will appears to have been written by one unfamiliar with technical language and the meaning of legal expressions, who used throughout the words "children," "heirs of the body," etc., indiscriminately and with reference to both real and personal property, and devises a part of his real property, after a life estate to his wife, to certain of his children, "and if any of my children before mentioned shall die without heirs lawfully begotten of their body them surviving, then the legacies herein given shall revert back to the survivor or survivors of my children and the lawfully begotten heirs of them surviving forever": *Held*, the intent of the testator will be construed as a devise to his children and the grandchildren, coming within its terms, by successive survivorship, determined with reference to the death of the testator's children, and not that of his own death, his living and named children taking absolutely, subject only to be defeated in the event any of such children die without children.

3. Same—Deeds and Conveyances—Quitclaim—Title.

Under a devise of lands to the testator's daughter, but shall she die without children the estate should revert to her sisters and living children, and the daughter has conveyed the land to another and since died without leaving living children, etc., a quitclaim deed to the land made by the contingent remaindermen to the same grantee, of all "right, title, and interest, estate, claim, and demand, both in law and equity, as well in possession as in expectancy," is sufficient to pass their title to the purchaser. *Beacon v. Amos*, 161 N. C., 367, etc., cited as controlling.

(204) CIVIL ACTION, tried before *Whedbee, J.*, at February Term, 1916, of GREENE.

This is an action to recover land, both parties claiming under Gray R. Pridgen, who died in 1866, leaving a will, the material parts of which are as follows:

"Item first. I give and devise to my beloved wife, Mary T. Pridgen, during her natural life, all my land, money, stock of every kind, household and kitchen furniture, and in the meantime she, the said Mary T. Pridgen, can give off to each child their respective legacies hereinafter named.

"Item second. I give to my son, H. R. Pridgen, after the death of his mother, Mary T. Pridgen, one-half of my land, one horse, bridle and saddle, one cow and calf, one sow and pigs, two plows and gear, one horse cart, one bed and its necessary furniture, to him and the lawful begotten heirs of his body forever.

"Item third. I give to Egbad Rouse and Edward Rouse, each, one bed and its necessary furniture, to them and the lawful begotten heirs of their body them surviving, but if they leave no issue, then to revert back to my children, Henry R., Elizabeth J., Nancy, Sarah E., and M. B. Hill.

"Item fourth. I give to my daughter Mary B. Hill, wife of D. Hill, one-fourth part of the remainder of my tract of land, and if she die without issue lawfully begotten of her body, then to revert back to my other four children, Henry R., Elizabeth J., Nancy, and Sarah E.

"Item fifth. I give to my daughters Nancy, Elizabeth J., and Sarah E. Pridgen the balance of my land, to share and share alike, also one bed and its necessary furniture, each, to them and the lawful begotten heirs of their body forever.

"My will is that if any of my children before mentioned shall die without heirs lawfully begotten of their body them surviving, then and in that case the legacies herein given shall revert back to the survivor or survivors of my children and the lawful begotten heirs of their body them surviving forever."

The said Gray R. Pridgen died, leaving him surviving five children, viz., Henry R. Pridgen, Mary B. Hill, formerly Mary B. Pridgen, Elizabeth J., Sarah E. Pridgen, and Nancy Pridgen, the testator having only one other child, Winnie Rouse, who died in the year 1863, or three years before the death of testator. Her name does not appear in the will as devisee or legatee, though her children are bequeathed certain personal properties by Item 3 of the will.

In the year 1873 the lands of which Gray R. Pridgen died (205) seized and possessed, and which are situate in said Greene County, and which were devised in his said will, were duly partitioned and allotted in severalty to the said five children of the said Gray R. Pridgen to whom said lands were devised, lot No. 3 in said division having been allotted to said Nancy Pridgen, said lot being the land in controversy.

On 4 January, 1877, Nancy Pridgen executed a deed upon a valuable consideration by which she purported to convey said lot of land to Patrick Lynch, under whom the defendants claim, and on the same day all of the plaintiffs in this action, except the children of Mary B. Hill and Winnie Rouse, executed to said Lynch a deed in consideration of $1, by which they "do bargain, sell, and quitclaim unto the said Patrick Lynch, and to his heirs and assigns forever, all our and each of our right, title, and interest, estate, claim and demand, both at law and equity, and as well in possession as in expectancy of, in and to all that certain piece or parcel of land situated in the county of Greene and State aforesaid, known as lot drawn by Nancy Pridgen in a division of the lands of G. R. Pridgen, deceased, adjoining the lands of Patrick Lynch and others."

Nancy Pridgen died in 1909, leaving no children, but leaving surviving Henry R. Pridgen and Sarah E. Bowden, children of Gray R.

Pridgen, and also the children of Winnie Rouse, Mary B. Hill, and Eliza Pollock, all of whom are the plaintiffs in this action.

Mary T. Pridgen, wife of Gray R. Pridgen, is dead.

The controversy arises upon the construction of the last paragraph of the fifth item of the will, and upon the effect of the quitclaim deed to Patrick Lynch.

The plaintiffs contend that upon the death of Nancy Pridgen her share passed under the fifth item of the will to the children of Gray Pridgen surviving her, and to the children of those who had died leaving children, and that the deed to Patrick Lynch, being a quitclaim deed, did not convey this title.

The defendants claim Nancy Pridgen took an estate in fee, but if not, that only the children of Gray Pridgen surviving Nancy Pridgen would take, and that this interest passed under the deed to Lynch, and that if the children of a deceased child are included in the devise, that the deed to Lynch conveyed the title of all the plaintiffs except as to the children of Mary Hill.

His Honor held that the children of Mary Hill were entitled to one-fourth of the land under the devise, and that the defendants were entitled to three-fourths thereof under the deed to Lynch, and entered judgment accordingly, and the plaintiffs and defendants excepted and appealed.

(206) *M. T. Dickinson for plaintiffs.*

J. Paul Frizzelle and George M. Lindsay for defendants.

ALLEN, J. It is apparent from an inspection of the whole will that the paramount and controlling purpose in the mind of the testator was to provide for the five children named therein and their children, and that he intended for the children and grandchildren to take in succession, and not as tenants in common, and this general intent should prevail even against minor considerations in conflict with it if they appeared in the will. *Lassiter v. Wood,* 63 N. C., 360; *Balsley v. Balsley,* 116 N. C., 477.

It is also clear that the will was drawn by one who was not versed in technical legal rules or language, and that the terms "issue" and "lawful begotten heirs of their body" are used indiscriminately as descriptive of children. This is illustrated by the third item, in which personal property alone is disposed of, and this is given to Egbad and Edward Rouse and the "lawful begotten heirs of their body," but if they leave "no issue," then "to revert back" to the children of the testator. Here we have "lawful begotten heirs" and "issue" referring to the same class, and evidently meaning children, and this construction has been placed on

similar language in a number of cases. *Tucker v. Moye,* 115 N. C., 71; *Francks v. Whitaker,* 116 N. C., 518; *Smith v. Lumber Co.,* 155 N. C., 392.

In the last case cited items in a will were considered very much like the fifth item in the will before us, and the Court said: "Construing this will in reference to these authorities and bearing in mind the well-recognized positions that as to wills the intent of the testator as ascertained from the consideration of the whole will in the light of the surrounding circumstances must govern (*Holt v. Holt,* 114 N. C., 241), and that as to both wills and deeds the intent as embodied in the entire instrument must prevail, and each and every part must be given effect if it can be done by fair and reasonable intendment before one clause may be construed as repugnant to or irreconcilable with another (*Davis v. Frazier,* 150 N. C., 447), we are of opinion that the will conveys to the children mentioned in the third item an estate in fee, defeasible on dying without leaving lawful issue of his or her body surviving, and in that event, as to either, and when it occurs, the interest passes to the surviving children or to the 'lawful heirs who may be surviving any of my children'; and that by these words the testator did not intend heirs in the ordinary or general meaning of the term, but surviving issue and in the sense of children and grandchildren, etc., of the devisees named, and that in case this interest should arise to them, they would take and hold as purchasers directly from the devisor."

In the last paragraph in the fifth item "children" must there- (207) fore be substituted in one place for "heirs lawfully begotten of their body," and in the other for "lawful begotten heirs of their body," and the paragraph must be read as follows: "My will is that if any of my children before mentioned shall die without children them surviving, then and in that case the legacies herein given shall revert back to the survivor or survivors of my children and the children them surviving forever."

Under the authorities since the case of *Buchanan v. Buchanan,* 99 N. C., 308, the time of dying without children which will give rise to survivorship must be referred to the death of the devisee and not to the death of the testator (*Harrell v. Hagan,* 147 N. C., 111; *Rees v. Williams,* 165 N. C., 201, and cases cited), and the question is, Who are included in the words "children them surviving" as of the death of Nancy Pridgen?

It is presumed that every part of the will "expresses an intelligible intent, *i. e.,* means something" (*Wooten v. Hobbs,* 170 N. C., 214), and this intent is not only to be "gathered from the language used, if possible" (*Freeman v. Freeman,* 141 N. C., 99) "but in seeking for his

intention we must not pass by the language he has used. If we do, we shall make the will and not expound it." *Alexander v. Alexander,* 41 N. C., 231, approved in *McCallum v. McCallum* 167 N. C., 311.

"Every part of a will is to be considered in its construction, and no words ought to be rejected if any meaning can possibly be put upon them. Every string should give its sound." *Edens v. Williams,* 7 N. C., 31.

We must, then, give some meaning to the language "children them surviving"; and they are not the children of the testator because they are already provided for in the same paragraph.

Nor is reference made to children of *living children* of the testator, as the property is given in the same item of the will to the children of the testator absolutely, subject to be defeated only in the event of dying without children.

The only other conclusion permissible, if we give any meaning to the language of the testator, is that he intended to include the children of deceased children of the testator, and this accords with the leading purpose of the will.

It follows, therefore, that his Honor was correct in holding that the plaintiffs, who are the children of Mary B. Hill, who died before Nancy Pridgen, are entitled to one-fourth of the land in controversy.

The children of Winnie Rouse, who died before the testator, are excluded, because Winnie Rouse is not mentioned in the will, and
(208) the devises under the terms of the will are to the children of the testator named, and to the children of those deceased, "before mentioned."

We are also of opinion that the quitclaim deed executed by the plaintiffs passed their interest to the defendant.

It purports to convey all "right, title, and interest, estate, claim and demand, both in law and equity, as well in possession as in expectancy," and is in all material respects like the deed which was sustained in *Kornegay v. Miller,* 137 N. C., 661, which has been approved on this point in *Cheek v. Walker,* 138 N. C., 449; *Smith v. Moore,* 142 N. C., 299; *Beacon v. Amos,* 161 N. C., 367, and is a controlling authority.

In the *Kornegay case* the grantor could only take in the event of a death of one without issue, and before the contingency happened she executed a deed, in consideration of $1 conveying "her right, title, and interest, present, contingent, and prospective," and it was held that the grantor had a "possibility coupled with an interest" which passed by her deed, and that it operated "to vest in the plaintiff the equitable title to all of the interest, title, and estate which she has or may, by the happening of the contingency provided for, have in the *locus in quo;*

that this title is something more than the mere right in equity; that in the event of the plaintiff's death without offspring the title will be perfected without any act on the part of the plaintiff or those claiming under him; that the consideration agreed upon by the parties is sufficient and adequate to pass such equitable title, and sustain it in the event the perfect title shall come to her."

There is no error.

Affirmed.

Cited: Bank v. Vass, 184 N.C. 301; *Yarn Co. v. Dewstoe,* 192 N.C. 125; *Electric Supply Co. v. Burgess,* 223 N.C. 100; *Williams v. Rand,* 223 N.C. 737; *Turpin v. Jarrett,* 226 N.C. 137; *Voncannon v. Hudson Belk Co.,* 236 N.C. 711; *Bradford v. Johnson,* 237 N.C. 581.

IN RE CAREY W. STONE, GUARDIAN OF THOMAS STONE.

(Filed 28 March, 1917.)

1. **Master and Servant—Federal Employers' Liability Act—Negligent Death—Beneficiaries—Distribution—Statutes.**

   The Federal Employers' Liability Act creates three classes, separate and distinct from each other, who may recover damages for the negligent death of an employee, the existence of one to be benefited in any preceding class excluding those in next class following, etc., and the first such class being the surviving widow and the child or children of such employee, and the act not providing for the method of distribution, it is governed by the State statute, and when there is only a widow and one child, the former receives one-third and the latter two-thirds of the amount.

2. **Master and Servant—Federal Employers' Liability Act—"Dependents"—Enlarged Recovery—Appeal and Error—Objections and Exceptions.**

   When under the Federal Employers' Liability Act a recovery in the third class is enlarged by erroneously including those not "dependents," exceptions thereto should be aptly and duly taken upon the trial; but where the amount of the recovery has been admitted, as by compromise in this case, the question of the method of its distribution in the first and second class depends upon the State statute of distribution.

3. **Master and Servant—Federal Employers' Liability Act—Distribution—Courts—Questions of Law—Trials.**

   Under our statute, the method of distribution of a recovery under the Federal Employers' Liability Act among the widow and children of the deceased employee is one of law, not requiring the intervention of the jury.

APPEAL by respondent guardian from *Bond, J.,* at October (209) Term, 1916, of WAKE.

This proceeding was begun before the clerk, whose decision was affirmed in the Superior Court upon appeal.

It is admitted that the deceased was killed while employed by the Seaboard Air Line Railway Company in interstate commerce, and left a widow 31 years old and one son 11 years old, and that the net amount received by her as administratrix of her husband after payment of attorney's fees was $9,750, and that they are both dependent and are the sole beneficiaries. It is agreed that property owned by either, if any, shall not be considered in passing on this question; that both are in good health; that the boy lives with his mother and that their relations to each other are such as usually prevail between mother and minor son. It is admitted that the money received was paid by compromise to the administrator without action and that the decedent had taken care of his wife and child. Upon these facts counsel for the widow moved the court to submit to the jury issues as to the relative rights of herself and her child in the fund or to refer it to a referee to ascertain the amount due each. The court refused to do this, and affirmed the order of the clerk to divide the fund in accordance with our statute of distributions, allotting to the widow one-third and the child two-thirds, and directed that the widow should give an administration bond in the sum of $13,000, being double the amount of the $6,500 allotted to the child. From such judgment she excepted and appealed.

Moses N. Amiss and Winston & Biggs for infant.
Douglass & Douglass for appellant.

CLARK, C. J. The net sum received by the administratrix under the compromise and settlement with the railroad company stands on
(210) the same basis as if it had been recovered by action. The sole question presented, therefore, is whether the compensation for wrongful death of an employee while engaged in interstate commerce already ascertained and determined is, on the facts of this case, to be apportioned according to our statute of distribution.

The Federal Employers' Liability Act provides that the action shall be brought by the personal representative of the deceased employee "for the benefit—

"(1) Of the surviving widow, or husband and children of such employee; and if none, then

"(2) Of such employee's parents; and if none, then

"(3) Of the next of kin dependent upon said employee."

The Federal statute, therefore, creates three classes, which are separate and distinct from the other. If there is any member of the first class,

the other two are excluded. If there is none of the first class, but one or more of the second, then the third class will be excluded. If any member of the last class does not come under the provision, "dependent upon such employee," (*Allen, J., Dooley v. R. R.,* 163 N. C., 454), then such person is excluded from that class, and if such exclusion should apply to the whole of that class, then there can be no recovery. If the recovery by "next of kin" should be enlarged by the wrongful inclusion of one not "dependent," that question must be raised at the trial by proper exceptions. *R. R. v. Zachary,* 232 U. S., 248.

The Federal Employers' Liability Act declares *who* shall take in case of wrongful death, but leaves it as a matter of law how much and what proportion each shall take in its class, except when the State act requires that the appropriation must be made in the verdict, as in *McGinnis v. R. R.,* 228 U. S., 173, under the Texas act. The Federal statute makes no provision for the apportionment of the fund, and, therefore, the State statute controls. The source of the recovery is the United States statute, and that indicates only the different classes of the beneficiaries and the matter of ascertaining the amount due. But when the amount and class are ascertained, the sum paid or recovered must be distributed in that class according to the requirement of the State law. In this case, there being a widow and a child, the amount is to be divided between them according to our statute, two-thirds to the child and one-third to the widow. That matter is regulated by the State statute of distribution. *R. R. v. White,* 238 U. S., 507.

It is true, as contended by the appellant's brief, that the classification of beneficiaries under the Federal act must govern when it differs from the State act, but within the class entitled the Federal act applies only so far as to restrict recovery in the third class to those who suffer some pecuniary loss, while under the State statute this is not so. When, as here, the parties are in the same class, there being no conflict (211) between the State and Federal statutes, the latter is silent and the State statute controls the distribution.

In *Broadnax v. Broadnax,* 160 N. C., 432, the Court held that the amount of recovery for wrongful death must under Revisal, secs. 59, 60, "be disposed of as provided for the distribution of personal property in case of intestacy, and that it cannot be applied either in payment of debts nor can any part thereof be allotted to the widow on her year's support," and to the same purport, *Neill v. Wilson,* 146 N. C., 242; but this does not exempt the share of the distributee from being liable to his creditors.

In *Hartness v. Pharr,* 133 N. C., 566, it was held that where a person domiciled in another State is killed in this State, and his administrator

sues here, the funds recovered must be distributed according to our statute, although prior administration had been taken out in the State of his domicile, citing *Dennick v. R. R.,* 103 U. S., 11; *McDonald v. McDonald* (Ky.), 49 Am. St., 289; *Nelson v. R. R.,* 88 Va., 971; *s. c.* 15 L. R. A., 583; *Morris v. R. R.,* 65 Iowa, 727, and other cases. The reason is that the fund having been recovered in our jurisdiction, and not being assets for payment of debts, must be distributed according to our statute in such cases.

In *Kenney v. R. R.,* 167 N. C., 14, it was held that the meaning of the words "next of kin" in the Federal Employers' Liability Act is dependent upon the State law regulating inheritances. This was affirmed on writ of error, *R. R. v. Kenney,* 240 U. S., 489, citing *Blagge v. Blach,* 162 U. S. (at p. 464), that Congress intended that the "next of kin" should be determined "according to the statutes of distribution of the respective States of the domicile of the original sufferers." Holding, further, that whether the next of kin occupied a dependent relation which would have entitled them to recover was foreclosed by the finding of the jury, as it is in this case by the adjustment of the amount by the parties in lieu of a verdict.

In regard to the cases relied on by the appellants, *McGinnis v. R. R.,* 228 U. S., 173, presented a question whether, the recovery being limited to dependent relatives, a surviving child who was not dependent upon the decedent could recover anything. That is not the case here, where the amount is determined and the only question is as to the apportionment between the child and dependent widow. The same question as to making an allowance in the verdict arises in *R. R. v. Holbrook,* 235 U. S., 629.

In *R. R. v. White,* 238 U. S., 508, it was held that the omission from the Federal statute of the apportionment required by Lord Campbell's Act (and in only a few of the American States) indicated "The intention of Congress to follow the practice in most of the American
(212) States of not requiring such apportionment, and that where it was alleged that next of kin not dependent, and, therefore, not entitled to recover, were included, and had thus swelled the amount of the recovery, the question of their exclusion, or, rather, wrongful inclusion, should be raised in an appropriate manner under the practice of the court in which the trial was had," citing *R. R. v. Zachary,* 232 U. S., 248. No question of that kind (which could concern the railroad company only) arises here, as the amount was settled by compromise, and both the widow and her son are entitled to recover in the first class.

In *Taylor v. Taylor,* 232 U. S., 363, it was held that the State statutes could not defeat the right of the widow, though childless, from recovery,

because she is expressly embraced in the preferred class under the Federal statute.

In *R. R. v. Leslie,* 238 U. S., 599, it was held that a recovery under the Federal statute would not be reversed on writ of error because the jury was not required to specify in its verdict the amount awarded on account of each distinct liability, where such verdict is in accordance with local practice. It was otherwise in the *McGinnis case, supra,* for in Texas it was held that the failure of the jury to apportion the damages assessed was error. Tiffany on Death by Wrongful Act, sec. 89.

It is well settled that the amount allotted to each party entitled is of no concern to the defendant unless such allotment increased the amount of the total recovery. In this case, the amount being settled by agreement, the defendant is not concerned, and the sole question is as to the distribution, which must be determined by the State statute of distributions. In apportionment States—Maryland, Texas, and Virginia, which substantially follow Lord Campbell's Act—the recovery should be apportioned by the jury or other appropriate tribunal. But in nonapportionment States, like North Carolina and probably all the other States not above named, while such fund must be distributed among the beneficiaries designated by the Federal statute, yet the amount going to each distributee (if belonging to the class entitled to recover and dependent) must be disbursed according to our statute of distributions.

Upon the facts in this case the judgment was entirely correct, and must be

Affirmed.

WALKER, J., and ALLEN, J., dissent.

Cited: Horton v. R. R., 175 N.C. 477; *In re Stone,* 176 N.C. 337; *Strunks v. Payne,* 184 N.C. 593.

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WALTER M. ALSTON ET ALS., ADMR., v. JOHN A. SAVAGE ET ALS.

(Filed 28 March, 1917.)

1. Deeds and Conveyances—Registration.

A contract to convey lands signed by the life tenant, who also purported to sign it for his son, the remainderman, without his authority, acquiescence, or ratification, is not enforcible against a valid contract therefor subsequently made but prior registered.

2. Deeds and Conveyances—Description—Parol Evidence—Identification.

A description in a contract to convey lands as a certain tract in a designated township, "now being advertised for sale," further stating in the contract that the obligor "owns the land in fee simple, and has a right to sell it and deed it," is sufficient to admit of parol evidence of identification, it appearing that this was the only land owned by the obligor in the township and was being advertised in a paper published in the county at the time.

3. Deeds and Conveyances—Failure of Title—Damages.

The obligee, under a contract to convey title to lands in fee, paid $190, entered into possession and enjoyment, and was dispossessed by reason of the failure of the obligor's title. Under the circumstances of this case, a verdict awarding 25 cents as the measure of his damage is not disturbed on appeal.

APPEAL by plaintiffs from *Bond, J.*, at August Term, 1916, of FRANKLIN.

This is an action by the heirs at law and the administrator of Ellis Alston under a contract to convey a certain tract of land dated 1 April, 1909, at the price of $1,250, of which $190 was paid in cash. The contract was in writing and signed by John A. Savage and by him for "son John, Jr." The codefendant Brown claims under a contract to convey, 5 December, 1912, signed by John A. Savage and a deed in usual form by John A. Savage, Jr. The title to the land was in John A. Savage, Sr., for life, with remainder to John A. Savage, Jr., and F. L. Savage. At the time of the execution of the contract to Ellis Alston he paid $190 on the purchase money and entered into possession, listing and paying taxes, which possession continued up to the bringing of this action. It is admitted that the $190 was received by John A. Savage and deposited by him in bank to the credit of John A. Savage, Jr., but there is no evidence that the latter had drawn it out or accepted it, or knew of it.

The jury found, upon issues submitted, that John A. Savage, Jr., did not execute the contract with Ellis Alston, and that John A. Savage, Sr., had no authority as agent to execute said contract for his son, John A. Savage, Jr., and that the latter has not ratified the same, and (214) that the contract of 5 December, 1912, between John A. Savage, Sr., and Shelly Brown was made for value and in good faith, and was registered prior to the contract with Ellis Alston; that the plaintiffs cannot recover from John A. Savage, Jr., any damage for failure to convey all the land described in the complaint, and that they are entitled to recover from John A. Savage, Sr., as damages for failure to convey 25 cents, and that the plaintiffs are not entitled to a deed from John A. Savage, Jr., John A. Savage, Sr., and Shelly T. Brown, upon payment

of the balance of the purchase money. The above findings were based upon competent evidence.

Appeal by plaintiff.

White & Malone for plaintiff.

W. M. Person for J. A. Savage and J. A. Savage, Jr.

W. H. Yarborough and Ben T. Holden for Brown.

CLARK, C. J. As to the first seven exceptions to the admission in evidence of the contract of Savage to Brown of 5 December, 1912, they cannot be sustained.

It is conceded that the plaintiffs are entitled to the life interest of John A. Savage, Sr., unless the defendant Brown acquired that interest through the agreement made between Savage, Sr., and Brown of 5 December, 1912, recorded 18 December, 1912. The agreement of John A. Savage, Sr., to Ellis Alston was registered two days later, 20 December, 1912.

The plaintiffs contend, however, that the contract between Savage, Sr., and Brown to give a warranty deed to the latter to "a certain tract of land in Louisburg Township, now being advertised for sale," was too indefinite.

It is in evidence that there was but one paper published at that time in Franklin County, and that that paper carried at the time an advertisement for the sale of the lands in controversy over the signature of John A. Savage, Sr., and that these were the only lands then being advertised for sale. This was sufficient to admit parol testimony to identify the land, *Fulcher v. Fulcher,* 122 N. C., 101.

In *Phillips v. Hooker,* 62 N. C., 193, the memorandum "to make a deed for a house and lot north of Kinston" was held sufficient to be aided by a parol proof, it being admitted that the defendant owned but one house in the county. In *Spivey v. Grant,* 96 N. C., 214, the description was "one horse," and the mortgagor having only one horse, it was held that the title passed. In *Lupton v. Lupton,* 117 N. C., 30, the assignment to widow for year's provision was of "one-half of boat," and it being proved that the husband had only one boat, this was held sufficient to pass the title.

"Where lands can be definitely identified by the aid of parol (215) evidence a deed is not void for uncertainty of description." *Bachelor v. Norris,* 166 N. C., 506. To same purport, *Patton v. Sluder,* 167 N. C., 500; *Speed v. Perry, Ib.,* 122. The contract between John A. Savage and Brown further identified the land by adding: "J. A. Savage, Jr., owns the land in fee simple and has a right to sell it and deed it."

It was in evidence that there was an oral agreement between John A. Savage, Sr., and the administrator of Ellis Alston to sell the land at public auction, and that in pursuance of that agreement said Savage caused the notice, above referred to, to be published in the *Franklin Times*.

The plaintiffs had no conveyance or contract to convey from either of the remaindermen. The contract by the life tenant to convey to Ellis Alston was registered after the contract to convey executed by the life tenant to the defendant Brown, and specific performance could not be decreed. The only remaining question was as to damages against the life tenant for breach of his contract and as to the measure thereof, and under a correct charge by the court the jury have assessed these damages at 25 cents, possibly making allowance for rents and profits received by plaintiffs as against $190 partial payment made by Ellis Alston.

No error.

Cited: Motor Co. v. Motor Co., 197 N.C. 374; *Self Help Corp. v. Brinkley*, 215 N.C. 620.

HENRY MASSEY v. LOUIS ALSTON.

(Filed 28 March, 1917.)

1. Equity—Deeds and Conveyances—Delivery of Deed—Promise of Payment—Fraudulent Intent.

Where a grantor of lands has relied upon the promise of a grantee in a deed that he would make immediate payment of the consideration, and delivered the deed to him in consequence, and it is shown that the grantee had no intention of making the payment, but gave the promise as a means of only securing the deed, it is *Held*, that the promise so made is a false representation which will entitle the grantor to equitable relief, and it can make no difference that he could have secured the purchase price at the time.

2. Same—Trusts and Trustees.

Where the owner of lands has been induced to part with his deed owing to the fraudulent promise of the grantee of immediate payment of the consideration therefor, which the latter had no intention of keeping, equity is not confined to the relief of rescinding the contract and canceling the deed, but under the circumstances of this case may compel the defrauding party to make his representations good so that the other be placed in the same situation as if the fact stated were true; as, in this case, convert the grantee into a trustee to hold the land subject to the payment of the consideration as a charge thereon.

3. Same—Contracts—Enforcement—Partnership.

Where partners enter into an agreement to purchase lands and hold them as a partnership asset, and one of them pays therefor, takes deed to himself, and delivers a deed to the other for a one-half interest, induced thereto by his fraudulent representation that he would immediately pay his part, it is *Held*, equity may regard the purpose for which the transaction was made, and decree a lien upon the land as a security for the consideration due by the defrauding partner.

4. Partnership—Deeds and Conveyances—Frauds—Trusts and Trustees—Accounting.

Where one partner has fraudulently obtained from another a deed to partnership lands, and equity has decreed a charge upon the lands to secure the consideration, instead of rescinding the contract, the plaintiff individually, is not entitled to an accounting for the rents and profits, for such would be due the partnership.

5. Same—Parties—Creditors.

In this suit in equity, decreeing the consideration due by one partner a charge upon partnership lands, the rights of creditors, not made parties, are not considered.

6. Appeal and Error—Improper Remarks—Correction.

Improper remarks of counsel should be corrected by the trial judge in the exercise of his discretion, and his prompt intervention in this case, in explicit and positive language, is held to have rendered such remarks harmless.

CIVIL ACTION, tried before *Bond, J.*, and a jury, at October (216) Term, 1916, of WAKE.

The action was brought to obtain equitable relief against a transaction in which plaintiff alleged that the defendant had induced him to part with the possession of a deed for an interest in land upon a false and fraudulent promise to pay at once the consideration therefor which was mentioned in the deed. The allegation is that plaintiff was to buy the land from Eunice Dunn, the owner thereof, and pay the entire purchase price to her, and convey one-half interest in the same to defendant, upon his promise to pay immediately in cash to plaintiff his share of the purchase money. That he obtained the deed upon this promise, fraudulently intending at the time not to pay for the same, and there is some evidence of an additional representation, viz., that there was something wrong with the deed and that he pretended to want the deed for the purpose of correction, whereas his real intention and design were to get possession of it in order to record it, and thereby vest the title in him without paying for the land or performing the promise by reason of which (217) he procured it. Issues were submitted to the jury and answered as follows:

1. Did Henry Massey pay $150 for land described in complaint and was an undivided half interest in the land conveyed to Lewis Alston by Eunice Dunn upon an agreement between said Alston and plaintiff Massey that if said conveyance should be so made the said Alston would at once pay to plaintiff Massey the sum of $75 as alleged in the complaint? Answer: "Yes."

2. What part, if any, of said $75 and interest has been paid by defendant Alston to plaintiff Massey? Answer: "No part; nothing."

3. Was it agreed at any time between plaintiff Massey and defendant Alston that said property should become and be a part of the partnership property to be owned by a partnership existing between said Massey and said Alston? Answer: "Yes."

4. Did the defendant Lewis Alston procure title to an undivided half interest of said lot without paying for same, and fraudulently intending at the time not to pay for it? Answer: "Yes."

The court gave judgment for the plaintiff, declaring the amount of the purchase money agreed to be paid by defendant to be a lien on the land and decreed a sale thereof to pay it, and ordered an account to be taken of the partnership. Defendant appealed.

B. C. Beckwith and C. W. Beckwith for plaintiff.

Douglass & Douglass for defendant.

WALKER, J., after stating the case: It is manifest that the finding upon the first issue entitled the plaintiff to no equitable relief, as it merely shows a contract for the payment of money, which can be enforced by a simple action at law for its recovery. But the response to the fourth issue presents quite a different phase of the matter, and the facts found do entitle the plaintiff to relief in equity. Where upon receiving a deed for land the vendee promises to pay the purchase money, and the promise does not induce the delivery of the deed, or is not intended to influence the vendor to part with its possession, equity will not interfere, because the vendor has an adequate legal remedy; but where he promises to pay when he has no intention of doing so, as in the present case, and the vendor is induced thereby to give up something of value, it is considered as fraudulent, and equity will intervene. 35 Cyc., treating of this question, under the title, "Intention to Pay," at pp. 79 *et seq.*, says: "Although a representation of intention ordinarily amounts to a mere promise, yet if a person represents that he has a certain intention when he has not, he makes a misrepresentation of fact. Accordingly it is gen-
(218) erally held that one who buys goods on credit impliedly represents that he intends to pay for them, and that if he intends not to pay

for them he is guilty of fraud. The intention not to pay must be a pre-existing intention, that is, it must exist at the time of the sale, or contract to sell, and must be an intention not merely to pay when the price falls due, or according to agreement, but not to pay at all." The principle was then being stated in regard to personal property, but it applies equally to sales of real estate. Referring to like dealings between vendor and purchaser, the same authority says: "A promise as to the future conduct of the party making the same, as distinguished from a statement of present fact, cannot amount to fraud or misrepresentation if the party making such promise had at the time of making it the intention of performing the same." And the same is true of a mere prediction or a statement of intention or expectation. If, however, the party making the promise had at the time of making it no intention of performance, the promise involves a false statement as to the intention of the promisor, and may amount to fraud or misrepresentation. 39 Cyc., 1256. And again: "A representation of intention or expectation as to some future act or performance, although it may have induced the agreement, is not a sufficient ground for a charge of fraud merely because it is not afterward carried into effect. It must have been made with intent to deceive. Where the statement of intention can be construed as really a statement of fact, it is treated as a fraud if false, as where there is a false statement of intention. It has repeatedly been held that one who purchases goods on credit impliedly represents that he intends to pay for them, and if he not only fails to disclose his insolvency, but intends at the time not to pay for them, there is such fraud on the part of the purchaser as will entitle the seller to rescind the contract." 9 Cyc., 418. In *Edgington v. Fitzmaurice,* 29 Ch. Div., 459, *Lord Justice Cotton* said: "It was argued that this was only the statement of an intention, and that the mere fact that an intention was not carried into effect could not make the defendants liable to the plaintiff. I agree that it was a statement of intention, but it is nevertheless a statement of fact." And in the same case is the following concurring opinion of *Lord Justice Bowen,* which has been frequently quoted: "A mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action of deceit. There must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact." Bispham's (219) Equity (9 Ed.), sec. 211, under the title of Fraud, thus states the same principles: "The representation must not be an expression of inten-

tion merely. A man has no right to rely upon what another says he intends to do, unless, indeed, the expression of intention assumes such a shape that it amounts to a contract, when, of course, the party will be bound by his engagement and for the breach of which the other side has, ordinarily, an adequate remedy at law. But if a promise is made with no intent to perform it, and merely with a fraudulent design to induce action under an erroneous belief, or if a representation amounts to a statement of fact, although dependent upon future action, in either case there is ground for equitable relief." Mr. Bispham is fully sustained in this view by the authorities cited by him in support of the text. As we are told by moralists and jurists, words are to be understood by courts of justice in the sense which it was intended they should have, and which those using them wished, and believed, that they should be believed by him to whom they are addressed, and the latter has the right to accept and act upon them as having such a meaning. The intention that he should thus understand them, and govern himself accordingly in his business intercourse with another who used them, is what gives a right to relief if it turns out that they are false, if they induce the other party to act to his prejudice, relying upon the truth of what is said in accordance with a fair and reasonable interpretation of the words. If defendant said that he would pay at once, or immediately, if the deed was delivered to him, and he had no intention of keeping his promise and no ability to do so, as in this case, and he made the false statement, dishonestly and for the purpose of getting possession of the deed, and thereby overreaching the plaintiff, knowing that plaintiff was trusting in his promise and its strict fulfillment, and gave up the deed because he did so confide in defendant's integrity and in the belief that he would do exactly what he had promised, we cannot see why this is not such a false representation as would entitle the plaintiff to equitable relief. And the great weight of authority is to this effect. It was said in *Goodwin v. Horne,* 60 N. H., 485: "Ordinarily false promises are not fraudulent, nor evidence of fraud, and only false representations of past or existing facts are actionable, or can be made the ground of defense. *Long v. Woodman,* 58 Me., 49; *Murray v. Beckwith,* 48 Ill., 391; *Loupe v. Wood,* 51 Cal., 586; *Jorden v. Money,* 5 H. L. Cas., 185; Cooley on Torts, 486. But when a promise is made with no intention of performance, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defense. Such are cases of concealed
(220) insolvency and purchases of goods with no intention to pay for them. *Bradley v. Obear,* 10 N. H., 477." And this Court has announced the same doctrine in *Des Farges v. Pugh,* 93 N. C., 31, quot-

ing from *Donaldson v. Farwell,* 93 U. S., 631, the following: "The doctrine is now established by a preponderance of authority that a party not intending to pay, who, as in this instance, induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent to not pay for them, is guilty of a fraud, which entitles the vendor, if no innocent party has acquired an interest in them, to disaffirm the contract and recover the goods. And he cites a number of authorities, both English and American, to support his position." It is further said: "It matters not by what means the deception is practiced—whether by signs, by words, by silence, or by acts—provided that it actually produce a false and injurious impression, of such a nature that it may reasonably be supposed that but for such deception the vendor might never have entered into the contract." The principle was applied in *Crabtree v. Bradbury,* 13 S. W., 935, to a sale of land where the facts were similar to ours and where the Court said: "There was evidence to warrant the court in finding that appellant L. P. Crabtree obtained the deed from Bradbury through a pretended purchase of the land conveyed thereby, with the preconceived intention and determination not to pay for it; and this was a fraud for which the deed should have been canceled. Fraud avoids a contract *ab initio,* both at law and in equity, and gives the defrauded party the right utterly to reject the contract," citing *Taylor v. Mills,* 1 S. W., 283, and other cases; Kerr on Fraud and Mistake, 333, 334, where it is said that the contract will be rescinded or the defrauding party will be compelled in some way to make his representation good. In *Cerry v. Paxton,* 78 Neb., 134: "The procuring of property upon a promise which the party at the time does not intend to perform is a fraud; and it makes no difference whether the property is real or personal. Ordinarily, false promises are not fraudulent, nor evidence of fraud, and only false representation of past or existing facts are actionable. . . . But when a promise is made with no intention of performance, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defense," citing *Dowd v. Tucker,* 41 Conn., 197; *Goodwin v. Horne,* 60 N. H., 485, and numerous other cases. It can make no difference that the plaintiff could have secured the payment of the money by adopting other methods at the time for this will not defeat his equity to relief. If defendant's promise, and the declaration of his intention, had been sincere and faithful, instead of the opposite, all such precautions were unnecessary, and the business of life could not be conducted if it were required (221) that men should anticipate, and expressly guard against the wily devices to which the deceitful may resort. The defendant will not

be allowed thus to take advantage of his own wrong, by which the plaintiff was innocently misled, and escape the consequences of his act by pleading that he should not have been trusted, but, on the contrary, dealt with on the supposition that he would act dishonorably. The law does not look with favor upon such an inadequate excuse for the wrong, but affords relief against the fraud because plaintiff might well have relied upon the promise and was misled by it, instead of pursuing some other course which defendant really prevented by his deceitful promise. The courts have rejected such a defense. *Piggott v. Stratton,* De Gex, F. and C., 33; *Sewing Machine Co. v. Bullock,* 161 N. C., 1. In the case last cited numerous authorities are collected to show that such a defense, which is founded, of course, not in the merit of the plaintiff, but the demerit of the defendant, is not allowable. We there said: "We find this in *Cottrell v. Krum,* 100 Mo., 399: 'It is no excuse for, nor does it lie in the mouth of the defendant to aver that plaintiff might have discovered the wrong and prevented its accomplishment had he exercised watchfulness, because this is but equivalent to saying: "You trusted me; therefore, I had the right to betray you."' The same idea is expressed in another opinion, thus: 'We doubt if it is equity to allow a sharper to insist on the fulfillment of his bargain, on the ground that his victim was so destitute of sagacity as to make no further inquiries,' citing *Pomeroy v. Benton,* 57 Mo., 531; *Wannell v. Kem,* 57 Mo., 478. No man can complain that another has relied too implicitly on the truth of what he himself stated (Kerr on Fraud, p. 81), for it is not just that a man who has intentionally deceived another should be permitted to say to him, 'You ought not to have trusted me, and you were yourself guilty of negligence,' when he had a special knowledge of the facts of which he knew the other to be ignorant. Bigelow on Fraud, p. 523, *et seq.* 'We are not inclined to encourage falsehood and dishonesty by protecting one who is guilty of such fraud, on the ground that his victim had faith in his word, and for that reason did not pursue inquiries that would have disclosed the falsehood.' *Hale v. Philbrick,* 42 Iowa, 81. The very representations relied upon may have caused the party to desist from inquiry and neglect his means of information; and it does not rest with him who made them to say that their falsity might be ascertained, and it was wrong to credit them. To this principle many authorities might be cited. *Graham v. Thompson,* 55 Ark., 299. A person cannot procure a contract in his favor by fraud, and then bar a defense to suit on it on the ground
(222) that had not the other party been so ignorant or negligent he could not have succeeded in deceiving him. *Warder v. Whitich,* 77 Wis., 430. However negligent the party may have been to whom the

incorrect statement has been made, yet that is a matter affording no ground of defense to the other. No man can complain that another has too implicitly relied on the truth of things he has himself stated. *Reynell v. Sprys,* 1 De Gex, M. and G., 549. These cases are approved in *Strand v. Griffith,* 97 Fed. 854, which is a very instructive one," citing, also, *Eaton v. Winnil,* 20 Mich., 156; Pollock on Torts, 293, and *Griffin v. Lumber Co.,* 140 N. C., 514, where the principle as stated in the above cases was applied. In this connection and also on the general question as to the representation being actionable, we may add the case of *Herndon v. R. R.,* 162 N. C., 317, where it was held that a promise without any intention to perform it, and merely to induce action by another, is fraudulent in a legal sense, and the party who is the victim of the fraud is entitled to relief, citing *Hill v. Gettys,* 135 N. C., 375, and *Braddy v. Elliott,* 146 N. C., 582, both of which fully sustain the principle, and they were decided upon transactions concerning the conveyance of lands, and not sales of personal property.

The next question is as to the proper remedy. The plaintiff would be entitled to rescission of the contract and cancellation of the deed; but is this the only relief? Kerr on Fraud and Mistake, at p. 333, says that when a contract has been induced by false representation or the transaction is tained with fraud and the person who committed the fraud is a party to the transaction, the latter will be set aside, if the nature of the case and the condition of the parties admit of it, or the defrauding party will be compelled to make his representation good, so that "the one whose interest has been affected by the misrepresentation (or fraud) has an equal right to be placed in the same situation as if the fact stated were true." He then says that the defrauded party may elect to have the transaction set aside, or to have such relief as will make good the representation. We do not base the right to the decree upon the doctrine of the vendor's lien, which does not exist in this State, but upon the equity arising out of the fraud to have the purchase money made a charge upon the land, upon the idea that defendant should be adjudged to hold the land in trust because of the fraud, and not be entitled to hold it absolutely until the purchase money has been paid. It is not, in principle, unlike the case of *Sykes v. Boone,* 132 N. C., 199, where a trust was created because the title had been obtained by false promise. It is in the nature of a trust *ex maleficio.* It was said in a similar case: "Where the party fraudulently obtained the conveyance, having at the time no intention of procuring a conveyance to his grantor, equity should have no hesitation in treating the trans- (223) action as a completed sale and requiring him to pay the value of the premises he received and retained. The mere fact that the person

defrauded might have a remedy at law would not deprive her of the right to come into a court of chancery and have the agreed consideration, or the value of the premises, declared to be an equitable lien upon the lands. *Merrill v. Allen,* 38 Mich., 483. It would be against conscience for defendant to hold the land, as he insists he has the right to do, and not pay for it, after procuring the deed and the title by a fraud practiced upon the plaintiff.

A court of equity is not bound to wrest the property from the wrongdoer by a rescission, but may mould its decree to the particular and controlling equity of the case and the real and substantial rights of the parties. Story's Eq. Jur., sec. 27 and 28; *Edwards v. Culberson,* 111 N. C., 342, where *Chief Justice Shepherd* discusses the subject at length. Equity makes use of the machinery of a trust for the purpose of affording redress in cases of fraud, and will follow the property obtained by a fraud in order to remedy the wrong, and only stops the pursuit when the means of ascertainment fails or the rights of *bona fide* purchasers for value, without notice of the fraud or trust, have intervened. "The beautiful character, pervading excellence, if one may say so, of Equity Jurisprudence," says Judge Story, "is that it varies its adjustments and proportions so as to meet the very form and posture of each case in all its complex habitudes." *Edwards v. Culberson, supra.* "It is very evident," said the Court in *Danzeisen's Appeal,* 73 Pa. St. 65, "that the deed was a mortgage, or a trust *ex maleficio* would arise; for when the deed was delivered no consideration passed. Miller procured the estate without payment of any purchase money, and therefore stood in no better situation in point of fact than one in whose name a deed is taken by another who pays the purchase money. In equity the estate should remain in Danzeisen, who had received nothing but a promise to raise money for his use, unless the promise to raise be equivalent of the money when raised. If the promise was not intended to be performed by Miller, the deed was obtained by a deceit, and it was a fraud at the time it was delivered. But if the promise be performed, the true intention of the parties is executed, and the deed should stand as a security for the money." But more directly to the point is the following statement of the principle, in 2 Story's Eq. Jur., sec. 1265, p. 495: "In equity, even more strongly than at law, the maxim prevails that no man shall take advantage of his own wrong. The truth is that courts of equity, in regard to fraud, whether it be constructive or actual, have adopted principles exceedingly broad and comprehen-
(224) sive in the application of their remedial justice; and especially where there is any fraud touching property, they will interfere and administer a wholesome justice, and, sometimes, even a stern

justice, in favor of innocent persons who are sufferers by it, without any fault on their own side. This is often done by converting the offending party into a trustee, and making the property itself subservient to the proper purposes of recompense, by way of equitable trust or lien. Thus a fraudulent purchaser will be held a mere trustee for the honest but deluded and cheated vendor." The purchaser, where he has procured the title by fraud, will be treated as holding the land in trust (*ex delicto* or *ex maleficio*) for the benefit of his vendor, at least, in order that his obligation to the latter may be enforced. If one invests the money of another in land, especially when the money has been obtained by fraud, a court of equity will follow the fund so laid out in the land, and subject the latter by sale, if necessary, to the reimbursement of the defrauded party or owner of the money. *Edwards v. Culberson, supra.* "In cases of this sort the *cestui que trust* (the beneficiary) is not at all bound by the act of the other party. He has, therefore, an option to insist upon taking the property; or he may disclaim any title thereto, and proceed upon any other remedies to which he is entitled, either *in rem* or *in personam.* The substituted fund is only liable to his option. But he cannot insist upon opposite and repugnant rights." 2 Story's Eq. Jur., sec. 1262. What substantial difference is there between such an equity and ours, where land is procured, instead of money, upon a false and fraudulent representation of intention to pay for it? The form of the transaction is different, but not the substance. It is said that "the forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto,* are practically without limit, and the principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoers." 2 Pomeroy's Eq. Jur., sec. 1053, p. 628.

But if this were not a valid reason for declaring the lien the decree should be sustained, upon the ground that the declaration of a lien is necessary to conform to the purpose for which the conveyance was made, and to execute that purpose, viz., that the property should become part of the partnership's assets, each of the parties contributing one-half of the purchase money for the original tract bought of Eunice Dunn.

The plaintiff is not entitled to any accounting for rents and profits as vendor, which relief would follow a rescission, for the decree merely carries out the contract, and vests the title to the land in the defendant, subject, however, to the payment of the purchase money. What will be the rights of the parties in this land, hereafter, growing out (225) of their partnership dealings, we need not now determine, nor until the account is taken. The sections of the judgment numbered 1, 2, 3, 4,

and 5, being the questions "specially referred to," will be stricken out, at present and without prejudice, and a reference ordered to take and state the partnership account, if necessary. The questions eliminated above, if they become material in taking the account, or in the further progress of the case, may then be considered, but no rents and profits can be recovered unless due by defendant to the partnership in some way, or to plaintiff on account of the partnership relation.

The other questions are not important. The creditors cannot be affected by this judgment, they not being parties to the action. It will be time enough to hear them when they assert their rights.

There is an exception to remarks of counsel. As we said, substantially, in *S. v. Davenport,* 156 N. C., 596, and *S. v. Tyson,* 133 N. C., 692, it must be left largely to the discretion of the judge at what stage of the case he will interfere to protect a party against any abuse of privilege by counsel. If the offense is aggravated, it may call for immediate action, and it may always be safer to act promptly, and also to give the jury proper caution, in the charge, against any wrong influence of improper remarks made in the heat and zeal of debate, but, at least, it is a case for the exercise of a sound and wise discretion and for full provision against harm to the injured party. Counsel, too, should be careful lest they spoil a verdict, otherwise perfectly good, by intemperate utterances or immoderate speech. A party, or witness, should not be subjected unjustly to abuse, which is calculated to degrade him or to bring him into ridicule or contempt, and when this occurs he is clearly entitled to the protection of the court, when he asks for it in proper time, and sometimes, perhaps, when he does not, for the court should extend it voluntarily, in the exercise of its judgment and, if necessary, in order that the trial may proceed fairly and impartially and lead to a just result. We have adverted to this matter again because of the comparative frequency of such exceptions as this one. In this case the judge acted quickly and administered a proper caution. *S. v. Hill,* 114 N. C., 780. Counsel, no doubt, was exasperated by the alleged conduct of the witness on the stand towards him, and was in a measure, excusable for what he said, under the influence of the supposed provocation, and certainly does not seem to have been blamable for any intentional excess of description or denunciation. We are not ready to say that abuse by counsel may not be so gross, sometimes, as to require the court to interfere of its own volition, without any appeal from a party, but this question is not before us. See *S. v. Tyson, supra;*
(226) *S. v. Davenport, supra.* The remarks of counsel were checked by the judge, and what the attorney afterwards said was addressed to the court and not to the jury. We cannot see that any harm was done.

It was sufficient that the judge promptly intervened and stopped counsel in a proper manner, and his language was explicit, positive, and peremptory enough.

There was no error in the rulings of the court upon the questions of evidence, and the judge was right in confining the trial to the material questions in controversy.

The judgment will be modified as herein indicated.

Modified.

Cited: Bank v. Yelverton, 185 N.C. 319; *Erskine v. Motors Co.,* 185 N.C. 493; *S. v. Love,* 189 N.C. 773; *McNair v. Finance Co.,* 191 N.C. 716, 717; *Bank v. Crowder,* 194 N.C. 314; *Lamborn v. Hollingsworth,* 195 N.C. 353; *Hood, Comr. of Banks, v. Martin,* 203 N.C. 627; *Williams v. Williams,* 220 N.C. 811.

PAUL H. LEE v. BETTIE L. MONTAGUE ET AL.

(Filed 28 March, 1917.)

Tenants in Common — Deeds and Conveyances — Partition — Equality in Value—Evidence.

Tenants in common of land under a devise that the *locus in quo* be equally divided between them had the lands surveyed and executed mutual conveyances to the other, each deed purporting to convey the same number of acres, "more or less." One of them brought action thereafter against the other with allegation and evidence tending to show that his acreage was substantially less than stated in his deed, which he had made good by payment of damages to a purchaser, and sought to recover the amount of his loss therein. *Held,* a division of lands in common rests upon equality of value rather than acreage, and in the absence of allegation or evidence tending to show an inequality in the former, a recovery was properly denied.

CIVIL ACTION, tried before *Bond, J.,* at October Term, 1916, of WAKE.

This is an action to recover the value of an alleged shortage of 81 acres of land in a voluntary partition between the plaintiff and the defendant as tenants in common, tried on the following agreed statement facts:

The mother of the plaintiff and the *feme* defendant owned the land at the time of her death. She devised it to the plaintiff and the *feme* defendant, to be equally divided between them. In 1907, December 18th, the plaintiff executed a deed to the *feme* defendant, and the *feme* defendant and her husband executed to the plaintiff a deed, each deed purporting to sever the unity of possession as between them as tenants

in common and to convey to the grantee in each deed the land covered by the boundaries thereof. Those deeds were promptly probated and
(227) registered. The boundaries of the tract in each deed were gotten from and in accordance with survey made by W. P. Massey, who was county surveyor of Wake County, but the land is all in Johnston County. The survey was made by said Massey by reason of a verbal agreement between the plaintiff and the *feme* defendant and her husband that he should survey the tract of land and divide it as near as could be into two parts in accordance with the provisions of the will referred to.

There was no dispute as to the boundaries of the tract as an entirety. The surveyor made his survey, made his map, and reported the division in exact accord with the boundaries afterwards adopted by the two deeds. If there was any difference in the quantity, the *feme* defendant had no knowledge thereof. The *feme* defendant furnished no data and had nothing to do with the survey. The old deed for the whole tract was furnished to the surveyor by the plaintiff and the male defendant. The *feme* defendant had nothing to do with directing any part of the survey, further than to furnish from her mother's old papers the old survey above referred to.

The deed from the defendant to the plaintiff contained the exact boundaries which both parties intended at the time it was written that it should contain, and the deed from the plaintiff to the *feme* defendant contained the exact boundaries which both sides intended it should contain at the time it was written. They were executed and respectively delivered on 18 December, 1907. Both deeds concluded the description as follows: "containing 517 acres, be the same more or less."

Neither party discovered any error, if any had been made, and made no complaint about the division until October, 1911. Each party was given right to draw, and did draw, lots for the shares they were to have.

In October, 1911, the plaintiff, Paul H. Lee, sold to the Raleigh Real Estate and Trust Company the land which had been conveyed to him by deed made by the *feme* defendant in the division between the plaintiff and the defendant. In that sale the plaintiff sold to the said company the land, assuming the acreage to be as stated in the deed which had been made to him by the *feme* defendant and her husband. The description in this deed concluded: "containing 517 acres, be the same more or less."

It is admitted that before this suit was started, and before either party had discovered any error, if any was ever made, the *feme* defendant and her husband had sold the land conveyed to her by the deed from the plaintiff in said division.

(228) In the fall of 1911 the Raleigh Real Estate and Trust Company had a survey made of the land which they had bought from the

plaintiff, and upon the strength of that survey set up the contention that the land which had been conveyed to Paul H. Lee by the partition deed contained about 81 acres less than the quantity called for in the deed to said Lee from the *feme* defendant and her husband, and 40.5 acres less than an equal division of the entire acreage would have entitled him to according to the contention of the plaintiff, and, further, that they had paid for 81 acres of land more than they got, and that the plaintiff, Paul H. Lee, from whom said company had bought the land, should refund to them the acreage value, which would amount to $1,534, according to the contention of said company, between said Paul H. Lee and said Raleigh Real Estate and Trust Company.

The *feme* defendant and her husband were in no way connected with the sale made by Lee, the plaintiff, to the Raleigh Real Estate and Trust Company.

Without being sued by said Raleigh Real Estate and Trust Company, and accepting the survey made by said company as being correct, the plaintiff refunded, in October, 1911, to said Raleigh Real Estate and Trust Company the amount claimed by them as representing the shortage under the contract between Lee and said company.

This action was begun by the issuance of a summons 11 October, 1912. At the time of said partition the defendant was and has been ever since a *feme covert*.

After having refunded the alleged shortage claimed by said company, the plaintiff had some talk with the *feme* defendant in which intimation was made by him that there should be a readjustment of the matter. As to whether any actual demand on her was or was not made before the issuing of the summons is disputed.

The defendants ever since the action was brought have denied liability. It is contended by the plaintiff that the survey made by Massey, surveyor, did not divide the land equally according to acreage. It is contended by the defendant that it was divided correctly according to acreage, but that, in any event, whether that be true or not, it was so divided as that the part gotten by the plaintiff Lee represented half at least, if not more, in value.

The plaintiff contends that that part allotted to Lee was not half in value of the entire tract at the time of the division.

When the *feme* defendant sold her land the deed for same was promptly registered. The defendant, Bettie L. Montague, sold the land set apart to her by the division before she had ever heard any complaint about any alleged error. In January, 1908, the *feme* defendant made said sale.

(229) His Honor held that the plaintiff was not entitled to recover, and entered judgment accordingly, and the plaintiff excepted and appealed.

William B. Snow for plaintiff.
James H. Pou for defendant.

ALLEN, J. The plaintiff and the defendant were tenants in common of the land devised to them by their mother, and equality of division and partition could only be had upon the basis of the value of the land and not of the number of acres. Revisal, sec. 2491; *Sanderson v. Bigham,* 40 S. C., 501; *Howard v. Howard,* 19 Conn., 317.

It follows, therefore, that there is no error in the judgment pronounced as there is neither allegation nor proof that the land conveyed to the plaintiff by the defendant is not equal in value to the land conveyed to the defendant.

The authorities relied on by the plaintiff are not pertinent to the present inquiry, as they are cases in which the owner of the property directed a division to be made by the acreage and not by value.

Affirmed.

Cited: Moore v. Baker, 224 N.C. 502.

INTERNATIONAL HARVESTER COMPANY v. DANIEL CARTER.

(Filed 28 March, 1917.)

Vendor and Purchaser—Contracts—Parol Evidence—Fraud.

Where a purchaser of machinery has signed a written order stating that it was not to be varied by parol representations of the seller's agent, and containing provision that it may be returned on certain conditions, with which the purchaser has not complied, in the absence of evidence that the agent had procured the contract by fraud, it may not be shown as a defense in the seller's action on the contract that his agent had made representations, precluded by the contract, as to its pulling stumps, which were false.

APPEAL by plaintiff from *Winston, J.,* at September Term, 1916, of CUMBERLAND.

Cook & Cook, Sinclair, Dye & Ray, McIntyre, Lawrence & Proctor, McLean, Varser & McLean for plaintiff.

Robinson & Lyon, Oates & Herring, John G. Shaw, and V. C. Bullard for defendant.

CLARK, C. J. This is an action on certain notes for the bal- (230) ance due on an engine purchased by the defendant. The only defense involved is that of fraud alleged by defendant to have been practiced on him by plaintiff's agent who sold defendant the engine, upon the written contract signed by the defendant set out in the record. This contract described the engine, with a stipulation against the order being countermanded and providing that no agent had the power to change the contract or warranty, and providing for notice to be given if the engine should fail to work well, and that a man should then be sent by plaintiff, and that if such agent could not make it work satisfactorily, then the purchaser should immediately return the engine and the price paid should be immediately refunded. The answer does not allege that there was any fraud practiced by the defendant in inducing him to sign the contract and notes, but alleges oral misrepresentation by the agent as to the capacity of the engine to pull stumps. The defendant made no contention on the trial that he had complied with the requirement in the contract by giving notice of the defect or that the plaintiff had failed to send a man in consequence of such notice to remedy the defect.

The defendant excepted to the following charge: "The plaintiff contends that the contract upon its face, signed by the defendant, shows that no such representations (as to stump pulling) as claimed by defendant were made. That would be true and you would be bound by that if this suit was upon the warranty; but as it is not a suit upon the warranty, but is a suit upon the fraud, if any was committed, then the plaintiff gets no benefit from anything that appears upon the face of the contract so far as the representations were concerned. It is not a suit upon the warranty, but suit based upon alleged fraud." This was erroneous, for it eliminated the effect of the recital in the contract, which the defendant admits he signed, to the effect that no other representations than those contained in the contract were made and that the agent had no authority to make other representations, and allowed the jury to set aside the slip signed by Carter admitting his satisfaction with the engine.

The defendant could read and write and was a man of intelligence, and there is no evidence that there was fraud and misrepresentations in procuring his signature to the contract or the satisfaction slip signed by him, on which he noted in his own handwriting the words "except as to extension rims." Under such circumstances the purchaser who has had full opportunity to read a written contract of purchase, voluntarily signed by him without fraudulent inducement or device, cannot show that the vendor's agent by parol warranted the machine or that it

was not a second-hand machine, when, as in this case, it appears
(231) on the face of the contract that the parties understood that this was a second-hand machine and that the agent was without authority to vary the written terms of the contract. *Machine Co. v. McClamrock,* 152 N. C., 405, which is on all-fours as to the facts with this case.

In *Machine Co. v. Feezer,* 152 N. C., 516, where the answer alleged fraud and misrepresentation by the vendor in making the contract of sale by false representations as to the weight and capacity of the machinery, the quality of work it would do, the amount of power it would require to properly run it, and that these representations were falsely and fraudulently made, it was held proper to submit to the jury the question of fraud in the factum to set aside the written contract; but that is not the case here. The court erred in permitting the jury to consider as evidence of fraud the contention of the defendant that there were misrepresentations made by the agent as to the capacity of the engine for pulling stumps when there was no evidence of fraud in procuring the contract to be signed, in which contract there was an express stipulation that no agent had power to make any changes in the contract or warranty and requiring notice to be given if the engine should not come up to the terms of the contract, and such notice was not given, and opportunity not furnished to the vendor to examine into and correct the alleged defect if such there was.

The charge was a misconception of the scope of this defense, which does not rest upon fraud or misrepresentation in procuring the execution of the contract, but upon an alleged misrepresentation by the vendor's agent, outside the contract, which contract was voluntarily signed by an intelligent man without any fraud in its procurement and which, upon its face, stipulated against liability for any implied warranty or change of the stipulations in the contract.

Error.

Cited: Murray Co. v. Broadway, 176 N.C. 151; *Fay v. Crowell,* 182 N.C. 534; *Colt v. Kimball,* 190 N.C. 172; *Colt v. Springle,* 190 N.C. 230; *Perry v. Surety Co.,* 190 N.C. 289; *Furst v. Merritt,* 190 N.C. 402, 404; *Laundry Machinery Co. v. Skinner,* 225 N.C. 289, 290, 291; *Walston v. Whitley & Co.,* 226 N.C. 540.

ORVIS BROTHERS & CO. v. HOLT-MORGAN MILLS.

(Filed 28 March, 1917.)

1. Instructions—Illegal Contract — Cotton Futures — Special Requests — Trials—Statutes.

The trial judge is required by our statute to state in a plain and correct manner the material portions of the evidence given in the case and explain the law arising thereon, Rev., sec. 535; and where in an action upon contract it is alleged in defense, with evidence to support it, that the contract was a wagering one in cotton futures (Rev., secs. 1689, 3823, 3824) the judge should to some extent explain the statute, the consideration of the contract which would make it illegal, and the law applicable; and his merely placing the burden on defendant, and instructing the jury to answer the issue "Yes" if the defendant had shown it was illegal, but if it had failed in this respect to answer it "No," is insufficient and constitutes reversible error, though no special requests were tendered on this phase of the case.

2. Contracts—Wagering—Bills and Notes—Courts.

A note given for margins upon an illegal contract for cotton futures, without intention of delivery of the cotton, cannot be collected by suit in our courts, and the promisor's repeated promise to pay it cannot impart any validity to it.

CIVIL ACTION, tried before *Winston, J.*, and a jury, at Septem- (232) ber Term, 1916, of CUMBERLAND.

The action was brought to recover the amount of a promissory note made by the defendant to the plaintiffs 25 March, 1915, for $2,100, due sixty days after date. Plaintiff introduced the note in evidence and then rested. Defendant alleged that the note was given for margins upon what is known as "futures" or contracts in the form of sale of cotton to be delivered in the future, when there was no real intention to deliver the cotton, but merely to settle them by paying the differences in prices according to the rise or fall in the market. There was evidence tending to show that the original note was given for such margins and renewed from time to time. The jury returned the following verdict:

1. At the time of the alleged indebtedness to Orvis Bros. & Co. by the defendant, and at the time of the execution of the note sued on, was the defendant Holt-Morgan Mills engaged in the ordinary course of its business in the manufacture of cotton? Answer: "Yes."

2. Is the defendant indebted to the plaintiff; and, if so, in what sum? Answer: "$2,100 and interest from 25 March, 1915."

3. Was the note in question based on a contract for cotton on margins and without any intention of the contracting parties to deliver or receive the actual cotton? Answer: "No."

Judgment for the plaintiff, and appeal by defendant.

Johnson & Johnson for plaintiff.
Robinson & Lyon and Cook & Cook for defendant.

WALKER, J., after stating the case: The charge of the judge was very meager. He simply instructed the jury that the burden was upon the defendant, and if it had shown that the contract was illegal, they should answer the third issue "Yes," but if it had failed in this respect they should answer it "No." We do not think this was an adequate
(233) charge or a compliance with the statute. All the evidence tended to show that the contracts for the pretended sales of cotton were condemned by our statute. Revisal, secs. 1689, 3823, 3824. There was no instruction or intimation to the jury as to what would be an illegal contract and in this respect the jury were left, without any aid from the court, to pass upon the validity of the note according to their own notion of the law. The statute requires that "The judge shall state in a plain and correct manner the evidence given in the case and declare, and explain, the law arising thereon." This was not done. The jury were not told what would constitute an "illegal consideration" or a "gambling contract" under the statute in cases of this kind. Nor was anything of the kind said to them which was calculated to enlighten their minds upon this vital question in the case. The judge must instruct the jury as to the law of the case in some way, even if it be a general statement of the same. In the latter event, if either party would have more special instructions given, he must ask for them.

We said in *Simmons v. Davenport,* 140 N. C., 407: "The rule which requires that the complaining party should ask for specific instructions if he desires the 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; *S. v. Kale,* 124 N. C., 816." The statute clearly defines what is an illegal contract where there is no real sale, but merely an agreement for an adjustment upon the basis of the differences in the prices of the commodity at the time fixed. Gregory's Supplement, sec. 1689. But the jury are not supposed to know these provisions or to understand them, and their meaning should have been explained to them, not in every phase or view of the matter, but at least in a general way, so that they might comprehend the inquiry submitted to them.

We said in *Edgerton v. Edgerton,* 153 N. C., 167: "The form of the contract is not conclusive in determining its validity when it is assailed as being founded upon an illegal consideration and as having been made in contravention of public policy. If under the guise of a contract of sale the real intent of the parties is merely to speculate in the rise or fall of the price and the property is not to be delivered, but only money is to be paid by the party who loses in the venture, it is a gambling contract and void." And again: "When, however, there is no real transaction, no real contract for purchase or sale, but only a wager upon the rise or fall of the price of stock, or an article of merchandise in the exchange or market, one party agreeing to pay, if there is a rise, and the other party agreeing to pay if there is a fall in price, (234) the agreement is a pure wager. No business is done—nothing is bought or sold or contracted for. There is only a bet."

In this case, was it the intention of both parties that the cotton should not be delivered, or was it their purpose to conceal, in the deceptive terms of a fair and lawful contract of sale, a gambling deal, or transaction, by which they contemplated no real bargain as to the article agreed to be delivered? If so, the contract is void. *Holt v. Wellons,* 163 N. C., 124. We said in that case: "Of course, the law deals only with realities and not appearances—the substance and not the shadow. It will not be misled by a mere pretense, but strips a transaction of its artificial disguise in order to reveal its true character. It goes beneath the false and deceitful presentment to discover what the parties actually intended and agreed, knowing that 'the knave counterfeits well—a good knave.' It always rejects the ostensible for the real in looking for fraud or a violation of law. The essential inquiry, therefor, in every case is as to the necessary effect of the contract and its true purpose." See, also, *Harvey v. Pettaway,* 156 N. C., 375, and numerous cases cited therein. A proper form of the issue in cases like this one is suggested in *Rankin v. Mitchem,* 141 N. C. at p. 281.

Another question is, can plaintiff recover upon the note if it was given in payment of margins due on contracts ostensibly for the sale of cotton, but really with no intention of a delivery?

It is said in *Embrey v. Jamison,* 131 U. S., 347: "While there are authorities that seem to support the position taken by the defendant in error, we are of opinion that, upon principle, the original payee cannot maintain an action on a note the consideration of which is money advanced by him upon or in execution of a contract of wager, he being a party to that contract, or having directly participated in the making of it in the name or on behalf of one of the parties." That case was cited with approval in *Garseed v. Sternberger,* 135 N. C., 502, where it was

held: "If a broker or other agent is employed to carry out an illegal transaction, and is privy to the unlawful design, and by virtue of his employment performs services, makes disbursements, suffers losses, or incurs liabilities, he has no remedy against his principal. Not only is this true, but it has been held that any express promise made by the principal to reimburse him is void, citing *Embrey v. Jamison* and other cases. Both cases were approved in *Burrus v. Witcover,* 158 N. C., 384, with a full discussion by *Justice Allen.*

If the jury believed the evidence as it now is, and found the facts to be in accordance with it, defendant was entitled to their verdict
(235) (*Holt v. Wellons,* 163 N. C., at p. 130), and failed to receive it, perhaps, because the jury were not informed as to the law. Errors in rulings upon the admission and exclusion of testimony were alleged, but they need not be noticed.

Repetitions of the promise to pay it did not impart any validity to the note. It was just as void as before, if the consideration was margins due on "futures," or gambling contracts, plaintiff being a party to the original transaction and note and continuing as such. *Cobb v. Guthrie,* 160 N. C., 313; *Garseed v. Sternberger, supra; Burns v. Tomlinson,* 147 N. C., 645; *Burrus v. Witcover, supra.*

There was material error in the charge.

New trial.

Cited: Power Co. v. Power Co., 175 N.C. 680; *Futch v. R. R.,* 178 N.C. 284; *Bowen v. Schnibben,* 184 N.C. 251; *Welles & Co. v. Satterfield,* 190 N.C. 95; *Moore v. Schwartz,* 195 N.C. 550; *Williams v. Coach Co.,* 197 N.C. 15; *Bodie v. Horn,* 211 N.C. 397; *Switzerland Co. v. Highway Com.,* 216 N.C. 459; *Kilman v. Silbert,* 219 N.C. 136; *Barnes v. Teer,* 219 N.C. 825; *Chambers v. Allen,* 233 N.C. 198; *Bank v. Phillips,* 236 N.C. 476.

C. H. ZIBLIN v. T. H. LONG.

(Filed 28 March, 1917.)

Reference—Exceptions—Issues—Trial by Jury.

A party to a compulsory reference, who has duly excepted thereto, is not entitled to a jury trial by excepting specifically to the findings of fact, for he must also aptly tender the issues he desires to be answered by the jury, or he will be deemed to have waived the right.

APPEAL by defendant from *Connor, J.,* at November Term, 1916, of PENDER.

This action was begun before the clerk of the Superior Court of Pender for the purpose of establishing a disputed boundary line in the nature of processioning proceedings. The clerk gave judgment in favor of the plaintiff and on appeal the case was transferred to the civil-issue docket, where a compulsory reference was made, to which order both the plaintiff and defendant excepted and demanded a jury trial upon the issues raised by the pleadings. On the coming in of the report of the referee at a subsequent term there were four findings of fact and four conclusions of law by the referee, all adverse to the defendant, who excepted to each and also demanded a jury trial upon each finding of fact. The defendant did not, however, eliminate and present the issues of fact which he desired presented to the jury.

C. E. McCullen and C. D. Weeks for plaintiff.

McClammy & Burgwin for defendant.

CLARK, C. J. This appeal presents the single question whether (236) the court ruled correctly in refusing to submit the case to the jury upon defendant's exception to the report of the referee.

This case is almost identical, on this point, with *Ogden v. Land Co.*, 146 N. C., 443, where it is said: "As each exception was made, the defendants merely stated that as to the matters and issues embraced in said finding they and each of them demand a jury trial. The defendants did not specify the particular fact controverted upon which they think an issue should be submitted to the jury, nor do they formally tender an issue upon each finding of fact against them to which they excepted."

In the same case the Court further said that the appellant had waived the right to a trial by jury "by not pointing out the questions or issues of fact raised by the exceptions and presenting such issue as they deem necessary to cover all the controverted facts," citing *Driller Co. v. Worth,* 117 N. C., 515, which is the leading case on the subject, and *Simpson v. Scronce,* 152 N. C., 594. In the present case, as in those, there was a compulsory reference, excepted to when made, but upon the coming in of the report the defendant merely excepted to each of the four findings of fact and said: "Therefore, the defendant demands a jury trial of the said finding of fact." It was held in *Driller Co. v. Worth, supra,* which has been often cited since (see Anno. Ed.), that this was insufficient and that it is a "reasonable requirement that the demand for a jury trial should be deemed waived if not made by specific exception and limited to the points upon which there has been a joinder in the pleadings"; that is, the appellant is required not merely to point

out the findings of fact of the referee excepted to (which merely presents such findings for review by the judge and upon which the ruling of the judge is final, if there is any evidence), but the party excepting must go further, in order to preserve his right to a trial by jury, by formulating the issues raised by the pleadings and presenting them with his demand for a trial by jury of such issues. This the defendant did not do. Even when there is no compulsory reference the appellant must formulate and tender issues.

The judgment of the court below is

Affirmed.

Cited: Bartlett v. Hopkins, 235 N.C. 168.

(237)

DORA C. KEZIAH AND ADA M. LITTLE v. SAMUEL O. MEDLIN.

(Filed 28 March, 1917.)

Estates Tail—Statutes—Fee Simple—Tenants in Common—Descent.

A devise of lands for life, followed by a separate paragraph, to the "bodily heirs" of the devisees named after their death, creates an estate in fee tail, which is enlarged into a fee simple under our statute (Rev., sec. 1578), creating a tenancy in common, which, although the land is undivided, would descend to the heirs at law of the deceased devisees.

CONTROVERSY without action, submitted to *Cline, J.,* at December Term, 1916, of UNION.

His Honor rendered judgment in favor of plaintiffs, and defendant appealed.

Stack & Parker for plaintiffs.

T. F. Limerick for defendant.

BROWN, J. The facts set out in the record are to the effect that plaintiffs contracted to sell defendant and defendant agreed to buy a fee-simple estate in the land devised to them by the will of their father. Defendant refused to comply with the contract, on the ground that *feme* plaintiffs did not have and could not convey a fee-simple interest in said shares of land. The only point involved is whether *feme* plaintiffs took a fee-simple estate under the will of their father.

In paragraph 1 of said will a tract of land is given for life to one of the sons. In paragraph 2 another tract is given for life to another

son. In paragraph 3 the remainder of the realty is devised to the seven daughters, two of whom are the *feme* plaintiffs, for life. Paragraph 4 is as follows: "I will and devise that all land bequeathed in paragraphs one, two, and three (1, 2, and 3), of this my last will and testament for and during the natural lives of the parties named in said paragraphs 1, 2, and 3 shall at the deaths of the said parties named in said paragraphs go to the bodily heirs of the parties whose names are given in said paragraphs 1, 2 and 3 above."

His Honor correctly held that the *feme* plaintiffs took an estate in fee under the will. In paragraph 3 the testator devises his lands to his seven daughters for life. The *feme* plaintiffs are two of his seven daughters mentioned by name in said paragraph.

The next paragraph provided that at the death of the said daughters, who are named in paragraph 3, the lands go to their bodily heirs, thus creating an estate in fee tail, which by the statute is enlarged into a fee simple. Rev., 1578. *Sessoms v. Sessoms,* 144 N. C., 121; (238) *Jones v. Ragsdale,* 141 N. C., 200, and *Maynard v. Sears,* 157 N. C., 1, are directly in point.

It is immaterial that the devise is to the seven daughters for life, as by section 4 of the will the limitation over is to their bodily heirs, thus creating a tenancy in common in fee in the seven daughters. Upon the death of any one of the daughters, her share, although the land be undivided, would descend to her heirs. The limitation in the fourth clause of the will "at the deaths" of the several daughters does not create a contingent remainder.

In *Perry v. Hackney,* 142 N. C., 369, the limitation was to the lawful heirs of her body (a granddaughter) after her death. It was held that the rule in *Shelley's case* applied and that the granddaughter took an estate in fee.

The case of *Richardson v. Richardson,* cited in brief of appellant, is not in point. There the devise was to S. for life, and at her death to J. for life, and at his death to his children if he should have any living, and, if he should leave no children, then to his brother; and it was held that the remainder devised to J. was a contingent remainder. This subject has been very recently considered in *McSwain v. Washburn,* 170 N. C., 363, and the rule adhered to that a limitation to M. for life and at her death to the heirs of her body vests in her a fee-simple estate under the rule in *Shelley's case.*

Affirmed.

Cited: Harward v. Edwards, 185 N.C. 605; *Elledge v. Parrish,* 224 N.C. 399.

WILLIE M. POPE v. A. R. McPHAIL.

(Filed 4 April, 1917.)

Statute of Fraud—Deeds and Conveyances—Escrow—Specific Performance —Damages—Registration.

A good and sufficient deed executed in pursuance of a parol contract to convey land, and placed in escrow, is a sufficient writing within the intent and meaning of the statute of frauds for the grantee to recover damages for a breach of contract to convey, especially when his grantor has conveyed the land to another who holds under a prior recorded deed.

CIVIL ACTION to recover damages for breach of contract to sell land, tried before *Stacy, J.*, and a jury, at September Term, 1916, of HARNETT.

On denial of liability, the jury rendered the following verdict on issues as to defendant McPhail:

(239) 1. Did the defendant contract and agree to sell the said land in question to the plaintiff, as alleged in the complaint? Answer: "Yes."

2. Did the defendant A. R. McPhail prepare, execute, and sign a deed to said land in accordance with such contract, as alleged in the fourth paragraph of the complaint? Answer: "Yes."

3. If so, has deed been destroyed? Answer: "Yes."

4. Did the defendant A. R. McPhail breach his contract with the plaintiff, as alleged in the complaint? Answer: "Yes."

5. What damages, if any, is plaintiff entitled to recover? Answer: "$1,000."

Judgment on the verdict, and defendant excepted and appealed, relying for error on the refusal of the judge to order a nonsuit and for the reason that there was no memorandum of the contract in writing as required by the statute of frauds.

E. F. Young and Clifford & Townsend for plaintiff.

J. R. Baggett for defendant.

HOKE, J. The evidence on the part of the plaintiff tended to show that in July, 1911, defendant entered into an oral contract with plaintiff to sell the latter a tract of land in Sampson County, N. C., of 640 acres, sufficiently designated and described, for the sum of $7,000, to be evidenced by plaintiff's notes, one for $2,500, due 1 September, 1911, and a second note for $4,500, due 1 December, 1912, and that, pursuant to said verbal contract, defendant and wife prepared and signed a deed for the property and for the consideration stated, which was duly probated, purporting to convey the said land to plaintiff,

and plaintiff and wife executed promissory notes due and a mortgage on the land to secure the same, and these papers, with a memorandum in writing also signed by the parties, were delivered to the Bank of Clinton, N. C., to hold in escrow until defendant could secure a complete title to the land which he was selling, the memorandum referred to being to the effect that the papers should be held in escrow, etc.; that in violation of the contract defendant McPhail took the papers from the Bank of Clinton or in some way procured the same, and having destroyed his deed, sold and conveyed the land to a third party at an advance price of $1,900, the purchaser now holding the land under a deed duly registered. Upon this testimony the motion for nonsuit was properly overruled, and, the jury having found the same to be true, plaintiff has a clear right of action. While there is much authority to the contrary, it is the rule in this jurisdiction that when parties, having entered into an oral contract to sell land, prepare and sign a written deed substantially expressing the bargain, and deliver (240) the same in escrow, such a deed is a sufficient "memorandum" within the meaning and requirement of our statute of frauds, and the contract may be considered and dealt with as a valid and binding agreement. We so held at the present term, in *Vinson v. Pugh,* p. 190, *Associate Justice Brown* delivering the opinion, and *Flowe v. Hartwick,* 167 N. C., 452, and *Magee v. Blankenship,* 95 N. C., 563, are in recognition of the principle. A similar ruling has been made in other States by courts of recognized authority. *Moore v. Ward,* 71 W. Va., 393; *Pavill v. McKinley,* 50 Va., 1; *Bowles v. Woodson,* 47 Va., 78; *Johnston v. Jones,* 85 Ala., 286, and *Campbell v. Thomas,* 42 Wis., 437, seem to sustain the position. Plaintiff, then, having a valid contract to purchase the land, which was wrongfully broken by defendant, is entitled to recover the damages he has sustained by the breach. This being a contract to convey land, he has ordinarily an additional remedy by action for specific performance; but he is not confined to that in any case. He can always avail himself of an action for damages for such wrong if he so elects, *Warren v. Dail,* 170 N. C., 406, a right emphasized in this instance by the fact that defendant has conveyed the property to a third person, who holds by conveyance of prior registry, and plaintiff's remedy, by specific performance, is no longer available.

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

No error.

Cited: Harper v. Battle, 180 N.C. 376; *Oxendine v. Stephenson,* 195 N.C. 239; *Austin v. McCollum,* 210 N.C. 818; *Aiken v. Andrews,* 233 N.C. 305.

J. A. MEADOWS v. POSTAL TELEGRAPH AND CABLE COMPANY.

(Filed 4 April, 1917.)

Telegraphs—Commerce—Federal Control—Federal Decisions—Unrepeated Messages—Extra Charge.

The amendment by Congress passed in 1910 to the Federal Employers' Liability Act subjects interstate messages by telegraph to the provisions of that act, requiring that charges therefor shall be reasonable, classifying them into day, night, repeated, unrepeated messages, etc., and permitting different rates to be charged for the different classes of messages. *Held*, Congress having assumed entire control of interstate messages, the decisions of the Federal courts are controlling, and thereunder a stipulation on the message blank that no recovery can be had beyond the toll paid for the message, unless repeated upon the payment of an extra charge, is valid and enforcible, when suit is brought upon the contract, in the courts of this State.

(241) CIVIL ACTION, tried before *Lyon, J.*, and a jury, at November Term, 1916, of CRAVEN.

Plaintiff brought this action to recover damages for failure to transmit correctly and deliver the following telegram:

"J. A. MEADOWS,
New Bern, N. C.
Bot ten May corn 49 one-eighth
GARDNER V. VA. NESS."

The message was sent under the following contract, which was printed on one of the company's blanks: "The Postal Telegraph-Cable Company (Incorporated) transmits and delivers this message subject to the terms and conditions printed on the back of this blank. Send the following message, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to."

"The Postal Telegraph-Cable Company (Incorporated) transmits and delivers the within message subject to the following terms and conditions: To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the message on the face hereof and the Postal Telegraph-Cable Company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeated message, beyond the amount received for sending the same, nor for mistakes or for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages.

And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of messages to any point on the lines of the company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz.: One per cent for any distance not exceeding 1,000 miles, and 2 per cent for any greater distance. No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of this company's messengers, he acts for that purpose as the agent of the sender. Messages will be delivered free within the established free-delivery limits of the terminal office. For delivery at a greater distance a special charge will be made to cover the cost of such delivery. This company shall not be liable for damages or statu- (242) tory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission. This is an unrepeated message and is transmitted and delivered by request of the sender under the conditions named above. Errors can be guarded against only by repeating a message back to the sending station for comparison. The above terms and conditions shall be binding upon the receiver as well as the sender of this message. No employee of this company is authorized to vary the foregoing. The same being delivered to the defendant at its office in Chicago to be delivered to plaintiff at New Bern, N. C."

As delivered to plaintiffs in New Bern, the message read as follows:

"J. A. MEADOWS,
New Bern, N. C.
Bot ten May corn 48 one-eighth.
GARDINER B. VANNESS."

There was evidence of the plaintiff tending to show the above stated facts, and also that plaintiff bought the corn to fill an existing contract for the sale of meal, and that while they made a profit on the meal transaction, they lost on the corn by reason of defendant's error in negligently transmitting the message. Defendant introduced no evidence. A preliminary motion was made in the Superior Court to dismiss on two grounds, but as the opinion of the Court is with the defendant for another reason, this question is not considered.

The case originated in a justice's court and was carried by appeal to the Superior Court, where the jury, under the evidence and the instructions of the court, returned the following verdict for the plaintiff:

1. Did the defendant negligently fail to deliver the message sent to plaintiff by Gardiner B. Van Ness, as alleged in complaint? Answer: "Yes."

2. What damage, if any, is plaintiff entitled to recover? Answer: "$100."

Judgment for the plaintiff, and appeal by defendant.

Guion & Guion for plaintiff.

D. E. Henderson for defendant.

WALKER, J., after stating the case: Plaintiff introduced all the evidence showing the message and the contract as above stated.

(243) This and other State courts have held that the stipulation as to repeating messages for a higher charge is one restricting the liability of the defendant for negligence, and is void, as being against public policy. *Lassiter v. Tel. Co.*, 89 N. C., 334; *Hendricks v. Tel. Co.*, 126 N. C., 304. Other courts, including the highest Federal court, hold that such stipulations are valid, 37 Cyc., 1684 *et seq.*, where the principal cases are collected in the notes. *Primrose v. Tel Co.*, 154 U. S., 1 (38 L. Ed., 883). We have held that sender and sendee are both bound by the valid stipulations of the contract, as, for instance, the one prescribing the time for bringing suit for damages, limiting it to sixty days after receipt of the telegram or knowledge of its nondelivery. But since this Court and others have adjudged the stipulation, as to repeating messages, to be invalid, a radical change has been wrought in the control and management of carriers, telegraphs, and telephone companies doing an interstate business and traversing more than one of the States. Congress passed the Employers' Liability Act, which is applicable to interstate railroads, and thereby materially changed the principles upon which the liability of the employer to his employee, who is injured while at the time engaged in performing a duty in interstate commerce, is determined. *Fleming v. R. R.*, 160 N. C., 196; *Lloyd v. R. R.*, 166 N. C., 24; *Tilghman v. R. R.*, 167 N. C., 163 (same case on writ of error, *S. A. L. Railway Co. v. Tilghman*, 237 U. S., 499, 59 L. Ed., 1069); *Railway Co. v. Renn*, 241 U. S., 290 (60 L. Ed., 1006); and although an action is brought by the employee in the State court, the rule as to liability created by the act of Congress is the applicable one in the trial of the case, except as to certain methods of practice and procedure (*Fleming's case, supra*) in the local court. By an amendment to the "Act to regulate Commerce," passed by Congress on 18 June, 1910, interstate telegraph and telephone companies were made subject to the rules and regulations of that act, in the particulars set forth by the amendment, and, as the courts who have since considered the

question have held, Congress has occupied the entire field of interstate commerce, or traffic, with respect to such companies, and especially with reference to the transmission of messages from one State to another. The amendment of 1910 reads as follows: "All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: *Provided,* that messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, (244) letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages."

Before the passage of the amendment of 1910 there had been no legislation by Congress affecting or conflicting with State statutes and other laws respecting the liability of telegraph companies for negligence in transmitting and delivering interstate messages, and therefore the local rule of law prevailed and was controlling in fixing such liability. *Tel. Co. v. James,* 162 U. S. 650 (40 L. Ed., 1105); *Commercial Milling Co. case,* 218 U. S., 406 (54 L. Ed., 1088); *Crovo case,* 220 U. S., 364 (55 L. Ed., 498).

A neighboring State court, in reviewing the above cases and others, adopts the language of the Court by which they were decided, and having final authority to declare the law upon the subject, and held, in substance, that where the State statute did not unfavorably affect or embarrass the telegraph company in the course of its employment, it would be held valid until Congress spoke on the subject. These decisions are based upon the fact that at the time they were rendered no congressional legislation existed on the subject. Such judicial utterances would mean nothing unless they meant that when Congress did act and undertake to regulate telegraph companies in the matter of the transmission and delivery of interstate messages the statutes of the State on the subject would be superseded by the action. "It would be inconvenient, as well as unnecessary, to recite the detailed provisions of the act of Congress approved 18 June, 1910. It is sufficient to say that by it Congress has occupied the field of regulation with respect to interstate telegrams, and hence the State statute imposing a penalty for failure to make prompt delivery can no longer be invoked in such cases. The act of Congress has ousted the State of jurisdiction over the subject." *Tel. Co. v. White,* 113 Va., 421; *W. U. Tel. Co. v. Bilisoly,* 82 S. E. (Va.), 91. The Virginia court was there dealing with a statute of that State imposing a penalty on the telegraph company

for negligence in transmitting or delivering a message, though interstate in character, and held that since the amendment of 1910 was enacted by Congress, its former decisions in regard to the validity of that statute had no longer any force or effect as they conflicted with the provisions of the new law. They were not, of course, reversed, but merely displaced by the new rule adopted by Congress for the determination of cases arising under its recent amendment to the Commerce Act. And so we must say with reference to our own decisions, which equally conflict with the act
(245) of Congress, as we have before said of those which had been rendered in cases before the Employers' Liability Act was passed, and which conflicted with it.

The Supreme Court of Maine has recently had this question under consideration. It had held in the *Ayer case* (79 Me., 493) that the stipulation as to repeating messages was against public policy and void, and that a mere mistake in the transmission of the words of a message raised a presumption of negligence. Referring to the amendment of 1910 to the Interstate Commerce Act, the same court in a later case (*Haskell v. Postal Tel. Co.*, 114 Me., 219) said: "Many changes have occurred in business and business regulation in the twenty-eight years since the decision in the *Ayer case* and the creation of the Interstate Commerce Commission. The decision stands, but the Commerce Act has expanded until it comprehends and includes the questions involved in the case at bar, and, so including, it must perforce, being the supreme law, suspend the operation of any State statute or regulation, or the force and effect of any decision in opposition thereto, the *Ayer case* among the rest, so far as they conflict with the act of 18 June, 1910. The rule does no violence to any State corporation, or individual, and is in keeping with the sentiment and reasons underlying sound public policy, the highest good, the best interest of all the people, not that of one State or one locality." The Court held that by the amendment of 1910 telegraph companies engaged in interstate business were subject now to the provisions of the Federal statute regulating commerce between the States, and that the State courts are bound to recognize the change in the law and to decide in accordance therewith; and, further, that it is especially their duty to follow the construction placed on the contracts of telegraph companies as to repeating messages and so forth which has been sanctioned by the highest of the Federal courts. In *Williams v. W. U. Tel. Co.*, 203 Fed. (Dist. of Col.), 140, the Court said: "It is apparent that the Interstate Commerce Act expressly recognizes the right of the telegraph company to charge for repeated messages different rates from those charged for unrepeated messages." The same Court, in *Tel. Co. v. Dant*, 42 App. (Dist. of Col.), 398, said in reference to the amendment of 1910: "Mes-

sages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages. . . . By this act express authority is given for the different classifications of messages, and the charge of different rates for the different classes is also expressly authorized. Repeated and unre- (246) peated messages were well known to the art, and, of course, it must be presumed that Congress intended the words to be given their ordinary meaning. Prior to the enactment of this statute, as we have seen, the court of last resort had ruled that, in the absence of State statutes to the contrary, it was competent for a telegraph company to make such classification of its messages. *Primrose v. Western Union Tel. Co.*, 154 U. S., 1 (14 Sup. Ct., 1098, 38 L. Ed., 883). Congress, therefore, in express terms has sanctioned the practice theretofore existing."

This whole subject, with special reference to the act of 1910, amending the Interstate Commerce Law and bringing all interstate messages under the influence and control of Federal legislation, has most recently been fully considered and exhaustively discussed in the two cases of *W. U. Tel. Co. v. Bilisoly* (Va.) *supra,* and *Boyce v. W. U. Tel. Co.*, 89 S. E., 106; and in the former the Court held that the sendee, who had not paid for the message, could recover nothing for a mistake in it caused by negligence, as the message was not repeated, the requirement as to repeating messages and the classification of messages contained in the contract being reasonable, since Congress had legislated with reference thereto; and in the latter case it was held that the sender, for the same reason, could recover only the amount paid by him for the message. The Supreme Court of the United States had held before the passage of the amendment of 1910 that a contract such as the one under which this message was sent was reasonable and valid. *Primrose v. W. U. Tel. Co.*, 154 U. S., 1, As that decision has stated the governing rule in cases like this one, and must be followed by us, it will not be amiss to quote fully from it, so as to understand from the Court's own language the reasons which had led the Court to its conclusion that the contract is binding. The Court said: "In the earliest American case, decided by the Court of Appeals of Kentucky, the reasons for upholding the validity of a regulation very like that now in question were thus stated: 'The public are admonished by the notice that in order to guard against mistakes in the transmission of messages, every message of importance ought to be repeated. A person desiring to send a message is thus apprised that there may be a mistake in its transmission, to guard against which it is necessary that it should be repeated. He is also notified that if a mistake occur the company will

not be responsible for it unless the message be repeated. There is nothing unreasonable in this condition. It gives the party sending the message the option to send it in such a manner as to hold the company re-
(247) sponsible, or to send it for a less price at his own risk. If the message be important he may be willing to pay the cost of repeating the message. This regulation, considering the accidents to which the business is liable, is obviously just and reasonable. It does not exempt the company from responsibility, but only fixes the price of that responsibility, and allows the person who sends the message either to transmit it at his own risk at the usual price, or, by paying in addition thereto half the usual price, to have it repeated, and thus render the company liable for any mistake that may occur.' (*Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.), 164, 168; 71 Am. Dec., 461.) . . . 'If the change of words in the message was owing to mistake or inattention of any of the defendant's servants, it would seem it must have consisted either in a want of plainness of the handwriting of Tindall, the operator who took it down at Brookville, or in a mistake of his fellow operator, Stevens, in reading that writing, or in transmitting it to Ellis, or else in a mistake of the operator at Ellis in taking down the message at that place. If the message had been repeated, the mistake, from whatever cause it arose, must have been detected by means of the differing versions made and kept at the offices at Ellis and Brookville. The conclusion is irresistible that if there was negligence on the part of any of the defendant's servants a jury would not have been warranted in finding that it was more than ordinary negligence, and that, upon principle and authority, the mistake was one for which the plaintiff, not having had the message repeated according to the terms printed upon the back thereof, and forming part of his contract with the company, could not recover more than the sum which he had paid for sending the single message. Any other conclusion would restrict the right of telegraph companies to regulate the amount of their liability within narrower limits than were allowed to common carriers in *Hart v. Pennsylvania R. R.* (112 U. S., 331).'" That case has been accepted by the subsequent decisions of the courts as settling, once for all time, the perplexing question, upon which so many courts had theretofore divided in opinion, whether such conditions and stipulations as are contained in the contract now being considered are reasonable and valid, so far, at least, as all cases coming within the purview and operation of Federal legislation are concerned. The Virginia Court, commenting on the *Primrose case,* said in *Boyce v. W. U. Tel. Co., supra:* "The conclusion of the Court in the foregoing case, that a stipulation such as that in the case at bar providing that the company shall not be liable for mistakes in transmission or delivery beyond the sum received for sending it,

unless the sender orders it to be repeated, is reasonable and valid, and that the recovery cannot exceed the amount agreed upon in (248) that stipulation, has been followed in numerous cases which need not be cited. . . . So that telegraph companies have here the direct authority and sanction of Congress to classify their messages into repeated and unrepeated messages, and to charge different rates for each; in other words, to enter into the very contract which was made in this case. . . . We are of opinion that the weight of authority and the better reason sustain the conclusion we have reached, that the defendant company is entitled to the protection afforded it by the stipulation in question, and is only liable to the plaintiff for the cost of transmitting the unrepeated message sent by him. The plaintiff further contends that the classification and stipulation of the company for interstate messages had never been submitted to the Interstate Commerce Commission nor in any wise authorized. It is sufficient to say that the act of Congress bringing telegraph companies under the regulation of the Interstate Commerce Commission does not require them to file their contract forms or tariffs with the Commission." The *Boyce case* is so well considered, and covers this entire field of inquiry so completely, that we content ourselves with referring to it especially for the reasons controlling our decision and also for any additional precedents.

While it is sufficient for our purpose that the highest court in the Federal jurisdiction has decided this question, upon a contract identical with ours, it may yet be well to state one of the reasons it gives in the *Primrose case* for its conclusion, and in its own language: "Even a common carrier of goods may, by special contract with the owner, restrict the sum for which he may be liable, even in case of a loss by the carrier's negligence; and this upon the distinct ground, as stated by *Mr. Justice Blatchford,* speaking for the whole Court, that 'Where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property, that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the liability and the freight he receives, and of protecting himself against extravagant and fanciful valuations.' *Hart v. Pennsylvania R. R.,* 112 U. S., 331, 343. By the regulation now in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated, and to pay half as much again as the usual price in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering a message, whether happening by negligence of its servants or otherwise." And re- (249)

ferring to *Tyler v. W. U. Telegraph Co.*, 60 Ill., 439, and 74 Ill., 170, where such a provision was held invalid, the Court says: "The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever. Whereas, what the company had done is to fix that rate for those messages only which are transmitted at the risk of the sender; and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery or in the nondelivery of a message."

It was held in *K. C. & C. Railway Co. v. Carl*, 227 U. S., 639, that the Carmack amendment brings contracts for interstate shipments under one uniform rule of law and withdraws them from State regulation, so that what is a reasonable rule or regulation of the carrier must be determined by the Federal law. To the same effect, *Wells, Fargo & Co. v. Neiman-Marcus Co., ibid.*, 469; *Railway Co. v. Edwards, ibid.*, 265; *Adams Express Co. v. Croninger*, 226 U. S., 491; *Railway v. Miller, ibid.*, 513; *G. N. Railway Co. v. O'Connor*, 34 Sup. Ct. Rep., 380. The same was held with regard to the Hepburn Act. *Railway Co. v. Elevator Co.*, 225 U. S., 426; *Railway Co. v. Reid*, 222 U. S., 424; and also as to the Employers' Liability Act, which we have already shown, *Mondon v. R. R.*, 223 U. S., 1. As to the Hours of Service Law, *Railway Co. v. State of Washington*, 222 U. S., 370. As to penalties under State laws, *Railway Co. v. Lumber Co.*, 32 Sup. Ct. Rep., 657.

Defendant also raises the question whether, as the message is in cipher or is obscure, there can be any recovery of damages, but we need not decide the point, as it is not necessary that we should do so.

We are of the opinion, following the decision of the highest Federal Court upon the question involved (*Primrose case, supra*), that the court should have granted the nonsuit, as plaintiff is not entitled to recover by reason of the fact that Congress has taken possession of the entire field of interstate commerce so far as it affects telegraph companies in their interstate business. Having declared upon a contract, with the terms of which there has been no compliance, he cannot recover. *Tel. Co. v. Bilisoly, supra; Lewis v. Tel. Co.*, 117 N. C., 436. It follows that there was error in not so adjudging.

Reversed.

Cited: Bateman v. Telegraph Co., 174 N.C. 98; *Moore v. R. R.*, 179 N.C. 643; *Hardie v. Telegraph Co.*, 190 N.C. 47, 48; *Russ v. Telegraph Co.*, 222 N.C. 508.

(250)

NORTH CAROLINA STATE BOARD OF HEALTH AND W. S. RANKIN, ITS SECRETARY AND EX OFFICIO HEALTH OFFICER, v. COMMISSIONERS OF THE TOWN OF LOUISBURG.

(Filed 4 April, 1917.)

1. Health—Sewage—Police Powers—Constitutional Law—Statutes.

Our statute prohibiting the discharge of sewage above the intake into any drain, brook, creek, or river from which a public drinking-water supply is taken, unless the same shall have passed through some well-known system of sewage purification approved by the State Board of Health, and that the prohibited act may be enjoined "on the application of any person," is a constitutional and valid exercise by the Legislature of its police power. Revisal, sec. 3057; Laws 1911, ch. 62, sec. 33.

2. Same—State Board of Health.

It appearing in this suit to enjoin a town from emptying its untreated sewage in a stream 75 miles above the intake of another town for purpose of water supply; that sworn statements were made by the State Board of Health and its Secretary that under the conditions, and especially in times of epidemic, the discharge of the untreated sewage by defendant imports a menace to the inhabitants of the lower towns, it is *Held*, that the statutes prohibiting the town so emptying its sewage is constitutional as applied to this case, and the defendant must comply with its provisions.

3. Health—Pleadings—Demurrer—Statutes—Admissions.

In a suit brought to enjoin a town of several thousand inhabitants from emptying its untreated sewage into a river, contrary to the provisions of Revisal, sec. 3057, and chapter 62, Laws 1911, sec. 33, a demurrer to an answer alleging that owing to the distance to the next town below on the stream, natural conditions, etc., the stream was not polluted or the water rendered harmful for use there, does not admit the truth thereof, the statute controlling the matter necessarily implying the contrary.

4. Health—Statutes—Prescriptive Rights.

The unlawful emptying of untreated sewage into a stream prohibited by statute, Revisal, sec. 3057; ch. 62, Laws 1911, sec. 33, without hindrance or question on the part of the health authorities or others, cannot confer upon a town the right to continue therein contrary to the express provision of the statutes, or acquire for it a prescriptive right as against the public, however long the same may have continued; nor can the town acquire a vested right therein to defeat the enforcement of the provisions of the statute subsequently passed.

5. Health—Sewage—Statutes—Injunctions—Parties.

In this suit to enjoin a town from emptying untreated sewage into a stream, etc., under the provisions of Revisal, sec. 3057, and chapter 62, Laws 1911, sec. 33, it is *Held*, that the Secretary of the State Board of Health, in his individual name, comes within the meaning of the statute, that the act "may be enjoined on the application of any person," and the question is not presented as to the authority of the board, acting as such, to maintain the action.

6. Health—State Board—Sewage—Regulations—Advice of Board.

Revisal, sec. 3057, Laws of 1911, ch. 62, sec. 33, does not require that an arbitrary or fixed method of treating sewage before emptying into a stream, etc., should be established in advance, but that the defendant confer with the State Board of Health and obtain and follow the reasonable requirements prescribed for the conditions presented.

(251) CIVIL ACTION, heard on demurrer to answer and by consent before *Bond, J.*, in FRANKLIN County, 28 September, 1916.

The action was instituted to restrain the defendants from discharging raw sewage into Tar River a short distance below the town without having the same properly treated as required by statute, Public Laws 1911, ch. 62, sec. 33, etc.

In the complaint it is, among other things, alleged that defendant, a town of several thousand people situate on Tar River, maintains water-works and a sewerage system, the latter consisting of five principal sewer lines and their ramifications extending through the business district and a large part of the residential section of the town, discharging the sewer into Tar River and without having the same subjected to any treatment whatsoever for the purification thereof, etc.

2. "That, basing this allegation upon the approved teachings of modern sanitary science applied to physical conditions, such as have been hereinbefore set out, and likewise upon the conclusions arrived at, after mature consideration by the individual plaintiff above named and by those members of the North Carolina State Board of Health who, in the proper discharge of their official duties, have been called upon to take under advisement the problem in sanitation presented by continued contamination of the waters of Tar River by the discharge of raw sewage into the same above the point of intake of the water-works system of the city of Rocky Mount and the towns of Tarboro and Greenville, as set out in the preceding paragraph of this complaint, these plaintiffs aver that such contamination of the waters of said river, owing to the above present danger of the bacterial pollution thereof, in the event of an epidemic of typhoid fever or other like communicable diseases in the town of Louisburg, constitutes a continuing menace to the public health of the city of Rocky Mount and, in a lesser and diminishing degree, to that of the towns of Tarboro and Greenville."

That below Louisburg on said stream the towns of Rocky Mount, Tarboro, and Greenville draw their municipal water supply therefrom, and also have a sewerage system discharging into said stream below, after same has been subjected to treatment as required by law.

(252) That on complaint of the authorities of Rocky Mount, and with a view of protecting the water supply of that city from contami-

nation, plaintiff board, etc., had, by resolution duly passed and communicated, and otherwise, endeavored to induce a compliance with the law on the part of defendant town and had made repeated and insistent demands thereto, but the latter had thus far failed and refused to comply, asserted their right to discharge the untreated sewage into said stream, and expressed the purpose to continue so to do. In connection with these allegations, a report of an expert was submitted, giving a description of the stream and its tributaries, the fall, volume of water, etc., and stating the sources of contamination that could reasonably be apprehended.

Defendants, admitting that they were discharging their sewage into the river without any treatment looking to its purification, and that the municipalities below were now obtaining their water supply from the river, answer the complaint and allege that they have now maintained their water supply and sewer system for thirteen years, commencing long before the cities mentioned began taking their water supply from the river; that the nearest of these towns, Rocky Mount, was by actual measurement and as the river winds, 75 miles below Louisburg, and on account of the comparatively small amount of their sewage, the volume and flow of the water, etc., there was absolutely no danger of pollution to the inhabitants of the lower towns, but that the water by the time it reached them or either of them was as well purified as it could possibly be by any known method of treatment; that this was not only true as a scientific fact, but defendant had caused the same to be tested by experts at points not more than half-way down the stream, and it was thereby ascertained that the waters of the river were as free from noxious germs, etc., as they were above Louisburg and before any sewage was discharged into the river. Defendants denied that plaintiffs or any of them had any legal right to maintain the suit, and averred, further, that they had never been given any proper hearing before the State Board of Health and that the latter had never made or supplied any plan or system to be pursued by defendants and by means of which the sewage could be properly treated, etc. To this answer plaintiff demurred, and the matter having been heard on the pleadings attached thereto, the court gave judgment that defendants be restrained unless a proper system of sewage treatment was installed and put in operation within ninety days, etc. From which judgment defendant town excepted and appealed.

L. V. Bassett for plaintiff. (253)

William H. Ruffin and Yarborough and Beam for defendant.

HOKE, J., after stating the case: In section 33, Laws 1911, ch. 62, a statute to collect and amend the laws more directly appertaining to the public health, it is enacted that "No person, firm, corporation, or municipality shall flow or discharge sewage above the intake into any drain, brook, creek, or river from which a public drinking-water supply is taken unless the same shall have been passed through some well-known system of sewage purification approved by the State Board of Health; and the continued flow and discharge of such sewage may be enjoined on the application of any person." This same provision, enacted in 1903, ch. 159, sec. 13, and contained in Revisal 1905, sec. 3057, has been very fully considered and upheld in several decisions of the Court: *Shelby v. Power Co.,* 155 N. C., 196; *Durham v. Cotton Mills,* 144 N. C., 705; *Durham v. Cotton Mills,* 141 N. C., 615; and it appearing from the statements and admissions in the pleadings that defendant town has been for several years past and is now discharging its raw sewage into Tar River, and that below, on said stream and beginning not more than 75 miles as the river winds, several other towns are drawing their public drinking-water supply therefrom, the case is one coming directly within the provisions of the law, and we are of opinion that defendant has been properly enjoined.

It is urged for defendant that plaintiffs having demurred to the answer it is thereby admitted that the water supply of the lower towns is entirely beyond the danger zone, and that owing to the natural conditions prevailing, the distance, the volume and flow of the stream, etc., the water supply of the lower towns is as free from pollution as if it had been subject to any kind of known purification, etc.

It is fully recognized that, for the purpose of presenting the legal question involved, a demurrer is construed as admitting relevant facts well pleaded and, ordinarily, relevant inferences of fact necessarily deducible therefrom; but the principle is not extended to admitting conclusions or inferences of law nor to admissions of fact when contrary to those of which the Court is required to take judicial notice, and more especially when such opposing facts and conditions are declared and established by a valid statute applicable to and controlling the subject. *Pritchard v. Comrs.,* 126 N. C., pp. 908-913; *Hopper v. Covington,* 118 U. S., pp. 148-151; *Equitable Assurance v. Brown,* 213 U. S., 25; *Graef v. Equitable Insurance,* 160 N. Y., 119; *Griffin v. R. R.,* 72 Ga., 423; *Bramham v. Mayor,* 24 Cal., 585; 6 Pl. and Pr., pp. 336-338; (254) 31 Cyc., pp. 333-337. While a demurrer might be taken as an admission that the water of Tar River reaches the lower towns without appreciable contamination from defendant's sewage, and, in proper instances, such an admission would justify a denial of any inter-

ference by court process, it may not have that effect when a statute, explicit in terms and plain of meaning, absolutely forbids the discharge of untreated sewage into the stream, in another section makes such act a misdemeanor and in effect declares such conduct and the conditions thereby created an indictable nuisance. True, in the cases upholding the law heretofore cited, the distances between the upper and lower points on the river were 17 and 25 miles, respectively, and the distance here is said to be 75 miles as the river winds; but this difference, in our opinion, may not be allowed to affect the result. The conservation and protection of the public water supply are peculiarly within the police power of the State, referred very largely to the legislative discretion, entirely so with us unless it clearly offends against some constitutional principle, and the Legislature, in the exercise of such powers, having forbidden the use of such stream for the purpose and in the manner described, its decision on the facts presented must be accepted as final and defendants required to conform to the requirements of the law. *Skinner v. Thomas,* 171 N. C., 98; *S. v. R. R.,* 169 N. C., pp. 295-304; *Daniels v. Homer,* 139 N. C., 219.

And the same answer, we think, will suffice to a kindred position insisted on, that the defendant town, situate on the river, had installed its present system long before the lower towns had resorted to the stream for their public water supply and has operated same in the present manner for at least thirteen years without hindrance or question on the part of the health authorities or any others, and to compel defendants now to make this radical change in their system at a burdensome and unnecessary cost would be an unwarranted interference with defendant's riparian and vested rights, etc.

In so far as the mere question of time is concerned, and as between individuals, it requires an adverse user of twenty years to create a right of this character, *Tise v. Whitaker,* 146 N. C., 374; and, in reference to this statute, it was expressly held in *Shelby v. Power Co., supra,* that no length of time will justify the maintenance of a nuisance of this kind as against the public. On this question, *Brown, J.,* delivering the opinion, said: "There are authorities to the effect that as against a private individual lower down on the stream, the right to pollute it to a greater extent than is permissible at common law may be acquired by prescription by an upper riparian owner. But we are not now dealing with the rights of riparian owners, but with the rights of the public at large as represented by the General Assembly. It is well settled (255) that unless by legislative enactment, no title can be acquired against the public by user alone, nor lost to the public by non-user. *Commonwealth v. Morehead,* 4 Am. St., 601, and cases cited, Am. and

Eng., p. 1190. Public rights are never destroyed by long continued encroachments or permissive trespasses. If it is in the power of the General Assembly, in the exercise of its police power, as we have held in the *Durham case,* to enact this law and make its violation a misdemeanor, it necessarily follows that the defendant could not acquire a right by prescription which would exempt it from the operation of the statute."

And even vested rights having reference to the ordinary incidents of ownership must yield to reasonable interference in the exercise of police power. In that field, as stated, the judgment of the Legislature is to a great extent decisive, and must be upheld unless the statute in question has no reasonable relation to the end or purpose in view and is manifestly an arbitrary and palpable invasion of personal and private rights. *Skinner v. Thomas, supra; S. v. R. R., supra; Hadacheck v. Los Angeles,* 239 U. S., 394; *Chicago, etc., R. R. v. Tranbarger,* 238 U. S., pp. 67-77; *Reinman v. City of Little Rock,* 237 U. S., 171; *Mo. Pac. R. R. v. Omaha,* 235 U. S., 121; *McLean v. Arkansas,* 211 U. S., pp. 539-547.

In *Skinner's case, supra,* speaking of the police power, *Allen, J.,* delivering the opinion of this Court, said: "It is the power to protect the public health and public safety, to preserve good order and the public morals, to protect the lives and property of the citizens, the power to govern men and things by any legislation appropriate to the end," citing from 9 Enc. of U. S. Reports, p. 473, and again from the *Slaughterhouse cases,* 16 Wallace, 36: "Upon it depends the security of social order, the life and health of the citizens, the comfort of existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property"; and, further: "The exercise of the power 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 citizens or when there is no reasonable relation between the statute enacted and the end or purpose sought to be accomplished."

In *Hadacheck's case, supra,* in upholding a city ordinance prohibiting the manufacturing of brick in certain localities in the city of Los Angeles, it was held, among other things, as follows: "While the police power of the State cannot be so arbitrarily exercised as to deprive persons of their property without due process of law or deny them
(256) equal protection of the law, it is one of the most essential powers of government and one of the least limitable—in fact, the imperative necessity for its existence precludes any limitation upon it when not arbitrarily exercised.

"A vested interest cannot, because of conditions once obtaining, be asserted against the proper exercise of the police power. To so hold

would preclude development. *Chicago and Alton R. R. v. Tranbarger,* 238 U. S., 67. There must be progress, and in its march private interests must yield to the good of the community.

"The police power may be exerted under some conditions to declare that under particular circumstances and in particular localities specified businesses which are not nuisances *per se* (such as livery stables, as in *Reinman v. Little Rock,* 237 U. S., 171, and brickyards, as in this case) are to be deemed nuisances in fact and law."

In *Mo. Pacific v. Omaha, supra,* it was said: "In the exercise of the police power the means to be employed to promote the public safety are primarily in the judgment of the Legislature, and the courts will not interfere with duly enacted legislation which has a substantial relation to the purpose to be accomplished and does not arbitrarily interfere with personal and private rights."

In recognition of these well established principles, and on the admissions appearing of record that three populous and progressive towns lower down on the same stream are now taking their drinking-water supply from the river, beginning within a distance of 75 miles, and adverting to the sworn statements of the Board of Health and its dutiful, trained, and capable secretary, that under the conditions presented, and especially in times of epidemic, the discharge of untreated sewage by defendant imports a menace to the inhabitants of the lower towns, we are of opinion that the statute in question is a valid law and that the defendant must be held to comply with its provisions.

It is further contended that plaintiffs are not proper parties to maintain a suit of this kind, but the position cannot be sustained. We are inclined to the opinion that plaintiff board, as a public quasi-corporation charged with the duty of looking after the public health and of the statutes promotive of such purpose, have a right in their quasi-corporate name to resort to the courts of the State in enforcement of these statutes and of regulations pursuant thereto having the force of law, *Salt Lake City, etc., v. Golding,* 2 Utah, 319; 28 Cyc., p. 131; but the question is not necessarily presented, as the secretary of the board, in his individual name, is also a party, and, by the express provision of the law, an injunction may be obtained on the "application of any person." It is the accepted rule with us that the joinder of unnecessary parties (257) is without material effect except as to the matter of cost. *Ormond v. Ins. Co.,* 145 N. C., 142. The presence of the Board of Health, therefore, even without the power to sue, does not prevent the efficient maintenance of the action. And the further position must be also overruled, that the Board of Health have prescribed no stated method of purification informing defendant as to how they must proceed. By the terms

of the statute, expressly forbidding the discharge of the sewage unless treated, etc., the defendants, and others in like cases desiring to use the stream, are made primarily actors in such cases, and it is their duty to confer with the board and ascertain a proper method before resorting to the river for the purpose. It is to the interests of municipalities desiring to make use of a stream that no arbitrary or fixed method or system should be established in advance, for, no doubt, in many instances, a modification from the more exacting method may be found reasonable, permitting the maintenance of a less burdensome and less costly system. In any event, the statute bearing on the conduct of defendant is peremptory, and they must at once confer with the Board of Health and obtain and follow the reasonable requirements prescribed for the conditions presented.

We find no error in the judgment below, and this will be certified that judgment be entered restraining defendant from discharging their untreated sewage into Tar River unless, within a definite time stated, the time fixed to be reasonable for the purpose, the method of treatment looking to the purification of the sewage shall be installed and put in operation as required by law.

Affirmed.

CLARK, C. J., concurs in the opinion in every respect, and calls attention to the fact that according to the official reports of the State, of which the Court takes judicial notice, there are already 98 cities and towns in North Carolina which have public water-works and 10 more are now being built. This number includes 58 county seats and nearly every town in the State of over 1,000 population, according to the last census. The town of Belhaven, with 2,863 population, was the last town of over 2,000 population without such public facilities. Comparatively few between 1,000 and 2,000 in population remain without such public water-works, while Saluda with 235 population, Franklin with 379, and 10 others under 1,000 have already installed such plants.

(258) That the State has been comparatively free of late years from epidemics of typhoid fever and others of a water-borne origin is due to the general interest that has been taken in the protection of public water supplies and the supervision of sewerage.

The number of public water plants and of towns having sewerage will steadily increase, and with it the importance of preventing the pollution of our streams and waterways. The act of the Legislature for this purpose is very carefully drawn, and should there be, on experience, any defect found it will be remedied by legislation. The province of the courts is to construe such legislation in accordance with the intent and

in favor of the most careful enforcement in behalf of the health of the people at large.

With the growth of the State in population and wealth, legislation of this kind which was unknown, if not unneeded, in an earlier day has become a necessity. *Salus populi suprema lex.* The public welfare is the highest law.

Cited: Thomas v. Sanderlin, 173 N.C. 332; *Comrs. of Hendersonville v. Pruden,* 180 N.C. 499; *Bank v. Bank,* 183 N.C. 467; *Whitehead v. Telephone Co.,* 190 N.C. 199; *Brick Co. v. Gentry,* 191 N.C. 639; *S. v. Bank,* 194 N.C. 440; *Lane v. Graham County,* 194 N.C. 725; *Board of Health v. Lewis,* 196 N.C. 648; *Smithfield v. Raleigh,* 207 N.C. 600; *Byrd v. Waldrop,* 210 N.C. 670; *Champion v. Board of Health,* 221 N.C. 100; *Banks v. Burnsville,* 228 N.C. 554.

SEABOARD AIR LINE RAILWAY COMPANY v. MARTIN THOMPSON.

(Filed 4 April, 1917.)

Injunction—Railroads—Public Interests—Right of Way—Home Place—Title.

Where a railroad company claims title to land for a parallel line or double track as a part of its original right of way, taking part of the land occupied and claimed as a home by an adjoining owner, and in a suit by the company an order is sought to restrain the owner from interference with work of such public character, which is continued to the hearing by the trial court upon findings from the evidence that the question of title was *bona fide* involved; and it appears on appeal that the company had entered upon the lands, built its track, and was operating its trains thereon: *Held,* the restraining order will not be disturbed, though the proper order would have been to restrain both parties and preserve the original status of the property.

HOKE, J., concurring in part; ALLEN, J., concurring in opinion of HOKE, J.; CLARK, C. J., filing concurring opinion.

CIVIL ACTION pending in Superior Court of WAKE County and heard at October Term, 1916, by *Bond, J.,* upon motion to continue injunction to final hearing. His Honor made the following findings and order:

"After hearing the allegations of the complaint and considering the affidavits filed, the court finds that there is a *bona fide* controversy as to the rights of the plaintiff to enter upon land claimed by defendant for the purpose of constructing the additional track which it (259)

desires to construct. The right is asserted by the plaintiff and denied by the defendant. The court finds as a fact that the land is actually needed in good faith for railroad purposes.

"Upon consideration of all of which it is adjudged, ordered, and decreed that the defendant, his agents and servants, be and they are hereby restrained and enjoined, until the final hearing of this cause, from interfering with any of the operations of the plaintiff company upon any of the land claimed by both parties as far as twenty-nine (29) feet westwardly from the center of the present track of the plaintiff company, seven (7) feet of which twenty-nine (29) feet is to form the base of the slope and six (6) feet of it is to be used for ditch and leveling of track between where the seven (7) feet gives out and the westwardly side of the track is to be laid.

"It is further considered and adjudged that the plaintiff shall leave safe and sufficient support for the underpinning of the house, in so far as any of it may be interfered with by the construction of the track, leveling and sloping as above provided for.

"The court finds as a fact that the westward end of the cross-ties for some distance when laid as the plaintiff proposes to lay them will be inside of the yard inclosure of the defendant Thompson, and, of course, the slope between the end of the cross-ties and the westward limit of said twenty-nine (29) feet.

"It is further ordered and decreed that the plaintiff company shall execute bond in the sum of two thousand dollars ($2,000), conditioned to pay to the defendant any and all sums which may be recovered as damages, if any, of the plaintiff in this action by reason of the granting of the restraining order and injunction and the wrongful appropriation, if any, of the defendant's land to the use which the plaintiff company proposes to make of it.

"Upon giving of said bond the plaintiff company is allowed to proceed with its work, and the defendant, his agents and servants, are restrained and enjoined until the final hearing of this action from in any way interfering with the operations of the plaintiff within the limits above provided for."

From this order the defendant appealed.

Upon the hearing in this Court the following affidavit is offered by plaintiff:

"Vance Sykes, being duly sworn, says that he is a civil engineer in the employ of the Seaboard Air Line Railway Company and has been in charge of the work of constructing an additional track from Johnson Street in the city of Raleigh to the Boylan Avenue Bridge in said (260) city; that he was in charge of said work at the time the restrain-

ing order was entered in this cause; that upon said restraining order being granted, the Seaboard Air Line Railway Company proceeded with the construction of its track upon the property involved in this action, and the construction of said track has since been completed and trains are now being operated over said track; that the track as now constructed is of a permanent character and is permanently located upon the land involved in this action; that the said track has been constructed within the limits fixed by the restraining order granted by Judge Bond; that in the construction of said track it was found to be unnecessary to place any supports under the house occupied by the defendant in this action; that the use of the said track is necessary for the proper performance by the Seaboard Air Line Company of its duties to the public as a common carrier of passengers and freight, and is being used for such purposes."

It is not denied that, acting under the order of the Superior Court, the track has been completed and that trains are in full operation over it.

Murray Allen for plaintiff.

W. C. Harris, Armistead Jones & Son for defendant.

BROWN, J. The plaintiff contends that the land in controversy is a part of its right of way, and that it has become necessary in the discharge of its duties to the public as a common carrier to occupy it for the operation of its train service.

The plaintiff contends that its predecessor, the Raleigh and Gaston Railroad Company, under the act of 1852, ch. 145, is granted "the same means of purchasing or condemning land, etc., as are provided in the act incorporating the North Carolina Railroad Company," including the right to acquire title by failure of the landowner to apply for an assessment within two years after the track is finished.

The plaintiff further contends that section 30 of chapter 82 of the Public Laws of 1848-49, incorporating the North Carolina Railroad Company, became a part of the charter of the Raleigh and Gaston Railroad Company by virtue of the enactment of section 18 of chapter 140 of the Laws of 1852. Section 30 of the act incorporating the North Carolina Railroad provides as follows:

"That all lands not heretofore granted to any person, nor appropriated by law to the use of the State, within 100 feet of the center of said road, which may be constructed by the said company, shall vest in the company as soon as the line of the road is definitely laid out through it, and any grant of said land thereafter shall be void." It is set (261) forth in the complaint and not denied that at the time of the

construction of the connection track by the Raleigh and Gaston Railroad Company, the property in controversy in this connection belonged to the State of North Carolina, and the effect of the above section was to vest in the Raleigh and Gaston Railroad, its predecessor, a right of way of the width of 100 feet on each side of the center of its track.

The answer of defendant denies the principal allegations of the complaint and admits the possession of the defendant. Upon considering the pleadings and affidavits offered, the judge made the findings and order above set out, holding that the construction of the road should not be enjoined until the final hearing, and requiring plaintiff to enter into an indemnifying bond.

It appearing to us that since the order of the Superior Court was made the plaintiff has constructed its track according to the terms of said order and is now operating its trains over it, we are not disposed to reverse the order and dissolve the injunction, but will let the controversy over the land be settled upon a final hearing and not upon an appeal from an interlocutory order. Serious injury to plaintiff and to the public may result from an interference now with the operation of the railway. Whatever damage that can be done to defendant has already been sustained, and to now dissolve the injunction would do defendant no good. His injury cannot be said to be entirely irreparable and he is fully protected by a good and sufficient bond.

Courts are loath to interfere with the construction and operation of railroads and other works of great public importance. Commenting upon the exercise of this jurisdiction, Mr. High, sec. 598, says: "Courts of equity are frequently called upon to interfere by injunction with the construction of railroads in such manner or under such circumstances as would be productive of irreparable injury. In exercising its jurisdiction over cases of this nature a court of equity will in the use of a sound discretion balance the relative inconvenience and injury which is likely to result from granting or withholding the writ, and will be largely governed by such circumstances in determining upon the relief. And where an injunction restraining the use of a railway would not only be productive of great injury to the railway company and to the public, but would result in no corresponding advantage to any one, not even to the persons asking such relief, it will not be granted. So where the work of constructing a railway is of great magnitude, and one involving large expense, if it is apparent that the injury which would result to defendant by granting the injunction in case the result should prove it to have been wrongly granted, would be greater than that which would result
(262) to complainant from a refusal of the injunction, in the event of the legal right being proved to be in his favor, the court will not interpose."

Again, the same writer says: "From the peculiar nature of works of public improvement and the serious injury that may result from any unwarranted interference with their construction, the jurisdiction in restraint of such works is exercised with great caution, keeping constantly in view the damage that may result from improperly restraining their operation." High on Injunctions sec. 615.

The same principle has been stated by our Court as follows: "It is contrary to the policy of the law to use the extraordinary powers of the court to arrest the development of industrial enterprises or the progress of works prosecuted apparently for the public good as well as for private gain." *Lewis v. Lumber Co.,* 99 N. C., 11.

There are other cases in which this salutary principle is recognized. *Navigation Co. v. Emry,* 108 N. C., 130. In this case the Court further declares: "The courts have in many cases not unlike the present one granted relief by injunction pending the action, and when the evidence has left the material matter in dispute in doubt, this Court has generally directed the order granting such injunction to be affirmed. Here the defense alleged by the defendants is more than doubtful, but we are not to be understood as expressing any opinion upon the facts further than as may be proper in directing an affirmance of the order appealed from. *Parker v. Parker,* 82 N. C., 165; *Lumber Co. v. Wallace,* 93 N. C., 22; *Lewis v. Lumber Co., supra; Evans v. R. R.,* 96 N. C., 45; *Whitaker v. Hill, ibid.,* 2."

The track having been already constructed in accordance with the order of the Superior Court, and the trains being in full operation over it, if we were to dissolve the injunction, the defendant could not remove the track and stop the operation of the trains by force, and under the circumstances of this case, we would not consider it advisable to interfere until the facts are all established and the rights of the parties have been adjudicated upon final hearing.

Affirmed.

HOKE, J., concurring in part: Plaintiff having entered within the boundaries of defendant's lot and completed its road before the appeal could be heard and the rights of the parties determined, there seems to be no present good to come from dissolving the injunction, but I am clearly of the opinion that such a process should never have been issued against defendant unless it had also run against the plaintiff and its avowed purpose to enter on and appropriate a part of the dwelling lot claimed by the defendant and where he and his family made (263) their home. From the facts in evidence as I understand them, defendant and his family, as stated, claimed, occupied, and used as their

home a house and lot in the city of Raleigh, adjacent to plaintiff's single track, now connecting Johnson Street, its original terminal, with North Carolina Railroad and its own track, running from Raleigh to Cary. That plaintiff, having decided that it would be to its interest and facilitate the connection and proper operation of its trains at this point to have a double track for the purpose parallel to its former single track, ascertained that in order to construct such track would require a portion of defendant's lot. Under existent conditions there was no likelihood that it could successfully condemn the property under the law, this being a part of defendant's dwelling lot, Pell's Revisal, sec. 2578; and plaintiff thereupon having advanced a claim for right of way of 100 feet on each side of its single track from Johnson Street through the city of Raleigh to the junction with its track leading to Cary, entered the present suit, setting up its claim and asking that defendant be enjoined from committing trespass or otherwise interfering with plaintiff's operations in extending its track and taking over a portion of the yard and lot occupied by defendant. The statute relied on by plaintiff to justify this claim seems rather to refer to the *method* whereby, for certain purposes, plaintiff may be allowed to acquire property and not to any specified amount or width of right of way; but if it be conceded that there is a *bona fide* controversy between these parties as to the existence of such right on the facts presented in this case, it was to my mind a most improvident order by which defendant was enjoined from any and all interference and plaintiff permitted to proceed and take over the property peaceably occupied and claimed by defendant as his home. There are many decisions with us to the effect that when the principal purpose of action is to obtain an injunction, and the facts are such as to present a serious controversy as to the rights of the parties, an injunction will be continued to the hearing. *Tise v. Whitaker,* 144 N. C., 508. But even in cases of that character, and this is not one of them, the principle only applies where the effect of the injunction is to maintain existent conditions until the right can be properly and finally determined. In the present case the defendant was in the peaceable possession of the property, and the only move that threatened a disturbance was the proposed action of the plaintiff, and yet the process of the court was issued to stay the defendant and allow plaintiff to proceed, and the affidavit of defendant filed in the case here will disclose that plaintiff was prompt to take advantage of the conditions thus created. It is as follows: "That after the order

(264) of Judge Bond granting the injunction herein, the plaintiff took possession of a part of defendant's lot and proceeded to cut through the same for the purpose of double tracking its line; that the edge of the cut at one point at the time the work was done was within

18 inches of one of the corners of defendant's house, and at another point about 30 inches from defendant's bedroom; that since the cut was made rains have washed away a part of the top of the cut and it is nearer now to defendant's said house. That the cut is almost perpendicular and in such close proximity to defendant's house that it is dangerous and defendant fears in a short time the safety of his house will be imperiled by the constant washing in of the sides of the cut; that under the order of the court it was required that the cut be sloped down and not perpendicular, and the defendant avers that plaintiff did not leave safe and sufficient support for the underpinning of his house. That the track of the plaintiff has not been completed entirely to the connection with the main line at Boylan Bridge, and the condition of the track is of such character that it can be removed elsewhere, and there is nothing of permanency about it"; and this on facts showing that defendant was in possession and on a finding by his Honor that there was a *bona fide* question of the rights of the parties. It is not required to look beyond our own decisions to show that no such order should have been made nor such untoward results permitted. In *R. R. v. Olive,* 142 N. C., 257, a contest about a right of way, it was held, among other things, *Conner, J.,* delivering the opinion: "Before a railroad company is entitled to invoke the injunctive power of the court it must show clearly: (1) that it has a right of way over the lands in controversy; (2) the extent of such right; (3) that defendants are obstructing or threaten to obstruct its use. If there is a controversy in respect to any facts necessary to be proved to entitle the plaintiff to the injunction, both parties will be restrained from trespassing or interfering until a trial can be had." And in *Cobb v. Clegg,* 137 N. C., 153, opinion by *Walker, J.,* it was said: "It is generally proper, when the parties are at issue concerning the legal or equitable right, to grant an interlocutory injunction, to preserve the right in *statu quo* until the determination of the controversy, and especially is this the rule when the principal relief sought is in itself an injunction because a dissolution of a pending interlocutory injunction or a refusal of one on application in the first instance will virtually decide the case on its merits and deprive plaintiff (here defendant) of all remedy or relief even though he should afterwards be able to show ever so good a case."

In this case, as stated, defendant, in the peaceable possession of his home, has had his case practically prejudged contrary to our decisions, and, in my opinion, the injunctive order should be even (265) now so modified as to restrain plaintiff from entering or trespassing on the lot occupied and claimed by defendant until the issues can be tried and the rights of the parties properly determined. It is no doubt a correct proposition that when a railroad company has constructed its

road, and, in the exercise of its quasi-public franchise, is operating its trains, its work should not be lightly interfered with in furtherance of individual or private interests; but this doctrine, wholesome as it is, has no proper application here, and, on the facts of the record as I understand them, I am of opinion, as stated, that both parties should be restrained till the hearing, and if, on a full and fair investigation, it should be determined that plaintiff had a right of way, it is well and will be so adjudged; but if it shall be then established that plaintiff has wrongfully trespassed on defendant's rights of property, as he claims, it should be held to restore the lot to its former condition and make proper compensation to defendant for the injury inflicted upon him.

ALLEN, J., concurs.

CLARK, C. J., concurs with *Hoke, J.*, that the court below should have enjoined both parties, and that it was erroneous to enjoin the defendant only, which permitted the plaintiff to proceed without hindrance to the detriment of the defendant. The matter should have been kept in *statu quo* till the facts were determined by a jury.

Cited: Greenville v. Highway Com., 196 N.C. 228.

CHARLES ELLIOTT, RECEIVER FOURTH NATIONAL BANK OF FAYETTEVILLE, v. JOHN L. SMITH.

(Filed 4 April, 1917.)

1. Principal and Surety—Banks and Banking—Agreement with Surety—Consideration—Principal and Agent—Evidence.

Where there is evidence tending to show that the cashier of a bank discounted a note signed by a surety, and received, at the time, a mortgage given by the maker to the surety to indemnify him, under promise by the cashier who attached the papers together to have the mortgage registered, but did not do so for several years, when, fearing the insolvency of the parties, he had the mortgage recorded, but not until other mortgages had been registered to the full value of the property: *Held*, sufficient to show that the cashier was acting for the bank, and not personally for himself, the consideration being the additional security for the note; and to sustain a verdict in behalf of the surety, the defendant in the action. The charge in this case is approved.

2. Appeal and Error—Exclusion of Evidence—Harmless Error.

Evidence excluded at the trial which could not appreciably have affected the verdict rendered will not be held as reversible error on appeal.

ELLIOTT *v.* SMITH.

CIVIL ACTION, tried before *Connor, J.*, at February Term, 1917, (266) of CUMBERLAND.

This is an action commenced before the recorder's court of Cumberland County in the name of S. D. Scudder, receiver of the Fourth National Bank of Fayetteville, N. C., against John L. Smith. Judgment was rendered in the recorder's court in favor of the defendant, and the plaintiff appealed to the Superior Court. S. D. Scudder having resigned as receiver, and Charles Elliott having been duly appointed his successor, he was substituted in the Superior Court as party plaintiff, and the action was tried at February Term, 1917, of Cumberland Superior Court.

The defendant admitted the execution of the note sued on, amounting to $300, upon which there was a credit of $25, the note being dated 7 January, 1913, payable to the Fourth National Bank, and signed O. Wadkins, which note was endorsed by defendant Smith.

It appeared from the evidence that Wadkins applied to the bank through A. W. Peace, cashier and vice president of the bank, for a loan of $300 some time prior to 7 January, 1913, offering as security certain real estate. Peace refused to loan the money on this security, and later Wadkins came into the bank with Smith, on 7 January, 1913, and the bank, through Peace, as cashier and active vice president, loaned the money on a note payable to the bank, indorsed by Smith. At the time this transaction was had with the bank, Smith delivered to the bank a note of $300, payable to Smith, and a mortgage securing same, dated 7 January, 1913, the mortgage being also made to Smith. Smith testified that he took this mortgage as security for his endorsement, as he wanted some protection. That the mortgage was at that time a first mortgage on the property, worth at least $2,000; that he delivered same to Peace and asked him to have it recorded, and that he (Peace) said he would. The note and mortgage remained in the possession of the bank from 7 January, 1913, up to the time of the receivership in February, 1916. It was not registered by the bank until 14 September, 1914, prior to which time two other mortgages were registered on the same land, and the mortgage to one W. F. Smith & Co. was registered in May, 1913, and the property foreclosed thereunder and sold to one Breece at the price of $1,000.

A. W. Peace testified that he had no understanding or agreement of any kind with Smith about recording the paper; that no registration fees were paid to him to have the same recorded, and that (267) he simply held the note and mortgage payable to Smith at Smith's request.

His Honor held that if the jury should find that Peace, acting as an officer of the bank, agreed to have the mortgage recorded, and, relying on this promise, Smith delivered the unregistered mortgage to him, and took no further steps toward having it recorded, on account of Peace's promise, then it was the duty of the bank to have it properly recorded within a reasonable time, and if it failed so to do, they should answer the issue in favor of the defendant. Plaintiff excepted.

There was a verdict and judgment for the defendant, and the plaintiff appealed.

Rose & Rose for plaintiff.
Sinclair, Dye & Ray for defendant.

ALLEN, J. It is not denied that the value of the mortgage deposited by the defendant Smith with the cashier of the bank was destroyed as a security and indemnity on account of the failure to register it until after two other mortgages, subsequent in date, were registered; but the plaintiff contends that there is no evidence of an agreement to register; that if there is such evidence it was an agreement made by the cashier personally, which would not be binding on the bank; and that the mortgage was not deposited as collateral with the bank, and was merely left with the cashier to hold for Smith.

We cannot determine the fact, and the only legal question presented by these contentions is whether there is evidence to support findings in favor of the defendant that there was an agreement to register the mortgage; that the agreement was made for the bank, and that the mortgage was deposited with the cashier for the bank.

On the first point, as to the agreement, the defendant testified: "I turned both note and mortgage over to Mr. Peace, and told him to have the mortgage recorded. He said he would. Mr. Peace was then cashier of the bank."

On the other questions all the evidence for the plaintiff and the defendant shows that the cashier was acting for the bank at the time the agreement was made, if made at all, and that the parties understood that the mortgage was deposited with the bank.

Mr. Peace, witness for the plaintiff, testified that he was cashier and active vice president of the Fourth National Bank of Fayetteville, N. C., in January, 1913, and that he handled the transaction with Mr. Smith and Mr. Wadkins. He never saw the land described in the mortgage. Wadkins wanted to borrow $300, offering as security a mortgage on real estate. He declined this, and Wadkins later came in with John
(268) L. Smith, and the witness filled out the note payable to the bank; Wadkins signed it and Smith indorsed it. "I accepted the note

for the bank, and Smith and Wadkins had mortgage executed by Wadkins and wife to Smith with them at the time, and these papers were attached to the note given the bank. I made no agreement with Smith to have the mortgage registered, and no registration fees were paid for this purpose. I had the mortgage registered and the bank paid the fees. Wadkins had left this community, and I was informed that his affairs were in bad shape. My recollection is that Mr. Smith was also in trouble at the time, and not knowing the outcome of those troubles, I got out the mortgage and had same recorded. From 7 January, 1913, up to the appointment of the receiver, the bank had possession of the note and mortgage. The writing in the face of the note payable to the bank is in my handwriting."

If "he handled the transaction with Mr. Smith and Mr. Wadkins"; if the note and mortgage executed by Wadkins to Smith were attached to the note payable to the bank; if all the papers were handed to the cashier, and were thereafter in the possession of the bank and the bank paid the fees for registration, as the cashier testified, there is evidence that the agreement to register was made for the bank, and that the papers were deposited with the bank.

The consideration for the promise was the additional security for the loan.

His Honor submitted the question to the jury in a charge free from objection, telling them, among other things:

"Upon the admitted facts in this case, the court charges you that if you find from the evidence, and by its greater weight, that at the time Smith indorsed the note upon which this action is brought he called Mr. Peace's attention to the fact that the mortgage was not recorded, and requested him to have same recorded; that Peace was acting in the matter as an officer of the bank; that Peace thereupon agreed to have the mortgage recorded, and that, relying upon this promise by Peace, the defendant delivered the mortgage, unrecorded, to the bank, and took no further steps toward having the same recorded on account of Peace's promise to have this done, then it was the duty of the bank to have the mortgage recorded within a reasonable time thereafter; and it being admitted that the bank did not have the mortgage recorded until September, 1914, there was a failure of the bank to perform its duty in this regard, and you will answer the first issue "Yes."

There is also an exception by the plaintiff to the exclusion of evidence that it was the custom of the bank to collect registration fees and to note the collection on the papers.

We recognize the principle that under certain conditions evi- (269) dence of custom is competent in corroboration of a witness, but

in this case, as counsel for the plaintiff practically conceded, it would have no appreciable effect on the verdict, and the plaintiff had the benefit in the charge of the circumstance that no fees were paid as tending to corroborate the evidence of the cashier that no agreement was made, and there was no proof as to whether a notation was made on the paper or not.

The case has been tried under proper instructions, and in our opinion there is evidence to support the verdict, and no reversible error.

No error.

Cited: S. v. Davis, 175 N.C. 729; *Mfg. Co. v. Building Co.,* 177 N.C. 106; *Bank v. Wysong & Miles Co.,* 177 N.C. 292.

WYNNEWOOD LUMBER COMPANY v. THE TRAVELERS INSURANCE COMPANY.

(Filed 4 April, 1917.)

Insurance—Master and Servant—Employer and Employee—Indemnity—Policy—Employment of Counsel—Compromise—Appeal and Error.

A policy of employer's indemnity giving the insurer the right to employ counsel and defend or compromise an action brought thereunder by an employee is for the benefit of the insurer, and it is not liable in damages sustained by the employer for refusing to compromise the employee's action for a less sum than that indemnified against, and for compromising a judgment in a large amount rendered in the employee's action, without appeal, in the absence of suggestion that the insurer was negligent in the proper prosecution of that action, or had acted in bad faith.

CIVIL ACTION, heard at December Term, 1916, of NEW HANOVER before *Connor, J.,* upon complaint and demurrer. The demurrer was sustained, and the plaintiff electing to stand upon its complaint, it was further ordered that the action be dismissed. The plaintiff appealed.

McClammy & Burgwyn for plaintiff.

George Rountree, Thomas W. Davis, J. O. Carr for defendant.

BROWN, J. This action is brought to recover the sum of $5,000, which the plaintiff alleges it was compelled to pay on a judgment obtained against it by one Joseph Jones, as damages for injuries sustained while in its employment. The complaint shows that the defendant had issued a policy of indemnity in the usual form in the sum of $5,000, indemni-

fying the plaintiff from loss by reason of injury to its employees.

One Jefferson Jones, working on the logging road, was seriously (270) injured, and plaintiff alleges that it gave notice to the defendant of the injuries and assisted in making the investigation, and that it could have settled the claim for from $1,000 to $2,500, but the defendant company refused to do so. Action was brought by Jones against the plaintiff, the Wynnewood Lumber Company, and it was defended by counsel employed by the Travelers Insurance Company. The trial resulted in a verdict for $20,000 damages. Subsequently the court reduced this verdict to the sum of $15,000, and by the negotiations entered into by counsel for the insurance company and the Wynnewood Lumber Company with counsel for the plaintiff, Joseph Jones, an agreement was entered into whereby the appeal was abandoned and judgment was entered for $10,000. Five thousand dollars of this sum was paid by the plaintiff in this action, and $5,000 by the defendant.

The ground of demurrer is that the facts set forth in the complaint do not constitute a cause of action. In the brief of the learned counsel for the plaintiff it is said: "This raises the question as to whether or not an insurance company, which has issued a policy of insurance indemnifying the plaintiff against loss, which has the right under the terms of the policy, after notice of injury, to take absolute control of the litigation, and fails to settle at a time that it could settle, without loss to the insured, can evade payment, when it controls the suit, and the judgment rendered is for four times the amount of the policy issued."

It is true, as held by other courts, that where an insurer under an employer's liability policy, on being notified of an action for injuries to the insurer's servant, assumes the defense thereof and was negligent in conducting the suit, to the loss of the employer, the latter was entitled to sue the insurance company for breach of its implied contract to exercise reasonable care in conducting the suit or in tort for negligence. *Mfg. Co. v. Plate Glass Ins. Co.,* 171 Fed., 495.

There is no allegation in the complaint in this action that the defendant company was guilty of any negligence in the conduct of the suit brought against the plaintiff for the injuries to Jones. There is no allegation that it failed to employ competent counsel and no allegation that the counsel employed by it was guilty of any negligence the consequence of which was a verdict and judgment against the plaintiff. So far as the complaint shows, the case was conducted properly and skillfully, although it resulted in a verdict of $20,000 against the plaintiff.

The only suggestion of a tortious act is in the language used with reference to the defendant's negligently refusing to settle the Jones claim for $1,000 or $2,500. A casual examination of the policy (271)

makes it clear that the parties agreed that the defendant should have the sole right to compromise and settle claims brought against the plaintiff. There is no allegation that this power was exercised by the defendant fraudulently, oppressively, or otherwise than in good faith. That provision was evidently placed in the contract for the protection of the insurer, and gives the insurer the right to exercise its own judgment as to when a compromise and a settlement shall be made. Of course, it must be exercised in good faith and without any wrongful or fraudulent purpose. When properly exercised, it is binding upon the insured. It turns out that it would have been better for all parties, the plaintiff as well as the defendant, if the offer of a compromise had been accepted; but as is said in the brief of the counsel for the defendant, "This is a case where *hindsight* turns out to be better than *foresight.*" It was a mistake of judgment, something not unusual in the affairs of this life. Such a mistake honestly made does not subject the person to legal liability. *Schmidt v. Ins. Co.*, 52 L. R. A. (N. S.), 126.

It is well settled that these provisions in policies of insurance indemnifying employer against loss by injury, that the insured shall have the exclusive right to compromise and settle such claims, is valid if exercised in good faith. The insurer is liable where it assumes the duty of defending a suit and negligently fails to discharge such duty. The insurer is also liable if it exercises the exclusive power of settlement in bad faith, or for purposes of fraud, to the injury of the insured. *New Orleans Co. v. Casualty Co.*, 6 L. R. A. (N. S.), 562.

A case very much in point is *Zinc Co. v. Fidelity and Deposit Co.*, 156 N. W., 1081. In this case the Wisconsin court held that "Under policy indemnifying employer against claims for personal injury in any case up to $5,000, held that the insurer was not bound to settle a claim, though it might be settled for $5,000 or less, so that where it had contributed $5,000 on a judgment of $12,500 the insured could not recover the excess which he was required to pay."

The fact that the defendant failed to prosecute an appeal does not constitute of itself either a tort or a breach of the implied contract, for the reasons given by the Supreme Court of Iowa in *Lumber Mfg. Co. v. Employers' Assurance Corporation*, 62 L. R. A., 617, viz.: "An insurer against employer's liability, whose contract gives it the right to defend against suits by employees against the assured, and which, after a judgment in excess of the insurance has been obtained against the assured, agrees to perfect an appeal, is not liable for negligently failing to do so,

whereby the judgment is affirmed, in the absence of anything to
(272) show that the judgment was erroneous and that plaintiff could not have succeeded on a second trial." See, also, *Davidson v. Casualty Co.*, 197 Mass., 167.

We are of opinion that the complaint fails to state a cause of action either as a breach of the implied contract or in tort for negligence, and that his Honor properly sustained the demurrer.

Affirmed.

IN RE E. E. GORHAM, ADMINISTRATOR.

(Filed 4 April, 1917.)

1. Liens—Buildings—Loans—Resulting Trusts—Husband and Wife.

The loan of money by a wife to her husband and used by him in building a house upon his own land does not, in the absence of contract or statute, give the wife a lien upon the house or the land for its repayment, or create a resulting trust in her favor.

2. Liens—Commingling of Goods—Husband and Wife—Equity.

Where the wife has permitted the husband to use her money indiscriminately with his own in erecting a building on his own land, so that the amount may not be ascertained, the doctrine of the admixture of goods would prevent her acquiring a lien for its repayment, were she otherwise entitled to it.

APPEAL by administrator and by claimant from *Winston, J.*, at September Term, 1916, of CUMBERLAND.

Q. K. Nimocks and E. G. Davis for administrator.

Sinclair, Dye & Ray for claimant.

CLARK, C. J. This is a matter arising out of the administration of the estate of John C. Gorham, deceased. His widow, who has since married and is now Mrs. Chedester, is a claimant against the estate. Her claim was referred to H. S. Averitt, referee, to report the facts and conclusions of law. The referee found that the wife of the deceased loaned him the sum of $6,129.70, which bears interest from September, 1907, and that some part thereof, but the evidence does not prove how much, was used by him in building his residence. He further finds that there is no agreement shown that it should be used in the building and that no resulting trust arises in her favor for whatever amount was so used, and that, therefore, she is not entitled to a lien upon the home place, or on the proceeds thereof, for such of her money as was used by her husband in the erection of the house. She had filed a claim for (273) the amount used by the husband, describing it as a loan. Though she was allowed in this proceeding to amend that claim by striking out

the words, "as a loan," the referee finds as a fact that it was a loan, and further, that as a matter of law, by signing the petition for a sale of the house and lot for partition and by acceptance of the value of her dower out of the proceeds she is estopped to set up a lien against the home place or the proceeds thereof, but is entitled to file her claim as an unsecured creditor against the estate for the sum loaned her husband.

The court on appeal sustained the report of the referee, except that he finds that the amount of money loaned by the wife, which was used by the deceased in building the house, was $6,129.70. The administrator appeals from this ruling upon the ground that there is no evidence to support it. The claimant appeals because it was held that she had no lien or resulting trust in the building for that amount.

The evidence is that the building cost $12,000 and that no part of the wife's money went into the purchase of the lot on which it was erected.

If the judgment is correct, in which we concur, that the wife has no lien or resulting trust on the house by reason of the loan to her husband, it becomes immaterial to consider the ruling that the widow was estopped, by joining in the partition proceedings and receiving the value of her dower out of the proceeds, to set up the lien, and also whether or not the evidence established how much of the money she loaned her husband went into the construction of the building.

There was no evidence and no findings that the husband received the money under an agreement to use it or any part of it in constructing the building, and there is nothing from which the court could construe that there is a resulting trust in the wife's favor. It could not arise from the mere fact of loaning money to her husband. Such lien could arise only by contract or by statute, and there was neither, and there was nothing to put other creditors on notice of such lien. Even if there was such use of the wife's money, together with other funds, in building the house, the wife, having permitted such mixture of the funds, could not claim a lien. *Wells v. Batts,* 112 N. C., 283. There is also authority, if it were necessary to pass on the point, that by joining in the proceedings for sale of the premises in partition and accepting her allotment thereof for dower she is estopped. *Weeks v. McPhail,* 129 N. C., 73; *Propst v. Caldwell,* 172 N. C., 594.

The judgment that the claimant is entitled to prove for the full amount of the loan, as found by the judgment, against her husband's estate as an unsecured claim and to receive her pro rata is

Affirmed.

Cited: Oliver v. Fidelity Co., 176 N.C. 600.

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JAMES W. SNEEDEN v. JAMES J. DARBY.

(Filed 4 April, 1917.)

Appeal—Recorder's Court—Justice's Court—Dismissal of Appeal—Judgment—Stay Bond—Costs—Statutes.

Where a defendant appeals a judgment rendered against him in a recorder's court, under a statute prescribing the same methods as from a court of a justice of the peace, and fails to have it docketed in the Superior Court at the next ensuing term, etc., the plaintiff may have the appeal docketed and dismissed upon motion, and the judgment in the lower court affirmed (Rev., sec. 608), and tax the defendant and his surety on his stay bond with the costs of appeal, according to the conditions thereof. Revisal, sec. 607.

CIVIL ACTION, tried before *Connor, J.*, at November Term, 1916, of NEW HANOVER.

This is a civil action begun 25 May, 1916, by summons issued from the recorder's court of New Hanover County at the instance of the plaintiff, to recover money alleged to be due him by the defendant for labor performed. Judgment was duly rendered on 8 July, 1916, in favor of the plaintiff and against the defendant for the sum of $192.12, from which the defendant gave notice of appeal to the Superior Court. The next term of the Superior Court of New Hanover County after the rendition of said judgment was held on 11 September, 1916, which was "for the trial of criminal cases only," and at the succeeding term of the Superior Court of said county, which was for the trial of civil cases only, defendant having failed up to that time to have said appeal docketed on his own behalf, on 27 October, 1916, which was the fifth day of said term, plaintiff caused said appeal to be docketed, and paid the fees therefor, for the purpose of moving for the dismissal of the same, under section 607 of the Revisal of 1905. Thereupon judgment was rendered in the Superior Court, dismissing the appeal and affirming the judgment of the recorder, and also against the surety upon the stay bond.

The defendant excepted and appealed upon the ground that the docketing of the judgment in the Superior Court was a docketing for the purpose of the appeal, and that no further action was required to perfect the appeal, and also upon the ground that the court could not dismiss the appeal and at the same time enter judgment upon the stay bond.

J. C. King and L. Clayton Grant for plaintiff.

J. O. Carr for defendant.

(275) ALLEN, J. The act establishing the recorder's court in Wilmington, chapter 389 of Public Laws of 1909, as amended by

chapter 217 of the Public Laws of 1911, provides that "Any person desiring to appeal to the Superior Court in a criminal or civil case from a judgment of the recorder's court shall be allowed to do so in the same manner as is now provided for appeals from the courts of justices of the peace"; and section 608 of the Revisal requires an appeal from a justice to the Superior Court to be docketed "at the ensuing term of said court."

It has been frequently held that a failure to comply with this provision of the statute and to docket the appeal at the ensuing term entitles the party recovering judgment to dismiss the appeal.

The latest case on this question is *Helsabeck v. Grubbs,* 171 N. C., 337.

It follows, therefore, that there is no error in dismissing the appeal, as the defendant has never docketed his appeal in the Superior Court.

The provision of the statute relied on by the defendant, saying that "All judgments for the plaintiff rendered by the recorder shall be duly docketed in the office of the clerk of the Superior Court, and execution shall be issued thereon as is now provided by law for executions," does not refer to proceedings connected with the appeal, but to the docketing of the judgment for the purposes of lien and execution.

The judgment against the sureties on the stay bond is also authorized under section 607 of the Revisal, which provides: "That if the appellant shall fail to have his appeal docketed as required by law, the appellee may, at the term of said court next succeeding the term to which the appeal is taken, have the case placed upon the docket, and upon motion the judgment of the justice shall be affirmed and judgment rendered against the appellant accordingly, and for the costs of appeal and against his sureties upon the undertaking, if there be any, according to the conditions thereof."

It is probable that the defendant was not more diligent because he did not hope to reduce the amount recovered before the recorder, as it is stated in the judgment in that court that the plaintiff submitted to the defendant an account showing $235.63 due him, and that this was not denied by the defendant, and that the claim of the defendant against the plaintiff for $43.51 was allowed, leaving a balance of $192.12, for which judgment was rendered.

Affirmed.

Cited: Simonds v. Carson, 182 N.C. 83; *S. v. Goff,* 205 N.C. 549; *Summerell v. Sales Corp.,* 218 N.C. 454.

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TAYLOR JACOBS ET AL. v. RILEY WILLIAMS ET ALS.

(Filed 4 April, 1917.)

1. Limitation of Actions—Possession — Dower — Heirs at Law — Title — State.

The possession of the widow under dower in the lands of her husband's estate may be tacked to that of her husband for the purpose of perfecting title in the heir claiming by adverse possession under the deed to his ancestor as color of title; and when sufficient for twenty-one years will take the title out of the State.

2. Same—Adverse Possession—Continuity.

Evidence in this case of getting turpentine from the *locus in quo*, cultivating the lands, etc., on the entire tract, by the grantee under the deed, relied upon as color, also by the widow after his death, as to her dower and other lands, and by the heirs at law, claiming title by continuous adverse possession for more than twenty-one years in all, is held sufficient to take the title out of the State.

CIVIL ACTION, tried before *Connor, J.*, at September Term, 1916, of PENDER.

This is an action to recover land. The plaintiffs are the heirs at law of Matthew Jacobs and claim title by adverse possession.

They introduced a deed covering the land in controversy from Thomas Jacobs to Matthew Jacobs of date 10 September, 1840, and offered evidence tending to prove that their ancestor, the grantee in said deed, had continuous possession of said land from the date of the deed until his death, about 1858, and claimed and used it as his own.

After his death dower was allotted in said land to the widow of Matthew Jacobs, Eliza Jacobs, at December Term, 1858, of the Court of Pleas and Quarter Sessions.

Evidence was also introduced tending to prove that the widow remained in possession of the land after the death of her husband until her death in 1900, and that during a part of the time the plaintiffs were in possession with her.

The widow, Eliza Jacobs, afterwards married William Williams, the date not stated.

In 1860, June 2, W. A. Lamb executed a deed to William Williams covering the land, and it is under this deed the defendants claim.

On 1 June, 1897, William Williams conveyed a part of said land to one of the defendants, and a part to another defendant.

The defendant offered evidence tending to prove that Eliza Jacobs died in 1899 and that they have been in the adverse possession of said land since that time.

(277) An action was commenced by the plaintiffs against the defendants to recover said land, 4 February, 1907, in which judgment of nonsuit was entered at January Term, 1910, and this action was commenced within one year thereafter.

The defendants moved for judgment of nonsuit upon the ground that there was no evidence of twenty-one years adverse possession under color in the plaintiffs, and, therefore, it had not been proven that title was out of the State, which was overruled, and the defendants excepted. There are also several exceptions to the charge, but all of them, except one to a statement of an agreement by counsel as a misapprehension, are on the ground there was no sufficient evidence to justify the charge given.

The jury returned the following verdict:

1. Are the plaintiffs, or any of them, the owners and entitled to the possession of the land described in the complaint as the Matthew Jacobs land outside the dower? Answer: "Yes."

2. Are the plaintiffs, or any of them, the owners and entitled to the possession of the land described in the complaint as the dower of Eliza (Williams) Jacobs? Answer: "Yes."

3. Are defendants in the unlawful possession of either of said tracts of land? Answer: "Yes."

4. What sum, if any, are plaintiffs entitled to recover of defendants as damages? Answer: "One penny."

5. Did Eliza Williams die seven years or more before 4 February, 1907? Answer: "No."

Judgment was entered upon the verdict in favor of the plaintiffs, and the defendants excepted and appealed.

R. G. Grady and C. D. Weeks for plaintiffs.

Bland & Bland and C. E. McCullen for defendants.

ALLEN, J. The only question presented by the appeal is whether there is any evidence that the plaintiffs and those under whom they claim have had an adverse possession under color for twenty-one years, and in considering this question we must accept the evidence of the plaintiffs as true, and must give to it the construction most favorable to them.

As to the part of the land covered by the dower, the evidence showing title in the plaintiff is too clear to admit of debate.

The deed to the ancestor of the plaintiffs, dated in 1840, is color of title, and the uncontradicted evidence is that the grantee in this deed entered into possession of the land, used it openly as his own until his death in 1858, and that after the allotment of dower in the same

year to his widow she remained in possession, exercising acts of (278) ownership until her death, which the evidence of the plaintiffs shows was in 1900.

The possession of the widow is not only not adverse to the heir, but it may be tacked to the possession of the ancestor for the purpose of perfecting title in the heir.

This question was fully considered and decided in *Atwell v. Shook,* 133 N. C., 391, in which the Court says: "It is clear that the possession of the heir may be added to the possession of the ancestor to complete the twenty years which will bar the action. We do not understand this to be controverted; but the defendant says that the possession of the widow was not the possession of the heirs, but was adverse to them. This is the point in the case. We agree with his Honor that the question is not whether the widow took any title by the allotment of the homestead, but whether she claimed under the heirs, thereby making her possession their possession. Certainly her possession could not be adverse to the heirs, and this is so without regard to the question, discussed before us, as to the effect of the allotment of the homestead. If instead of taking a homestead she had taken a dower in her husband's land, and in the allotment the 3 acres to which he had no paper title were included therein, and she remained in possession, certainly such possession would inure to the benefit of the heirs, being an elongation of the husband's title or estate. This would not be upon the principle that she acquired any new or independent right by the allotment of the dower, but that she claimed under the husband and thereby her possession inured to the benefit of the heirs."

There is also evidence of an adverse possession of twenty-one years of the land outside of the dower.

John Jacobs, one of the plaintiffs and an heir, testified that he was born on the land in 1843, and lived there from his earliest recollection until he was 19 or 20 years of age; that they "tended turpentine and farmed" and "worked the whole place where there was any pine"; that after he left the place he went back from time to time, and Eliza Jacobs, the widow, "was cultivating all the cleared land, all of the 175-acre tract."

This is evidence of a possession in the ancestor and in the heir from 1840, the date of the deed to the ancestor, to 1862 or 1863, more than twenty-one years.

Melvin Jacobs, another plaintiff and heir, testified that he was not two years old when his father died; that he worked on the land from the time he "was big enough" till he "was grown," and lived (279)

there till he "was about 21"; that he split rails, cut firewood, and hauled straw off any part of the land not included in the dower.

If the witness was born two years before the death of his father and lived on the land until he was 21, he lived on the land nineteen years after the death of his father, which, added to the possession of his father from 1840 to 1858, or eighteen years, would furnish evidence of possession in the heirs and their father of thirty-seven years.

It, therefore, appears that there is evidence of twenty-one years adverse possession of the land outside of the dower as well as of that included therein, without passing on the effect on the other land of the possession of the dower by the widow.

Nor is it necessary to consider the character of the possession by Williams after his marriage with the widow of Matthew Jacobs, or of the possession of the defendants, as these questions were submitted to the jury under a charge free from objection.

We have considered all of the exceptions and find

No error.

Cited: Clendenin v. Clendenin, 181 N.C. 473; *Ramsey v. Ramsey,* 224 N.C. 115; *Newkirk v. Porter,* 237 N.C. 120.

LELIA B. JONES v. WALTER J. JONES.

(Filed 4 April, 1917.)

1. Divorce—Alimony—Motions—Notice—Statutes.

Feme plaintiff's motion for alimony and attorney's fees in an action for divorce, made upon complaint and resisted upon an answer during the pleadings term, does not require previous notice to be given; and when the judge hears it upon one day's postponement, the last day of the term, five days after complaint filed demanding such relief, his order granting it will not be disturbed for lack of sufficient notice, Rev., secs. 1566, 877; and when it appears that the defendant is about to remove his property and effects from the State to defeat plaintiff's rights, notice of any kind is not required. Rev., sec. 1556.

2. Divorce—Pleadings—Verification—Knowledge—Six Months—Condonation—Breach.

A verification to the complaint in an action for divorce *a mensa,* that the facts set forth therein as grounds for a divorce have existed to the plaintiff's knowledge at least six months prior to the filing of the complaint, is sufficient, though coupled with averments as to matters in condonation and breach occurring within that period, and the trial will be proceeded with as to all.

3. Divorce—Alimony—Court's Discretion—Appeal and Error.

The allowance to a *feme* plaintiff of alimony *pendente lite* and attorney's fee in an action for divorce *a mensa* is within the discretion of the trial court, and not reviewable on appeal, in the absence of its abuse.

4. Divorce—Children—Custody—Alimony.

Where in passing upon a motion of *feme* plaintiff in her action for divorce *a mensa* for alimony, etc., *pendente lite*, the trial judge has found facts sufficient upon the evidence, he may award the custody of the minor children, who have been removed by the defendant from the State, to the plaintiff, with an additional allowance for them from the time they may be placed in her custody.

Everton v. Everton, 50 N. C., 202, and *Miller v. Miller*, 78 N. C., 102, OVERRULED.

APPEAL by defendant from *Cooke, J.*, at October Term, 1916, (280) from PERSON.

This is an appeal from the judgment of the Superior Court allowing the plaintiff alimony *pendente lite* and counsel fees, in an action for divorce from bed and board. The action was begun 18 September, 1916, the summons being returnable to October Term of Person, 1916, which began on 16 October. The complaint was filed Saturday, 14 October. On Wednesday of October Term the plaintiff moved in open court for an allowance for alimony *pendente lite* and counsel fees in accordance with the request in the complaint. The defendant in open court resisted the motion. The court postponed the hearing till the next evening, Thursday, 21 October, when, court being about to adjourn, he heard the motion and found the following facts upon the complaint and answer used as affidavits, and such other evidence as was offered.

That the plaintiff and defendant were married in October, 1911, and have two children, aged 3½ and 1½ years, respectively; that the defendant has offered such indignities to the person of the plaintiff as to make her condition intolerable and her life burdensome; that in August, 1916, the defendant abandoned the plaintiff and caused her to leave his home; that in 1914 he tried to get the plaintiff to release her right in his property and make him free, in consideration of $1,000 and became greatly enraged because she did not do so; that in 1913 the defendant said to the plaintiff that "when he got his business straight and like he wanted it, the plaintiff could take the cook and go to hell, or walk up and down the big road and eat flint-rocks, as far as he cared"; that he often left the plaintiff for three or four days during the week and refused her request for a pistol for protection during his absence; that he drank a great deal of whiskey and in November, 1914, he accused the plaintiff of taking a quart of his whiskey, which he later found in his auto,

(281) but did not apologize; that in 1914 the defendant repeatedly stayed out two or three nights in the week until 4 o'clock in the morning, and in November of that year he moved a negro woman and her children into a house in the yard, and boasted to the plaintiff the woman's boy was his son; that the negro woman and her children annoyed the plaintiff by taking her wood, and were insolent to her, and that when the plaintiff complained the defendant upheld the negro woman and abused the plaintiff, and upon the plaintiff's saying that she could not stand such conditions any longer, and would have to go home, the defendant told her she "could take her choice"; that under such conditions, her health becoming impaired and fearing for her personal safety, she went to her father's; that about three weeks thereafter the defendant went to her, asking her to return, and promised that he would not mistreat her again and would send the negro woman away, and under the circumstances and relying upon such promise she returned with the defendant, who did get rid of the negro woman, but in a day or two began to abuse the plaintiff, insisting that she should sign papers releasing all her interest in his property and give him a divorce, and upon her refusal he became greatly enraged and told the plaintiff she could "go to ——— and eat flint-rocks, for all he cared"; that he unnecessarily required her to do an unusual amount of work just prior to Christmas, 1914 (when she was in a pregnant condition), in regard to hog killing, and though she did all she could, the defendant told her if she "did not attend to business what ——— did he want with her there"; that when the plaintiff had finished the work of drying up the lard besides doing the cooking and looking after the house while she was in an exhausted condition therefrom the defendant brought a drunken companion home with him late on Christmas eve and made the plaintiff late at night cook an oyster supper for them, though she had already cooked supper for the family; that the defendant was often gone a week at a time without letting plaintiff know his whereabouts, without having any one at home for her protection; that in May, 1916, the defendant told the plaintiff he was "going to sell everything and was not going to be bothered with women and children; that he had enough to take care of himself, and did not expect to hit a lick of work for any one," and often repeated this to the plaintiff; that in August, 1916, he came to plaintiff's father's about 2 o'clock at night and carried her home, reaching there about 4 o'clock in the morning, whereupon the defendant himself retired to bed, but put the plaintiff to work preparing breakfast and supply of bread to last his hands three days; that in August, 1916, the defendant took the oldest child from plaintiff's arms, and struck the plaintiff on her breast,
(282) knocking her against the sewing machine, which blow left finger

prints and bruises on the plaintiff for several days; that he charged the plaintiff with adultery with one Loman, which charge the court finds was untrue and without foundation; that the defendant took both the children away and carried them to his father's house in Virginia; that he was often drunk and used personal violence and foul language to her.

The judge finds that the plaintiff during her married life had been a good, kind, dutiful wife, and has performed faithfully her household duties, and has often been required, in addition to cooking, washing, ironing, cleaning the house, and attending to the children, to work in the garden, and carry slops to the hogs a quarter of a mile distant; that the plaintiff gave the defendant no cause of provocation for his cruel and unjust conduct or for the indignities he has heaped upon her, and that she was put in bodily fear of the defendant and her life rendered intolerable and burdensome, and that the plaintiff by reason of defendant's false accusations against her and his violence is unable to endure living further with him.

The judge also finds that the defendant is a man of good health and strength, 47 years of age, of good earning capacity, and is worth from $15,000 to $20,000, and owns, according to admission of his counsel in open court, 535 acres of land; that the defendant for the last two years has greatly neglected his farm and other business; that the net annual income of the defendant, with proper attention to business, is reasonably $2,000 per year; that the plaintiff has no separate estate, is worth no property, and has no means of subsistence during the pendency of litigation or to pay for the prosecution of this action; that the defendant removed the children from the jurisdiction of this State and carried them to Virginia, where they now are, and that the plaintiff is entitled to the custody of said children.

Upon finding the foregoing facts and others of like nature, the judge awarded the custody of the two children to plaintiff and adjudged that the defendant should in thirty days pay to the plaintiff or into court the sum of $150, to enable her to prosecute this action, and that he should pay her or into court for her benefit $50 per month alimony, to begin on the day of the order and $15 per month for the support of said children, to begin when they are placed in her custody.

The defendant excepted and appealed.

L. M. Carlton, Manning & Kitchin for plaintiff.
Wm. D. Merritt, Bryant & Brogden for defendant.

CLARK, C. J. There was evidence to support the above findings of fact, and it cannot be questioned that upon such findings the judg-

(283) ment of the court is fully supported. The cases of *Everton v. Everton,* 50 N. C., 202, and *Miller v. Miller,* 89 N. C., 402, cannot be deemed authority in this day, but even if they were, they would not authorize the reversal of the orders made by the judge in this case. Indeed, the defendant's counsel rest the appeal practically upon the proviso in Revisal 1566, as follows: *"Provided,* that no order allowing alimony *pendente lite* shall be made unless the husband had five days notice thereof, and in all cases of application for alimony *pendente lite* under this or the succeeding section, whether in or out of term, it shall be admissible for the husband to be heard by affidavit in reply or answer to the allegations of the complaint"; but this Court has uniformly held that the five days notice of a motion applies only when such motion is heard out of term, and that parties are fixed with notice of all motions or orders made during the term of court in causes pending therein, *Hemphill v. Moore,* 104 N. C., 379; *Coor v. Smith,* 107 N. C., 431, and numerous cases since.

In *Lea v. Lea,* 104 N. C., 603, which was upon a motion for alimony *pendente lite,* the Court said: "The statute does not require that a day shall be set when a motion in the cause is to be heard at term. It only provides that five days notice shall be given, and we think that this requirement was fully complied with in the present case."

In the case at bar the complaint filed on Saturday, 16 October, asks for an order for alimony *pendente lite,* and the order was made on the Thursday following, 21 October, five days thereafter.

In *Zimmerman v. Zimmerman,* 113 N. C., 434, the Court held on an appeal from an order for alimony: "The application for alimony can be made by a motion in the cause, and the defendant is fixed with notice thereof. It is only when made out of term that a notice is necessary," citing *Coor v. Smith,* 107 N. C., 430. In *Moore v. Moore,* 130 N. C., 333, it was held: "A motion for alimony *pendente lite* may be heard anywhere in the judicial district, five days notice being required when heard out of term-time," and holding that such five days notice "is required only when a motion is heard out of term," citing *Zimmerman v. Zimmerman,* 113 N. C., 432.

Besides all this, Revisal, 877, provides: "When notice of a motion is necessary, it must be served ten days before the time appointed for the hearing, but the court or judge may, by an order to show cause, prescribe a shorter time." In this case the court in effect did shorten the time when, refusing to hear the motion on Wednesday, he directed that it be heard the following day, which was the last day of the term. It is true

(284) that the statute as to alimony makes the time of the notice five days, instead of ten, but the authority conferred by Revisal 877,

authorizes the judge to shorten the time for the notice in any case "when notice of a motion is necessary."

In Pell's Revisal, under section 877, a great number of cases are cited holding that a party to an action pending in court "is fixed with notice of all motions and orders except those made out of term, of which notice must be given." A motion might be made during the term of court, without previous notice, in a case of such nature that it would be error for that reason to enter judgment thereon without giving the defendant sufficient time to prepare affidavits or other evidence, but this would not be on the ground that a motion in a cause if made at term necessarily requires notice. The defendant in this case relied on his answer as an affidavit in the cause, and does not allege that he did not have opportunity of fully setting up his defense. In fact his case was carried over till the next day and to the latest moment before the court adjourned. The plaintiff, as the court finds, was wholly without means of subsistence or means of prosecuting the cause. If the hearing had been postponed till some other time, or to some possibly distant point in the district, she would have been unable to present her cause, if the finding of the judge is correct in this particular, as we must take it to be.

The facts found most fully justified the order of the judge. It would have been a great hardship to deny the plaintiff a hearing at this term of the court, which hearing was had five days after application for the order filed on Saturday and which in itself gave notice of the motion of which the defendant had service, for he filed his answer thereto at that term, and the hearing was had upon such answer, treated as an affidavit, and the defendant did not offer any additional evidence. Though he was in court he did not go upon the stand as the plaintiff did, nor did he offer additional affidavits. The refusal to postpone the hearing longer than the next day does not show any hardship placed on the defendant whereas its postponement without good cause would have been a great hardship to the plaintiff.

Moreover, Revisal 1566, provides that no notice shall be necessary if the husband has abandoned his wife and left the State, or if he is about to dispose of his property for the purpose of defeating the claim of his wife. The court found that plaintiff was driven from home by the defendant's conduct and that he had told plaintiff he was going to sell everything and was not going to be bothered by women and children. The verification to the complaint avers that the defendant has threatened to sell his property and that he is about to remove his property and effects from the State, whereby she may be disappointed in the alimony, and the court finds that the defendant has moved the (285) two children from the jurisdiction of this State and has them in Virginia.

The defendant excepts that the complaint does not aver that the facts therein stated had existed to the knowledge of the plaintiff for six months prior to the filing of the complaint. But the verification is in the language required by the statute: "The facts set forth in the complaint as grounds for a divorce from bed and board have existed to her knowledge at least six months prior to the filing of the complaint" (which are sufficient facts under the statute, if true), and adds: "except those therein stated as having occurred within said six months," and these last are merely in aggravation.

Where there was condonation upon a condition which is broken, the former conduct of the defendant is revived in full force. *Page v. Page,* 167 N. C., 346, and here the court found that whatever condonation there was, was upon condition that the defendant would never mistreat the plaintiff again, and the facts show that he continued to mistreat her. Upon the complaint, verified as in this case, the plaintiff can proceed to trial upon the facts which existed prior to six months and also upon the facts occurring since said six months, at least so far as necessary to show breach of the condition upon which the condonation was made. *Sanders v. Sanders,* 157 N. C., 229.

The amount of attorney's fees and alimony is within the discretion of the trial court and is not reviewable unless such discretion is abused. *Moore v. Moore,* 130 N. C., 333; *Barker v. Barker,* 136 N. C., 316; *Bailey v. Bailey,* 127 N. C., 474. The court had the right to award the plaintiff an amount per month for the maintenance of the children, to begin when the children should be placed in her custody. *Ellett v. Ellett,* 157 N. C., 161.

It was in the sound discretion of the trial court to award the custody of the children, and in view of the facts as to the conduct and character of the defendant, his continued drunkenness, and that he had already carried the children out of the State, the order to place them in the custody of the mother was proper.

The charges of brutality and mistreatment are not merely allegations in the complaint, but are findings of fact by the judge, and justify his judgment. The ruling of *Pearson, C. J.,* in *S. v. Black,* 60 N. C., 262, that a husband had the right to thrash his wife "to make her behave herself," and the ruling of the trial judge in *S. v. Rhodes,* 61 N. C., 453 (which was affirmed on appeal), that a husband "had a right to whip his wife with a switch no larger than his thumb," were merely the expression of judicial opinion formulated in the barbarous ages of the Common Law (for there was never a statute to that effect), which still
(286) lingered in the atmosphere of the Reports, and was brusquely brushed aside by *Settle, J.,* in *S. v. Oliver,* 70 N. C., 61, when he

succinctly said: "The courts have advanced from that barbarism." This was said in 1874, now more than forty years ago, when the writers of both the previous opinions were still on the bench, and with their concurrence. But if that doctrine was still law it would not justify this defendant, who, as the judge finds, beat his wife with his fists and left bruises upon her, and not under the pretense even of "making her behave herself." Nor would his false charges of adultery and his profanity and other mistreatments be justified within the limits of *Everton v. Everton* and *Miller v. Miller,* above cited, if we could hold that we had not also "advanced from that barbarism." Indeed, the facts which in *Miller v. Miller* were held to be a venial offense in the husband, and not entitling the wife even to a divorce from bed and board or alimony, have now been made by the Legislature ground for an absolute divorce.

The judgment of the court below must be

Affirmed.

Cited: Allen v. Allen, 180 N.C. 467; *Davidson v. Davidson,* 189 N.C. 627, 628; *Discount Corp v. Butler,* 200 N.C. 713; *S. v. Manon,* 204 N.C. 54; *Harris v. Board of Education,* 217 N.C. 283; *Brooks v. Brooks,* 226 N.C. 286; *Hospital v. Joint Committee,* 234 N.C. 683; *Collins v. Highway Com.,* 237 N.C. 282.

T. B. MOSELEY, ADMINISTRATOR OF J. W. STEPHENSON, v. WILL TAYLOR, SURVIVING PARTNER, ETC.

(Filed 11 April, 1917.)

Partnership—Services—Profits and Loss—Dissolution by Death—Contributing Partner—Impairment of Capital—Distribution of Assets.

Where, under partnership agreement, one of the partners is to contribute the capital and the other his services in managing the business, and receive "his part" by equally dividing the profits after paying all necessary expenses, and the partnership has been dissolved by the death of the contributing partner, and it has been ascertained that the capital has been impaired, the agreement will not admit of the construction that the surviving partner should receive for his services, in addition to his share of the profits, an equal distribution of the remaining capital; and there being no profits for division, the surplus thereof, after paying the partnership debts, should be paid to the personal representative of the deceased partner.

CIVIL ACTION, tried at January Term, 1917, WAKE, before *Devin, J.*

A jury trial being waived, the court found the facts and rendered judgment as follows: "That the defendant Will Taylor, as surviving partner and individually, is indebted to the plaintiff in the sum of
(287) $3,676.59, with interest thereon from 25 February, 1916, until paid, and also for the promissory notes described in the complaint, and being those set out in the final report of Will Taylor, surviving partner of the said firm of Will Taylor & Co., filed in the office of the clerk of the Superior Court of Wake County, N. C., on 25 February, 1916, and which is recorded in Docket 'I,' page 271, in said office."

From this judgment, defendant appealed.

R. N. Simms for plaintiff.
Armistead Jones & Son, Douglass & Douglass for defendant.

BROWN, J. The decision of this appeal depends upon the construction of the following contract:

This agreement is made and entered into between J. W. Stephenson and Will Taylor has gone (?) into copartnership in horse and mule business at Raleigh, N. C., and the said J. W. Stephenson has this day put in $5,000 (five thousand dollars) to operate said business. The said Will Taylor agrees to manage the said business for his part. After all necessary expenses is paid, the profit shall be equally divided. This partnership business is to run twelve months, or longer if all parties are satisfied.

(Signed) J. W. STEPHENSON.
December 30, 1912. (Signed) WILL TAYLOR.

It is admitted that the partnership was dissolved on 26 June, 1913, by the death of Stephenson. The surviving partner, Taylor, settled up the partnership business, and after paying all the expenses and the partnership debts there remains in his hands the sum of $3,676.69, together with certain uncollected notes aggregating $398.63, as set out in the decree.

It is admitted that the original capital put in by Stephenson has been impaired and that his estate must sustain a loss in any event. The plaintiff claims that all of the remaining assets in hands of the surviving partner should be applied to the repayment of the capital invested. Defendant contends that under the terms of the contract of partnership he is the owner of one-half of the capital and therefore entitled to one-half of the remaining assets.

We concur with the learned judge below that under the proper construction of the contract the capital of $5,000, put in by Stephenson, must be repaid, and as that will more than exhaust the assets, and defendant is entitled to nothing.

The defendant, admitting that he put in no cash, contends that he was to contribute his services for the period of the partnership, which is fixed at twelve months, at a valuation equal to the $5,000 put in (288) by Stephenson. We do not think the contract can fairly be so construed. Such construction is neither within the letter nor spirit of the agreement. In fact, it is a most unreasonable construction and ought not to be adopted unless it is the plain import of the language used. Such construction would give the defendant $2,500 in cash for his services for twelve months, in addition to one-half of the net profits. It is the same thing as if Stephenson had handed defendant $2,500 in money for defendant to pay in on the capital of $5,000 and then paid in the remaining $2,500 himself, and at same time agreed to pay defendant half the profits, all for his personal services.

Under his contention, if the partnership had been dissolved by the death of Stephenson the next day after it was formed, the defendant would have made $2,500 and Stephenson's estate would have lost $2,500, and this in the face of the fact that the agreement provided that Taylor should have but one-half of the profits; that is, that the profits should be divided equally.

It is uniformly held that after the debts of a partnership are paid, the capital must be returned to the partners who invested it before there are profits to divide, and even those authorities which hold that the capital upon being invested becomes joint property, nevertheless also hold that the relative rights of the partners therein created by the proportions respectively advanced by them are not disturbed when it comes to a settlement of the partnership.

Mr. Bates says in his treatise on Partnership, Vol. 1, sec. 181: "The capital of a partnership is to be treated as if a debt, and to be first paid before the profits are divided, and, in case of impairment, to be paid less the equalization of losses." And again, section 256: "The capital, in whatever shape contributed, becomes at once the property of the firm, and is no longer individual property. . . . The fact that one partner is to, and does, contribute all the capital and the other services only does not affect the rule, nor should it. Even if in such case the partners dissolve the day after the contribution to capital was made, the capital is joint property, but the interest in it may be in the proportion of all to nothing, whether the partnership be regarded as a joint ownership in different proportions or the firm be considered a conventional entity distinct from its constituent members, and members' interests a mere claim upon a share of surplus. The rules of distribution on winding up, which require repayment of capital to the respective partners after equalizing losses be-

fore distribution between them, prevents any inequality arising from the cessation of individual ownership in the contribution of capital."

(289) The fact that one partner has furnished all the capital and the other all the services does not alter the rule. The loss of capital is like any other loss, and the partner who contributes his services and loses them is debtor to the other for such share of the capital as represents the amount of loss he is to bear. Bates, sec. 815, giving a number of illustrations.

The same author (section 813) further says: "If there are no profits and the capital has been impaired or wholly lost, in dividing losses the deficit must be repaid like any other loss, for impairment of capital is a loss the same as any other, and is not to be reimbursed out of the profits merely. That the capital has been contributed unequally and losses are to be equal makes no difference, for if the capital has been wholly paid by one partner, the other contributing services and skill, the latter who has lost his time owes to the former the same proportion of a loss of capital that he would be chargeable with had the losses not reached the capital, but had simply diminished the profits."

Many pertinent cases are cited in the notes.

Thus in *Norman v. Conn.*, 20 Kan., 159, the capital was unequally contributed and profits were to be equally divided; it was held that the total of the expenditures are to be deducted from the total of the capital and receipts, *the capital is then to be paid* and the balance is to be divided equally as profits.

In *Livingston v. Blanchard,* 130 Mass., 341-342, L. had put in all the capital, $3,300; the other partner, B., was to receive a salary as part of the expenses. On dissolution the whole assets sold for $3,718.26. The salary had been paid, and of the proceeds $3,300 was paid to L. as his capital, together with one-half the profits, less one-half the depreciation in value of the fixtures, and the balance to B. This was held to be as favorable to B. as he was entitled to.

The judgment of the Superior Court is

Affirmed.

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(290)

ROWLAND HARDWARE AND SUPPLY COMPANY ET AL.
v. R. E. LEWIS ET AL.

(Filed 11 April, 1917.)

1. Mortgages, Chattel—Levy—Judgments.

A sale under levy of an execution on personal property subject to a prior registered, existent, and unpaid mortgage is a nullity.

2. Equity—Estoppel in Pais—Mortgages—Judgments—Judicial Sales.

In order to create an estoppel by matter *in pais* the other party must be put to some disadvantage, and a mortgagee under an existing registered and unpaid chattel mortgage is not estopped to assert his rights because he participated in the bidding and received possession of the property at an execution sale thereof, under a judgment obtained after his lien by the prior mortgage has attached thereto, where his rights under the mortgage were known and recognized at the time of sale.

3. Judgments—Mortgages—Execution—Trusts—Statute of Uses—Statutes.

Revisal, sec. 629, subsection 4, permitting execution under judgment against personalty held in trust, does not apply when the trustee holds under a mixed trust, as where the instrument is existent and the debt it secures remains unpaid; but only where the naked title is outstanding with the right of the *cestui que trust* to demand it as a matter of right under the Statute of Uses.

4. Constitutional Law—Judicial Sales—Mortgages—Equities—Courts.

Article IV, section 1, of our Constitution does not affect the rights of a prior lienor by a registered chattel mortgage in favor of a judgment creditor who has sold the personal property by execution under a judgment subsequent to the mortgage lien, or give the creditor a right to levy his execution instead of pursuing the equitable remedy.

5. Judicial Sales—Mortgages—Purchasers — Destroyed Property — Negligence—Damages.

Where chattels are sold under execution of a judgment, subsequent to the lien of a prior registered mortgage, and the mortgagee has become the successful bidder under the mistake that his debt was first to be paid; and it appears that the value of the property was insufficient to pay his debt; he is not liable to the judgment creditor for damages for the destruction of the property thereafter by fire, while in his possession, in the absence of evidence of negligence on his part.

CLARK, C. J., dissenting; BROWN, J., concurs in dissenting opinion.

CIVIL ACTION, tried before *Winston, J.*, and a jury, at November Term, 1916, of ROBESON.

The action was brought by plaintiff against R. E. Lewis, sheriff of Robeson County, C. T. Pate & Co. and C. T. Pate, to recover the $725, the amount bid by C. T. Pate, acting for the firm of C. T. (291) Pate & Co., of which he was a member, at a sale under the execution hereinafter described.

The material and undisputed facts are as follows:

1. Plaintiff obtained a judgment against one R. T. Gaitley, who was and is insolvent, for $1,302.

2. Execution was issued upon this judgment and levied upon personal property, on nearly all of which defendant C. T. Pate & Co. and the International Harvester Company held chattel mortgages for more than

$3,000, these mortgages having been taken and registered before the rendition of plaintiff's judgment, and nothing having been paid thereon. The mortgage of the International Harvester Company has since been sold and assigned to the Pates. The small part of the property levied upon, which was not embraced in these mortgages, was valued by the jury at $86.

3. The property levied upon was worth, in all, $1,000—less than one-third the amount due upon the mortgages, which mortgages constituted liens upon the property superior to the lien of plaintiff's judgment.

4. The property levied upon was offered for sale by the sheriff "subject to liens and mortgages"; and he so announced publicly to the bystanders before the sale. Defendant Pate became the purchaser at $725. Pate's bid, as he alleges, was based upon a misconception of the sheriff's announcement, he thinking that it meant that the proceeds of sale would be first applied to his mortgage, and knowing that his mortgage debt was far more in amount than the property was worth, he bid for it under the belief that his bid would be credited upon his mortgage, and he would not have bid but for this understanding.

5. After the sale, when defendant Pate found out that he had misunderstood the terms of sale, he tendered the property to the sheriff and requested him to resell it. This the sheriff was willing to do, but the plaintiffs would not consent, saying that "Pate is a responsible man, and leave it as it is," or words to that effect.

6. The property bid for by Pate at the sale was delivered to him.

7. Some weeks after the sale the mules sold were burned to death without any apparent negligence on the part of anyone.

8. This suit was brought to compel defendant Pate to pay his bid.

9. The mortgagor was in possession of the property when the levy was made by the sheriff.

The court held that plaintiff was not entitled to recover anything, except the value of such property as was sold by the sheriff and was
(292) not embraced within the mortgages of defendant C. T. Pate & Co., and the jury having found this value to be $86, judgment for that amount was entered in favor of plaintiff, who excepted and appealed.

McLean, Varser & McLean for plaintiff.

H. E. Stacy, McIntyre, Lawrence & Proctor for defendants.

WALKER, J., after stating the case: At common law no property but that to which the debtor has a legal title is liable to be taken under execution against him, and where this rule has not been changed by statute, an equity of redemption in chattels subject to a mortgage cannot be levied

upon and sold by creditors of the mortgagor under execution. This is the prevailing rule, and is applied rigorously where the debt secured by the mortgage is past due and the mortgagee has the right of possession, which is the case here. 17 Cyc., 961, and Freeman on Executions, secs. 116 and 117, where the question is fully discussed and the various views collated, but all culminating in this statement of the law: The mortgagee being entitled to the possession as against the mortgagor, no creditor of the latter can acquire any right which his debtor has not; and no right of possession can be acquired by levying a writ against one who is without such right; and, finally, that it would very seriously impair the rights of the mortgagee if the property could be taken from his hands for an indefinite period in order to subject to execution an equity of redemption which might be of no value whatsoever. Freeman on Executions, sec. 117. Several reasons have been assigned for the rule. One which applies in this State grows out of the common-law principle that a mortgage conveys the legal title and is not to be regarded as merely a security for the debt with the right of possession in the mortgagor. 17 Cyc., 961. "It was a principle of the common law, steadily maintained, that an equitable interest in chattels could not be sold under execution." *Yeldell v. Barnes,* 15 Mo., 434. An able judge has said: "I do not know of any case in which the court has considered an execution at law as binding an equitable interest. The idea is inadmissible." *Hendricks v. Robinson,* 2 Johns Ch., 312. And a text-writer says: "If there is no such statutory provision, an officer cannot levy upon personal property which is mortgaged, whether in possession of the mortgagor or mortgagee, even if the mortgage is not due, unless it contains an express stipulation permitting the mortgagor to retain possession for a definite period; nor even then if that period has elapsed. Notwithstanding a levy upon the property in the mortgagor's possession, the mortgagee retains his right of taking possession." Hermon on Executions, p. 150, sec. 118. In some of the States the common-law rule has been abrogated, but even where (293) this has been done it is held that where the debt has not been paid and the right of possession, as here, is in the mortgagee, the levy cannot be made. In a few cases, decided in other jurisdictions, it is held that while a mere equity of redemption is not, of itself, subject to execution, when such equity is joined with the right to remain for a definite time in possession of the property mortgaged, the mortgagor has an interest, which may be seized and sold under an execution at law. Freeman on Executions, p. 482. But the rule seems to be well settled that after default by the mortgagor, no levy can be made as then the mortgagee's right to the possession has fully accrued, and it cannot be taken from him under process against the mortgagor.

But however the law may be elsewhere upon this important subject, it has long since been settled in this State, and uniformly to this date, by our decisions, that such an equity of redemption is not subject to levy, and in the classification of the courts upon the question we are assigned to the large class which holds that a levy of an execution upon an equity of redemption under a chattel mortgage cannot be made, and we should, of course, follow our own rulings. The following cases will show the decided trend of our decisions.

"That section (now Revisal, 629, subsec. 3) subjects equities of redemption *in land only* to execution sale. The same interest in chattels is left as at common law, and can be subjected to satisfaction of an execution only in a court of equity." *Harrison v. Battle,* 16 N. C., 538; *Burgin v. Burgin,* 23 N. C., 160; *Campe v. Coxe,* 18 N. C., 52; *Allison v. Gregory,* 5 N. C., 333.

"The second section of the act of 1812, which authorized the sale of an equity of redemption, is confined to a mortgage of land, and therefore this case (personal property) is not within that clause." *Thompson v. Ford,* 29 N. C., 418.

"The equity of redemption in a mortgage of slaves is not in law subject to execution. The sheriff had no authority to levy on it; therefore, he could transfer no title or interest to the purchaser under his sale. The equity of redemption in land is liable to an execution by force of the act of Assembly, but the redemption in slaves, as in other personal estate, is not embraced by the act." *Whitesides v. Allen,* 22 N. C., 153.

"In the absence of statutory regulation, the interest of a mortgagee in personal property while the mortgagor remains in possession, having also an interest therein, is not subject of levy by direct seizure, either under attachment or execution." *Bowen v. King,* 146 N. C., 390, citing Freeman on Executions, secs. 118-184; Am. and Eng. Enc. Law, 974.

(294) And 17 Cyc., p. 957, says: "The general rule was well established that in the absence of statute a debtor's equitable estate in real or personal property, although accompanied with possession, could not be seized and sold under a *fieri facias,* and it was necessary for the judgment creditor to go into equity to subject such interest," citing *Sprinkle v. Martin,* 66 N. C., 55; *McKeithan v. Walker, ibid.,* 95, among many other cases. See also, *Burgin v. Burgin,* 23 N. C., 160; *Allison v. Gregory,* 5 N. C., 333.

Justice Barbour, for the Court, in *Van Ness v. Hyatt,* 12 Peters, 294 (10 L. Ed., 170), said: "We have already seen that by the common-law an equitable interest, such as an equity of redemption, is not liable to execution. This would be decisive of the case unless there should be found to be some legislation, or some course of authoritative judicial decision,

which had so far modified the common law by engrafting upon it the principles of the court of equity in relation to mortgages as to change the rule in this respect. It is not pretended that any legislative act has produced this effect, nor is there any course of judicial decision which does."

But the plaintiffs contend that Pate & Co. are estopped because they were present at the sale by their agent, a member of the firm, and made no objection to it, and for this position they rely upon the following authorities: *Lentz v. Chambers,* 27 N. C., 587; *Mason v. Williams,* 66 N. C., 564; *Rice v. Bunce,* 8 Am. Rep. (Mo.), 129; *Biggs v. Brickell,* 68 N. C., 239; *Fleming v. Barden,* 126 N. C., 450; *Bird v. Benton,* 13 N. C., 179; *Governor v. Freeman,* 15 N. C., 472. The principle, they say, is thus stated in *Rice v. Bunce, supra:* "The defendant, who had an equitable interest in one-half of a lot of land, was present when the lot was offered for sale at auction, but gave no notice of his claim, and entered the list of bidders. The court held that he was estopped from afterwards asserting his title against the purchaser." And again, in 16 Cyc., 764: "If the owner of property, with knowledge of the fact, bids on it at a judicial sale without giving notice of his title, he will be estopped thereafter to assert his title or contest the validity of the sale to the prejudice of one who has acted in reliance on his conduct and in ignorance of the facts."

We think it obvious that this position cannot be successfully maintained. The cases of *Lentz v. Chambers, Mason v. Williams,* and *Rice v. Bunce,* and quotations from Cyc., relate to a very different matter. There the owner of the property, or an interest therein, who was present when the sale was made, was estopped because he did not disclose his ownership and permitted someone else, relying on his silence, and believing, therefore, that there was no adverse or hostile claim, to bid in the property. He is not permitted to assert his interest afterwards as (295) against the innocent buyer of the property and to his prejudice, because he was silent when he should have spoken, and now the law will not hear him when he should be silent. He is equitably estopped from being heard and asserting his claim to the property. But that is not the case here. No third party bought the property, but the mortgagees themselves, who held the liens and had the right to the possession, were the purchasers. This was not a purchase by a third person, or stranger, who had bid at the sale and been misled by the owner of the property, and, besides, the levy and sale were utterly void and a nullity, while in the cases cited by the plaintiffs the sales were valid, one or more made under the exercise of a good power of sale and the others by sheriffs under valid executions and levies. The distinction between the two cases is perfectly manifest.

The doctrine of equitable estoppel does not apply here. The plaintiffs have not been harmed or prejudiced, for they cannot be said to have lost something which the debtor did not have for the purpose of levy and sale. They can still pursue their remedy against his property if he has any subject to levy and sale, for there has been no satisfaction of their execution. If defendants had not bid at the sale, or had not been present, the sale would still have been void and nothing would have passed to the purchaser or to the plaintiffs, for from nothing it is said that nothing comes (*ex nihilo nihil fit*). Plaintiffs have not been hurt. "The representation must have been acted upon to the damage of the party acting. It is not enough that the representation has been barely acted upon, for if no substantial prejudice would result by admitting the party who made it to contradict it, he will not be estopped." Bigelow on Estoppel, 27; *Boddie v. Bond,* 154 N. C., 359: "The law does not favor estoppels, and as to estoppels by matter *in pais,* it may be said that unless a person has induced another by representations or declarations to alter his position injuriously to himself, he will not be estopped. The fundamental principle on which the doctrine of estoppel rests is an equitable one—a principle which is intended to suppress fraud and to compel just and fair dealings between all. On the principle of fair dealing and equity, can it be held that one should be estopped to protect his rights in a matter because of his conduct in reference thereto and upon which another has acted, but without prejudice to his rights and interests. It cannot be said, with consistency, that a man has taken advantage of his own wrong where his statements have not damaged or injured another." *Rainey v. Hines,* 120 N. C., 376; *Lovelace v. Carpenter,* 115 N. C., 424. Nor is this the case of an irregular execution, where the irregularity can be
(296) waived by conduct, as was done in one of the cases cited by plaintiffs, because here the levy was void—the property or interest not being the subject of levy and sale.

Some of the cases hold that the mortgagee of chattels, default of the mortgagor having occurred, is entitled to the possession, and when the sheriff levies on the property he is guilty of an unlawful conversion which entitles the mortgagee to sue him in trover for the same if he takes possession of the property. There can be no doubt that the sheriff levied on the equity of the mortgagor after the latter's default, as the debt was past due. The officer announced that he would sell subject to the mortgages, which was nothing, therefore, but a sale of the mortgagor's interest or equity.

The last position taken by the plaintiffs is that the levy and sale were valid under Revisal, sec. 629, subsec. 4. At common law an equity of redemption in land was not subject to levy and sale under execution, and

was first made so in this State by Acts of 1812, ch. 4, sec. 2, and this was true also as to the trusts mentioned in Acts of 1812, ch. 4, sec. 1, which changed the law in this respect. The act refers only to an equity of redemption in realty and not to such an equity in personalty. The two provisions will be found in the following order in the successive statutes, trusts being mentioned first and then equities of redemption: Acts of 1812, ch. 4, secs. 1 and 2; Rev. Statutes of 1836-7, ch. 45, secs. 4 and 5; Rev. Code, ch. 45, secs. 4 and 5; Code of 1883, ch. 10, sec. 450, subsecs. 3 and 4, and secs. 451 and 452. These sections are all substantially the same, and, as originally passed, they were in these words:

"1. Where any person shall be seized or possessed of any lands, tenements, rents, and hereditaments, or any goods and chattels in trust for any person against whom any execution or process shall be issued, such estate may be levied on and sold under such execution or process; and the purchaser thereof shall hold and enjoy the same freed and discharged from all encumbrances of the person so seized, or possessed in trust, as aforesaid.

"2. The equity of redemption, and the legal right of redemption, in lands, tenements, rents, or other hereditaments which shall be pledged or mortgaged shall in like manner be liable to any execution or process sued out on any judgment against the mortgagor or bargainor."

Section 1, mentioned above, and upon which plaintiff relies, has been construed by this Court in numerous cases as not applying to any trusts in property, real or personal, except those which are unmixed, or what are called simple trusts, where the trustee holds the legal title alone for the *cestui que trust* and for no one else and for no other purpose. It is a passive instead of an active trust, when he has nothing to (297) do, or no duty to perform except to hold the legal title as already stated. It, therefore, excludes an equity of redemption, and a contract to convey land, where anything remains due upon the debt, because the trust is a mixed one in these cases, as the mortgagee in the one case and the vendor in the other holds in trust for the purpose of securing the money due, but when this is paid he holds nothing but the naked legal title. The section, therefore, refers only to a trust estate where the *cestui que trust* may call for the transfer of the legal title to him at any time without doing more than demanding the same, and if anyone other than the *cestui que trust* is beneficially interested it is not a simple one and is not subject to levy under execution.

Chief Justice Ruffin thus states the legal effect of the statute, in *Battle v. Petway,* 27 N. C., 576: "The act of 1812 did not mean to change the nature of trusts, the relation between the trustee and *cestui que trust,* or the rights of the latter against the former. The sole purpose of it was to

render the interest of the *cestui que trust* liable at law, as it was before in equity, for the debts of the *cestui que trust* in certain cases, by transferring by a sale on execution against the *cestui que trust* the legal estate of the trustee, as well as the trust estate of the debtor. It is a necessary construction of such a provision that it was not intended to embrace any such cases as those just adverted to, in which the trustee could not voluntarily convey to the debtor without incurring a breach of trust to other persons with whose interests he is also charged. As was said in *Gillis v. McKay,* 15 N. C., 172: 'The principle is that the legal estate is not to be divested out of the trustee unless it may be done without affecting any rightful purpose for which it was created; and, therefore, that if others had an equity in the same property, that is, in the debtor's particular share, the act did not operate on it.'" And again the same learned judge said in *Forbes v. Smith,* 43 N. C., 30: "Although the act of 1812 makes trusts in personal property liable to execution against the *cestui que trust,* yet it is settled that the case of a trust of personal chattels for one for life and then in trust for others is not within it, as the trustee's legal title must be preserved entire for the security of those entitled under the ulterior limitations. *Dick v. Pitchford,* 21 N. C., 480; *Battle v. Petway,* 27 N. C., 576. But although an execution will not reach the slaves, yet they and also the money, or rather Shackleford's beneficial interest in those funds as his equitable property, may and ought to be sold under a decree of this Court." And also in *Frost v. Reynolds,* 39 N. C., 494: "The interest of a vendee of land, where the contract rests in articles for a conveyance when the purchase money shall have been paid, is not the
(298) subject of sale under execution at law, while the purchase money or any part remains unpaid. After the payment of the price, it was held in *Henderson v. Hoke,* 21 N. C., 119, that it may be sold as a trust estate, within the act of 1812. But until payment there is not a pure trust for the vendee, upon the sale and conveyance of which it was the purpose to displace the legal estate. Neither is it an equity of redemption, properly speaking."

The point is tersely and clearly stated by *Pearson, J.,* in *Williams v. Council,* 49 N. C., 206: "It is settled by many cases that the act of 1812 only applies to a pure, unmixed trust, so that the purchaser of the trust can acquire the entire legal estate without prejudice to the rights of third persons."

Judge Battle states in *Turnage v. Greene,* 55 N. C., at p. 65, that the trust must be simple, that is, of a kind where the *cestui que trust* has an "absolute and perfect property, as is known to the law (in the thing), and can call for the legal estate at his will."

Chief Justice Pearson, in *Hinsdale v. Thornton,* 75 N. C., at p. 383, shows clearly the meaning and purpose of the statute by putting the case of a contract or bond for title, when he says: "where one buys land and the contract complies with the statute, and is put in writing, he acquires an estate in equity, and the vendor holds the legal estate in trust for himself to secure payment of the purchase money, and then in trust for the vendee. But although the vendee acquires an estate in equity, it is decided that his equitable estate is not a trust subject to sale under *fi. fa.* until the trust in favor of the vendor is satisfied by payment of the purchase money in full, when it becomes an unmixed trust estate, to use the words of the cases."

Justice Dillard, in *Love v. Smathers,* 82 N. C., at p. 372, is equally explicit in the same construction of the statute, when he says: "A trust estate of a debtor in land could not be levied on and sold under execution until the act of 1812, nor under that act if it was to be raised by construction of a court of equity by reason of fraud, or being an expressed or implied trust in an honest transaction, unless the debtor at the time of the sale was in such situation as to have the legal title decreed to him if he were to sue for it. The debtor, being in a condition to call for the legal title, is regarded as having the absolute beneficial property, as much so as if he had the legal estate; and hence in such case the act, instead of requiring the creditor to go into equity as formerly, allowed the trust estate to be sold by execution, and gave to the sale and sheriff's deed the legal operation to take the title out of the trustee and vest it in the purchaser." See, also, *King v. Rhew,* 108 N. C., 696. A simple trust is well defined in *McKenzie v. Sumner,* 114 N. C., 428, 429; *Turnage v. Greene,* 55 N. C., 63, where it is said that the simple trust is where (299) property is vested in one person upon trust for another, and the nature of the trust not being prescribed, or stated, by the settler, is left to the construction of law, and the *cestui que trust* then has the right to be put into actual possession of the property, and the right to call upon the trustee to execute a conveyance of the legal estate as the *cestui que trust* directs, this being a valuable part of the right of alienation (*jus disponendi*). In such a case the *cestui que trust* is an absolute equitable owner, and the trustee has nothing but a bare, naked legal estate, unaccompanied with a single specified duty, and there being no ulterior limitation or other beneficial interest to protect. Lewis on Trusts, 18. And so it was said by this Court of the gift of stock that "A present right to the whole profits, as well as the absolute, ultimate dominion of the bank stock, are given to the legatees, and they are therefore entitled to have a transfer of the stock made to them. The rule would be different, and the *cestui qui trust* would not be entitled to call for the legal estate if from the

nature of the trust their ownership were not immediate and absolute, and it would defeat or put it into their power to defeat or endanger a legitimate, ultimate limitation of the trust property." *Turnage v. Greene,* 55 N. C., 63.

We have reviewed the cases upon this question, as there seems to be some misunderstanding as to the true meaning of the statute in regard to levies upon and sales of trust estates under execution, and the importance of a stable and uniform construction is so great as to call for a final settlement of the question, if it has not already been definitely closed. It is true, as argued by counsel, that a mortgagee, in a sense, holds in trust for the mortgagor, but not in the sense of this statute, as it is a mixed trust, and the mortgagor cannot call for the legal estate until he pays his debt, and the trust is simplified. The statute declares, too, that the purchaser of a trust estate at execution sale "shall hold and enjoy the same freed and discharged from all encumbrances of the person so seized or possessed in trust." Surely it did not mean to destroy the rights of the mortgagee by a sale of the mortgagor's estate. It meant only to merge the naked legal and the trust estate into one. The able and learned argument of Mr. Dickson McLean has been fully considered, but we are compelled to follow the unanimous opinion of our predecessors, that the interest of the mortgagor of a chattel, the secured debt not being paid, cannot be sold under execution, and, consequently, that the sale in this case being void, there is no estoppel raised by the purchase of the property by the defendants. "The law only sells estate under its process, and not the chances of an estoppel." *Badham v. Cox,* 33 N. C., 456.

(300) It may further be said that if the Legislature intended that an equity of redemption in chattels might be sold under execution it would have so declared in plain language, as it did in the case of real estate mortgages. But a long line of decisions in this State has settled the question.

It is suggested that a change of the law was effected in 1868. The Constitution of that year abolished only "the distinctions between actions at law and suits in equity and the forms of all such actions and suits." Const., Art. IV. It did not abolish the principles of law or equity, which still survive in full vigor, but are enforced by "one form of action denominated a civil action." Trover, replevin and detinue, as forms of actions, are abolished, but not the torts for which they were the appropriate remedies. It has been held that "The abolition of the distinctions between actions at law and suits in equity, and the forms of all such actions and suits, does not destroy equitable rights and remedies, nor does it merge legal and equitable rights." Connor and Cheshire on the Constitution,

p. 147. *Rudisill v. Whitener,* 146 N. C., 403; *Ely v. Early,* 94 N. C., 1; *Boles v. Caudle,* 133 N. C., 528; *Morisey v. Swinson,* 104 N. C., 555.

There is a marked distinction, as the authorities show, between abolishing the forms of actions and destroying the principles which they were intended to enforce, and, besides, the abolition of forms of actions does not affect the question as to what can be levied on and sold under an execution.

The common law prohibited the sale of an equity of redemption in a chattel for substantial reasons, and no statute of this State has ever authorized such a sale and thereby changed the common law. This is true according to every decision of this Court upon the question, some of them having been decided upon transactions occurring since 1868. The sale being void, the doctrine of estoppel does not apply. The cases relied on by plaintiff are those where the sales were lawful, but the owner of the legal or equitable estate stood by and permitted his interest to be sold, under a valid power, without disclosing his right or objecting to the sale.

The case was correctly decided by Judge Winston in all its phases, and we must, therefore, declare that there is no error in the record.

No error.

CLARK, C. J., dissenting: The defendant Pate bought certain personal property at execution sale against one Gaitley on which Pate held chattel mortgages. The defendant Lewis, the sheriff, delivered the property to Pate, in whose possession it was destroyed by fire. This is a proceeding to compel Pate to pay the price bid at the sale, and he (301) seeks to defend upon the ground that personal property could not be sold at execution sale because there was a mortgage upon it.

The sale by the sheriff of the personal property of the execution debtor was valid under Revisal 629, sec. 1, which provides that: "The goods, chattels, houses, lands, tenements, and other hereditaments and real estate" and "effects of the judgment debtor, not exempt from sale under Constitution and laws of this State, may be levied on and sold under execution." The personal property exemption of the judgment debtor had been laid off before the sale.

Under the broad words used in the statute there should be no question that this property was subject to sale, and that the title passed to the purchaser. The judgment debtor was the owner of this property subject only to the encumbrance of the chattel mortgages held by the purchaser himself to secure his indebtedness. It is true that under the long abolished system which made a distinction between equity and law there had grown up a series of rulings that in a mortgage the legal title passed to the mortgagee and that the mortgagor held only an equitable interest.

The reason and the sole foundation for this was abolished by the Constitution of 1868, which destroyed at one blow the distinction by providing Constitution, Art. IV, sec. 1, that the "Distinctions between actions at law and suits in equity, and the forms of all such actions and suits, shall be abolished." There was left, therefore, no reason why the interest of the true owner, the mortgagor, should not be subject to sale under execution at law, for there was thenceforward no other kind of judgment or execution, since there could be no other form of action.

The statute makes no exceptions as to the sale of any interest of the judgment debtor in any property, "except such exemptions as are allowed under the Constitution and laws of this State." The continuation of the ruling made prior to the Constitution of 1868 in regard to equitable interests, or equity of redemption, being exempt from sale has no authority under our Constitution or statutes now to support it. There is no reason to perpetuate such abolished distinctions.

The provision in Revisal, 629 (3), for the sale of "the equity of redemption and legal right of redemption in lands, tenements, rents, or other hereditaments" is not a prohibition of the sale of personal property on which there is a mortgage. It is true that when that statute was passed in 1812 the courts, adhering to the distinction then existing, held that it did not extend to the sale of personal property. But if such distinction should have been drawn even then, notwithstanding the evident intent of the statute, there is no reason for the continuance of
(302) such ruling, since the Constitution of 1868, which was intended to simplify procedure by destroying all technical distinctions based on the former divorce between law and equity.

This subsection 3 of Revisal 629, is brought forward from the act of 1812, but it should now be construed in the light of the constitutional provision of 1868 and not in the light of the distinction between law and equity which existed prior thereto. Besides, it must be noted that there is in it no prohibition of the sale of the equity of redemption in personal property. The judicial gloss put upon the statute at the time when the distinction between law and equity existed was merely negative, and it did not extend the power of sale to an equity of redemption in personal property. The broad words of Revisal, 629, subjects to execution sale the "property, estate, and effects of the judgment debtor not exempted from sale" and specifically enumerates "goods and chattels, estates, equity of redemption," and every other kind of property that could be thought of. There is no reason, in the nature of things, why real estate on which there is a mortgage shall be subject to execution, but that personal property under mortgage shall not be, and that there must be "a proceeding in equity" to subject the latter to payment of debts, because that was neces-

sary prior to 1868, when such proceeding has now been utterly abolished for forty-nine years.

But even taking the restricted technical view set up by the defendant Pate, still this sale was valid under Revisal, 629 (4), which provides that sale under execution may be had of any "goods and chattels of which any person may be seized and possessed in trust for the debtor." The chattel mortgages executed by Gaitley to Pate and his assignor subjected the property to the payment of the indebtedness named in the chattel mortgages. These liens created the relation of trustee and *cestui que trust* between Pate and the judgment debtor, Gaitley. *McLeod v. Bullard,* 86 N. C., 210; *Whitehead v. Hellen,* 76 N. C., 99. Pate, as mortgagee held an interest in the property which made him a trustee for the benefit of the mortgagor Gaitley and the interest of the latter, under the said section 4, could be sold for the benefit of the judgment debtor.

There has been no decision in this Court, till now, contrary to the above view. Revisal, 629, was enacted in lieu of chapter 45, Revised Statutes. There were several cases under the old statute which held that property conveyed to a trustee upon a mixed trust could not be sold under execution, but that property in which the trustee had only a bare naked trust could be sold under the language of the former statute, which is now subsection 4 of Revisal, 629. *Thompson v. Ford,* 29 N. C., 418; *Battle v. Petway,* 27 N. C., 576.

Pate as mortgagee was trustee for the benefit of Gaitley. The (303) form of the mortgage does not change the fact that the mortgagee held the property, after payment of his debt, under a naked trust for the benefit of the mortgagor whose interest was sold at the execution sale.

Besides the above reasons, Pate is estopped to attack the validity of the sheriff's sale both by the notice given at the sale that the property was sold subject to the chattel mortgages and by his purchase at such sale. The sheriff stated in Pate's presence that this property was "sold subject to all liens, only the interest of Gaitley being offered for sale." Other persons bid on the property, but the defendant Pate outbid them all. His bid was accepted and the property was delivered to Pate and removed by him. While the property was in his possession the most valuable part of it was destroyed by fire. If other bidders had bought and taken possession there would have been in all probability no such loss. By reason of the conduct of Pate and the subsequent fire, the parties cannot be not put *in statu quo,* and the judgment creditor should not bear the loss.

There are many cases which hold that the purchaser at the sheriff's sale is estopped by his conduct to deny the validity of the sale. In *Lentz v. Chambers,* 27 N. C., 587, a slave, the property of the plaintiff,

was sold under execution on a judgment against the former owner of the slave. The Court held that the sheriff had no right to sell the slave under execution, as it was the property of another, but that the plaintiff was estopped to deny the validity of the sale because he was present at the sale, made no objection thereto, and endeavored to borrow money to purchase the slave himself.

In *Mason v. Williams,* 66 N. C., 564, certain property had been conveyed to plaintiff in a deed of trust. One Pescud, who owned an interest in the property as trustee, advertised the property, and plaintiff was present at the sale and bid upon it. The Court held that he was estopped to assert his claim to the title.

In *Biggs v. Brickell,* 68 N. C., 239, the Court held that one who is present at an execution sale and makes no objection cannot attack the validity of the sale. To same purport, *Flemming v. Barden,* 126 N. C., 450; *Governor v. Freeman,* 15 N. C., 472.

In *Bird v. Benton,* 13 N. C., 179, the Court held that where a sale or pledge of property by one who had no title thereto was made in the presence of the owner, without objection on his part, the latter is estopped to assert his better title.

In 16 Cyc., 764, the rule as deduced from the authorities is thus stated: "When a person having title to or an interest in property knowingly stands by and suffers it to be sold under a judgment or decree, (304) without asserting his title, or right, or making it known to the bidders, he cannot afterwards set up his claim. So, too, if he has knowledge of any irregularity in the proceedings, but permits the sale to be made without objection, he is estopped to contest its validity afterwards. . . . Where one who owns or has an interest in personal property with full knowledge of his rights suffers another to deal with it as his own by selling or pledging it, or otherwise disposing of it, he will be estopped to assert his title or right as against a third person who has acted on the faith of, and been misled by, his acquiescence."

A case exactly in point is *Rice v. Bunce* (Mo.), 8 Am. Rep., 129, where the defendant, who had an equitable interest in one-half of a lot of land, was present when the property was sold at auction, but gave no notice of his claim, and bid on the property. The Court held that he was "estopped from afterwards asserting his title against the purchaser." In 16 Cyc., 765, the same rule is thus stated: "If the owner of property, with knowledge of the fact, bids on it at a judicial sale without giving notice of his title, he will be estopped thereafter to assert his title or contest the validity of the sale, to the prejudice of one who has acted in reliance on his conduct and in ignorance of the facts."

The defendant Pate, purchaser at the sale, does not claim that he is an innocent purchaser, knowing nothing of the liens recorded against the property, but had full notice, for he was himself owner of all the outstanding liens. He should not be relieved of his bid for the property interest of the judgment debtor, which he took possession of and removed, merely because it has since been destroyed by fire.

BROWN, J., concurs in dissent.

Cited: Upton v. Ferebee, 178 N.C. 197; *Lewis v. Nunn,* 180 N.C. 163; *Chappell v. Surety Co.,* 191 N.C. 708; *Sugg v. Credit Corp.,* 196 N.C. 100; *Phipps v. Wyatt,* 199 N.C. 731; *Bank v. Sternberger,* 207 N.C. 819; *Chinnis v. Cobb,* 210 N.C. 109.

ODELL HARDWARE COMPANY v. HOLT-MORGAN MILLS.

(Filed 11 April, 1917.)

1. Receivers — Corporations — Time to File Claims — Additional Time — Court's Discretion.

It is within the discretion of the Superior Court judge to permit a creditor of a defunct corporation to file his claim with the receiver beyond the time theretofore generally allowed the creditors, so that he may share in the surplus of the assets, without disturbing the payments theretofore made.

2. Receivers—Corporations—Claims—Contract — Termination — Electric Companies.

Where an electric power supply company, under a contract with a manufacturing company, is to receive a stated monthly sum for an unfixed period, for the investment and maintenance, etc., of the local line transmitting the electricity, in addition to that charged for the power used, and has shut off the supply upon the insolvency of the corporation, such act amounts to a termination of the contract, and the electric company is not entitled to an allowance from the receiver for such maintenance charge, etc., thereafter.

APPEAL by the National Bank of Fayetteville from an order (305) allowing the claim of the Carolina Power and Light Company in the sum of $4,264.42, made by *Winston, J.,* at November Term, 1916, of CUMBERLAND.

Cook & Cook, Robinson & Lyon for appellant.
Rose & Rose for the appellee, Carolina Power and Light Company.

BROWN, J. It appears from the record that the defendant corporation was placed in the hands of receivers in April, 1916, and an order made requiring the creditors to file their claims on or before 15 May, 1916. The Carolina Power and Light Company, within the period named in the notice, filed with the receivers its claim itemized and verified as follows:

RALEIGH, N. C., 29 April, 1916.

HOLT-MORGAN MILLS, *Fayetteville, N. C.*

To CAROLINA POWER AND LIGHT COMPANY, *Dr.*

1915			
June 30.	To amount power bill for month	$	546.74
July 31.	" " " " " "		397.77
Aug. 31.	" " " " " "		487.01
Sept. 30.	" " " " " "		430.90
			$1,864.42

Some time after 15 May, 1916, the said Power and Light Company made application to the Superior Court for permission to file an additional claim for $2,400. Permission was granted and the other creditors excepted. We are of opinion that it was within the sound discretion of the judge of the Superior Court to permit the filing of the claim, although the time fixed in the original order had expired.

(306) It has been held in other States whose practice is similar to that of North Carolina that the court may, in its discretion, permit a creditor to come in and prove his claim at any time before the actual distribution of the funds, or even after partial payments have been made, if there is a surplus in the hands of the receivers, so as not to interfere with payments already made. *Wall v. Young,* 54 N. J. Eq., 24; *Grinnell v. Ins. Co.,* 16 N. J. Eq., 283; *People v. Ins. Co.,* 79 N. Y., 267; *In re Ziegler,* 98 N. Y. App. Div., 117; *Smith v. Ins. Co.,* 4 Hun (N. Y.), 127; *Ins. Com. v. Ins. Co.,* 20 R. I., 7; *In re Eddy,* 15 R. I., 474.

The claim was referred to the receivers for investigation and adjudication. They refused to allow the claim and reported against it. Their report was overruled and the additional claim of $2,400 was allowed. The other creditors, who had filed their claims, excepted.

The claim of the said Power and Light Company, which has already been filed and allowed, appears to have been based upon a written contract for the supply of electrical power to the defendant mills by the Power and Light Company. The additional sum of $2,400 is demanded for investment and maintenance charge under the following clauses of the contract:

"Second. In consideration of company making and maintaining necessary investment to supply power, consumer agrees to pay to company a monthly investment and maintenance charge of $0.9375 for each horse-power of said aggregated rated capacity, whether any power is used or not. If consumer at any time during any month shall take power in excess of said aggregate rated capacity, it shall pay for such month an investment and maintenance charge of $0.9375 for each electrical horse-power of the maximum power during said month. In estimating said maximum electrical horse-power, however, there shall not be included peaks lasting less than two minutes, or peaks due to short circuits or accidents to consumer's machinery, or necessary peaks due to starting machinery at regular times.

"In addition to said investment and maintenance charge, consumer shall pay at end of each month 3.5 mills per kilowatt hour for all energy used, as shown by watt meter to be furnished by company."

It is admitted that the said mills failed in business and were closed down on 26 September, 1915, and remained closed until receivers were appointed, and it is for this period that the additional $2,400 is claimed, during which time it is also admitted that the Power and Light Company furnished no electrical current to the defendant.

The judge of the Superior Court, while overruling the receivers, failed to find the facts, and simply allowed the additional claim. Notwithstanding this, we think that we can properly dispose of the (307) case, for in our opinion upon all the evidence the additional claim of $2,400 should not be allowed.

There were only two witnesses examined: H. L. Hansen, the auditor of the Power and Light Company, and J. A. Withers, secretary and treasurer of the mills company. Hansen testifies that the claim for $1,864.42 was made out by his predecessor, Mr. Dalton, 29 April, 1916, seven months after the mills closed down, and filed with the receivers; that Dalton had possession of the contract and had kept a record of all the charges; that when he succeeded Dalton he found this contract in the Power and Light Company's papers, and after consultation with the attorney for the Power and Light Company decided to file an additional claim for $2,400. It appears in evidence that no power was actually furnished after 26 September because the mills had failed and been closed up.

Mr. Withers testifies that the current from the Power and Light Company was cut off 26 September, 1915, at the mill by the Power and Light Company itself; that it was also cut off at the same time by the Power and Light Company's substation. He further testifies that on one occasion, subsequent to 26 September, 1915, he had occasion to run some

machinery in the mill and needed the power, and as he could not get it he had to use a hand-power machine. He further testifies that no reason was ever given to him or the officers of the company for the cutting off of the power by the Power and Light Company, and that it was cut off without notice.

We are of opinion that the contract upon which this claim is based has no fixed period for its continuance. The mills company had the right to terminate it at the end of any month. This was admitted upon the argument. The Power and Light Company had notice of the condition of the mills, and itself cut off the power, not only at the mill but at its substation, thereby terminating the contract. It is perfectly evident that they regarded the contract as terminated by the shutting down of the mills on account of their insolvent condition. This was evidently the view of Mr. Dalton, the auditor, when he made out his account for the power furnished. The filing of the additional account seems to have been an afterthought.

Upon all the evidence we are of opinion that the claim should not be allowed. The original claim of $1,864.42 is not contested.

Reversed.

Cited: Observer Co. v. Little, 175 N.C. 44.

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(308)

ODELL HARDWARE COMPANY v. HOLT-MORGAN MILLS.

(Filed 11 April, 1917.)

1. Receivers—Corporation—Title—Appointment—Judgments.

The title to the property of a corporation vests in the receiver at the time he has been duly appointed by the court, from which time the corporation is divested thereof, and a judgment against the corporation entered thereafter, but before the docketing of the order or the qualifying of the receiver thereunder can acquire no lien in favor of the judgment creditor. Revisal, sec. 1224.

2. Same—Implication of Law—Beginning of Term.

A judgment rendered against a corporation does not relate back, by implication of law, to the beginning of the term, so as to create a lien on the corporate property as against the vesting of the title in a receiver, under the statute (Revisal, sec. 1224), who had in the meanwhile been appointed. Revisal, secs. 573, 574.

3. Same—Consent of Corporation—Rights of Creditors.

The consent of a defunct corporation that a judgment rendered should relate back to a preceding term of court cannot affect the vesting of the

title in the receiver, representing the general creditors, who has been appointed in the meanwhile.

CIVIL ACTION, heard on exceptions to report of referee before *Connor, J.*, at February Term, 1917, of CUMBERLAND.

The question presented was on the right of Odell Hardware Company to a lien by docketed judgment on the real property of the defendant mills as against the receiver, appointed for said mills by order of the court duly entered. The relevant facts sufficiently appear in certain findings by the referee, as follows:

"First. That the summons was duly issued and served upon the defendant, and verified complaint filed at the return term, November Term, 1915, of Cumberland Superior Court.

"Second. That judgment was not taken at such term for the reason that at the request of the defendant or its counsel the cause was continued from term to term until March Term, 1916, in order that the officers and directors might use their best efforts to effect reorganization of the Holt-Morgan Mills, in which efforts the plaintiff and its counsel cooperated.

"Third. That the March Term, 1916, a civil term of court, expired by limitation on 1 April, 1916.

"Fourth. The efforts to effect a reorganization of the Holt-Morgan Mills having failed in their object, H. L. Cook, Esq., attorney for the Odell Hardware Company, plaintiff herein, and Hon. John (309) G. Shaw, president and attorney of the Holt-Morgan Mills, on 12 April, 1916, went to Lumberton, N. C., and appeared before his Honor, F. A. Daniels, judge holding the courts of the Ninth Judicial District, who was then presiding at a regular term of Robeson Superior Court.

"Fifth. That on the morning of 12 April, 1916, Judge Daniels signed a judgment for the plaintiff in full of the indebtedness and interest, a copy of the judgment being hereto attached as a part of this finding, and marked Exhibit 'A.'

"Sixth. That while in Lumberton, N. C., Hon. John G. Shaw, president and attorney of the Holt-Morgan Mills, prepared and filed an answer, admitting the allegations of the complaint, as appears of record in this action.

"Seventh. That some time during the afternoon of 12 April, 1916, an order was prepared and signed by Judge Daniels, at Lumberton, N. C,. placing the Holt-Morgan Mills, the defendant, in the hands of S. W. Cooper, John G. Shaw, and C. C. McAlister, as receivers, and requiring, among other things, that each of the receivers file a bond with the clerk of the Superior Court of Cumberland County in the sum of $5,000, to be approved by said clerk (see copy marked Exhibit 'B.')

"Eighth. That immediately upon the return of H. L. Cook, Esq., and Hon. John G. Shaw to Fayetteville, on said 12 April, 1916, the judgment for the debt (Exhibit 'A') was filed with the clerk of the Superior Court of Cumberland County, and was by him recorded in the minutes of March Term, 1916, as if actually rendered at said term.

"Ninth. That Hon. John G. Shaw, representing the Holt-Morgan Mills, consented to the judgment being rendered 'as of March Term, 1916,' as appears by his written consent on the original judgment in the files.

"Tenth. That said judgment (Exhibit 'A') was by the clerk of the Superior Court of Cumberland County immediately docketed on his judgment docket on 12 April, 1916, as Judgment Roll No. 15333, between a judgment docketed 11 April, 1916, and another docketed 14 April, 1916.

"Twelfth. That on 14 April, 1916, the order appointing the receivers was filed with the clerk, and at the same time the said receivers each filed a bond with said clerk, each of which was on said date approved, and the receivers duly qualified, as required in the order of appointment."

Upon these findings the referee held, as a conclusion of law, that plaintiff acquired no lien by reason of the docketed judgment as against
(310) the receiver representing general creditors, and this conclusion having been affirmed by the court, judgment was so entered, and plaintiff excepted and appealed.

Cook & Cook for Odell Hardware Company.

Robinson & Lyon for bank.

HOKE, J., after stating the case: The statute applicable, Revisal 1905, sec. 1224, provides as follows: "All the real and personal property of an insolvent corporation and all its franchise rights and privileges and effects shall, upon the appointment of the receiver, forthwith vest in him, and the corporation shall be divested of the title thereto."

The facts showing that the order appointing the receiver was signed on 12 April and prior to the docketing of appellant's judgment in the county where the real estate of the corporation was situated, by the plain intent and meaning of the law, the appellant has acquired no lien on the corporate assets and holds only a claim as general creditor.

The position is not affected by the fact that the receivers did not qualify or give bond until 14 April. True, the receivers, unless otherwise provided in the order, could not properly assume control of the property till they had qualified. Certainly they could make no author-

itative disposition of it before that; but the language of the statute is that the property vests at the date of the appointment and that the title of the corporation is divested at that date. The statute was evidently expressed in these explicit and peremptory terms with a view of insuring a distribution of the property under conditions existent at the time of the appointment and to prevent a creditor from obtaining any advantage over another from and after that time, and it is, therefore, expressly provided that from such date the corporation shall have no interest in the property on which a lien can be acquired.

We were cited to several authorities by counsel to the effect that a judgment signed out of term shall be considered a valid judgment, and, as between the parties, it may be entered and given the effect of a judgment *nunc pro tunc;* but we find nothing in these cases that, on the facts now presented, and as against other creditors, would uphold a lien in plaintiff's favor or carry the effect of its docketed judgment by relation from the time it was actually entered on 12 April to the preceding term of the court in March. Our statute, Revisal 1905, sec. 574, enacts that a judgment shall be a lien from the time it is docketed. The only provision made for extending this lien by relation to a preceding time is in sec. 573, to the effect that judgments entered during any term of the court and docketed during the term or within ten days thereafter shall be held and deemed to have been docketed on the first day (311) of the term. This provision does not purport to apply to a judgment signed out of term and a judgment *nunc pro tunc,* though by agreement, is not allowed to take effect by relation and confer a lien to the prejudice of third parties. *Ferrell v. Hales,* 119 N. C., 199; 23 Cyc., 1365.

On the facts of this record, the receiver, representing the rights and interests of all the creditors, is not concluded by an agreement made by the attorney of the claimant and counsel representing the mill.

In the citation from Cyc. it is said that a judgment entered *nunc pro tunc* does not relate back for the *purpose of a lien* to the day as of which it is entered, but takes effect only from its actual entry.

Even in cases coming within the express provision of the statute, that is, judgments entered during a term, it is held with us that this lien by relation has no application as against claimants who have meantime acquired the title *bona fide* and for value. *Fowle v. McLean,* 168 N. C., 537; *McKinney v. Street,* 165 N. C., 515. In such case the law will take notice of fractions of a day in favor of such a purchaser, and it would seem that the receivers, vested by statute with title from the time of their appointment and representing all the creditors, should be entitled to, at least, equal consideration.

We find no error in the proceedings below, and the judgment is Affirmed.

Cited: Jernigan v. Jernigan, 178 N.C. 86; *McDonald v. Howe,* 178 N.C. 258; *Thompson v. Dillingham,* 183 N.C. 569; *Hardware Co. v. Garage Co.,* 184 N.C. 126; *Motor Co. v. Jackson,* 184 N.C. 335; *Chemical Co. v. Long,* 184 N.C. 399; *Douglass v. Dawson,* 190 N.C. 463; *Surety Corp. v. Sharpe,* 236 N.C. 58.

J. S. MOORE & CO., INC. v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 11 April, 1917.)

1. Railroads—Fires—Defective Locomotives—Evidence.

In an action to recover damages for the alleged negligent setting fire to the plaintiff's lumber and plant by sparks from the defendant railroad company's defective locomotive while passing the place, evidence that another locomotive of the defendant was throwing sparks while passing there on the preceding day is incompetent.

2. Railroads—Fires—Defective Locomotives—Damages—Trials—Evidence —Nonsuit.

Where the evidence in an action against a railroad company to recover damages alleged to have been caused by the negligent burning of plaintiff's lumber and plant by sparks from the defendant's engine, passing 70 feet away, tends only to show that there was a mild wind blowing from the tracks at the time, but without evidence of any defective condition of the engine; that the fire was discovered thirty minutes after the engine had passed, it is too conjectural to be submitted to the jury upon the issue of defendant's negligence; nor is the question affected by evidence that the only fire in the plant was in the boiler 200 feet from where the fire started, which operated the dry-kiln, on account of the likelihood of fires occurring in places of this character; and under the circumstances of this case a judgment as of nonsuit should be granted.

CLARK, C. J., concurring; ALLEN, J., dissenting; HOKE, J., concurring in the dissenting opinion.

(312) CIVIL ACTION, tried at October Term, 1916, of CUMBERLAND, before *Winston, J.*

The action is brought to recover damages for burning plaintiff's lumber and part of its mill plant, alleged to have been caused by the negligence of defendant in carelessly permitting fire to escape from its engine.

At the conclusion of the evidence a motion to nonsuit was sustained, and plaintiff appealed.

Sinclair, Dye & Ray, Oates & Herring for plaintiff.
Rose & Rose for defendant.

BROWN, J. Plaintiff assigns error:

1. That it was error for the court to sustain defendant's objection when plaintiff offered to show by the witness J. R. Bowden that the day before the fire complained of the defendant's locomotive on the through freight, going north, put out fire on the witness's lands near the plaintiff's mill.

2. That the court also erred in allowing the defendant's motion for judgment as of nonsuit.

The first exception cannot be sustained. *Ice Co. v. R. R.*, 126 N. C., 800; *R. R. v. Smith*, 55 Southern, 871; *Kerner v. R. R.*, 170 N. C., 94.

In the last case it is said: "It is conceded that where a fatal fire has been set out from a designated or known engine, it is admissible to introduce evidence of other fires previously set out by the same engine, for the purpose of showing its defective condition, but the rule has never been extended so as to permit evidence of sparks emitted by some other engine at some other time and place."

The motion to nonsuit was likewise properly allowed.

If the evidence is taken in the light most favorable to the plaintiff, as it must be on a motion for nonsuit, the following facts are shown: That the mill plant was located on the east side of the railroad, 70 feet from it; that the wind was blowing across the railroad track towards the mill, but there was not much wind blowing. The fire caught on the side of the mill next to the railroad, about 1 o'clock in the morning, and two trains had passed along the railroad track within (313) thirty minutes before the fire was discovered; that the mill was located on a grade which started about 200 yards below or south of the mill. There was a fire in the boiler of the plant, which was about 280 feet from where the fire started. No other fires were kept going at night except that.

When first discovered, about 1 o'clock at night, the fire was next to the railroad and the side of the planing mill next to the railroad was burning at the north end. The lumber shed and mills are all together. When discovered, the fire had not reached quite to the top of the lumber shed.

There is no evidence tending to show that either of the engines which passed the mill within thirty minutes before the fire were throwing any sparks, nor were any burned cinders discovered between the track and the mill. There was evidence that there were rotten lumber, trash, and shavings in the mill shed. There was no evidence that the fire was

communicated from the right of way or that the right of way was in a foul condition, or had any inflammable matter on it.

The defendant's evidence established the fact, if true, that the engines were properly equipped with spark arresters and skillfully operated.

There is no difference of opinion as to the law applicable to this case. It is settled that if the plaintiff has introduced evidence sufficient in probative force to justify a jury in finding that the fire was caused by a spark from defendant's engine, the issue should have been submitted, the weight of the evidence being a matter for the jury. In such case the defendant is called upon to prove that its engine was properly equipped and operated. If so equipped and operated, there is no negligence or liability upon the part of defendant. *Williams v. R. R.*, 140 N. C., 624; *Aman v. Lumber Co.*, 160 N. C., 371; *McRainey v. R. R.*, 168 N. C., 571.

It is undoubtedly true that the fact in controversy here, as to the origin of the fire, may be established by circumstantial evidence, but the circumstances proven must have sufficient probative force to justify a jury in finding that the fire originated from a spark from defendant's engine before the issues can be submitted to them. What is sufficient evidence to justify the court in submitting a controverted issue to the jury has been much debated.

This Court has used various forms of expression in commenting on the subject. In *Lewis v. Steamship Co.*, 132 N. C., 904, the Court holds that if the evidence is "conjectural or speculative, it should not be submitted to the jury." In *S. v. Satterfield*, 121 N. C., 558, the Court
(314) holds that it is for the court to find "that the evidence is such as would satisfy a jury in proceeding to a verdict, such as will satisfy an impartial mind."

In *Young v. R. R.*, 116 N. C., 932, we find this language: "Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the parties having the burden of proof, unless the evidence be of such character as that it would warrant a jury to proceed in finding any verdict in favor of the party introducing such evidence."

In *Cobb v. Fogalman*, 23 N. C., 440, the Court says that the evidence must amount to more than that which raises "a possibility or conjecture of a fact."

In *Wittkowsky v. Wasson*, 71 N. C., 451, the Court says: "There must be evidence from which they might reasonably and properly conclude that there was negligence."

The subject was considered by the House of Lords in *Bridges v. Ry. Co.*, Law Journal 1874, 7 H. L. 213, all the judges rendering opinions.

The rule is thus stated by *Mr. Justice Brett:* "Are there facts in evidence which, if unanswered, would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?" This is regarded by Professor Wigmore as the best and fairest statement of the most satisfactory test that can be adopted. 4 Wig., 2495.

"Are the circumstances in evidence adequate to convince a reasonable man?" asks the Supreme Court of Kansas in *R. R. v. Matthews,* 58 Kan., 447.

We think not, in this case, in the absence of any evidence that the engines were emitting sparks at the time they passed. The plaintiff seeks to bolster up its case by attempting to exclude every other possible cause. If this were sufficient, then plaintiff has failed. The only evidence as to that is that the sole fire at the mill kept up by the plaintiff that night was in the boiler room. It is likely the fire started in the machine-room shed, where the burned lumber was. The witness Spencer says the burned lumber was in a part of the machine-room shed, and before that in the dry-kiln. The room was afire when the witness McArthur first saw it. The fire might have been started by a match carelessly dropped in the shed during the day or from a spark from a workman's pipe as he left after his day's work, or the lumber might have been greatly overheated in the dry-kiln and developed a fire in that way. A fire just started, as is well known, will sometimes slumber and smolder for hours and then burst into a blaze.

There are many unaccountable ways by which sawmills catch (315) fire, for they are notoriously very bad fire risks. If this fire originated from a spark from the defendant's engine, it is remarkable that it should have reached such proportions in the space of thirty minutes. It is also remarkable that if the engines were throwing sparks the witness McArthur should not have observed it and testified to it, and further that no cinders were found about the right of way and mill grounds. The cases cited by the learned counsel for plaintiff do not support their contention and are easily distinguished.

In *McRainey's case, supra,* the fire started on right of way at the place where the track crossed the swamp and set fire to combustible matter on right of way. In *Deppe's case,* 152 N. C., 80, an engine was switching for three-quarters of an hour near the mill; the ventilator on top of the mill was open; the fire started there; the mill and ventilator were entirely enveloped in dense smoke from the engine; it was a bright summer day and sparks could not have been seen in the smoke. In *Ice Co. case,* 126 N. C., 798, the evidence showed affirmatively that the engine passed the ice factory emitting sparks, and that soon thereafter the fire

broke out. In *Kerner's case,* 170 N. C., 94, there was evidence of sparks from the engine, but the jury found that they were not the cause of the fire.

In *Hardy v. Lumber Co.,* 160 N. C., 116, also in *Kornegay's case,* 154 N. C., 389, there was abundant evidence that sparks were emitted by the engines. In *Williams' case,* 140 N. C., 624, the fire broke out in foul matter on the right of way shortly after the engine passed. In *Aman's case,* 160 N. C., 371, there is evidence that the engine threw sparks and live coals. In *Maguire's case,* 154 N. C., 384, the fire occurred off the right of way, and, as in this case, there was no evidence that the engine threw out sparks. There was a verdict for plaintiff, but this Court unanimously sustained the motion to nonsuit, saying: "Where plaintiff alleges that he has been injured by fire originating from sparks issued from defendant's locomotive he must not only prove that the fire *might have* proceeded from defendant's locomotive, but must show by *reasonable affirmative* evidence that it did so originate," quoting from *Ice Co. case, supra.*

In *Kemp's case,* 169 N. C., 731, the fire started in the defendant's depot, which set fire to a box car and communicated the same to property belonging to the plaintiff. The Court held that where the evidence only tended to show that the defendant's depot caught fire during the night, *supposedly from a passing engine,* and this fire was communicated to the plaintiff's property, a judgment of nonsuit was properly allowed.

(316) In *R. R. v. Gossard,* 14 Ind. App., 244, it is held that proof that a fire started a few minutes after an engine passed, and that at a point a quarter of a mile distant sparks were escaping from the engine, is insufficient to show negligence on part of the railroad company, especially in a case where the evidence shows that engine was properly equipped with a spark arrester. In a concurring opinion the decision is sustained on the ground that there is no evidence that the engine on that or any other occasion threw live sparks a distance of 66 feet.

In *Musselwhite v. R. R.,* 4 Hughes, 166, the evidence showed that soon after a freight train passed a large shop that stood near the track was on fire in the upper story near a broken window. It was alleged that the fire was started by a spark from defendant's engine, proved to be in good condition. The evidence was held to be too uncertain and conjectural to justify a recovery.

We have found cases holding that where engines had passed through open fields covered with dry grass and straw, with high winds prevailing, and a fire broke out shortly after their passage, the coincidence was a fact sufficient to be submitted to the jury as some evidence of the origin

of the fire. But a diligent search has failed to find a case wherein it has been held that the fact that an engine passed a building situated 70 feet from the track and off the right of way, a half-hour before a fire broke out in it, is sufficient evidence to warrant a finding that such fire was caused by the engine.

There are hundreds of lumber mills situated very near railroad tracks in this State, and to hold passing engines responsible for every unexplained fire that breaks out in them, without other evidence, would impose too great a liability upon the common carriers who are compelled to serve them.

In our opinion, the evidence raises nothing more than a conjecture and is not strong enough in probative force to justify the submission of the issue to the jury.

The judgment is

Affirmed.

CLARK, C. J., concurring: In *Williams v. R. R.*, 140 N. C., 624, the rules of negligence applicable to a case of this kind are thus summed up:

"1. If fire escape from an engine in proper condition, having a proper spark arrester, and operated in a careful way by a skillful and competent engineer, and the fire catches off the right of way, the defendant is not liable, for there is no negligence.

"2. If fire escape from an engine in proper condition, with proper spark arrester, and operated in a careful way by a skillful and competent engineer, but the fire catches on the right of way, which (317) is in a foul and negligent condition, and thence spreads to the plaintiff's premises, the defendant is liable. *Moore v. R. R.*, 124 N. C., 341.

"3. If fire escape from a defective engine, or defective arrester, or from a good engine not operated in a careful way or not by a skillful engineer, whether the fire catches off or on the right of way, the defendant is liable.

"In the first case there would be, as above stated, no negligence. In the second, the foul right of way would be negligence, and in the third the defective engine or spark arrester, or the negligent operation of a good engine, would be negligence."

In this case it is true the evidence of the defendant of a proper spark arrester and a competent engineer cannot be considerd on a motion to nonsuit, but there is no evidence from the plaintiff to show negligence in that respect, nor even that the fire "escaped from its engine."

Neither is there any evidence that the fire caught on the right of way, but the contrary appears from the right of way not having been burned

over. It is true that if the origin of the fire is traced to the defendant the burden would then be upon it to show that it was not negligent. But the plaintiff's evidence failed to show the origin of the fire.

In *McRainey v. R. R.*, 168 N. C., 571, and that class of cases the fire started on the right of way, and this is evidence of negligence under Rule I as above stated in *Williams' case.* In *Aman v. R. R.*, 160 N. C., 371, and like cases there was evidence that the engine threw sparks and live coals, which was evidence of negligence. But there is nothing of the kind in this case.

In *Deppe's case,* 152 N. C., 80, which comes nearer this case on the facts than any other relied on by the plaintiff, the engine had been switching for three-quarters of an hour near the mill, and it was shown that the ventilator on top of the mill was open, that the fire started there soon after and the smoke from the engine entirely enveloped the mill, and it was on a bright summer day so that sparks could not be seen in the smoke. In this case there was no evidence except that an engine passed by not very long before the fire occurred, but there was nothing to indicate that the engine was throwing sparks or that its smoke, bearing sparks, enveloped the plaintiff's property, nor any evidence tending to show the absence of a spark arrester or that the engine was throwing sparks or that it was defectively equipped or operated.

In *Kemp v. R. R.*, 169 N. C., 731, though the fire started in defendant's depot which caught fire in the night, and, it was alleged,
(318) from a passing engine, and this fire extended to the plaintiff's property, a judgment of nonsuit was sustained because it was not shown that the depot was set fire by sparks from an engine.

The case almost exactly like this on the facts is *McGuire v. R. R.*, 154 N. C., 384, where it was not shown that the fire began on the right of way, though it was burned over and no evidence that the engine threw out sparks. Though there was a verdict for the plaintiff, the Court held that there should be a nonsuit, for the plaintiff "must not only prove that the fire *might have* proceeded from defendant's locomotive, but must show by *reasonable affirmative* evidence that it did so originate," citing *Ice Co. v. R. R.*, 126 N. C., 798.

This case does not come within the rule laid down in *Williams v. R. R., supra,* nor under any other precedent in our books, as I understand them. There is no evidence that the engine was defective or defectively operated or that it threw out sparks, and the fire did not originate on the right of way.

It would be dangerous and might lead to great injustice to hold the railroad company responsible for every fire that breaks out after an engine has passed, when the fire originates off the right of way and

there is no evidence beyond the fact that an engine passed not long before the fire began. This would make the railroad company an insurer of all the property along the right of way, unless it can show that the fire was not caused by its engine.

While direct evidence that the fire was caused by the negligence of the defendant is not required, but it may be inferred by the jury from the attendant circumstances, there must be more than bare evidence of a possibility, or even a probability, that the fire was so caused. As the counsel for the defendant well says, there must be more than the argument of the solicitor, on one occasion: ' 'Gentlemen of the jury, there *was* a hog. *Here* is a negro. Take the case."

ALLEN, J., dissenting: The plaintiffs allege that their property was destroyed by fire which negligently escaped from the engine of the defendant, and the rule uniformly applied in cases of this character since the case of *Ellis v. R. R.*, 24 N. C., 138, is that a presumption of negligence arises from proof of the origin of the fire, and that when this is shown the burden is "on the defendant to rebut the presumption of negligence arising from proof connecting it with the origin of the fire, by evidence which would satisfy the jury that the engine was properly equipped, that competent men were in charge of it, and that it was prudently operated." *Currie v. R. R.*, 156 N. C., 423.

It follows necessarily, as the burden of proof is on the de- (319) fendant, if there is evidence of the origin of the fire, that we cannot consider the evidence of the defendant that the engines were properly equipped and skillfully operated, on a motion for judgment of nonsuit, and, as said in *McRainey v. R. R.*, 168 N. C., 571, "The only question presented by this appeal is whether there is any evidence that the fire of which the plaintiff complains originated from defendant's engine and passed to his land, causing him damage."

Is there evidence of the origin of the fire?

The fact may be established by circumstantial evidence, and it is not necessary for a witness to testify that he saw sparks coming from the engine. Recoveries were sustained in *McMillan v. R. R.*, 126 N. C., 725; *Williams v. R. R.*, 140 N. C., 623; and in *Deppe v. R. R.*, 152 N. C., 82, on circumstantial evidence, and when no witness testified to seeing sparks.

The rule laid down by Shearman and Redfield on Negligence, sec. 58, as to what amounts to evidence, is that "The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself. Having done this, he is entitled to recover unless the defendant produces evidence

to rebut the presumption. It has sometimes been held not sufficient for the plaintiff to establish a probability of the defendant's default; but this is going too far. If the facts proved render it probable that the defendant violated its duty, it is for the jury to decide whether it did so or not. To hold otherwise would be to deny the value of circumstantial evidence."

In *Fitzgerald v. R. R.*, 141 N. C., 535, the rule is stated to be that the case cannot be withdrawn from the jury "if the facts proved established the more reasonable probability that the defendant has been guilty of actionable negligence," and this was approved in *McRainey v. R. R., supra.*

In *Henderson v. R. R.*, 159 N. C., 583: "But if the more reasonable probability is in favor of the plaintiff's contention the question ought to be submitted to the jury"; and in *Kelly v. Power Co.*, 160 N. C., 285: "If the evidence for the plaintiff renders it probable that the defendant neglected its duty, it is for the jury, not for the court, to decide whether it did so or not."

If, therefore, upon proof of the origin of the fire, there arises a presumption of negligence, and the burden of proof is then on the defendant, and if the degree of proof required of the plaintiffs is that they furnish evidence that establishes the "more reasonable probability" or "renders it probable" that the fire originated from the defendant,
(320) the only inquiry with us is whether the plaintiffs have furnished evidence which makes it reasonably probable that the defendant set out the fire; and in determining this question the unvarying rule is that the evidence must be construed favorably for the plaintiffs, and that every fact which the evidence tends to prove must be accepted as established.

What, then, does the evidence tend to prove?

The fire was discovered about 1 o'clock at night, and Frank McArthur, who was on the premises at the time, testified "that the fire in the boiler was only pulling the dry-kiln, and there was no other fire around the place." The witness McAllister also testified that "when he got there the fire was burning from the railroad, coming to the mill." All the evidence is to the effect that the boiler was 250 or 260 feet from the place where the fire started, and that the wind was blowing from this place to the boiler and not from the boiler to the origin of the fire. The wind was also blowing from the railroad to the place where the fire started.

We have it, then, established for the purpose of a motion for judgment of nonsuit that there was no fire on the premises before the engines of the defendant passed except in the boiler, and that the wind was

blowing so it could not carry the sparks from the boiler to the place where the fire was first seen. Two engines of the defendant passed, and within thirty minutes the fire was discovered burning on the side of the shed next to the track, and within 60 or 70 feet from the track, and the wind was blowing from the track to the shed. If there was fire in the engines of the defendant and in the boiler of the plaintiffs, and no other fire on or about the premises, the fire which caused the damage must have originated from the engines or the boiler. Which is the "more reasonable probability"—that it was from the engines, which passed within 60 or 70 feet, with the wind blowing to the place of the fire, or from the boiler, distant 250 or 260 feet, with the wind blowing in a different direction? The evidence also shows that the fire caught on the side next to the railroad, and that there was a large shed between the boiler and the place of the fire.

The Court evidently felt the probative force of this evidence, and thought it necessary to furnish some explanation for the fire.

It is, therefore, suggested that the fire might have started from a match carelessly dropped during the day, or from a spark from a workman's pipe, or that the lumber might have been greatly overheated in the dry-kiln and developed a fire in that way, when there is no evidence that any one about the premises had a match or dropped one, or that any workman smoked, or that the lumber was overheated in the dry-kiln. It is certainly more reasonable to conclude that the engines, which passed with fire in them, set out the fire, than that the fire was (321) caused by a match or a workman's pipe, which have no existence so far as this record discloses, except in the imagination, or by the overheating of lumber in a kiln, which had been out of the kiln in the open air, in March, at least six or seven hours.

Nor does it appear that the fire attained unusual proportions in thirty minutes. J. A. Powell testified that he was asleep when the whistle blew; that he got up and dressed and went to the mill, and "the fire was moving in toward the main body of the mill and was about 10 feet square." McArthur saw no spark, because he was in the boiler room, and he says: "The door toward the railroad was shut."

The evidence as to the origin of the fire is as convincing as in *McMillan v. R. R.*, 126 N. C., 725; *Williams v. R. R.*, 140 N. C., 623; *Deppe v. R. R.*, 152 N. C., 82; *Aman v. Lumber Co.*, 160 N. C., 370; *McRainey v. R. R.*, 168 N. C., 571; and in all of these cases it was held sufficient to be submitted to a jury.

The Court says in the *McMillan case:* "While it is not negligence for a railroad to run its trains over its roads well managed and well equipped, as it seems the defendant's train was, yet we know that no spark arrester

can be so constructed as to entirely prevent the emission of sparks, without destroying the efficiency of the engine; and while it was not negligence in the defendant to run such a train over its road, the fact that it had recently passed over the road, and fire was found there, was some evidence tending to show that it emitted sparks that set the grass on fire."

This is quoted and approved in the *Williams case,* and in the latter case the Court further says: "No one testified that he saw the sparks fall from the engine upon the right of way. . . . But here the fire was seen on the right of way; it burnt along the track between the ditch and the ends of the ties, and thence had gone into the woods. The wind was blowing from the northwest across the track, the fire being on the south side. Two witnesses testified that they first saw the smoke about thirty minutes after the defendant's engine passed. How long before that the fire began no one knew, but there was no fire before the engine passed. These were matters for the jury."

It is true that in each of these cases the fire from the engine ignited combustible matter on the right of way, but, as said in the *Deppe case,* "In considering the *origin* of the fire, it is immaterial whether the fire caught on or off the right of way."

These cases establish the principle that when it is shown that there was no fire before the train passed, and it breaks out shortly thereafter
(322) at a point to which the wind is blowing from the train, that this is circumstantial evidence that the fire came from the train.

In the *Deppe case* the fire started in a dry-kiln off the right of way, in which there were heated pipes, and it could not have come from the defendant's train unless sparks from the engine entered a ventilator near the top of the kiln, 4½ by 8 feet and opening back 6 or 7 feet. No witness saw any sparks. The plaintiff offered evidence tending to prove that the fire was not near the heated pipes, and that there was no other fire on the premises nearer than 156 feet, and that the wind was not blowing from this place towards the kiln, but in an opposite direction; that an engine of the defendant was shifting within about 60 feet of the kiln three-quarters of an hour or one hour and three-quarters before the fire was discovered, and that the smoke from the engines enveloped the kiln.

The only circumstance in favor of a recovery present in the *Deppe case* that is not in the case before us is as to the smoke, and this proves nothing except that there was smoke, and that the wind was carrying it to the kiln, while, on the other hand, there were the circumstances in favor of the defendant of the improbability of a spark entering the ventilator and passing back 6 or 7 feet into the kiln, and the strong probability that the lumber in the kiln became ignited by the heat from the pipes. The *Deppe*

case has been approved eighteen times, as appears from the annotations, 164 N. C., 710, and four times since the annotations were printed.

In *Aman's case* there was evidence that sparks were seen to come from the engine on the day *before* the fire, but that on the day of the fire "no one saw any sparks emitting from it," and the circumstances relied on were that there was no fire before the engine passed, that the engine passed and the fire broke out soon thereafter.

Justice Walker says, when considering this evidence on the refusal of a motion for judgment of nonsuit: "The familiar rule is that the evidence, upon such a motion, should be considered in its most favorable light to the plaintiff, and every fact which it proves or can prove should be taken as established. With this guide before us, we are led unhesitatingly to the conclusion that the ruling of the Court was correct"; and again: "It can make no difference whether the sparks light on or off the right of way, if they kindled the fire and destroyed plaintiffs' trees, there was a sufficient case of *prima facie* evidence for submission to the jury, upon the whole evidence, to find the ultimate fact of negligence. This Court has been most pronounced in its opinion upon this subject, and has adhered steadily and strictly, without the shadow of turn- (323) ing, to the just rules which have heretofore been promulgated."

In *Kemp's case,* 169 N. C., 732, no recovery was allowed because, as stated in the opinion, "It was admitted by the plaintiff that he could not prove the origin of the fire," and there was no evidence that any engine of the defendant ever passed the point where the fire originated, unless this might be inferred from the fact that the defendant was maintaining a depot building and a railroad track.

I have thought it necessary to discuss the principal cases bearing upon the question involved in this case, because, as I see it, a precedent is being established which will prevent just recoveries hereafter in cases which have heretofore been sanctioned by a long line of decisions.

HOKE, J., concurs in this opinion.

Cited: Boney v. R. R., 175 N.C. 357; *Perry v. Mfg. Co.,* 176 N.C. 70; *Reid v. R. R.,* 180 N.C. 513; *Nowell v. Basnight,* 185 N. C., 148; *Dickerson v. R. R.,* 190 N.C. 299; *Lawrence v. Power Co.,* 190 N.C. 669; *Mfg. Co. v. R. R.,* 191 N.C. 111; *Wilson v. Lumber Co.,* 194 N.C. 376, 377; *Heath v. R. R.,* 197 N.C. 543; *S. v. Johnson,* 199 N.C. 431; *Mfg. Co. v. R. R.,* 222 N.C. 339; *Lumber Co. v. Elizabeth City,* 227 N.C. 272, 273; *Transport Co. v. Ins. Co.,* 236 N.C. 540; *Grinnan v. R. R.,* 238 N.C. 435.

BEAUFORT LUMBER COMPANY v. A. J. COTTINGHAM.

(Filed 11 April, 1917.)

1. Appeal and Error—Judgment — Excusable Neglect — Terms Agreed — Willful Refusal.

Where the trial judge has found as facts that a defendant who had obtained a continuance of his case upon terms that he had agreed upon and willfully refused to perform, and that his answer had been stricken out and judgment as for contempt rendered against him, the claim of mistake, inadvertence, surprise, or excusable neglect is excluded, and will not be sustained on appeal.

2. Judgments—Default—Answer Stricken Out—Collateral Attack—Appeal and Error.

The legal authority of the trial court to strike out defendant's answer and render judgment against him cannot be collaterally attacked on appeal from a refusal of that court to set aside the judgment for mistake, etc., arising from a different and later matter.

3. Judgments—Continuance of Case—Terms — Bonds — Duty of Client — Neglect of Counsel.

It is the duty of a party to an action, or his duly authorized agent, who is present and acting for him, to comply with agreed terms of an order granting him a continuance, and not the duty of his attorneys, and the neglect of the latter therein is not sufficient ground to set aside the judgment rendered against him in consequence.

4. Appeal and Error—Excusable Neglect—Trial Court—Findings of Fact—Evidence.

Upon appeal from a motion to set aside a judgment for excusable neglect, the finding of facts by the trial court, when supported by evidence, is conclusive.

5. Judgments Set Aside—Offer of Party—Contracts—Complaint—Excusable Neglect—Courts.

An offer privately made by the plaintiff that a judgment *pro confesso* in his favor will be set aside upon the defendant's giving a mortgage on the lands described in the complaint to indemnify him against damages, etc., must be complied with according to its terms, and the courts, in passing upon the question of defendant's excusable neglect therein, are without power to vary the terms of the offer, and set aside the judgment previously rendered.

(324) Motion to set aside a judgment, heard by *Kerr, J.*, at December Term, 1916, of ROBESON.

This controversy grew out of a case which was before this Court at a former term, *Lumber Co. v. Cottingham,* 168 N. C., 544, affirmed on rehearing.

The present proceeding is an application to set aside the judgment rendered at December Term, 1914, in the case, for excusable neglect. After the judgment had been entered because the defendants had failed to comply with the condition of a continuance granted by Judge Cooke, who presided at December Term, 1914, the plaintiff's counsel, of their own motion, signed and filed with the record in the case the following written stipulation: "The plaintiff offers to strike out the judgment rendered at this term *pro confesso,* if the defendants file the bond specified in the order or continuance entered at this term within ten days from 19 December, 1914, or they may give a mortgage on the lands described in the complaint, in said sum, conditioned as set out in the order of continuance."

Judge Cooke had, on request of defendants, granted a continuance, at December Term, 1914, upon condition that defendants file a bond, before the adjournment of court, in the sum of $4,500, with surety, or a mortgage on the land in dispute, to secure plaintiff's damages, if any, which they failed to do, whereupon the answer was stricken from the files and judgment entered, the failure to comply with the terms of the continuance being adjudged as a contempt of court. The judgment was affirmed, on appeal by defendant, and reaffirmed on rehearing.

It is found as a fact by Judge Kerr that at December Term, 1914, the *feme* defendant was represented by her husband, A. J. Cottingham, as her agent, and also her codefendant, and that both were represented during the term by able and learned counsel, who acted throughout with due diligence and fidelity, though Mrs. Cottingham, who was (325) sick, had no actual knowledge of what had taken place during the term until after its adjournment. It is further found as a fact that the judge had nothing to do with, nor was he influenced by, the offer or stipulation of plaintiff's counsel in rendering the judgment, but that the same was filed after the judgment was entered, and was wholly voluntary on the part of said counsel. The defendants Cottingham and wife did not formally accept the offer of plaintiff's counsel but within the ten days allowed in the offer they filed in the clerk's office a mortgage, duly executed by them on a part of the lands described in the complaint, and not all of them, and that said mortgage was not filed absolutely, but conditionally, or in escrow, that is, it was not to be considered as filed absolutely during the pendency of the appeal from the judgment, but should await the result of that appeal, the offer being that it should be filed unconditionally. The judge, therefore, found as a fact that in these respects the defendants had not complied with the offer or proposed stipulation of plaintiff's counsel. The judge also finds that the affidavit of one of plaintiff's counsel is true, and it is therein stated

that he notified defendant's counsel of the offer in the courthouse, and the judge states in his finding that "defendants and their counsel knew or should have known of the voluntary stipulation and the terms thereof." It also appears in the findings that the plaintiffs, when their attention was called to the entry on the mortgage filed by defendants with the clerk of the court, refused to accept the same as a compliance with their offer, because it omitted between 90 and 95 acres of the land and was filed conditionally, or in escrow, and further because it contained untrue and improper recitals. The appeal in the case was then perfected and prosecuted with the result already stated. There is one other material finding, viz.: "The said (defendant's) counsel prepared the mortgage aforesaid, and defendants signed the same and delivered it to their counsel to be filed, and that the said counsel filed the same, as appears of record."

The court held: (1) That it had no power to interfere with the judgment of December Term, 1914, signed by Judge Cooke. (2) That the facts found by him from the evidence do not constitute excusable neglect. (3) That defendants are not entitled to have the judgment set aside.

The motion of defendants was, therefore, denied, and defendants excepted.

The defendants specially requested a finding with reference to what had occurred at Maxton, N. C., when the mortgage was prepared and executed by defendants, and as to the advice of their attorneys that the (326) mortgage was properly drawn, and their instructions to one of their attorneys to file the same in accordance with the offer of plaintiff's counsel, and his statement, on his return, that he had done so, and as to some other matters. There was evidence upon which to base this request for a finding, but with respect thereto the case states that the judge considered all the evidence, and "that the facts found by him, as set out in the judgment, and in the papers and records therein mentioned, are all the facts established to the satisfaction of the court at the hearing of the motion."

An order denying the motion, and for costs to be taxed against defendants, was entered, and they appealed.

McLean, Varser & McLean for plaintiff.

McIntyre, Lawrence & Proctor and Walter H. Neal for defendants.

WALKER, J., after stating the case: There is no ground upon which it can be claimed that there was any excusable neglect during the term of the court at which the judgment was rendered. A continuance was granted the defendants by Judge Cooke upon terms which were that they

secure any damages plaintiffs recovered, by bond or mortgage, as specifically set forth, and these terms were accepted by defendants, though not complied with by them, and Judge Cooke found as facts that defendants had said late in the term "that they would not comply with the order, and it was then too late to try the case," and, further, that the refusal of defendants was willful. This excludes the idea that the defendants failed to comply with the order, made with their consent, because of any mistake, inadvertence, surprise, or excusable neglect. It cannot properly be said of a willful refusal to perform an act, or a duty, that it was neglectful, and, with less reason, that it was excusably so. The finding of Judge Cooke was, substantially, that the refusal of the defendants to comply with the terms of the consent order was not only willful, but contemptuous, and this Court so regarded the finding when the case was here at a former term (168 N. C., 546), and the defendants, in their brief, so treat the finding and ruling of Judge Cooke. Besides, the judge states that the *feme* defendant was represented "fully and ably and loyally by counsel," and by her husband, as agent for her, and there is no reason perceived by us why she should not be bound by the judgment, except the one she advanced, that the court could not legally strike out her answer and give judgment, even though she was guilty of contempt, and that is not open to her in this proceeding, which is collateral to the other one and proceeds on the assumption that the judgment, on the face of the record, is a valid one. It was no part of her counsel's duty to file a bond for (327) her, and if her agent willfully refused to file it, the plaintiffs should not suffer therefrom, as it was not their fault. But however this may be, the judge has found that there was no excusable neglect at the time the judgment was entered or prior thereto, and we concur in this ruling.

We seriously doubt if section 533 of the Revisal, authorizing a judgment to be set aside because of excusable neglect, applies to a case where a party has simply failed to comply with the terms of a private offer by counsel of the other side, with which the court had nothing to do. It would seem to be a matter for settlement between the parties interested. Excusable neglect is something which must have occurred at or before entry of the judgment, and which caused it to be entered, not matter *ex post facto* which had no relation to the action of the court or to anything which transpired before its rendition. But assuming that it is embraced by the statute, for the sake of discussion, we do not find any fact or facts in the judgment of Judge Kerr which constitute excusable neglect according to the meaning and understanding of the law. We are concluded by the judge's finding of facts, where there is some supporting evidence. *Weil v. Woodard,* 104 N. C., 94; *Koch v. Porter,*

129 N. C., 132; *Morris v. Ins. Co.*, 131 N. C., 212; *Turner v. Machine Co.*, 133 N. C., 381; *Gaylord v. Berry*, 169 N. C., 733; *Gardiner v. May*, 172 N. C., 192. In *Norton v. McLaurin*, 125 N. C., 185, the following classification was made under the corresponding section of The Code:

"1. The findings of fact by the judge are final (*Weil v. Woodard*, 104 N. C., 94; *Albertson v. Terry*, 108 N. C., 75; *Sykes v. Weatherly*, 110 N. C., 131), unless upon an exception that there was no evidence as to some fact found by him (*Marion v. Tilley*, 119 N. C., 473), or failure to find material facts, *Smith v. Hahn*, 80 N. C., 241.

"2. Upon the facts found, the judge finds, as a conclusion of law, whether there has or has not been excusable neglect, and from such conclusion either side may appeal. *Winborne v. Johnson*, 95 N. C., 46; *Weil v. Woodard, supra.*

"3. If he finds correctly that the negligence was inexcusable, of course, that defeats the motion to set aside the judgment.

"4. If he finds correctly that the negligence was excusable, then whether he will or will not set the judgment aside is in his irreviewable discretion (*Manning v. R. R.*, 122 N. C., 824; *Stith v. Jones*, 119 N. C., 428; *Sykes v. Weatherly, supra; Winborne v. Johnson, supra,* and cases therein cited), unless in case of gross abuse of discretion (*Wyche v. Ross*, 119 N. C., 174); but the discretion to set aside is not given by the statute (Code, 274), unless there has been excusable neglect."

(328) And in *Seawell v. Lumber Co.*, 172 N. C., 320 (90 S. E., 241), the following further classification is suggested:

1. The distinction between the negligence of counsel while engaged in the performance of a professional duty and the negligence of the party is clearly marked, and the uniform rule with us is that the negligence of the first will not be attributed to the client, if he, himself, is in no fault; and this is true without regard to the solvency or insolvency of counsel. *Schiele v. Ins. Co.*, 171 N. C., 426, 88 S. E., 764, and cases there cited.

2. The employment of counsel does not excuse the client from proper attention to his case. (*Pepper v. Clegg*, 132 N. C., 316, 43 S. E., 906), and the test of the negligence of the client or party is whether he has acted as a man of ordinary prudence while engaged in transacting important business (*Norton v. McLaurin*, 125 N. C., 190, 34 S. E., 269; *Allen v. McPherson*, 168 N. C., 437, 84 S. E., 766.)

If we bring the facts found by Judge Kerr to the test of these practical rules, we find that he has correctly decided that there was no excusable negligence. It was not incumbent upon the *feme* defendant's attorneys, as such, to prepare and file the bond or mortgage, but it was a duty devolved upon her. *Norton v. McLaurin, supra.* It is there said: "This bond, The Code, sec. 237, requires the defendant to file before he can

answer or demur, and the failure to file the bond was the neglect of the defendant himself, and no excuse whatever is shown relieving him from the judgment authorized by The Code, sec. 390, upon his failure to file it. When a man (or a woman) has business in court it is his (or her) duty to attend to it, and at the proper time." The obstacle in the *feme* defendant's way is that the judge has refused to find the facts set forth in the affidavit filed by her as to what occurred at Maxton between her and her counsel (even if they show a case of excusable neglect), and has, on the contrary, found that her counsel prepared the mortgage, defendants signed the same, and delivered it to counsel "to be filed, and that counsel filed the same, as appears in the record." This means that counsel simply filed the mortgage as instructed or, at least, as empowered to do, which implies that they were authorized, if not directed, to file it "as an escrow." It follows, therefore, that the proffered stipulation of plaintiff's counsel was not accepted, and complied with, in the terms of the offer, which we know is necessary to complete the agreement between them. There being no proper acceptance of the offer within the time fixed by it, it fell through, and the court has no right to revive it, or to restore rights under it, or to modify its terms in any respect, as it is no party to it, and has no control over it. The judge finds that the offer was not made through the court, or with its sanction, and that it was made after (329) the judgment had been entered, and by counsel alone. The acceptance by defendants should have been in the terms of the offer, and if it was not so, the plaintiff had the right to treat the offer as rejected, a conditional acceptance not being sufficient, and especially is this true when, in a certain eventuality, it would not take effect at all. And even if the offer had been that of the court, it does not appear, in the judge's findings of fact, that there was any such restriction upon defendant's counsel as prevented them from filing the mortgage as an escrow, or that they disobeyed instruction, if this would change the result. We cannot remand in order to have additional facts found, as the judge has considered all the evidence, and has stated all the facts which he deemed to be established, and they fail to show a case of excusable neglect. *Norton v. McLaurin, supra.* We cannot compel the judge to believe the evidence. He must pass upon its credibility and its weight without any coercion from us.

It does not appear in the finding of the court that the defendants have a meritorious defense, which is ordinarily fatal to such a motion. *Mauney v. Gidney,* 88 N. C., 200; *Dell School v. Peirce,* 163 N. C., 424; *Minton v. Hughes,* 158 N. C., 587; *Miller v. Curl,* 162 N. C., 1, and cases cited. It would be idle to vacate a judgment if there is no real and substantial defense on the merits. But we need not decide as to this feature of the case, for there must be both excusable neglect and a meritorious defense, as the cases cited by us will show.

In no view of the facts, therefore, as found by Judge Kerr, can we reverse the judgment.

Affirmed.

Cited: Grandy v. Products Co., 175 N.C. 513; *Land Co. v. Wooten,* 177 N.C. 250; *Shepherd v. Shepherd,* 180 N.C. 495; *Helderman v. Mills Co.,* 192 N.C. 628; *Abbitt v. Gregory,* 195 N.C. 209; *Texas Co. v. Fuel Co.,* 199 N.C. 495; *Alston v. R. R.,* 207 N.C. 117; *Cayton v. Clark,* 212 N.C. 375; *Gunter v. Dowdy,* 224 N.C. 523; *Ledford v. Ledford,* 229 N.C. 376.

J. H. THOMAS v. L. E. SANDLIN.

(Filed 11 April, 1917.)

1. Mortgages—Household Furniture—Husband and Wife—Statutes—Constitutional Law.

Revisal, sec. 1041, providing that a mortgage on the household and kitchen furniture shall be void unless the wife join therein and her privy examination taken in the manner prescribed by law as on conveyances of real estate, is in the exercise of the police power of a State and promotive of its economic welfare and public convenience and comfort, and designed for the protection of the home, and is a constitutional and valid enactment.

2. Mortgages — Husband and Wife — Household Furniture — Pianos — Statutes.

A piano owned by the husband and placed in his home for the use of his wife and daughters, and so used by them, is included under the statutory terms, "Household and kitchen furniture," as used in Revisal, sec. 1041, and a chattel mortgage thereof by the husband is invalid unless the wife signs as directed by the statute.

CLARK, C. J., concurring.

(330) CIVIL ACTION to recover a piano on which plaintiff held a chattel mortgage, executed by the defendant to secure a debt of $153, due September, 1914, heard on appeal from recorder's court before *Bond, J.,* at February Term, 1917, of NEW HANOVER.

On the hearing the relevant facts agreed upon by the parties were as follows:

1. L. E. Sandlin, defendant, is a married man residing with his wife and daughters.

2. He purchased a piano and had the same placed in his house to be used by his wife and daughters, and it was used by them.

3. That L. E. Sandlin mortgaged the piano subsequent to the passage of section 1041 of the Revisal of 1905.

5. That the mortgage was not signed by the wife of the defendant, nor was her privy examination taken as required under section 1041 of the Revisal of 1905.

6. That the defendant was indebted to the plaintiff in the sum of $153, which was secured by said mortgage, less a credit of $21.08, leaving a balance due of $131.92, with interest from 5 June, 1914.

Upon these facts, the court, reversing the action of the recorder, entered judgment for plaintiff, the pertinent portions of said judgment, after reciting that the piano was purchased by defendant subsequent to passage of section 1041, being as follows:

"Upon the foregoing facts, the court being of the opinion that a piano is an article of household and kitchen furniture under section 1041 of the Revisal of 1905, but that said section is an unwarranted interference with defendants' *jus disponendi,* and that said section is unconstitutional and is void; that the said mortgage is a valid and subsisting lien upon said piano, and it is, therefore, upon motion of counsel for plaintiff, ordered, adjudged, and decreed: that the said mortgage is a valid and subsisting lien on said piano; that the plaintiff recover of the defendant the said piano, which is hereby condemned for sale," etc.

From which judgment defendant duly excepted and appealed.

L. J. Poisson and J. O. Carr for plaintiff.

J. C. King for defendant.

HOKE, J., after stating case: The statute enacted in 1891 and appearing in Revisal 1905, sec. 1041, provides that "A chattel mortgage by the husband on the household and kitchen furniture shall be (331) void unless the wife join therein and her privy examination be taken in the manner prescribed by law, as on conveyances of real estate." In the present instance the wife did not join in the conveyance as required, and unless the statute is unconstitutional or the piano does not come within its descriptive terms, a recovery by plaintiff cannot be sustained. While the *jus disponendi* is fully recognized with us as a substantial incident of ownership coming under the constitutional guarantees for the protection of private property, it is also established in this jurisdiction that neither this nor any other proprietary right is absolute in its nature, but the same is enjoyed and held subject to legislative regulation in the reasonable exercise of the police power.

It has been properly said that no adequate or satisfactory definition of police power can be given, for as our civilization and social conditions

become more advanced and complex the extent and inclusive character of this power is being more and more illustrated, and in the later decisions has been held to embrace not only governmental regulations appertaining to the good order, health, and morals of a community, but also such as are considered promotive of its economic welfare and public convenience and comfort. In reference to the ownership of property, the exercise of this power may be extended to measures affecting its acquisition, use, transfer and devolution, the latter certainly so far as the disposition of property by will is concerned, being, under our decisions, in the absolute control of the Legislature, and as to all other features of ownership the legislative will must prevail unless clearly in contravention of some express constitutional provision, the recognized position being that the statute will in all cases be upheld unless it has no substantial relation to the purpose sought to be attained and is an arbitrary and manifest invasion of personal and private rights. Speaking to the subject in 6 Ruling Case Law, p. 193, the author says: "All property within the jurisdiction of a State, however unqualified may be the title of the owner, is held on the implied condition or obligation that it shall not be injurious to the equal right of others to the use and benefit of their own property. In other words, all property is held subject to the general police power of the State so to regulate and control its use in a proper case as to secure the general safety, the public welfare, and the peace, good order, and morals of the community. Accordingly it is a fundamental principle of the constitutional system of the United States that rights of property, like all other social and conventional rights, are subject to such reasonable restraints and regulations established by law as the Legislature, under the governing and controlling power vested in it by the Constitution, may think necessary and expedient. And (332) to these ends the Legislature under its police power may pass laws regulating the acquisition, enjoyment, and disposition of property, even though in some respects these may operate as a restraint on individual freedom or the use of property. The subordination of property rights to the just exercise of the police power has been said to be as complete as is the subjection of these rights to the proper exercise of the taxing power; and it is held that this implied condition is quite irrespective of the source or character of the title. This principle is in effect an application of the maxim which underlies the police power, *Sic utere tuo ut alienum non lædas.*" And authoritative cases on the subject are in full support of this statement of the principle. *Chicago and Alton R. R. v. Tranbarger,* 238 U. S., 67; *Reinman v. City of Little Rock,* 237 U. S., 171; *Atlantic Coast Line v. Goldsboro,* 232 U. S., pp. 548-558; *Mutual Loan Co. v. Martell,* 222 U. S., pp. 225-236; affirming same case in 200

Mass., 482; *McLean v. Arkansas,* 211 U. S., pp. 539-547; *Holden v. Hardy,* 169 U. S., 366; *Bushnell v. Loomis,* 234 Mo., 371; *Harbeson v. Knoxville Iron Co.,* 103 Tenn., 421; affirmed in 183 U. S., 13. In *Atlantic Coast Line v. Goldsboro, supra, Associate Justice Pitney,* delivering the opinion, said, among other things (p. 558): "For it is settled that neither the contract clause nor the due process clause has the effect of overruling the police power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant, and that all contract and property rights are held subject to its fair exercise," citing *Slaughterhouse* and other cases. And in *McLean v. Arkansas, Associate Justice Day,* for the Court, said: "The Legislature, being familiar with local conditions, is primarily the judge of the necessity of such enactments. The mere fact that a court may differ with the Legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of this legislation in question, affords no ground for judicial interference unless the act is unmistakably and palpably in excess of legislative power."

Our own decisions are in accord with these cases, chiefly interpretative of the Federal Constitution. *Board of Health v. Louisburg, ante,* p. 250. *Skinner v. Thomas,* 171 N. C., 99; *Glenn v. Express Co.,* 170 N. C., 286; *S. v. R. R.,* 169 N. C., 295. All the more so that in this State, under our Constitution, the General Assembly, so far as that instrument is concerned, is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom. *S. v. Lewis,* 142 N. C., 626; Black on Constitutional Law (3d Ed.), 357.

In *Lewis's case, supra,* it was held: "The Legislature of North (333) Carolina has full legislative power which the people of this State can exercise as fully as the Parliament of England or any other legislative body of a free people save only as there are restrictions imposed by the State and Federal constitutions. Among the authorities heretofore cited, the case coming nearer, probably, to the one before us is *Mutual Loan v. Martell, supra,* in which an act of the Legislature of Massachusetts provided that no order for assignment of wages to be earned in amount less than $200 should be valid unless accepted in writing by the employer, and in case of a married man no such order should be valid unless the written consent of his wife was attached thereto."

The statute was upheld by the Supreme Court of Massachusetts and the decision was sustained by the Supreme Court of the United States, 222 U. S., 225, both tribunals making distinct reference to the require-

ment as to the wife's signature. In the opinion of the United States Supreme Court by *Associate Justice McKenna,* it was held, among other things: "The validity of police regulations depends upon the circumstances of each case, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose. *Chicago, Burlington and Quincy Ry. Co. v. Drainage Commissioners,* 200 U. S., 591.

The power of the State extends to so dealing with conditions existing in the State as to bring out of them the greatest welfare of its people. *Bacon v. Walker,* 204 U. S., 311.

"Police power is but another name for the power of government; it is subject only to constitutional limitations which allow a comprehensive range of judgment, and it is the province of the State to adopt by its Legislature such policy as it deems best.

"Legislation cannot be judged by theoretical standards, but must be tested by the concrete conditions inducing it.

"A State may, as a police regulation, make assignments of future wages invalid except under conditions that will properly restrict extravagance and improvidence of wage-earners.

"A State may, under conditions justifying it, prescribe that an assignment by a married man of wages to be earned by him in future shall be invalid unless consented to by his wife.

"This Court recognizes the propriety of deferring to tribunals on the spot, and will not oppose its notions of necssity to legislation adopted to accomplish a legitimate purpose. *Laurel Hill Cemetery v. San Francisco,* 216 U. S., 358.

"A State has power to prescribe the form and manner of execution and authentication of legal instruments in regard to property, its devolution and transfer. *Arnett v. Reade,* 220 U. S., 311.

(334) "There are many legal restrictions that may be placed by a State on the liberty of contract, and this Court will not interfere except in a clear case of abuse of power. *Chicago, Burlington and Quincy R. R. v. McGuire,* 219 U. S., 549."

The influences that proceed from a well ordered home are among the chiefest bulwarks of our social order, and if these various statutes restrictive of the right of contract and of the ordinary use and enjoyment of property can be upheld as a valid exercise of the police power, assuredly a statute of this kind, designed and calculated to maintain the peace and comfort of the home and to protect the wife and children therein from the ill-considered action of an improvident husband, may be sustained and referred to the same beneficent principle, our own decisions requiring the joinder of the wife to a valid conveyance of an allotted homestead, *Joyner v. Sugg,* 132 N. C., 580, and that her privy examina-

tion must be taken in order to a valid conveyance of her own realty. *Sutherland v. Hunter,* 93 N. C., 310, and *Ferguson v. Kinsland,* 93 N. C., 337, are in general affirmance of the position. The State decisions to which we were referred by counsel, *Hughes v. Hodges,* 102 N. C., 236, and *Bruce v. Strickland,* 81 N. C., 267, and others of like kind, are to the effect merely that statutes in general restraint of the right of alienation will not, as a rule, be upheld and have no necessary application to a case of this kind where the limitation on the rights of ownership is restrictive in its nature and designed and well calculated to promote a laudable purpose, one peculiarly within the influence and protection of the police power of the State.

In regard to the property conveyed, a piano coming within the descriptive terms of the statute, "household and kitchen furniture," the facts show that it had been placed in the home to be used by defendant's wife and daughters and was so used by them, and, on these facts, there is nothing which tends to show that the statute does not embrace it. The statutory terms should be held to include property dedicated to the convenience and comfort of the home which is adequate and adapted to the purpose, having due regard to the owner's means and station in life, and, so defined, it is usually held to extend to a piano. *Von Storch v. Winslow,* 13 R. I., 23; *Alsup v. Jordan,* 69 Tex., 300; *McCoy v. Thompson,* 138 S. W., 1062.

On the facts agreed upon, we are of opinion that the statute in question is valid; that the piano is well within its terms and meaning, and the attempted conveyance by plaintiff without the joinder of the wife is void, as the statute declares.

This will be certified, that the judgment awarding recovery be set aside and the action dismissed.

Reversed.

CLARK, C. J., concurring: It is well settled by our own deci- (335) sions, and everywhere else, that the Legislature of a State possesses the lawmaking power as absolutely as the people themselves can exercise it if they could assemble in one place, except where that power is restricted by some provision of the State or Federal Constitution. There is no provision in either that has disabled the Legislature of North Carolina from enacting Revisal, 1041.

Prior to the Constitution of 1868 a married woman by the fact of marriage itself lost not only the *jus disponendi* but the entire ownership of her personal property, and of her real estate during the life of her husband, and the power to dispose of it by will or any conveyance. The Convention of 1868 modernized our Constitution by putting husband

and wife on an equality in this respect, save only the restriction that in the conveyance of her realty the wife must have the written consent of her husband.

Since the Constitution of 1868 the husband cannot convey his "allotted" homestead without the joinder and privy examination of his wife. Const., Art. X, sec. 8; *Dalrymple v. Cole,* 170 N. C., 102. It would be strange, therefore, if the Legislature could not forbid him to convey his household and kitchen furniture without the same joinder and privy examination of the wife, for there is no prohibition against such enactment by the General Assembly. The house would be of small use to her without furniture and kitchen utensils.

The same public policy which requires the joinder of the wife in a mortgage by the husband of his household and kitchen furniture, Revisal, 1041, is also shown in the legislation which requires the joinder of the wife to relieve the husband's realty from the dower right of the wife, Revisal, 3085. Dower exists only by virtue of the statute of 1868-9, Revisal, 3084, and if the Legislature can require the joinder of the wife in the conveyance of the husband's realty in order to make a full and perfect conveyance of it, it has authority to impose the same requirement upon a conveyance by the husband of his household and kitchen furniture.

From 1784 up to the act of 1868-9 such dower right did not exist as to lands conveyed by the husband, for the wife was entitled to dower only in the real estate of which the husband "died seized and possessed." This was not changed by the Constitution of 1868, but by the act of 1868-9, which required the joinder of the wife in the husband's conveyance of "all lands, tenements, and hereditaments whereof the husband was seized and possessed at any time during the coverture." Revisal, 3084, 3085. The General Assembly showed its absolute power over the whole subject by dispensing with the joinder of the wife in certain
(336) cases, Revisal, 959. It is simply a matter of public policy which is vested in the sovereignty of the people to be exercised by their representatives in the General Assembly, subject to review, not by the courts, but only by the people themselves in the election of new representatives.

The courts have no control over the public policy of the State, its social legislation or exercise of the police power. If the courts had any control over such matters, and their views and not those enunciated by the lawmaking powers should govern them, as has been well said, "the selection of the judges must be frankly based upon the political and social outlook of candidates for judicial position, and the ultimate

sovereignty over the public policy of the State and Union would lay with the judges and not with the people."

The requirement that the wife must join in the conveyance of the husband's realty, in the conveyance of his allotted homestead, and in a mortgage of his household and kitchen furniture, and that the husband must give his written assent to the conveyance by the wife of her realty, are all of a piece as a declaration of public policy. Two of these are statutory and can be changed, repealed, or added to at the will of the Legislature.

The requirement of the privy examination of the wife has come down to us from a distant and barbarous past, and was based upon the conception of the inherent inferiority and incompetence of the woman, the presumption that the husband would bully her and that she could be bullied by him. Originally such examination was in court, but became useless when made by a magistrate selected by the husband. It must be admitted that there was some ground for this examination as long as we continued to hold that a husband had the right to whip his wife "if he did not use a switch larger than his thumb." But this doctrine was repudiated here in 1874, in *S. v. Oliver,* 70 N. C., 61, and probably before that everywhere else, and hence the privy examination has long since been abolished in England, in all our adjoining States—Virginia, South Carolina, Georgia, Tennessee, and West Virginia—and, indeed in all the States of the Union except North Carolina and four others. However antiquated and unnecessary the privy examination has now become, it cannot be questioned that the General Assembly can require it as to all conveyances made by the husband in which the wife is required to join. It is otherwise as to conveyances by the wife of her realty, as to which the Constitution has guaranteed that the property of the wife shall remain hers as fully as if she were unmarried, and that she may convey it, requiring only "the written assent of the husband." The addition of the privy examination, therefore, in conveyances by her is contrary to this stipulation in the Constitution.

Revisal, 1041, applies only to conveyances by the husband of (337) the household and kitchen furniture, and the requirement of the privy examination of the wife in giving her assent thereto is within the power of the General Assembly and is in line with the same requirement in the Constitution as to the joinder of the wife in the conveyance of the allotted homestead—the only instance in which the Constitution recognizes such requirement.

Cited: In re Utilities Co., 179 N.C. 159; *S. v. Burnett,* 179 N.C. 741; *Long v. Watts,* 183 N.C. 107; *Selma v. Nobles,* 183 N.C. 327; *S. v. Revis,*

193 N.C. 196; *Boyd v. Brooks,* 197 N.C. 651; *Calcutt v. McGeachey,* 213 N.C. 7; *Mt. Olive v. Cowan,* 235 N.C. 263.

MRS. L. P. RAY ET AL. V. JOHN E. EASON ET AL.

(Filed 11 April, 1917.)

Appeal and Error—Courts—Findings of Fact—Executors and Administrators—Parties.

Where the heirs at law of a grantee of lands sue to recover them, and it is found by the jury that the deed was given merely as security for a debt, a judgment rendered for the amount by the trial judge, not based upon admissions or agreement of the parties, and without waiver of the right to a jury trial, is erroneous, and a new trial on this issue will be granted by the Supreme Court, with order to make the administrator of the deceased grantee a party plaintiff.

CIVIL ACTION, tried before *Winston, J.,* at September Term, 1916, of CUMBERLAND.

This is an action by the heirs of N. W. Ray to recover land. The defendants filed an answer in which they allege that the deed to N. W. Ray under which the plaintiffs claim was executed as a security for a debt of $25, and they tender that sum, with interest from the date of the deed.

The jury returned the following verdict:

1. Did N. W. Ray acquire title to the said lands described in the complaint as security for an indebtedness of Eason to him? Answer: "Yes."

2. Are the plaintiffs the owners in fee simple of the land described in the complaint, and entitled to the immediate possession thereof? Answer: "No."

3. Is the defendant in the unlawful possession of the said land? Answer: "No."

4. What damages, if any, are plaintiffs entitled to recover of the defendants? Answer: .....

(338) 5. Were Eason and Beady Ann Bowling married at the date of the deed from Beady Ann Bolling to N. W. Ray? Answer: "No."

6. Had Guthrie conveyed to Jackson Williams a described 90 acres of land before his execution of the conveyance to Ray? Answer: "No."

7. Had Guthrie conveyed to Beady A. Bolling a described 197 acres of the lands before his execution of the conveyance to Ray? Answer: "Yes."

8. Had Guthrie conveyed to Hector Williams a described 71 acres of the lands before his execution of the conveyance to Ray? Answer: "Yes."

The defendants tendered a judgment declaring that the plaintiffs are not the owners of the land in controversy and that the defendants are not in the unlawful possession thereof, which his Honor refused to sign, and the defendants excepted.

His Honor rendered judgment declaring the defendant Eason to be the owner of the land, and subjecting it to a charge of $125 in favor of the executrix of N. W. Ray, which amount he finds to be due on the purchase money, and the defendants excepted and appealed.

Sinclair, Dye & Ray for plaintiffs.

Davis & Handcock for defendants.

ALLEN, J. The jury has found that the deed executed to N. W. Ray was a security for a debt, but there is neither a finding by the jury nor an admission by the defendants that the amount of the debt is $125. Nor do we find in the record any evidence that this was the amount due, and the defendants have not consented that his Honor might find the fact or waive their right to a trial by jury.

It follows, therefore, that there was no authority in the judge presiding to find the amount of the indebtedness due to the estate of Ray, and for this reason the judgment must be reversed, with directions to make the executrix of N. W. Ray a party plaintiff, and to submit an additional issue to determine the amount of the indebtedness to be secured by the deed to Ray.

Error.

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(339)

MAUD L. HOWARD, ADMINISTRATRIX, v. R. H. WRIGHT.

(Filed 11 April, 1917.)

1. Master and Servant—Negligence—Assumption of Risks.

The defense of assumption of risk is one growing out of the contract of employment and extends only to the ordinary risks naturally and usually incident to the work that the employee has undertaken to perform, and does not include risks and dangers incident to a failure on the part of the employer to perform his own nondelegable duties.

2. Same—Issues—Instructions—Appeal and Error—Harmless Error.

Where the issues are presented in an action for damages against an employer for failing to provide his employee a safe place to work in the performance of his duties, as to negligence, contributory negligence, and assumption of risk, the defense of assumption of risk is referable to the

issue as to contributory negligence, and where the judge has properly charged the jury on that issue, it will not be held for reversible error that he failed to charge them upon the issue as to assumption of risks.

3. Master and Servant—Dangerous Employment—Nondelegable Duties.

The owner, who is employing his workmen, under the superintendence of another, to build his dwelling, may not escape liability for damages caused by the negligent failure of his superintendent to provide a safe scaffold for his employees to work on, as such duty may not be delegated to another to perform and escape such liability.

4. Negligence — Master and Servant — Personal Injury — Declarations — Weight of Evidence—Physicians.

In an action to recover damages for the negligent killing of plaintiff's intestate while engaged in the defendant's employment, declarations made by the intestate as to his physical condition with relation to the injury complained of, to the witness, though not a physician, are competent, the fact that the witness was not a physician going only to the weight to be given his testimony by the jury; the requisite being that such declarations must not be narrative in form, either as to a past condition or the cause of it.

5. Appeal and Error—Conflict — Record — Objections and Exceptions — Questions and Answers.

On appeal, the record will control in case of conflict, as to whether the answer to a question by a witness at the trial was excepted to as well as the question asked him; and where the answer is only incompetent in part, an exception to the whole thereof will not be considered.

CIVIL ACTION to recover damages for death of plaintiff's intestate, caused by alleged negligence of defendant's employees, tried before *Daniels, J.*, and a jury, at November Term, 1916, of DURHAM.

There was evidence on part of plaintiff tending to show that in the fall of 1915 defendant was having a dwelling-house built in said county
(340) by his own employees and under the supervision and direction of W. C. Gibson. That on 10 September, 1915, intestate, one of the employees, while engaged in said employment, fell from a scaffold or platform prepared for carrying on the work and received severe physical injuries, from which he subsequently died. That the platform, erected under the supervision of the said foreman, was improperly constructed and made of improper and inferior material, "common knotty stuff," and while intestate was on same in course of his duty a weak plank broke, throwing intestate to the ground, causing injuries as stated.

On denial of liability, there was evidence on part of defendant tending to show that intestate was an alert, capable, experienced man, who had every opportunity to observe and note the conditions of the platform and the material of which it was made. There was evidence to the effect,

further, that intestate did not die of his injuries, as claimed by plaintiff, but that his death was the result of typhoid fever, subsequently contracted.

On issues submitted, the jury rendered the following verdict:

1. Was the death of plaintiff's intestate, L. A. Howard, caused by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

2. Did the plaintiff's intestate, L. A. Howard, by his own negligence, contribute to his injuries, as alleged in the answer? Answer: "No."

3. Did the plaintiff's intestate, L. A. Howard, assume the risk and danger incident to his employment, as alleged in the answer? Answer: "No."

4. What damages, if any, is the plaintiff entitled to recover? Answer: "$5,000."

Judgment, and defendant excepted and appealed.

Brawley & Gantt for plaintiff.

Fuller, Reade & Fuller for defendant.

HOKE, J. There was ample evidence of negligence in respect to the platform, both as to the material of which it was made and the manner in which it was built, two of the witnesses testifying that when it was being put up one of the employees said to the foreman: "You are fixing a trap there to throw men down and break their necks," and the foreman replied: "Let the men look where they walk, and if they fall the ground will catch them." Defendant, however, contends that there was error in the proceedings below as to the assumption of risk on the part of the intestate, in that his Honor did not lay down any rule of law to guide the jury in the determination of that issue, but only stated the differing positions of the parties in reference to it. The statements (341) of his Honor on these questions were so full and direct that we might well hold the jury were sufficiently instructed on the issue, but if it be conceded that this objection to the charge is well taken, it could not be held for reversible error on this record. Under the rule prevailing in this jurisdiction, the defense of assumption of risk is one growing out of the contract of employment, and extends only to the ordinary risks naturally and usually incident to the work that an employee has undertaken to perform. It does not include risks and dangers incident to a failure on the part of the employer to perform his own nondelegable duties. These are usually considered as extraordinary risks, which an employee does not assume and which are not available as a defense unless they are of such kind and character as to render an employee guilty of

contributory negligence who knowingly continues to work on under the conditions they present. This position has been repeatedly approved in our decisions and may be taken as the established rule for the trial of causes controlled by the principles prevailing in this jurisdiction. *Yarborough v. Geer,* 171 N. C., 335; *Norris v. Holt-Morgan Mills,* 154 N. C., pp. 474-485; *Pressly v. Yarn Mills,* 138 N. C., 410; *Marks v. Cotton Mills,* 138 N. C., 401; *Hicks v. Mfg. Co.,* 138 N. C., pp. 319-327.

In *Yarborough's case* it was held: "The rule that the servant assumes the risks of 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."

In *Norris' case* it was said: "The charge to the jury was, we think, in some respects more favorable to the defendant than it was entitled to, and particularly as to the doctrine of assumption of risk, as the employee never assumes the risk of an injury caused by the failure of the employer to perform a duty which he cannot delegate, and the duty to provide a reasonably safe place to work in is one of them."

In *Pressly v. Yarn Mill, supra,* it was held: "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 such defect is obvious and so immediately dangerous that no prudent man would continue to work on and incur the attendant risks."

And in *Hicks v. Mfg. Co.* it was said: "To have such effect, that is, to bring the knowledge of such observed conditions of increased hazard imputable to the master's negligence into the class of ordinary risks which the employee is said to assume, the danger must be obvious and so imminent that no man of ordinary prudence, and acting with such
(342) prudence, would incur the risk which the conditions disclose," citing Labatt on Master and Servant, secs. 279a, 296, 297, 298, 298a; Beach on Contr. Neg., sec. 361; *Sims v. Lindsay,* 122 N. C., 678; *Lloyd v. Hanes,* 126 N. C., 359; *Patterson v. Pittsburg,* 76 Pa. St., 389; *Kane v. R. R.,* 128 U. S., 95."

It will thus be seen that the conduct of an employee, in working on in the presence of dangerous conditions caused by breaches of nondelegable duties on the part of the employer, the present case being one of them, is referred by our law to the principles of contributory negligence, and the question, in this aspect of the matter, having been determined against defendant on a separate issue, the second, and under a charge free from any valid exception, there has no harm come to defendant in the alleged failure to charge more definitely on the third issue as to the assumption of risk.

It was further objected that in the evidence of the administratrix, testifying as to the effect of the fall on her husband and his condition following it, the plaintiff was allowed to ask witness as to the husband's declarations, the objection and the form in which presented and the answer to it appearing in the record as follows: the witness testifying, as stated, among other things, said: "He always went bent with his stick—never was straight again like he was before. He had a cough; he would cough real often; he would cough often during the day and night, and always spit up blood in what he spit, and called my attention to that. He continued to cough from the time he fell until he died. I never noticed him ever coughing before he was injured."

Question: "State what your husband said, if anything, about his condition as to his suffering."

Objection in apt time by defendant, as declaration of a dead man is not competent. Objection overruled, the court saying: "I guess the declaration of a patient when sick is competent."

Exception by defendant.

"He said he was hurt, and he believed he was hurt inside somewhere, because he always hurt there, and he said it was going to kill him; he would never get over it. He showed me the back of his head, neck, and breast where it hurt him. He was 35 years old in November. He died December 6th, a few days after his birthday. Some of the blood he vomited was thin and some thick—seemed to be clotty. He vomited about a small cupful on two occasions—one the afternoon of the injury and the other the following night."

It is very generally held that when the physical condition of a person is the subject of inquiry, his declarations as to his present health, the condition of his body, suffering and pain, etc., are admissible in evidence.

Some of the courts elsewhere, and especially in the later deci- (343) sions, have shown a disposition to restrict the reception of such testimony, but others are more liberal in reference to it, our own Court being among them. All of the cases here and elsewhere hold that such declarations must not be narrative in their nature, either as to a past condition or the cause of it. *Lush v. McDaniel,* 35 N. C., 485; Jones on Evidence, p. 345. But when, as stated, a man's physical or mental condition is a circumstance involved in the issue, his declarations, having a reasonable tendency to show his present health, condition, etc., will be received as pertinent evidence, and, when admissible on this ground and for this purpose, the fact, the mere fact that they may be self-serving or that they are made *post litem motam* or that the declarant may or may not be dead, will not affect the principle. *S. v. Harris,* 63 N. C., 1;

Biles v. Holmes, 33 N. C., 16; *Quaife v. Chicago, N. W., etc., R. R.,* 48 Wis., 513, reported also in 33 Am. Rep., 821; *Central R. R. v. Smith,* 76 Ga,. 219; *Bagley v. Mason,* 69 Vt., 175; *Northern Pacific Ry. v. Urlin,* 168 U. S., 271; *Keyes v. City Falls,* 107 Iowa, 509; *Indiana R. R. v. Maurer,* 160 Ind., 25; 15 A. & E. (2d Ed.), 315; 4 Chamberlain Modern Law Ev., secs. 2627-2635; 1 Elliott on Evidence, sec. 523 *et seq.* When declarations of this kind are self-serving they have been rejected altogether in one or two jurisdictions. In others, they are admitted only when made to a physician consulted about the case. This is said to be the rule in Massachusetts. But while in the instance of self-serving declarations a judge may properly admonish a jury that the declarations should be received with cautious scrutiny, our cases hold that the considerations suggested only go to the weight of the evidence and not to its competency, and that the declarations must be submitted to the jury. In *S. v. Harris, supra,* a declaration of deceased as to existence of a burn on the abdomen, *Reade, Jr.,* delivering the opinion, said: "The declarations of the deceased as to the condition of his body and health at the time when the declarations were made fall under the head of natural evidence. Such declarations are admissible in the very nature of things. No physician would undertake to prescribe for a patient without inquiry of him how he felt, where were his pains, and the like. What weight the physician will give to the patient's declarations must be for his consideration, and so what weight the jury will give is for their consideration." And in *Biles v. Holmes* declarations of a slave as to his having headache and his inability to work, *Pearson, J.,* for the Court, said: "The object of the plaintiff was to show the condition of his slave, that he had not recovered from the effect of the blow and was permanently injured. For this purpose it was competent to prove how he acted, how he looked, and of what he complained. In fact, this is almost the
(344) only kind of evidence by which the condition of body or mind can be ascertained; it is natural evidence or the evidence of facts, as distinguished from personal evidence or the testimony of witnesses. Best on the Principles of Evidence.

"The declarations of a patient to his physician are strong evidence of the state of his health, and only differ from his declarations to a third person because it is less probable that he will feign or state falsehoods to one by whom he hopes to be relieved; but this consideration only affects the degree of credit due to such declarations and does not affect their admissibility. Whether expressions of pain are real or feigned must be determined by the jury. 1 Greenleaf Ev., 126.

"If it be material to ascertain the mental condition of an individual, his conversation at different times is admissible. Upon the same ground,

it being material to ascertain the bodily condition of the slave, his complaints of headache when exposed to the sun, and his declarations that he was unable to work in the sun or to endure hard labor, are admissible. True, one may feign the language of a madman or may utter false complaints of pain, but the law does not on this account exclude what may be the only mode of proof. It is left to the good sense of the jury, connecting the declarations with the acts and looks of the party and other circumstances, to say how far such evidence is to be relied on."

In *Northern Pacific v. Urlin, supra, Associate Justice Shiras,* delivering the opinion, quotes with approval from Greenleaf on Evidence as follows: "Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof of its existence, and whether they were real or feigned is for the jury to determine. So, also, the representations by a sick person of the nature, symptoms, and effects of the malady under which he is suffering at the time are original evidence. If made to a medical attendant, they are of greater weight as evidence, but if made to any other person they are not on that account rejected. Greenleaf Ev. (14th Ed.), sec. 102."

A very correct and inclusive statement as to declarations of this kind, deducible from the better considered decisions on the subject, is contained in a note to *Quaife v. R. R.,* 33 Am. Reports at page 829, as follows: "The conclusion, therefore, is: (1) That the complaints and statements of the injured party at the very time of the occurrence, not only as to bodily suffering but as to the circumstances of the occurrence, are admissible as *res gestæ.* (2) That the statements of the injured party subsequently and not substantially at the time of the occurrence, (345) as to the circumstances of the occurrence, are not admissible, whether made to a physician or to a nonexpert. (3) Complaints and statements of the injured party as to his present physical condition, although subsequently to the occurrence and indeed after suit is brought for the injuries, are admissible, whether made to a physician or to one who is not an expert."

In some courts, too, it is held that when the declarant is alive, the statutes enabling a party to testify should have the effect of precluding the admissions of such declarations, but this is said by an intelligent writer on the law of evidence to be against the weight of authority, 1 Elliott, sec. 526, citing many authorities in support of his view and quoting more especially from *Board, etc., v. Leggett,* 115 Ind., pp. 544-47-48.

Applying the principle of these cases, the question certain was competent, and this was all that the record shows was objected to. Much of the answer is properly responsive and also admissible; we are inclined to the opinion that all of it is so, for the declaration that the hurt was going to kill him and he would never get over it, when considered in reference to the entire answer and the attendant circumstances, may be very properly interpreted as only and in effect a declaration as to the character and intensity of his pain or hurt. But even if this particular part of the answer should be held incompetent as giving the inference of the witness, there was no objection made to it on that ground, and no motion to strike it out, and the objection being to the entire answer, part of which was competent, it would be necessarily overruled. *Goins v. Indian Training School,* 169 N. C., 736; *Carmichael v. Tel. Co.,* 162 N. C., 333; *Smathers v. Hotel Co.,* 167 N. C., 469; *S. v. Ledford,* 133 N. C., 722; *Ricks v. Woodard,* 159 N. C., pp. 647-650. In fact, as heretofore stated, the objection as disclosed by the record was only to the question, which was entirely proper, and only the assignment of error making objection to the answer. It is well understood that in case of conflict the record will prevail. *McDonald v. McLendon, ante, p.* 172.

We find no error in the trial, and the judgment in plaintiff's favor must be affirmed.

No error.

Cited: Wooten v. Order of Odd Fellows, 176 N.C. 62; *Thompson v. Oil Co.,* 177 N.C. 282, 283; *Davis v. Shipbuilding Co.,* 180 N.C. 76; *Medford v. Spinning Co.,* 188 N.C. 128; *Crisp v. Thread Mills,* 189 N.C. 92; *Martin v. Hanes Co.,* 189 N.C. 645; *Fowler v. Conduit Co.,* 192 N.C. 17, 18; *S. v. Jeffreys,* 192 N.C. 320; *Maulden v. Chair Co.,* 196 N.C. 124; *Bryant v. Construction Co.,* 197 N.C. 641; *McCord v. Harrison-Wright Co.,* 198 N.C. 745; *Hunt v. R. R.,* 203 N.C. 108; *Carlton v. Bernhardt-Seagle Co.,* 210 N.C. 655; *Munden v. Ins. Co.,* 213 N.C. 506.

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(346)

S. C. GRAY v. J. M. LENTZ.

(Filed 11 April, 1917.)

1. Register of Deeds—Marriage License—Statutes—In Pari Materia—Reasonable Inquiry.

Revisal, sec. 2090, imposing a penalty on the register of deeds for issuing a license without reasonable inquiry for the marriage of persons to which there is lawful impediment, or where either is under the age of 18 years,

and section 2088, requiring that written consent of the parent be filed with him, should be construed together; and where the reasonable inquiry as to the age has been made by the register of deeds, he is not subject to the penalty, because he has not required the written consent of the parent provided for in section 2088.

2. Statutes—Remedial—Register of Deeds—Marriage Licenses.

Revisal, secs. 2090 and 2088, requiring reasonable inquiry to be made by the register of deeds as to the age of the parties, etc., before issuing a marriage license to them, are remedial, and should be construed to prevent the mischief and advance the remedy intended.

3. Register of Deeds—Marriage License—Reasonable Inquiry—Questions of Law—Trials.

The question of the reasonableness of the inquiry required by Revisal, secs. 2088 and 2090, to be made by the register of deeds before issuing a marriage license, is one of law where the facts are not disputed.

4. Same—Oath of Applicants—Unknown Applicant.

Where it appears that a register of deeds issued a marriage license for a female under the age of 18, against the consent of her parents, living in another county, but accessible by telegraph and telephone, upon the application of two parties unknown to him, who proved to be of bad character, and of whose character he made no investigation, and it appears that one of them, claiming to have known the female all of her life, had refused to swear to her age upon oath, and returned with the other, who also claimed to have known her, and who stated she was 18 her last birthday, and produced an unsigned letter purporting to be the parents' consent, and upon both of them making oath as to the age given, the certificate was issued: *Held*, insufficient as to the question of "reasonable inquiry," and a charge of the trial court submitting the case to the jury is reversible error.

CIVIL ACTION, tried before *Starbuck, J.*, in FORSYTH County Court, and judgment for defendant afterwards affirmed in the Superior Court at September Term, 1916, *Long, J.*, presiding.

The action was brought to recover the penalty of $200, allowed by Revisal, secs. 2088 and 2090, for issuing a marriage license contrary to the provisions of those sections.

The material facts are that one Charles Stanley applied to defendant on 28 August, 1915, for a license to marry Myrtle Gray, daughter of plaintiff, who was at the time 16 years and about 4 months old. (347) Stanley went to the defendant's office with John Hull, who was asked by the defendant, according to Hull's evidence, if he knew the age of the girl, to which he replied that he had known her all his life, and that "to the best of his knowledge or the best he could find out, she was about 18 years old—looked like a girl about 18." The defendant told him "he would have to swear to her age," and he said: "I could not do that," and defendant then said: "You can't get the license." Chris

Edwards was then brought to the office, who, John Hull testified, looked like he was drunk—was drinking the day before and was drunk on the train and fighting the night of August 28. Defendant stated that he did not appear to have been drinking when in his office in the afternoon. Chris Edwards stated to the defendant that he knew Myrtle Gray's age, was her first cousin and had known her all her life, and that she was 18 years old on her last birthday. Defendant then warned both Stanley and Edwards as to the seriousness of the oath they were about to take, and replied: "We can take that oath all right; we know what we are doing." The oath was administered and signed by them and the license issued.

Defendant testified:

"Q. Told you where Mr. Gray lived? A. Yes; and I asked Mr. Stanley about phoning, and he said they had no phone.

Q. You knew there was a telegraph station here and at Mount Airy? A. Yes; but he said Mr. Gray lived out in the country.

Q. The truth of the whole matter is, that you relied solely on what Chris Edwards and Charlie Stanley said? A. No.

Q. I will ask you if you didn't rely solely on the statements and information furnished you by Charlie Stanley and Chris Edwards, and the affidavit furnished you and on the license? A. Of course; that's what I had to do.

Q. And nothing else but that? A. No; had to rely on what they all said.

Q. You didn't phone Mr. Gray? A. No, sir.

Q. You didn't telegraph? Answer: No, sir.

Q. Didn't make any inquiry except from Chris Edwards and Charles Stanley? A. Mr. Hull.

Q. Oh, well, that was in the morning. You didn't go out and see anybody in town about it? A. No, sir.

Q. Did you know Chris Edwards and Charlie Stanley up until that time—until they came in your office that day. A. No, sir.

Q. Had you ever seen them? A. I don't know; I might have.

Q. To know them? A. No, not to know them.

(348) Q. You didn't know what kind of character either one of them had? A. No, sir."

The defendant knew that Charles Stanley and the Grays lived in Surry County and that Stanley had come to Forsyth County for a marriage license. Defendant further testified:

"Q. Isn't this the truth about it: after you had found a man that would swear to the affidavit, Chris Edwards and Charlie Stanley—after they had agreed to swear to that affidavit, you issued the license—isn't that the truth? A. No. After he brought Mr. Edwards in, and I explained the oath to them, and they both took it, I issued the license."

There was some evidence given by defendant's witness W. A. Mickle that when Stanley came back in the afternoon he showed him an unsigned note which he said was from the father and mother of the girl, but that he told him it would not do, as there was no evidence that it was genuine, and when defendant came in he spoke to him about it and added that "he had turned it down," whereupon defendant said: "It was the same parties who had been in that morning and did not have sufficient evidence of the girl's age." The witness W. A. Mickle testified further that the license was issued on the affidavit of Stanley and Edwards as shown on its face. There was evidence of the bad character of Charles Stanley and Chris Edwards and that Edwards is not related to the girl, and is not known by her family, and was not heard of before. He is a cousin of the Allens of Hillsville, Va. The girl lived with her parents in Mount Airy, and the family had access to a telegraph station nearby and a phone across the street, though there is no phone in their home. The marriage took place on 29 August, 1915, after the license was issued, but the father did not know that the license had been issued until Monday, 30 August, when he read the notice of it in the newspaper. He then wrote to the court clerks in the adjoining counties, "and fought against it." He wrote to Stuart at Hillsville in Virginia, but did not wire or phone to Mr. Lentz, because he did not think Charles Stanley would leave his own county to go to another, in the same State, for a license. The parents had not consented to the marriage of their daughter. Defendant inquired of Stanley why they had come from Surry County for a license, but what he or they said in answer to his inquiry does not appear. None of the parties, John Hull, Charles Stanley, and Chris Edwards, was known by defendant, but they were absolute strangers to him. There were telephone and telegraph lines connecting Mount Airy with Winston-Salem.

The court charged the jury, in part, as follows: "The law requires that a register of deeds should make such inquiry as a prudent business man, acting in the most important affairs of life, would (349) make; to make such inquiry not as a mere matter of form, but carefully and conscientiously, and as a prudent business man—I will quote again—acting in the most important affairs of life, would make. Now, if he did make such inquiry as I have explained to you that the law requires him to make, then you would answer the second issue in his favor, 'No.' If he failed to make such inquiry, then you answer the issue in favor of the plaintiff Gray, 'Yes.' The evidence shows, although the register of deeds had no information to that effect, that Stanley and Edwards or at least there is evidence to the effect that Stanley and Edwards were men of bad character. The evidence, if believed, shows that all three of these men—Stanley, Edwards, and Hull—were strangers

to the register of deeds, and that he had no information in regard to them from any person outside of themselves, and that he made no attempt to get in communication with the parents of the girl, but that he issued the license from information obtained from these three men, and that is all the information that he had. It is for you to say whether or not he discharged his duty under the rule of law as I have laid down to you. It is for you to say whether or not he made reasonable inquiry. The plaintiff contends that he did not make the inquiry that a man of ordinary prudence would make in the discharge of important business affairs, but relied upon the statements of men who were utter strangers to him. On the other hand, the defendant contends that, all things considered, he was taking the affidavit of two of the men—one of them, as he was informed, being her cousin, although the evidence introduced by the plaintiff, if believed, shows as a matter of fact that he was not her cousin; and also upon the statement of Mr. Hull; all of the parties stating to the register of deeds that they had known the girl practically all their lives, or her life, and that that was sufficient to convince a man of ordinary prudence, in the discharge of important business affairs, that he could safely rely and act upon their statement, upon information laid before him in issuing the license."

The jury returned the following verdict:

1. Was Myrtle Gray, at the time of the issuing of the marriage license, under the age of 18 years, as alleged in the complaint? Answer: "Yes."

2. Did the defendant knowingly or without reasonable inquiry as to the unlawful impediment issue a marriage license to Charley Stanley and Myrtle Gray, as alleged in the complaint? Answer: "No."

3. If so, what sum, if any, is the plaintiff entitled to recover as penalty therefor? No answer.

Judgment for defendant upon the verdict, and plaintiff appealed.

(350) *E. C. Bivins and Manning & Kitchin for plaintiff.*
L. M. Swink and Gilmer Korner for defendant.

WALKER, J., after stating the case: There is no real controversy about the material facts in this case, and if they are considered in the view most favorably to the defendant, our opinion is that there was not reasonable inquiry by the defendant, so that it could appear to him that the parties were 18 years old or probably that there was no legal impediment to the marriage between them. Revisal, secs. 2088, 2090, which provides that a register of deeds "who shall knowingly or without reasonable inquiry, personally or by deputy, issue a license for the marriage of any two persons to which there is any lawful impediment, or where

either of the persons is under the age of 18 years, without the consent required by law, shall forfeit and pay $200 to any parent, guardian, or person standing *in loco parentis* who shall sue for the same." Section 2090. It is provided by section 2088 that written consent of the parent to the marriage shall be filed with the register where either of the parties is under 18 years of age, but the two sections have generally been construed together, as they relate to the same subject. The statute is an exceedingly important one and was enacted to prevent hasty and improvident marriages. It is remedial in its nature, as it furnishes the means, and the remedy, for the forestalling of all evasions or violations of its provisions by the tricks and contrivances of the ardent and artful lover, and should be construed and enforced so as to suppress the mischief and advance the remedy. The duty of the register is to demand the production of the written permission of the parent, or to act with care and caution in ascertaining the age of the parties, by a reasonable and proper inquiry, such as a man of ordinary prudence would make in important affairs of his own. It has been held that when the facts are not disputed, what is a reasonable inquiry is a question of law. *Joyner v. Roberts,* 114 N. C., 389; *Joyner v. Harris,* 157 N. C., 295. Some rules have been formulated for our guidance in cases of this kind, and they will be found in the last cited case. They are founded upon prior decisions of this Court, and are deemed to be sound and firmly settled. We need not restate them here, but simply refer to several cases where, as we think, the law has been stated directly contrary to the charge of the court upon the vital and decisive question involved in this appeal. *Justice Merrimon* said: "The license shall not be issued as of course to any person who shall apply for it. The register is charged to be cautious and to scrutinize the application; it must appear probable to him, upon reasonable inquiry when he has not personal knowledge of the parties, that the license may and ought to be issued. The (351) probability upon which the register should act is not such as arises from conjecture . . . but from inquiry of trustworthy persons known to the register who can and do give pertinent information called out by similar inquiry, presently or within a reasonable time; from the examination of pertinent records and entries; from inquiry as to like events, and from the like inquiries; and the evidence thus elicited should render it probable—more likely than the contrary—that the license should be issued in pursuance of the application for the same. . . . To issue a license to marry 'without reasonable inquiry,' without care and scrutiny, and when it does not appear probable to the register that it may and ought to issue, as the law contemplates, is a perversion of the statute, disappoints its just purpose, and often-times

brings distress and ruin upon individuals and families. To prevent such evils the statute provides heavy penalties. . . Surely such inquiry in respect to such a matter was not reasonable nor, did the inquiries and the information, so unsatisfactory, make it appear probable that the female was of the age of 18 years. The mere personal appearance of an entire stranger was not evidence to create such probability; it was scarcely ground for conjecture. That an entire stranger, not vouched for, should make such an application was rather ground of suspicion that it was not made in good faith, and this should have prompted further and satisfactory inquiry before issuing the license. *Coley v. Lewis,* 91 N. C., 21; *Bowles v. Cochran, supra.*" *Williams v. Hodges,* 101 N. C., 300.

The rule is well stated in *Trolinger v. Boroughs,* 133 N. C., 315, by *Justice Connor,* as follows: "While we may not prescribe any rule for the guidance of the register, it would seem that 'reasonable inquiry' involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identified and approved by some reliable person known to the register. This is the rule upon which banks act in paying checks, and surely in the matter of such grave importance as issuing a marriage license the register should not be excused upon a less degree of care. It is said that if the register fails to issue the license upon a proper application he is liable to the penalty. Certainly this statute would not be construed to impose such penalty unless it was made to appear that such information was furnished the register as would induce a man of ordinary prudence upon reasonable inquiry to issue it."

The facts in this case, which are claimed to show reasonable inquiry, are certainly no stronger than those in *Trolinger v. Boroughs,* and we do not think they are as strong. In *Cole v. Laws,* 104 N. C., 651, the rule is thus stated in the syllabus: "When a register of deeds
(352) issues a license for the marriage of a woman under 18 years of age, without the assent of her parents, upon the application of one of whose general character for reliability he was ignorant, and who falsely stated the age of the woman, without making any further inquiry as to his sources of information: *Held* that he had not made such reasonable inquiry into the facts as the law required, and he incurred the penalty for the neglect of his duty in that respect." Likewise, in *Morrison v. Teague,* 143 N. C., 186, it was held that, "In an action against a register of deeds to recover the penalty under Revisal, sec. 2090, for issuing a marriage license contrary to its provisions, where the uncontradicted evidence showed that the register took the word of the prospective bridegroom and his friend, neither of whom he knew, as to

the age of the young lady, and made no further inquiry of any one, the court should have given the plaintiff's prayer for instruction, that as a matter of law defendant failed to make reasonable inquiry as to the age of the plaintiff's daughter." The present *Chief Justice* said in *Laney v. Mackey,* 144 N. C., at p. 634: "The application was made by a man whose name was not known to the defendant, whom he does not show to have been trustworthy, and to to whom the only evidence is that his general character is bad. Such inquiry as the defendant made in this case was not reasonable. It was purely perfunctory and did not furnish the security against a violation of the law required by a proper observance of the requirements of the statute." The same rule was adopted by the Court in *Agent v. Willis,* 124 N. C., 29, where *Justice Montgomery* says, at p. 33: "The defendant seemed to think that an oath on the part of anybody was all that was necessary to authorize him to issue the license. But the character of the witness and accuracy of information are the things that the register of deeds should look to when he issues a license for marriage, in cases where there is doubt about the age of the parties." The language of *Justice Brown,* in *Morrison v. Teague,* 143 N. C., 186, follows closely the facts of our case, and is very suggestive of the real principle and established rule which should control the decision of it: "The learned counsel for the defendant, Mr. Gwaltney, most earnestly contended in his argument that upon a fair interpretation of the words 'reasonable inquiry,' the charge of his Honor should be sustained. Notwithstanding we find ourselves unable to reconcile this view with very recent decisions of this Court, we agree with counsel that upon the evidence in the record the question was one of law, and that his Honor was correct in so holding. The uncontradicted evidence shows that the register took the word of the prospective bridegroom and his friend as to the age of the young lady, and made no further inquiry of any one; that the register did not know either Ken- (353) nedy or his friend. The register's suspicions seem to have been aroused, for he inquired why they applied for license in Taylorsville, as the girl lived in Iredell; nevertheless, he made no further inquiry." *Chief Justice Smith* said in *Cole v. Laws,* 104 N. C., 656, when referring to facts not substantially dissimilar to those in this case: "In a matter involving such grave consequences and fixing her further life, did the deputy make any reasonable effort to inform himself of the fact, and act with a prudent regard to a parent's right in granting and so soon following the license by consummating the marriage itself? The case cited for the defendant (*Bowles v. Cochran,* 93 N. C., 398) is not at variance with the view taken of the facts of the present case. There a paper, without signature, however, was produced before the register, giving the age, by

one known to him to be of good character and trustworthy, and the applicant stated that he knew her age to be that stated in the writing—18 years. There was nothing calculated to awaken suspicion in the register's mind of the truthfulness of the representations, and it was held that the penalty had not been incurred (in this case). No such favoring circumstances attend the action of the deputy to excuse his precipitate action. He manifests an inexcusable indifference to the results of his action, and risks the well-being of others upon representations, not themselves suspicious, which have no outside support. This case is not like *Williams v. Hodges,* 101 N. C., 300, in which more diligence was shown in finding out the facts and the true age of the infant *feme;* and yet it was held that the register had been remiss and culpably careless in issuing the license. In the opinion *Merrimon, J.,* says: 'To issue a license to marry, without reasonable inquiry, without care and scrutiny, and where it does not appear probable to the register that it may and ought to issue, as the law contemplates, is a perversion of the statute, disappoints its just purpose, and oftentimes brings distress and ruin upon individuals and families. To prevent such evils that statute provides heavy penalties.'" In *Furr v. Johnson,* 140 N. C., 157, *Justice Connor* repeated the rule in language which we take from the 4th headnote: "While the court may not prescribe any rule for the guidance of the register, it would seem that 'reasonable inquiry' involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identified and approved by some reliable person known to the register." The case of *Joyner v. Harris,* 157 N. C., 295, while in some respects not like this one, is yet, in principle, not unlike it. It referred to the rule which, as we have said, had been settled for some time in several decisions of this Court, that the register should have some reliable information before he
(354) issues the license, and not act blindly or too confidingly upon the statements of mere strangers, and especially those who are directly interested and under a strong temptation to falsify, as here. We adopted and applied the familiar rule formulated in previous cases and held that sufficient inquiry had not been made. It is true that in *Joyner v. Harris* we treated the information given as to her age as practically a statement of the girl herself; but the case is otherwise decisive of this one. It was there said: "If we should hold that a register of deeds can satisfy himself as to the essential facts upon such an inadequate investigation as was made in this case, we would defeat the very object and purpose of the statute to throw safeguards about the young and inexperienced, who would by reason of their youthful impulses be liable to enter into so solemn and serious a relation lightly and unadvisedly and

not soberly, discreetly, and reverently, as they should do and as the best interests of society require to be done."

The fact that the register administered an oath to the applicant and his friend does not, of itself, exonerate him. He is permitted by the statute to do so, that he may the better elicit the facts, and his doing so or failing to do so would be but a circumstance for the jury to consider. *Furr v. Johnson, supra.* The defendant relied upon *Bowles v. Cochran,* 93 N. C., 399; *Walker v. Adams,* 109 N. C., 481, and especially on *Harcum v. Marsh,* 130 N. C., 154. It appeared in *Bowles v. Cochran* that "the person who produced the paper (as to the age), was known by the register to be a man of good character and reliable, and he stated that he knew the statement in the paper to be true." Not at all like this case, but comes directly within the correct rule. *Walker v. Adams* was a case of the same kind. The party was well known to the register, and there was nothing against his character, and this was treated by the court as some evidence of his good character and reliability upon which the register might depend. The last case, *Harcum v. Marsh,* while not exactly like this case, there being at least a legal shade of difference, has been criticized and its weight and authority as a precedent greatly diminished and impaired, if the case has not been disapproved. Referring to that case in *Trolinger v. Boroughs,* 133 N. C. at p. 315, *Justice Connor* said: "It may not be easy to reconcile the opinion of the court, that the defendant in that case was not liable, with several cases in our reports defining the term 'reasonable inquiry.'" And again at p. 318: "Without reviewing the several cases, we think that they, certainly with the exception of *Harcum v. Marsh, supra,* lead to the conclusion that the defendant did not make reasonable inquiry." Besides, *Justice Merrimon* said in *Williams v. Hodges, supra,* at p. 304: "The mere personal appearance of an entire stranger was not evidence to create such probability (as to there being no legal impediment)—it was (355) scarcely ground for conjecture." If those cases conflict with the ones we have cited as stating the correct rule, we would not regard them as controlling.

In this case the evidence shows that the defendant relied exclusively upon the statements of mere strangers, who proved to be men of bad characters. They either knew nothing of the girl's age or, if they did know it, they swore falsely as to the fact, for she was just 14 years old at the time. John Hull had put the defendant on his guard by refusing to swear to her age, or even that it was about 18 years, though he had known her, he stated, all her life. Chris Edwards, who turned out to be a perjurer, and appears to have been a bad man generally, was not calculated by his demeanor, even if not drunk, to inspire confidence in

his statements. His manner was not altogether that of a trustworthy man. But when the evidence is sifted, we find nothing but the bare statements of entire strangers upon which the defendant based his action in issuing the license, and we hold that there was no "reasonable inquiry" within the meaning and intent of the law. If a register is justified in issuing a license for a marriage of two young persons under the circumstances disclosed in this record the statute would be of no practical value; its main object would be defeated, and it had just as well be repealed, because there is no ordinary man who could not make as good a showing, and sometimes with little effort, as we find in this evidence. The convenient and accommodating friend is not always hard to find. The statute was passed to prevent this kind of imposition upon the register. The trial court should have charged the jury, as requested by the plaintiff, that there was no reasonable inquiry, if the facts were as stated by the witnesses.

There was error in affirming the judgment of the county court, and it will be so certified, to the end that proper proceedings be taken to set aside the judgment and verdict, so that there may be a new trial.

Error.

Cited: Julian v. Daniels, 175 N.C. 552; *Snipes v. Wood,* 179 N.C. 354, 356; *Lemmons v. Sigman,* 181 N.C. 240; *Spencer v. Saunders,* 189 N.C. 184; *Worthy v. Knight,* 210 N.C. 499.

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B. C. CLINARD ET AL V. CITY OF WINSTON-SALEM.

(Filed 11 April, 1917.)

1. Municipal Corporations—Cities and Towns—Building Permits—Issues—Mandamus.

Where a city, under an ordinance, with legislative authority in such matters, has issued a permit to build an additional room to a residence, and thereafter has recalled the permit pending the settlement of a dispute as to whether it would be situate upon an alley claimed to have been widened, the word "unlawful" used in the issue as to the refusal of the city authorities to grant the permit is a matter of law and surplusage; and upon the finding by the jury that the alley had not been widened and that the room would not be thereon, a mandamus is the proper remedy, though the form of the issue was incorrect.

2. Municipal Corporations—Cities and Towns—Building Permits—Threats —Trials—Matters of Law.

Where under a valid ordinance a city has recalled a permit to build an additional room to a residence, and its officer has informed the owner that he would be liable under the ordinance if he built it until a certain matter in dispute as to the width of the alley had been settled, the circumstances afford no evidence that the owner had been prevented from using his own property by threats of indictment arbitrarily made, and an issue to this effect, in an action by the owner, should be answered "No" as a matter of law.

3. Municipal Corporations—Cities and Towns—Building Permits—Judicial Powers—Damages.

The exercise of the power by a municipality, under valid ordinance, to grant or refuse a building permit or license, is a governmental function, for which the city cannot be held liable in damages; though liability may attach to the officials, individually, if acting corruptly or oppressively in refusing it.

ALLEN, J., concurs; WALKER, J., concurs in the concurring opinion.

APPEAL by defendant from *Long, J.*, at November Term, 1916, of FORSYTH.

L. M. Swink, David H. Blair, Gilmer Korner, Jr., for plaintiffs.
Manly, Hendren & Womble for defendant.

CLARK, C. J. This is an action for damages and a mandamus because of the refusal of the defendant to issue a building permit.

The defendant had issued a permit to put up an additional room to a building, but, it subsequently coming to the knowledge of the authorities that it was claimed that the location was part of an alley, withdrew the permit. Whether the additional room sought to be built would be within the bounds of the alley depended on whether the alley (357) had been widened by dedication and user. The alley had originally been laid off in 1890, 15 feet wide, but it was claimed that subsequently the heirs to the property, in the partition thereof, had set the houses back and made the alley 18 feet wider, and that it had been recognized and used by the public as of that width, adversely and of right, for more than twenty years. There was evidence to that effect, and the city revoked the license until this matter could be determined.

In this action th jury found that the width of the alley had not been increased, and while the issue, "Did the defendant unlawfully refuse to issue the permit for building the house?" was found in the affirmative, the word "unlawfully" must be treated as surplusage, for that was a conclusion of law and not justified by the evidence any further than

meaning that the plaintiff was entitled to have such license issued, which should have been the form of the issue.

The second issue, "Were plaintiffs prevented from using and building on their property by threats of indictment arbitrarily made by defendant?" the court should have instructed the jury to answer "No." The evidence was that O. B. Eaton, the witness for the defendant, told the plaintiff's foreman that the permit to build the additional room had been withdrawn and that it would be a violation of the ordinance to proceed with the building until the matter was settled and would make him liable for indictment, which was correct.

The charter of the defendant provides: "The board of aldermen shall have the power to enact ordinances in such form as they may deem advisable, as follows: . . . To grant permits for the construction of buildings and other structures, and to prohibit the construction of any building or structure which in the judgment of the board of aldermen may be a nuisance or of injury to adjacent property or to the general public; . . . to regulate and control the character of buildings which shall be constructed or permitted to be and remain in any part of the city of Winston; . . . to define and establish fire limits and prevent the location of wooden or other buildings within said fire limits and in any part of the city where they may increase the danger of fire; to regulate and describe what character of buildings shall be constructed within the said limits, and provide for the conditions under which such buildings may be erected."

In pursuance of this authority, the defendant enacted the following ordinance:

"*Erecting building without permit.* It shall be unlawful for any person, firm, or corporation to erect any building within the corporate limits of the city of Winston without first submitting the plan of
(358) the same to the mayor and chairman of the street committee and receiving a written or printed permit signed by the mayor and said chairman to erect the same. Any person, firm, or corporation violating the foregoing ordinance shall be fined $25; and in case any person, firm, or corporation in violation of said ordinance persists in the erection of any building after notice is served on him, signed by the mayor of the city of Winston, notifying him to suspend the building thereof, each day or part of a day that such person, firm, or corporation so persists in building shall constitute a separate offense."

The exercise of the power to grant or refuse the license to erect a building was a governmental function, and if, as a jury finds in this case, the reason given for the refusal of the license was erroneous, the plaintiff's remedy was by a mandamus, which has been awarded them; but in

no aspect would the city be liable in an action for damages, and a nonsuit should have been granted on the third issue, for no cause of action had been stated in that respect.

If the officials charged with the exercise of the duty should have corruptly or oppressively refused the license asked, an action might have been laid against them individually; but there is no such allegation in the pleadings. They are not parties individually, and there is no proof tending to sustain such charge against them if it had been made. The city, even in that event, would not be liable in damages for such conduct on the part of its officials. *McIlhenney v. Wilmington,* 127 N. C., 146 N. C. (see Anno. Ed.). These principles are elementary law, and need not be reiterated, *Price v. Road Trustees,* 172 N. C., 84.

A municipal corporation has a double character. In one aspect it is a representative of the sovereign charged with certain governmental, legislative, judicial, and discretionary powers and duties; in the other it is similar to a private corporation, with duties purely ministerial, corporate, or private, with powers granted of a business nature for the especial emolument or benefit of the municipality. The rule is well settled that in the former capacity the corporation is liable to an action for damages resulting from the conduct of its agents only where a statute imposes such liability. When such officers are discharging a governmental duty, or exercising the police power, or acting in a matter committed to their discretion the municipality is not liable. 2 McQuillin Municipal Corporations, secs. 889, 894, pp. 5414, 5416, 5417. For instance, no liability attaches for the wrongful refusal to issue a permit. *Bretter v. Moberley,* 131 Mo. App., 172.

To allow damages for so erroneous or even arbitrary determination in the field of municipal activities is contrary to well settled law. In *Burford v. Grand Rapids,* 53 Mich., 98, *Judge Cooley* said that the decision of the town authorities had been "made in the exer- (359) cise of its powers in its discretionary and governmental field over a subject confided by the State to its judgment, and is presumptively correct. But whether correct or not, no appeal from that judgment to court and jury has been provided for, and, therefore, none can be had. An indirect appeal by suit against the city to establish a liability against it for an erroneous legislative determination is not only not provided for, but it would be opposed to a principle as well settled and as familiar as any in government."

To the same purport are our own decisions above cited or, referred to. While the first issue is incorrect in form, the fact seems to have been properly determined by the jury that the alleyway was only 15 feet wide, and the judgment for the mandamus is not reversed. But the other

exceptions are sustained. The plaintiff is not entitled to recover any damages, and will pay the costs of this appeal.

Error.

ALLEN, J. I concur in the result holding that the defendant is not liable in damages on the facts appearing in the record, but I do not wish to be understood as agreeing that the ordinance under consideration is valid.

On the contrary, I think it comes under the condemnation of *S. v. Tenant,* 110 N. C., 609, which has been approved in *Rosenbaum v. New Bern,* 118 N. C., 97; *S. v. Eubanks,* 154 N. C., 631; *S. v. Lawing,* 164 N. C., 495.

WALKER, J., concurs in the above opinion of JUSTICE ALLEN.

C. S. LAWRENCE v. H. E. NISSEN AND THE BOARD OF ALDERMEN OF WINSTON-SALEM.

(Filed 11 April, 1917.)

1. Municipal Corporations—Cities and Towns—Police Powers—Health—Ordinances—Hospitals—Courts.

An ordinance of a municipal corporation declaring hospitals within the city limits, where surgical operations are performed, etc., for pay, a nuisance to adjacent property owners and prohibiting them within 100 feet of a building or house used or occupied as a residence, when within the powers conferred by the Legislature, will not be declared unreasonable or invalid by the courts.

2. Same—Presumptions.

There is a strong presumption of the validity of an ordinance passed, with legislative authority, looking to the health of the residents within a municipality; and the courts will not pass upon the reasonableness of the ordinance with reference to existing conditions, when such could exist and justify it.

3. Municipal Corporations—Cities and Towns—Health—Ordinances—Nuisance—Injunction.

Where the enforcement of an ordinance prohibiting the erection of a hospital is sought to be enjoined, and the authority to enforce it has been given by statute, it is not necessary for the courts to pass upon the question as to whether a hospital is a nuisance *per se* in order to refuse the injunction.

4. Constitutional Law—Municipal Corporations—Cities and Towns—Discrimination—Health—Ordinances.

An ordinance of a municipality passed under legislative authority, prohibiting the existence of hospitals, for pay, within a certain distance of dwellings therein, etc., is not objectionable as discriminative in favor of strictly charitable institutions of this character, or class legislation prohibited by Fourteenth Amendment to the Federal Constitution.

WALKER and ALLEN, JJ., dissenting.

PROCEEDINGS in mandamus, heard by *Harding, J.*, at chambers, (360) in the city of Winston-Salem, FORSYTH County, on 13 March, 1917.

His Honor dismissed the proceedings and the plaintiff appealed.

Hastings, Stephenson & Wicker for plaintiff.

Manly, Hendren & Womble for defendants.

BROWN, J. The object of this proceeding is to compel the defendants to issue to plaintiff a building permit for the erection of a private hospital upon a certain lot within the corporate limits of the city of Winston-Salem.

The Court finds that the building is to be erected on a lot belonging to plaintiff and used as a private hospital to be conducted for pay; that it is for surgical cases only, and that patients suffering with contagious or infectious diseases will not be admitted.

The west side of the building will be 6 feet from the property line on west side and 12 feet from the east side of the residence occupied by Thomas Patterson.

The charter of the city confers power "to define and condemn nuisances . . . to grant permits for the construction of buildings and other structures, and to prohibit the construction of any building or structure which in the judgment of the board of aldermen may be a nuisance or of injury to adjacent property or to the general public; to regulate and control the character of buildings which shall (361) be constructed or permitted to be or remain in any part of the City of Winston-Salem, with a right to declare the same a nuisance or unsafe, and cause their demolition or removal."

Pursuant to this grant of power, the board of aldermen enacted an ordinance as follows:

"*Be it Ordained,* That the construction, operation, or maintenance of a hospital or place or institution of like character where sick or diseased persons are treated or surgical operations performed for pay, within the corporate limits of the city of Winston-Salem, and within 100 feet of a

building or house used or occupied as a residence, is hereby declared to be a nuisance, or injury to adjacent property, and to the general public, and the same is hereby prohibited."

It is contended by plaintiff that the ordinance is void: (1) Because it is unreasonable, and the municipal authorities cannot declare that to be nuisance which is not so at common law or made so by statute. (2) Because the ordinance is discriminative.

Courts are slow to declare municipal ordinances invalid, especially where enacted in pursuance of valid legislative authority. There is a strong presumption in favor of their reasonableness. Judges may not agree with the municipal authorities always in thinking an ordinance wise, but such representatives of the people may be trusted to understand their own requirements better than the courts.

It is not necessary that we hold that a hospital is *per se* a nuisance. We are not asked by adjacent residents to restrain from building it upon that ground. We are asked to compel defendants to issue a permit to erect the hospital upon the ground that the ordinance prohibiting it is unreasonable and beyond the power of the municipality to enact.

The enactment of such an ordinance is plainly within the powers conferred by the Legislature, for the aldermen are vested with power not only to grant building permits, but to prohibit the construction of buildings or structures that may be a nuisance or injurious to adjacent property. Having the authority to enact the ordinance, the reasonableness of it is not a matter for us. *S. v. Rice,* 158 N. C., 640.

The power of a court to declare an ordinance unreasonable and, therefore, void is practically restricted to cases in which the Legislature has enacted nothing on the subject-matter of the ordinance, and consequently to cases in which the ordinance was passed under the supposed power of the corporation merely. *Coal Fleet v. Jeffersonville,* 112 Ind., 15, 19. This distinction has been noted and observed in this State. *S. v. Ray,* 131 N. C., 814; *S. v. Thomas,* 118 N. C., 1221, 1225, 1226.

(362) Says Mr. McQuillin (2 Mun. Corps., secs. 724-25): "In brief, if passed by virtue of express power, an ordinance cannot be set aside by a court for mere unreasonableness, since questions as to the wisdom and expediency of a regulation rests alone with the lawmaking power."

Neither is it necessary that we should find that conditions actually exist that require the enactment of the ordinance. It is sufficient if a state of facts could exist which would justify it. As said by the Supreme Court of the United States in the case of *Munn v. Illinois,* 94 U. S., 113: "For our purposes we must assume that if a state of facts could exist that would justify such legislation, it actually did exist when the

statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State; but if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the Legislature is the exclusive judge."

This ordinance is preventive in character and intended to protect the comfort, health, and safety of the citizens. As said in *Shelby v. Power Co.*, 155 N. C., 201: "Such legislation is preventive, and to limit it to cases where actual injury is shown to have occurred would be to deprive it of its most effective force. To be of value, such laws must be able to restrain acts which have a tendency to produce public injury."

A hospital may not be a nuisance *per se*, but it may become such because of its location or by reason of the manner in which it is conducted. *Hospital v. Bontjes*, 207 Ill., 553; 39 A. and E. Anno. Cases, 126, notes.

Discussing this subject, the Supreme Court of Kansas, in *Statler v. Rochelle*, 83 Kans., 86, said: "However carefully the hospital may be constructed and however worthy the institution might be, its mere presence, which would necessarily be manifested in various ways, would make the neighborhood less desirable for residential purposes, not to the oversensitive alone, but to persons of normal sensibility."

In sustaining the validity of an act similar in its purport to the ordinance under consideration the Supreme Court of Pennsylvania said: "That the prohibition of hospitals, therefore, in crowded communities, has a real and substantial relation to the protection of the public health in general must also be admitted. Whether the relation is or is not so close as to justify the prohibition of the building of a hospital is a matter purely for legislative determination, and cannot be reviewed by this Court." *Commonwealth v. Hospital*, 198 Pa., St., 279.

In *Reinman v. Little Rock*, 237 U. S., 170, the Supreme Court said: "Therefore, the argument that a livery stable is not a (363) nuisance *per se* is beside the question. It is clearly within the police power of the State to regulate the business and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law provided the power is not exerted arbitrarily or with unjust discrimination so as to infringe upon rights guaranteed by the fourteenth amendment."

The same principle of law is recognized by the English courts. In *White v. Morley*, 2 Q. B., 34, it is said: "Where a thing is of a character that it can be a nuisance, then it is almost always for the local authority, which has the power to make the by-law, to say whether it shall be

declared a nuisance and an annoyance in the particular locality in respect to which they make the by-laws. The court will say the by-law may be unreasonable if they think the act forbidden cannot be a nuisance; but they will not, as a rule, if they think it could be a nuisance, interfere with the discretion of the local authority as to whether or not it should be forbidden in that particular locality."

The other objection to the ordinance is that it is unduly discriminative in that it applies only to hospitals established for profit and not for charity, and thus violates the fourteenth amendment.

We are not impressed by the force of the objection. The discriminations which are open to objection are those where persons engaged in the same business are subjected 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. This is the rule laid down by the Supreme Court of the United States in *Soon Hing v. Crowley,* 113 U. S., 709.

It is those restrictions imposed upon one class of persons engaged *in a particular business,* which are not imposed upon others engaged in the same business and under like conditions, that impair the equal right which all can claim in the enforcement of the laws.

In *Barbier v. Connolly,* 113 U. S., 32, *Mr. Justice Field* said: "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Upon this principle, the Supreme Court of Pennsylvania, in *Philadelphia v. Brabender,* 201 Pa. St., 574, sustained an ordinance prohibiting the casting of advertisements, handbills, and circulars into the vestibules of dwelling-houses, and did not prohibit the casting of newspapers and addressed envelopes containing advertisements.

(364) The Court quoted largely from *Soon Hing v. Crowley, supra,* and said: "Nor can we see that an invidious discrimination is made against any one by the ordinance. All persons are treated alike and subject to the same restrictions. True, the ordinance exempts from its operation newspapers and addressed envelopes, but evidently not for the purpose of favoring those who advertise in that way, but because in the judgment of the municipal authorities there was not the same necessity for prohibiting the delivery of newspapers and addressed envelopes to the persons for whom they are intended in that way. This discriminates against no persons or class of persons, and surely it is not for the

defendant to say that the ordinance is void because it does not prohibit other acts equally as mischievous as the acts prohibited."

This Court, in *S. v. Medlin,* 170 N. C., 682, following the same line of authority, held that an ordinance permitting drug stores to remain open on Sunday and to sell cigars, tobacco, and soft drinks, was not an unlawful discrimination in favor of druggists against other persons engaged in general merchandise who sold such articles on week days, but were required to close their places of business on Sundays.

The establishment and conduct of hospitals for pay is now a recognized and established business. It is rare to find a city or town of any size without such institutions. These hospitals are generally established, owned, and conducted by members of the medical profession for their own convenience and profit. No one is engaged in the business of establishing and conducting hospitals for charity.

There are public hospitals in large cities with charity wards as well as pay wards in them, established and conducted by the municipal government or by trustees of some endowment fund donated by philanthropy, but the establishment of charitable hospitals is in no sense a recognized business.

For this reason it is probable the board of aldermen did not consider it necessary or important to embrace charity hospitals within the ordinance, deeming the erection of one by some local philanthropist a remote possibility which could be attended to in the future if application for a building permit should be made.

The judgment of the Superior Court is

Affirmed.

WALKER and ALLEN, JJ., dissent.

Cited: S. v. Kirkpatrick, 179 N.C. 750, 751; *S. v. Stowe,* 190 N.C. 80, 81, 86; *Bizzell v. Goldsboro,* 192 N.C. 356, 361; *Wake Forest v. Medlin,* 199 N.C. 85; *King v. Ward,* 207 N.C. 784; *Shuford v. Waynesville,* 214 N.C. 138; *Suddreth v. Charlotte,* 223 N.C. 633; *Clinton v. Ross,* 226 N.C. 689; *S. v. Stallings,* 230 N.C. 255; *Cab Co. v. Shaw,* 232 N.C. 143; *S. v. McGee,* 237 N.C. 641.

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WILLIAM S. BAKER ET AL. v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 18 April, 1917.)

1. **Wills—Personalty—Contingent Remainders.**

Personal property may be bequeathed upon successive contingent interests in the same manner lands may be transferred by deed or testamentary disposition.

2. **Corporations—Shares—Transfer — Trusts — Rights of Shareholders — Notice—Executors and Administrators—Contingent Interests.**

Officials of a corporation upon whose books its shares are transferable act as trustees for the shareholders, and as such owe them the duty of exercising care and diligence therein; and where such transfer has been made at the instance of an executor to a devisee owning a contingent interest, with limitation over, the officials of the company making the transfer and issuing the shares thereon, and their successors, are fixed with knowledge both of the terms of the will and the fact that it was not done in the proper course of administration, which knowledge is imputed to the corporation; and the corporation is liable to the ulterior owner, upon the happening of the contingency, for the value of the shares thus wrongfully transferred.

3. **Statute of Limitations—Corporations—Transfer of Shares—Contingent Interests—Conversion.**

Where a contingent interest in shares of stock has vested by will in the remainderman after the death of the first beneficiary, and he brings his action against the corporation wrongfully transferring them, for the stock or its value within three years of the happening of the contingency, the action is not for a conversion, and the statute of limitations will not bar it.

CIVIL ACTION, tried before *O. H. Allen, J.*, at November Term, 1916, of EDGECOMBE.

This is an action to recover four shares of stock, or the value thereof, bequeathed in item 12 of the will of Moses Baker, the plaintiffs being the next of kin referred to in said item, tried on the following agreed facts:

1. Moses Baker died, in 1857, a resident of Edgecombe County, North Carolina. In August, 1857, his last will and testament was duly admitted to probate, the material part of which is as follows:

"Item 12th. I give and bequeath unto my grandsons, John Baker and Jesse Baker, negro man Ben and my 'Ruffin tract of land.' adjoining the lands of Samuel P. Jenkins, and containing about 200 acres; also two shares each of Wilmington and Raleigh railroad stock. If either of them shall die without issue, I give the share of the one so dying in all property given or devised to them in this instrument to the sur-

vivor; and if both shall die, leaving no issue, then I give, devise, (366) and bequeath the lands, slaves, and other property to their next of kin, in equal degree, who shall be of the issue of my body, except Naomi Armstrong, wife of Baker Armstrong, and her sister, Martha Ann Baker, it being intended that they or their issue shall under no circumstances inherit any portion of my estate, either directly or indirectly."

The executor therein named, William S. Baker, duly qualified and letters testamentary were duly issued to him.

2. At the time the will became effective, Moses Baker, testator, held and owned nineteen (19) shares of stock, a portion of which was the stock referred to in paragraph 12 of the will, in the corporation, Wilmington and Raleigh Railroad Company, whose name was by act of the North Carolina Legislature changed to Wilmington and Weldon Railroad Company on 14 February, 1855.

3. On 13 November, 1857, William S. Baker, the duly appointed and qualified executor of the will of Moses Baker, as such executor, surrendered certificates for nineteen shares of stock then standing in the name of the testator on the books of the Wilmington and Weldon Railroad Company, the then name of the company, and the said Wilmington and Weldon Railroad Company, at his request, issued new certificates, among which was one certificate for two (2) shares to John Baker and one certificate for two (2) shares to Jesse Baker.

4. The John and Jesse Baker to whom such certificates were issued were the John and Jesse named as legatees in paragraph 12 of Moses Baker's will. That Jesse Baker died in 1863 without issue.

5. Thereafter, and on 12 January, 1866, the certificate for two (2) shares which had been issued to John Baker was delivered to the Wilmington and Weldon Railroad Company by John Baker, and the certificate which had been issued to Jesse Baker for two shares was likewise delivered to the Wilmington and Weldon Railroad Company, and the four (4) shares of stock were canceled on the books of the company and a new certificate or certificates therefor issued and delivered to one John I. Proctor.

6. In 1900 the Wilmington and Weldon Railroad Company was merged in the Atlantic Coast Line Railroad Company, defendant herein.

7. That among the terms of the merger agreement are the following: On 21 April, 1900, by the merger agreement, on page 14, the Wilmington and Weldon Railroad Company conveyed to the Atlantic Coast Line Railroad Company all its property, rights, franchises, etc.; subject, however, to all existing liens thereon and all the liabilities of (367)

the said Wilmington and Weldon Railroad Company of every kind and nature.

8. John Baker died in 1913, leaving no issue.

9. Prior to the commencement of this action, plaintiffs demanded of defendant the certificates of stock above described, and any stock issued in lieu thereof, and all increment, rights, and property accruing thereto, and same has been refused. This action was commenced within one year after the death of John Baker.

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

G. M. T. Fountain & Son and Henry Staton for plaintiffs.

P. A. Wilcox, F. S. Spruill, John L. Bridges and W. A. Townes for defendant.

ALLEN, J. At common law the ownership of personal property was absolute and incapable of division into successive interests, but this was modified by the English courts to permit the disposition of such property *by will,* but not by deed, upon the same terms and in the same manner as real property, and this State has followed and adopted the later doctrine. 24 A. and E. Enc., 436 *et seq.,* and cases cited in the note.

The plaintiffs, then, have an interest in the stock in controversy, and their right to recover is dependent upon establishing that the defendant has participated in the wrongful transfer of stock, in which they had an interest, thereby depriving them of their property, and the correct solution of the question involved requires an investigation of the relation existing between the corporation and the stockholder, and of the duty owing by one to the other in reference to the transfer of stock, because if there is no duty there is no liability, and, on the other hand, if there is a duty, which the defendant has failed to perform, causing damage to the plaintiffs, the defendant is responsible.

The usual method of transferring stock is for the holder of the share to indorse thereon a written transfer or authority to transfer, and to deliver the certificate to the transferee, who in turn delivers it to the corporation, which, if satisfied of the genuineness of the signature of the holder and of the identity of the transferee, takes up the old certificate and issues a new one, so that ordinarily a transfer is not completed without the active participation of the corporation.

The corporation is the "custodian of the shares" (*Leury v. Bank,* 131 La., 30) and is a trustee for the shareholder. *Bayard v. Bank,* 52 Pa. St., 235; *Tafft v. R. R.,* 84 Cal., 131; *Leury v. Bank,* Anno. Cases, 1913 E, 1174; *Cox v. Bank,* 119 N. C., 302.

The Court says in the case from Pennsylvania: "That a bank (368) or other corporation, and also these defendants, are trustees to a certain extent for stockholders—that is, for the protection of individual interests—cannot be denied. They are alike trustees of the property and of the title of each owner. They have in their keeping the primary evidence of title, and they are justly held to proper diligence and care in its preservation. From this it results that they may rightfully demand evidence of authority to make a transfer before they permit it to be made. Their own safety requires that they be satisfied of the right of the person proposing to make a transfer to do what he proposes. Generally, sufficient evidence of such right is found in the possession of legal title to the stock. Yet it is well settled that it is not in all cases sufficient, notwithstanding that the true equitable ownership may be in some other than the holder of the legal title, and a transfer may be a gross wrong to such an equitable owner. To that wrong the corporation or keepers of the register make themselves parties, if, with knowledge that there is no equitable right to transfer, they permit it to be done. And, in equity, whatever puts a party upon inquiry is notice of what inquiry must reveal. The real difficulty is in determining how far it is the duty of the transferer to inquire. *Bayard v. Bank,* 52 Pa. St., 232, quoted in *Tafft v. R. R.,* 84 Cal., 131.

Our Court lays down the same doctrine in the *Cox case,* as follows: "The rights of stockholders and persons interested in stock are placed by law under the protection of the bank, so far as concerns the transfer on its books. The defendant bank, as a corporation, is made the custodian of the shares of its stockholders, and is clothed with power to protect the rights of every one from unauthorized transfer. It is a trust placed in its hands for the protection of individual interests, as well as its own, and, like every other trustee, it is bound to execute the trust with proper diligence and care, and is responsible for any loss sustained by its negligence or misconduct."

These authorities and others also establish the principle that the corporation, as trustee, owes the duty to the shareholder of care and diligence; that it has the right and it is its duty to make inquiry as to the authority of one asking for a transfer of stock; and that if put on inquiry it has notice of all the inquiry would reveal.

"For the protection of the lawful owner of the shares, the corporation is bound to use reasonable care in the issue of certificates; if by the form of the certificate or otherwise the corporation has notice that the present holder is not the absolute owner, but holds the shares by such a title that he may not have authority to transfer them, the corporation is not obliged, without evidence of such authority, to issue a

(369) certificate to his assignee; and if, without making any inquiry, it does issue a new certificate, and the rightful owner is injured by its negligence and wrongful act, the corporation is liable without proof of fraud and collusion." *Loring v. Salisbury Mills,* 125 Mass., 150.

"The fact that stock is assigned by one other than the person to whom it was issued devolves upon a corporation, when called upon to transfer the shares and issue a new certificate, the duty of inquiry as to the power of the assignor to make the assignment." *Smith v. R. R.* (Tenn.), 18 S. W., 547.

If, therefore, an agent makes demand on the corporation for a transfer of stock it must look to the power of attorney; if an administrator, to his letters; and if an executor, to the will, because these are the sources of power; and in the case of an executor, as it is its duty to make inquiry, it is fixed with knowledge of the contents of the will.

"Knowledge of the contents of a will on the part of a corporation is presumed by law from its knowledge of the fact that there is a will upon the terms of which the title to its stock is made to depend. A corporation whose stock is, as in this case, transferable only on the books of the company is made the custodian of the shares, and is clothed with power to protect the rights of shareholders from unauthorized transfers. With this power there exists the duty that rests on all trustees: to protect, so far as the exercise of proper diligence and care can do so, the interests of the *cestui que trust;* and it must respond in damages for any injury sustained in consequence of its negligence or misconduct." *Caulkins v. Gas Light Co.,* 4 A. S. R., 794 (85 Tenn., 683).

"In *Stewart's case,* 53 Md., 575, the Court says: 'The fact that Simms and Tyson, in making these transfers, professed to act as executors of Johnson, the deceased stockholder, gave the company or its officers, to whom superintendence of transfers was committed, actual notice that Johnson left a will which was open to inspection upon the public record, and made the company chargeable to the same extent as if such officers had actually read it and thereby made themselves acquainted with its contents. The company, therefore, must be dealt with as if it had actual knowledge of the provisions of that will at the time the first transfer was proposed to be made. This proposition was expressly decided by *Chief Justice Taney* in the case of *Lowry v. The Commercial and Farmers Bank, Taney* 310.' This decision by *Judge Taney* has been adopted throughout the country now as the law, and is the leading case on the subject." *Marbury v. Ehlen,* 72 Md., 206.

"The fact that the proposed transfer was to be made by an executrix was notice of the existence of the will. An examination of the will, the

production of which, or a certified copy of the record of which, he could have required, would have disclosed the true state of the (370) title to the stock. It was negligence in him to rely upon the statement of Whitaker as to the ownership, instead of consulting the will, and if loss is to result it should be borne by the bank, whose agent he was, and not by the complainants." *Peck v. Bank* (R. I.), 7 L. R. A., 831.

"After mature consideration of all the cases cited and the text in the law books to which our attention has been called, our opinion is: First, that where a transfer of stock of a corporation is made on its books by an executor, the corporation is fixed with a knowledge that there is a will, and is chargeable with a knowledge of its contents to the same extent as if the officers had actually read it." *Wooten v. R. R.*, 128 N. C., 126.

The defendant not only had notice that there was a will and of its contents at the time of the transfer to the two legatees, but also that the transfer was not being made in the ordinary course of administration for the purpose of procuring assets with which to pay debts.

This appears from the fact that the executor did not have an order of sale, which is required by our statute (Rev., sec. 64), and because the transfer was made to the legatees named in the will.

This question was dealt with in *Weyer v. Bank*, 57 Ind., 209, in which an administrator *de bonis non c. t. a.* recovered the value of certain stock from a corporation because it had permitted a transfer at the request of an executor, without requiring him to produce an order of court authorizing the sale, in which the Court says: "At common law an executor or administrator had the same property in and, of course, the same powers over the personal effects or estate of his decedent that such decedent had at and before his death. . . . The power to sell the personal property of the decedent still exists in the executor or administrator, but the modes of sale and the power to sell are given and prescribed by statute. . . . For the reasons given, we hold that section 60 of the act providing for the settlement of decedents' estates, etc., is mandatory in its provisions and that an executor or administrator cannot sell the personal property of his decedent, or any part thereof, at private sale without having been authorized so to do by an order of the court having jurisdiction of the administration of his decedent's estate. . . . The appellees in this case were bound to know that the executor of Mrs. Shippen could not make a valid and legal sale and transfer of said stock at private sale until he had been first authorized so to do by an order of the proper court; for such is the law of this State, which citizens, individuals and corporate, are conclusively presumed to know."

(371) "Where by statute executor's sales are to be at public auction, the corporation is bound to ascertain whether the statute was complied with, and is liable for allowing the registry when the sale was a private one." Cook Corp., vol. 1, sec. 330.

It is also accepted that notice to the officers of corporations is notice to the corporations, and that no subsequent change of officers requires new notice of the facts (*Bank v. Seton,* 1 Pet., 309), which principle was applied in *Robinson v. B. of L. F. and E.,* 170 N. C., 546, so as to affect the defendant with notice, at the time of issuing a policy of insurance in 1907, of the contents of an application for insurance filed with the company in 1891.

Applying these principles to the facts agreed, the defendant knew when it issued the shares of stock to John and Jesse Baker in 1857 that each had an interest in the stock which would be defeated upon his dying without issue, and subsequently, in 1866, when at the request of John Baker it issued the four shares to John I. Proctor, it knew that John Baker was then alive; that if he died without issue the plaintiffs in this action would be entitled to the stock it was then issuing, and that the transfer absolutely and without any restrictions would defeat the rights of the plaintiffs unless it, the defendant, was held liable in damages.

This is a clear breach of duty and a failure to exercise ordinary care and diligence, for which the defendant must be held responsible.

If it be conceded that the executor had the right in the first instance to have the stock transferred to the owners of the defeasible estate, this does not affect the question of liability, as the wrong done to the plaintiffs, which caused the loss of their stock, was in permitting and aiding in the sale to Proctor, when the defendant knew, in law, that the seller did not have an absolute estate, and that if he died without issue the stock would belong to the plaintiffs.

When it is once established that the corporation has notice of the contents of the will when a transfer is made by an executor, the case of *Cox v. Bank,* 119 N. C., 302, is almost directly in point on every question raised by the appeal, and that case is strongly supported by the subsequent case of *Wooten v. R. R.,* 128 N. C., 119, which differs from this and the *Cox case* in that the stock transferred in the *Wooten case* stood on the books of the company in the name of a trustee.

The Court says in the *Cox case:* "The case, then, is this: On the one hand, the original stock stood on the books in the name of the testator, with actual knowledge of the contents of the will, wherein this stock was directed to be held by trustees for successive parties, including said Frances for life; and about two years after the testator's death (372) said life tenant presented said stock to the bank and demanded

new certificates for the absolute interest in the original stock. On the other hand, the bank officer sees on the back of the certificate what is in form, and purports to be, a sale for value, signed by the executor, one of whom is one of the trustees appointed in the will. We are led to the conclusion that a prudent business man with these facts before him would have made further inquiry, which was easily done by looking at the executors' returns in the clerk's office, or by asking the executors themselves, or by simply asking the life tenant, Frances, when she demanded new stock at the counter of the bank, what was the truth of the matter. But nothing of this kind was done. We think, therefore, that the defendant and its officers were negligent in this respect, and are liable for the loss of the plaintiff in consequence thereof."

The case of *Albert v. Bank,* 2 Md., 159, if opposed to the conclusion reached by us, would be overruled by the later decisions of that Court; but there is no conflict, because in that case the stock in controversy did not belong to the testator, but was bought by the executor, and was of course not referred to in the will.

Nor does *Smith v. R. R.,* 91 Tenn., 221, which is the only authority cited by the learned author of Cook on Corporations (vol. 1, sec. 330) in support of the statement that the corporation is not affected with notice of the contents of a will when the transfer is made by an executor, justify that conclusion, because in the *Smith case* the transfer was made by an administrator, and there is clear intimation in the opinion that if he had added *"cum testamento annexo"* to his signature, which was his true position, that the corporation would have been held to have knowledge of the will and its contents, which is the doctrine of the earlier case of *Caulkins v. Gas Light Co.,* 85 Tenn., 683.

This ruling imposes no burden on the corporation, because it can require the production of the will and may issue a new certificate under its provisions, which will protect it and others interested in the stock, while a contrary holding would enable the corporation and the executor to defeat the will of the testator and to destroy the property rights of legatees.

The defense of the statute of limitations cannot avail the defendant, as was decided in the *Wooten case, supra.*

The plaintiffs are not suing for a conversion, but they are demanding their stock or its value, and their right did not accrue until the death of John Baker, which was within less than three years before action brought.

Affirmed.

Cited: Pritchard v. Williams, 175 N.C. 324; *Woodard v. Clark,* 234 N.C. 221; *Woodard v. Clark,* 236 N.C. 193, 194.

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RACHEL OWENS, ADMINISTRATRIX, v. NORTH STATE LIFE INSURANCE COMPANY ET AL.

(Filed 18 April, 1917.)

1. Insurance, Life—Premium Notes—Payment—Stipulations.

The stipulation on the form of note given for a premium of life insurance that the policy shall be void if the note is not paid at maturity is a valid one, and a recovery on the policy contract will be denied when the note has not been paid accordingly, unless the insurer has waived this provision.

2. Insurance, Life—Premium Notes—Interest.

A premium note for life insurance at 6 per cent interest draws that rate from its date unless otherwise specified (Rev., sec. 1915).

3. Same—Tender—Grounds for Refusal.

Where the money for the face value of a premium note without interest from its date has been tendered the insurer, before maturity, who refuses to receive it, stating that the insured, who was then sick, must first get well enough to come and arrange it himself, the failure to tender the interest on the note as well as the principal will not avail as a defense for the insurer, in an action against it upon the policy since matured by the death of the insured, the refusal being based upon an entirely different statement.

4. Insurance, Life—Forfeiture—Premium Notes—Tender — Judgments — Deductions.

A valid tender made for the payment of a premium note for life insurance before its maturity is for the purpose of saving a forfeiture, and when refused by the insurer it is not required to be kept good *pro hac vice*, in the sense that the money must always be ready and available, as in cases where the stopping of interest or court costs, etc., are involved; and it is sufficient if the principal of the note and proper interest is deducted from the amount of the recovery on the policy in the Superior Court.

5. Judgments—Verdict—Interpretation—Insurance, Life—Premium Note —Tender.

While the verdict of the jury must, as a general rule, establish the facts required to support the judgment, it may be interpreted and allowed significance by reference to the pleadings, testimony, and charge of the court; and where upon an issue as to tender of payment for a premium note for life insurance the jury has responded "Yes," and in the principal sum of the note, leaving off 65 cents interest, and in applying the principle referred to: *Held*, the verdict was sufficient to support a judgment in the plaintiff's favor, especially as the issue was inadvertently answered under the direction of the court.

6. Insurance, Life—Forfeiture—Notes—Statutes.

Semble, our statute, Gregory's Supplement, 4779a, would prevent a forfeiture under a life insurance policy, within a year, under the circumstances of this case.

CIVIL ACTION, tried before *Winston, J.*, and a jury at October (374) Term, 1916, of CUMBERLAND.

The action was to recover the amount of an insurance policy for $1,000 issued by the company on James Holiday Owens, husband of administratrix. It was proved or admitted that such a policy was issued on 23 August, 1915, the company taking a note for premium, $42.37, payable 1 November, 1915, said note containing the specification, "at the rate of 6 per cent per annum," and the stipulation, further, that the policy should become "null and void" if the note was not paid at maturity. That payment of the note had been postponed by agreement to 1 December, 1915; that in latter part of November, 1915, the insured was taken ill with pneumonia, and died therefrom on 6 December, 1915.

Plaintiff alleged and testified that about 1 December, 1915, or just before, by direction of her husband, she brought the money for the premium note to the officers of the company and offered to pay same to the general manager, telling him that her husband was sick at home at the time; that the officer refused to receive the money, saying that "her husband would have to wait till he got well and come and see about it himself," etc., and witness then put the money in one of the banks of the city. There was evidence also offered to show that there was a deposit in the bank for James Holiday Owens of $70 on 27 November, 1915.

Defendant company denied liability, claiming that the policy was forfeited by reason of nonpayment of the premium note, and in support of the plea the manager testified that plaintiff had never made any tender of this $42.37 nor had ever been to his office when he was there, and that she had never seen him at any time before the trial.

On issues submitted the jury rendered the following verdict:

Did Rachel Owens, for her husband, James Holiday Owens, tender to the defendant company or to its agents prior to 1 December, 1915, any sum of money in payment of the premium note due 1 December, 1915; and if so, what sum did she tender? Answer: "Yes; $42.37."

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

Cook & Cook and J. M. Williford for plaintiff.

Dickinson and Laird and Rouse and Rouse for defendant.

HOKE, J. Both the policy and the premium note contain the provision that the contract of insurance shall be null and void unless the premium note is paid, and our cases hold that such a stipulation is valid, and unless the note is paid as promised, or the payment is in some way waived by the company, a recovery on the policy cannot be had. *Murphy v. Ins. Co.,* 167 N. C., 334. In that case the position as it prevails in this jurisdiction is stated as follows: "The delivery of a life (375) insurance policy absolute and unconditional is a waiver of the stipulation for a previous or contemporaneous payment of the first premium; and where the insurer has received the insured's note for the payment of this premium upon condition that the policy shall be avoided unless the note is paid at maturity, the condition will be upheld unless the time for its payment has been postponed by valid agreement or the stipulation, made for the benefit of the company, has in some way been waived by it, or the company has so acted in reference to the matter as to induce the policyholder, in the exercise of reasonable business prudence, to believe that prompt payment is not expected and that forfeiture on that account will not be insisted upon."

It was objected for defendant (1) that the tender of the premium note, established by the verdict in this instance, will not avail the plaintiff for the reason that it was not for the full amount, as, per contract, the note bore interest from date. (2) That the tender was not kept good.

Under our statute, Revisal sec. 1952, this note, we think, bore interest from date. While a note for the payment of money ordinarily draws interest from the time it is due, this statute enacts that "When an instrument provides for payment of interest without specifying the date from which it runs, it draws interest from date," and the stipulation in the note, "at the rate of 6 per cent," is a sufficient expression to bring the same within the statute, and the tender in the exact terms of the issue is not a valid tender, in that it did not include the interest; but it is well understood that when a tender is made, purporting to be the full amount, and there is an absolute refusal to accept on a specified ground that is untenable, the obligee is concluded and will not be heard to allege other and different ground for his refusal. *Moynahan v. Moore,* 9 Mich., 9; *Brady v. Wells,* 88 Neb., 554; 3 Elliott on Contracts, sec. 1971; 3 Paige on Contracts, sec. 1426. In *Moynahan's case* it was held: "that objection made at the time of the tender precludes all others, and if that is not well grounded the tender will be held good." In *Brady v. Wells:* "When a tender is refused without objection to the sufficiency of the amount, but on other grounds, the tender will be considered waived." On the facts in evidence and as accepted by the jury, this tender was refused on the ground that "insured would have to wait till he got well and could

come and see about it himself," and it is not now open to defendant to maintain that the interest, about 60 cents at most, was not included in the amount. And as to the second reason, that the tender was not "kept good": The usual office of a tender is to stop interest and save costs, and when it is relied upon for such purpose it must be "kept good," and in case of suit instituted it is usually required that the sum admitted to be due shall be paid into court. *Parker v. Beasley,* (376) 116 N. C., 1. But the principle has no necessary application when, under the stipulations of a contract, a tender is required to save a forfeiture. When such a tender is once properly made within the time, and refused, it fills its purpose and *pro hac vice* the alleged forfeiture is prevented. *Rosenweig v. Kalichman,* 106 N. Y., Supp., 860; *Parker v. Gurtatowki,* 129 Ga., 623; *Ashley v. Telephone Co.,* 25 Mont., 286; *Travelers Ins. Co. v. Pulling,* 159 Ill., 603; 28 A. and E. Enc. (2d Ed.), p. 40, citing *Denison v. Mason's Accident Ins. Co.,* 59 N. Y., App. Div., 294.

A like principle prevails here and elsewhere when a proper tender is made of a debt secured by a mortgage on property. Such a tender relieves the encumbered property; it is held to satisfy the conditions of the mortgage, and thus prevents a foreclosure.

Intestate, therefore, was not bound to keep the tender good in the sense that he should always have the money in evidence. The forfeiture was prevented when he made the proper tender within the time or such tender was waived by the company, and the insured having died before any other premium became due, plaintiff's recovery on the policy will be sustained.

As a matter of fact, the attempted forfeiture for nonpayment of this note being unavailing for the reasons stated, and intestate having meantime died, holding a valid policy against the company, there was no obligation to make further tender. When he undertakes, however, to seek affirmative relief on the policy by reason of this tender, he is required to "keep it good" in the sense that the court will reduce the policy by the amount of the premium due. To that extent he is required to keep his tender good, and, on the facts presented, this is the correct significance of the term, and the position has been allowed defendant in the judgment rendered.

It is earnestly urged that while the verdict shows a tender of the principal sum, the facts on which the alleged waiver is based, are not established by the verdict, and for that reason a new trial should be awarded; but, on the record, this objection also must be overruled.

It is well understood here that while a verdict must as a general rule establish the facts required to support the judgment, such verdict may be

interpreted and allowed significance by reference to the pleadings, the testimony, and the charge of the court. *Reynolds v. Express Co.*, 172 N. C., 487, 90 S.E. 510.

In the present case plaintiff claimed and testified that she tendered the amount of the premium note to the general manager of the defendant company prior to the time it was due under the existent agree-
(377) ment, and the tender was refused on the ground that the husband was then sick and would have to get well and make the tender in person. Defendant alleged and testified that no tender whatever was made, and that he had never seen the plaintiff before in his life. His Honor fully stated these opposing positions, and by reference to the testimony, the argument, and the charge it is clear the jury have accepted the plaintiff's version of the occurrence, to wit, that a tender was made and refused on the ground stated. Indeed, the issue and verdict established the tender of the amount of the premium note, and the amount, $42.37, fixed in response to a positive direction of the court to that effect, was evidently an inadvertence of the judge, and should not be allowed to destroy the effect of the tender. If there was room for difference about that small amount of interest—65 cents, at most—it would seem that our statute, Gregory's Supplement to Pell's Revisal, sec. 4779a, would prevent a forfeiture within a year unless the claimant was properly informed of the exact amount due, where it should be paid, and to whom payable.

Considering the facts in evidence, we have no hesitation in holding that on the verdict, correctly interpreted, there has been no forfeiture of the policy, and the judgment for same, less the unpaid premium, must be affirmed.

No error.

Cited: Fry v. Utilities Co., 183 N.C. 293; *Tesh v. Rominger*, 215 N.C. 56.

COMMISSIONERS OF ORANGE COUNTY v. R. D. BAIN.

(Filed 18 April, 1917.)

Sheriffs—Successors—Taxes—Salaries—Tax Lists—Emoluments — Fees—Counties.

While collecting the county taxes is made a part of the duties of a sheriff, it is a separate function, and exists after his term as such, for the purpose of collecting, from the tax lists in his hands, the taxes for the current year, in the absence of legislation to the contrary; and an act of

the Legislature changing the pay of county officials from a salary to a fee basis, taking prospective effect from the expiration of the terms of the present incumbents, except the clerk, for whom it is to be effective two years later, will be presumed to have a sensible and just intent, with knowledge of existing conditions; and where it does not direct the incumbent sheriff to deliver the tax lists to his successor, it will not be construed as discriminative in favor of the clerk, register of deeds, or like officers, and to deprive the incumbent sheriff of the emoluments of his term by requiring that he deliver the tax lists to his successor. *Mills v. Deaton*, 170 N. C., 388, cited and distinguished.

BROWN, J., *concurring*; CLARK, C. J., dissenting.

APPEAL from judgment and order dissolving injunction and (378) denying mandamus, rendered by *Daniels, J.*, at chambers, in DURHAM, 15 December, 1916.

This is an action to compel the defendant, former sheriff of Orange County, to turn over the tax lists of 1916 to Charles G. Rosemond, who was elected sheriff of said county in November, 1916.

The defendant R. D. Bain had served two terms as sheriff of Orange County, and was entering upon his third term when the General Assembly, on 29 January, 1915, enacted a law entitled "An act to fix salaries for public officers in Orange County," but the operation of the act was postponed to the end of the terms of the then county officers. At the end of his term, on the qualification of his successor, the plaintiff Charles G. Rosemond, on 9 December, 1916, the plaintiff commissioners made demand upon the defendant R. D. Bain for the tax list of 1916 and other books and papers of his office; but the defendant claimed that notwithstanding chapter 46 of Public Laws, 1915, he was entitled to collect the taxes for 1916. Proceedings for a temporary injunction and mandamus were brought by plaintiffs against the defendant, and being heard before F. A. Daniels, judge presiding, at chambers in Durham on 16 December, 1916, the temporary restraining order was dissolved and mandamus refused, the court below holding that it was not the intention of the act of 1915 to take from the outgoing sheriff the tax list of 1916.

The plaintiffs excepted and appealed.

Frank Nash for plaintiff.

S. M. Gattis, S. M. Gattis, Jr., A. H. Graham, and John W. Graham for defendant.

ALLEN, J. It has been the custom in this State for the retiring sheriff to collect the taxes due on tax lists already in his hands, and this custom has the sanction of numerous judicial decisions.

In *Fitts v. Hawkins*, 9 N. C., 396, *Taylor, C. J.*, says: "A sheriff who is elected for the first time has nothing to do with the list of the preceding year before he was in office. The clerk has delivered them to his predecessor, who alone has authority to collect under them; and the law makes no provision for setting them over to the new sheriff, as in case of prisoners and writs. If he receive the lists and collect the taxes, it must be in consequence of some private arrangement between the predecessor and himself, which cannot undoubtedly bind his sureties in this form of proceeding, for if it could they would be responsible for two years instead of one (at that time sheriff's term was one year). (379) If the sheriff is reëlected he is then bound to collect the taxes of the preceding year; but this is by virtue of his former appointment, and under the responsibility of his old bond."

In *Slade v. Governor*, 14 N. C., 365, *Daniel, J.*: "In England the office of collector is distinct from that of sheriff, and filled by a different person. In this State the office of collector of taxes is thrown upon the person who shall be elected sheriff. . . . The office of collector of taxes does not expire when that of sheriff does; the last terminates at the end of twelve months from the time he qualified as sheriff, whereas the former does not begin (except when a person liable to pay a tax is about to move away) until the first day of April in the year after he has been appointed sheriff, and he is not compellable to collect the taxes even until after the office of sheriff expires. . . . He gave bond and surety to perform the duties of sheriff; he also gave another bond with surety to perform the duties of collector of public taxes. His office of sheriff began immediately upon his qualification, and expired at the end of one year from that time. His office of collector of public taxes began immediately, so far as related to taxes that might be due and not listed, as, for instance, those imposed on peddlers, showmen, etc., but he had no right to enforce the payment of the dues on the list of taxes (except where a person was about to remove) before the first of April in the year after his appointment. . . . The sureties to his bond for the collection of taxes and settlement with the treasurer were bound until those duties were performed."

In the same case, *Ruffin, J.*, on p. 368: "The case of *Fitts v. Hawkins* (9 N. C., 394) seems to be an authority upon every point that can be made in this case. . . . For the *Chief Justice* (Taylor) states that if the new sheriff receives the lists and collects the taxes it must be in consequence of a private arrangement between him and his predecessor, which would not bind his sureties and make them responsible for two years instead of one. The new sheriff has no authority to collect the taxes even if the lists be delivered to him. He is not the sheriff to whom

they are directed, and it is the same as if he were to take them not being sheriff at all. This I have said merely establishes the power and duty of the former sheriff, for the law must intend that the tax shall be collected by somebody. But it is put beyond doubt by the provisions which authorize the sheriff to make these collections and distrain from them at any time within a year after he is accountable at the treasury. Thus, for this purpose his official term is extended beyond his first year, during which his ordinary official duties continue."

In *S. v. Long,* 30 N. C., 419, *Ruffin, C. J.*: "So if a sheriff (380) collect taxes not duly laid, or for a year when the duty of collection belonged to another person as former sheriff, the sureties cannot be made responsible."

In *Perry v. Campbell,* 63 N. C., 258, *Dick, J.*: "In this State the fiscal authority of a sheriff in collecting the public taxes is not a necessary incident of the office of sheriff, and does not always terminate with it. The authority and duty is regulated by the revenue laws of the State. By these laws it is made a duty on or before a certain day to receive the tax lists and proceed to collect and make due returns of the public taxes within a specified period. To enable him to perform this duty he is invested with ample and summary authority. When he receives the tax lists his responsibility begins, and neither his duty nor authority is dependent upon the continuance of the office of sheriff. He cannot free himself from such responsibility except by collecting and paying over the taxes to the proper officers under the provisions of the revenue laws."

In *S. ex rel. Coffield v. McNeill,* 74 N. C., 537, *Bynum, J.*: "The question is simplified by considering that the sheriff was elected for the first time in August, 1874. He then had nothing to do with the tax lists of the preceding year, which ended on 1 April, 1874; and before his election, the clerk, as required by law, had delivered these lists to his predecessor, who alone had authority to collect the taxes. The law has made no provision for transferring the tax lists to the new sheriff, as is provided for delivering prisoners and certain writs. If the new sheriff receives the lists and collects the taxes, it must be by some private arrangement between his predecessor and himself, which, being unauthorized by law, cannot bind his sureties; for if it did bind them they would be bound for three years instead of two, the term of office. If the sheriff is reëlected, as it happened in this case, he is then bound to collect the taxes of the preceding year; but this is by virtue of his former election and under the responsibility of his old bond. The duty of collecting taxes is not an incident to the office of sheriff, though ordinarily discharged by that officer. The duty, therefore, does not terminate with the office, but he is

bound to go on and collect the taxes after his term of office as sheriff has expired, and the sureties upon his bond are liable for the money by him collected or that should have been collected after that time. *Perry v. Campbell,* 63 N. C., 257."

In *Dixon v. Comrs.,* 80 N. C., 119: "It is true that the functions of the proper office of sheriff and tax collector, though united and imposed by law upon the same person, are in themselves essentially distinct, and may under some circumstances be disassociated. This occurs (381) when a sheriff goes out of office at the expiration of his term with an uncollected tax list in his hands, or which ought to have been in his hands, though it may have been delivered afterwards. *Slade v. Governor,* 14 N. C., 365."

In *McNeill v. Somers,* 96 N. C., 472, *Smith, C. J.:* "Nor, in our opinion, does the prolonged authority, given by statute, to proceed in the collection of taxes for which he is accountable after the expiration of the term of office constitute 'an office or place of trust or profit,' according to the true meaning of those words. The office of sheriff was then filled, or about to be filled, by a newly elected successor, and the relator's term had expired. He was no longer 'in office,' nor did he occupy 'a place of trust or profit,' but was simply engaged in completing an unfinished duty which survived the termination of the office before held. The continued right to coerce payment of unpaid taxes after, as before, the determination of the office may be, and indeed is, the correlative of the obligation to account for what is on the tax list, that is, of an official duty, but it remains detached from the office to which it was incident, a separated function, but it is not itself an office of trust or profit. There can be but one incumbent of a single office, and the one term being ended, the other is filled by a successor. The distinction is between the office and the prolonging of the exercise of one of its functions after its determination for all other purposes."

It is established by these authorities that at the time the salary act for Orange County was adopted a sheriff elected for the first time had nothing to do with the tax lists of the preceding year; that the new sheriff had no authority to collect the taxes of the current year; that the sheriff going out of office did have authority to collect these taxes after his term of office expired; that this authority was not an office or place of trust, and in exercising it he was simply engaged in completing an unfinished duty which survived the termination of the office before held.

It is also true that the taxes of 1916 were due, under the provisions of the Machinery Act then in force, 1 October, 1916, and when the tax lists of that year were delivered to the defendant, which was before the plain-

tiff Rosemond was inducted into office, the total amount of the taxes was charged against the defendant and the sureties on his bond.

These were the existing conditions at the time of the enactment of the salary act of 1915, and the General Assembly is presumed to have had knowledge of them.

It is also a presumption, adopted in the construction of statutes, "that it was the intention of the Legislature to enact a valid, sensible, and just law, and one which should change the prior law no (382) further than may be necessary to effectuate the specific purpose of the act in question" (Black's Interp. Stat., sec. 41), and "that the Legislature never intends to do an injustice." Black Interp. Statutes, sec. 46.

If, therefore, it was the purpose of the General Assembly to deprive the defendant of the right to collect the taxes of 1916, we would expect to find in the statute a direction to turn over the tax lists to his successor; but there is no such provision, and the construction of the statute contended for by the plaintiffs would work a serious injustice, as it would take from the defendant, who was elected and inducted into office prior to the enactment, nearly the whole of the emoluments of his office for one year without substituting any compensation therefor.

The act manifests a clear intention to the contrary, by the provision: "That this act shall be in full force and effect from and after the first Monday in December, 1916, as to all *officers* except clerk, and as to him on first Monday in December, 1918."

The officers affected by the act had already been elected and were in office when it was enacted, and the operation of the act was postponed for the purpose of giving to the incumbents the salaries and fees belonging to the officers for the terms they were then filling.

If this is not so, the act discriminates against the sheriff, by giving the register of deeds and treasurer all the fees for two years and to the clerk for four years, while it deprives the sheriff of his commissions for collecting the taxes for 1916, which is, as said in plaintiff's brief, "practically the only value the sheriff's office has" in Orange, and the act shows on its face an intent to treat all alike.

The act, considered as a whole, shows that it was the purpose of the General Assembly to abolish the fee system in Orange County and to provide fixed salaries in lieu thereof; to treat all of the officers affected by the act alike and to do no injustice, and to this end the operation of the act was postponed so that the officers already elected might have all of the emoluments of their terms; to provide fixed salaries in substitution for fees and commissions to which the officer receiving the salary would

have been entitled but for the act, and not to give one a salary at the expense of another or in the place of fees to which another was entitled.

If we were to hold otherwise we would take from the sheriff his commissions for one year without compensation therefor and without express legislative declaration to that effect, and would require these commissions to be turned into the treasury of Orange to be used in the payment of the salaries of other men, thereby imposing upon the sheriff the burden of the payment of salaries for one year.

(383) The case of *Mills v. Deaton,* 170 N. C., 388, is radically different from the one before us. In the first place, the statute then under consideration, relating to the salaries of officers in Iredell County, provided that all *uncollected tax levies* should be turned over to the county commissioners on the first Monday of December of each year; and there is no such provision in this statute. Again, the defendant Deaton was reëlected, and he accepted the office under the act fixing his salary.

Upon a careful consideration of the questions involved, we are of opinion there is no error.

Affirmed.

BROWN, J., concurring: In my opinion, there is a marked distinction between this case and *Mills v. Deaton,* 170 N. C., 388. In that case Sheriff Deaton succeeded himself. When he qualified in December, 1914, for the second term the office of sheriff became a salaried office, which compensated the incumbent for all loss of fees. At that time Deaton had the tax lists of 1913 in his hands, which had been given him 1 October, 1914. As he succeeded himself, we held that he could not receive the salary and the commissions both; and, further, the Iredell statute differs from the statute now under consideration in the material particular pointed out in the opinion of the court.

In this case the sheriff did not succeed himself, and went out of office with a partially uncollected tax list in his hands with which he had been charged and for the collection of which he had given bond. It was his privilege and duty under the statute to finish the collection and to account for the taxes. His successor, Rosemond, had no authority to collect these taxes. Only the defendant Bain was invested with that authority. Inasmuch as Bain only could finish the collection, he was entitled to deduct the commission for collecting in his settlement. The Legislature failed to invest the succeeding Sheriff with the power to collect the preceding year's taxes. As that could be done only by Bain, and as he was still charged with their collection, it evidently was not the purpose of the Legislature to deprive him of his commissions.

A similar condition arises when a sheriff dies in office. His successor has no authority to collect the tax lists in the deceased sheriff's hands for collection. The law provides that the bondsmen shall appoint a tax collector, and he receives his compensation in the commissions allowed by law for collecting.

CLARK, C. J., dissenting: Custom cannot avail against an act of the Legislature repealing it. The arm of the lawmaking body of the State is not so shortened that it cannot repeal a custom as well as a former statute.

Chapter 46, Public Local Laws 1915, changed the compensation (384) of all the county officers of Orange to the salary basis. It is entitled "An act to fix salaries for public officers in Orange County." It provides (section 1) that the sheriff of that county may appoint a deputy in each township who shall receive the fees for serving summons and other process and commissions on executions except the deputy for Hillsboro Township, who shall receive a salary of $600 per annum. Section 2 provides: *"All other fees, commissions, profits, and emoluments of all kinds* now belonging to or appertaining to, or hereafter by any law belonging or appertaining to the sheriff by virtue of his office shall be faithfully collected by him and turned over to treasurer of said county, to be disposed of as hereinafter provided." This is explicit and cannot admit of two constructions. Section 14 provides that "This act shall be *in full force and effect* on and after the first Monday in December, 1916, as to all offices except clerk, and as to him the first Monday in December, 1918."

Section 3 provides that the jailer shall be paid a salary, to be fixed by the county commissioners. Section 4 provides that "Said sheriff shall receive a salary of $1,600 per annum *in lieu of all other compensation whatever,"* and provides, further, that his deputy for Hillsboro Township shall be paid $600 per annum and that the county shall pay the premium on the sheriff's bond. All the above to be paid by the county "out of the funds herein created."

The statute then provides for the amount of the salary of the Superior Court clerk, the register of deeds, and treasurer; and section 9 provides, under a penalty, that all the officers "hereinbefore mentioned shall faithfully perform all the duties of their several offices imposed upon them by law, and shall receive no compensation nor allowance whatever for any extra or additional service rendered to the county or State or other Government agencies under existing law or laws hereafter enacted, except as hereinbefore provided."

Section 10 provides: "The officers hereinbefore named are each required to keep a fee book upon which shall be entered, immediately upon their receipt, all fees or *commissions,* and are required to turn over to the treasurer of Orange County all moneys coming into their hands from such source"; that the treasurer shall audit the books and shall post at the courthouse door an itemized statement of all the fees and commissions, and that the county commissioners shall supervise the whole matter. And section 11 provides that any officer failing to collect or turn over any fees and commissions shall be guilty of misdemeanor. This would apply to the defendant if he received any commissions after the date the act was to be "in full force and effect."

(385) Section 12 provides: "All moneys coming into the hands of the treasurer of Orange County by virtue of this act shall be held by him as a separate and distinct fund, and after paying the monthly salaries and allowances provided for in this act and after paying premiums of sheriff and treasurer, the balance of said fund shall semiannually be divided equally between the public school fund and the fund for public roads," with a provision that if at any time this fund is insufficient "to pay the monthly salaries as they become due, the commissioners may borrow temporarily the amount necessary from the general county fund." Section 13 repeals "All laws and parts of law in conflict herewith."

This act was ratified 29 January, 1915, and was clearly expressed to put in force the will of the people of that county, doubtless made after full public discussion, and enacted by the Legislature at the instance of the Senator and Representative from that county, that on the first Monday in December, 1916, all fees and commissions to county officials theretofore authorized by any law or custom whatsoever should be paid into the county fund and from that day said officers should receive in lieu thereof the salaries authorized in the act as their sole compensation for any and all services, whether ordinary or extra services, and whether under existing laws or laws thereafter to be enacted. The only exceptions made are that the deputy sheriffs in the townships, other than Hillsboro, shall continue to receive fees for serving process and commissions on execution sales, and that the clerk of the court should continue to receive fees up to the first Monday in December, 1918. With this exception the act was to be in full force and effect on the first Monday in December, 1916. The reason for the exemption of the clerk till December, 1918, was because his term of office, unlike that of the other officers, did not expire in December, 1916.

Under the Constitution the term of the defendant as sheriff expired on the first Monday in December, 1916. He was notified by this statute,

ratified 29 January, 1915, that on said first Monday in December, 1916, all perquisites and fees of every kind allowed to the sheriff of Orange by virtue of his office or any statute or custom to the contrary should be paid into the county treasury. It was within the power of the Legislature to have made this change take effect on the ratification of the act. But with great liberality the General Assembly made the act to take effect as to all the officers, except the clerk, on the first Monday in December, 1916, and, as to the clerk, two years later. The defendant, therefore, had nearly two years notice that all fees and commissions pertaining to his office should be turned into the county treasury after the first Monday in December, 1916.

This act was the expression of the sentiment of the county of (386) Orange that compensation by fees to the public officers was excessive and that there should be substituted the payment of fixed and definite salaries, and that all fees and commissions theretofore received should be paid into the public treasury, out of which these salaries were to be taken, and the surplus should be devoted to the public schools and public roads. With great liberality the act was not to take effect until the dates named, and in the meantime the sheriff then in office was allowed to receive the commissions on the collection of taxes for 1914, 1915, and even on the taxes of 1916, collected before the first Monday in December of that year.

The object of this legislation was for the relief of the people from what they deemed excessive compensation, and should not be construed as putting upon them additional and unnecessary expenses. It is no aid in construing the language, and the evident intent of this statute, to quote decisions made prior to its enactment under which the sheriff after the expiration of his term received compensation for collecting the tax list, for, as already stated, the sole purpose of the statute was to change the old system and to substitute a new system by the payment of salaries.

The Legislature had full power to make the act apply to one or to all officers, or to some and to exempt others. It exempted the clerk in this case till December, 1918, because the term of the clerk, unlike that of the sheriff and other county officers, did not expire in December, 1916.

The power of the Legislature to change the compensation of all county officers has been settled beyond question since the decision in *Mial v. Ellington,* 134 N. C., 131, which overruled the doctrine which had been laid down in *Hoke v. Henderson,* 15 N. C., 1, that "office is property," and that the public had no control over such matters after an officer had got an office in his hands. The power of the Legislature as to this very matter of changing compensation by fees into compensation by salary is fully recognized in *Mills v. Deaton,* 170 N. C., 388. The language of

the present statute expresses its intention as clearly as the power is unquestioned.

In *Mills v. Deaton,* 170 N. C., 386, *Brown, J.,* said (p. 388): "The explicit language leaves no room for construction. When the sheriff received the tax list, 1 October, 1914, he was required by law to collect them upon a commission basis, and when that was changed to a salary, the sheriff was likewise compelled to collect the taxes for the salary fixed. *It does not matter that the present sheriff was elected, or whether some one else was elected in his place, the office of sheriff is one and indivisible, and the salary fixed for it under this statute is intended to cover all the duties.*"

(387) The object of government is not to furnish the honors and the emoluments of office as a favor to individuals, nor have officers any property rights in an office or its compensation. Public officers are (not as a figure of speech, but as a matter of fact and of law) public servants, and except in those cases in which the Constitution forbids a change of compensation the Legislature can alter, increase, or diminish, at will, the compensation of any public officer. The officer has the alternative of resigning if he so wishes.

It appears on the argument here that prior to the enactment of this statute the emoluments of the sheriff's office in Orange County aggregated about $4,000 annually. This chapter 46, Public-Local Laws 1915, substituted for all the fees and commissions formerly allowed the sheriff (amounting annually to $4,000) a salary of $1,600, with other allowances for deputies (as above stated) and premium on his bond, making an aggregate cost of that office to the county treasurer of about $2,400.

The defendant in this case had already served two terms as sheriff of Orange and was entering upon the third term at the time this act was ratified, in January, 1915. It gave him nearly two years notice that *at the expiration of his term in December, 1916,* all officials would be paid by salaries and that after that date all fees and all commissions theretofore allowed must be paid into the public treasury.

Under the defendant's claim, if allowed, the county, instead of making an economy of $1,600 per annum in the sheriff's office beginning on the first Monday in December, 1916, will have to pay more than double: that is, the sheriff whose term had expired will be paid at the rate of at least $4,000 (and, indeed, more, for it is claimed by him that the greater part of his fees were in the collection of the tax list) until all the taxes of 1916 are collected, while at the same time the new sheriff will be receiving the full salary and expenses of $2,400 per annum out of the county treasury, thus costing the county at the rate of at least $6,400 per annum. It is hardly conceivable that so intelligent a population as that

of the county of Orange would have asked the Legislature to continue the emoluments of the sheriff, *whose term has expired,* at the rate of at least $4,000 a year and at the same time tax the public at the rate of $2,400 per annum for the sheriff who is in office. It is not reasonable to suppose that the Senator and the Member from Orange advocated a statute leading to any such result, or that the legislature could have so understood in enacting this statute, whose object was to relieve the taxpayers of the county, and not to increase their burdens.

On the first Monday in December, 1916, by virtue of the statute, the salary of $1,600 to the sheriff, and incidentals of $800 other allowances, became a charge on the county treasury of Orange. At (388) the same time the county was to be recouped by the payment into the public treasury of "all the commissions and fees of every kind" received after that date by the sheriff's office, which were at least at the rate of $4,000. The defendant contends that because prior to the change made by the act of January, 1915, the outgoing sheriff received the fees for collecting the tax list, so far as he had not already collected it, that the court should now read into this statute an intention that the former sheriff should have the commissions for collecting the taxes, when there is no indication whatever of such intention shown in the statute, which is expressly to the contrary. This would leave the county only the other fees of the sheriff (which it appears amounted to less than $20 in ninety days from the first Monday in December) to recoup the salary allowed the new sheriff and his deputies of $200 per month, for the process fees continue to go to the sheriff's deputies, except as to Hillsboro Township.

The county of Orange and its taxpayers, by the construction the defendant asks, are penalized heavily for wishing to make the change which so many other counties have had adopted to their satisfaction and to economy in the public expenditure. In Orange the same statute is made a heavy loss to the public instead of an economy.

The Public-Local Laws of 1911, 1913, 1915 show that there were 48 acts putting county officers on salary (and there have been others since), only 9 of which have any express provision requiring officers to turn over their books and papers at the end of the term. The other 37 rely upon the common-law rule which treats that as a necessary incident of leaving any office. Only two of these 48 statutes permit the outgoing sheriff to retain the tax list of the preceding year. Such enactment is not in this statute, and its absence leaves no ground for the defendant's contention that he is entitled to do so notwithstanding the clear-cut, incisive substitution, at the date fixed, of the new system of salaries for the former custom.

The collection of taxes is not an inherent part of the duties of sheriff. 37 Cyc., 1192. It was not so in England, from which we derived our system of laws, nor is it so in many of the States of this Union. 35 Cyc., 1489. But if it were, it was competent for the Legislature to change the method of compensation. The people of Orange had the right to ask for such change and the Legislature had the power to order it. In doing so they prescribed the date when the change should take place and that after that time the sheriff should receive no fees whatever for the collection of taxes, but allowed him, instead, a salary which began at that date for all the sheriff's duties of every kind. The act (389) not only does not permit, but prohibits, the allowance, either to the old sheriff or the new, of any fees or commissions, for any work whatever, since the first Monday in December, 1916, beyond the salary and allowances therein provided for him and his deputies.

After the first Monday in December, 1916, the act permits no commissions to any one for collecting taxes, and the sheriff whose term has expired cannot claim them, any more than the new sheriff can claim them after his term shall expire in December, 1918.

The plaintiffs are the commissioners of Orange, and their attorney in this case was the Senator from Orange in 1915 (Mr. Nash), who, expressing the will of the people of that county, drafted and procured the passage of this act, whose intent, very clearly expressed, provides that after the first Monday in December, 1916, all fees and commissions theretofore paid to county officers should be paid into the county treasury (section 12), out of which fund the salaries provided in the act shall be paid to the officers, and (section 9) that the officers shall receive after that date "no compensation or allowance whatsoever" except as otherwise provided in the act, which exception specifies that the clerk shall continue to receive fees for two years thereafter, and that the deputy sheriff shall receive process and commissions on executions in certain townships. Neither the former sheriff nor any other officer or any other fees or commissions are excepted. The object of this action is to enforce the provisions of this statute enacted after full discussion at the instance of the people of Orange County in a matter concerning their own county and restricting their county expenses.

The cardinal idea, repeated again and again throughout the act and which runs through it as its warp and woof, is that on the date named (nearly two years ahead) the system previously in force, by which county officials were compensated by fees and commissions, was absolutely and utterly changed, and fixed salaries substituted. The slight exception made in the act, of process fees to the deputy sheriff in some of the townships, emphasizes the statement in the act that "except as

hereinbefore provided" the officers shall thereafter receive *no compensation or allowance whatsoever,* under existing laws or laws hereinafter enacted, except the salaries named in the act.

The act places all the duties of the office on the new sheriff, and all the compensation is his, after the date specified. If the old sheriff insists on collecting the taxes, the commissions, nevertheless, must be paid into the county treasury, for the act provides that fees and commissions are *all* to be paid into the treasury and out of them the salaries, to a smaller amount, are to be paid. Least of all is there any indication that the former sheriff, *whose term has expired,* shall nevertheless be allowed to receive several thousand dollars in commissions not- (390) withstanding the act, while the taxpayers are to pay the new sheriff and his deputies $200 per month. The defendant has not pointed out a line nor a word in the act which justifies him in making such claim, which is contrary to the whole scope of the act and the prohibitions therein.

Cited: Thompson v. Comrs. of Person, 181 N.C. 267; *Pender County v. King,* 197 N.C. 55; *Ferguson v. Martin,* 197 N.C. 305; *Martin v. Swain County,* 201 N.C. 70.

T. H. LINDSEY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 18 April, 1917.)

1. Carriers of Passengers—Railroads—Negligence.

A large bolt of the kind used for fastening rails together, loose in the aisle of a passenger coach, which caused a passenger therein to fall and injure himself while going for a drink of water, is sufficient evidence of the defendant's negligence in the passenger's action for damages against the carrier.

2. Same—Safety of Passenger—Duty of Carrier—Prima Facie Case—Burden of Proof—Trials—Nonsuit.

Under its contract of carriage a railroad company owes its passengers a high degree of care for their safety, and where in the passenger's action for damages there is evidence tending to show that the plaintiff was injured by stepping upon a large bolt in the aisle of the coach, negligently left there by defendant's employees, a prima facie case is made out, imposing the burden of proof on the defendant to show that it was not in default of this duty.

3. Same—Instructions—Proximate Cause.

In a passenger's action against a railroad company for damages for an injury received by him from stepping upon a large bolt in the aisle of the defendant's passenger coach, a charge is proper that, the coach being under the management and control of the defendant, it would afford evidence of negligence and proximate cause should they find the accident would not have occurred in the ordinary course of things or in the defendant's exercise of proper care.

CIVIL ACTION, tried November Term, 1916, of DURHAM, before Daniels, J., upon these issues:

1. "Was the plaintiff injured by the negligence of the defendant as alleged in the complaint?" which the jury answered "Yes."

2. "Did the plaintiff, by his own negligence, contribute to his injury?" which the judge, by consent of both plaintiff and defendant, answered "No."

(391) 3. "What amount, if any, is the plaintiff entitled to recover?" which the jury answered "$3,000."

From the judgment rendered, the defendant appealed.

Douglass & Douglass, Brawley & Gant for plaintiff.

P. A. Wilcox, Fuller, Reade & Fuller for defendant.

BROWN, J. There are only two assignments of error; one relates to the refusal to sustain motion to nonsuit and the other to a part of the charge. As we understand the law applicable to this case, the motion was properly denied.

The material facts as testified to by plaintiff and his witnesses are practically uncontradicted. Plaintiff was a passenger on defendant's train from Goldsboro to Warsaw, 16 December, 1914. It was nearly dark and the lamps were lighted. Plaintiff was seated in the smoking apartment of the rear passenger coach. A short while before the train reached Warsaw the plaintiff, desiring a drink of water, arose from his seat, approached the water tank in the rear of the coach, and stepped on a loose bolt which was on the floor of the coach, was thrown down and seriously injured. This bolt was large and of a kind used in bolting the rails of the track together. Such bolts are frequently carried by railroad trackmen with them on defendant's engines and trains.

Plaintiff testified: "When I stepped on the bolt it rolled and twisted under me, shot my leg or left foot from under me, and it slid under my right foot and threw me to the floor, not allowing my body to fall over as it would ordinarily if out in the open. This rear seat was so close to me I fell on the side of that and my hip slid out like that. When I

pulled up by the bench and attempted to make a step I found I had lost the use of this left hip, hurting me very much at the time. I leaned over and caught the seat opposite across the aisle and sat down on this seat, which had no arm to it. This bolt rolled out against the rear door of the coach when I stepped on it, and the motion of the train rolled it back in the aisle—down the aisle, like."

The defendant offered evidence tending to rebut the allegation that the injury was caused by its negligence. Its evidence tended to prove that the cars were properly lighted; that the bolt must have been suddenly rolled in the aisle, and that there was no time or opportunity afforded defendant to discover and remove it, and that the plaintiff's injury was the result of an accident that reasonable care could not have prevented. It will be seen from the response to the second issue that the plaintiff's conduct in no way contributed to his injury.

The defendant's counsel earnestly contends that there is no (392) evidence of negligence to be submitted to the jury; that there is no evidence "as to the length of time the bolt had been on the floor, who put it there, or that it was even discovered by or brought to the attention of any members of the train crew."

A loose track bolt, as large as the one in evidence, lying on the aisle floor of a passenger car, is unquestionably a danger and menace to the passengers.

The defendant's witness Page testified: "I would have picked the bolt up quickly if I had seen it. We are supposed to pick up those things." Its witness Whitehead said: "If I had seen this bolt on the floor, I would have picked it up, because some one might have stepped on it or slipped over it; some one might have stumped and broke his thigh."

The learned counsel for defendant mistake the rule of evidence in such cases. The burden is not on plaintiff to prove how the bolt happened to be on the aisle floor, nor how long it had been there. When plaintiff offered evidence tending to establish the facts we have stated, he made out a prima facie case of negligence, and a motion for nonsuit cannot properly be allowed. It is only in cases where no sufficient evidence of negligence is introduced, or where the evidence offered by plaintiff also rebuts any presumption that might otherwise arise from it, or establishes contributory negligence that such motion may be properly sustained, at close of plaintiff's evidence. The plaintiff having made out a prima facie case of negligence, it became incumbent upon defendant to offer evidence to rebut it and to exculpate itself from the charge of negligence.

We are referring, of course, to injuries to passengers only, where the cause of action is based upon an alleged breach of a contract for safe

carriage. This rule is based upon the contract of safe carriage of the passenger which the carrier has entered into, and is not, therefore, *ex delicto*. In the earlier English cases this contract was interpreted as a contract of insurance, but now it is treated only as a contract to exercise a high degree of care. Therefore, where the passenger is injured by an apparent act of negligence while in the care of the carrier, the latter must rebut such prima facie case by evidence tending to prove that it exercised such degree of care and that the injury was not the result of its negligence.

This is the well settled doctrine of the courts of this country. 43 Am. Dec., 363, notes, where it is said: "Where a person, suing a carrier of passengers for an injury, shows that the injury happened to him without fault or negligence on his part in consequence of the breaking or
(393) failure of the vehicle, roadway, or other appliances owned or controlled by the carrier in making the transit, he makes out a prima facie case for recovery of damages," citing a large number of adjudications. Thompson Carr. Pass., 210; Ang. on Carr., sec. 569; *Mercer v. Penn. Ry.*, 64 Pa. St., 230; *McCord v. R. R.*, 134 N. C., 56.

A more recent case is *Ferne v. Penn. Ry. Co.*, 96 Atl. Rep., 590. A case very much in point in *Schonleben v. Interborough Rapid Transit Co.*, 145 N. Y. Sup., 692. In delivering the opinion of the Court, *McLaughlin, J.*, says: "The plaintiff was a passenger in one of defendant's cars. The floor of the car was covered with wooden slats about an inch apart, fastened thereto by metal screws. One of these screws in the aisle between the seats projected above the slats from one-half to three-fourths of an inch. When the plaintiff reached his destination he was told to leave the car, and as he was doing so, one of his shoes caught upon this screw, and he was thrown down and injured. He had no knowledge of the existence of the screw until he was thrown down, and offered no evidence to show how long it had been in that condition; nor did it appear that the defendant had any knowledge, at or prior to the accident, of the actual condition of the screw when plaintiff was thrown. The court dismissed the complaint, and plaintiff appeals. . . . I am of the opinion that the judgment should be reversed. The relation of the plaintiff to the defendant at the time of the accident was that of a passenger. The defendant was obliged to exercise the greatest care for his safety. The mere happening of the accident, under the circumstances described, imposed upon the defendant the duty of an explanation. It was bound, without any further evidence, to show, if it could, that the existence of the screw at the place and in the condition in which it was, which caused plaintiff to fall, was not due to its negligence."

This is the accepted doctrine obtaining in the Federal as well as the State courts.

Mr. Justice Lamar, in delivering the opinion of the Court in the case of *Gleeson v. R. R.,* 140 U. S., at p. 443, says: "Since the decisions in *Stokes v. Saltonstall,* 13 Pet., 181, and *R. R. v. Pollard,* 22 Wall., 341, it has been settled law in this Court that the happening of an injurious accident is in passenger cases *prima facie* evidence of negligence on the part of the carrier, and that (the passengers being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed and that the injury was unavoidable by human foresight. The rule announced in these cases has received general acceptance, and was followed at the present term in *Inland and Seaboard Coasting Co. v. Talson,* 139 U. S., 557."

This is, of course, followed by the lower Federal courts. *Wiley* (394) *v. R. R.,* 227 Fed., 127. The remaining assignment of error is to the charge, viz.: "I charge you when a thing or condition or operation is carried on which causes injury is shown to be under the management of the defendant, and the injury is such as in the ordinary course of things does not happen, if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care, and carries the question of negligence to the jury, not relieving the plaintiff of the burden of proof, but being merely submitted to the jury in view of all the circumstances and conditions for the purpose of enabling them to say whether or not that was negligence, and that such negligence was the proximate cause of the injury."

Of course, his Honor applied this to the present case, wherein a passenger is proven to have been injured. As a proposition of law, we see nothing in it that this defendant can reasonably complain of, in view of the array of authorities we have cited.

No error.

Cited: Nowell v. Basnight, 185 N.C. 148; *Saunders v. R.R.,* 185 N.C. 290; *Humphries v. Coach Co.,* 228 N.C. 403.

A. S. PRICE ET AL. v. SOUTHERN RAILWAY COMPANY.

(Filed 18 April, 1917.)

1. Carriers of Goods—Connecting Lines—Carriers by Water—Negligence—Commerce—Federal Statutes—Loss of Vessel.

Where loss or damage is caused an interstate shipment of goods by a connecting carrier by water in its designated or usual route of shipment, and suit is brought in the State court having jurisdiction of the parties

and subject-matter to recover therefor against the initial carrier by rail, the defendant may avail itself of the defenses under the Federal statute (34 St. at Large, 594) limiting liability in case of carriers by water, where the same properly applies; and where it is shown on behalf of the defendant that the carrier by water undertook the transportation of the goods upon a seaworthy vessel, properly manned and equipped, and that the vessel with the cargo was an entire loss, without privity or knowledge of the owner or owners, a recovery for such loss will be denied.

2. Same—Verdict—Inconsistency—Interpretation.

Held, on the present record, and having due regard to the pleadings, testimony, and charge, there is no such conflict in the issues as to prevent the defendant from securing his judgment on the verdict.

CIVIL ACTION, tried before *Long, J.*, and a jury, at January term, 1915, of ROCKINGHAM.

(395) The action was to recover for the loss of certain goods delivered to defendant as initial carrier, at Reidsville, N. C., and consigned for shipment to Shoninger Bros., New York City, title to remain in conveyor till delivery and receipt, etc., said goods having been lost on the route.

There was denial of liability on part of defendant company and allegation by way of defense and proof tending to show that the goods in question were shipped over the usual route for such shipments, by way of Norfolk, Va., and thence with the Old Dominion Steamship Company, a connecting carrier; that they were sent by the latter company on their steamer *Monroe*, a seaworthy vessel in all respects, properly manned and equipped for the purpose, and the steamer was sunk on the voyage, in collision with the steamer *Nantucket* of the Merchants and Miners Transportation Line, and the same with cargo was a total loss, no freight being earned, etc.

On issues submitted, the jury rendered the following verdict:

1. Was loss of the goods caused by the default or conduct of those in charge of the steamship *Monroe?* Answer: "Yes."

2. Was the steamship *Monroe* a seaworthy vessel, properly equipped and manned? Answer: "Yes."

3. Was the steamship *Monroe* and its cargo lost at sea? Answer: "Yes."

4. Was there any part of the cargo, save an unsubstantial amount in value, salvaged? Answer: "No."

5. In what sum, if any, is the defendant indebted to the plaintiff? Answer: $210.99 and interest."

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

J. M. Sharp for plaintiff.
Manly, Hendren & Womble for defendant.

HOKE, J. The disposition of the present appeal, in its principal features, is determined by the decision of this Court in *Brinson v. R. R., reported* in 169 N. C., 425. In that case it was held, among other things, that an initial carrier sued under the provisions of the Federal Statute of 29 June, 1906, 34 Statutes at Large, 594, for the loss or damage to a shipment by reason of the default of a connecting carrier, could avail itself of any defense existent in the latter's favor, and that where such shipment by a designated or usual route was in part by water, the Federal statute as to limitations of liability, in case of carriers by water, could in proper instances be set up and relied upon, citing in support of the position, among other cases, the *Hoffman*, 171 Fed., 455; *Riverside Mills v. R. R.*, 168 Fed., 987; *Ford v. S. S. Co.*, 4 Saw- (396) yer, 292; *same case*, 15 Fed. Cases, No. 8506. Speaking to these authorities in *Brinson's case*, the Court said: "On this question, in *Riverside Mills v. R. R.*, it was held: 'In an action by the shipper against an initial carrier for loss of goods shipped in interstate commerce, under amendment to Hepburn Act of 29 June, 1906, the carrier may make any proper defense which can be made in a court of law and which any connecting carrier on the line of which the goods were lost or the injury occurred might make.' And in the case of *Lord v. Goodhall, supra*, it was held, among other things, that 'A party using for the transportation of his goods, an instrument of commerce which is subject to the regulating power of Congress must use it subject to all the limitations imposed upon its use by Congress.' Both of these causes were affirmed, on writ of error, in Supreme Court of the United States; the first in *R. R. v. Riverside Mills, supra*, and the second in *Lord v. Goodhall*, 102 U. S., 541. The deliverance of the higher Court, however, dealt with other, chiefly constitutional, questions, and the precise point we are discussing was not directly presented; but, as stated, from the language of the statute and the fact that recovery over is allowed the initial carrier, and from the reason and justice of the position we are well assured that the lower Federal courts have taken the correct view, and that in case of loss by sea the initial carrier may avail itself of these Federal statutes where the same properly apply." It was further held, in the decision, that in cases coming properly under these provisions of the Federal laws, 3 Compiled Statutes, 1901, ch. 6, secs. 4283-4289 (erroneously printed in *Brinson's case* as 5 Compiled Stat., 1913), where there was a total loss of vessel, cargo, and freight, "without privity or knowledge of the owner or owners," that ordinarily no recovery could be had, the statute in such

cases limiting liability to the owners to the amount or value of their interest in the vessel. On this subject it was said: "These laws, being chapter 5, Laws 1913 (correct by 3 Laws 1901, ch. 6), classified in United States Compiled Statutes under section 4289, p. 2946, by which the owner of a vessel is relieved of responsibility, under certain conditions, by reason of faulty navigation and other specified causes, and section 4283 of the same volume, by which the liability of the owner is restricted to the "value of his interest in the vessel and its freight then pending, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred without the privity or knowledge of such owner or owners," etc., have been
(397) many times construed by the Supreme Court of the United States, and it is very generally recognized that defenses existent by reason of the statutes may be made available in a State court having cognizance and jurisdiction of the cause of action, *R. R. v. Wallace,* 223 U. S., 481; *Riverside Mills v. R. R.,* 168 Fed., 1987; and in reference to the last mentioned section, that on limitation of liability, it is held, in *Norwich v. Transportation Co.,* 118 U. S., 468; *Norwich v. Wright,* 13 *Wallace,* 104, and other cases, the value of the vessel must be estimated after the collision, and in case the vessel is then sunk and no freight earned, there is usually an end of liability on the part of the owners." In the case to which we have referred a recovery by plaintiff was sustained, but this was for the reason that, on a "case agreed," it was not made to appear that the vessel in question was seaworthy or properly manned or equipped," a condition required for the operation of the Federal statutes in question; but, in the present suit the defendant, assuming the burden of this position, as required by the law, has alleged and proved that the ship in this instance was both seaworthy and properly equipped, and that the vessel with the cargo was an entire loss," and, under the principles approved in our former decision, we must hold that no recovery by plaintiff can be had for this loss.

It was objected for plaintiff that there was conflict in the findings of the jury and, on that account, the verdict should be set aside and a new trial allowed. "It is the recognized position with us that a conflict in a verdict on essential and determinative issues will vitiate it"; but it is also held that a verdict should be liberally and favorably construed with a view of sustaining it if possible, and that to this end it may be interpreted and allowed significance by reference to the pleadings, the testimony, and the charge of the court." *Reynolds v. Express Co.,* 172 N. C., 487. Considering the present verdict in the light of these prin-

ciples, we do not discover any material conflict in the findings of the jury. As to the verdict on the fifth issue, though in the form of an indebtedness, it was only entered for the purpose of ascertaining the amount in case the court should rule with plaintiff on the question of liability. We do not understand that plaintiff's exception was addressed to that issue. And in reference to the alleged conflict in the responses to the first and second and third issues, the Federal statute, limiting liability to the value of the ship or the owner's interest therein, applies to all loss, damage, or injury, by collision, etc., "without the privity or knowledge of the owner." While this qualification includes the owner's default in not supplying a seaworthy vessel in the first instance, this being a primary and nondelegable duty, it does not extend to errors in navigation or other negligence on the part of the crew that may be committed on the voyage and in which the owner does not share (398) and of which he is necessarily ignorant. In *Lord v. Goodhall,* 4 Sawyer *supra,* the correct principle, we think, is stated as follows: "The owner is bound to exercise the utmost care in the selection of a competent master and crew, and in providing a vessel in all respects seaworthy; and if by reason of any neglect or fault in these particulars a loss occurs, the owner is in privity within the meaning of the statute. If the owner exercises due care in the selection of the master and crew, and in providing a seaworthy vessel, and a loss afterwards occurs, without his privity or knowledge, through the negligence of the master or crew, or from some secret defect in the ship or its equipments, which could not have been discovered or avoided by the exercise of proper care on his part, the owner's liability is within the limitation of the statute. Where a vessel is properly officered and manned, and in all respects seaworthy, when she leaves port, and a loss occurs from the subsequent negligence of the master or crew, or from other causes arising during the voyage, without the privity or knowledge of the owner, the owner's liability is within the limitations prescribed by the statute."

Interpreting the verdict in reference to these positions, it is clear that the steamship *Monroe,* on which these goods were shipped, was a seaworthy vessel, properly manned and equipped for the voyage, and the default established by the response to first issue refers to errors in navigation or neglect on the part of the crew while the voyage was in the course of performance. This is not only the permissible and natural interpretation of the verdict as rendered, but it was admitted on the argument that the only evidence offered or claimed on the trial was of default in the way the vessel was managed or navigated at the time of the collision.

There is, therefore, no necessary conflict in the issues, and in the verdict in response to the second and third issues the judgment for defendant must be affirmed.

No error.

Cited: S. v. Snipes, 185 N.C. 747.

J. M. SUMMERS v. THE SOUTHERN RAILWAY COMPANY ET AL.

(Filed 18 April, 1917.)

Limitation of Actions—Nonsuit—Payment of Costs—Second Action.

Revisal, sec. 370, is an extension of time beyond that allowed by the general statute, in the instances stated, including nonsuit, and the amendment in the laws of 1915 (Greg. Rev., Biennial, 1915, p. 350) requiring the payment of costs has no application when the second action has been brought within the time permitted by the general law.

(399) CIVIL ACTION, tried before *Webb, J.,* and a jury, at November Term, 1916, of DAVIDSON.

On motion of defendant, there was judgment dismissing the action, and plaintiff, having duly excepted, appealed.

George W. Garland for plaintiff.

Linn and Linn for defendant.

HOKE, J. On the hearing it was properly made to appear that in the spring of 1914 plaintiff, having given bond for costs, instituted an action against the North Carolina Midland Railway, a corporation said to be owned, controlled, and operated by the present company, to recover damages for an alleged injury occurring in January of that year when plaintiff was a passenger on said road; that at July Term, 1916, of Superior Court for said county cause came on for trial, and, both sides having introduced their evidence, there was judgment of nonsuit against the plaintiff, including a judgment for costs to the amount of $268; that in September, 1916, plaintiff instituted this action against the present defendant to recover for the same injury without having paid the costs adjudged against him, and his Honor, as stated, gave judgment dismissing the action for the reason that the costs adjudged against plaintiff in the former suit had not been paid.

It is not required to examine into or decide the question whether the present action is the same as that in which the nonsuit was taken, for if this be conceded we are of opinion that under our decisions construing the statutes applicable to and controlling the subject the judgment dismissing the present suit cannot be sustained. In our statute of limitations, Revisal 1905, sec. 370, it is enacted: "That if an action shall be commenced within the time prescribed therefor and the plaintiff be nonsuited or a judgment therein be reversed on appeal or be arrested, the plaintiff or, if he die and the cause of action survive, his heir or representative may commence a new action within one year after such nonsuit, reversal or arrest of judgment. In Laws 1915, ch. 211, Gregory's Revisal, Biennial 1915, p. 350, a proviso was annexed to the section as follows: *"Provided,* that the costs in such action shall have been paid before the commencement of the new suit unless said first suit shall have been brought *in forma pauperis."* It will be noted that this section in question and the amendment thereto are a part of our statute of limitations, and in well considered cases construing the section prior to the amendment it was held that it was not the purpose or meaning of the law to curtail or abridge the time within which an action might be brought, but to extend it. *Lumber Co. v. Hayes,* 157 N. C., 333; and construing the section as amended, it has been recently held (400) in *Bradshaw v. Bank,* 172 N. C., 632, that when both suits, as in this case, are brought within the time allowed by the general law, neither the section in question nor the amendment thereto requiring the prepayment of costs, applied for in such case, it was not necessary to resort to it, nor could plaintiff be properly considered as proceeding under it, but, under the provisions of the general statute, establishing the time within which these actions should be brought.

In our opinion, *Bradshaw's case* is decisive of the present appeal, and the judgment dismissing the action must be

Reversed.

Cited: Rankin v. Oates, 183 N.C. 520.

ARDENA B. AIKEN v. ATLANTIC LIFE INSURANCE COMPANY.

(Filed 18 April, 1917.)

1. Insurance—Policy—Abandonment—Instructions—Trials—Questions for Jury.

Where the facts are ascertained, the question as to whether a party seeking to enforce a contract had abandoned it is one of law, and, upon conflicting evidence, is a mixed one of law and fact for the determination of the jury under proper instruction from the court as to what, in law, constitutes an abandonment.

2. Insurance, Life—Premiums—Notice—Statutes.

An insurer may not declare its policy of life insurance forfeited or void for nonpayment of premium within the time therein specified for it to be made, when such has solely resulted from its own error in failing to properly address the notice required by the statute; and where upon receipt of the notice the insured promptly tendered payment of the premium, and keeps his tender good, and the policy remains in his possession until its maturity by death, without demand or action of the insurer, and without notification of further premiums becoming due, as the statute requires, the defense may not successfully be maintained, in an action by the beneficiary under the policy, that it had become forfeited for nonpayment of premiums. Gregory's Supplement, sec. 4779a.

3. Same—Reinsurance—Statements—Abandonment—Questions for Jury.

A statement made for the reinstatement of a life insurance policy, that it had lapsed for nonpayment of premium, may not be declared an abandonment thereof as a matter of law, when there is evidence tending to show that a sufficient tender of payment had been duly made and wrongfully refused by the insurer, who continued to insist upon his rights.

4. Insurance, Life—Premiums—Tender—Conditions.

Where the insurer has erroneously declared a policy of life insurance forfeited for the nonpayment of a premium, and has refused a good tender of payment thereof duly made, which the insured continues to insist upon and make good, and, acting upon the insistence of the insurer, the insured makes application for reinstatement of the policy under protest, remitting the premiums therewith, the insurer, having itself annexed the condition, may not successfully maintain that the tender of the insured was upon condition and therefore not sufficient in law.

(401) CIVIL ACTION, tried before *Webb, J.*, and a jury, at November Term, 1916, of GUILFORD.

On 15 August, 1911, the American National Life Insurance Company of Lynchburg, Va., issued and delivered to E. R. Aiken its policy of insurance upon his life, payable to the plaintiff, his wife, in the sum of $1,000. The annual premium was $49.64. One year's premium was paid at the time of the issuance of the policy, and thereafter the premium

was payable semiannually; $24.82 on 15 August, 1912, and a like sum on the 15th day of February and August of each succeeding year. The semiannual premium due 15 August, 1912, was paid. The semi-annual premiums due 15 February, 1913, 15 August, 1913, and 15 February, 1914, were never paid. The insured died 18 April, 1914.

On 1 October, 1912, the defendant took over the assets and assumed the liabilities of the American National Life Insurance Company so far as this policy is concerned.

This suit was begun 5 October, 1914. The complaint contained three causes of action:

The first alleged the execution and delivery of the policy, the death of the insured, and the refusal of the defendant to pay.

The second consisted of a repetition of the first cause of action and the further allegation, in substance, that it was the general custom of the American National Life Insurance Company and of defendant to notify all their policyholders of the date when premium fell due; that such notice was given as to the semiannual premiums due 15 August, 1912, which was paid by the insured. It was further alleged, in substance, that no further notice as to premiums was given by either of said companies to the insured until on or about 1 May, 1913, when he received a notice of the premium due 15 February, 1913; that this notice had been sent to the wrong address, the name being wrong and Fuquay Springs the address instead of Greensboro, the correct one; that upon receipt of it, insured at once remitted the amount by postoffice order to defendant, but it refused to receive it; it was further alleged that the insured, until his death, was ready, able, and willing to pay said premium, and that since his death plaintiff has been ready and willing to pay the same, and also that no further notice was ever given by the defendant of the maturity of the premiums which accrued during the life of insured.

The other allegations in this cause of action related to the loan (402) value of the policy and the automatic nonforfeiture clause therein; these were abandoned at the trial, and hence are immaterial.

The third cause of action consisted, in substance, of a repetition of the first cause of action, an averment that insured was ready, able and willing to pay all premiums on the policy, and that he did pay or tender all premiums of which he received notice; it further alleged that the policy was still in force by virtue of chapter 884 of the Laws of North Carolina for 1909 (Gregory, 4779a), which provides that no policy shall be forfeited or lapsed unless notice of the amount and due date of the premium shall have been previously given, as required by the section. If by mail, the notice shall be duly addressed and postage prepaid.

The defendant answered and denied all the material allegations of the complaint except the issuing of the policy by the American National Life Insurance Company and the allegation that it had taken over the assets and assumed the liabilities of that company so far as this policy was concerned. It pleaded, as a defense to the several causes of action, the nonpayment of the semiannual premiums due 15 February, 1913, 15 August, 1913, and 15 February, 1914. It further alleged, in substance, that after the insured failed to pay the premium due 15 February, 1913, and after he had been notified that his policy had thereby lapsed, he agreed with defendant so to consider and treat it, and did so consider and treat it, and that he thereby abandoned all rights and claims thereunder; that on 31 March, 1913, he applied in writing to defendant for reinstatement of said policy, and then for the first time tendered a check for the amount of the semiannual premium due 15 February, 1913, in order to procure the consideration of his said application for reinstatement; that in said application he stated that said policy "was no longer in force"; that upon a medical examination required in such case by the policy as a condition for reinstatement, his state of health was found unsatisfactory and he was rejected as a risk by the medical director, and thereupon the defendant declined his application for reinstatement and so notified him and returned to him, unused, his check for $24.82, which had accompanied his application; that the insured never thereafter claimed that the policy was in force and never thereafter paid or offered to pay any premium thereon, but, on the contrary, abandoned said policy and all claims thereunder. The plaintiff denied that there had been any abandonment of the policy and averred that the premium due 15 August, 1913, and 15 February, 1914, were not paid because no notice thereof was given, as required by the statute and no demand made for them, and further alleged that the policy was in full force when her husband died.

(403) The policy was retained by the decedent and was found among his papers at the time of his death. There was evidence that E. R. Aiken, the insured, had signed an application to defendant for reinstatement of his policy, which was rejected, and the check sent to pay the premium was returned to him. This occurred 26 April, 1913. The check for the premium due 15 February, 1913, was dated 31 March, 1913, and was received by the defendant on 1 April, 1913, having been sent by mail in a letter dated 31 March, 1913. In the application for reinstatement it was stated that the policy was no longer in force, because the premium due 15 February, 1913, was not paid, and that the application was subject to the approval of the company.

The jury returned the following verdict:

"Is the defendant indebted to the plaintiff; and, if so, in what amount?" Answer: "One thousand dollars, less premiums unpaid, $74.46; total of $925.54, with interest on the balance."

Harry B. Grimsley, Brooks, Sapp & Williams for plaintiff.
R. C. Strudwick for defendant.

WALKER, J., after stating facts: The learned counsel who argued the case for the defendant in this Court, with his usual ability and clearness, stated very frankly that it turned upon two questions, first, whether the policy of insurance had lapsed for non-payment of premium, and, second, whether, as matter of law, upon the admitted facts, the contract had been abandoned by the plaintiff. The court, under correct instructions, as we think, submitted the question of abandonment to the jury and the verdict was against the defendant, the jury finding that the plaintiff did not intend to abandon the contract. There was evidence for the jury upon this question, and we cannot hold, as contended by the defendant, that the facts were of such a conclusive nature as to require a peremptory instruction that, even if the jury believed the evidence, there had been an abandonment. Two reasonable men might differ in opinion upon this question. But this will appear more clearly in the discussion of the other phases of the case. It is true, as asserted by counsel, that what amounts to abandonment is a question of law, just as what is negligence is a question of law; but whether there was an abandonment, or whether there was negligence, in any particular case, is a mixed question of law and fact, the judge declaring what is the law and the jury finding what are the facts and applying the law to them. We said in *McCurry v. Purgason,* 170 N. C., 463, 467: "As to whether the contract was abandoned is a mixed question of law and fact, as to what constitutes an abandonment being matter of law and as to whether there has (404) been an abandonment being a question depending upon how the jury may find the facts to be. The subject is discussed in *May v. Getty,* 140 N. C., 310. See, also, *Faw v. Whittington,* 72 N. C., 321; *Banks v. Banks,* 77 N. C., 186." The defendant relied upon *Faw v. Whittington, supra,* where *Justice Bynum* states the true rule as to abandonment of a contract. The headnote of that case is as follows:

"1. Where a defendant relies upon a renunciation of a contract in relation to the sale of land by the plaintiff, it is his duty to make it out unmistakably, and that he himself had assented to it.

"2. The acts and conduct constituting an abandonment by the vendee of his contract of purchase of land must be positive, unequivocal, and inconsistent with the contract. Mere lapse of time or other delay in

asserting his claim, unaccompanied by acts inconsistent with his rights, will not amount to a waiver or abandonment."

And discussing the question more broadly, but with special reference to the facts of that case, the Court in *Faw v. Whittington, supra,* referred to *Dula v. Cowles,* 52 N. C., 290, and said that "The contract is considered to have remained in force until it is rescinded by mutual consent, or until the plaintiffs do some acts inconsistent with the duty imposed upon them by the contract which amount to an abandonment." Applying these principles to the facts of this case, we think it results that the verdict is correct and should not be disturbed.

There was some dispute between the parties as to whether the insured, E. R. Aiken, had received due notice of the premium which was payable on 15 February, 1913. The evidence of Mrs. E. R. Aiken, the beneficiary and plaintiff, and Dr. O. A. Jones, was to the effect that defendant mailed a notice to E. H. Aiken, Fuquay Springs, N. C., and that the envelope inclosing it was not in fact received until 22 March, 1913. Mrs. Aiken saw the unopened envelope in her husband's mail about 22 March, 1913, and the insured immediately wrote to the company's agent about it, explaining how the delay in receiving the notice had occurred, and attributing it entirely to the company's fault in misdirecting the letter as to his name and postoffice address. The insured lived in Greensboro, N. C., and not at Fuquay Springs. He again wrote to the agent on 22 March, 1913, acknowledging receipt of the latter's letter of 20 March, 1913, and said: "Please note that I am in no way responsible for the delay in payment of the premium on said policy, and as I have been ready to remit the amount of the premium at any time when due, I do not think in a spirit of fairness that I should be required to have the expense of reëxamination." And again: "If you wish the premium on said policy and have the policy remain in force, notify me at
(405) once and I will give the matter my prompt attention." He received the following answer from the agent, dated 26 March, 1913: "Your letter of the 22d, addressed to the Atlantic Life Insurance Company, has been referred to me. We appreciate your business and want you to pay your premium. Please send me your check for $24.82, together with the inclosed blank filled out and signed by you." The blank inclosed in the letter was an application for reinstatement, in which the original contract was stated to be no longer in force, having lapsed by nonpayment of premium of 15 February, 1913. Right here it is proper to state that the jury found, under the evidence and instructions of the court, that the plaintiff's evidence as to the time when the notice was received by the insured was true, so that we may take it as established that the notice was delayed by defendant's fault and was not

received until about 22 March, 1913. The insured on 31 March, 1913, wrote to the agent as follows: "Your favor of the 28th inst., to hand, and replying to same, will say that I am sending you application blank and check for $24.82 for premium on policy. Trusting I may hear from you at an early date, I beg to remain." The receipt of the check and application was acknowledged by the company on 1 April, 1913, and on 26 April, 1913, the insured was informed by the agent that the company had refused the application, and his check for $24.82 was returned to him. This closed the correspondence, and there was nothing more done until the insured died, on 18 April, 1914, when payment of the policy was demanded. It appears that defendant gave no notice of the premiums due on 15 November, 1913, and 15 February, 1914, and they were not paid. It does not appear that the insured ever applied to any other company for insurance, but he kept defendant's policy and it was found among his papers at the time of his death.

The jury having found that the notice of the premium due 15 February, 1913, was not received until about 22 March, 1913, and as this occurred without any fault of the insured, the statute of 1909 (Gregory Suppl., sec. 4779a) prevented a forfeiture of the policy, as it provides that none shall take place unless notice is given as therein prescribed. The insured acted not only within reasonable time, but very promptly when he received the notice, and made a sufficient tender of the premium, as we shall see. It is argued by the defendant that this was not a legal tender because it was not unconditional. The correspondence shows clearly that the insured was ready, able, and willing to pay the premium absolutely and keep his policy alive. He annexed no condition, but it was the defendant who did so. It required the signing of the application for reinstatement, which was done against his full assertion of his rights under the existing policy and a protest (406) against requiring him to submit to another examination. If the company had taken the check and not challenged the validity of the policy, there would have been no objection on the part of the insured. He evidently wished to continue the insurance under the existing policy, which had not lapsed or been forfeited, but was in full force, and he so thought, for he complained of the demand for a second examination and insisted upon his rights under the policy he then had.

We do not think he waived or abandoned his right by signing the application. In a similar case, *Coile v. Commercial Travelers of America,* 161 N. C., 104, this Court, by *Justice Brown,* said: "It is true, the plaintiff applied for reinstatement prior to the accident, and it is contended that this was an acknowledgment that he had been properly suspended. We do not think so. The plaintiff applied because he had been

notified that he had been suspended; but he had a right also to rely upon the fact that his Assessment No. 99 had been paid and that the company had no right to suspend him." And in *Mutual Life Assn. v. Hamlin,* 139 U. S., 297, at p. 306, it is said by *Justice Harlan* for the Court: "Some stress is laid upon the fact that an application was made in December, 1884, in the name of the insured, for reinstatement as a member of the association. When information of the June assessment was received by Mrs. Hamlin, the beneficiary in the contract of insurance, in September, 1884, she promptly offered, through a friend, to pay all previous unpaid assessments upon the insured. The defendant refusing to accept such payment, and denying that the insured was any longer one of its members, the attempt was made to have him reinstated by the act of the association. That attempt—evidently made to avoid litigation—cannot be regarded as a waiver of the rights the insured had as a member; for those rights were not forfeited by his failure to pay the assessment of 2 June, 1884, the only one in question; notice of which, as the jury found, was not given as required by the contract." If this is the law, it cannot be said that the existing policy had lapsed, or was not longer in force, by reason of the insured having signed an application, which was promptly rejected. A reinstatement follows upon a true and legal suspension in a fraternal order, or a lapse or forfeiture in the case of an ordinary life policy; but in this case, as we have shown, there was no lapse and the policy was then in force. If we should hold otherwise, it would substantially be allowing the defendant to take advantage of and to profit by its own wrong. The whole effort at reinstatement proceeded upon a false basis, that is, the assumption by the defendant that a fact existed, which was that there had been no payment of a premium of which notice was properly given, which was false, as the fact (407) did not exist, and the jury so find. The defendant should not have been misled by the circumstances resulting from its own negligence. *Collins v. U. S. Casualty Co.,* 90 S. E., 585. It would be dangerous to decide that it could virtually cancel a policy in any such way, and would, at least, be unfair and unjust. The company was itself in fault, and not the agent, for he is to be commended for having acted with proper courtesy and consideration, and it is quite evident that he did not anticipate any loss by the insured of his policy. But it would seem that the "home office" of the company did not act its part so well.

It is contended that the insured by his subsequent conduct has waived his claim under the policy, but we do not think so. The defendant had returned his check and he was not required to controvert with it any longer, but could silently stand upon his legal right. He had asserted this right once, and rather emphatically, and was required to do no more.

There was no necessity of a reinstatement, as the insured had not forfeited his policy. It was not his fault that the notice went astray, but that of the defendant, and the latter cannot be permitted to take advantage of its own wrong. If the policy had, in fact, been forfeited, the proceedings to reinstate would have played a more important part in the case. As it is, the insured should not be prejudiced by filing a petition to reinstate, for he did merely a vain, or unnecessary, thing, and should lose nothing by it. His position is not changed, but is the same as it was before he applied to the company, at its request or suggestion, for reinstatement. 25 Cyc., 849, note 87, citing *Appleton v. Phœnix Mutual Life Ins. Co.*, 59 N. H., 541.

It is perfectly manifest from the evidence that the jury were right in finding that the insured had no intent to abandon his contract, as he was trying to preserve it. The only thing he has done was to admit something which has been found to be untrue, or incorrect, that is, the lapse of the policy. In *Manhattan Life Ins. Co. v. Wright,* 126 Fed., 82, at p. 88, *Judge Sanborn* (of the Circuit Court of Appeals) said: "Nor does the record seem to us to establish the defense that the complainant or Thomas W. Wright, her husband, ever abandoned their rights under the policy in hand. The test of abandonment is the existence or nonexistence of intent to abandon. Acts indicating abandonment are not always sufficient to establish it, and are generally material only as they tend to prove the intent to abandon. *Saxlehner v. Eisner and Mendelson Co.,* 179 U. S., 19, 31; *Dawson v. Daniel,* 7 Fed. Cas., pp. 215, 216, No. 3669; *Singer Mfg. Co. v. June Mfg. Co.,* 163 U. S., 169, 186; *Moore v. Stephenson,* 27 Conn., 13; *Livermore v. White,* 74 Me., 452; *Judson v. Malloy,* 40 Cal., 299; *Hickman v. Link,* 116 Mo., 123. The presumption is that the owner of property or of (408) rights to property intends to preserve them, because this is the usual purpose of such owners. The burden is on him who alleges abandonment to clearly establish the intent to abandon by evidence sufficient to overcome this natural presumption. The insurance company failed to bear this burden successfully. The record is barren of evidence that the complainant, the beneficiary in the policy, ever had any intention, or ever did any act evidencing an intention, to abandon her contract of insurance or her rights under it." In that case the insured had received a letter from the company stating that his policy had lapsed, and "it presumed that he did not care to revive and continue his policy." He made no reply and took no action in regard to the matter. He had expressed a desire not to "hazard" his policy. The policy had not lapsed, and both sides were silent for eight months, at the end of which time the insured died. The Court said: "This evidence does not convince that

Wright even intended to abandon his policy or his rights in equity which he was entitled to enforce thereunder." The legal effect of that decision is elsewhere stated to be that where an insured had declared his desire to continue his insurance, a failure by him to reply to a letter from the company, received about eight months before his death, and erroneously stating that the policy had lapsed and that it was presumed that he did not care to revive his policy, did not amount to an abandonment thereof. If that be true, and a very able and learned Court so held, there has been no abandonment here, or we are entirely safe in saying that it was, at least, a proper question for a jury to settle. The facts of this case are quite as strong for the plaintiff as were those in that case for the complainant, Mrs. Wright; the only difference being in the time, our period being twelve months and the other eight months before the death of the insured, and that is so slight as to be immaterial. The insured here kept his policy among his papers, after the premium which he had tendered was returned, and the company took no action at all to have the policy surrendered or canceled, and the insured was not required to pay the other two premiums until properly notified under the statute. The company will not be heard to say that it did not give the notice because it had illegally and wrongfully declared the policy as lapsed. It was a live policy, under the law, and the notice of premiums was required. 25 Cyc., 784, and cases; *Mutual L. Co. v. Dingley,* 49 L. R. A., 132; *McAlister v. Ins. Co.,* 101 Mass., 558. To constitute an abandonment in respect to a right secured, there must be a clear, unequivocal, and decisive act of the party; an act done which shows a determination in the individual not to have a benefit which is designed for him," 1 Cyc., 5. Such an intention is not presumed. 1 (409) Cyc., 7. "Where payments on a certificate are refused unless the member complies with conditions which he is not required to comply with according to his contract, as, for instance, furnishing a health certificate when he is not in arrears, or the association would not, by reason of an attempted expulsion, receive payments, or has wrongfully suspended a member or forfeited his membership, or has on unwarranted grounds refused to accept payments, a failure to pay or tender subsequent assessments will not prejudice the rights of the insured and his beneficiary until after notice of a readiness to receive the payments has been brought home to him." 3 Cooley's Briefs on Insurance, p. 2378; *Boyce v. Royal Circle,* 104 Mo. App., 528; *Byrum v. Sovereign Camp,* 108 Iowa, 430; *Supr. Council Am. L. of Honor,* 119 Fed., 682.

As the insured made a proper tender as soon as notified of the premium being due, and the application for reinstatement being out of the way, it preserved his rights under the original policy to the same extent

as if the tender had been accepted, as the company cannot refuse a legal tender and then deny its liability to the policyholder. As the application did not have the effect of destroying the plaintiff's right, and as the policy was still in force, because no notice was duly given of the premium due 15 February, 1913, and tender of the premium was promptly made when notice was received; nothing afterwards done deprived plaintiff of her claim, as mere silence did not do so, and everything that did occur was directly traceable to defendant's first and continued wrong.

The issue being sufficient in form and substance for the parties to present all relevant questions, the court did not err in refusing to submit those tendered by defendant. *Power Co. v. Power Co.*, 171 N. C., 248.

The evidence admitted by the court was clearly competent. We will not extend this opinion by a discussion of other exceptions, which are really involved in those already considered.

The finding below is amply sustained by the evidence, and there is nothing in the record to indicate that the court has either mistaken the facts or erred in the application of the law; but if there was any error, it was not prejudicial, but, on the contrary, in the defendant's favor.

No error.

Cited: Power Co. v. Power Co., 175 N.C. 679; *Highway Com. v. Rand*, 194 N.C. 811; *Furniture Co. v. Cole*, 207 N.C. 846; *Miller v. Teer*, 220 N.C. 612; *Henley v. Holt*, 221 N.C. 277; *Abrams v. Ins. Co.*, 224 N.C. 2, 10; *Bell v. Brown*, 227 N.C. 322.

(*410*)

Y. F. CECIL ET ALS. v. JOHN A. CECIL ET ALS.

(Filed 18 April, 1917.)

1. Wills—Interpretation—Intent—Equality of Division.

A testator owning and living on a 200-acre tract of land and owning a valuable city lot at the time of making his will, and who afterwards acquired a 7-acre tract of land, provided for his eight children by the first and second marriage as follows: To two of his sons, 40 acres each, which he had marked off from the 200-acre tract, valued at $350 each; $350 to each of his three daughters from his personalty, which was found to take it all; for the remaining three sons, "the land to be divided . . . each tract valued at $350 apiece, the remainder equally divided among my eight children." The two sons to whom the designated and marked lands were devised took possession in the testator's lifetime. *Held*, the intent

of the testator was an equality of division among his eight children, and the division intended among his three sons was of the remainder of his 200-acre home tract, leaving as the remainder to be equally divided the town lot and the 7-acre tract.

2. Wills—Interpretation—Intent—Findings of Court.

Extraneous findings of the court as to the valuation of the testator's property in getting at his viewpoint in interpreting his will is allowable in proper instances, but not controlling when remaining property is left for a further division.

APPEAL by defendants from *Webb, J.*, at November Term, 1916, of DAVIDSON.

S. A. Cecil died leaving two sons, C. A. Cecil, Yancey Cecil, and a daughter, Julia A. York, by the first wife; and three sons, Alpheus Cecil, Barna Cecil, and John A. Cecil, and two daughters, Leovina and Daisy Cecil by his second wife. He left the following will:

"In the Name of God Amen. June 25, '84.

This is my last will and testament. 1st, I will to C. A. Cecil the tract of land he lives on, 40 acres, more or less. Also to Yancey Cecil the tract of land he lives on, the line to run as I have mark, 40 acres, more or less; each farm is valued at $350 a peace; and also to Julia A. York and her heirs $300. Now, I will to my wife, Nancy Cecil, all my lands and horses, cattle, hogs and money (after my few debts is paid), as long as she remains my widow; after her death the Land to be divided between Alpheus Cecil, Barna Cecil, and John A. Cecil; each tract valued at $350. Leovina and Daisy Cecil to $350 a peace; the remainder equally divided among my eight children.

S. A. CECIL."

At the time the will was made the testator was the owner of about 200 acres of land in Davidson County, on which he lived, and also a
(411) lot in High Point on Main Street with a two-story brick building on it, and about $1,200 of personal property, and he acquired after the date of the will a 7-acre tract. All the children were living at the date of the will and are still living except Daisy, who has died since her father, leaving as heir at law one of the plaintiffs. The widow died after the testator.

The defendants Alpheus, Barna, and John A. claim to own all the realty, including the town lot and the after-acquired 7-acre tract, except only the 40 acres each given in the will to C. A. and Yancey Cecil. This action is brought by the three children of the first marriage and the two daughters of the second marriage, claiming that each of the plaintiffs and defendants are tenants in common and owners of one-eighth interest

of the realty, after allotting to each of the three defendants in the home "land" "each (a) tract valued at $350," which the judge finds was in fact allotted to each of defendants during testator's life, two of whom built thereon and the other has occupied the residence and 40 acres attached thereto.

The court held with the plaintiffs and adjudged that the lot in High Point and the 7-acre tract did not pass to John A. Cecil, Barna Cecil, and A. D. Cecil, but belonged in the "remainder equally to be divided," and the defendants appealed.

Raper & Raper, Phillips & Bower, Robertson, Barnhardt & Smith for plaintiffs.

L. B. Williams and William P. Bynum for defendants.

CLARK, C. J. The main allegations of the complaint are admitted in the answer, and the only controverted facts arising upon the pleadings are the number of acres in the tract of land owned by the testator, and the value of the said tract and of the lots in High Point and the value of the personal property. These are not issues of fact, but incidental questions of fact, properly found by the judge in construing the will, which is a matter of law for the court.

It was alleged in the complaint and admitted in the answer that prior to the date of the will the testator had marked off to Y. F. Cecil and C. A. Cecil each about 40 acres of the home place, and that each was living on the same at the time, and that he had previously given Julia A. York the sum of $50 at her marriage. The entire evidence shows that the home tract contained a little over 200 acres, and the valuation, taking the evidence of both sides, was about $1,750, being a tract of about $350 to each of the five sons. The personalty was about enough to give each of the daughters $350.

It appears from the four corners of the will that the ruling intention thereof was equality of division among the eight children. The testator had given 40 acres of land to each of the two sons by the (412) first marriage and was giving the remainder of the home tract to the three sons by the second marriage (to whom, it is in evidence and is found by the judge, 40 acres each was marked off in the testator's lifetime and was occupied by each of defendants in severalty, two of whom have conveyed by metes and bounds, and the other has mortgaged his allotted tract since his death). This would give them slightly over 40 acres each, valued by him at $350. He had given Julia $50, and he adds in the will $300 in money, making her share $350. In the will he gives to the other two daughters $350 each, out of the personalty, which to-

gether with the $300 to Julia about absorbed the personalty. He gave to his wife "all my lands, and horses, cattle, hogs and money (after my few debts is paid) as long as she remains my widow after her death, the land to be divided between Alpheus Cecil, Barna Cecil, and John A. Cecil, each tract valued at $350."

The whole controversy turns on the construction of the sentence in the will just quoted. We think the court properly held that the word "land" referred to the home tract, which he directed to be "divided between Alpheus, Barna, and John A. Cecil, each tract valued at $350," which would absorb that tract. This would be plain if he had inserted "a" so as to read "each a tract valued at $350," and we think that the word "Land," with a capital L, meant the home or farm tract. He gave to his wife "all my lands," but when he speaks of the division among the three defendants he used the word "Land" in the singular, and with a capital letter, showing that he referred to the home tract. He evidently omitted the "a," just as in the next line he omitted the word "have" before "$350 a peace" to his two daughters by the second wife. After making the above division of a $350 tract of land to each of his five sons and $350 in money to each of his three daughters, the intent of the will is made plain by the concluding sentence: "The remainder equally to be divided among my eight children." There would have been no remainder if the three defendants were to have the real estate in High Point and the seven acres subsequently acquired.

Upon the evidence the judge finds that the farm of 200 acres or more was worth about $1,750
Lot in High Point, $1,000 to 4,500
Personal property $1,000 to 1,250

Total $3,750 to $7,500

If the contention of the three defendants was right, they would get out of this $2,050 to $5,550, besides the 7-acre tract, while the other
(413) five children, two of whom were also children of the last marriage, would get $350 each. This is contrary to the evident intention of the will, which is equality. Neither do we think it a fair construction that the word "land," which was to be divided between the three sons, who are defendants, was intended to embrace the valuable lot in the city, and that he would describe it as "each tract valued at $350." Lots in town are not called "tracts," and the context shows that the intention was to give, as the will expressed it, "to each of the three sons (a) tract valued at $350."

The defendants except to the judge's findings of fact, but all the findings are as to "questions of fact" in regard to the value of the different

tracts and incidental matters throwing light upon the intent of the testator and the construction of the will. The findings as to valuation are not conclusive in the division of the undevised property, which will probably be made by a sale and division of the proceeds. The other facts found are mostly matters alleged in the complaint and admitted in the answer. On the trial the defendants themselves objected to the submission of issues to a jury. The extraneous evidence was properly "admitted for placing the court at testator's point of view when he made the will and thereby aiding in the right interpretation of the will." *Wooten v. Hobbs,* 170 N. C., 214.

We conclude that the true intent of the will that Alpheus, Barna, and John A. Cecil, the defendants, were devised "each (a) tract of land valued at $350," being the balance of the home "land" not already marked off by the testator to the other two sons, and that after taking out the $300 in money devised to Julia and the $350 each to Leovina and Daisy, all the "remainder is to be equally divided among the eight children." Any other construction would be contrary to the palpable intent of the will, and would destroy the possibility of any "remainder," which the testator directed to be divided.

The decision below is

Affirmed.

Cited: Reynolds v. Trust Co., 201 N.C. 279.

STATE EX REL. NORTH CAROLINA CORPORATION COMMISSION AND THE LAURINBURG AND SOUTHERN RAILROAD COMPANY v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 25 April, 1917.)

1. Consent Judgments—Contracts—Corporation Commission—Police Powers—Railroads—Crossings—Switches—Public Safety.

A consent judgment is regarded as a contract between the parties; and when thereunder one railroad company is permitted by another to cross its track upon condition that it will put in such switch system as the other may designate, and the system has been designated accordingly, the Corporation Commission has no power to set aside the contract, when it is found by the Commission that the systems contended for by each of the railroad companies are equally safe and that the interests of the public are not involved.

2. Railroads—Contracts—Judgments—Federal Courts—Corporation Commission—Courts—Equity—Rights of Public.

While the Corporation Commission, which has no equity jurisdiction, and the equitable jurisdiction of the courts may, in proper instances, interfere with the enforcement of an unconscionable contract between railroad companies that would impair the utility of one of them to the public as a common carrier, the application of this principle does not arise in this case, owing to an arrangement which may prove satisfactory and under which the question may not again arise.

(414) APPEAL by the petitioner, Laurinburg and Southern Railroad Company, from a judgment of *Bond, J.*, at October Term, 1916, of WAKE, which judgment affirmed the order of the North Carolina Corporation Commission dismissing the petition filed before the Corporation Commission by the petitioner, Laurinburg and Southern Railroad Company, v. the Seaboard Air Line Railway Company.

The Corporation Commission rendered the following judgment:

TRAVIS, Chairman: This is a proceeding brought by the Laurinburg and Southern Railroad Company for the purpose of having this Commission, pursuant to the powers conferred upon it by statute, prescribe what kind of interlocking switch or switches shall be installed and maintained by the plaintiff where its tracks cross the tracks of the defendant Seaboard Air Line Railway in the town of Laurinburg.

It appears that at the time of procuring the consent of the defendant to cross its tracks and right of way the plaintiff company entered into a contract in which it stipulated that it would construct at this point such interlocking switches as the defendant company, through its chief engineer, might at any time thereafter require. The defendant company, therefore, subsequently required and demanded that the plaintiff install at this crossing what is called an automatic interlocking plant. The plaintiff company deeming this an unreasonable requirement, imposing upon it an unnecessarily large investment and cost of operation, refused to construct it. The Seaboard Air Line Company, then being in the hands of a receiver, appointed under proceeding instituted in the United States Court before Judge Pritchard, appealed to Judge Pritchard for a mandamus requiring the construction of the plant by them under the contract. It seems that at the hearing before Judge Pritchard a consent order was entered requiring the construction of the automatic

(415) interlocking plant. Subsequent negotiations in respect to the matter occurred between the respective companies, but they failed to reach any satisfactory arrangement. The defendant company thereafter applied to Judge Connor of the United States District Court for an order requiring the plaintiff to comply with the former order made by Judge Pritchard. Subsequent to an order made in the premises by

Judge Connor the plaintiff instituted this proceeding before the Corporation Commission. This Commission heard the evidence in the matter, and has given their careful consideration to the questions involved.

If it was an original question for us to determine what kind of interlocking plant we would prescribe at this crossing for the public protection, we would find little trouble in determining the matter, but we find the question complicated both by the contractual obligation of the plaintiff company to the defendant company, given in consideration of a right granted by the defendant to cross its track, and also by the orders of the Federal court above referred to. This Commission is clearly of the opinion that an interlocking plant known as the "Cabin Door" interlocking system would be adequate and safe at this crossing, and considering the amount and character of use made of this crossing by the plaintiff, it is all that the public safety demands and is all that ought reasonably to be required, and but for the contractual obligations and the orders of court above referred to, it is what this Commission would prescribe. We are of the opinion, however, that this Commission could not nullify the contract of the plaintiff to put in such an interlocking plant as the defendant may demand, nor could it direct or require defendant to ignore the order of the Federal court to put in such a plant unless it appeared to this Commission that the character of plant required by the defendant and ordered by the court was unsafe and did not furnish adequate protection for the traveling public.

Examining the record with a view of determining this question, we find from the evidence that the plans and drawing of the interlocking plant demanded by defendant and ordered to be put in by the court are defective in that they do not show the proper number of levers to operate the derails provided in this plant, and that if the plant were installed, or it were attempted to be installed, in strict accordance with these plans and drawings, the same would be defective and unsafe, and this Commission would feel that it was its duty, in the interest of the public safety, to require a different and more perfect plant. The defendants contend, however, that this defect in the drawings, which is not seriously denied, is remedied by a provision in the specifications, as follows:

"The contractor shall furnish all tools, material, and labor, ex- (416)
cept as may be hereafter noted, to erect and complete the work in accordance with the intent of the plans and specifications, and anything that is obviously necessary to complete or make useful any part mentioned in specifications shall be provided by the contractor, although such part is not shown on the plans."

We find that if, under this stipulation, the automatic interlocking plant were properly installed and the defects in the plans and drawings

remedied, it would be a safe interlocking system, although in the opinion of this Commission unnecessarily and unreasonably elaborate and expensive for a crossing subject to no more use than is this one.

The conclusion to which we have come, therefore, is that, while this Commission clearly thinks that the Cabin Door interlocking plant would be suitable and adequate for this crossing, it does not think that it has the power to order that this system be put in, and no other, without improperly interfering with the contractual rights of the defendant in the premises; and the petition is, therefore, dismissed.

G. B. Patterson, Winston & Biggs for plaintiff.
Murray Allen, McIntyre, Lawrence & Proctor for defendant.

BROWN, J. The facts of this case are very clearly and fully stated in the judgment of the Corporation Commission, and it is unnecessary to do more than refer to it for a statement of the controversy.

The petition of the Laurinburg and Southern Railroad Company sets forth the matter in controversy between it and the defendant, and petitions the Commission "to make such orders in the premises as the public safety demands with reference to a system of interlocking switches or signals at the Laurinburg crossing, specifying and determining the kind of system which shall be installed and maintained at said crossing and apportioning the cost thereof between petitioner and defendant as may be just and proper."

The Commission finds upon investigation that the "cabin door" interlocking system of switches is adequate and safe at the crossing and, "considering the amount and character of use made of this crossing by the plaintiff, it is all that the public safety demands and is all that ought reasonably to be required, and but for the contractual obligations and the orders of court above referred to, it is what this Commission would prescribe."

The Commission further finds that the tower interlocking system is a perfectly safe system, "but unnecessarily and unreasonably elaborate and expensive for a crossing subject to no more use than this one."

(417) The Commission concludes that both systems being equally safe, the public safety is not involved, and that in view of the contract between the parties, it has no power to direct that the cabin door system be installed in preference to the other without unduly interfering with the contractual rights of the defendant.

We think this conclusion is well founded and supported by authority. It is undoubtedly true, as contended by petitioner, that public-service corporations cannot by contracting among themselves deprive the State

of its right to exercise its police power in the interest of public safety. If the contract does not adequately protect the public, then the police power may be used to the full extent necessary to require the contracting parties, notwithstanding the contract, to conform to every requirement necessary for the public safety. But, under the guise of an exercise of the police power of the State, the courts cannot deprive a citizen of property or contract rights that have no tendency to injure the public health, morals, safety, or general welfare.

As said in *R. R. v. Drainage District,* 233 U. S., 75, "The decisions also show that a State cannot avoid the operation of the fourteenth amendment by simply invoking the *convenient apologetics* of the police power." *Mugler v. Kansas,* 123 U. S., 210; *Eubank v. Richmond,* 226 U. S., 137.

It having been found by the Commission that both systems of switches are equally safe, the public interest in that respect is eliminated and the parties are remitted to their rights under the contract. That a consent judgment is a contract is too well settled to be questioned. *Edney v. Edney,* 81 N. C., 1; *Massey v. Barbee,* 138 N. C., 84; *Bank v. McEwen,* 160 N. C., 425.

It is contended that the contract is needlessly harsh and oppressive and ought not to be enforced. Petitioner contends that its railroad is only 18 miles in length and operates in only one county in North Carolina; that its capital stock is only $50,000; that the present cost of installing the tower plant will approximate $15,000 and that the cost of operation will be $2,000 per annum in addition to the depreciation and maintenance cost. Petitioner contends that the installation of such an expensive system is not only utterly unreasonable, but entirely beyond its means, and that if compelled to install it, petitioner will be so burdened that it will be unable to properly discharge its duties as a common carrier.

If these facts are true, they present a strong case for the intervention of a court of equity; but the Corporation Commission has no equitable jurisdiction and no right to grant equitable relief.

If petitioner, being a common carrier within this State, and (418) affected with a public trust, has unadvisedly entered into this contract with defendant, and it turns out that its enforcement is unnecessary to public safety, unconscionable and oppressive, so much that it will seriously impair the ability of petitioner to discharge its public duties as a common carrier, then the State has an interest in the controversy which may be protected by the Corporation Commission or the courts. But that phase of the controversy is not before us and need not now be considered. It may never arise.

It is stated in the evidence for defendant that its president, Hix, agreed that "he would allow the Seaboard to put in the cabin door type temporarily, with the understanding that if its operation did not prove satisfactory that they would, at their own expense, extend the plant and provide full protection under the tower system."

It may be that when tried out the cabin door switch will prove its efficiency, and that is all that is necessary, and thereby put an end to the controversy. As the matter now stands upon the facts found by the Corporation Commission, we think the petition was properly dismissed.

The judgment of the Superior Court affirming the judgment of the Corporation Commission is

Affirmed.

The costs will be taxed against the Laurinburg and Southern Railroad Company.

Cited: Walls v. Strickland, 174 N.C. 302; *In re Utilities Co.,* 179 N.C. 166.

ROBERT GADSDEN v. CRAFT & CO., ET AL., SEABOARD AND COAST LINE RAILROAD COMPANIES.

(Filed 25 April, 1917.)

1. Master and Servant—Employer and Employee—Independent Contractor —Dangerous Work.

A contract to erect a reinforced concrete bridge for a railroad company is not necessarily for work so inherently dangerous as to fix liability upon the company, when the relation of independent contractor has been established, for a negligent injury inflicted upon an employee of the contractor in the course of his employment.

2. Master and Servant—Employer and Employee—Independent Contractor —Respondeat Superior.

The relation of independent contractor for the building of a bridge for a railroad company does not arise under the terms of the contract, reserving to the company's engineer the authority to direct the work and issue certificates of payment therefor when done to his satisfaction; and discretionary right to employ and pay laborers and others having claims, upon conditions relating to the progress of the work, and to such additional work to that specified as may thereafter be determined upon, with the right to terminate the contract in whole or in part; and the doctrine of *respondeat superior* applies in an action brought by an employee of the contractor to recover damages for a personal injury negligently inflicted upon him while engaged in the course of his employment.

GADSDEN *v.* CRAFT.

CIVIL ACTION to recover for physical injury to plaintiff, caused (419) by alleged negligence on the part of the defendants, tried before *Connor, J.*, and a jury, at December Term, 1916, of NEW HANOVER.

There was evidence tending to show that in the fall of 1914 defendants Craft & Co. were engaged in constructing a reinforced concrete bridge over Fourth Street in the city of Wilmington, under a contract with the two defendant railroads, and that on 27 November, 1914, plaintiff, while engaged as an employee in said work, was injured by the fall of a scaffold on which he was placed in the course of his employment, the scaffold having been improperly and insecurely constructed.

On the trial it appeared for defendant companies that the work in question was being done by their codefendant, Craft & Co., under a written contract which was put in evidence and under the terms of which defendants contended that Craft & Co. were independent contractors and that no liability could be properly imputed to the companies by reason of default of such contractor.

The court having intimated an opinion that this was the effect of the contract and the attendant facts in evidence, plaintiff excepted and submitted to a nonsuit as to the railroad companies. There was recovery and judgment for $1,250 damages against Craft & Co. and judgment of nonsuit as to the railroad companies, and from the judgment as to these companies, plaintiff appealed.

A. G. Ricaud for plaintiff.

Rountree & Davis for Atlantic Coast Line Railroad.

John D. Bellamy and Emmett Bellamy for Seaboard Air Line Railway.

HOKE, J. Plaintiff objects to the validity of the judgment of nonsuit for the reasons: (1) that under the terms of the written agreement Craft & Co. were not independent contractors; (2) that the work in which they were engaged was inherently dangerous, and that the position of independent contractor could in no event be maintained for the benefit of the appellees.

On the record we see nothing to justify the position that the (420) work was inherently dangerous, and the objection made upon that ground must be disallowed. *Scales v. Llewellyn*, 172 N. C., 494. We are of opinion, however, that under the written agreement offered in evidence the powers reserved to the railroads during the performance of the work and as to the manner and methods of doing it are so extended and controlling that Craft & Co. could in no proper sense be considered as independent contractors, but are themselves agents and employees of the

railroads, for whose negligent default the companies may be held responsible under the principles of *respondeat superior.*

In *Beal v. Fiber Co.,* 154 N. C., pp. 147-150, the Court quotes with approval from Moll on Independent Contractors, sec. 19, as follows: "In his commentaries on negligence Judge Thompson states the rule thus: If the proprietor retains for himself or for his agent (e.g., architect and superintendent) a general control over the work, not only with reference to results, but also with reference to methods of procedure, then the contractor is not deemed an independent contractor within the meaning of the rule under consideration, but he is deemed the mere agent or servant of the proprietor, and the rule of *respondeat superior* operates to make the proprietor liable for his wrongful acts or those of his servants, whether the proprietor directly interfered with the work and authorized and commanded the doing of such acts or not. It is not necessary in such a case that the employer should actually guide and control the contractor. It is enough that the contract vests him with the right of guidance and control."

And again, from *Smith v. Simmons,* 103 Pa., 32: "Where one who contracts to perform a lawful service for another is independent of his employer in all that pertains to the execution of the work, and is subordinate only in a result in accordance with the employer's designs, he is an independent contractor, and in such case the contractor alone and not the employer is liable for damages caused by the contractor's negligence in the execution of the work."

These tests for determining the position of an independent contractor are in accord with the generally prevailing doctrine and have been recently approved and applied in several decisions of this Court. *Embler v. Lumber Co.,* 167 N. C., 457; *Harmon v. Contracting Co.,* 159 N. C., 22; *Johnson v. R. R.,* 157 N. C., 382; *Hopper v. Ordway,* 157 N. C., 125; *Denny v. Burlington,* 155 N. C., 33.

True, in *Denny v. Burlington* and in *Hopper v. Ordway, supra,* it was held that, "When the relation of independent contractor has been created, within the meaning of these definitions, the result is not affected by the fact that an agent of the proprietor is to be present for
(421) the purpose of seeing that the work is done according to specifications." *Johnson v. R. R.,* 157 N. C., pp. 382-384. No more would conditions be changed by the mere fact that the contract contains provision that in case of failure to perform properly the proprietor could take over the contract and complete the same.

But in our opinion the powers reserved to the companies and their immediate agents by the provisions of the present contract go much beyond anything appearing in these decisions or the principles they are intended to sustain.

In the opening clause of the contract there is stipulation that "The *work* is to be done and finished agreeably to the directions and orders of the chief engineer of one of the defendants or his assistants." This officer, too, is given large powers with reference to modifications of the plan as the work progresses. His decision as to amounts due on the previous estimates is absolutely conclusive, and, in the final estimate, the amount due is to be paid when the entire work is completed to the satisfaction of the said engineer and on his certificate that it has been done according to specifications and in accordance with *his directions* and to his satisfaction and acceptance. In another clause the work is to begin at once and be completed on or before a specified period and prosecuted with such force as the engineer may deem adequate, and "If said party shall fail to prosecute the work with sufficient force in the opinion of said engineer, the latter or such agent or agents as he may designate, may proceed to employ such number of workmen, laborers, and overseers as may be necessary to insure completion at such wages as they may find necessary or expedient and charge same over to Craft & Co. on the contract," etc. And again: "Or for failure to prosecute the work with an adequate force or *for noncompliance* with his *directions* in regard to the *manner of constructing* it, or for failure to complete the work within the time limit, or for other delays in the performance of or any omission or neglect of the requirements of the agreement and specification on the part of the party of the first part, the said engineer may, at his discretion, declare this contract or any portion or section of it forfeited and the railroad companies exonerated from all liability under it."

In section 12 stipulation is made as follows: "It is further understood and agreed that the parties of the second and third parts, the railroad companies, jointly and severally, may at any time, either with or without an estimate furnished, pay any moneys directly to the employees and others having claims and demands against the party of the first part for work done and material furnished to the party of the first part for the purposes of this contract, and may at any time require (422) voucher for the payment to employees and others having claims and demands against the party of the first part for the purposes aforesaid."

And section 13: "If during the progress of the work contracted for, which shall be under the direction of the engineer not contemplated in the specifications mentioned in section 1 of this agreement and not specifically included herein, which work cannot, in the opinion of the engineer, be accurately measured or estimated under the terms of this contract, then in that case the same shall be paid for at actual cost for labor and materials furnished by the party of the first part, with 10

per cent added for superintendence and use of tools; and it is further agreed and understood that all terms and stipulations of this contract, as far as may be applicable, shall attach to all work so done, which work for all purposes shall be deemed part of the work contracted for by the party of the first part hereunder."

From these stipulations and under the principles approved and sustained by the authorities cited, it will sufficiently appear, as stated, that the powers over this work reserved to the companies and their agents, in the course of its performance and as to the manner and methods of doing it, are of such a character and extent as to constitute the contractor, Crafts & Co., the agents and employees of the railroads in reference to the construction of this bridge, and the rights of the parties must be adjusted on that basis.

There is error, and this will be certified, that the question of the responsibility of the appellees may be properly determined.

Reversed.

Cited: Aderholt v. Condon, 189 N.C. 756; *Greer v. Construction Co.,* 190 N.C. 635; *Lumber Co. v. Motor Co.,* 192 N.C. 381; *Drake v. Asheville,* 194 N.C. 10; *Inman v. Refining Co.,* 194 N.C. 569; *Berry v. Furniture Co.,* 201 N.C. 848; *Teague v. R.R.,* 212 N.C. 34, 35; *Graham v. Wall,* 220 N.C. 88; *Scott v. Lumber Co.,* 232 N.C. 165; *McGraw v. Mills Co.,* 233 N.C. 526.

DUDLEY TROXLER v. ERNEST GANT.

(Filed 25 April, 1917.)

1. **Tenants in Common—Outstanding Title—Mortgage of Ancestor—Foreclosure Sale.**

   Where the ancestor has mortgaged his lands, and subject thereto they have descended to his heirs at law as tenants in common, and one of them has become the purchaser at the foreclosure sale, the title thus acquired is not regarded as outstanding, in the sense it may not be acquired by one tenant in common against the others, but in that of the ancestor himself; and where the sale and conveyance thereunder are regular and valid, the purchaser's title will be upheld.

2. **Mortgages—Foreclosure Sale—Deeds and Conveyances—Recitals—Presumptions—Burden of Proof.**

   Where a deed made in pursuance of a sale of land by foreclosure under a mortgage sufficiently recites the facts thereof, it will be presumed to have been regularly made, and the burden of proof is on the party attacking its regularity to establish to the contrary.

3. Tenants in Common—Limitation of Actions—Adverse Possession—Minority—Instructions—Appeal and Error.

Where a tenant in common claims the lands by adverse possession without sufficient evidence as to the time thereof, and there is evidence of the minority of the other party for a part of the period claimed, it is reversible error for the judge to charge the jury that such possession for twenty years, etc., would ripen the claimant's title, and without reference to the evidence of the minority of the adverse party, when such is relevant to the inquiry.

CIVIL ACTION, tried before *Webb, J.*, at October Term, 1916, of (423) GUILFORD.

This is an action to recover land.

The plaintiff introduced evidence tending to show that Peter Vanstory was the owner of the land in controversy; that he died in 1887 or 1888 leaving surviving him three children as his heirs at law, to wit, Charlie Vanstory, Bob Vanstory, and Sarah Vanstory; that Sarah Vanstory died prior to 1905, having theretofore intermarried with one Troxler, leaving surviving her her husband, who died about 1905, and the plaintiff, who was a son born of said marriage and an heir at law of Sarah.

The plaintiff also offered in evidence, for the purpose of attacking it, the mortgage deed from Peter Vanstory and wife to S. S. Gant, dated 24 May, 1880, and registered 3 July, 1880, and a deed from C. R. Doggett and others, executors of the said Gant, to Robert Vanstory. This deed purports to be made by virtue of a sale made under the power contained in the mortgage from Vanstory to Gant, and it contains all of the recitals showing the regularity of the advertisement of the sale of the land and the regularity of the sale.

The plaintiff also offered evidence tending to prove that the land was not advertised for sale according to law under the power contained in said mortgage deed, and then offered mesne conveyances from the said Robert Vanstory to the defendant for the purpose of showing that the defendant claimed under Peter Vanstory.

The defendant also offered in evidence the chain of title from Peter Vanstory to the defendant, including the deed from the said executors to Robert Vanstory and the deed to the defendant, which is dated in 1903.

The evidence for the plaintiff tended to prove that he was born (424) in 1890 or 1891; that this action was commenced on 20 November, 1915, and within twelve months of a judgment of nonsuit in a former action between the same parties to recover this land, which said former action was commenced on 19 October, 1911.

The only evidence to the contrary as to the age of the plaintiff is that one witness stated that Peter Vanstory died in 1886 or 1887 and that he thought the plaintiff was living at the time Peter Vanstory died.

There is no evidence as to the possession of said land from the death of Peter Vanstory up to the time the defendant bought in 1903, except that the plaintiff stated: "My Uncle, Bob Vanstory, stayed there a right smart while."

The defendant offered evidence tending to prove that he had been in the continuous adverse possession of the land from and after his purchase in 1903.

His Honor charged the jury that the burden of proof was on the plaintiff to show that the land had not been properly advertised under the mortgage of Peter Vanstory to Gant, and the plaintiff excepted.

His Honor further charged the jury as to possession as follows: "If you should find that there was a void deed, that there was no sale made by the executors, no advertisement, that would give the plaintiff one-third interest in the property in question; that is, he would be a tenant in common with the defendant, and the law says it takes twenty years to bar him; the defendant would have to be there twenty years in order to bar the plaintiff's right from bringing action against his cotenant, unless you find there was actual ouster, unless you find that his cotenant, the defendant, turned him out of possession; then he would have to bring his action within seven years; but if there is no ouster, and the plaintiff simply knowing he was there would be no ouster; so if you find that it was a void deed, that is, the deed the executors made, there was no sale and no advertisement made by the executors—if you find that by the greater weight of the testimony, then the court charges you the plaintiff would be entitled to one-third interest in this property; and I withdraw from you what I said on yesterday, that notwithstanding that, if he permitted the defendant to stay there seven years, under known and visible lines, that would ripen his title, I withdraw that, and tell you it would take twenty years, unless you find there was an actual ouster." The plaintiff excepted.

There was a verdict and judgment for the defendant, and the plaintiff appealed.

(425) *G. M. Patton and Jerome & Jerome for plaintiff.*
No Counsel for defendant.

ALLEN, J. The exceptions of the plaintiff which are relied on in the brief present three questions for decision: (1) Did Robert Vanstory, a son of Peter Vanstory and a tenant in common with the mother of the

plaintiff, have the right to buy under the power of sale contained in the mortgage executed by Peter Vanstory and wife, and did he thereby acquire the title to the land, if the sale was regular and properly advertised? (2) Was it error in his Honor to charge that the burden of proof was on the plaintiff to show that the land was not properly advertised for sale under said mortgage? (3) Was the charge of his Honor as to adverse possession erroneous?

The first of these questions is decided against the contention of the plaintiff in *Jackson v. Baird,* 148 N. C., 29, and the second in *Lunsford v. Speaks,* 112 N. C., 608, and in *Cawfield v. Owens,* 129 N. C., 288.

The Court said in the *Jackson case,* in dealing with the right of a cotenant to buy at a sale made under an instrument executed by an ancestor, that "The contention of plaintiffs that John Baird could not acquire the exclusive title at the sale is founded upon a misapprehension of the law. The general rule is well settled that one cotenant cannot purchase an outstanding title or encumbrance affecting the common estate for his own exclusive benefit, and assert such right against his cotenants. But that rule does not apply under the facts of this case. The title which was acquired by Shuford, assuming that he acquired it for Baird, was not an outstanding title adverse to the title of Robert Baird. It was the title of Robert Baird himself, the common ancestor under whom all claimed, and the sale was being made under a deed executed by such ancestor and to pay his debts, which were an encumbrance on the land when it descended to plaintiffs and their coheir. It is held in this State that one cotenant lawfully may purchase his cotenant's share of the common property under execution sale to pay the debt of such cotenant. Likewise it is held that one of the cotenants may purchase the entire property at a sale to pay the common ancestor's debt"; and in the *Cawfield case,* as to the burden of proof: "The presumption of law is in favor of the regularity in the execution of the power of sale, and if there was any failure to advertise properly, the burden was on defendant to show it."

The recitals in the deed establish prima facie that the sale was regularly advertised, and it is, therefore, incumbent upon the plaintiff to offer evidence to rebut the presumption therefrom in favor of the defendant.

The exception to the charge of his Honor on adverse possession (426) is well taken.

The charge is predicated upon a finding by the jury that the sale under the mortgage executed by Peter Vanstory was void because of want of advertisement, and that, therefore, the defendant, having acquired his title through Robert Vanstory, who was one of the children of

Peter Vanstory, became a tenant in common with the plaintiff, and the jury was instructed, in substance, that if the defendant had been in the adverse possession of the land for twenty years without an actual ouster, or for seven years if there was an ouster, the title would be in the defendant and the plaintiff could not recover.

There are several objections to this charge.

There is no evidence that the defendant or those under whom he claimed had been in possession of the land for twenty years, nor is there any evidence of an actual ouster.

The evidence tends to prove that the defendant took possession of the land in 1903 and had occupied it since that time, and prior to 1903 there is no evidence of possession after the death of Peter Vanstory in 1887 or 1888 except that the plaintiff testified that "Bob Vanstory stayed there a right smart while."

Neither the plaintiff nor his mother was turned out of possession by the defendant, nor does it appear that there was any demand made for an accounting as to the rents and profits and a denial of the right by the defendant.

The charge is also objectionable because it is not qualified by any instruction to the jury as to the effect of the minority of the plaintiff, and as there is no evidence that the adverse possession began in the lifetime of the mother of the plaintiff, if, as his evidence tends to prove, he did not become 21 until 1910 or 1911 and his action was commenced in 1911, the possession of the defendant could not avail as against him.

For the error pointed out, there must be a

New trial.

Cited: Jenkins v. Griffin, 174 N.C. 186; *Berry v. Boomer,* 180 N.C. 69; *Jessup v. Nixon,* 186 N.C. 103; *Gentry v. Gentry,* 187 N.C. 32; *Douglas v. Rhodes,* 188 N.C. 584; *Pearce v. Watkins,* 219 N.C. 642; *Jones v. Percy,* 237 N.C. 242.

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(427)

EULA M. CHANDLER v. J. W. JONES ET AL.

(Filed 25 April, 1917.)

1. Evidence—Hearsay—Declarations—Appeal and Error — Determinative Issues.

In an action upon a contract for the payment of money, controverted upon the ground that the defendant and his wife had paid a certain sum of money to the plaintiff's husband at her request and for her benefit,

declarations of the defendant's wife, not made in plaintiff's presence, as to this controlling feature of the case are incompetent, not falling within the exceptions as to the admissibility of hearsay evidence (*King v. Bynum*, 137 N. C., 495), and their admission constitutes reversible error. The court frames issues to be used upon the new trial awarded, which will be terminative under a former opinion.

2. Parties—Contracts—Beneficial Interests—Actions.

In an action to recover money due upon contract the defense is available that the defendant had paid, at the request and for the benefit of the plaintiff, certain moneys to another in a transaction to which the plaintiff was not a party.

CIVIL ACTION, tried before *Long, J.*, at January Term, 1917, of GUILFORD.

This is an action to recover the sum of $600 alleged to be due by contract.

The defendant admitted the execution of the contract, and alleged that he had paid the sum of $500 thereon.

The contract was entered into on 30 April, 1890, between the defendant and his wife, and under its terms the defendant was to become the owner of a certain tract of land if he survived his wife, upon the payment of $600 to the plaintiff, who was then Miss Eula Vanstory, and it is upon this contract the plaintiff is suing.

The plaintiff offered evidence tending to prove that she did not know of the existence of said contract at the time said money was paid; that it was not paid at her request; that she knew nothing of the purpose for which it was paid, and that it was a gift to her husband, A. D. Chandler.

The defendant offered evidence tending to prove that the said sum of $500 was paid in part satisfaction of the sum of $600 due under said contract, and at the request of the plaintiff Eula Chandler, and that it was used, with her knowledge, in satisfaction of a mortgage on a tract of land which was conveyed to her said husband.

The defendant introduced Mr. and Mrs. Rankin, who testified, over the objection of plaintiff, in substance, that they had heard Mrs. Jones, wife of the defendant, say, in the absence of the plaintiff, (428) that said sum of $500 was paid on said contract, and the plaintiff excepted.

There was a verdict and judgment for the defendant, and the plaintiff excepted and appealed.

King & Kimball for plaintiff.

Cooke & Fentress and Jerome & Jerome for defendant.

ALLEN, J. It is not denied by the plaintiff that the defendant paid $500 in 1893, which inured to the benefit of her husband, but she contends that the payment was not made at her request; that it was not in satisfaction *pro tanto* of the amount due to her under the contract between the defendant and his wife, and that it was not paid for the purpose of discharging a mortgage on the land conveyed to her husband.

It therefore appears that the evidence of Mr. and Mrs. Rankin was important and material on the only controverted facts submitted to the jury, and this evidence falls within the rule excluding hearsay evidence, and is not covered by any of the exceptions to the rule.

Mr. and Mrs. Rankin, in effect, testified that they *heard* Mrs. Jones, wife of the defendant, *say,* in the absence of the plaintiff, that the $500 was to come out of the contract.

The rule, with the exceptions and the comment of the Court in *King v. Bynum,* 137 N. C., 495, cited in Lockhart's Evidence, sec. 138, are directly applicable to the evidence in this record, erroneously admitted. The Court says in that case: " 'Evidence oral or written, is called hearsay when its probative force depends in whole or in part upon the competency and credibility of some person other than the witness by whom it is sought to produce it.' 11 A. and E. Enc. (2 Ed.), 520, and cases cited; *Coleman v. Southwick,* 9 Johns. (N. Y.), 45; *S. v. Haynes,* 71 N. C., 79. There are exceptions to this general rule excluding hearsay evidence laid down in the text-writers on evidence, such as admissions, confessions, dying declarations, declarations against interest, ancient documents, declarations concerning matters of public interest, matters of pedigree, and the *res gestæ.* The most ingenious mind can hardly bring the testimony pointed out within any recognized exception to the general rule excluding hearsay evidence. 1 Greenleaf Ev., ch. 6 (13 Ed.), gives the recognized exceptions to the general rule."

There must be a new trial on account of the error pointed out, and as this is the second appeal in the action and the amount in controversy is in danger of being consumed by the litigation, in order that all (429) matters in controversy be settled, the defendant may move the court to be permitted to make the husband of the plaintiff a party and to amend his answer, and it is directed that the following issues be submitted to the jury in addition to the ones submitted at the last trial:

1. Did the defendant lend to or advance at the request of A. D. Chandler any money, and if so, when and how much?

2. If so, was said money lent or advanced for the purpose of paying off and satisfying a mortgage on the land conveyed to the said Chandler by one Lambeth, and was it so used?

3. If so, was said money lent or advanced at the request of the plaintiff Eula Chandler?

4. If so, was said money lent or advanced as a payment on the amount due under the contract entered into between the defendant and wife?

5. If so, did the plaintiff Eula Chandler know that said amount was lent or advanced as a payment on said contract, and that it was to be used in satisfying said mortgage?

When these facts are ascertained by the verdict of a jury the rights of the parties can be determined under the former opinion of this Court.

If answered in favor of the defendant, he will be entitled to a credit on his contract, or to subrogation; and if against him, the plaintiff will have judgment for the full amount due under the contract.

The motion of the defendant to dismiss the action upon the ground that the plaintiff is not a party to the contract on which she sues cannot be sustained, as "One not a party or privy to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach." *Gorrell v. Water Co.*, 124 N. C., 333, and cases cited.

New trial.

Cited: S. v. Collins, 109 N.C. 19; *Nance v. R. R.,* 189 N.C. 639; *S. v. Kluttz,* 206 N.C. 728; *Randle v. Grady,* 228 N.C. 163; *Canestrino v. Powell,* 231 N.C. 195.

R. W. McLEAN ET AL. v. C. A. McDONALD ET AL.

(Filed 25 April, 1917.)

Actions—Joinder—Pleadings—Issues—Equity—Cloud on Title—Nonsuit—Trials—Statutes.

Where the plaintiffs allege they are entitled to the possession of certain lands as the heirs at law of the deceased owner, and that the defendant is in wrongful possession claiming under a void sheriff's deed by execution sale, and the answer denies plaintiff's allegation of ownership and asserts the defendant's title: *Held,* the matters in defense come within the meaning of Revisal, sec. 481 (1), permitting joinder of causes of action; and Revisal, sec. 1589, affording an owner of lands a remedy to establish and quiet his title, giving the defendant a legal right to have the issues tried; and plaintiffs' motion for a voluntary nonsuit should be denied.

CIVIL ACTION, tried before *Webb, J.*, and a jury, at February (430) Term, 1917, of MOORE.

The jury having been impaneled, plaintiffs introduced their evidence and, thereupon, the court having intimated an opinion adverse to plaintiff's right to recover, they submitted to a nonsuit. At the time this was done, and before the jury was discharged, defendants objected, insisting

that there were other issues in the case raised by defendant's cross-action or counterclaim which defendant had a right to have determined. The objection was overruled.

Judgment of nonsuit was entered, and defendants, having duly excepted, appealed.

No Counsel for plaintiff.

L. B. Clegg, U. L. Spence, and Seawell & Land for defendant.

HOKE, J. The action was instituted by the heirs at law of John F. McLean, deceased, and the complaint alleged ownership as such of certain lands in said county, duly described and specified, and that defendants were in the wrongful possession of said lands, claiming to own the same under and by virtue of an execution sale and sheriff's deed pursuant thereto, had under a judgment against said J. F. McLean, during his life, on or about April, 1892.

The pleadings on the part of the defendant, the answer and amended answer, after denying plaintiff's allegations of ownership and fraud, contain averment, further, that the sale and deed to defendants of said land were in all respects valid and defendants are true owners of the same; that plaintiffs wrongfully make claim to said property adverse to defendants; that the only pretense of claim they have is as heirs at law of said John F. McLean, and they have no right, title, interest, or estate in said land, and demand judgment that defendants are the owners in fee simple and that plaintiffs have no right, title, or interest in said property, and "for such other and further relief as to which defendants may be entitled," etc. Upon these allegations and formal denial and reply entered by plaintiffs, we are of opinion that the defendants are of right entitled to have the question of ownership determined on proper issues, and that the judgment of nonsuit must be set aside.

Our Code of Civil Procedure, Rev. 1905, sec. 481, contemplates and provides for two classes of counterclaim. Subsection 1: "A cause (431) of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim or connected with the subject of the action." Subsection 2: "In an action arising in contract, any other cause of action arising also out of contract and existent at the commencement of the action." And, construing these sections, our decisions hold that while a plaintiff may suffer a nonsuit as to his own cause of action in cases coming under the second subsection above stated, this cannot be allowed in causes coming under the first subsection, but, as to these, defendant has a right to insist that the cause be retained and the issue decided which are essential to the full

determination of the controversy. This was held in the case of *Whedbee v. Leggett,* 92 N. C., pp. 465 and 469, and *Francis v. Edwards,* 77 N. C., 271, and other well considered cases are in affirmance of the position.

Plaintiffs, averring ownership of the land in controversy as heirs at law of J. F. McLean, allege that defendants are in possession, claiming to own the same under an execution sale and sheriff's deed pursuant thereto, under a judgment against J. F. McLean, and that this sale and deed are fraudulent and void. Defendants, denying these allegations, make averment that they are in fact the true owners of the land; that the said sale and deed are in all respects *void;* that plaintiffs, without right, interest, or estate, are setting up a pretended claim, and ask that defendants be declared the owners. The answer of defendants presents a case clearly arising under the provisions of our statute, Revisal, sec. 1589, affording an owner a remedy to establish and quiet his title. And the facts alleged and relied on, being connected with the subject of plaintiff's action and the transaction on which plaintiffs base their right to relief, constitute a counterclaim within the first subsection of the statute applicable, and entitles defendants, as we have said, to have the controversy between the parties fully determined on appropriate issues. *Smith v. French,* 141 N. C., pp. 1 and 7; *Dempsey v. Rhodes,* 93 N. C., 120.

In *Smith v. French, supra,* the Court, after stating the provisions of our statute on counterclaim, in speaking of the broad and inclusive nature of the provision, said: "Subject to the limitations expressed in this statute, a counterclaim includes well-nigh every kind of cross-demand existing in favor of defendant against the plaintiff in the same right, whether the demand be of a legal or an equitable nature. It is said to be broader in meaning than set-off, recoupment, or cross-action, and includes them all, and secures to defendant the full relief which a separate action at law, or a bill in chancery, or a cross-bill would have secured to him on the same state of facts." And in well considered cases in other jurisdictions the right of action to remove (432) a cloud from title, when so pleaded by way of answer, has been recognized as a proper subject of counterclaim within the meaning of the principle. *Moody v. Moody,* 23 N. Y. Supreme Ct., 189; *Griffin v. Jorgensen,* 22 Minn., 92; 32 Cyc., p. 1361.

There was error in allowing a judgment of nonsuit over defendant's objection, and the judgment to that effect will be set aside, that the rights of the parties may be determined on appropriate issues.

Reversed.

Cited: Barker v. Ins. Co., 181 N.C. 269; *Shearer v. Herring,* 189 N.C. 464; *Caldwell v. Caldwell,* 189 N.C. 811; *Thompson v. Buchanan,* 195 N.C. 158.

B. K. BRADSHAW v. J. E. MILLIKIN.

(Filed 25 April, 1917.)

1. Vendor and Purchaser—Contracts—Restraint of Trade.

A sale of business with agreement that the seller will not engage therein in the same locality for a certain number of years is not in restraint of trade if it affords a fair protection to the interests of the purchaser, and not so extensive as to interfere with that of the public; and a covenant in the sale of a barber business within a town, that the seller will not engage in such business within the town for two years, is valid and enforcible.

2. Same—Liquidated Damages—Equity—Injunction.

Where it is agreed in positive terms in a written contract of sale of a business that the seller will not engage therein for two years in the same town, specifying that he pay a reasonable sum as liquidated damages upon its breach, the specification of such damages is not construed as an implied permission to breach his covenant and pay the amount of the damages named, as the purchaser is left to his remedy at law for the recovery of his damages and his equitable remedy by injunction to restrain the seller from violating his covenant.

3. Same—Penalties.

Where the seller of his business has made a valid covenant with the purchaser not to go into the same business in the same locality for a term of years, with further agreement to pay a certain sum as liquidated damages upon his breaching his covenant, it is the policy of the courts to construe such agreement as liquidated damages rather than a penalty, in the absence of evidence to show that the amount claimed is unjust or oppressive, or disproportionate to the loss actually sustained; and their payment being of the very substance of the agreement, they may be recovered by the purchaser.

4. Same—Appeal and Error—Damages.

The trial court having erroneously dissolved an order restraining the seller of his business from breaching his covenant not to engage therein for a term of years, upon the ground that liquidated damages were agreed to be paid by the seller in that event, as an alternative of performance, it is *Held*, that the defendant should be enjoined, and that the plaintiff may recover any damages he can prove to the date when the injunction is served.

(433) CIVIL ACTION, from RICHMOND, heard 8 January, 1917, by *Webb, J.*, upon a motion for the continuance of an injunction to the final hearing of the case.

The court denied the motion, and plaintiff appealed.

These are the facts: Defendant sold and transferred to the plaintiff his barber business in the town of Hamlet, N. C., together with the

furniture, fixtures, and other property used therein, and the good will of the business, for a certain consideration, and also agreed that he would not in any manner, either directly or indirectly, engage in the same, or any similar business, in said town for the period of two years from the execution of the contract, 9 June, 1916, with this further condition: "It is expressly understood that the stipulations aforesaid are to apply to, and to bind the heirs, executors, and administrators of the respective parties; and in case of failure, the parties bind themselves, each unto the other, in the sum of $400 as liquidated damages, and not as a penalty, to be paid by the failing party."

The defendant did engage in the business of a barber in the town of Hamlet, N. C., within the two years, and plaintiff brought this action to enjoin him from continuing therein. The court held, and so adjudged, that the defendant should not be enjoined if he gave a good and sufficient bond in the sum of $500, upon condition that he pay the plaintiff such damages as he may suffer for the breach of this contract.

The record is silent as to the important fact whether the bond was given by the defendant as required to be done by the order, but it was admitted here that it had been given and that the restraining order was dissolved, and the parties desire the case to be decided on its merits.

W. H. Sanders, W. Steele Lowdermilk for plaintiff.

E. A. Harrill for defendant.

WALKER, J., after stating the case: The plaintiff appealed, and his counsel contended here that he had a legal right to a continuance of the injunction to the final hearing, whether the bond was given or not, and in this we agree with him. Contracts in restraint of trade, like the one we are now considering, were formerly held to be invalid as against public policy, but the more modern doctrine sustains them (434) when the restraint is only partial and reasonable. The test suggested by *Chief Justice Tindal* in *Honer v. Graves,* 7 Bing., 743, by which to determine whether the restraint is a reasonable one and valid, is to consider whether it is such only as will afford a fair protection to the interests of the party in favor of whom it is given, and not so large or extensive as to interfere with the interests of the public.

Without discussing the reasons upon which the rule is based or endeavoring to fix a limit beyond which the parties may not contract, it is sufficient to say that the terms of present agreement are well within the principle under which such contracts are held to be valid. 9 Cyc., 525 to 533; *Faust v. Rohr,* 166 N. C., 187; *Sea Food Co. v. Way,* 169 N. C., 679. It was said in *Faust v. Rohr, supra,* citing *King v. Fountain,* 126

N. C., 196: "The general rule was, and still is, that contracts in restraint of trade and the like are void, on the grounds that they are against public policy, similar to contracts illegal and *contra bonos mores*. Clark on Contracts, 451-457. This rule has been modified in order to protect the business of convenantee or promisee, when it can be done without detriment to the public interest. The reasonableness of such restrain depends in each case on all the circumstances. If it be greater than is required for the protection of the promisee, the agreement is unreasonable and void. If it is a reasonable limit in time and space, the current of decisions is that the agreement is reasonable, and will be upheld."

These contracts not infrequently contain a clause in regard to the amount of damages to be paid if there is a breach, and the question is often raised whether the provision is to be considered in law as a liquidation of the damages or merely as a cover for the exaction of a penalty and there is a rule established for deciding this question. Where a contract has been made not to engage in any particular profession or business within stated limits, it has been the policy of the courts to construe such an agreement as liquidated damages rather than as a penalty, in the absence of any evidence to show that the amount of damages claimed is unjust or oppressive, or that the amount claimed is disproportionate to the damages that would result from the breach or breaches of the several covenants of the agreement. While the decisions in this class of cases are usually based upon the fact that the damages are uncertain and cannot be estimated, it has also been held that where the payment of the sum named is the very substance of the agreement, a recovery may be had for it. 13 Cyc., 99, 100. It is to be observed,

(435) however, that the use of the terms "penalty" and "unliquidated damages" in the instrument is not necessarily conclusive as to the interpretation which shall be put upon it; and the sum so reserved may be held to be liquidated damages, although called a penalty in the covenant, and *vice versa*. 2 High on Injunctions (3 Ed.), sec. 1140. In deciding whether the sum fixed by the contract as the measure of a recovery, if there is a breach, should be regarded as a penalty or as liquidated damages, the court will look at the nature of the contract, and its words, and try to ascertain the intentions of the parties; and also will consider that the parties, being informed as to the facts and circumstances, are better able than any one else to determine what would be a fair and reasonable compensation for a breach; but the courts have been greatly influenced by the fact that in almost all the cases the damages are uncertain and very difficult to estimate. 13 Cyc., 102. We are of the opinion that the sum to be paid upon a breach, as stipulated in this contract, is to be considered as liquidated damages and not as a penalty.

There is nothing to show any disproportion between it and the real loss if there should be a breach, and there is no standard by which a jury could fix with any degree of certainty what would be the amount of damages flowing from a breach.

This being settled, what is the plaintiff's remedy? As a general rule, a plaintiff cannot sue both at law and in equity. If his legal remedy is certain and adequate, he must resort to it, but sometimes he may have an election between the legal and the equitable remedy. It would be manifestly unjust that he should be fully compensated for any loss resulting from a breach, and at the same time restrain the defendant from committing the very act for the doing of which, in the future as well as in the past, and for its injurious consequences, he has received or willingly accepted full damages. The rule governing such cases has thus been stated: "If it is manifest that the parties intended that the particular act might be done upon payment of the sum specified, the power to do the act upon payment of the money enters into and forms a part of the contract, and equity will neither interfere to prevent the doing of the act nor to grant relief from the payment of the money agreed upon as an equivalent." 2 High on Injunctions (3 Ed.), sec. 1139. Or, as expressed in another way: "If liquidated damages are provided for in case of a breach, and it appears that the intention was to give the party the alternative to perform or pay, the breach will not be enjoined. But when the contract is an absolute one, and cannot be construed as meaning that the defendant shall have the right to do the prohibited acts on paying the sum named, an injunction will be granted to (436) restrain him, whether or not the sum to be paid be regarded as liquidated damages." 22 Cyc., 870.

The mere insertion in the contract of a clause describing the sum to be recovered for a breach as liquidated damages, but which were not intended to be payable in return for the privilege of doing the acts forbidden by the contract, will not exclude the equitable remedy, and is regarded as put there for the purpose of settling the damages if there should be a suit and recovery for a breach, instead of an action, in the nature of a bill in equity, for what substantially would be a specific enforcement of the contract by restraining any further violation of it. This is the true doctrine, and is applicable to the facts of this case, as here the damages are liquidated, and they are not allowed for the purpose of authorizing the prohibited act to be done if they are paid, "or in return for the privilege of doing the act," but the intention was that the act should not be done, and the sum is fixed as the estimated damages if it is done. The contract says, and means: "You shall not do the act, nor buy the right to do it, by paying the stated amount; but if you fail

to do it, you must pay the liquidated damages for your breach of it." These views are supported, we think, by the best authorities, if not by all of them when properly construed.

The case of *McCurry v. Gibson,* 108 Ala., 451, is a very instructive one upon this question, and is so much like ours, and the law is so clearly and exhaustively considered therein, that we will refer to it at some length. The Court first settles the principle, by reason and precedent, that contracts of professional men and tradesmen not to practice their business or calling in competition with another purchasing the same, if based upon a sufficient consideration, such as the purchase of the promisor's business, will be enforced in equity by injunction to restrain any breach of it. Reference is made to clauses in such contracts for the payment of a sum certain in case of a breach, and the variety of the language used in describing it, as "penalty," "liquidated damages," or "forfeiture." It is then said: "Courts have not always agreed in their views upon the question whether such stated sums were to be treated as penalties or liquidated damages, although the current of authorities is to treat the sum named as liquidated damages, rather than as a penalty. *Keeble v. Keeble,* 85 Ala., 552; *Roper v. Upton,* 125 Mass., 258; *Halbrook v. Talby,* 66 Me., 410, and authorities cited therein. The word is not decisive of the character of the stipulation. We need not repeat the rules which have been adopted for the determination of the ques-
(437) tion, and which are only different in their application. Upon the authority of the cases cited, and others upon which they are based, we are of the opinion that the contract averred in the bill contained a valid agreement for the payment of $200 as liquidated damages for its breach; and it is out of this fact that the supposed adequacy of the legal remedy, ousting the equitable jurisdiction, is thought to grow. There are some cases, decided by courts of last resort, which so hold (*Hahn v. Concordia Society,* 42 Md., 460; *Martin v. Murphy,* 129 Ind., 464); and we have been cited to like decisions by courts of inferior jurisdiction in New York. Such, however, is not the rule adopted by the New York Court of Appeals, nor is it supported by the weight of authority. We have recently declared that such a provision for liquidated damages was no bar to a decree for specific performance, in a case otherwise sufficient, and we are satisfied the decision was correct. *Morris v. Lagerfelt,* 103 Ala., 609. No one doubts that the parties might stipulate for the payment of a sum which upon a proper construction of the contract would be deemed a price paid for the privilege of resuming business by the party theretofore restrained. Such was the nature of the agreement construed in *Dills v. Doebler,* 62 Com., 366 (20 L. R. A.), by which it was provided that the party sought to be restrained should be

"at liberty to practice dentistry in said Hartford at any time after the termination of this contract by paying to said Dills $1,000"; and in that case it was held that the insolvency of the defendant would not suffice to give jurisdiction to enjoin his resumption of practice until he paid the stipulated sum, which evidently was not designed to prevent a breach of the contract to refrain from practicing, but was in truth the price of the privilege of again pursuing his calling in the city of Hartford." It will be noted that here the learned Court makes the distinction very clear between a case where by the terms of the contract, the damages are to be paid as an alternative for the privilege of doing the forbidden act and where this is not so, but the stated amount is to be paid if there is a breach merely and a recovery for the breach. In the former case there is no jurisdiction in equity to enjoin, while in the latter there is, though as we will see, an injunction is not the only remedy, but the party has his choice between it and an action upon the contract, where there has been a breach, to recover the fixed sum as damages. The Court then says, at page 458: "Of the rule we adopt, *Cooley, C. J.*, in *Watrous v. Allen,* 57 Mich., 362, used the following language: 'This is perfectly reasonable and equitable, for the penalty, forfeiture, or fixed damages are only agreed upon to render it more improbable that the act against which they are directed will be committed.' The same (438) thought but with more elaboration, was expressed by the Court of Appeals in *Diamond Match Co. v. Rocher,* 106 N. Y., 464; and we quote from the opinion an accurate statement of the law, as exactly applicable to this case: 'It is, of course, competent for parties to a covenant to agree that a fixed sum shall be paid in case of a breach by the party in default, and that this should be the exclusive remedy. The intention, in that case, would be manifest that the payment of the penalty should be the price of nonperformance, and to be accepted by the covenantee in lieu of performance. *Phœnix Ins. Co. v. Continental Ins. Co.,* 87 N. Y., 400-405. But the taking of a bond in connection with a covenant does not exclude the jurisdiction of equity in a case otherwise cognizable therein; and the fact that the damages in the bond are liquidated does not change the rule. It is a question of intention, to be deducted from the whole instrument and the circumstances; and if it appears that the performance of the covenant was intended, and not merely the payment of damages in case of a breach, the covenant will be enforced.' All that is settled by the insertion of a simple agreement to pay liquidated damages; so that, if an action is brought for damages, the recovery shall be for the amount named, neither more nor less. *Long v. Bowring,* 33 Beav., 585. No doubt can be entertained, in this case, that the parties were not contemplating a breach of the contract,

nor a return by the defendant to the practice of medicine in Anniston. He was on the eve of departure to another State, which he expected to make his future home, and had decided and declared that he would no longer practice in said city. The stipulation to which we have adverted is no barrier in the way of granting complainant relief by injunction, which is a negative specific performance of the contract. *Dooley v. Watson,* 1 Gray, 414; *Howard v. Woodward,* 10 Jur. (N. S.), 1123; *Fox v. Scard,* 33 Beav., 327; 2 High Inj., 1175. The complainant had his election to sue for damages or to have the agreement performed, according to its terms."

The case of *Diamond Match Co. v. Rocher,* 106 N. Y., 473 (60 Amer. Rep., 464), which was cited in the above case, is also a strong authority for the position that in a contract worded like the one in this case the party who has bought the business and provided against the rivalry of the one who has sold it may have its breach enjoined or recover damages at his option. The Court said: "There can be no doubt, upon the circumstances in this case, that the parties intended that the covenant should be performed, and not that defendant might at his option repurchase his right to manufacture and sell matches on payment
(439) of the liquidated damages. The right to relief by injunction in similar contracts is established by numerous cases. *Phœnix Ins. Co. v. Continental Ins. Co., supra; Long v. Bowring, supra; Howard v. Woodward,* 10 Jur. (N. S.), 1123; *Coles v. Sims,* 5 De G., McN. & G., 1; *Avery v. Langford,* Kay's Ch., 663; *Whittaker v. Howe, supra; Hubbard v. Miller,* 27 Mich., 15."

It will be seen, therefore, that the election as to the remedy is with the plaintiff, or injured party, and not with the defendant, who cannot, as a right, buy his peace by paying the stipulated amount as damages, but must desist from a further breach of the contract, if the plaintiff so elects and asks that he be enjoined. This was decided in *Roper v. Upton,* 125 Mass., 258. There *Judge Endicott* said: "It is often stated that a court of equity will not interfere to prevent a party from doing an act which he has agreed not to do, when liquidated damages are provided in case he does the act. But this must be taken with some qualifications; for it must appear from the whole contract that the stipulated sum was to be paid in lieu of the strict performance of the agreement, and was an alternative which the party making the covenant had the right or option to adopt, as in cases often cited in support of the general proposition. *Woodward v. Gyles,* 2 Vern., 119; *Rolfe v. Peterson,* 2 Bro. P. C. (2d Ed.), 436; *Ponsonby v. Adams,* 2 Bro. P. C. 431." And again: "It is said in all the cases on this subject that the question in every case is, What is the real meaning of the contract? And if the substance of

the agreement is that the party shall not do a particular act, and that is the evident object and purpose of the agreement, and it is provided that if there is a breach of this agreement the party shall pay a stated sum, which does not clearly appear to be an alternative which he has the right to adopt instead of performing his contract, there would seem to be no reason why a court of equity should not restrain him from doing the act, and thus carry out the intention of the parties. If such appears to be the purpose of the agreement, the fact that the sum to be paid is a stated or stipulated amount, in the nature of liquidated damages, should not oust a court of equity of its jurisdiction to compel the party to carry out his agreement. In other words naming a sum to be paid as liquidated damages does not in itself conclusively establish that the parties contemplated the right to do the act upon payment of the compensation, and make an alternative agreement for the benefit of the party who has done what he had agreed not to do."

An interesting case is *Sainter v. Ferguson,* 1 McN. & Gordon, 286, where it appeared that upon application for an injunction against a breach of the agreement the court ordered that plaintiff might (440) take proceedings at law, which he did, and recovered £500 by way of liquidated damages. He then renewed his application for an injunction, which was refused, *Lord Cottenham* saying: "If the plaintiff had seen the difficulty which has since arisen, he might have put the matter so as to have had the option left to him either of exercising his legal right or his equitable remedy and not to have been precluded from the alternative which, before the action, he had either to ask for an injunction or to obtain compensation at law. The order, however, does not provide for this; it places the plaintiff under no restriction; it only refuses to interfere until the legal right has been tried. It was then the plaintiff's own choice to go on; and the matter now stands just as if the plaintiff had brought the action first, and then come to this Court for an injunction. 1 McN. & Gord., 290." And in *Fox v. Scard,* 33 Beav., 327, it was held on the authority of *Sainter v. Ferguson* that where a person enters into an agreement not to do an act, and gives his bond to another to secure it in a penal sum, the latter has a right in law and equity, and can obtain relief in either, but not in both courts.

We find this clear analogy: "The fact that a right of reëntry is reserved to a lessor in the event of a breach of covenant does not preclude him from obtaining relief in equity against the commission of the breach, since he is not bound to adopt the remedy of reëntry provided in the lease, but may seek relief in an equitable forum." 2 High on Injunctions (3 Ed.), sec. 1138, citing *Parker v. Wythe,* 1 Hem. & M., 167 (32 L. J. Ch., 520). The case of *Stafford v. Shortried,* 62 Iowa, 524, is an

authority for the same principle and also holds that the stated sum to be paid in case of a breach is in the nature of stipulated damages, and that the defendant incurred liability for the whole amount by a single breach.

The ordinary rule is that where there is an express covenant not to do a certain thing, for which injury will result to the covenantee, an injunction will be granted to restrain a breach, if the mischief cannot be repaired, nor can well be estimated, as a suit at law would afford no adequate remedy and the damage would be continuous and recurring from day to day, and, furthermore, the object of the contract can only be attained by the parties conforming faithfully and exactly to its terms. 2 High on Inj., p. 907 and note; *Butler v. Burleson,* 16 Vt., 176.

It is clear, upon examining the language of the agreement between the parties to this action, as applied to the subject of the sale and the situation at the time, that its object is to secure absolutely to the (441) plaintiff the exclusive right, as against the defendant, to pursue the business of a barber in the town of Hamlet, and the latter, having sold his interest and good-will, expressly stipulates not to engage in the business, and to pay certain fixed damages if there is a breach. There is nothing here to show any right or option in the defendant to continue the business upon payment of the money, or that the covenant would be satisfied by the payment of the sum stated, except by consent of the plaintiff, but it is an absolute agreement not to do certain acts and thereby interfere with the plaintiff's business. This is a distinct agreement, independent of the stipulation as to the money to be paid if he violates the contract, or in case of a breach of the condition. The substance of the whole paper is that the defendant covenants not to do a particular thing, and, if he does, that he will pay $400 as satisfaction, if plaintiff elects to sue for damages; but this does not prevent the court from enjoining him from doing that which he has agreed not to do. He did not purchase the right to disregard the contract by agreeing to pay damages for a breach of it, and in satisfaction thereof, for he had no such alternative right. *Roper v. Upton, supra.*

There is a general rule that the enforcement of specific performance is discretionary with the court, and that it must be satisfied not only that there was a valid contract, but that its enforcement would be just and equitable, and that it will work no hardship or oppression, for if that result would follow, the court usually leaves the parties to their remedy at law in the way of damages, unless the granting of the specific relief can be done with conditions which will obviate such a result. Clark on Contracts (2 Ed.), p. 490, and cases cited; *Willard v. Tayloe,* 8 Wall., 557; *Hennessey v. Woolworth,* 128 U. S., 438; *Conger v. R. R.,* 120 N. Y., 29. But there is no injustice or oppression likely to ensue

from an enforcement of this covenant by an injunction against its further violation.

The court erred in refusing the injunction to the final hearing and allowing defendant to give bond to stay its restraining power or in lieu of its exercise. Plaintiff is entitled to the specific relief by injunction and to any damages he may be able to prove up to the operation of the injunction order, when the defendant must cease his violation of the covenant by discontinuing the business.

The parties may imparl, if they so desire, and in that event the plaintiff may, if he chooses, accept satisfaction of the breach in money or arrange otherwise as the parties may agree. We are now passing only upon plaintiff's legal rights.

Error.

Cited: Mar-Hof Co. v. Rosenbacker, 176 N.C. 331; *Cooperative Asso. v. Jones,* 185 N.C. 270, 273, 283; *Hill v. Davenport,* 195 N.C. 272; *Realty Co. v. Barnes,* 197 N.C. 7; *Moskin Bros. v. Swartzberg,* 199 N.C. 544; *Kadis v. Britt,* 224 N.C. 161.

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(442)

FOWLER & LEE v. W. M. WEBSTER ET AL.

(Filed 25 April, 1917.)

1. Trusts and Trustees—Spendthrift Trusts—Income—Statute of Uses—Statutes.

A devise creating a spendthrift trust, under Revisal, sec. 1588, for the trustee to receive and pay the profits, annually, or oftener for the support and maintenance of the testator's named son, is not a passive trust either as to the principal or income, or one executed under the statute of uses, and is not subject, as to either, to the payment of the debts created by the *cestui que trust,* though he be a nonresident of the State.

2. Same—Creditors—Exemptions.

The effect of the spendthrift trust, Revisal, sec. 1588, is not to create a personal property exemption in favor of a nonresident *cestui que trust* in the income from the trust estate.

APPEAL by plaintiffs from *Cline, J.,* from August Term, 1916, of UNION.

J. C. M. Vann for plaintiffs.

Stewart & McRae for garnishee.

CLARK, C. J. This is a proceeding to garnishee the trustee in a "spendthrift trust" in order to subject the income maturing from the fund in its hands to the payment of a debt of the *cestui que trust,* who is a nonresident.

Revisal, 1588, provides: *"Spendthrift Trusts authorized.*—It shall be lawful for any person by deed or will to convey any property, which does not yield at the time of the conveyance a clear annual income exceeding $500, to any person in trust to receive and pay the profits annually or oftener for the support and maintenance of any child, grandchild, or other relation of the grantor, for the life of such child, grandchild, or other person, with remainder as the grantor shall provide; and the property so conveyed shall not be liable for or subject to be seized or taken in any manner for the debts of such child, grandchild, or other relations, whether the same be contracted or incurred before or after the grant."

This trust is created by a devise, and the parts pertinent to this controversy are a direction that the fund specified is given "in trust to receive and pay the profits, annually or oftener, for the support and maintenance of my son, McRae Webster (W. M. Webster), during his lifetime," with provision for the disposal of the fund at his death, and adding: "This trust is created in accordance with the provisions (443) of section 1588 of the Revisal of 1905, and the said company is hereby authorized and empowered to sell and convey, invest and reinvest the said trust property as often as in the judgment of the proper officer of the said corporation it may seem best."

This trust is created in exact compliance with the object and the language of the statute. The learned counsel for the plaintiff insists, however, that it is invalid because it confers the "personal property exemption" on a nonresident. We need not consider whether the Legislature is forbidden to create a personal property exemption in favor of a nonresident, for that is not the effect of this statute.

The learned counsel for the plaintiff admits that the corpus of the fund is not the property of the *cestui que trust,* and, therefore, that cannot be touched; but he insists that the income therefrom is to be paid over to the defendant, and, becoming his property, it can be subjected to his debt. But this ignores the language of the statute and the terms of the trust created by this will. This is not a passive trust as to the income, which would, therefore, be executed under the statute of uses, any more than it is as to the corpus of the fund. A trust in which the trustee pays over the income to the beneficiary could be created without the necessity of this statute, and in such trust the income is the property of the *cestui que trust* and can, of course, be subjected to the

payment of his debts. It was precisely for this reason that equity created spendthrift trusts, which in this State, and some others, are now statutory. This object is expressed in Beach on Trusts, sec. 554, which says that these trusts are created for the benefit of such persons as "are deemed incapable of holding or disposing of this income."

Spendthrift trusts are not created merely for the purpose of preserving the corpus of the fund intact for the remainderman or on other trusts, leaving the beneficiary to use the income as he may see fit, but they require the trustees to hold and disburse the income itself. The *cestui que trust* has no right to touch one cent thereof. It is this that differentiates a spendthrift trust from an ordinary trust, in which last the trustee hands over the income to be disposed of by the beneficiary.

A spendthrift trust is not a passive trust, even as to the income, for in that case the income would become the property of the beneficiary as fast as it accrues and could be subjected to his debts, unless exempted by statute as a part of his personal property exemption; but the income itself is to be used and disposed of by the trustee according to its judgment for the best results in the support and maintenance of the beneficiary. The language of this trust is not "to receive and pay (444) the profits annually to W. M. Webster," which would make it a passive trust as to the income, but the language is "to receive and pay the profits annually or oftener for the support and maintenance of my son, W. M. Webster, during his lifetime." This is, therefore, an active trust in regard to the income as well as to the corpus of the fund, and the trustee is not to pay the income to the son, but is to disburse it "in the support and maintenance" of the son.

Such trusts as these have been often before the courts and have been upheld. Among other cases, *Spindle v. Shrever,* 111 U. S., 546; *Graff v. Bonnett* (N. Y.), 88 Am. Dec., 236; *Trust Co. v. Chambers,* 86 Am. Dec., 513; *Garland v. Garland,* 24 Am. St., 682; *Talley v. Ferguson,* 17 L. R. A. (N. S.), 1215; *Kutz v. Nolan,* 24 L. R. A. (N. S.), 1124; *In re Morgan,* 25 L. R. A. (N. S.), 236; *School v. Warden,* 40 L. R. A. (N. S.), 1215; 26 A. & E. (2 Ed.), 439; 39 Cyc., 33, 40, citing numerous cases in the notes thereto.

In *Trust Co. v. Chambers, supra,* it was held that an attachment would not lie to subject the fund in the hands of the trustee. In our own State the Court has protected the corpus of the fund in *Lummus v. Davidson,* 160 N. C., 484, which the plaintiff does not contest. *Mebane v. Mebane,* 39 N. C., 131, strenuously relied on by the plaintiff as authority to subject the income in this case, has no application, for *Chief Justice Ruffin* was there speaking of an ordinary trust in which the income was to be paid over to the *cestui que trust,* and, with his

usual clearness and his scorn of any subterfuge by which a party sought to exempt from liability for his debts a fund which he could use at his own will and for his own purposes, he said: "It would be a shame upon any system of law if, through the medium of a trust or any kind of contrivance, property from which a person is absolutely entitled to a comfortable, perhaps an affluent, support, and over which he can exercise the highest right of property, namely, alienation, and which upon his death would undoubtedly be assets, should be shielded from the creditors of that person during his life. There is no such reproach." To the same purport, *Vaughan v. Wise,* 152 N. C., 32, and cases therein cited, in all of which the *income* was to be paid to the *cestui que trust,* and, of course, could be subjected for his debts.

In a spendthrift trust the beneficiary cannot "exercise the highest right of property, namely, alienation" as to the income, nor will it "upon his death undoubtedly be assets." In spendthrift trusts authorized by the statute the beneficiary acquires no interest or property in the income any more than he does in the principal of the fund. He cannot alienate the income, he cannot direct its application in the pur-
(445) chase of any article whatever, or its disposal for any purpose.

The trustee holds the income just as he holds the principal, to be applied for the designated purposes. It is the duty of the trustee to make the disbursement, whether for board or clothing or in any other method in his judgment required for the support of the beneficiary. But he is not authorized to pay over any part of the income to the beneficiary that he may spend it or use it or disburse it. The cardinal idea is that the *cestui que trust* is "incompetent and cannot be trusted with the handling of the income." Beach on Trusts, *supra,* which duty is to be discharged by the trustee. Such being the case, the courts cannot, without violating the right of property possessed by the trustor, and the proper discharge of the trust by the trustee, condemn any part of the income for the foreign purpose of paying the debts of the *cestui que trust,* since the whole idea and purpose of this trust is that the beneficiary is unfit to handle the income of the fund.

The statute (Rev., 1588) serves a wise and humane public policy, and it is protected against abuse by limiting the income in amount to $500.

The judgment of the court below in refusing the application to subject the income of this fund to the payment of debts incurred by the *cestui que trust* is

Affirmed.

Cited: Cole v. Bank, 186 N.C. 516; *Bank v. Heath,* 187 N.C. 65; *Chinnis v. Cobb,* 210 N.C. 108; *Fisher v. Fisher,* 218 N.C. 48.

SOUTHERN STATES SUPPLY COMPANY v. R. P. LYON ET AL.

(Filed 25 April, 1917.)

1. Partnership—Dissolution—Notice.

Personal notice of dissolution of a partnership should be given to those who had theretofore sold it goods, and notice by newspaper publication to the public generally. Where a vendor ships goods to a partnership who had theretofore dealt with it, upon order in the partnership name, without knowledge of the dissolution or notice sent to that effect, each member of the partnership is liable therefor. Revisal, 2521, *et seq.*, as to limited partnerships, is inapplicable to the facts of this case.

2. Same—Inquiry.

Inquiry made of the cashier of a local bank as to the financial standing of a partnership, with the reply that in his opinion the order would be good if "O.K.'d" by a certain member of the firm, is not in itself sufficient notice of the dissolution of the partnership.

APPEAL by defendant Lyon from *Cline, J.*, at November Term, (446) 1916, of ANSON.

The defendants Lyon and Morton were engaged in business as a partnership under the style of the Wadesboro Plumbing Company. This is an action to recover the price of certain goods shipped to them by the plaintiff on 29 July, 1914. The defendant Lyon contends that the partnership was dissolved before the goods were shipped. But there was no evidence that any notice was sent to the plaintiff of such dissolution before shipment of the goods. On 17 May, 1914, the plaintiff wrote to a bank in Wadesboro making the ordinary inquiry as to the responsibility of the Wadesboro Plumbing Company. The cashier of the bank, after making inquiry of the defendant Lyon, replied: "Any order O. K'd. by R. P. Lyon will be perfectly good, in our opinion." Before this shipment, the plaintiff had shipped the defendants goods. This shipment was made on an order signed in the firm name. On 8 August, 1914, after the goods had arrived, A. R. McPhail, attorney for the defendants, wrote the plaintiff a letter with notification that the firm had been dissolved by mutual consent, and not to fill any further orders unless signed by both. Notice of dissolution was published in the Anson County paper in four issues beginning 12 August and ending 2 September, 1914, according to testimony of defendant Lyon. The attorney for Lyon on 3 September wrote plaintiff that he had "matters in position for a final settlement by 10 September." On 18 August he wrote plaintiff, stating that he was unable to make settlement for these goods at once, but he hoped to make settlement by the end of the week. There was no dispute as to the amount of the bill and the goods shipped. There are several

exceptions, but the facts and the dates do not seem to be in dispute, as to the matters above stated. Verdict and judgment for plaintiff. Appeal by defendant Lyon.

James A. Lockhart and Frank L. Dunlap for plaintiff.
Brock & Henry for defendants.

CLARK, C. J. It is immaterial when the dissolution of the partnership was made, as it appears that this shipment was made on 29 July, and that the plaintiff, in Columbia, S. C., received no notice of the dissolution till 8 August after the goods reached Hamlet, N. C., for the statement from the cashier of the bank in Wadesboro, who was not agent for Lyon, that he thought the order would be good if "O. K'd. by R. P. Lyon," was not a notice of dissolution, nor a notice from the defendants,

(447) but rather an expression of opinion by the cashier that Lyon was a limited partner. There was no evidence that articles of limited partnership had been filed and recorded as required by the statute. Revisal, 2521 *et seq.* On the contrary, the notice of dissolution given 8 August, and the advertisement on 12 August, 1914, negative any notice having been given theretofore.

The rule that on dissolution of a partnership personal notice must be given to those having formerly dealt with the firm (and an advertisement made for the public generally) is too well settled to be questioned. The exceptions to the evidence and to the charge require no discussion.

No error.

Cited: Hanford v. McSwain, 230 N.C. 234.

MARY J. GURLEY, ADMINISTRATRIX, v. THE SOUTHERN POWER COMPANY AND G. C. HOWARD.

(Filed 2 May, 1917.)

Removal of Causes—Federal Courts—Diversity of Citizenship—Pleadings—Judgments—Severable Controversy.

Where suit is brought against a resident and nonresident defendant, upon motion of the latter to remove it to the Federal court for diversity of citizenship the plaintiff is entitled to have his cause considered and dealt with as stated in his complaint, and ordinarily under conditions existent at or before the time the defendant is required to answer; and where the plaintiff has alleged a joint cause of action, and has not voluntarily discontinued his action against the resident defendant, but on

defendant's appeal from a joint judgment the judgment is affirmed as to the resident defendant and a new trial granted to the nonresident, it does not work such a severance as to constitute a separable controversy within the meaning of the removal statutes, and a motion thereafter duly made to remove the cause will be denied.

CIVIL ACTION, heard on motion by defendant The Southern Power Company, to remove the cause to the Federal court, before *Long, J.*, at January Term, 1917, of GUILFORD.

The said motion was denied, the order to that effect being entered in terms as follows:

"This cause, coming on at this term, January, 1917, for a hearing, upon the motion of the defendant Southern Power Company to remove this case into the United States District Court for the Western District of North Carolina, upon the complaint and the answer, and especially upon the petition filed by the Southern Power Company, that is to say, upon the whole record in the cause in this court and in the Supreme Court in this cause, it appearing that the bond had been filed by the petitioner; and it appearing to this court that the plaintiff (448) has never submitted to a nonsuit against the resident defendant, but insists upon prosecuting the action agreeably to the averments made in the original complaint, against both defendants, the motion to remove is denied."

To this ruling defendant the Southern Power Company excepted and appealed.

Peacock & Dalton and Brooks, Sapp & Williams for plaintiff.

King & Kimball for defendant.

Osborne, Cooke & Robinson for Power Company.

HOKE, J. The action was originally brought by the plaintiff as administratrix of the estate of Samuel Shropshire, deceased, to recover for the death of her intestate, alleged to have been caused by the joint negligence of the defendant the Southern Power Company and G. C. Howard. The action was first tried at the February Term, 1916, of the Superior Court of Guilford County, and the jury for their verdict found that the death of the plaintiff's intestate was caused by the negligence of both of the defendants, as alleged in the complaint, and assessed the plaintiff's damages at $10,000. From the judgment entered upon this verdict the defendants appealed. The appeal was heard at Fall Term, 1916, and the judgment as to the defendant Howard was affirmed, and a new trial was awarded as to the defendant the Southern Power Company.

The mandate of this Court was certified down to the court below on 2 January, 1917. At the first term of said Superior Court to be held subsequent to the coming down of the said mandate, that is to say, at January Term, 1917, the defendant the Southern Power Company, after proper notice to the plaintiff, presented to the court below its petition and bond for the removal of the cause to the United States District Court for the Western District of North Carolina, on the ground that the affirmance of the judgment as to Howard (who with the plaintiff is a resident of this State) and the awarding of a new trial as to it (a nonresident of this State) effect a severance of the plaintiff's original action brought upon the alleged joint liability of both defendants as joint tortfeasors, and presents a severable controversy, removable to the Federal court under the statutes controlling the subject.

Under the Federal statutes applicable and authoritative decisions construing the same, on motion to remove a cause to the United States District Court by reason of the presence of a separable controversy
(449) between a plaintiff and nonresident defendant, such plaintiff is entitled to have his cause of action considered and dealt with as stated in his complaint, and, ordinarily, as his complaint presents them at or before the time when defendant, the applicant, is required to answer. *Southern Ry. v. Miller,* 217 U. S., 209; *Ala. Ry. v. Thompson,* 200 U. S., 206; *Ches. and Ohio R. R. v. Dixon,* 179 U. S., 131; *Rea v. Mirror Co.,* 158 N. C., pp. 24, 27; *Hough v. R. R.,* 144 N. C., 704; *Western Union v. Griffith,* 104 Ga., 56; *Nat. Docks, etc., Ry. v. Penn. Ry.,* 52 N. J. Eq., 58; Federal Judicial Code, sec. 29.

Under the present statute we find no decision which justifies a departure from these requirements by reason of changes subsequently occurring in the record, unless these changes have been brought about by the voluntary action of plaintiff himself, as when he voluntarily discontinues his action against the resident defendant, the case presented in *Powers v. R. R.,* 169 U. S., 92, or by amendment subsequently made, he states a separable controversy when none had been originally presented. *Fritzlen v. Boatmen's Bank,* 212 U. S., 364.

In this case plaintiff, by allegation and proof, seeks to recover for a joint wrong. On the facts disclosed and under the principles prevailing in this jurisdiction she had a right, at her election, so to prosecute her suit. *Rea v. Mirror Co., supra; Hough v. R. R., supra.* She has insisted on that right throughout and has thus far done nothing of her own motion to abandon or waive it. In such case the mere fact that, on appeal from a joint judgment, a new trial has been granted at the instance of appellant does not, in our opinion, work such a severance as to constitute a separable controversy within the meaning of the removal

statutes. In *Brooks v. Clark,* 119 U. S., 502, defendant in error, Edward S. Clark, citizen and resident of Pennsylvania, in Dec., 1884, instituted his action in the courts of that State against Josiah D. Brooks, also a citizen and resident of Pennsylvania, and Charles H. Brooks, resident in the State of New York, to enforce a partnership liability, as surviving partners of Brooks, Miller & Co. Service was accepted as to Josiah D. Brooks, resident, and judgment final was had against him for the amount, 26 January, 1883. On 3 February Charles H. Brooks accepted service on the original process and, in May following, filed his affidavit of defense, setting up facts in exoneration special to him, and thereupon preferred his petition for removal of the cause to the Federal court, on the ground that, under existent conditions, the record presented a separable controversy. The cause having been removed, a motion to remand was allowed, and, on writ of error, this order was affirmed in the Supreme Court, the Court holding, among other things: Held (450) "(1) That under the practice in Pennsylvania this was a proceeding in the original suit, under the original cause of action; (2) That the controversy was not a separable one within the meaning of the removal act of 1875; (3) That the fact that the liability of C. had been fixed by the entry of judgment against him did not affect the principle."

In a former suit relating to this subject, *Putnam v. Ingraham,* 114 U. S., 57, there had been judgment by default taken against the resident defendant, and the cause having been removed on petition of the nonresident, alleging the existence of a severable controversy, an order remanding the same to the State court was also affirmed on writ of error, and in *Brooks v. Clark, supra, Chief Justice Waite,* delivering the opinion and speaking of the two cases, said: "It is true, there is now no longer any controversy upon the original cause of action with Josiah D. Brooks, against whom a final judgment has already been rendered; but neither was there is *Putnam v. Ingraham, supra.* In this respect the two causes differ in degree and not in kind. In this case the proceedings had gone one step further than in the other, and the default of Josiah D. Brooks had been fixed by the judgment. In principle, however, the cases are alike." And in *Putnam v. Ingraham, supra,* the same judge delivering the opinion and speaking to the existence of a statute in Connecticut similar to our own, Revisal, sec. 563, authorizing a judgment against one or more defendants, said: "In Connecticut, as in New York, judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants, etc., and, in addition to this, the court may, in Connecticut, determine the ultimate rights of the parties on each side as between themselves and grant to defendant affirmative relief, etc. But this, as we have said in the case

just decided (*Louisville, etc. R. R. v. Ide,* 114 U. S., 52), does not make a joint suit into separate parts. The suit is still one and indivisible for the purpose of removal."

These cases seem to be decisive of the question presented on this appeal, and the same principle has been stated with approval in several other decisions of the United States Supreme Court dealing with the subject. *American Car, etc. Co. v. Ketteldrake,* 236 U. S., 311; *Lathrop, Shea & Hillwood Co. v. Interior Cars Co., etc.,* 215 U. S., 246; *Kansas City, etc. Ry. v. Herman,* 187 U. S., 63; *Whitcombe v. Southern,* 175 U. S., 635, cited in *Lloyd v. R. R.,* 162 N. C., pp. 485-497; *Springer v. Amer. Tob. Co.,* 208 Fed., 199; *Hax et al. v. Caspar,* 31 Fed., 499.

(451) In *American Car Co. case, supra, Associate Justice Day,* after reviewing several of the decisions referred to, said: "Taking these cases together, we think it fairly appears from them that when there is a joint cause of action against defendants, a resident in the same State with plaintiff, it must appear to make the case a removable one as to nonresident defendants because of dismissal as to resident defendants, that the discontinuance as to such defendants was voluntary on the part of plaintiff and that such action has taken the resident defendants out of the case so as to leave a controversy wholly between the plaintiff and the nonresident defendant."

In *Lathrop's case, supra,* it was held: "Where plaintiff in good faith insists on the joint liability of all the defendants until the close of the trial the dismissal of the complaint on the merits as to defendants who are citizens of plaintiff's State, does not operate to make the cause then removable as to nonresident defendants and to prevent the plaintiff from taking a verdict against the defendants who might have removed the cause had they been sued alone or if there had originally been separable controversy as to them."

In *Hax et al v. Caspar,* where there had been a disclaimer by the two resident defendants and the cause removed on the application of the nonresident, in granting the plaintiff's motion to remand, it was held: "The removal of the cause from a State to a Federal court does not depend upon the question of what issue remains to be tried, but must be determined by the nature of the cause of action presented in the complaint. If there be but one involving many defendants, the fact that each makes a separate defense does not make severable controversies, nor does the default of one of them or his disclaimer of title to the land in controversy give a right of removal to the contesting defendant who is a citizen of the State other than that of plaintiffs."

We are referred by counsel for appellant to the case of *Yulee v. Vose*, 99 U. S., 539, as an authority in support of the petition. That was a decision upholding a right of removal under the act of 1866 which permitted such a petition to be filed at any time before the trial or final hearing, and provided, further, that when there was a suit between resident and nonresident defendants, and there could be a final determination of the controversy as to the nonresident without the presence of the others, the suit could be removed as to the nonresident, leaving the cause to be proceeded with in the State courts as to the resident defendants. Both on the facts and the statute applicable there is such a marked difference between the two cases that the decision (452) can in no sense be considered an authority for defendant's position on the present record.

The same case was very much relied on by plaintiff in error in the subsequent decision of *Brooks v. Clark*, heretofore cited, and in the latter case *Chief Justice Waite*, who delivered both opinions, refers very fully to the difference in the two statutes and gives decided intimation, if he does not fully decide, that *Yulee v. Vose* is not an authority as to proceedings under the present law.

On careful consideration of the record, we concur in his Honor's view, that no removable case has been presented, and his order denying appellant's petition to that effect is affirmed.

Judgment affirmed.

Cited: Patterson v. Lumber Co., 175 N.C. 92; *Hill v. R. R.*, 178 N.C. 610, 612.

LILLIE F. WILLIAMS v. JOHN BLUE, HALBERT BLUE, FANNIE A. BLUE, AND J. W. GRAHAM.

(Filed 2 May, 1917.)

1. Negligence—Automobiles — Chauffeur — Management of Car — Master and Servant—Employer and Employee.

Where a chauffeur is running an automobile under the charge and direction of another therein, and by its negligent operation injury is caused to a third person, the chauffeur will be deemed the servant of such other person and fix him with liability, whether actually employed by him or not, and without respect to the fact of the ownership of the car.

2. Pleadings—Allegations—Demurrer—Cause of Action.

Where the allegations of a complaint to recover for the joint tort of several defendants are definite as to some and vague as to the others, but

so interwoven that it appears that a cause of action is sufficiently stated as to all, a demurrer thereto will not be sustained for uncertainty of allegation.

CIVIL ACTION, heard at February Term, 1917, of MOORE, before *Webb, J.*, upon demurrer by defendants Fannie A. Blue and J. W. Graham.

The court sustained the demurrer and plaintiff appealed.

H. F. Seawell, R. L. Burns for plaintiff.

U. L. Spence, Johnson & Johnson for defendants.

(453) BROWN, J. The ground of demurrer is that the complaint fails to state a cause of action as to the demurring defendants, Fannie A. Blue and J. W. Graham.

The demurrer of the defendant Fannie A. Blue sets forth that it appears upon the face of said complaint and from the allegations thereof that this defendant was a guest in the automobile referred to in the complaint at the time of the negligent acts complained of by the defendant Halbert Blue; and said complaint does not allege that this defendant participated in any respect in the negligent acts of the said Halbert Blue or in any way directed the commission of such negligent acts, or omitted to perform any duty owed by this defendant to the plaintiff in connection therewith, and fails to allege that this defendant had such control and direction of said automobile or said chauffeur, or assumed such control and direction of said automobile and chauffeur, as to be considered as practically in exclusive possession of said vehicle, and does not allege that this defendant had authority to control and direct the conduct of said chauffeur and the movement of said automobile.

The grounds of the demurrer of defendant Graham are that the complaint fails to state that he was the owner of the automobile or that the defendant Halbert Blue acted as his chauffeur, and that it appears from the whole complaint that he was only a guest in the car and exercised no control or direction over it.

The allegations of the complaint are so interwoven as to each defendant that it is difficult to separate and analyze the grounds of their individual liability.

The complaint alleges that the defendant John Blue was the owner of the automobile that collided with that of plaintiff and caused serious injury, and that such collision was caused by defendant Halbert Blue's negligence, who was acting at the time as chauffeur for defendant Fannie A. Blue. The complaint further alleges that at the time of the collision defendant Graham was in part directing the operation of the automobile.

While the allegations as to defendants Fannie Blue and J. W. Graham are rather meager, they are sufficient, we think, to require an answer upon their part.

Ownership of an automobile is not essential to charge one with responsibility for its operation. The question is, was Fannie A. Blue in actual control of the machine? One in charge of operation of a motor vehicle, although he is neither the owner nor the person actually operating it, is nevertheless liable for injury sustained by third persons by reason of its negligent operation, as the person actu- (454) ally operating the vehicle will be deemed his servant irrespective of whether he employed him or not. 28 Cyc., page 40.

If it should turn out upon the trial that defendant Fannie A. Blue was exercising no control over the machine or chauffeur and was occupying it simply as the wife of John Blue and with his consent, then she would not be liable.

As to defendant Graham, the allegation of the complaint, as we read it, is that he was actually assisting in operating the machine at the time of the collision. If it should turn out upon the trial that he did not assist in directing the operation and course of the machine at the time of the collision he would not be liable.

The defendants will answer over.

Reversed.

Cited: Tyree v. Tudor, 183 N.C. 346; *Williams v. R. R.,* 187 N. C., 352, 355; *Dillon v. Winston-Salem,* 221 N.C. 520.

E. M. ASBURY v. C. J. MAUNEY.

(Filed 2 May, 1917.)

1. Corporations—Stockholders—Resolutions—Individual Liability.

The minutes of a specially called meeting of the stockholders, showing only that a motion had been duly made for the stockholders to assume the debts of the corporation beyond its assets, is not sufficient evidence that it had been voted upon or carried.

2. Same—Special Meetings—Notice.

Notice of a specially called meeting of the stockholders of a mercantile corporation, stating as its object the fixing of the value of its merchandise in view of closing out an unprofitable enterprise, limits the scope of the meeting to this special purpose, and will not bind an absent stockholder, who had received the notice, to a resolution attempting to fix individual liability among them; and such action will be void unless all the members

of the corporation are present or give their consent, or they thereafter ratify it.

3. Corporations—Shareholders—Resolutions—Individual Liability.

Action by the stockholders to assume personal liability for the debts of a corporation is not a corporate act, but a personal one to each of them, dependent upon the agreement by them all; and where a general resolution of this character is passed by a majority of them, it is not binding upon those present when those absent refuse to consent thereto.

4. Corporations—Shareholders—Meetings—Resolutions — Individual Liability—Principal and Agent—Statute of Frauds.

Where the shareholders of a corporation have passed a resolution attempting to fix individual liability among themselves for the corporation's debts, and one of them has signed the minutes in the capacity of secretary, his signing is not, in effect, a corporate act, and he will not be regarded as the duly authorized agent for the shareholders within the meaning of the statute of frauds.

5. Same—Contracts—Parties.

Where the secretary of a meeting of the shareholders of a corporation signs the minutes of the meeting containing a resolution attempting to fix individual liability among them, and afterwards sues on a corporate debt which he has paid and upon which he was secondarily liable, claiming in subrogation, he will not be considered as the duly authorized agent of the other shareholders within the meaning of the statute of frauds, upon the principle that one of the parties to the writing required may not be the agent of the other who is sought to be bound therewith.

(455) CIVIL ACTION, tried before *Cline, J.*, at November Term, 1913, of STANLY.

This is an action to recover the sum of $93.66 which the plaintiff alleges is due him on account of an agreement entered into by the defendant, a stockholder of the E. M. Asbury Company.

The E. M. Asbury Company was a corporation and the stockholders were F. V. Watkins, C. J. Mauney, C. W. Andrews, E. M. Asbury, A. S. McRae, and Miss Spencer.

The corporation became insolvent and on 16 September, 1909, the stockholders held a call meeting for the purpose of fixing a price on the stock of merchandise on hand with a view to closing out the business, and the following are the minutes of said meeting:

E. M. ASBURY COMPANY,
GENERAL MERCHANTS.

ALBEMARLE, N. C., 16 September, 1909.

Call meeting of the stockholders of the E. M. Asbury Company, with the following stockholders present, and stock represented as follows:

F. V. Watkins, 17 shares, $1,700; C. J. Mauney, 5 shares, $500; C. W. Andrews 5 shares $500; F. V. Watkins proxy for Miss Spencer, 2 shares, $200; E. M. Asbury, 17 shares, $1,700. Total, 46 shares, $4,600.

The object of the meeting is to fix a price on the stock of merchandise on hand with a view to closing out the business, which has been running at a loss to the stockholders for three years; and on motion of C. J. Mauney to fix a price of 50 cents on the dollar, that is, on the invoice price of the goods, with the exception of the new goods just received from J. W. Ould Company. This motion carries with it a proviso to first offer the stock to any one of the stockholders, and (456) if they do not buy it, then to sell to best advantage to any outsider, with the understanding to proceed at once to sell the stock. The above seconded by C. W. Andrews and carried by all the stock here represented, as follows: C. J. Mauney, 5 shares; F. V. Watkins, 17 shares; F. V. Watkins for Miss Spencer, 2 shares; C. W. Andrews, 5 shares; E. M. Asbury, 17 shares.

On motion of C. J. Mauney, seconded by C. W. Andrews, to appoint F. V. Watkins and E. M. Asbury a committee to sell the stock and pay off the indebtedness as far as it will go. Moved by C. W. Andrews, seconded by C. J. Mauney, that after the stock of goods have been sold, and the proceeds placed to the payment of notes, accounts and claims against the said E. M. Asbury Company, that all remaining unpaid bills and notes be paid by the stockholders in proportion to the stock they hold. Moved by C. W. Andrews, seconded by C. J. Mauney, that the new goods above excepted be taken by the purchaser of the stock at invoice price, unless placing it with the entire stock will be the means of getting a better price for the whole stock. Moved and carried that a copy of these minutes be sent to A. S. McRae, the only stockholder not represented, and this being his fault, as he had been duly notified and had set his own time to meet with us.

Moved and carried to notify the Corporation Commission of the dissolution in legal form as soon as the stock has been sold.

Motion to adjourn by C. J. Mauney.

E. M. ASBURY, *Secretary.*

At the time said meeting was held the corporation was indebted to J. W. Ould and Co. and the Hetch-Hirschler Company in certain amounts for which the plaintiff E. M. Asbury was personally liable, which amounts the plaintiff has paid, and he now brings this action to recover of the defendant a proportionate part thereof, relying upon the following statement in said minutes: "Moved by C. W. Andrews, seconded by C. J. Mauney, that after the stock of goods had been sold and the pro-

ceeds placed to the payment of notes, accounts and claims against the said E. M. Asbury Company, that all remaining unpaid bills and notes be paid by stockholders in proportion to the stock they hold."

The plaintiff contends that this was an agreement entered into by the defendant and the other stockholders who were present to pay the debts of the corporation; that the minutes signed by the secretary of the corporation is a sufficient memorandum thereof to satisfy the statute of frauds, and that as he has paid certain debts of the corpora-
(457) tion in existence at the time of the meeting of the stockholders, that he is entitled to be subrogated to the rights of the creditors as against the defendant.

His Honor ruled against the plaintiff and entered judgment of nonsuit, and plaintiff excepted and appealed.

R. L. Brown and R. L. Smith for plaintiff.

J. R. Price for defendant.

ALLEN, J. There are several objections to the right of the plaintiff to maintain this action.

In the first place, it does not appear that the stockholders entered into any agreement to pay the debts of the corporation. It is stated in the minutes that a motion to this effect was made and seconded, but it does not appear that it was voted upon or adopted, and this omission has particular significance in view of the evidence of all of the stockholders who were present at the meeting except the plaintiff, that after the motion was made and seconded, objection was raised, and it never came to a vote, and that the plaintiff, who was examined as a witness in his own behalf did not contradict them, but contented himself with stating that the minutes contained a true account of the meeting, and that they were read over to the stockholders.

Again, the stockholders' meeting of 16 September was a call meeting for a special purpose, and at such meetings no action can be taken which will be binding upon the corporation unless every stockholder has notice (*Hill v. R. R.*, 143 N. C., 552), and if the meeting is called for a special purpose, business not embraced in the notice will be void unless all the members of the corporation are present and give their consent or the action is thereafter ratified. 10 Cyc., 327.

In this case notice was given to all of the stockholders, but the notice did not suggest that any action would be taken or considered as to the imposition of personal liability upon the stockholders for the debts of the corporation, and the action of the stockholders, if they agreed to become personally liable, could not be corporate action, and would

amount in any event to no more than a personal agreement between the stockholders.

The agreement also if made, was not the act of the corporation, because it did not purport to deal with the property of the corporation or the conduct of its business, but simply undertook to determine the relationship between the stockholders themselves as to their liability for the debts of the corporation.

We must then treat the stipulation in the minutes as an effort to bind the stockholders to pay the debts of the corporation, for which they were not liable, and when so considered it is apparent that (458) it was not the purpose of those present at the meeting to assume the debts, but that this liability should be imposed on all the stockholders as the resolution introduced does not say that the debts remaining after the application of the proceeds of the goods shall be paid by the stockholders *present,* but by "the stockholders," which means all the stockholders, and as so understood it was in the nature of a proposal, which did not become effective because of the refusal of the absent stockholder to give his consent.

If, however, we accepted the view of the plaintiff that the minutes furnish evidence of an agreement between the stockholders to pay the debts of the corporation, and that this agreement would be void under Revisal, sec. 974, unless in writing and signed by the party or by "some other person thereunto by him lawfully authorized," we would not adopt the conclusion of the plaintiff that the minutes are a sufficient memorandum of the agreement.

The defendant did not sign the minutes and the plaintiff must, therefore, show, in order to maintain his position, that he himself when signing the minutes as secretary of the corporation was signing as the duly authorized agent of the defendant.

The first objection to this position is that the plaintiff did not purport to sign the minutes as agent for the defendant, but as secretary of the corporation, and, again, it seems to be well settled that one of the contracting parties cannot be the agent of the other for the purpose of binding him by his signature under the statute of frauds.

Lord Ellenborough said in *Wright v. Dannah,* 2 Camp., 203: "The agent must be some third person and could not be the other contracting party." *Abbott, C. J.,* in *Fairbrother v. Simmons,* 5 Barn. and Ald., 120: "The agent contemplated by the Legislature, who is to bind a defendant by his signature must be some third person and not the contracting party." And the same doctrine is declared in *Sharman v. Brandit,* 6 Q. B., 722, as follows: "One of the parties cannot be the agent of the other for the purpose of signing the contract."

In Brown on the Statute of Frauds, sec. 367, the author says: "The statute does not require the party's own signature to the memorandum, but allows it to be signed by some other person thereunto by him lawfully authorized. . . . One rule, however, has been settled, both under the fourth and seventeenth sections, that neither party can be the other's agent to bind him by signing the memorandum," and this is quoted with approval in *Wilson v. Mill Co.,* 150 N. Y., 314, and the same principle is declared and approved in 20 Cyc., 276; *Wingate v. Herschauer,* 42 Iowa, 508; *Leland v. Creyon,* 1 McCord (S. C.), 100; *Bent v.*
(459) *Cobb,* 9 Gray (Mass.), 397; *Tull v. David,* 45 Mo., 444; and we have found nothing to the contrary.

The reason for the rule is stated with great clearness in the case from Massachusetts, and it is pointed out that if the party was permitted to sign the contract as the agent of the other party, the statute, instead of preventing fraud, would encourage fraud and perjury. It would enable one to draw a contract to suit himself, and then, by proving his authority by his own oath, to bind the other party to a contract which he had not made, and to establish a liability by parol when the statute says it can only be done by writing.

In the case from Missouri the Court quotes with approval from the opinion of *Bigelow, J.,* in *Bent v. Cobb,* as follows: "The great mischief intended to be prevented by the statute would still exist if one party to a contract could make a memorandum of it which would absolutely bind the other. If such were its true construction, it would be a feeble security against fraud, or, rather, it would open a door for its easy commission. A vendor could fasten his own terms on his vendee. If it was a written contract binding on the purchaser, he could not show by parol evidence that the terms of the bargain were incorrectly or imperfectly stated."

If it be objected that a third party might also incorporate terms in the agreement which had not been assented to, the answer is that the danger here is not great, because the disinterested agent has no inducement to commit fraud or perjury, which would be present with an interested party.

There are other questions raised by the defendant as to the rights of a creditor to sue upon the agreement between the stockholders, assuming it to have been made, and as to the consideration, but as what we have said disposes of the case, it is not necessary to consider them.

The case of *Armstrong v. Asbury,* 170 N. C., 161, has no bearing upon the question now before us, as in that case a judgment by default had been taken, and the only question before the court was as to the admissi-

bility of evidence, which would have destroyed the effect of the judgment, if admitted and found to be true.

Affirmed.

Cited: Everett v. Staton, 192 N.C. 220; *Bank v. Courtway,* 200 N.C. 526; *Gennett v. Lyerly,* 207 N.C. 207; *Tuttle v. Building Corp.,* 228 N.C. 513.

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(460)

R. L. KIRKWOOD ET AL. v. W. N. PEDEN, EXECUTOR, ET AL.

(Filed 2 May, 1917.)

1. Homestead—Right—Judgments—Execution.

The mere right of homestead is not such an estate or interest in lands as is subject to a lien by judgment.

2. Homestead—Right—Reservation—Deeds and Conveyances.

A reservation of an indefinite right of homestead in lands from a conveyance thereof is valid.

3. Same—Limitation of Actions—Judgments—Liens—Statutes — Suspension.

Where a judgment debtor had previously conveyed his lands, subject to an indefinite right of homestead therein, before the lien of the judgment attached, and his homestead laid off thereunder, Revisal, sec. 685, suspending the operation of the statute of limitations, has no application; and where he has acquired the reversionary interest in the land after the judgment has been barred, the plea of the statute is a complete defense. Revisal, sec. 574.

4. Homestead—Deeds and Conveyances—Reservation of Right—Judgment —Estoppel.

A judgment debtor is not estopped to show that prior to the time of laying off his homestead under judgment he had conveyed the lands with reservation of his bare right to a homestead exemption therein, though he may not collaterally attack the validity of the allotment proceedings.

CIVIL ACTION, tried at October Term, 1916, of SCOTLAND, before *Cline, J.*

A jury trial being waived, the court found the facts and rendered judgment denying the relief prayed and dismissing the action. Plaintiffs appealed.

M. L. John, Cox & Dunn, Walter H. Neal for plaintiffs.

Russell & Weatherspoon, G. B. Patterson, E. H. Gibson, and McIntyre, Lawrence & Proctor for defendants.

BROWN, J. By this action the plaintiffs seek to subject certain land in Laurinburg, Scotland County, to the payment of a judgment duly rendered and docketed in 1885 in favor of W. F. and D. D. Gibson v. W. H. McLaurin, which judgment is now the property of plaintiffs. The defendants plead the statute of limitations and an estoppel by judgment of record. We will consider only the former. The following is a brief summary of the facts found by the court:

The land sought to be impressed with the alleged judgment lien was acquired in fee simple by W. H. McLaurin about 1866. On 1 (461) July, 1879, said McLaurin conveyed all the land to J. C. Everett in fee simple by deed containing covenants of general warranty, reserving to the grantor *"the right of the homestead."* At February Term, 1885, of Richmond Superior Court W. F. and D. D. Gibson (under whom plaintiffs in this action claim) obtained judgment against W. H. McLaurin which was duly docketed. On 2 April, 1885, execution was issued upon this judgment, and the sheriff allotted a homestead to the judgment debtor, *the homestead allotted being on a part of the land which said McLaurin had sold and conveyed to J. C. Everett on 1 July, 1879, prior to the rendition of the judgment under which the homestead was allotted.* McLaurin was living upon that part of the land when the homestead was allotted, and continued to live there until his death in 1913.

In 1891 J. C. Everett conveyed the entire land conveyed to him to W. N. Everett, trustee, who conveyed it in 1896 to Laura D. McLaurin. She executed a mortgage to John F. McNair, who duly foreclosed the same 18 April, 1898, and conveyed the land by deed in fee to W. H. McLaurin, the original owner of the land whose homestead had been set apart on it. At this date the judgment sued on was admittedly barred by the statute of limitations unless the running of the statute was suspended by operation of section 685 of the Revisal, which reads as follows:

"The property, real and personal, specified in the third subdivision of this section, and the homestead of any resident of this State, shall not be subject to sale under execution or other process thereon except such as may be rendered or issued to secure the payment of obligations contracted for the purchase of the said real estate, or for laborers' or mechanics' lien, for work done and performed for the claimant of said homestead, or for lawful taxes: *Provided,* that the allotment of the homestead shall, as to all property therein embraced, suspend the running of the statute of limitations on all judgments against the homesteader during the continuance of the homestead: *Provided further,* that the owners of judgments docketed since 11 March, 1885, shall have two

years from the 1st day April, 1901, within which to assign and set apart the homestead under such judgment; the suspension of the statute of limitations shall be suspended not only as to the judgment under which the homestead is allotted, but as to all other judgments."

This statute has been discussed and applied in the recent case of *Brown v. Harding,* 171 N. C., 686, and under that decision there could be no question as to the correctness of plaintiff's contention that the judgment lien is protected by the statute during the existence of the homestead, but for the conveyance in 1879 to J. C. Everett, some years prior to the rendition and docketing of the judgment. This (462) deed conveyed to Everett in fee the entire tract of land by metes and bounds, "together with its appurtenances, reserving *the right* of the homestead." It is to be observed that the deed did not reserve or except a specifically described part of the land upon which a homestead had been or was to be set apart.

Had it done so, there would have been left in the grantor a reversionary interest or estate in the land allotted as a homestead upon which the judgment when docketed would have been a lien. As such reversionary interest or estate could not be sold under execution during the existence of the homestead, the judgment lien would have been protected by the suspension of the statute of limitations until the homestead expired. But the deed reserved only *the right* to a homestead, and there was no estate in the land left in McLaurin upon which the judgment would be a lien.

As the only interest McLaurin had in the land at the date the judgment was docketed was a bare right to a homestead, if this right was not an estate in the land, then he had no interest to which the lien of the judgment could attach. For some time after the Constitution of 1868, creating a homestead in land, was adopted there was much confusion in the judicial mind as to the nature and character of the homestead. *Judge Pearson* defined it as a "determinable fee," endeavoring to correlate it with some estate known to the common law, of which he was a recognized master. Since then the homestead has been defined as a mere determinable exemption, *Joyner v. Sugg,* 132 N. C., 580; *Fleming v. Graham,* 110 N. C., 374. A mere stay of execution, *Bank v. Green,* 78 N. C., 247. An exemption merely, *Markham v. Hicks,* 90 N. C., 204. A quality annexed to the land, *Littlejohn v. Egerton,* 77 N. C., 384; *Hughes v. Hodges,* 102 N. C., 236. A privilege only, *Simpson v. Wallace,* 83 N. C., 481. A mere exemption right, *Fulp v. Brown,* 153 N. C., 533; *Sash Co. v. Parker,* 153 N. C., 130. The measure of the debtor's privilege, *Campbell v. White,* 95 N. C., 345.

It is now settled beyond controversy that whatever else it may be, a homestead is not an interest or estate in land. Although it has always been held that a conveyance reserving the right of the homestead is valid and enforcible (*Smith v. McDonald,* 95 N. C., 163; *Ex Parte Brach,* 72 N. C., 106), and that such a reservation is neither conclusive nor presumptive evidence of fraud (*Davis v. Smith,* 113 N. C., 94; *Bank v. Whitaker,* 110 N. C., 345), there was formerly some doubt as to the effect of such a conveyance, and the character and extent of the *title and estate* which passed to a grantee under such a deed. But the
(463) matter has finally been settled by this Court in *Joyner v. Sugg,* 132 N. C., 580, where it was said by a unanimous Court: "We cannot understand why a conveyance of land subject to the owner's right of exemption should not be permitted to have full force and effect and to convey all the interest he has in it, subject only to his right to use and enjoy it during the period of the exemption. This is all the Constitution secures to him, and every principle of law and public policy requires that his right of alienation should be as little hampered as possible."

The principle thus announced has been adhered to to such an extent as that it has become a well settled doctrine under our law. *Robinson v. McDowell,* 133 N. C., 182; *Rodman v. Robinson,* 134 N. C., 505; *Davenport v. Fleming,* 154 N. C., 291; *Dalrymple v. Cole,* 156 N. C., 353; 170 N. C., 102.

The *precise question presented in the case at bar* was before the Court in *Davenport v. Fleming,* 154 N. C., 291, and the decision in that case is controlling. It was there said, at page 294: "It follows that when the ownership of a tract of land and any and all interest therein except the homestead interest has been passed from the debtor by valid conveyance, and such homestead interest determines by the death of the parties entitled, or by any of the recognized methods of abandonment, it does so in favor of the grantee in such conveyance, and *where such conveyance has become effective before a judgment is docketed, there is no estate in the debtor to which a judgment lien could attach* and no interest of the judgment creditor in the property that would call for or permit the interference of a court in his behalf by injunction or otherwise.

"In the present case, prior to any judgment docketed or any lien acquired, the debtor conveyed the entire land in trust for creditors, reserving from the operation of the instrument the homestead exemption of said Joseph Fleming.

"After the execution of this deed, the homestead having been duly allotted, the trustee sold and conveyed the tract of land except the homestead, and also the reversion after the homestead interest, to Isabella Fleming. There is no suggestion of fraud or irregularity, and on the

facts in evidence and applying the principles recognized and upheld by the decisions referred to, we are of opinion that there is no right in the judgment creditor to stay the cutting of the timber on the land contained in the homestead."

This case is on "all-fours" with the case at bar, as the only land sought to be impressed with a lien is the land allotted to W. H. McLaurin as his homestead.

The homestead itself, that is, the right of the judgment debtor (464) with respect to the land embraced within the homestead allotment is, of course, not subject to execution, and the judgment is not a lien thereon. Constitution, Art. X, sec. 2; Revisal, secs. 629, 685; *Rankin v. Shaw*, 94 N. C., 407, and cases cited; Black on Judgments, secs. 424 and 425.

The plaintiffs, recognizing the effect of these decisions, contend that when McLaurin acquired title in fee in 1898 to the land covered by the homestead the judgment then became a lien upon the reversionary interest, subject to the homestead.

That would be true if the judgment then had any vitality, but as the statute had not been suspended up to that time, it was barred. The Revisal, sec. 574, limits the lien of a judgment to such lands as the judgment debtor owns at the docketing of the judgment or shall acquire within ten years thereafter.

As we have shown, the judgment when docketed was not a lien on the reversionary interest because McLaurin did not own it. When McLaurin did acquire it, the statute of limitations had barred the judgment.

The only reason for keeping a judgment in full force and effect during the existence of the homestead is to subject the reversionary interest to its payment when the homestead expires, as such interest cannot be sold under execution during the life of the homestead.

In *Bruce v. Nicholson*, 109 N. C., 202, it was said: "The lien only attaches and secures the right of the creditor to have the judgment debt paid out of the proceeds of the sale of the property, made under the ordinary process of execution or other proper process or order of the court. *The lien extends to and embraces only such estate, legal or equitable, in the real property of the judgment debtor as may be sold or disposed of at the time it attaches.*"

Therefore, where the judgment debtor has conveyed the reversionary interest before the judgment lien attaches, there is no reason to preserve the judgment in force beyond the statutory period, as has been declared in several decisions of this Court.

In *McDonald v. Dickson,* 85 N. C., 253, it was said: "Even then (after the allotment of the homestead) the cessation of the statute is only as to debts affected by such allotment, that is, as to judgments docketed in the county where the homestead is situate, and *solely with reference to their* LIENS *upon the reversionary interest* in such lands. As to every debt, except judgments docketed, and for every purpose except that of enforcing their liens upon the reversionary interest after the falling in of the homestead interest, the statute runs and may become a bar."

(465) In *Morton v. Barber,* 90 N. C., 401, it was said: "This Court has held that the provisions of that act (the statute suspending the running of the statute of limitations) were only intended to apply where the homestead had been actually allotted, and only as to debts affected by such allotments, *i. e.,* to judgments docketed in the county where the homestead is situated, and *solely with reference to their liens upon the reversioning interest in such lands.*"

In *Cotten v. McClenahan,* 85 N. C., 258, it was said: "There is no stay to the statute until there has been an allotment of the homestead, and then only to the enforcement of the *liens* of docketed judgments upon the *interest in reversion.* As to all other debts and for all other purposes the statute runs."

We are unable to see the force of plaintiff's contention that the defendants, claiming under McLaurin, are estopped to deny that he was seized in fee of the land allotted as homestead.

In our opinion, that position is not supported by reason or authority. The defendants do not deny that McLaurin's homestead was allotted to him on this land, but they aver that at the time of its allotment he had conveyed away the reversionary interest some years before the judgment was rendered.

The allotment of a homestead under execution without exception or appeal by the debtor is an estoppel of record against him, and he cannot dispute the validity of the allotment proceedings. *Spoon v. Reid,* 78 N. C., 244. That is to say, the judgment debtor cannot thereafter deny that his homestead was regularly set apart in that particular land and that its value was as much as $1,000.

But there is no authority that we can find for the position that the judgment debtor and those claiming under him may not show that when the homestead was allotted he did not own the reversionary interest in the land, but owned only the bare right to a homestead exemption, for the reversionary interest is not embraced in the homestead proceedings.

In the view we take of this case it is unnecessary to consider the plea of estoppel as to the judgment of 1910 set up by defendants.

Affirmed.

Cited: Williams v. Johnson, 230 N.C. 344.

(466)

DANIEL STARNES ET AL. V. L. A. THOMPSON ET AL.

(Filed 2 May, 1917.)

1. **Judgments—Presumptions—Inferior Courts—Clerks of Court—Probate.**

The presumption of the regularity of proceedings terminating in judgment in the Superior Court having jurisdiction of the parties and the subject-matter applies to courts of inferior or more limited jurisdiction, as, in this case, the action of the clerk of the Superior Court of the proper county admitting a will to probate in common form.

2. **Same—Burden of Proof.**

Where a party seeks to set aside the probate of a will as a cloud upon his title to lands, the burden of proof is upon him to show, in a proper suit, such substantial defects in the proceedings as would avoid the action of the clerk in admitting the will to probate.

3. **Judgments—Clerks of Court—Probate—Collateral Attack—New Counties.**

The action of the clerk of the Superior Court of the proper county admitting a will to probate cannot be attacked collaterally, in a suit brought to declare the probate void for irregularity, as a cloud upon the plaintiff's title to lands; and the fact that the lands, a part of a larger body, were situate and suit was brought within a new county cut off in part from the original one in which the probate was allowed, does not alter the application of the principle, there being *bona notabilia,* in the county, when the probate was had.

CIVIL ACTION tried before *Cline, J.,* at October Term, 1916, of UNION, on special appearance and motion by defendants to dismiss the action for want of jurisdiction of the court, and then on demurrer to the complaint, based upon the grounds, first, that the court has no jurisdiction of the action, and, second, that there is no cause of action stated, as the plaintiffs cannot attack collaterally the probate of a will taken in the court of another county, where the testator resided and was domiciled at his death.

The action was brought to remove a cloud from the title to land which plaintiffs allege they own. It is stated in the complaint that Alexander Thompson died in 1839, in Mecklenburg County, without leaving a will, and that defendants in 1912 produced before the clerk of the Superior Court of Mecklenburg County a paper-writing purporting to be his will, and caused the same to be probated by said clerk in common form. That Alexander Thompson never signed or executed the said paper as his will,

and no proof was offered as to his handwriting, and that the proofs before the clerk were otherwise irregular and defective.

Defendants claim title to the land under the will which plaintiffs allege clouds their title to the same, as the will which was probated (467) in Mecklenburg County, where the land was situated, at the death of Alexander Thompson, but since added to Union County by statute, is not his will and was not properly probated. They pray that the will and probate be set aside and annulled as a cloud on their title.

The court overruled the motion and the demurrer, and defendants appealed.

Redwine & Sikes for plaintiffs.

W. O. Lemmond, E. R. Preston, Vann & Prattys for defendants.

WALKER, J., after stating the case: It may be safely assumed that the following doctrine has been established by the courts with reference to the conclusiveness and binding effect of judgments, so long as they remain in force and unreversed. Where a judgment rendered by a domestic court of general or superior jurisdiction is attacked in a collateral proceeding there is a presumption, which can only be overcome by positive proof, that it had jurisdiction both of the persons and the subject-matter, and proceeded in the due exercise of its jurisdiction. "Although the court may be an inferior or limited tribunal, yet if it has general jurisdiction of any one subject, its proceedings and judgments in respect thereto will be sustained by the same liberal presumptions which obtain in the case of Superior Courts." 1 Black on Judgments (2 Ed.), sec. 282; 23 Cyc., 1078, 1082; *Moffitt v. Moffitt,* 69 Ill., 641. In nearly all the States of the Union probate courts and orphans' or surrogate's courts now rank with the courts of general or superior jurisdiction for the purposes of the rule under consideration, so that it is not necessary for their records to show the facts essential to sustain their judgments, against collateral attack, but, on the contrary, their jurisdiction and authority will be presumed. 23 Cyc., 1083. It will be shown hereafter that these rules prevail with us. "Presumptions against the validity of the proceedings will not be indulged in, where the record does not affirmatively show any error or irregularity" (40 Cyc., 1378, note 28; *McCrea v. Haraszthy,* 51 Cal., 146), which is fatal to the judgment therein. It has been held that assumption of jurisdiction by the court is prima facie evidence of the fact that it had it in the particular case, and throws the burden of disproving it on the party who denies that jurisdiction existed. 40 Cyc., 1379, note 37; *Fletcher v. Sanders,* 7 Dana, 345. This doctrine is clearly stated by *Chief Justice Smith* in *Sumner*

v. Sessoms, 94 N. C., 376: "It is true, the record produced does not show that notice was served on the infant or upon her guardian *ad litem,* nor does the contrary appear in the record, which, so far (468) as we have it, is silent on the point. The jurisdiction is presumed to have been acquired by the exercise of it, and if not, the judgment must stand and cannot be treated as a nullity until so declared in some impeaching proceeding instituted and directed to that end. The irregularity, if such there be, may be such as to warrant, in this mode, a judgment declaring it null; but it remains in force until this is done." We have approved it in *Burgess v. Kirby,* 94 N. C., 575; *Hargrove v. Wilson,* 148 N. C., 439; *Rackley v. Roberts,* 147 N. C., 201; *Pinnell v. Burroughs,* 168 N. C., 315, 320, and many other cases. This principle was stated and applied by *Justice Hoke,* speaking for the Court in the recent case of *Massey v. Hainey,* 165 N. C., 174, where he says "If this lack of jurisdiction appears of record, the judgment may be treated as a nullity when and wherever relied upon; but in most instances, and this is true where a party, though without authority, appears of record as plaintiff, it is both desirable and necessary that relief should be obtained by direct proceedings, the appropriate method, under our present system, being, as stated, by motion in the cause. *Rackley v. Roberts,* 147 N. C., 201; *Flowers v. King,* 145 N. C., 234; *Grant v. Harrell,* 109 N. C., 78; *Sutton v. Schonwald,* 86 N. C., 198; *Yeargin v. Wood,* 84 N. C., 326; *Doyle v. Brown,* 72 N. C., 393; Black on Judgments, sec. 307." And also it was recognized by *Judge Nash* in *Harven v. Springs,* 32 N. C., 180, 183, in the case of the probate of a will, where he said that there was a presumption in favor of a correct probate, if the will has been admitted to probate. The term judgment implies, prima facie, that all essentials were complied with, even to the extent of presuming, where there were two witnesses to a will, which was proved by one of them, and other evidence, that he testified to the proper execution and attestation of it, as without the necessary proof the court would not have admitted it to probate. These decisions are founded upon one of the favorite maxims of the law, that with regard to judicial proceedings everything is presumed to have been rightly and duly performed until the contrary is shown in the proper way. (*Omnia rite acta præsumuntur.*) Broom's Maxims 944; Co. Litt., 6 and 232.

As jurisdiction is presumed, at least prima facie, any acts or omissions affecting the validity of the proceedings and judgment must be affirmatively shown, and unless the want of jurisdiction, either as to the subject-matter or the parties, appears in some proper form, the jurisdiction and regularity of the proceedings leading up to the judgment will be supported by every intendment. 11 Cyc., 692, 693. The principle

(469) was well expressed by one of the courts: "If the court had jurisdiction of the subject-matter and the parties, it is altogether immaterial how grossly irregular or manifestly erroneous its proceedings may have been; its final order cannot be regarded as a nullity, and cannot, therefore, be collaterally impeached. On the other hand, if it proceeded without jurisdiction, it is equally unimportant how technically correct and precisely certain, in point of form, its record may appear; its judgment is void to every intent and for every purpose." *Sheldon v. Newton,* 3 Ohio St., 498. Or, as expressed in another case: "The power to review and reverse the decision so made is clearly appellate in its character and can be exercised only by an appellate tribunal in a proceeding directly had for that purpose. It cannot and ought not to be done by another court, in another case, where the subject is presented incidentally, and a reversal sought in such collateral proceeding. The settled rule of law is that jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular and irreversible for error. In the absence of fraud, no question can be collaterally entertained as to anything lying within the jurisdictional sphere of the original case." *Nash v. Williams,* 87 U. S. (20 Wall.), 226; approved in *Laing v. Riley,* 160 U. S., 531. "The rules as to the presumptions in favor of courts of general jurisdiction apply to courts of probate and those with like powers, where they are courts of general jurisdiction or possess the attributes thereof, even though they have not exclusive jurisdiction, or have a limited but not a special jurisdiction, or their powers are limited to certain specified subjects." 11 Cyc., 694. And Mr. Black says, in his work on Judgments, vol. 1 (2 Ed.), sec. 282: "It is further to be remarked that although a court may be an inferior or limited tribunal, yet if it has general jurisdiction of any one subject, its proceedings and judgments in respect to that subject will be sustained by the same liberal presumptions as to jurisdiction which obtain in the case of the superior courts." Our statute makes the record and probate of a will, even in common form, "conclusive as evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal." Revisal, secs. 3128, 3139.

The presumption, then, being in favor of the will and probate, the burden is upon him who would assail it. He may impeach them directly, but not collaterally. "It is well settled that a judgment or decree (470) admitting a will to probate, when made by a court having jurisdiction thereof, may be attacked only in such direct proceedings

as are authorized by statute, and that it is not open to attack or impeachment in a collateral proceeding. More specifically, it is not permissible to collaterally attack such a judgment or decree on the ground that certain errors and irregularities exist, which if shown really to exist would, at the most, make the judgment only voidable, such as an alleged fact that the persons interested were not all duly cited or given notice or made parties; that the probate was granted on insufficient proof, as where it was granted on production of a copy instead of an original will; that the execution of the will was defective and insufficient; that the order admitting the will to probate does not use the exact language of the statute; that there was no formal entry of the judgment; that the decree contained a translation of the will into English, or that the jury were erroneously instructed and returned a verdict contrary to the evidence; but when irregularities of this nature are alleged in a collateral proceeding, the court will indulge in liberal and conclusive presumptions in favor of the sufficiency of the record and proceedings, such as a presumption that proper and sufficient notice was given; that the petition for probate was properly filed; that orders continuing the hearing were regularly made; that the execution, attestation, and proof of the will were sufficient; that the testator possessed testamentary capacity, and that the instrument probated is sufficient to pass such property as it purports to pass. It is even held that fraud is not a ground of collateral attack, as the identity, validity, and sufficiency of the instrument propounded as the last testamentary act of the deceased is the very question determined; and while a judgment or decree relating to the probate of a will is open to collateral impeachment, when it has been rendered by a court which was wholly without jurisdiction, the determination, by the officer or court probating the will, that the requisite jurisdictional facts, such as the residence of the testator at the time of his death or the situation of his property within the county, is conclusive and not open to collateral attack." 40 Cyc., 1377, 1378. It is said in 1 Black on Judgments (2 Ed.), sec. 250: "The well recognized rule is that the judgments and decisions of an inferior court can in no case be assailed indirectly on account of errors or irregularities not affecting the jurisdiction." And again: "On similar principles, an order or decree of a surrogate, or probate or orphans' court, jurisdiction having attached, is not examinable in any collateral proceeding. In fact, the orders and judgments of probate courts concerning matters over which they have jurisdiction are no more open to collateral attack (471) than are the orders and judgment of other courts of general jurisdiction; they must have accorded to them the same intendments and favorable presumption which attend the judgments of courts of general

common-law jurisdiction. This rule applies to an order admitting a will to probate."

These established rules of the law with respect to the judgments of probate courts have been adopted by us. In *London v. R. R.,* 88 N. C., 584, the questions involved in this case were fully considered and decided contrary to plaintiff's contentions. *Chief Justice Smith* said: "The general rule is well settled that the judgment of the probate court, in which is vested exclusive jurisdiction to pass on wills of personalty (and in this State by statute of realty also) and to grant letters testamentary or of administration, is conclusive of the right determined, and is not exposed to impeachment collaterally in another court where the effect of the action is to be considered. A probate in common form, unrevoked, is conclusive in courts of law and equity as to the appointment of an executor and the validity and contents of a will; and it is not allowable in an action to show that another was appointed executor. This is the principle announced in the elementary books. Williams' Exrs., 339; Toller, 76. 'The probate,' says *Buller, J.,* 'is conclusive till it be repealed, and no court of common law can admit evidence to impeach it.' " He then says that the probate courts of this State have the jurisdiction of the ecclesiastical courts of England, with the same effect in regard to their proceedings and judgments. This is affirmed in *Ro. Nav. Co. v. Green,* 14 N. C., 434; *Redman v. Graham,* 80 N. C., at page 234, per *Ashe, J.* And *Judge Pearson,* speaking with reference to the probate of deeds and wills, and the difference between them, said in *Barwick v. Wood,* 48 N. C., 311: "There may be a distinction between this class of cases and the probate of wills of personalty. In England the ecclesiastical court has exclusive jurisdiction; the question of the execution of a will is tried by the certificate of the ordinary, and the courts of common law do not review his decision, holding that it cannot be impeached collaterally, and must be set aside by a direct proceeding in the court of probate. In this State the county court is substituted in place of the ecclesiastical court, with the right of appeal, which is quite different from an *ex parte* probate (as in case of a deed); and it would seem that when a court has exclusive jurisdiction, and a case is properly constituted before it, its action must be conclusive until it be reversed." In *London v. R. R., supra,* the allegation in the collateral suit was that the paper which had been first probated as the will of the deceased was not his will, as it had been revoked by a subsequent one, but the Court refused (472) to hear the plaintiff. So here, the plaintiffs attack this will because it was not the will of the alleged testator, and we must follow the course taken in that case. This question is fully considered by the Court in *Batchelor v. Overton,* 158 N. C., 397, where *Justice*

Hoke says: "Notwithstanding these requirements of the statute, it is very generally held that when a clerk of our Superior Court in the exercise of the probate powers conferred by statute, has general jurisdiction of the subject-matter of inquiry, as indicated in chapter 1, sec. 16, Revisal, and on application made has entered a decree appointing an executor or administrator, and letters are accordingly issued, such decree is controlling and may not be successfully attacked or in any way questioned but by direct proceedings instituted for the purpose. *Fann v. R. R.*, 155 N. C., 136; *Jordan v. R. R.*, 125 Wis., 581, 4 Anno. Cases, 1113; Croswell on Executors, pp. 19-127. In *Fann's case*, speaking to the general question, the Court said: 'In this day and time and under our present system it seems to be generally conceded that the decrees of probate courts, when acting within the scope of their powers, should be considered and dealt with as orders and decrees of courts of general jurisdiction, and, where jurisdiction over the subject-matter of inquiry has been properly acquired, that these orders and decrees are not as a rule subject to collateral attack.'" To the same effect is *McClure v. Spivy*, 125 N. C., 678, the second headnote of that case being as follows: "Probate of a will by the Clerk of the Superior Court is a judicial act, and his certificate is conclusive evidence of the validity of the will until vacated on appeal or declared void by a competent tribunal in a proceeding instituted for that purpose. It cannot be vacated in a collateral manner. *Mayo v. Jones*, 78 N. C., 402." It is held in the recent case of *Powell v. Watkins*, 172 N. C., 244, that in this State "The proceeding for the probate of a will is not regarded as an adversary suit *inter partes*, but is a proceeding *in rem*, in which the jurisdiction of the court, in the exercise of probate powers, is exclusive, and an adjudication of probate may not be assailed or questioned in any collateral or independent proceedings. *Collins v. Collins*, 125 N. C., 98, 34 S. E., 195; *McClure v. Spivy*, 123 N. C., 678, 31 S. E., 857; *Varner v. Johnson*, 112 N. C., 570, 17 S. E., 483; *McCormick v. Jernigan*, 110 N. C., 406, 14 S. E., 971; *Hutson v. Sawyer*, 104 N. C., 1, 10 S. E., 85."

In this case it appears by presumption and otherwise that Alexander Watkins, who was domiciled in Mecklenburg County, died there many years ago, and that some time after his death the paper-writing in question was filed before the clerk of the Superior Court of said county for probate as his last will and testament, and was declared to be his will and admitted to probate and recorded. The controversy has, in part, arisen from the fact that a part of the territory of Meck- (473) lenburg County was taken to form Union County, and the lands in question are situated within the severed territory. But this does not affect the jurisdiction of the clerk of Mecklenburg County, as the testator

still had lands, or *bona notabilia,* in the latter county, and was domiciled there at the time of his death, which appears from the probate, and the will was properly probated there.

It appears that the execution of the will was proved by the witness Mrs. Eliza Griffin, and the hand-writing of the other subscribing witness by his son, Harmon B. King. It may be that the proof is not as formal or as full as it might have been, or as it should have been, but the probate is not so radically defective as to admit of collateral attack, as the above authorities clearly show.

The court should have dismissed the action upon the first motion made by the defendants, for the want of jurisdiction, and also because there was no cause of action stated which was properly cognizable in that court, as the probate proceedings before the clerk of the Superior Court of Mecklenburg County cannot be thus collaterally attacked, and this reverses the judgment.

Reversed.

Cited: In re Thompson, 178 N.C. 541; *Edwards v. White,* 180 N.C. 56; *Springs v. Springs,* 182 N.C. 489; *Clark v. Homes,* 189 N.C. 708; *Ellis v. Ellis,* 190 N.C. 422; *In re Will of Rowland,* 202 N.C. 374; *Crowell v. Bradsher,* 203 N.C. 494; *Downing v. White,* 211 N.C. 42; *Smathers v. Ins. Co.,* 211 N.C. 354; *S. v. Adams,* 213 N.C. 245; *Perry v. Bassenger,* 219 N.C. 848; *Henderson County v. Johnson,* 230 N.C. 724; *Holt v. Holt,* 232 N.C. 502.

JAMES F. YATES ET ALS. v. DIXIE FIRE INSURANCE COMPANY.

(Filed 9 May, 1917.)

1. Deeds and Conveyances—Blanks—Grantors.

Where the names of the grantors in a conveyance of land are left in blank, with the name of the grantee therein properly appearing, the deed, otherwise sufficient, is not invalid when the names of the grantors are designated by the final clause, their signatures appearing thereunder, with proper certificate of the probate officer to that effect.

2. Same—Benefit—Mesne Conveyances.

A conveyance of land, with easement in an alleyway, reducing the width of the alley to the benefit of the adjoining land of a party whose name has been omitted from the conveyance: *Held,* such party and those claiming by mesne conveyances describing the reduced width of the alleyway and deriving benefit from the change are bound by the description of the alleyway in the original conveyance.

3. Same—Ratification.

Where the name of one of the owners of land with right in an adjoining alleyway is omitted from a conveyance making a reduction of the width of the alleyway to the advantage of the dominant tenement and reserving to the dominant tenement the right to erect an arch thereover to connect buildings on either side, a later conveyance by the owners of the dominant tenement is a ratification of the one from which he was omitted, and the privilege thus acquired is conveyed by the later deed.

4. Appeal and Error—Premature Appeal—Opinion.

In this action of ejectment and for possession of lands it is *Held*, the appeal was prematurely taken before the assessment of damages by the jury under that issue; but the Court indicates its opinion upon the merits of the case.

APPEAL by defendant from *Long, J.*, at March Term, 1917, of (474) GUILFORD.

In *Yates v. Ins. Co.*, 166 N. C., 134, as to the same subject-matter, the plaintiffs had obtained an order restraining the defendant from erecting a building over an alleyway, and they appealed from the order dissolving it. On the hearing in the Supreme Court, it being made to appear that pending the appeal the building had been completed, the Court refused to pass upon the abstract right of the plaintiffs, upon the ground that to grant an injunction then would be a vain and nugatory act. The Court said, however: "The defendants have proceeded at their peril, and whatever the rights of the parties are will be determined at the final hearing, when the issues of fact, if any are raised, can be determined by a jury and the rights of the parties and the remedy to be awarded can be determined by final judgment."

The plaintiffs took a nonsuit below and brought this action of ejectment to recover the possession of and establish their title to the property involved in the former action, which is a lot of land or alleyway fronting 10 feet on E. Sycamore Street, Greensboro, and running back 41.66 feet, as described in the complaint, and for damages. Both the plaintiffs and defendant claim title to the lot under the late Charles G. Yates, who died in 1882.

The jury found that the plaintiffs were owners and entitled to possession of the lot, and that it was wrongfully detained by the defendant. The judge rendered judgment accordingly, reserving the issue as to damages, and the defendant appealed.

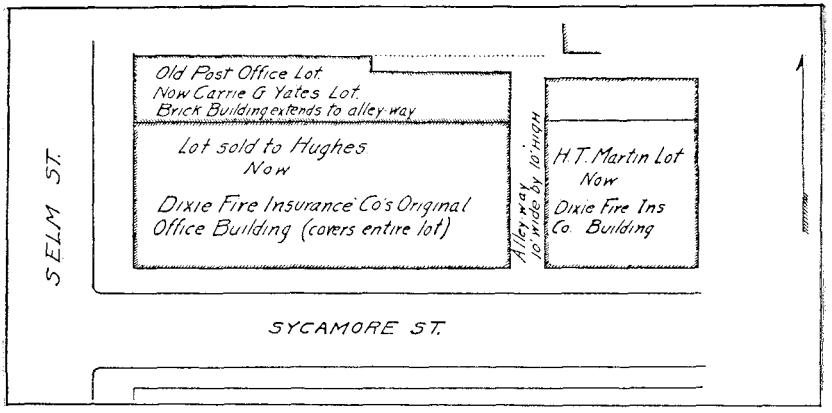
W. P. Bynum and R. C. Strudwick for plaintiffs.

Brooks, Sapp & Williams for defendant.

CLARK, C. J. The defendant insurance company is the owner of the lots marked on the annexed plot as the "Hughes" lot and the "Martin" lot facing on Sycamore Street in Greensboro, and also of an easement in an alley 10 feet wide between these two lots, holding title under mesne conveyances from C. G. Yates, who died in 1882.

(475) The heirs of Yates, in conveying the Martin lot, added thereto the conveyance of an easement in the alleyway as follows: "Together with right of way over, under and through an alleyway 10 feet wide, west of and adjoining the above described property running from Sycamore Street to Carrie G. Yates' property." In the mesne conveyances through which the Martin lot became vested in the defendant this conveyance of an easement in the alleyway as appurtenant to the ownership of said lot was continued.

C. G. Yates also owned the lot north of the "Hughes" lot, which is marked on the map as the "old postoffice lot," and in his will provided that this alleyway should be laid out as appurtenant to the ownership of said postoffice lot 15 feet wide; but the owner of said lot has entered into an arrangement and accepted and recorded a conveyance reducing the width of the alley to 10 feet, with the right reserved therein to the owners of the Martin lot to build an archway over said alley.



The defendant, owning the lots on both sides of said alleyway and by virtue of the ownership of the Martin lot owning also an easement in said alleyway, has proceeded to build 10 feet above the surface a connecting building so as to enable it to use as one building the structure covering both lots. The plaintiffs, who are heirs at law of C. G. Yates, contend that this is a forfeiture, or at least an unwarranted use, of the

alleyway, for which it is entitled to recover the possession of the alleyway or at least the possession of the building placed above the alleyway by the defendant; and the defendant has contended that the right of the plaintiffs, if any, is an abstraction, because it could not recover the atmosphere beginning 10 feet above the surface of the alleyway and could make no use of it, and that the court would not adjudge damages for the theoretical right which the plaintiffs could not exercise, or be benefited by in any way, since they could not erect any struc- (476) ture themselves on the alleyway, the unobstructed use of the surface of which belongs to the defendant, and that the plaintiffs can prove no damages sustained by them.

This point was ably discussed before us by the very learned counsel on both sides, but we do not find it necessary to consider the interesting question presented. On 1 October, 1899, the present plaintiffs or those under whom they claim, and at that time the owners of the "Martin" lot (except E. M. Selden, who has since conveyed to one of the plaintiffs), executed a conveyance and contract to Carrie G. Yates, who was then, and still is, owner of the "postoffice lot" (marked on the plat), by which conveyance the alleyway, which under the will of C. G. Yates was to be of the width of 15 feet, was reduced to 10 feet in width and the following stipulation made therein, as part consideration of the deed and contract, which was duly registered. "Nevertheless, it is expressly understood and agreed that the parties of the first part reserve the right to themselves and their heirs and assigns to arch over and use all of the space above the alleyway 10 feet from the surface of the ground," and said Carrie G. Yates, who was then and is still the owner of said postoffice lot, has consented to the construction and erection of the archway and building above said alleyway. On 7 May, 1901, two years after said contract between said Carrie G. Yates and the plaintiffs, they and those under whom they claim joined in the execution of a fee-simple deed for the Martin lot, in which they conveyed all their right, title, and interest in said lot, "together with the right of way forever over, *under, and through* an alleyway 10 feet wide west of and adjoining the above described property running from Sycamore Street to Carrie G. Yates' property." The defendant has acquired the title to said Martin lot under such conveyance from the plaintiffs by mesne conveyances and holds the right to build the said archway as fully as the plaintiffs themselves possessed it.

It is objected by the plaintiffs that the said deed between the owners of the Martin lot and Carrie G. Yates is not valid because the grantors therein are not named, but we do not think that this contention is well founded. The language of the deed is as follows:

"NORTH CAROLINA—GUILFORD COUNTY.

This indenture, made this 1 October, 1899, by and between_____, parties of the first part, and Carrie G. Yates, party of the second part: Witnesseth, That the said parties of the first part for, and in consideration of the sum of $1 to them paid, the receipt whereof is hereby acknowledged, have given and granted and by these presents do give and grant and convey unto the said party of the second part a right of
(477) way over the alleyway —— feet wide, described as follows:

Beginning on Sycamore Street at the southeast corner of the lot of land sold to J. R. Hughes and now owned by Katz, said corner being 108 feet from the east side of South Elm Street, and running thence north with Katz's line to the line of the party of the second part, known as the old postoffice property, thence east with the line of the said postoffice lot —— feet to a stake, thence south in a line parallel with first line to East Sycamore Street, and thence west along East Sycamore Street to the beginning, with the right of ingress, egress, and regress over said alley, to the said party of the second part, her tenants, heirs and assigns forever. Nevertheless, it is expressly understood and agreed that the parties of the first part reserve the right to themselves, their heirs and assigns, to arch over and use all the space above the alleyway 10 feet above the surface of the ground.

In witness whereof the said parties of the first part have hereunto set their hands and seals of the day and year first above written.

M. E. YATES. [SEAL.]
PETER P. YATES. [SEAL.]
KATE C. YATES. [SEAL.]"

It is objected by the plaintiffs to the above deed that it is void for want of parties, but Carrie G. Yates is named as grantee therein, and she is bound by accepting the same with the reservation of the right to narrow the lot to 10 feet and that the owners of the Martin lot should build over said alleyway, and has recorded the deed and is still assenting to said reservation and has since joined in the conveyance of the Martin lot with the easement in said alley. As to the grantors, the language is "the parties of the first part," and though a blank follows in the beginning of the deed, they are made certain by the final clause, "In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written," followed by their names and seals. It was not necessary that the names of the grantors should be set out in the first line of the deed when they are designated by the final clause and by their signatures thereunder. Moreover, the clerk of the court in his certificate, upon which the deed was

recorded, certified that "M. E. Yates, Peter P. Yates, and Kate C. Yates (his wife), grantors, personally appeared before me this day and acknowledged the execution of the foregoing deed of conveyance" (the certificate further setting out the privy examination of Kate C. Yates).

It is true that said conveyance and contract was not signed by E. M. Selden, at that time owning an interest in the Martin lot, but the reservation therein of said right was in her favor, being for the benefit of the said Martin lot, extending its width 5 feet by narrowing the alleyway, and reserving also the right to build over the same, and by the subsequent conveyance with warranty of said Martin lot, in (478) which E. M. Selden and Carrie G. Yates and all the plaintiffs or those under whom they claim joined, they conveyed the Martin lot thus benefited by the reservation, describing the same by boundaries, which included the added 5 feet taken from the alleyway by virtue of said reservation and the right to the alleyway as it then existed, as follows: "together with the right of way forever over, *under and through* an alleyway 10 feet wide west of and adjoining the above described property running from Sycamore Street to Carrie G. Yates' property." This deed to Martin was a warranty deed executed 7 May, 1901 (subsequent to the above conveyance and contract with Carrie G. Yates of 1 October, 1899), and was signed by M. E. Yates, E. M. Selden, Carrie G. Yates, Kate C. Yates, and Peter P. Yates, being thus a ratification by Carrie G. Yates and adding the concurrence of E. M. Selden, the only party in interest in the ownership of the Martin property who was not a party to the said conveyance of 1 October, 1899. E. M. Selden has since, in 1914, conveyed her interest in the alleyway to James F. Yates, but he is bound by her joinder in the conveyance of 7 May, 1901, of the Martin lot, with the easement (as it then stood) in the alleyway to Martin, whose rights the defendant now owns.

Nor do we deem it a fatal defect if the plaintiffs' contention is correct that the width of the alleyway, which is recorded in the registration of the conveyance of 1 October, 1899, as 10 feet, was left blank as to the number of feet, for in the subsequent conveyance between the same parties of 12 December, 1900, which is duly probated and recorded, the width is set out as being 10 feet.

It appears, therefore, that since 1 October, 1899, the ownership of the Martin lot had annexed to it an easement in the alleyway in question, with the right to build over it, and that all the plaintiffs and those under whom they claim conveyed said Martin lot with said rights in the alleyway by deed of 7 May, 1901, to Martin, and through mesne conveyances such rights passed to the defendant, which has not exceeded its rights therein in constructing the building over said alleyway.

It was irregular to appeal from a verdict and judgment upon the first two issues without passing upon the issue as to damages. The appeal is fragmentary and must be dismissed, but as it is apparent that upon the evidence the court should have directed a nonsuit for the reasons given, we have considered the appeal and indicated our opinion, as this Court has sometimes done in such cases, *S. v. Wylde,* 110 N. C., 502, and cases citing the same in Anno. Ed.; *Mfg. Co. v. Spruill,* 169 N. C., 621; *Taylor v. Johnson,* 171 N. C., 86.

Appeal dismissed.

Boyd v. Campbell, 192 N.C. 401; *Ins. Co. v. Hunt,* 206 N.C. 726.

(479)

W. R. COURTNEY, TRADING AND DOING BUSINESS AS THE WADESBORO MARBLE WORKS, v. J. S. PARKER AND THE CAROLINA COUNTRY CLUB.

(Filed 9 May, 1917.)

1. Contracts—Criminal Law—Statutes—Business—Assumed Name.

The law of 1913, chapter 77, making it punishable as a misdemeanor for a person to conduct his business under an assumed name, without filing a certificate with the clerk of the court of the county, etc., giving the name of the business and the full name or names, with post office address of the persons owning or conducting the same, etc., was enacted as a police regulation to protect the general public from fraud and imposition, and a person violating the same may not enforce a contract in our courts made in the course of such business, though the statute does not expressly invalidate such transactions.

2. Same—In Pari Delicto.

One who contracts with another carrying on his business in violation of the statute is not necessarily *in pari delicto* so as to prevent recovery on the contract.

3. Contracts—Criminal Law—Statutes—Business—Assumed Name—Contracts—Quantum Meruit.

Our statute prohibiting the conduct of a business under an assumed name without complying with certain conditions makes the transactions criminal, and the one violating the law may not recover, as upon a *quantum meruit,* for breach by another of a contract made with him in the course of the unlawful conduct of the business.

CIVIL ACTION, tried before *Webb, J.,* and a jury, at March Term, 1917, of ANSON.

The action was to recover a balance due for building material supplied to defendant pursuant to a contract made in the course of plaintiff's business, W. R. Courtney, and conducted by him under the name and style of the "Wadesboro Marble Works" and without having registered the true name of plaintiff as owner of the business, as required by act of 1913, ch. 77.

Plaintiff having admitted in open court that he had so conducted the business without having complied with the statute, the court entered judgment dismissing the action for that reason, and plaintiff excepted and appealed.

Brock & Henry for plaintiff.

Robinson, Caudle & Pruette for defendant.

HOKE, J. The statute in question, Laws 1913, ch. 77, in general terms, provides: "That no person or persons shall carry on, conduct, or transact business in this State under an assumed name, (480) or any designation, name, or style other than the real name of the individual or individuals owning, conducting, or transacting such business, unless such person shall file in the office of the clerk of the Superior Court of the county or counties in which such person or persons own, conduct, or transact, or intend to own, conduct, or transact such business, or maintain an office or place of business, a certificate setting forth the name under which such business is to be conducted, etc., and the true or full name or names of the person or persons owning, conducting, or transacting the same, with the home and postoffice address of such person or persons."

Such certificate shall be executed and duly acknowledged, and the clerk is required to keep an alphabetical index of the same, and a certified copy is made presumptive evidence of the facts.

Section 4 provides that any person or persons owning, carrying on, conducting, or transacting business aforesaid who shall fail to comply with provisions of this act shall be guilty of a misdemeanor and on conviction shall be punished by a fine of not more than $50 or imprisonment in the county jail not more than thirty days. Exceptions are made by the statute, not pertinent to the present inquiry, in cases of salesmen or traveling agents, etc., selling by samples or by means of orders, of corporations, domestic or foreign, and of limited partnerships, organized pursuant to the laws of the State.

It is well established that no recovery can be had on a contract forbidden by the positive law of the State, and the principle prevails as a general rule whether it is forbidden in express terms or by implication

arising from the fact that the transaction in question has been made an indictable offense or subjected to the imposition of a penalty. *Lloyd v. R. R.,* 151 N. C., pp. 536-540; *Edwards v. Goldsboro,* 141 N. C., 60; *Puckett v. Alexander,* 102 N. C., 95; *Warden v. Plummer,* 49 N. C., 524; *Sharp v. Farmer,* 20 N. C., 255. In reference to an avoidance of a contract by reason of an implied prohibition, it is the rule very generally enforced that recovery is denied to the offending party when the transaction in question is in violation of a statute establishing a general police regulation to "safeguard the public health or morals or to protect the general public from fraud or imposition." This was held in a recent case of the Supreme Court of Michigan on a statute very similar to ours, in *Cashin v. Pliter,* 168 Mich., 386, and the position is approved by many well considered decisions of other courts. *Levinson v. Boas,* 150 Cal., 185; *McConnel v. Kitchens,* 20 S. C., 430; *Taliaferro v. Moffitt,* 54 Ga., 150; *Pinney v. Natl. Bank,* 68 Kan., 223; *Woods v. Armstrong,* 54 Ala., 150; *Deaton v. Lawson,* 40 Wash., 486. In *Pinney's* case it was held that "Where a statute expressly provides that a violation thereof shall be a misdemeanor, a contract made in direct violation of the same (481) is illegal and there can be no recovery thereon, though the statute does not in express terms prohibit the contract and pronounce it void." And in *Lloyd's case, supra,* the position is stated as follows: "It is very generally held, universally so far as we are aware, that an action never lies when a plaintiff must have his claim in whole or in part on a violation by himself of the criminal or penal laws of the State." True, there are many cases which hold that the imposition of a penalty, without more, will not always have the effect of avoiding the contract, but that when the agreement is not immoral or criminal in itself, the courts, on perusal of the entire statute, its language, purpose, etc., may determine whether it was the meaning and intent of the Legislature to restrict the operation of the law to the penalty as expressed and specified therein or give it the further effect of avoiding the contract. To this principle may be referred the decisions as to the effect of penalties under the usury statutes and those in enforcement of the collection of taxes, etc., and, generally, the cases of *Ober v. Katzenstein,* in our own Court, 160 N. C., 439; *Harris v. Runnels,* 53 U. S. (12 Howard), 79; *Bowditch v. New England Life Ins. Co.,* 141 Mass., 474; *Neimeyer v. Wright,* 75 Va., 239; *Pangborn v. Westlake,* 36 Iowa, 546; *Lester v. Bank,* 33 Md., 558; *Dunlop v. Mercer,* 156 Fed., 545, are in illustration of the position.

Again, it is very generally recognized that on a question of implied prohibition the contract is not always avoided *in toto,* but, in proper cases, when the parties are not *in pari delicto,* the more innocent of the two can recover. Instances of this appear in *Sykes v. Thompson,*

160 N. C., 348; *Webb v. Fulchire,* 25 N. C., 485; and in *Cashin v. Pliter, supra,* there is decided intimation that this position would apply to a statute like the present in favor of innocent third persons dealing with one who had failed to register under the law. But neither of these limitations on the more general principle can avail the plaintiff in the present suit, where he is the offending party and must rest his claim on a transaction in violation of the criminal law of the State, enacted as a police regulation to protect the general public, as heretofore stated, from fraud and imposition.

It was suggested on the argument that though the contract should be held void as in violation of a criminal statute, recovery might be had on a *quantum meruit;* but it is the "transaction" that is made criminal, and the principle which forbids recovery is equally insistent whether it is sought in an express or implied contract.

We find no error in his Honor's ruling and the judgment dismissing the action must be affirmed.

No error.

Cited: Fineman v. Faulkner, 174 N.C. 16; *Jennette v. Coppersmith,* 176 N.C. 84; *Hines v. Norcott,* 176 N.C. 130; *Price v. Edwards,* 178 N.C. 496, 497, 499; *Real Estate Co. v. Sasser,* 179 N.C. 498, 499; *Miller v. Howell,* 184 N.C. 121, 122; *Phosphate Co. v. Johnson,* 188 N.C. 427; *Finance Co. v. Hendry,* 189 N.C. 552, 553, 554, 555, 556; *Respess v. Spinning Co.,* 191 N.C. 812; *Patterson v. R. R.,* 214 N.C. 47; *Cauble v. Trexler,* 227 N.C. 312.

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(482)

SOUTHERN PUBLIC UTILITIES COMPANY v. TOWN OF BESSEMER CITY.

(Filed 9 May, 1917.)

1. Municipal Corporations—Contracts—Annulment—New Contracts.

The duly authorized officials of a municipal corporation may by agreement annul an existing contract for the furnishing of electricity for street lighting purposes by entering into a new contract of more definite terms as to payment, when for the public benefit.

2. Same—Electricity—Abandonment—Debts.

Where a municipal corporation had entered into a contract for furnishing electricity for street lights at as low a price as the electric lighting company charged other towns, and thereafter entered into a new and complete contract with the same company to furnish the electricity at a certain price per lamp, expressly annulling the older contract, except as it may be evidence of the amount then due thereunder by the city: *Held,*

the rights acquired under the former contract are abandoned and relinquished, except for the purpose of recognizing and collecting the debt.

3. Appeal and Error—Reference—Findings—Evidence.

It will be presumed on appeal to the Supreme Court that the referee's findings of fact, approved by the lower court, were based upon sufficient evidence, where the evidence is not set out in the record, and the referee's findings will be adopted.

CIVIL ACTION, heard by *Cline, J.*, upon the report of a referee, at January Term, 1917, of GASTON.

Plaintiff sued for $1,566.87 and interest, being the amount it alleged to be due by the defendant for lights and current furnished to it under a contract, dated 8 November, 1912, between the Southern Power Company and defendant, the plaintiff having succeeded to the rights of the power company under the contract. The power company had previously, in the year 1907, contracted with the defendant to furnish lights to it at as low a rate as allowed to any other town for a similar service. The written contract of 1907 was lost, and parol evidence was offered by the defendant, and admitted by the referee, to show its contents. The exact wording of the clause in that contract as to the rate being as low as that of any other town was not given, and it is stated in the report that "no other stipulation or condition of the contract has been furnished from the testimony." The minutes of the town proceedings with reference to the contract were also lost. The findings as to the contract of 8 November, 1912, is as follows:

1. That on 8 November, 1912, the town of Bessemer City and the Southern Power Company entered into a written contract to the
(483) effect that the power company would furnish lights to Bessemer City for a period of five years from 1 December, 1912, and the town agreed to pay for that period $36 per year per lamp (if 25 to 50 lamps were used), and that payments should be made, under said contract in monthly installments on the 5th day of each month succeeding that in which the service was rendered, as will appear more specifically by reference to said contract introduced in evidence.

2. That at the time the said contract of 8 November, 1912, referred to in the preceding paragraph, was entered into between the parties, the rate given by the power company to said town was as low as that furnished by it to other towns or municipal corporations for similar service.

3. That there was nothing in the contract (of 1907), referred to as the "franchise contract," to disqualify or prevent the town of Bessemer City from entering into and being bound by the terms and conditions of the contract of 8 November, 1912, and the latter, as to the rate stipulated, would govern and control the parties thereto.

The referee further finds that in or about August, 1913, the plaintiff contracted with the town of Belmont to furnish lights to it at $30 per lamp for each year during the continuance of the service, and the cost of the two systems was practically the same, though there was some slight difference in the cost of maintenance in respect to labor required for each. The defendant furnished lights as it had agreed to do in the contract of 1912, and was ready, able, and willing to do so at all times. This continued until 10 March, 1916, when, at the request of the defendant, the plaintiff installed a cheaper plant for lighting the town, it being of less candle power, and was, therefore, cheaper, being similar to the Mount Holly plant. This was used for sixty days by defendant. The defendant fell behind considerably with payments for the lighting service, and plaintiff then agreed that if it would enter into a new contract, and the past-due accounts were paid, it would install permanently the Mount Holly system; but no new contract was made, and the accounts then due to the plaintiff for lights were not paid. The defendant, though, insisted that it should be allowed some deduction on account of the fact that plaintiff had given a lower rate to the town of Belmont. The referee then finds what is due by the defendant to the plaintiff for lights furnished under the contract of 1912, the balance being $1,494.82 principal, and $102.58 interest, to 29 December, 1916, the date of the report, making, in all, $1,597.40, with interest on the principal from that date. In arriving at the result the referee, whose report is remarkably clear, distinct, and accurate, allowed nothing to the defendant for the difference between the rates charged under the contract of 1912 and those under the Belmont contract.

The referee, from his finding of facts, draws the following con- (484) clusions of law:

1. The contract made between the town of Bessemer City and the Southern Power Company, of 8 November, 1912, would govern, control, and supersede any former contract as to the rate for lighting.

2. That there was nothing in the contract of 1907, known as the "franchise contract," to disqualify or prevent the town of Bessemer City from entering into and being bound by the terms and conditions of the contract of 28 November, 1912, and the latter would govern and control as to the rate stipulated therein for lighting.

3. That the town of Bessemer City is justly due thereon 29 December, 1916, to the Southern Public Utilities Company, the sum of $1,597.40, the same being $1,494.82 principal and $102.58 interest thereon.

The court approved and confirmed the report of the referee and entered judgment in favor of the plaintiff for the amount found by him to be due, and the costs. Defendant appealed.

Osborne, Cocke & Robinson for plaintiff.
Whitney & Whitney and Mangum & Woltz for defendant.

WALKER, J., after stating the case: We need not enter upon a discussion of most of the questions raised in the briefs. That the aldermen of the town of Bessemer City could not make a contract which in its operation would extend beyond their time of office, under *Wadsworth v. Concord,* 133 N. C., 587, is one of the positions of the plaintiff; but we may pass it by without any expression of opinion upon it, as the decisive question, in our view of the case, is whether the first contract was superseded by the second, the latter being fully substituted for it by the parties. There is a contention that the first contract has not been established, but only one of its terms, and it is said to be supported by 8 Enc. of Evidence, p. 359; 3 Wigmore on Evidence, sec. 1957, and *Dulin v. Bailey,* 172 N. C., 608. Let this be as it may, as we will confine ourselves to the other and controlling question, and, for the sake of the argument we will assume that the first contract has been sufficiently shown to be as defendant asserts that it was.

It appears from the finding of the referee that the intention of the parties was to come to a fresh agreement in November, 1912, and to enter into a contract, which should be complete in itself, and that there was nothing in the first contract which "qualified" the second or prevented the town from changing the form and substance of its contract as made in 1907, or from making an entirely new contract upon the same subject, as it subsequently did in 1912; and he further finds,
(485) substantially, that the latter contract was intended to take the place of the earlier one. But even if the plaintiff's predecessor had agreed to give to the defendant the lowest of its rates, it was competent for the parties, by mutual agreement, to alter this contract, or to substitute another for it, by fixing a flat or unchangeable rate, as was done by the last contract. There is nothing unlawful in it, nor is it contrary to good morals, but, on the contrary, such a change or substitution may, in certain instances, be beneficial to the town by declaring exactly what the rate per lamp shall be in dollars and cents during the fixed period, so that it will not be subject to change by the power company on account of fluctuations in the cost of production to it, for it may be that even the lowest rate given to another town may, in the future, be raised above that stated in the contract, if the cost and expense of production increases, so as to meet and provide for such an increase. A stationary rate might, therefore, be of value to the town. If the parties had intended to provide for a standard or minimum rate, above which the defendant should not be charged, why was not something said about it in the contract of November, 1912? We cannot look

at this transaction from its beginning to its end without concluding that in 1912 the parties were then making a fresh contract, and an entire one, for the future, canceling all those behind them. Every detail of such a contract was provided for in the writing, and there was not the slightest reference to the first contract, or any stipulation of it, and the contract itself states that the prior contract of 12 November, 1908, is canceled and annulled, "and neither party shall have any rights thereunder against the other," except for the purpose of enabling the plaintiff to collect what was then due by the defendant, and it was continued only for that purpose. *Smith v. Pritchard,* at this term. In other words, it was to be no longer of any force or effect, except as evidence of defendant's indebtedness to plaintiff, and so that the same would not be extinguished by repealing the contract, as it was anticipated that such a result would follow. The plaintiff, perhaps, had in mind a decision of this Court in *Lipschutz v. Weatherly,* 140 N. C., 365, and inserted the clause in order to preserve its rights to enforce payment of the amount already accrued. This shows what the parties intended when they met in November, 1912, and carefully prepared the contract to govern for the next five years. Rights acquired under a contract may be abandoned or relinquished either by agreement, or conduct, or by contract clearly indicating such a purpose. *Redding v. Vogt,* 140 N. C., 562; *Falls v. Carpenter,* 21 N. C., 237; *Faw v. Whittington,* 72 N. C., 321; *Miller v. Pierce,* 104 N. C., 389, and cases cited in *Redding v. Vogt, supra.* It was said in *Lipschutz v. Weatherly,* 140 N. C., 365: "Of the several methods by which a contract may be discharged, one is (486) by substitution of a new contract, the terms of which differ from the original. In such cases the release of the obligations of the old and the substitution of new obligations constitute valuable considerations. It is also now well settled that ordinarily a written contract, before breach, may be varied by a subsequent oral agreement, made on a sufficient consideration, as to the terms of it which are to be observed in the future. Such a subsequent oral agreement may enlarge the time of performance, or may vary other terms of the contract, or may waive and discharge it altogether." It was said in *Mather v. Butler County,* 28 Iowa, 253, 256: "The execution of the second contract was in law a substitute for the first, and an abandonment of it so far as it then remained unperformed; what the plaintiff had performed under it and what he had received under it were thereby closed, and the new contract controlled as to future materials, work, and prices, according to its provisions. We have examined the two contracts, and whether regarded by themselves alone or in the light of the circumstances under which they were concluded, it is our opinion that there was no error in the view of the court. They were not intended to coexist, but the second

was designed to take the place of the first and to embody the whole agreement of the parties." And in *Redding v. Vogt, supra,* we said: "If upon the facts of our case, therefore, we can gather that the parties intended the two contracts not to coexist, and the second was designed to take the place of the first, the former must be taken to embody the entire and final agreement of the parties," citing *Mather v. Butler County, supra.* It further appears, by the finding of the referee, that at the time the contract of 8 November, 1912, was executed the rates therein fixed were the lowest allowed to any town.

The findings of the referee, approved by the judge, are adopted by us, if there is evidence to support them, and there is no suggestion that there is none in this case. The evidence was not sent up.

This case and one entitled *Town of Bessemer City v. Southern Public Utilities Company* were consolidated by consent, and referred to Mr. J. W. Keerans, whose report embraces both cases, and only one judgment was rendered, which is applicable to both cases.

We are of the opinion that there was no error in the conclusion of the court or in its judgment.

Affirmed.

Cited: Power Co. v. Power Co., 175 N.C. 680; *Bixler v. Britton,* 192 N.C. 201; *Highway Com. v. Rand,* 195 N.C. 810; *Bell v. Brown,* 227 N.C. 322.

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(487)

DAVID W. MITCHEM v. C. J. PASOUR ET AL.

(Filed 9 May, 1917.)

1. Pleadings—Interpretation.

Allegations of a complaint are construed liberally in the pleader's favor with a view to substantial justice between the parties, and where the question of jurisdiction between the Superior Court and that of a justice of the peace arises, depending upon the amount involved, and whether the action is *ex contractu* or *ex delicto*, the courts are disposed to construe the complaint in favor of the jurisdiction chosen.

2. Same—Tort—Superior Court—Jurisdiction.

An action by the landlord against his tenant, alleging the tenancy, the nonpayment of rent, and a conversion of the crops raised on the land, successively joining in third parties claimed to have received the money, but as to whom the action was *nol prossed*, when brought in the Superior Court for an amount less than $200, will be regarded as an action sounding in tort, and the jurisdiction will be sustained.

MITCHEM *v.* PASOUR.

CIVIL ACTION, tried before *Justice, J.*, at September Term, 1916, of GASTON.

This is an action to recover money, commenced in the Superior Court, and the question presented by the appeal is whether it is an action in tort or in contract.

The action was commenced against the defendant Pasour, and thereafter the First National Bank of Gastonia was made a party defendant.

The plaintiff alleges in the original complaint that the defendant Pasour rented a farm from him for the year 1911 and agreed to pay $200 as rent; that no part of the rent had been paid except $25; that demand had been made for the payment of the rent, which had been refused; that the defendant Pasour wrongfully and unlawfully converted and disposed of all the crops raised on the land during the year 1911; that said defendant took a part of the proceeds of the crop, wrongfully converted, amounting to $134.16, and deposited it in the First National Bank of Gastonia; that Pasour was insolvent, and in the prayer for relief the plaintiff demands judgment against Pasour and the bank for $134.16, and that the bank be restrained from paying the same to said Pasour.

After this complaint was filed a *nol. pros.* was entered as to the defendant bank, as it was made to appear that the money had been withdrawn from the bank at the time the action was commenced, and S. M. Robinson was then made a party defendant.

The plaintiff then filed another complaint alleging substantially the same facts alleged in the original complaint, with the addition that the defendant Pasour had placed said sum of $134.16 in the hands of the defendant Robinson.

Thereafter a *nol. pros.* was entered as to the defendant Robin- (488) son, and at a subsequent term of court, the action being then for trial, his Honor, upon motion of the defendant, entered a judgment dismissing the action for want of jurisdiction, upon the ground that it was an action in contract and within the jurisdiction of a justice of the peace.

Plaintiff excepted and appealed.

Carpenter & Carpenter for plaintiff.

J. F. Flowers for defendant.

ALLEN, J. The uniform rule under our system of pleading is to construe the allegations liberally in favor of the pleader, with a view to substantial justice between the parties (*Brewer v. Wynne,* 154 N. C., 471), and "when the action can be fairly treated as based either in contract or in tort, the courts, in favor of jurisdiction, will sustain the election made by the plaintiff" (*Schulhofer v. R. R.,* 118 N. C., 1096,

approved in *White v. Ely,* 145 N. C., 36); and further: "If the complaint is so worded that under the liberal procedure of The Code it could have been construed to be either an action on an express or implied contract (*Stokes v. Taylor,* 104 N. C., 394; *Fulps v. Mock,* 108 N. C., 601; *Holden v. Warren,* 118 N. C., 326) or either *in tort* or contract (*Brittain v. Payne,* 118 N. C., 989, *Schulhofer v. R. R.,* 118 N. C., 1096; *Timber Co. v. Brooks,* 109 N. C., 698; *Bowers v. R. R.,* 107 N. C., 721), or as a common-law action or one under the statute (*Roberson v. Morgan,* 118 N. C., 991), the Court will sustain the jurisdiction." *Sams v. Price,* 119 N. C., 573.

In *Bowers v. R. R.,* 107 N. C., 727, these principles were applied and the jurisdiction of the Superior Court sustained to recover less than $200 upon a complaint which alleged a contract as the foundation of the action, and the negligent failure to perform the contract, and applying them to the allegations of the complaint in the present action it is clear that an action *in tort,* which is within the jurisdiction of the Superior Court, is alleged, as the complaint alleges a tenancy, the nonpayment of rent, and a conversion of the crops raised on the lands rented. The judgment dismissing the action must be set aside.

Reversed.

Cited: Furniture Co. v. Clark, 191 N.C. 370; *Roebuck v. Short,* 196 N.C. 64; *Jenkins v. Wood,* 201 N.C. 463; *Andrews v. Oil Co.,* 204 N.C. 274.

(489)

W. M. SMITH, ADMINISTRATOR, v. CHARLOTTE ELECTRIC RAILROAD COMPANY.

(Filed 9 May, 1917.)

1. Railroads—Street Railways—Fenders—Evidence—Nonsuit.

Where in an action to recover damages against a street car company for the negligent killing of plaintiff's intestate there is evidence tending to show that the intestate was run over while down upon the track, and that the car was equipped with an old style fender, costing about $5, which was unavailable to save a pedestrian in this position, but that with later styles of practical fenders, with which the car could have been equipped, in general use a number of years, costing about $30, the life of the intestate could have been saved, at the speed of the car at the time, defendant's motion to nonsuit should not be granted.

2. Railroads—Street Railways—Fenders—Statutes—Exceptions — Burden of Proof.

The burden of proof is on a street railway company to show that the Corporation Commission, in its judgment, had found it unnecessary to

enforce the provisions of Revisal, sec. 2616, requiring the use of "practical fenders" on their street cars, in an action to recover damages caused by its negligence in not using them.

3. Railroads—Street Railways—Statutes—Negligence Per Se.

The "practical fenders" required for street cars by Revisal, sec. 3601, making the failure to use them a misdemeanor, are those which are efficient for the purpose of protecting human life, etc., or the most approved appliances in general use, and a violation of this statute is negligence *per se*.

4. Railroads—Street Railways—Fenders—Instructions.

Where there is evidence tending to show that the plaintiff's intestate was killed by reason of the failure of defendant street car company to use "practical fenders" on its car, an instruction to the jury to answer the issue of negligence "No" is erroneous.

5. Railroads—Street Railways—Pedestrians—Negligence.

Pedestrians on the streets of the city have equal rights to the use of the streets with street car companies, and the motormen on the cars are held to a higher degree of care in looking out for their safety than engineers running the trains on the right of way of a railroad company; and failure of the motormen in this respect constitutes negligence.

6. Contributory Negligence—Evidence—Burden of Proof—Trials—Nonsuit.

Revisal, sec. 483, places the burden of proof on defendant to show contributory negligence by the preponderance of the evidence, and defendant's motion to nonsuit on this issue should not be granted unless it appears from the plaintiff's evidence that the plaintiff contributed to his own injury as the proximate cause thereof.

7. Railroads—Street Railways—Negligence—Trials—Evidence—Nonsuit.

Where there is evidence that the plaintiff's intestate while down upon the track of a street railway in a city was run over and killed at a place where the view of the track was unobstructed for 200 feet, and the intestate could have been seen by the motorman in time to have avoided the injury, a nonsuit is improperly allowed.

8. Railroads—Street Railways—Fenders—Negligence—Proximate Cause.

Where a pedestrian, helpless and down upon a street car track in a city, has been run over and killed by defendant street car, which would not have occurred with the use of a proper fender, the negligence of the defendant continues up to the time of the injury and is the proximate cause thereof.

APPEAL by plaintiff from *Justice, J.*, at September Term, 1916, (490) of MECKLENBURG.

R. S. Stewart and Cansler & Cansler for plaintiff.

Osborne, Cooke & Robinson for defendant.

CLARK, C. J. This is an action for the wrongful death of the plaintiff's intestate, Charles B. Skipper, who was run over and killed by defendant's car on College Street, Charlotte, on the night of 25 December, 1913.

Without discussing the other evidence alleged as negligence, it is sufficient to consider the evidence in regard to the fender used by defendant, for if that evidence is true—and it must be taken as true on this appeal—the judgment of nonsuit was erroneous.

There was evidence tending to show that the deceased was lying on his back across the track, as his legs and lower part of his body were uninjured, there being no bruise below his waist and his pants not even torn, while both his arms were cut off and the front wheel passed entirely over his chest. His neck was broken, but there were no bruises or cuts on his head. The track was straight in the direction the car was going, so that a man's body should have been seen on the track by a motorman 200 feet from where the deceased was killed.

The evidence is that car 45, which killed the deceased, was equipped with an old-fashioned fender known as the Philadelphia or basket fender, which was the first fender ever put on street cars and which has been in use since about 1892. This fender is merely a bent piece of piping with a rope on it, and is attached to the car in such manner that it cannot be lowered without stopping the car, and can be made for about $5. The fender on the car that killed the deceased was adjusted so that the front of it was 12 to 14 inches above the car track and could not have saved a man lying on the track, no matter how slow the car was running.
(491) Even if it touched him, the car and fender would have gone over his body. This was the evidence of the witnesses Gosney and Scott. The defendant's witness Voshall testified the same. The defendant's witness Tongue testified: "The only use of the Philadelphia fender is to save the life of people and objects that are standing up on the track." There was further evidence that this Philadelphia fender would not save a man's life if he was standing on the track unless under exceptional circumstances.

There was evidence that in December, 1913, at the time deceased was killed, there were several "practical" fenders which were in general use in the United States. Two types of these were well known and used in this State, *i. e.*, the "Providence mechanical-drop fender" and the "H. B. Life Guard." The Providence fender attached to the front of a street car is suspended from 4 to 8 inches above the rail of the track, and the motorman by pressing a pin with his foot can drop the fender instantly so that it will run along the rails, and the evidence was that in such case it would be practically impossible for a man lying down or standing up on the track to be run over by the car; and if it was

running at the rate of only 4 or 5 miles an hour, as the defendant's witness testified this car was running, a man lying on the track would not be injured at all. This was testified to by several witnesses, especially by the defendant's witness Voshall, a graduate of Drexel Institute in Philadelphia, who said: "Assuming that the jury should find from the evidence in this case that this man was lying on the track in front of the street car, as it approached him, at the rate of 4 or 5 miles an hour, and this track was level, and if the car had been equipped with the Providence fender, and that fender had been dropped on the track before coming to the man lying on the track, in my opinion, it very likely would have scraped him up and saved his life. Assuming the same state of facts, I will say that if the H. B. Life Guard had been used, I think it would have picked him up and saved his life."

There was evidence that the Providence fender has been in use in Wilmington, N. C., since 1903, and that it has been generally used in the principal cities of the country. There was evidence that it was entirely practicable to equip the car which killed the deceased with the Providence fender or with the "Life Guard" either of which, if used, would save the life of a person down on the track or knocked down by the car and would prevent his being run over, whether he was standing on the track or lying down. There was evidence that "Life Guard" fender was in very general use in this country, and was used in this State in Wilmington, Goldsboro, and New Bern. There was evidence of numerous instances in which the "Providence fender" and the "Life Guard" had picked up people who were on the track and saved their lives. The witness Scott testified that even if the car had been running at 10 (492) miles an hour, double the speed of this car, these fenders would save the lives of eighty people out of a hundred on the track.

There was further evidence along this line and evidence in contradiction. It was in evidence that the fender used would cost from $5 to $10, and the Providence and Life Guard fenders of later invention would cost from $30 to $40. The statute, Revisal 2616, provides: "All street passenger railway companies shall use practical fenders in front of all passenger cars run by them," with provision that the Corporation Commission could make exemptions when "in their judgment the enforcement of this section is unnecessary." The burden is on the defendant to show such exemption, *Powers v. R. R.*, 166 N. C., 599, and there was no evidence to such effect. Revisal 3601, provides that "if any city and street passenger railway company shall refuse or fail to use practical fenders in front of all passenger cars run, manipulated, or transported by them, such company shall be guilty of a misdemeanor and shall be subject to a fine of not less than $10 or more than $100 for each day."

In *Ingle v. Light and Power Co.*, at this term, the Court said: "There was also evidence that in the violation of a law which required the use of 'practical fenders in front of all passenger cars,' this car was not so equipped, and this failure was negligence," citing *Henderson v. Traction Co.*, 132 N. C., 779; *Barnes v. R. R.*, 168 N. C., 512; *Treadwell v. R. R.*, 169 N. C., 694. The Court has often held that when the law makes a violation of a statute a misdemeanor, such violation is negligence *per se*. This has been notable in cases where the railroad has failed to equip their engines with headlights, handholds, automatic couplers, Miller platforms, and other safety devices required by the statute.

In *Powers v. R. R.*, 166 N. C., 599, the Court said: "This Court has always held that any act of a common carrier which is a violation of law is negligence *per se*." In requiring "practical fenders" in front of all passenger cars the statute intended that they should be "efficient" for the purpose intended. It certainly did not mean that there should be a sham, or colorable, compliance by putting on an antiquated, out of date, and ineffective fender, because costing only $5, when there was in general use, according to the evidence, far more efficient fenders, the cost of which is around $30, by the use of which the life of deceased might have been saved. A human life is certainly worth the difference. According to the evidence the fender used would pass over a man lying on the track while the others would save 80 per cent or more in such cases.

The evidence should have been submitted to the jury, and the court erred in intimating that he would instruct the jury, "if they
(493) believed the evidence, to answer the first issue," as to the negligence of the defendant, "No." *Henderson v. R. R.*, 159 N. C., 581. There was, besides, evidence to go to the jury as to negligence of the defendant independent of the question whether the defendant had its car equipped with a practical fender. *Arrowood v. R. R.*, 126 N. C., 631; *Henderson v. R. R.*, 159 N. C., 583; *Smith v. R. R.*, 162 N. C., 29; *Hill v. R. R.*, 169 N. C., 740; *Hopkins v. R. R.*, 170 N. C., 487.

The motorman of a street car must be more diligent and careful for the safety of pedestrians than a locomotive engineer, for, as said recently in *Ingle v. Light and Power Co., supra*, the locomotive has exclusive right of way and is traveling on its own property, where, as a rule, pedestrians have no right to be, unless crossing a track or by recognized custom are using the track with the implied permission of the company, while the street railways are using the streets to which the public have the same right.

The court also erred in instructing the jury that if they believed the evidence to answer the second issue, as to contributory negligence, "Yes," for under the statute, Revisal, 483, the burden of this issue was on the

defendant, who is required to prove it by the preponderance of the evidence, *Cogdell v. R. R.*, 124 N. C., 302; *Cox v. R. R.*, 123 N. C., 606; *Powell v. R. R.*, 125 N. C., 370, unless it is shown by the evidence for the plaintiff. On a motion for nonsuit only the evidence of the plaintiff, and that in the light most favorable to him, can be considered. See cases collected on that point in *Cox v. R. R., supra.*

Independent of the statute requiring the use of "practical" fenders, and even if the jury should have found that the deceased was guilty of contributory negligence, the third issue should have been submitted to a jury, whether, notwithstanding the negligence of the deceased, the defendant could have avoided killing him. In *Lloyd v. R. R.*, 118 N. C., 1010, the Court said: "It is now settled law in this State (*Pickett v. R. R.*, 117 N. C., 616) that, notwithstanding the fact that a person who is lying insensible upon railroad track is drunk, his negligence is not deemed concurrent, where the company's servants, by the exercise of ordinary care, could have seen him in time to have prevented the injury by the proper use of the appliances at their command." See citations to this case in Anno. Ed.

The Court held that a failure to equip an engine with a headlight at night is a continuing negligence. *Powell v. R. R.*, 166 N. C., 599; *Lloyd v. R. R.*, 118 N. C., 1010; *Stanley v. R. R.*, 120 N. C., 514; *Shepherd v. R. R.*, 163 N. C., 518; *Horne v. R. R.*, 170 N. C., 645. Upon the same principle the failure to use a practical fender, also required by statute, must be a continuing negligence, and actionable if the jury find that the death or injury would not have occurred if the statute had been obeyed by using the required appliances.

Without any statute, if a proper fender would have saved life, (494) its absence was a continuing negligence which would have made the defendant liable if the proximate cause of the injury. *Greenlee v. R. R.*, 122 N. C., 977; *Troxler v. R. R.*, 124 N. C., 191; *Coley v. R. R.*, 128 N. C., 537; *Elmore v. R. R.*, 132 N. C., 865, and the long line of cases since to be found in the Anno. Ed. Indeed, as to employees when there is a failure to use the safety appliances required by statute, neither contributory negligence nor assumption of risk can even be pleaded. Laws 1913, ch. 6, Gregory's Supplement 2645a.

One of the definitions of "practical" given in Webster's Dictionary is "Valuable for use." We think, as already said, in this context it means "efficient," and is at least the equivalent of "the most approved appliance in general use and necessary for safety." *Witsell v. R. R.*, 120 N. C., 557.

The judgment of nonsuit must be set aside and the cause submitted to the jury with instructions in conformity with this opinion.

Reversed.

Cited: Sultan v. R. R., 176 N.C. 138; *Lea v. Utilities Co.*, 178 N.C. 512; *Hinnant v. Power Co.*, 187 N.C. 299; *Hudson v. R. R.*, 190 N.C. 119; *Hanes v. Utilities Co.*, 191 N.C. 21; *Alexander v. Utilities Co.*, 207 N.C. 440.

T. H. THOMAS v. SOUTHERN RAILWAY COMPANY.

(Filed 9 May, 1917.)

1. Carriers of Passengers—Station Platforms—Safety of Passengers—Duty of Carrier.

One who is on the passenger platform of a railroad company at its station with the purpose of becoming a passenger on its expected train is entitled to the protection due a passenger from dangerous conditions and usages there.

2. Same—Mail Agents—Negligence—Notifying Government.

Where the mail agent on the trains of a railroad company has continuously failed to use a crane provided for taking mail therefrom while rapidly passing its station, but has habitually thrown the bags on the passenger platform, to the danger of the passengers thereon, knowledge of such conditions will be imputed to the company, and the failure of the company to duly notify the proper Government officials of this fact is its own negligence, for which it is liable in damages for an injury to a passenger thereby proximately caused, and evidence that the required notice had been given is for the defendant to introduce.

APPEAL by plaintiff from *Ferguson, J.*, at December Term, 1916, of BURKE.

Avery & Huffman for plaintiff.
S. J. Ervin for defendant.

(495) CLARK, C. J. The plaintiff on 27 September, 1915, went to Bridgewater Station on the defendant's road to take the westbound train. He took his seat in the waiting-room, but, it being cold, he went out on the platform, and while waiting for the westbound train he sat down on the platform of the station four or five steps from the ground, 8 feet from the track and 2 feet from the edge of the platform. While sitting there the defendant's eastbound passenger train came by the station at a speed of about 35 miles an hour, and while passing at such speed a mail bag, weighing 35 to 40 pounds, was thrown from the mail car, striking the plaintiff on his leg, causing serious injury. The defendant had been in the habit of running by said station without stopping and permitting the mail bag to be thus thrown off. The

plaintiff having come on the premises for the purpose of becoming a passenger, and within a reasonable time, was entitled to the protection of a passenger. *Hansley v. R. R.*, 115 N. C., 603; *Tillett v. R. R., ib.*, 662; s. c., 118 N. C., 1032.

The testimony was that the train was running about 35 miles an hour; that there was a crane for mail purposes, but instead of using it, the defendant was in the habit of throwing out the mail pouch, which sometimes rolled up to the very steps of the platform, and the mail pouch was often thrown off at any point between the crane, which was 75 feet from the platform, down to the platform, and that the pouch thus thrown on this occasion struck the plaintiff, who was on the platform.

We presume that the court below nonsuited the plaintiff upon the ground that the defendant was not liable for the negligence of the postal clerk in the service of the Federal Government; but this practice was dangerous, and, being habitual, it was negligence in the defendant not to have reported it to the Postoffice authorities, which would doubtless have required the mail clerk to use the crane. If the defendant made such report, or took any other steps to stop this practice, this was a matter which the defendant should have put in evidence. In *Mangum v. R. R.*, 145 N. C., 155, *Brown, J.*, said: "For the same reason, *Muster v. R. R.*, 61 Wis., 325, cited by the defendant, is no authority, in our opinion, to sustain its contention. In that case a postal clerk negligently threw out a mail bag at an unusual place where he had never before thrown it. The court held that the company could not anticipate such conduct, and therefore was not called upon to take precautionary measures to prevent injuries. On the contrary, it was held in *Snow v. R. R.*, 136 Mass., 552, that 'A passenger waiting on a platform at the railroad station for a train, and injured by a mail bag being thrown from a passing train, such throwing being customary and well known to the company, may recover of the railroad company therefor.' The decision is put upon the ground that, although the postal clerk is not the agent of the railroad company, but is the agent of the National Government exclusively, the custom being known to the company, it (496) must take precautions to protect its passengers from injurious consequences."

It was further held in *Mangum v. R. R., supra* (at p. 154): "The defendant owed a duty to plaintiff, and to all other passengers, to keep the depot platforms used by them as a means of ingress and egress free from obstructions and *dangerous instrumentalities*, especially at the time when its passengers are hurrying to and from its cars. *Pineus v. R. R., supra; R. R. v. Johnson*, 36 Kan., 769."

Mangum v. R. R. has been cited with approval in *Roberts v. R. R.*, 155 N. C., 84, where the Court says that public carriers "must not only

provide safe platforms and approaches thereto, but they are bound to make it safe for all persons when they come to their stations in order to become passengers." To same purport *Fulghum v. R. R.*, 158 N. C., 561.

To same purport as to the liability of the common carrier for injuries sustained by mail pouches being thrown from moving trains to the injury of passengers, *R. R. v. Rhodes*, 30 C. C. A., 157; *Carpenter v. R. R.*, 97 N. Y., 494; and many other cases cited in the excellent brief of the plaintiff's counsel.

The authorities are summed in 6 Cyc., 609, 610, as follows: "A carrier will be liable if a passenger is injured by reason of the throwing of mail pouches from postal cars in such way as to involve danger to passengers, if it has permitted postal clerks to adopt an unsafe method of delivering such pouches."

The judgment of nonsuit must be

Reversed.

Cited: Clark v. Bland, 181 N.C. 114.

HUTTON & BOURBONNAIS, INC., v. J. H. COOK.

(Filed 9 May, 1917.)

1. Instructions—Trials—Pleadings—Admissions—Evidence—Nonsuit.

In an action for trespass, where the plaintiff has introduced in evidence a portion of his complaint alleging his deed from the defendant to timber standing upon lands, allowing fifteen years for its cutting and removal, and a portion of the answer admitting this allegation and that defendant had cut shingle blocks therefrom; and defendant denies that his deed, as given, allowed more than five years for the cutting and removal of the timber, and alleges that his act complained of occurred after that time, without introducing evidence as to the alteration alleged to have been made in his deed, an instruction to the jury is proper that if they believe the evidence, to find for the plaintiff; and defendant's motion for nonsuit is properly disallowed.

2. Deeds and Conveyances—Description.

A deed to lands, or standing timber thereon, referring for description to a former deed, incorporates the description referred to, and it will be considered as if therein embodied.

3. Trespass—Legal Right—Nominal Damages.

Nominal damages are awarded in recognition of a legal right where the right has been invaded and no actual damages are shown; and where trespass upon the right to cut timber standing upon lands has been shown

in an action, nominal damages, at least, are recoverable, which carries the cost against the defendant.

4. Evidence—Deeds and Conveyances—Contracts.

A grantor may not, as against his grantee, contradict the written terms of his deed, or deny its legal force and effect by evidence of inferior solemnity, while it remains in force as a conveyance, and unimpeached for fraud, accident, or mistake.

CIVIL ACTION, tried before *Ferguson, J.*, and a jury, at October (497) Term, 1916, of BURKE.

Plaintiffs allege that defendant J. H. Cook had trespassed on certain lands described in a deed from Tobias Queen to J. H. Cook, dated 21 February, 1894, and a deed from the latter, dated 13 October, 1905, for the timber thereon, consisting of "white pine, poplar, oak, chestnut, and yellow pine which will make merchantable lumber, except chestnut oak," with the right to cut, saw, and remove the same within fifteen years from date of deed. It is further alleged that plaintiffs, by virtue of said deed, are the owners of the timber trees on the land conveyed by the defendant's deed to them, and that defendant unlawfully and wrongfully entered upon the land while plaintiffs were cutting timber thereon, and cut timber and shingle blocks on the land, it being part of the timber belonging to the plaintiffs, thereby damaging them in the sum of $100. Defendant admitted the allegations of the first section of the complaint, that Tobias Queen had conveyed the land to him. He denied the second section, as to the deed of himself to plaintiffs, and as to the trespass, though he admitted that he had cut shingle blocks to the value of $10 from the land described in the deed of Tobias Queen to him. He denied the execution of the deed of J. H. Cook to plaintiffs, which was introduced in evidence, having been duly registered; and alleged that he did execute a deed to plaintiffs for timber, but that the deed in evidence was different from the one made by him, and that his deed had been changed and altered, and provisions added thereto after its execution, and that his true deed only allowed five years for cutting the timber, and not fifteen years, which words were inserted after the execution of his deed, without his knowledge or consent, and he avers that he is, and that at the time he cut the shingle blocks on the land he was entitled to cut and remove any and all timber then remaining on the land, (498) and that plaintiffs had no interest therein. He demands damages because he has been prevented by plaintiffs from cutting the timber remaining on the land, which belongs to him and not to the plaintiffs. The deed of Tobias Queen to defendant, and the deed of the latter to the plaintiffs, were offered in evidence by the plaintiffs, both deeds having been duly registered, as appeared therefrom. Plaintiffs next introduced the first section of the complaint, alleging the execution of

the deed of Tobias Queen to the defendant, and the first section of the answer, admitting the same, and also the fourth section of the answer, admitting the defendant had cut the shingle blocks from the land, which he claimed as his own, and plaintiffs then rested. Defendant moved for a nonsuit, which was refused, and he excepted. He did not introduce any evidence. The court charged the jury that if they believed the evidence they would answer the first issue "Yes" and assess nominal damages, say, twenty-five cents, or some small sum. The jury returned the following verdict:

1. Is the plaintiff the owner of the timber and timber rights, as alleged in the complaint? "Yes."

2. What damage has plaintiff sustained, if any, by the wrongful acts of defendant? "Twenty-five cents."

Judgment for plaintiffs on the verdict, and appeal by defendant.

W. B. Councill for plaintiffs.

Avery & Ervin for defendant.

WALKER, J., after stating the case: It is evident, we think, from a proper construction of the pleadings, that the defendant did not intend to deny plaintiffs' title and right of possession to the land for the purpose of cutting and removing the timber, if his allegations as to the alterations in his deed to them are not true or, what is the same thing, in legal effect, have not been proven. He admits the execution of the deed from Tobias Queen to himself, and plaintiffs introduced the deed from the defendant to them, both deeds having been registered. The second deed referred to the first for description of land, and this description is to be taken as embodied in the second deed, *Gudger v. White,* 141 N. C., 507. It appeared from these deeds that plaintiffs had the right to enter upon the land and cut the timber of the specified description within fifteen years from the date of the deed, which period had not expired when defendant admits he entered upon the land and cut the shingle blocks, which surely comes within the designation of merchantable lumber. The defendant claimed that "he cut the shingle blocks on his own land," but it is too plain, as not to be arguable, that this (499) meant only that if his allegations as to the alterations in the deed were true, he was entitled to the uncut timber remaining on the land at the end of the five years, which he contends, but without proof, was the time fixed by the deed for the cutting. But by the deed itself plaintiffs were allowed fifteen years to cut the timber, and in law, they are entitled to this full time, unless defendant had shown by sufficient allegations and proof that the deed had been tampered with as he suggests, but there was no proof offered upon

this allegation. The case as made by the uncontradicted proof resolved itself, therefor, into the simple question whether plaintiffs were entitled to a verdict upon the documentary evidence. The court charged the jury to find for the plaintiffs if they believed the evidence, and this was a correct instruction; nor was there any error in the refusal to grant a nonsuit. Upon the deeds themselves, and the admissions in the pleadings, the plaintiffs were entitled to a favorable response to the first issue, and, at least, to nominal damages. *Lumber Co. v. Lumber Co.*, 137 N. C., 443; 1 Joyce on Damages, sec. 8; Cooley on Torts (2 Ed.), p. 74; *Little v. Stanback*, 63 N. C., 285. A party is entitled to nominal damages if the jury find that there has been any injury to his legal rights. They are not given as an equivalent for the wrong, or as a substantial recompense, for they are not such, but are merely a small sum awarded in recognition of the right, and of the technical injury resulting from a violation of it, as the above authorities will show. They have been described as "a peg on which to hang costs."

As upon all the uncontradicted evidence there had been a trespass on the land, the recovery of nominal damages followed as a matter of course. There was evidence here of substantial damages, but plaintiffs have not claimed them. Upon the other question, as to the legal effect of the deed, if not assailed by competent proof, it is familiar learning that the grantor will not, as against his grantee, be heard to aver anything contrary to it, or to deny its legal force and effect by any evidence of inferior solemnity. Bigelow on Estoppel (5 Ed.), 332. He cannot assert any right or title in derogation of his deed to the grantee, nor deny the truth of any material fact alleged in it, in a collateral way. 16 Cyc., 686. This being true, defendant's attack upon his own deed in this case has nothing to rest upon.

There was, therefore, no error in the charge of the court or in any other respect.

No error.

Cited: Douglas v. Rhodes, 188 N.C. 584; *Carter v. Vann*, 189 N.C. 253; *Davis v. Wallace*, 190 N.C. 547; *Crawley v. Stearns*, 194 N.C. 16; *Bowen v. Bank*, 209 N.C. 144; *Wolfe v. Montgomery Ward & Co.*, 211 N.C. 296; *Land Bank v. Moss*, 215 N.C. 448; *Lee v. Stewart*, 218 N.C. 288; *Hairston v. Greyhound Corp.*, 220 N.C. 644; *Matthews v. Forrest*, 235 N.C. 283.

(500)

J. B. CAMPBELL ET ALS. v. ROAD COMMISSIONERS OF DAVIE COUNTY.

(Filed 9 May, 1917.)

1. Condemnation—Compensation—Constitutional Law—Statutes.

A statute for the relocation and construction of a public highway which provides that "the jurors shall in considering the question of damages take into consideration the benefits to the landowner and shall render a verdict for such amount, if any, as the damages may exceed the benefits," awards just compensation to the owner upon striking the balance, and is constitutional.

2. Same—Legislative Discretion.

The Legislature, in conferring the right of condemnation of lands for public use, may, in its discretion, and as compensation to the owner, require all the benefits or a specified part of them, or forbid any of them to be assessed as offsets against the damage.

3. Same—Offset—Special Advantages.

The defendant in condemnation proceedings, where the statute permits, is entitled to offset against the value of the land taken and the owner's damage, if any, to the rest of the land, the benefits the plaintiff has derived by reason of the additional value, if any, of his tract of land caused by the special advantage thereto which is not general to the other landowners.

APPEAL by plaintiffs from *Carter, J.*, at August Term, 1916, of DAVIE.

Jacob Stewart and Holton & Holton for plaintiffs.

A. T. Grant, Jr., for defendants.

CLARK, C. J. This is an action to recover damages for the relocation and construction of a public highway from Winston to Statesville via Mocksville, under Public-Local Laws 1913, ch. 7, sec. 7, which provides: "The jurors shall, in considering the question of damages, take into consideration the benefits to the landowner, and shall render a verdict for such amount, if any, as the damages may exceed the benefits," etc.

There are several exceptions to the testimony and the charge, but they can be resolved practically into one question, "What benefits to the landowner can be considered as a counterclaim in making up the verdict?" The plaintiffs contend that they are entitled to compensation for the value of the land taken, without any abatement by reason of benefit to the remainder of the tract, by the location of the road, and that such benefit is a counterclaim only against the damages, if any, sustained by the rest of the tract.

Such contention, however, is without any authority in this State to support it.

His Honor correctly charged that the jury should estimate the (501) value of the land taken and the damage, if any, to the rest of the plaintiff's tract by reason of the location of the road, and that from such sum there should be taken as a counterclaim any benefit which the plaintiff has sustained by reason of the addition to the value, if any, of his tract of land by reason of the special advantages thereto which is not general to the land of others in that section.

This is the rule laid down in *Bauman v. Ross,* 167 U. S., 548, in an exhaustive opinion, and the same rule has been applied in this State, *Asheville v. Johnston,* 71 N. C., 398; *R. R. v. Wicker,* 74 N. C., 220; *R. R. v. Land Co.,* 133 N. C., 330; *Bost v. Cabarrus,* 152 N. C., 531; *R. R. v. Armfield,* 167 N. C., 464; also, 2 Lewis on Em. Dom., 1187, paragraph 691.

It was competent for the Legislature to provide for a different rule, as in *Miller v. Asheville,* 112 N. C., 768, where the Court sustained the provisions of the statute in that case (sec. 16, ch. 135, Pr. Laws 1891) which permitted the defendant to reduce the damages not merely by the benefits special to the plaintiff, but by all the benefits accruing to him, either special or in common with others in the neighborhood. The Court held: "The present act, which extends the assessment of benefits to all received by the landowners, instead of a restriction to the special benefits, is valid. All the landowner can claim is that his property shall not be taken for public use without compensation. Compensation is had when the balance is struck between the damages and benefits conferred on him by the act complained of. To that, and that alone, he has a constitutional and vested right. The Legislature in conferring upon the corporation the exercise of the right of eminent domain can, in its discretion, require all the benefits or a specified part of them, or forbid any of them, to be assessed as offsets against the damages. This is a matter which rests in its grace, in which neither party has a vested right, and as to which the Legislature can change its mind always before rights are settled and vested by a verdict and judgment."

The above is quoted in *R. R. v. Platt Land,* 133 N. C., 273, 274, where the Court held that it was competent for the Legislature to provide that, as in this case, the defendant should be entitled to offset only the benefits "which are special to the owner and not such as he shares in common with other persons." This is the usual provision of the statute, and there was no error in the ruling of the court.

It seems that there are two or three States in which, possibly owing to the verbiage of their statutes, the defendant is not entitled to deduct from the damages for the land taken any benefits accruing to the remaining land of the plaintiff, even though special to himself. Such construction would deprive the defendant ordinarily of any offset (502)

against the damages in favor of the plaintiff, and the provision in the statute allowing such counterclaim would be idle.

The rule adopted by his Honor is in accordance with the wording of the statute and our precedents in such cases, where there is no express provision to the contrary, as in *Miller v. Asheville, supra.*

No error.

Cited: Lanier v. Greenville, 174 N.C. 317; *Harrold v. Good Roads Com.,* 182 N.C. 579; *Stamey v. Burnsville,* 189 N.C. 41; *Goode v. Asheville,* 193 N.C. 136; *Ayden v. Lancaster,* 197 N.C. 560; *Ward v. Waynesville,* 199 N.C. 276.

VAUGHAN-ROBERTSON DRUG COMPANY ET AL. v. GRIMES-MILLS DRUG COMPANY.

(Filed 16 May, 1917.)

1. Corporations — Subscription Lists — Application for Certificate — Evidence—Method of Payment.

Where some of the subscribers to the capital stock of a proposed corporation, upon agreement with the others to act for them, sign the application for the certificate apportioning the capital stock equally among the incorporators, the application for the certificate is the only subscription to the capital stock, and the subscription list theretofore taken is only evidence of the method of payments to be made, and is not objectionable on the ground that it varied the application upon which the charter was later obtained.

2. Same—Receivers—Unpaid Balance—Incorporation Credits.

Where some of the subscribers to the capital stock of a proposed corporation sign an application for the certificate apportioning the capital stock among themselves, under agreement with the other subscribers that they, in so doing, should act for them all, and the corporation, accordingly formed, accepts the subscription list as an asset and collects from the other subscribers thereon, in an action by the receiver to recover of the incorporators the unpaid balance of their subscription, it is *Held,* that the receiver in seeking to enforce the equity arising from the doctrine that such balance is in the nature of a trust fund for the creditors' benefit is required to do equity, and therein the incorporators are entitled as a credit not only to what they may have paid on their own subscriptions, but also such sums as the other subscribers may have paid.

3. Corporations—Subscriptions—Secret Agreement — Receivers — Unpaid Balance.

Subject to lienors, in accordance with their priorities, the unpaid subscriptions to the capital stock of a corporation are to be collected and held in the nature of a trust fund for the creditors and other stockholders; and

where suit is brought for them by the receiver of an insolvent corporation, an incorporator may not vary the written terms of his subscription by showing a secret agreement whereby he was only required to take a less amount of the shares.

4. Corporations—Insolvency—Unpaid Balance — Subscribers — Claims — Offsets.

A shareholder of a corporation, since having become insolvent, and in the hands of a receiver, cannot offset, as against his unpaid balance due upon his shares, a debt alleged to be due him by the corporation.

5. Corporations—Insolvency—Subscriptions—Unpaid Balance—Other Subscriptions.

Where a subscriber to the capital stock of a corporation is sued by the receiver of the corporation, having become insolvent, for an unpaid balance on his subscription, such sums as he may have paid on the subscription of others will not be allowed him as a credit on his own subscription.

6. Reference—Appeal and Error—Exceptions—Trial by Jury.

Where exception to a reference is not taken or the rights of the party preserved, his demand for a trial by jury will not be granted.

CIVIL ACTION, heard before *Long, J.*, at November Term, 1916, (503) of FORSYTH, upon exceptions to the report of a referee.

The drug company failed in business after a very brief career, and its affairs and assets were placed in the hands of a receiver by proper proceedings under the statute, and he has brought this suit to recover certain sums of money which he alleges are due to the company by the defendants upon their several subscriptions to its capital stock. The case was duly referred to Mr. Philip Williams, who submitted to the court an unusually clear and concise report.

The drug company was incorporated under the general law.

The referee finds the following facts:

1. A subscription agreement for stock in a corporation to be formed for the purpose of conducting a drug store in the city of Winston-Salem was entered into by a number of persons, whose names appear in said agreement and who agreed to subscribe for the number of shares of stock set opposite their names, and to pay therefor at the rate of $25 a share. That the said subscription agreement was accepted by and became the property of the Grimes-Mills Drug Company, which was incorporated, by certain of the subscribers whose names appear in said agreement. A copy of the subscription agreement is annexed.

2. In order to prevent the delay and inconvenience which would result from having all the subscribers in the subscription agreement sign the certificate of incorporation of the Grimes-Mills Drug Company, it was agreed orally between the incorporators that they would each sign the certificate of incorporation as a subscriber for 36 shares of stock, but

that they were only to be liable for the payment of the number of shares they had subscribed for in the subscription agreement, and the excess over and above that number necessary to make up the total subscribed capital stock of 144 shares was to be paid for by the other subscribers to the subscription agreement and by additional subscribers to be obtained.

(504) 3. The Grimes-Mills Drug Company accepted the parties whose names appeared in the subscription agreement as subscribers to its capital stock of 144 shares, and received the money paid by them as payments on this capital stock, and issued certificates of stock, as hereinbefore set out, in evidence thereof. That the subscription agreement was kept in the safe in the office of the Grimes-Mills Drug Company, and the company attempted to collect from the subscribers who failed to pay their subscriptions.

4. The parties who were the incorporators, and who subscribed to the stock under the foregoing agreement, were as follows: R. A. Mills, 36 shares, aggregate value $900; T. W. Grimes, 36 shares, aggregate value $900; T. A. Butner, 36 shares, aggregate value $900, and S. F. Vance, 36 shares, aggregate value $900.

5. It will appear from the subscription agreement herein that the number of shares of stock subscribed for therein amount to the total sum of $3,025; and of that sum $2,525 has been paid to the Grimes-Mills Drug Company, and the balance of $500 has not been paid. This result as to the amount paid in on the original subscription list, as we will call it, for the purpose of clear designation, was obtained after purging it of some plain errors and of wrong entries.

6. The subscription agreement, set out in Finding 1 hereof, was entered into by the parties herein found to be subscribers thereto, prior to the incorporation of the Grimes-Mills Drug Company, with the exception of the subscribers whose names appear in the said agreement after the name of George C. Tudor; the latter parties entered the agreement after the corporation had been organized.

7. That T. A. Butner, in his answer filed in this cause, sets up a counterclaim in which he alleges that the Grimes-Mills Drug Company is indebted to him for money paid to said company and for services rendered it. That evidence was introduced at the hearing to prove that the said Butner had loaned the said company the sum of $400. To this counterclaim the receiver in apt time filed a demurrer.

8. That T. W. Grimes, in his answer filed in this cause, sets up a counterclaim in which he alleges that the Grimes-Mills Drug Company is indebted to him for merchandise and for services rendered. To this counterclaim the receiver in apt time filed a demurrer. That evidence was offered at the hearing to prove said counterclaim.

9. That R. A. Mills, in his answer filed in this cause, sets up a counterclaim in which he alleges that the Grimes-Mills Drug Company is indebted to him for services rendered. To this counterclaim the receiver in apt time filed a demurrer. No evidence was offered at the hearing in proof of this counterclaim.

The following are the referee's conclusions of law:

(1) That the Grimes-Mills Drug Company was incorporated (505) according to the laws of this State, with a capital stock of 144 shares of the value of $25 per share, the aggregate value of which was $3,600.

(2) That the subscribers of this stock who are liable for its payment are:

R. A. Mills	36 shares, aggregate value	$900
T. W. Grimes	36 shares, aggregate value	900
T. A. Butner	36 shares, aggregate value	900
S. F. Vance	36 shares, aggregate value	900

(3) That the indebtedness of the Grimes-Mills Drug Company exceeds the proceeds derived from the sale of its assets, and the receiver is entitled to recover judgment against the subscribers of its stock for the amount of their subscriptions which remain unpaid.

(4) That the amount paid to the Grimes-Mills Drug Company by the subscribers to the subscription agreement constitutes a payment *pro tanto* of its capital stock, and should be credited as such. It follows, therefore, that upon the amount of the stock subscribed for by Mills, Grimes, Butner, and Vance in the certificate of incorporation, must be credited the payments made by each one of these parties, and in addition thereto each one of these parties is entitled to a credit, on the amount subscribed for by him, of an amount equal to one-fourth of the total of the payments made by the other parties to this subscription agreement.

(5) That the receiver is entitled to recover judgment for the balance of the stock subscriptions remaining unpaid after making the foregoing credits, as follows:

R. A. Mills	$106.25
T. W. Grimes	306.25
T. A. Butner	106.25
S. F. Vance	556.25

and interest from 2 April, 1914. The referee states that those amounts were arrived at by charging each of the incorporators with the amount of his subscription, or $900, and deducting therefrom the amount paid by him, and also his share or one-fourth of the payments made by the

subscribers on the list, other than the four above mentioned. He then proceeds to state the amount due by the other subscribers on the list, after correcting certain errors, and recommends that judgment be entered against each of the parties for the amount thus found to be due by him and the costs.

The court sustained the finding of facts, as being supported by the evidence, there being no exceptions thereto, but overruled the (506) decision of the referee as to the competency of the evidence relating to the twenty-fourth finding of fact, exception having been taken thereto, which evidence had been admitted by the referee, and from which he made his twenty-fourth finding of fact (No. 2 in this statement), in regard to the agreement as to payment of subscription by R. A. Mills and his three associates to the stock of the drug company, and approved the other findings, overruling all other exceptions. Finding No. 24 was disapproved. Judgment was rendered against the several parties accordingly, and for costs, that against T. A. Butner for $400 and interest, and the one against S. F. Vance for $850, and these two defendants excepted and appealed.

Louis M. Swink, Gilmer Korner for plaintiff.
Fred M. Parrish for defendant T. A. Butner.
Holton and Holton for defendant S. F. Vance.

WALKER, J., after stating the case: It will not be necessary to state the testimony introduced to support the second of the findings of fact, as it appears above, or the twenty-fourth, as it appears in the referee's report, the judge having held that there was evidence sufficient to warrant the finding, in which ruling we concur, and disapproved the finding upon the ground only that the testimony in support of it is incompetent. The evidence is substantially like the facts found by the referee, and the question is whether it was competent to hear the evidence and consider those facts in coming to a decision of the case. We think it was, as the evidence had no tendency to contradict, vary, or alter any writing, nor to show that one contract of subscription was being substituted for another, but simply proved that the parties had adopted a convenient way of paying for the stock which was subscribed by R. A. Mills, T. W. Grimes, T. A. Butner, and S. F. Vance, amounting in all to 144 shares, or $3,600, the par value of each share being $25.

There was great stress laid in the argument upon the erroneous supposition that there had been two subscriptions of stock, one by the parties who signed the list and the other by the four subscribers above named, whereas there was only one subscription by the incorporators, and the transaction in regard to the list was merely an indirect method adopted

by the parties for the payment of the latter subscription; that is, the one by the incorporators. The company, nevertheless, received payment *pro tanto* for the stock they subscribed, and for their part of the balance the court has given a judgment against the appellants. This judgment, though, is too large, as they have not received proper credit out of the amount that was paid in under the preliminary agreement between the shareholders. The company, and consequently the creditors, in this way having received a payment once, or what is equivalent to it, on the capital stock, has no right to demand another or a (507) double payment, but is entitled only to judgment for any balance due after giving proper credit for the payments. The money, so far as paid in cash, has gone into the treasury of the company and become a part of its assets for the payment of its obligations. If it has been squandered or misapplied, the creditors have no right to ask the stockholders, as such, to replace it for their use and benefit, but must look for indemnity to those who were guilty of the misappropriation of it. The ruling of the court was based upon a misapprehension of the true legal character of the transaction. There were not two subscriptions to the stock, but only one, and the list which was signed by the parties whose names appear thereon was intended to be nothing more than the means or instrumentality by which to raise the money to pay for the stock taken by the four incorporators, and the money received on that list has been so paid to the company. This was the only agreement, and the whole thereof, as found by the referee, for he states that "The Grimes-Mills Drug Company accepted the parties whose names appear on the subscription agreement as subscribers to its capital stock of *one hundred and forty-four shares* [italics ours], and received the money paid by them as payments on *this* capital stock, and issued certificates as hereinbefore set forth, *in evidence thereof.*" The company also attempted to collect from those whose names were on this list and who had not paid, the money due by them, to be applied to the payment of the balance owing for the 144 shares. The last statement is the substance and effect of the finding, as the referee had already found that there was only one subscription, and that was the one made by the four incorporators for the 144 shares, and that the money collected on the list was to be applied to the payment of that stock, and no other. The case of *Gilmore v. Smathers,* 167 N. C., 440, is an authority for the ruling of the referee, though this case is not, perhaps, as clear in its facts bearing upon the subject of payment as was that one; but it is clear enough. In the *Gilmore case* we recognized fully the principles underlying the trust fund doctrine, as thus stated:

1. The capital stock, including unpaid subscriptions therefor, of a corporation constitutes a trust fund for the benefit of creditors of the

corporation, and the creditors have a right to examine into the affairs of the corporation to ascertain if the subscriptions of stock have been paid, and how.

2. Each subscriber for stock in a corporation thereby becomes liable for the amount of stock subscribed by him, and he can only be discharged by paying money or money's worth in the manner provided by the charter and by-laws.

3. A subscriber cannot discharge his liability as against creditors for his subscription by substituting shares paid up by another subscriber.

(508) 4. Parol evidence will not be received to vary the terms of subscription or to show a discharge from liability on the part of a stockholder in any other way than that prescribed by the charter and by-laws.

The following cases support this doctrine: *Foundry Co. v. Killian,* 99 N. C., 501; *Sawyer v. Hoag,* 17 Wall. (U. S.), 620; *Burge v. Smith,* 16 Wall. (U. S.), 390; *New Albany v. Burke,* 11 Wall. (U. S.) 96, where it was substantially held that though it be a doctrine of modern date, it is now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund to be secured and administered for the benefit of the general creditors of the corporation, subject, of course, to the claims of lienors entitled to priority. We said in *Gilmore v. Smathers:* "If we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen. The governing officers of a corporation cannot, by agreement or other transaction with the stockholders, release the latter from their obligation to pay, to the prejudice of creditors, except by fair and honest dealing and for a valuable consideration. Such conduct is characterized as a fraud upon the public, who were expected to deal with them. This equitable principle has been as firmly rooted in our jurisprudence as any we now recall, and with good reason, as it is eminently fair and just," citing among other cases, *Heggie v. B. and L. Assn.,* 107 N. C., 581; *Hill v. Lumber Co.,* 113 N. C., 176; *Cotton Mills v. Burns,* 114 N. C., 355; *Bank v. Cotton Mills,* 115 N. C., 513; and *McIver v. Hardware Co.,* 144 N. C., 484. We adhere fully to that equitable doctrine; but it in no way answers the appellants' contentions, or interferes with the granting of the relief they demand in this case. They are as much favored by equity in the claim they now prefer as a creditor would be, whose right is protected by that doctrine. They are both founded upon the same just and equitable principles.

This is no attempt to substitute one person for another who has subscribed for corporate stock, nor to vary the terms of a written contract, nor to show a discharge in any other way than by payment of money or money's worth; nor is there any denial of a creditor's right, under the trust-fund doctrine, to inquire whether the stock subscriptions have been paid up, and how they were paid. They have exercised this right already, and the Court simply gives them that which is theirs, and requires them to turn loose that which is not. That carries this beneficent doctrine to its fullest extent in favor of the creditors. We will return to this subject when considering another exception of the appellants which we will overrule under the same doctrine. As said in *Gilmore v. Smathers, supra,* and the same is relevant here: "While we fully recognize the doctrine as thus established, and now relied on (509) by the plaintiff (trustee), we do not perceive its application to the finding of facts in this case, for here there was no unpaid subscription. The transaction was a simple one as described by the Court in its findings." And again: "When the subscriptions were thus validly made, certificates issued and the stock paid for, these stockholders were discharged from any further liability to the company and its creditors on their subscriptions, because they had done all that they had contracted to do. If a person has subscribed for stock, he is liable to the corporation and its creditors upon his subscription, and he cannot be relieved of this liability until he has paid for the stock taken by him." The referee in this case has found that there were 144 shares of stock taken by the incorporators, and this was the total subscription, and also that *the company accepted* the tentative list, *and the money collected thereon,* in payment of the said subscriptions for 144 shares. Will the law permit the company thus to act, or to receive this money for stock which they issued and the parties accepted upon the faith of having paid for it, and then allow the creditors, through the company, to collect for it again? This would be unfair and unjust if not a fraud, against which equity would steadily set its face and turn a deaf ear to the creditor who should ask that it be done. The trust-fund doctrine protects the creditor, but when he asks for the equity which it is ready to give he must also do equity. We close this reference to the *Gilmore case* with its concluding words: "The case needs no further elaboration. It depends more upon a clear understanding of the facts, which have been so well stated, than upon the application of any special principle of law, which is not perfectly familiar to all of us. Defendants admit their liability for the 20 shares not paid for, or $200."

It will be found that the discussion in that case answers fully the position taken here. But this very question was in 1894 before one of the highest courts of England in the Chancery Division, presided over

by *Lord Chancellor Harschell, Lord Esher,* Master of the Rolls, and the lord justices of the Court of Appeal, three of the latter delivering opinions, upon facts closely resembling those found by the referee in this case. *In re Glory Paper Mills Co.,* sometimes called *Dunster's case,* reported in L. R. Ch. Div. (1914) at page 473. It appeared there that T. M. Dunster signed for 100 preferred shares of the Glory Paper Mills Company in his own name. He afterwards applied, in the name of his firm of Dunster & Wakefield, for 100 preferred shares, the par value of each share being 10 pounds, and they were allotted to the firm. The company failed in business, and was placed in the hands of a receiver or liquidator, who placed Dunster, individually, on the list of contributors for 100 shares. Dunster petitioned to have his individual name re-
(510) moved from the list. The proof showed that the parties intended to make but one subscription, the signing of Dunster in his own name, and for the firm being but one transaction, though, in form, two separate applications by him. These facts were well known to the company and its stockholders and officials, though not to the creditors. The justice (*Vaughan Williams*) denied the petition below, but on appeal he was reversed, upon the ground that the Court could look into the transaction and ascertain its real nature, and that, in fact and in law, it was but one transaction and one subscription, the firm being the only subscriber. *Lord Justice Lindley* said: "I think that the learned judge has not come to a right conclusion in this case. The real question is whether there was one agreement to take shares, or two. At the first blush it looked as if there were two agreements; but it is plain from the evidence that the signing of the memorandum by Dunster was in performance of the arrangement that his firm should be the agents of the company, and that his subsequent application on behalf of the firm for 100 shares was part of the same arrangement. The documents might have supported two agreements, but the evidence is all in favor of there being only one. How, then, does the matter stand in point of law? Dunster was bound to take 100 shares, and he asked that they should be put in the name of himself and his partner. Why should he be fixed with 200 shares? None of the parties understood that there were to be two agreements; and that is the true solution of this case. . . . Was there one agreement to take 100 shares, or was there an agreement to take 200 shares? My opinion is that there was only one agreement for 100 shares, which Mr. Dunster has taken and which are fully paid up. Consequently Mr. Dunster's name must be removed from the list in respect of the additional 100 shares." *Lord Justice Lopes* concurred as follows: "I am of the same opinion. I agree in the last observation of my brother *Lindley* that this is really a question of fact. What was, in point of fact, the true state of the case?" And then, referring to the

last subscription in the name of the firm, he added: "It is said that this was a separate and independent agreement from the former, and that Dunster ought to be on the register for 100 shares and the firm on the register for another 100 shares. In my opinion, that is wrong. There were only 100 shares taken. What is afterwards done is simply the performance of the original contract. There was no intention from first to last to take 200 shares. The true meaning of the transaction was that 100 shares were to be taken, and no more." *Lord Justice Davey* said: "In my opinion, we should be doing a piece of injustice if we affirmed this order. We should be imposing a liability on this gentleman which neither he nor any other party to the transaction ever intended or dreamt of his entering into. If we are to believe the statements made on oath, not only by Mr. Dunster himself but by several (511) other witnesses, not one of whom has been cross-examined, there can be no manner of question that there was one contract, and one contract alone, and that when Dunster signed the memorandum of association he did so with the intention of carrying out that informal arrangement—informal because it was not binding at that time on the company—that his firm was to take 100 shares in this company." He then says that the form of the transaction was used "as a piece of machinery" for carrying into effect the real purpose, and that there was nothing in the least inconsistent with Dunster having signed the memorandum, or with his firm having taken the shares, in pursuance of an arrangement with the promoters, before the incorporation, that the firm should be the only shareholder. He then says: "In my opinion, it would be an outrage to hold that there were two sets of 100 shares in this case, and we should be acting contrary to the intention of everybody connected with the transaction. Nor do I think that the documents which are relied on by the respondents, when properly understood, are in the least degree inconsistent with this. . . . I am, therefore, of opinion that there was only one contract in this case, and that was a contract by Mr. Dunster to take 100 shares. It is proved that he entered into that contract on behalf of his firm just as if he had signed the memorandum on behalf of himself and Wakefield, and it is, to my mind, proved that the application in the name of Dunster & Wakefield for 100 shares was only made in pursuance of and for the purpose of carrying out that obligation." The last one of the justices employs very strong language, which we need not adopt or indorse, and which doubtless was merely employed to express the clear and intense conviction that there was but one subscription, and, therefore, only one obligation, and that it would, therefore, have contravened the plain rules of equity of Dunster had been required to pay for the stock a second time. If there was but one subscription, nobody will deny that a second payment should not have been

exacted. There is no such denial in this case, so that the whole matter resolves itself into the single question, Was there one subscription or two?, and we answer simply that, in our opinion, there was only one. The principle governing the *Dunster case, Gilmore v. Smathers,* and this case, is the same, though the special facts in the first named case more nearly resemble those in *Gilmore v. Smathers* than they do those in this record. However, they are substantially like those we have here, but if there is any difference it is in favor of the appellants.

The other exceptions are not tenable, and in respect to them the ruling of the court is affirmed. S. F. Vance has been allowed to show a payment *pro tanto* for his stock, but he cannot show that he made no subscription for himself, except for eight shares, or $200, and is
(512) not liable for the balance. This would contradict his written contract to take thirty-six shares, and falls within the principle thus stated in *Boushall v. Stronach,* 172 N. C., 273:

1. A written subscription to the stock of a corporation, supported by a valuable consideration, is within the principle that a written contract cannot be impaired or changed by parol.

2. When persons actually subscribe a stated sum for stock of a corporation, the subscription of one may be regarded as a proper consideration for that of the other.

3. When work has been done or expenditures made or debts incurred on the faith of a subscription to the stock of a corporation, it then becomes a binding obligation.

4. When one assumes a pecuniary obligation by writing, a contemporaneous agreement that he shall not be required to pay varies the contract and is not enforcible.

5. The law requires good faith and fair dealing between stockholders, and will not enforce a secret agreement which is for the benefit or to the disadvantage of other stockholders and creditors.

6. The law will not allow one to give or lend his good name to a promoter to assist him in getting other people to take stock, and then relieve him from liability upon an agreement that he would not be required to pay.

We said in *Boushall v. Myatt,* 167 N. C., 328: "A subscriber may be released in whole or in part from his contract by the corporation with the consent of all the other shareholders; but he cannot withdraw and surrender his shares without the consent of the corporation; nor can he do so with the consent of the corporation unless the other subscribers consent; nor can he do so with the consent both of the corporation and the other subscribers if the amount due from him is required to pay corporate debts."

It is clear that the evidence offered by S. F. Vance was incompetent to show that while he appeared to be a holder of 36 shares of stock, the subscription as to 34 shares was only apparent and not real, because he had a secret agreement with the other incorporators, but not all the other stockholders, or the creditors, that the cash paid in should be first applied to his subscription, which would leave the other incorporators more largely indebted on their stock and require other interested parties, including creditors, to rely on this indebtedness. He cannot thus change his contract without their consent, by practically substituting the personal liability of his associates for his own. He must stand by his contract, unless the collateral agreement received the sanction of others interested and who may be prejudiced by it. We would not only vary the contract, but substitute one debtor for another, if we enforced the alleged parol agreement, and this is forbidden to be done. Those on the preparatory list have an interest in this question, as stock- (513) holders, and neither they nor the creditors have consented to the change. The doctrine is well expressed in 1 Thompson on Corporations (2 Ed.), secs. 567-569: "Subscriptions to the capital stock of a corporation are governed by the same rule as other writings, in that parol evidence of a special agreement made prior to or concurrently with the subscription is not admissible to vary or in any manner alter the terms or effect of the subscription; nor can parol evidence be introduced to show that the subscription was made upon a condition not expressed in the instrument. Such secret and undisclosed parol agreements on condition not expressed are regarded as a fraud upon other subscribers." The following authorities support the rule: 1 Cook on Corporations (6 Ed.), sec. 137; *Upton v. Triblecock,* 91 U. S., 45; *Cartwright v. Dickinson,* 88 Tenn., 476; *McNulta v. Com. Belt Bank,* 164 Ill., 427; *Burke v. Smith,* 16 Wall., 390. One subscriber to stock cannot be substituted for another except with the full consent of all interested parties.

The appellants seek to set off debts of the corporation to them against their liability for their stock subscriptions. This cannot be done. It has been held by a court of high authority that capital stock or shares, especially the unpaid subscriptions, constitute a trust fund for the benefit of the general treasury of a corporation. A stockholder indebted to an insolvent corporation for unpaid shares cannot, therefore, set off against this trust fund for creditors a debt due him by the corporation. The fund arising from such unpaid shares must be equally divided among all the creditors. The relations of a stockholder to the corporation and to the public who deal with the latter are such as to require good faith and fair dealing in every transaction between him and the corporation of which he is part owner and controller, which may injuriously affect the rights of creditors or of the general public, and a rigid scrutiny will be

made into all such transactions in the interest of creditors. *Sawyer v. Hoag,* 17 Wall., 610, 624 (21 L. Ed., pp. 731, 732). And the same Court afterwards said: "The directors of a company are incompetent to release an original subscriber to its capital stock, or to make any arrangement with him by which the company, its creditors, or the State shall lose all the benefits of his subscription. Conditions attached to subscriptions which, if valid, lessen the capital of the company, are a fraud upon the grantor of the franchise and upon those who may become creditors of the corporation, and upon unconditional stockholders. The principle is not applicable to a condition allowing a transfer of the stock originally subscribed to another party on his subscribing, where (514) no capital is lost by the transfer. In such case, if the transfer is made, the original subscribers are not liable to creditors for the amount of the stock thus transferred." *Putnam v. R. R.,* 16 Wall., 390, 402 (21 L. Ed. 361). A shareholder cannot set off against his liability for a subscription to stock a debt due him by the corporation, the creditors being entitled to an equal distribution among them of the assets, and the allowance of such a set-off would violate this rule of equality. *Sawyer v. Hoag, supra; Handley v. Stutz,* 139 U. S., 417; Cook on Stock and Stockholders (7 Ed.), sec. 193.

The claim of a credit by T. A. Butner as to the amount paid by him on the Zimmerman stock cannot be sustained. He cannot thus bind other interested parties by such a transaction without their consent. The money was paid, not on his subscription, but on that of Zimmerman. The principles already stated fully cover this exception.

The reference in *Gilmore v. Smathers, supra,* to the excessive subscription of stock did not apply to its legal effect with regard to creditors, or nonassenting stockholders, but was merely made for the purpose, as appears, of aiding the view then taken by the Court, that a payment was intended, and not two subscriptions, as there would hardly be a subscription in excess of the limit already fixed, unless it had been authorized. An apparent subscription above the normal limit would, therefore, be a circumstance tending to show that it was not really one and not intended as a new subscription, or as an addition to the stock, but stood for something else and represented one already made.

The application for a jury to try the issue framed by S. F. Vance is disallowed. He did not except to the reference, or otherwise save his right to a jury. *Driller Co. v. Worth,* 117 N. C., 515; *Ogden v. Land Co.,* 146 N. C., 443.

There were numerous assignments of error by S. F. Vance and T. A. Butner, many of them substantially alike. We have stated the general principles which govern them, and they were all overruled, except the one to the refusal of the court to allow, as a payment on the subscrip-

tion of 144 shares of stock ($3,600), the amount actually paid in on the list, as found by the referee, which refusal was based on the alleged incompetency of the evidence. This assignment is sustained, and the judgment will be modified accordingly, the costs of this Court to be taxed one-half against the plaintiff and the other half against the defendants jointly.

Error.

Cited: Bassett v. Cooperage Co., 188 N.C. 513; *Redrying Co. v. Gurley*, 197 N.C. 61; *Thompson v. Shepherd*, 203 N.C. 314; *Hood, Comr. of Banks, v. Trust Co.*, 209 N.C. 376; *Bartlett v. Hopkins*, 235 N.C. 167, 168.

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(515)

CITY OF CHARLOTTE v. JOHN B. ALEXANDER.

(Filed 16 May, 1917.)

1. Municipal Corporations—Minutes — Contracts — Statutes — Parol Evidence.

A contract made by a municipality and the abutting owners on its street, respecting an improvement of the street, does not require, for its validity, that it be entered in the minutes of the meeting of the duly constituted authorities, acting in behalf of the municipality, in the absence of statutory provision requiring it, and may be shown by parol evidence.

2. Statute of Frauds—Municipal Corporations — Street Improvements — Promise—Direct Obligation—Consideration.

Where a statute prohibits a municipality from assessing the lands of adjoining owners upon a street exceeding 20 per cent of their value for its improvement, and the requisite number of such owners appear before the proper authorities at their regular meeting and propose that the street be improved at a cost beyond the limit imposed, the same to be assessed against their lands, the spokesman promising to obtain a written waiver of their statutory right from the other owners and deliver them to the city, and in consequence the proposition is accepted and the improvement made: *Held*, the promise made by the spokesman created a direct obligation upon himself, founded upon the benefits to be received by him, and is not a promise to answer for the debt or default of another, falling within the meaning of the statute of frauds requiring a writing, etc.

3. Same—Benefits—Estoppel.

Abutting property owners who have contracted with a municipality that the latter exceed its statutory authority in assessing their lands beyond a certain per cent of their value for street improvements, and to give it a written waiver of such right, are estopped to deny the validity of the contract by accepting its benefits, and the "waivers," when obtained, are enforceable by the municipality.

CHARLOTTE *v.* ALEXANDER.

CIVIL ACTION, tried at November Term, 1916, of MECKLENBURG, before *Justice, J.* At the conclusion of plaintiff's evidence the court sustained motion to nonsuit. Plaintiff excepted and appealed.

M. L. Ritch, C. D. Taliaferro, J. W. Keerans for plaintiff.
Cansler & Cansler for defendant.

BROWN, J. The plaintiff sues to compel defendant to deliver to it certain so-called waivers for street improvements in possession of defendant and to recover $7,504.83 for street paving assessments on account of the loss sustained by it, caused by the failure of the defendant, in violation of his promise, to procure and deliver to it agreements from all owners having property abutting on certain streets improved by the plaintiff, waiving the 20 per cent clause in the city charter and
(516) consenting to pay the actual cost incurred by the city in improving said streets; the judgment to be discharged upon the defendant procuring said agreements, without conditions or restrictions, duly executed, and delivery over to the plaintiff, or the payment of said assessments by the property owners.

It appears in the pleadings and evidence that the city of Charlotte had authority, upon petitions of citizens owning more than one-half of the frontage abutting on certain streets (including those in controversy) to adopt a system of laying out streets, etc., for permanent improvement, and equalize the assessments on the real estate to pay the cost thereof, as might be just and proper, provided that such assessments should not exceed the amount of special benefits to or enhancement in value of said property by reason of said improvements, or 20 per cent of the assessed taxable value thereof.

That certain citizens, including the defendant, owning the requisite frontage abutting on the four streets in controversy, presented petitions to the board of aldermen in March, 1912, asking that said streets be improved; that the defendant was especially interested therein, owning property abutting on three of same. That in April, 1912, the board passed an ordinance declaring said streets permanent improvement districts; that nothing whatever was done by the plaintiff towards improving said streets until after 27 March, 1913; that on this date the defendant and other citizens owning property abutting on said streets appeared before the board of aldermen, the defendant acting as spokesman, for the purpose of inducing the board to pave said streets.

The plaintiff offered evidence and proposed to prove that "at a meeting of the board of aldermen on 27 March, 1913, the defendant and other citizens interested in said streets appeared at a regular meeting of said board and were informed by the latter that on account of the cost

to improve said streets exceeding 20 per cent of the assessed taxable value thereof, as provided by the city charter (ch. 251, Private Laws 1911, sec. 7) the streets could not be improved by the city unless agreements were obtained from all property owners abutting on said streets waiving the 20 per cent clause and agreeing to pay the actual cost for the work; that upon such statement the defendant, as spokesman for the petitioners, then and there at said meeting promised and agreed that if the said streets were ordered to be paved and the work done by the city he, personally, would guarantee to secure such agreements or waivers from all the property owners and deliver over to the city; that the plaintiff acted and relied upon said promise and at said meeting passed a resolution or ordinance directing said streets to be paved, and they were so paved; that subsequently notice was given and assessments were made charging property owners with the actual cost of the work; that the contract was let and bonds issued; that defendant was (517) especially interested in having said streets improved; that he was the owner of property abutting on three of said streets; that but for his promise and guaranty said streets would not have been improved."

This evidence was excluded by the court, and plaintiff excepted.

It appears that a waiver is a paper-writing duly executed by the property owner whereby he waives the limitation of 20 per cent in the city charter and approves and confirms the full assessment, being the cost of the improvement, and covenants and agrees to pay the same.

It is admitted that the offer of defendant and the substance of what transpired between the aldermen and defendant was not taken down and entered on the minutes of the board. Plaintiff proposed to prove the transaction by the city clerk and others present at the meeting. So far as the record in this case discloses there is nothing in the city charter requiring all such matters or transactions to be entered of record and making the minutes the only evidence.

We are of opinion that the court erred in excluding the evidence. It may turn out when the evidence is taken that the whole thing was mere declamation and did not amount to a contract, but we must consider it as it is presented in the offer to prove.

1. It is competent to prove such a contract by parol evidence. Neither plaintiff nor defendant will be prejudiced by failure of the clerk to enter it upon the minutes of the corporation.

In 2 Dillon Mun. Corp. (5 Ed.), sec. 557, it is said: "Parol evidence to show facts omitted to be stated upon the record is receivable unless the law expressly and imperatively requires all matters to appear of record and makes the record the only evidence. Thus, in a well considered case in the Supreme Court of the United States it was held that the acts of a corporation might be proved otherwise than by its records

or some written document, even although it was its duty to keep a fair and regular record of its proceedings."

In *Bank of U. S. v. Dandridge,* 12 Wheat. (U. S.), 64, *Judge Story* says: "Would the omission of the corporation to record its own doings have prejudiced the rights of the party relying upon the good faith of an actual vote of the corporation? If such omission would not be fatal to the plaintiff in suits against the corporation (as in our opinion it would not be), it establishes the fact that acts of the corporation, not recorded, may be established by parol proofs, and, of course, by presumptive proofs; in reason and justice, there does not seem any solid ground why a corporation may not, in case of the omission of its officers to preserve a written record, give such proofs to support its rights as would be admissible in suits against it to support adverse rights. The true question in such case would seem to be, not which party was plaintiff or defendant, but whether the evidence was the best the (518) nature of the case admitted of, and left nothing behind in the possession or control of the party higher than secondary evidence. We do not admit, as a general proposition, that the acts of a corporation are invalid merely from an omission to have them reduced to writing, unless the statute creating it makes such writing indispensable as evidence or gives to them an obligatory force."

The same rule is recognized in *U. S. v. Filleborn,* 7 Pet. (U. S.), 28.

In 8 Enc. Ev., 833, it is said: "Where it is sought to prove a contract existing between a municipal corporation and a private person, the fact that the municipal authorities have failed to keep proper record does not prevent proof of such contract by any competent evidence, notwithstanding the fact that the law requires them to keep a complete record of their official proceedings in a proper book."

The authorities seem to be in full accord to the effect that in the absence of a statutory requirement that a record must be made of a contract in order to render the same valid and binding, where a contract or agreement within their jurisdiction has been entered into by a municipal board and has been executed, the same may be established by parol testimony, although there may be no record in the minutes of the board.

2. The contract of defendant need not be in writing, as it is an original promise and does not come within the statute of frauds requiring a promise to pay the debt of another to be in writing. The statute does not apply to original promises or undertakings, though the benefit accrues to another than the promisor. *Hospital v. Hobbs,* 153 N. C., 188.

In *Peele v. Powell,* 156 N. C., 557-8, the Court said: "The obligation is original if made at the time or before the debt is created, and the credit is given solely to the promisor, when the promise is for the bene-

fit of the promisor and he has a personal immediate and pecuniary benefit in the transactions, etc."

This rule is recognized and approved in *Gainesville Hosp. Assn. v. R. R.*, 157 N. C., 461-2; *Whitehurst v. Padget*, 157 N. C., 424-7; *Craig v. Stewart*, 163 N. C., 536; *Handle Co. v. Plumbing Co.*, 171 N. C., 503.

The defendant in making such promise and guaranty was acting for himself as much as any one else. His promise was an original obligation for value received by him from the city, to wit, the performing of the work on the streets in which he was vitally and personally interested. Therefore, he is liable upon his promise to the city, even though there was no writing.

The streets would not have been paved but for the promise and guarantee of defendant to secure waivers and deliver them to plaintiff, upon which promise plaintiff relied. Although plaintiff (519) had the authority to pave the streets, it could not be compelled to do so, as the 20 per cent clause is the limit of assessments fixed by the charter, beyond which the plaintiff could not go except by the consent of the property owners. *Charlotte v. Brown*, 165 N. C., 435.

3. The waivers (copies of which are set out in the record) are not *nudum pactum*, but are valid and enforcible by the plaintiff when duly executed and delivered.

There is no valid reason why citizens who wish to have their property improved by street paving may not expressly waive the charter restriction and contract with the city to pay the actual cost. There is nothing against public policy in such agreement. On the contrary, it conduces to the general improvement of the municipality. When such contracts are entered into with full knowledge by the property owner the law will not permit him to repudiate it after the work is done and he has received the benefits. This principle is approved by numerous authorities.

The Supreme Court of Arkansas says, 171 S. W., 108: "Where a property owner who was interested in the construction of a proposed improvement, the cost of which exceeds the statutory limit, executed an agreement obligating herself to pay the assessments, which would be uncollectible because in excess of the statutory limit, in consideration of a bonding company buying the bonds for the improvement, she is estopped thereafter to set up the invalidity of the assessments or of the improvement districts levying them." See, also, *Richcreek v. Moorman*, 42 N. E., 943 (Indiana); *Dunkirk v. Zehner*, 74 N. E. (Indiana).

In *McKnight v. Pittsburg*, 91 Pa. State, 273-6, the Court said: "The appellant made no objection to the grade or to the work as it progressed. The work was undertaken at her instance, among others, and for the benefit of her property, and her agents aided the contractor in hauling and furnishing material. *Held*, that she was estopped from controvert-

ing the acts of the city and its contractor, even though the contract under which the grading was done was void for want of power of a city to execute it."

"When abutting property owners signed a petition for an improvement, agreeing to pay such assessment irrespective of the number of owners of property signing the petition, they are estopped from setting up the constitutional limitation of special benefits." *Thornton v. Cincinnati,* 260 Ohio Cir. Ct., 33; *City of Belfast v. Water Co.,* 98 Atl., 738, is a recent case containing a well considered opinion of the Supreme Court of Maine, where the authorities are collected and reviewed.

(520) In our opinion, it is both good morals and sound law to hold that when a person has accepted the benefits of a contract, not *contra bonos mores,* he is estopped to question the validity of it.

The judgment of nonsuit is set aside.

Reversed.

HOKE, J., concurs in result.

Cited: Hearne v. Comrs., 188 N.C. 49; *Oliver v. Highway Com.,* 194 N.C. 384; *In re Assessment v. R. R.,* 196 N.C. 762; *Jones v. Durham,* 197 N.C. 133; *Wake Forest v. Holding,* 206 N.C. 428; *Ins. Co. v. Charlotte,* 213 N.C. 499, 500.

W. P. HANNON, ADMINISTRATOR, v. SOUTHERN POWER COMPANY ET AL.

(Filed 16 May, 1917.)

1. Venue—Nonresidents—Municipal Corporations—Executors and Administrators—Domicile—Statutes.

Where the plaintiff sues a nonresident corporation and a municipal corporation jointly for the wrongful death of his intestate in the county in which the intestate died domiciled, but at the time of commencing the action, by change made in the county line, the place of the domicile was in an adjoining county, the question of venue is ordinarily governed by the *locus* at the commencement of the action. Revisal, sec. 421.

2. Executors and Administrators—Letters—Proper County—Statutes.

Semble, Revisal, sec. 16 (1), requiring letters of administration to be taken out in the county of the death of deceased, means such county wherein this locality is situate at the time of taking out the letters, when by statute such change has been made.

3. Executors and Administrators—Venue—Domicile of Intestate.

Where an administrator sues to recover for the death of his intestate transpiring in a different county from that of his own residence, he may

bring his action in the latter county; though it is otherwise when the personal representative is the party defendant.

4. Venue—Foreign Corporations—Executors and Administrators—Wrongful Death—Statutes.

A foreign corporation may be sued by an administrator for the wrongful death of his intestate either in the county wherein the cause of action arose or that of the personal representative of the deceased. Revisal, sec. 423.

5. Venue—Municipal Corporations—Officials—Wrongful Death—Executors and Administrators.

The requirement of Revisal, sec. 421, that action against a municipal officer be brought in the county of the municipality, applies to actions on official bonds, and not against municipal corporations except as falling under Revisal, sec. 420 (2), which is inapplicable to actions by an administrator to recover for the wrongful death of his intestate.

6. Venue—Statutes, General—Special — Exceptions — Municipal Corporations—Executors and Administrators.

Revisal, sec. 420, providing, among other things, that an action against a public officer be brought in the county wherein the cause of action arose, subject to the power of the court to change the place of trial, Revisal, 425, is general in its terms, and Revisal, sec. 424, should be construed as an exception thereto, allowing an administrator to sue at his election in his own county for the wrongful death of his intestate.

7. Venue—Public Policy—Statutes—Conflicting Laws.

As a general rule, when not prohibited by public policy expressed by statute, a resident party seeking the aid of our courts may select the forum; and this should prevail when the statutory provisions respecting the venue are conflicting.

APPEAL by defendant from *Cline, J.*, at March Term, 1917, of (521) GASTON.

This action was begun in *Gaston* against the Southern Power Company and the town of Kings Mountain as joint defendants, to recover damages for the wrongful death of plaintiff's intestate, which occurred from coming in contact with a live wire. The Southern Power Company is a nonresident of this State and the town of Kings Mountain is a municipal corporation located in *Cleveland*. The plaintiff qualified as administrator of his intestate, who was a resident in territory which at his death lay in Gaston, but "at the commencement of the action" lay in Cleveland by reason of a change in the county boundary.

At March Term, 1917, of Gaston, which was the appearance term, the defendant the town of Kings Mountain, in due time and before answering, filed a written motion to remove this cause to Cleveland for trial. The other defendant objected to the removal of this cause to

Cleveland. The court overruled this motion to remove, and the town of Kings Mountain appealed.

Gwynn & Hannon and Mangum & Woltz for plaintiff.
O. Max Gardner, J. R. Davis, and Ryburn & Hoey for defendant.

CLARK, C. J. The death of the plaintiff's intestate, 16 August, 1916, was caused by contact with a live wire in that part of the town of Kings Mountain which at that time lay in the county of Gaston, but when this action was instituted on 6 February, 1917, the Legislature had changed the county line so that all the town lay in Cleveland. The question of venue is governed by the *locus* "at the commencement of the action." Revisal, 424.

Letters of administration should be taken out in the county where the deceased was domiciled at the time of his death. Revisal, 16 (1). We are inclined to think that this means in the county in which the
(522) locality of his death is situated at the time letters of administration are applied for, for that is the county which, at that time, has jurisdiction to issue the letters. In this case the plaintiff has taken out letters of administration both in Gaston and in Cleveland. However, a personal representative can bring an action at his election in the county in which he personally resides, though it is otherwise when he is sued in that capacity. *Whitford v. Ins. Co.*, 156 N. C., 42; *Smith v. Patterson*, 159 N. C., 138.

Revisal, 423, authorizes an action against a foreign corporation, either in the county in which the cause of action arose (which here is Cleveland, at the time of the commencement of the action) or in the county in which the plaintiff resides (which here is Gaston).

The defendant, however, contends that when the action is against a municipal officer the action must be brought, under Revisal, 421, in the county of Cleveland, but that section applies only in actions upon official bonds, and not against municipal corporations as such, except in cases falling under Revisal, 420 (2), which is not the case here.

The defendant, therefore, has no ground on which to base his motion to remove, *Cecil v. High Point*, 165 N. C., 431, unless Revisal, 420, controls, which provides that the cause "must be tried in the county where the cause of action arose," subject to the power of the court to change the place of trial, under Revisal, 425.

It is true that here the "cause of action arose" in a locality which "at the beginning of this action" was situated in the county of Cleveland. But we think that Revisal, 420, being a general provision the provision in 424 giving the plaintiff the right to select the forum must be "construed as an exception to its provisions." *Cecil v. High Point*,

165 N. C., 431, in which the matter is fully discussed and we think properly settled. Otherwise the two provisions are irreconcilable. We think the later statute, 424, is an exception to the general rule laid down in Revisal, 420.

Unless the sections subsequent to 420 are intended as exceptions to the general rule prescribed in Revisal, 420, they would be nugatory in all cases of conflict. Besides, it is a general rule as to venue that unless clearly denied by public policy expressed by statute, the party seeking the aid of the court, the plaintiff, should select the forum. This is founded upon the reason of the thing and should prevail when, as here, there is an apparent conflict in the provisions of the statute.

The denial of the motion to remove to Cleveland, as a matter of right, is

Affirmed.

Cited: Latham v. Latham, 178 N.C. 14; *Young v. Davis,* 182 N.C. 203; *Vaughan v. Fallin,* 183 N.C. 322; *Montford v. Simmons,* 193 N.C. 325; *Palmer v. Lowe,* 194 N.C. 707; *Lawson v. Langley,* 211 N.C. 530; *Godfrey v. Power Co.,* 223 N.C. 650; *Godfrey v. Power Co.,* 224 N.C. 660; *Wiggins v. Trust Co.,* 232 N.C. 396.

(523)

LONG CREEK DRAINAGE DISTRICT ET ALS. v. W. F. HUFFSTETLER.

(Filed 16 May, 1917.)

1. Drainage Districts—Constitutional Law—Assessments — Appeal — Due Process.

Where a statute relating to a drainage district provides for the assessment on the lands therein, and an appeal therefrom by the owner within ten days after the amount has been fixed, does not deprive the owner of "due process" guaranteed by the Constitution.

2. Drainage Districts—Assessments — Liens — Personal Liability — Judgments—Limitation of Actions.

An assessment upon the lands of an owner within a statutory drainage district, made only a lien upon the lands, does not impose a personal liability on the owner; and where the statute declares the lien "as a special tax on the land," the action provided by the statute to collect the assessment is as one upon a judgment to foreclose a lien, Revisal, sec. 2866, and is not barred within ten years.

CIVIL ACTION, tried before *Justice, J.,* at December Term, 1916, of GASTON.

This is an action commenced in the Superior Court to enforce the collection of $192.40 assessed against the land of the defendant for drainage purposes by the commissioners of the Long Creek Drainage District.

The district was created under Chapter 287 of the Public-Local Laws of 1911, which defines the district and the powers of the commissioners. Among other things, it empowers the commissioners to assess the lands in the district according to benefits, and that after such assessment that notice be given to each landowner, who shall have the right within ten days thereafter to appeal to the Superior Court of Gaston County from the assessment and classification of his lands.

It is also provided in section 8 as follows:

"Sec. 8. The said board of commissioners shall have power either to prosecute said work to completion and assess to each landowner his proportion of the actual cost thereof, or to estimate as accurately as may be the probable cost of such work, and assess to each landowner his proportion of such probable cost, to be collected during the progress of said work; and, if such estimate shall be found to be insufficient to pay the cost of such work in full, to make such additional assessment from time to time as shall be necessary to raise the full amount of the cost of such work. And the chairman of the said board of commissioners shall have power, and it shall be his duty, to institute an action in the Superior Court of Gaston County in the name of the board of commissioners against any landowner who fails or refuses to pay (524) his assessment, and shall prosecute same to judgment, and the process of the collection of such judgments shall be as provided by law in civil actions; and all assessments made hereunder are hereby declared to be a lien as for special tax upon the land of the landowner within said district, to be due and payable within (30) days after notice thereof in writing has been given by the said board of commissioners to said landowner."

The commissioners made the assessment in accordance with the provisions of the act in November, 1911, and assessed against the land of the defendant $192.40, which was duly entered upon the record kept by the commissioners, and of which due notice was given to the defendant. The defendant did not appeal from the assessment.

His Honor instructed the jury to answer the issue in favor of the plaintiff, and the defendant excepted, contending:

1. That the act under which the plaintiff proceeded was unconstitutional.

2. That the amount involved being less than $200, the Superior Court had no jurisdiction.

3. That the action is to recover a liability created by statute and is barred within three years.

His Honor held against the contention of the defendants and entered judgment in favor of the plaintiff, and the defendants excepted and appealed.

S. J. Durham and Mangum & Woltz for plaintiff.
George W. Wilson and A. C. Jones for defendant.

ALLEN, J. The questions raised by this appeal are settled against the defendant by *Canal Co. v. Whitley,* 172 N. C., 100, in which it was held that a statute in its essential features like the one before us was constitutional, and that the right to appeal to the Superior Court from the assessment levied constituted "due process."

The same case also decided that the assessment "is not a debt and does not arise *ex contractu.* It is not a personal liability of the landowner to be collected by execution, as against which he would be entitled to a homestead. It is a statutory charge upon the land, and must be collected by proceedings *in rem* in a court having equitable jurisdiction, unless some other method is provided by the statute. If the land benefited is insufficient in value to pay the assessment in full, the remainder cannot be collected out of the other estate of the landowner."

The assessment roll when made up and not appealed from is in effect a judgment, which is declared by the statute "to be a lien as for special tax upon the land of the landowner," and the action is one (525) upon a judgment to foreclose a lien, analogous to the remedy given for the collection of taxes. Revisal, sec. 2866.

If so, the action is not barred, as it falls within the statute of limitations barring actions upon judgments within ten years, and the statute providing that an action on a liability created by statute shall be brought within three years has no application.

It was, however, erroneous to render a personal judgment against the defendant, as the land is the debtor, and the judgment will be modified by striking out the judgment against the defendant and by directing that the land be sold to pay the assessment, with interest thereon, and costs.

The costs of this Court will be paid equally by the plaintiff and the defendant.

Modified and affirmed.

Cited: Commission v. Epley, 190 N.C. 673; *High Point v. Clinard,* 204 N.C. 151; *Wilkinson v. Boomer,* 217 N.C. 221; *Charlotte v. Kavanaugh,* 221 N.C. 267; *Nesbitt v. Kafer,* 222 N.C. 52; *Raleigh v. Bank,*

223 N.C. 289, 292, 303, 307, 308, 313; *Apex v. Templeton*, 223 N.C. 647.

FLORENCE C. SATTERWHITE AND HUSBAND, PRESTON SATTERWHITE, v. WILLIAM L. GALLAGHER.

(Filed 16 May, 1917.)

1. Husband and Wife—Deeds and Conveyances—Contracts to Convey—Separate Examination.

A contract to convey lands of a married woman cannot be specifically enforced against her unless her privy examination has been taken to the instrument, though, on breach established, an action for damages may lie.

2. Equity—Cloud on Title—Suits to Remove—Statutes.

Our statute has enlarged and broadened the old doctrine of permitting suit to remove a cloud upon title to lands, and affords the remedy wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner, whether by way of claim of an enforceable parol trust, leases not required to be in writing, existent records or written instruments, that are reasonably calculated to burden and embarrass such owner in the full enjoyment or disposition of his property at a fair market value; the statute affording a remedy by disclaimer when the party does not in fact claim the "adverse interest" which is alleged to be a cloud on the title of the true owner. Revisal, sec. 1589; Public Laws 1903, ch. 763.

3. Same—Husband and Wife—Separate Examination—Registration.

A contract to convey the lands of the wife, signed by her and her husband, but without having taken her privy examination, when recorded is a cloud upon her title to the lands and subject to her suit to remove the same, as such, within the intent and meaning of our statute, Revisal, sec. 1589; though she be and remain in possession of the land.

CLARK, C. J., dissents.

(526) CIVIL ACTION, heard on demurrer before *Justice, J.*, at March Term, 1917, of RANDOLPH.

The action was instituted by *feme* plaintiff and her husband against defendant, and the complaint alleged in effect that she was the owner and in possession of 2,400 acres of land in Randolph County, N. C., known as Fairview Kennels; that she had entered into a contract to convey the same to defendant at the contract price of $180,000, in partial payments, and she and her husband had signed and delivered a written agreement to that effect, witnessed by one J. M. Millikan, and that defendant, asserting an interest in said property adverse to plain-

tiff's ownership, had caused said instrument to be proved by said witness and put on the registry of Randolph County, and that said *feme* plaintiff was then and is now a married woman, and her privy examination of said contract had never been taken as required by law, and, on the facts the contract in question constituted a cloud on her title or an adverse claim to her property within the meaning of our statutes controlling the matter.

The defendant, having first answered, asserting his rights under the contract and demanding damages for a breach thereof, was afterwards allowed to withdraw the said counterclaim without prejudice and enter a demurrer. There was judgment sustaining the demurrer and dismissing the suit on the ground that as specific performance of the contract could not be enforced no cause of action was stated; and plaintiff, having duly excepted, appealed.

Brittain & Brittain for plaintiff.
Brooks, Sapp & Williams for defendant.

HOKE, J., after stating the case: We have held, in *Warren v. Dail*, 170 N. C., 406, that under our constitution and statutes applicable, a contract of this character could not be specifically enforced against a *feme* covert for lack of her privy examination, though, on breach established, she might be subjected to an action for damages, and the question is whether, under the conditions presented, the plaintiff, owner and in possession of the property, can proceed to have defendant's claim inquired into and determined under and by virtue of section 1589, Revisal, as an "adverse claim" within the intent and meaning of the law.

The old action to remove a cloud from title was an equity suit given the owner to enable him to relieve his property from an existent claim or encumbrance wrongfully set up against it when conditions were such that an action at law would not lie; and it was usually required that in order to maintain it the owner should be in possession or control of the property and that the claim in question should be apparently good, and requiring the presentation of evidence to upset it. Some of the courts more than others seemed at times reluctant to permit (527) the use of this remedy, or rather they were very insistent that the limitations they had placed upon it should be closely adhered to, and there were decisions on the subject, some of them in this jurisdiction, which, while they were probably in accord with precedent, were considered too restrictive on the rights of the owner in the use and enjoyment of his property, amounting at times to a denial of relief to which he was justly entitled. Referring to the unfortunate tendency of some of these rulings, Mr. Pomeroy, in his work on Equity Jurisprudence,

makes comment as follows: "In the absence of statutes giving prima facie validity to deeds or other proceedings, the following doctrine seems to be sustained by the great majority of the American decisions: Where the instrument or proceeding constituting the alleged cloud is absolutely void on its face, so that no extrinsic evidence is necessary to show its invalidity, and where the instrument or proceeding is not thus void on its face, but the party claiming under it, in order to enforce it, must necessarily offer evidence which will inevitably show its invalidity and destroy its efficacy, in each of these cases the court will not exercise its jurisdiction either to restrain or to remove a cloud, for the assumed reason that there is no cloud. While this doctrine may be settled by the weight of authority, I must express the opinion that it often operates to produce a denial of justice. It leads to the strange scene, almost daily in the courts, of defendants urging that the instruments under which they claim are void, and, therefore, that they ought to be permitted to stand unmolested, and of judges deciding that the court cannot interfere because the deed or other instrument is void, while from a business point of view every intelligent person knows that the instrument is a serious injury to the plaintiff's title, greatly depreciating its market value, and the judge himself who repeats the rule would neither buy the property while thus affected nor loan a dollar upon its security." 3 Pomeroy, sec. 1399.

To prevent these untoward results and with a view of enlarging the scope of the remedy in proceedings of this character, the Legislature, in 1893, chapter 6, enacted a statute providing (sec. 1) that an action may be brought by any person against another who claims an interest in real property adverse to him, for the purpose of determining such adverse claims. Section 2: That if defendant in such action disclaim in his answer any interest or estate in the property or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs," etc.

The remedy was further enlarged by chapter 763, Laws 1903, being extended to include the lien from docketed judgments, the entire law applicable being fully expressed in Pell's Revisal, sec. 1589.

(528) Having reference to the broad and inclusive language of the statute, the mischief complained of and the purpose sought to be accomplished, we are of opinion that the law, as its terms clearly import, was designed and intended to afford a remedy wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another wrongfully sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner and which is reasonably calculated to burden and embarrass such owner in the full and proper enjoyment of his proprie-

tary rights, including the right to dispose of the same at its fair market value. And it should and does extend to such adverse and wrongful claims, whether in writing or parol, whenever a claim by parol, if established, could create an interest or estate in the property, as in case of a parol trust or a lease not required to be in writing. And it should be allowed, too, when existent records or written instruments reasonably present such a claim, the statute preventing all hardship in such cases by its provision that if the holder does not insist on the same in his answer or does not answer at all, the plaintiff shall pay the costs.

The interpretation we have given is very clearly indicated, if it was not so expressly held, in *Rumbo v. Mfg. Co.*, 129 N. C., 9, where an action of this sort was sustained as against a wrongful claim, adverse to the true owner, the claim being made under a lease or written instrument which was void under our decisions. Referring to the change wrought by the statute, the present *Chief Justice,* delivering the opinion, said: "The defendant strenuously argued the equitable doctrines formerly applicable, but we need not discuss their application here, for this is not an equitable proceeding. It is an action given by statute. Laws 1893, ch. 6. It was because the General Assembly thought the equitable doctrines (as laid down in *Busbee v. Macey,* 85 N. C., 329, and *Busbee v. Lewis, ibid.,* 332, and like cases) inconvenient or unjust that the above act of 1893 was passed. If defendant had, as permitted under section 2 of said act, disclaimed any interest in the property, judgment could not have gone against him for costs. But having asserted his claim and lost, he cannot now plead the invalidity of his own claim as ground to dismiss the action."

Considering the record in view of the statute now controlling the matter and its proper construction, it is clear, we think, that the plaintiff is entitled to relief, it appearing that she is the owner and in possession of a valuable tract of land and defendant is asserting an invalid claim therein under a written instrument which has been put on the registry of the county and purports to create an interest in her property in his favor. It is a claim that would naturally arouse serious inquiry and is well calculated to hinder plaintiff in any effort to dispose of her property at its real value. As a matter of fact, it (529) does not appear on the face of the instrument that the plaintiff is a married woman, and under well considered decisions, both on the statute and under former decisions, plaintiff should have judgment relieving her property of such a claim. *Kinsman v. Spokane,* 20 Wash., 118; *Stoddard v. Burge,* 53 Cal., 394; *Johnston v. Cooper,* 10 Tenn., 524; *Waldron v. Harvey,* 54 W. Va., 609; *Rector, Church Wardens, and Vestrymen of St. Stephens Protestant Episcopal Church of the City of*

N. Y. v. Rector, Church Wardens, and Vestrymen of the Church of Transfiguration of the City of N. Y., 201 N. Y., 1.

There is error, and this will be certified, that the demurrer be overruled and defendant allowed to answer over if so advised.

Reversed.

CLARK, C. J., dissenting: We held in *Warren v. Dail*, 170 N. C., 406, that a married woman can make any contract that she could make if unmarried, and make her property, real and personal, liable, without privy examination and without charging the same upon any specific property. If this were not so, then it would have been necessary to have held the "Martin" Act, Laws 1911, ch. 109, null and void, though in full conformity with the Constitution of 1868, which emancipated married women as to property rights, making them *sui juris* and providing that as to their property, whether owned by them at the time of marriage or acquired thereafter in any manner, they should have as full control "as if they were unmarried," save only that the husband's assent is required as to conveyances. *Walker v. Long*, 109 N. C., 510.

This Court has always held that the husband's witnessing a conveyance made by his wife is a sufficient "assent," *Jennings v. Hinton*, 126 N. C., 48; or writing a letter, *Brinkley v. Ballance, ib.*, 393; or signing the deed without express assent, *Jones v. Craigmiles*, 114 N. C., 613, and many other cases. In the present case the husband fully concurred in the paper by signing it, and it having been recorded, the defendant is entitled to specific performance and the plaintiffs are not entitled to have such contract canceled as a cloud upon title.

The requirement of "privy examination" cannot be added to the constitutional provision which authorizes a married woman to convey subject (as said in the concurring opinion in *Warren v. Dail*, 170 N. C., at pp. 413-415) to only one restriction, "the written assent" of the husband, for no other clog or requirement can be added.

The privy examination was imposed at a time when married women had no such right, and was probably inadvertently brought forward in the codifications of the laws. Though copied in the "Martin" Act, it should be held subordinate to the change in the Constitution in regard to the freedom of married women to convey their own property
(530) with merely "the written assent" of the husband. Hence the privy examination can be required only when the wife joins in the conveyance by the husband of his own property, by way of release of her contingent right of dower, which is given and can be taken away by the Legislature. Even in that case, it is useless, as the husband in fact selects the justice of the peace. Its retention, after its abolition in England and all our sister States (except four) is nothing more than

a curious instance of mental inertia except to those who deem it little short of a standing insult to all husbands and wives, based upon the legal assumption thus made that husbands, in this State, will influence their wives by improper means, or cheat or bully them, and that wives by such means can be made to assent to conveyances unless protected by a magistrate selected by the husband.

The aggregate expense and annoyance of privy examinations, useless as they are, is no small consideration.

The Constitution requires privy examination of the wife only when she joins in the conveyance of the husband's "allotted" homestead, which is an implied abolition of it in all other cases: *Inclusio unius, exclusio alterius.*

The deed of a married woman, without privy examination, is color of title, *Perry v. Perry,* 99 N. C., 270. As, in this case, the husband joined in the contract to convey, it is a valid contract, and the court below, it seems to me, properly held that the plaintiffs had not stated a cause of action for cancellation.

Cited: Power Co. v. Power Co., 175 N.C. 684; *Byrd v. Byrd,* 176 N.C. 115; *Loven v. Roper,* 178 N.C. 582; *Bank v. Sumner,* 187 N.C. 764; *Hardware Co. v. Cotton Co.,* 188 N.C. 445; *Plotkin v. Bank,* 188 N.C. 716; *Tise v. Hicks,* 191 N.C. 613; *Vick v. Winslow,* 209 N.C. 542; *Maynard v. Holder,* 216 N.C. 524; *Fisher v. Fisher,* 217 N.C. 74; *Ramsey v. Ramsey,* 224 N.C. 113; *Wells v. Clayton,* 236 N.C. 107; *Barbee v. Edwards,* 238 N.C. 221; *Pressly v. Walker,* 238 N.C. 734.

NANCY EASELEY v. GILES EASELEY.

(Filed 16 May, 1917.)

Marriage and Divorce—Alimony—Findings—Appeal and Error—Statutes.

To sustain on appeal an order of the trial judge allowing alimony to the wife *pendente lite,* in an action for divorce *a mensa,* it is necessary for the judge to have found the facts, upon conflicting evidence, upon which he had based his order; and his finding only that the plaintiff had made out a prima facie case of abandonment is insufficient. Revisal, sec. 1566.

CIVIL ACTION to obtain a divorce from bed and board on account of abandonment, heard on motion for alimony *pendente lite,* before *Ferguson, J.,* at December Term, 1916, of BURKE.

There was judgment allowing alimony, and defendant, having duly excepted, appealed.

(531) *No counsel for plaintiff.*
Avery & Huffman for defendant.

HOKE, J. The complaint, properly verified, seems to contain facts sufficient to justify a decree on the ground claimed, and on motion for alimony *pendente lite* there were supporting affidavits on the part of plaintiff and very full affidavits in denial on the part of the defendant. After argument of counsel and on consideration of the affidavits, there was decree allowing alimony, the court adjudging that the "plaintiff has made out a prima facie case on the issue of abandonment." This statement contained in his Honor's judgment is all the finding that was made by him on the question submitted, and, in our opinion, it is entirely insufficient to sustain the order allowing alimony. The statute controlling the question, Revisal, sec. 1566, provides that on a hearing of this character alimony should be allowed when plaintiff shall, in her complaint, set forth such facts "which upon application for alimony shall be found by the judge to be true and to entitle her to the relief demanded in the complaint," and in numerous decisions construing the statute it has been held that the judge must find the essential and issuable facts and set them out in detail so that this Court can determine from the facts as found whether the order for alimony can be upheld as the correct legal conclusion. *Garsed v. Garsed,* 170 N. C., 672; *Moody v. Moody,* 118 N. C., 926; *Lassiter v. Lassiter,* 92 N. C., 129; *Morris v. Morris,* 89 N. C., 113. In *Moody's case* it was held: "An order allowing alimony is erroneous if made without a finding of facts by the judge." In *Lassiter v. Lassiter, supra,* it was held: "In applications for alimony *pendente lite* it is competent for the husband to controvert the allegations of the complaint by affidavit or answer, and the judge must find the facts and set them forth in the record." While these findings and the order predicated thereon are not finally conclusive on the parties nor receivable in evidence on the trial of the issues before the jury, unless modified on further notice and hearing, they are conclusive for the purposes of the motion, and, operating as they do to presently deprive a defendant of his property, they should be decided and set out in conclusive form and in such detail that the appellate court, as stated, may be able to determine whether they justify the order made. We have frequently held that the term "prima facie" is evidential and not conclusive. *Furniture Co. v. Express Co.,* 144 N. C., pp. 639-644; *Stewart v. Carpet Co.,* 138 N. C., 60; *Womble v. Grocery Co.,* 135 N. C., 474; and the findings of his Honor in the present case are defective both in failing to find and set out the relevant facts and in finding that the allegations were only prima facie established.

There is error, and this will be certified, that the judgment (532) awarding alimony be set aside and the questions and cause be proceeded with in accordance with law.

Error.

Cited: Allen v. Allen, 180 N.C. 469; *Moore v. Moore,* 185 N.C. 334; *Horton v. Horton,* 186 N.C. 333; *Price v. Price,* 188 N.C. 641; *McManus v. McManus,* 191 N.C. 742; *Goodman v. Goodman,* 201 N.C. 809; *Newell v. Newell,* 202 N.C. 255.

MAGGIE MOORE v. GENERAL ACCIDENT, FIRE, AND LIFE ASSURANCE CORPORATION, LIMITED.

(Filed 16 May, 1917.)

1. Insurance, Accident—Premiums—Payment.

A provision in a policy of accident insurance requiring prompt payment of the premiums as they fall due or that the insurer will not be liable for an injury received during a period within which the premium has not been paid, so pertains to the essence of the contract as ordinarily to require strict observance of it, unless the assurer waives compliance of the assured therewith in some recognized manner.

2. Same—Waiver.

Where the insurer has so habitually failed for such time in the past to insist upon prompt payment of the premiums of an accident insurance policy as to have misled the insured to believe that strict compliance would not be enforced, and an accident covered by the policy occurs a day after a premium has become due, which was remitted to the company on the day thereafter, stating on the check that it was for the payment of a three months period, the acceptance of the check by the insured and its premium receipt duly issued, taken in connection with the evidence of the "prior and long-continued course of dealing," is sufficient to be submitted to the jury upon the question of the waiver by the insurer of the condition stated in the policy, and to sustain a verdict in favor of the beneficiary after the death of the insured.

3. Same—Separate Benefits—Death—Notice.

Where under the provisions of a policy of accident insurance certain benefits are to be paid to the insured, with distinct provision that in case of accident resulting in death a certain sum is to be paid a beneficiary, the latter, during the lifetime of the insured, is not required to give the ten days notice of the injury which resulted in his death, but only the notice provided for from the time of the latter event; the interpretation of the policy being that the assured and the beneficiary shall each give notice of the event upon which his claim depends.

4. Same—Proof of Death—Evidence—Questions for Jury—Trials.

Where the beneficiary under an accident policy promptly notifies the insurer of the death of the insured from an accident, and of his claim under the policy, requesting the proper blanks furnished for the proof of death; and the insurer sends only a disability blank, but which the beneficiary has filled out and returned, containing the statement of the attending physician, with all necessary information, and though informed of its mistake the insurer continues therein in its correspondence, and does not send the blank applicable, the beneficiary offering at all times to supply whatever information the insurer required: *Held*, evidence sufficient of a compliance with the provision of the policy requiring notice within ten days, and the filing of process, to be submitted to the jury.

5. Insurance, Accident—Proof of Death—Stipulations as to Suit—Waiver.

Where an insurer denies all liability under its policy of accident insurance, covering the death of the insured, and refuses to proceed with the investigation respecting it, its action is a waiver of its requirements as to the proof of death and the clause in the policy forbidding the bringing of any suit upon it until after the three months from the filing of the proofs.

6. Insurance, Accident—Benefits—Independent Provisions.

Where a policy of accident insurance by its terms prohibits a recovery of the insured was not wholly and continuously disabled from the date of the accident, and there is also an independent liability created for a beneficiary in case the accident results in death, in an action upon the latter brought by the beneficiary the question of immediate, total, and continuous liability is not included, it applying only to the insured and to his life benefits.

7. Insurance, Accident—Policy Contracts—Ambiguity — Interpretation — Premiums—Payment in Advance.

A policy of accident insurance, in case of ambiguity, is construed favorably to the assured and beneficiary. Where there is evidence that the insurer has accepted payment of quarterly premiums for one year, as in this case, and there is a provision for additional benefits when premiums have been paid in advance for that time, the question of additional benefits was properly left to the jury.

8. Evidence—Witnesses—Medical Experts—Opinion — Hypothetical Questions—Evidence.

The opinion of a medical expert given upon a proper hypothetical question, based on the evidence, as to the cause of death from an injury, is competent, when material and relevant to the inquiry.

(533) CIVIL ACTION, tried before *Carter, J.*, and a jury, at Spring Term, 1917, of IREDELL.

The action was brought to recover the amount alleged by the plaintiff, the beneficiary, to be due upon a life and accident insurance policy issued to her husband, Dr. Nicholas Gibbon Moore, on 24 June, 1910. The policy insured against a total and partial loss from accident, pro-

ducing injuries and disabling the insured from pursuing his ordinary business, and it also provided for the payment of $1,000 if the accidental injuries caused his death, to be paid to the plaintiff, and, further, for an additional sum of 10 per cent of the amount due under the policy if the premiums have been paid in advance monthly or annually during a period of twelve months. The policy recites the pay- (534)
ment of the original or first premium, and provides for the payment of the following losses or indemnities:

TOTAL ACCIDENT DISABILITY.

"A. At the rate of $100 per month for a period not exceeding twenty-four consecutive months, against total loss of time resulting directly and independently of all other causes from bodily injuries effected through external, violent, or accidental means, and which wholly and continuously from date of accident disable and prevent the assured from performing every duty pertaining to any business or occupation.

PARTIAL DISABILITY.

"B. Or if such injuries shall wholly and continuously, from date of accident, disable and prevent the assured from performing one or more important daily duties pertaining to his occupation.

SPECIFIC TOTAL LOSSES.

"C. Or if any one of the following specific total losses shall result solely from the injuries described in Paragraph A within ninety days from date of accident, the company will pay in lieu of any other indemnity, for loss of life, $1,000 (the principal sum of this policy)."

The premiums were paid to 1 July, 1915, and the accident which caused the insured's death occurred on 1 or 2 July, 1915, and resulted from his falling from a scaffold while trimming a hedge. The premium due 1 July, 1915, was paid on 3 July, 1915, and the renewal receipt issued 7 July, 1915. The other material facts will be stated in the opinion.

The defendant resisted a recovery on the following grounds:

"1. That the policy sued on had lapsed, according to its terms, for nonpayment of premium at the time the injury of which it is contended the assured died was inflicted.

"2. The assured and the beneficiary are barred from recovery on account of their failure to give notice of the happening of the alleged accident in accordance with the terms of the policy contract; or, at least the recovery is limited to one-fifth the amount of the policy by reason

of the failure to give notice of the happening of the alleged accident in accordance with the terms of the policy.

"3. That the plaintiff failed to furnish to the defendant proper proofs 'affirmatively establishing the fact that the . . . death is such as comes within the provisions of the policy . . . within thirty days from the date of death,' as provided in paragraph 'n' of said policy.

(535) "4. That this suit was prematurely brought, in that the policy provides that 'No action at law or in equity shall be maintainable before three months . . . from the date on which this paragraph provides that the proofs must be furnished to the company—paragraph 'n' of the policy.

"5. That the death of the assured was not caused and did not occur in such a manner and by such means as to bring it within the terms of the policy so that the principal sum thereof became payable to the beneficiary on account thereof. The defendant contending that the death of Dr. Moore did not 'result directly and independently of all other causes from bodily injuries effected through external, violent, and accidental means, which wholly and continuously from the date of the accident disabled and prevented him from performing every duty pertaining to any business or occupation,' as provided in paragraph 'a' of the policy.

"6. That the plaintiff is not entitled to recover anything on account of the accumulation provision of the policy, for the reason that the premiums had not been paid in advance for any consecutive policy year."

The jury returned the following verdict:

1. Was the policy No. E171222 sued on in this case in full force and effect as a binding contract of insurance at the time the assured suffered the alleged injury during the afternoon of 1 July, 1915? Answer: "Yes."

2. Did the death of Dr. Moore, the assured, result directly or independently of all other causes from bodily injuries effected through external, violent, and accidental means? Answer: "Yes."

3. Did Dr. Moore, the assured, pay the premiums on the policy sued on yearly or monthly in advance for a consecutive period of twelve months; and if so, for how many consecutive periods of twelve months? Answer: "Yes; for one period."

4. In what amount, if anything, is the defendant indebted to the plaintiff? Answer: "$1,100, with interest from 1 January, 1916."

Judgment for the plaintiff was entered upon the verdict, and the defendant appealed.

Z. V. Turlington and H. P. Grier for plaintiff.

J. F. Flowers for defendant.

WALKER, J., *after stating the case:* It may be conceded at the outset that the provision as to the prompt payment of the premiums when they fall due is a valid one, and so pertains to the essence of the contract as ordinarily to require strict observance of it, unless compliance with it has been waived. Vance on Insurance, p. 213; Kerr on (536) Insurance, p. 392; *Klein v. Ins. Co.,* 104 U. S., 8; *Thompson v. Ins. Co., ibid.,* 252; *Hay v. Assn.,* 143 N. C., 257; *Clifton v. Ins. Co.,* 168 N. C., 499. This doctrine is well established. It is a very usual provision of a policy of accident insurance that it shall not become effective unless the premium is paid previous to an accident, or cover an injury received during an insurance period for which the premium has not been actually paid. 1 Corpus Juris, 409. And it is true that the insured is charged with notice of the terms of the policy affecting his rights under it, and, among them, is the one as to the payment of premiums. *Matthews v. Travelers Assn.,* 144 Pac., 85. But this provision, as well as others, may be waived, or the conduct of the company in its dealings with the insured may prevent it from insisting upon a strict compliance, and this by equitable estoppel.

The policy provides that the company shall not be liable thereunder, if it has lapsed by nonpayment of premium, for any accidental injury happening between the date of such expiration and 12 o'clock noon of the day following the date of the renewal payment. But in this case the jury have found by the verdict, upon sufficient evidence, that the policy was "in full force and effect as a binding contract of insurance at the time that the insured suffered the alleged injury during the afternoon of 1 July, 1915." This verdict was based upon testimony from which the jury might well infer that the defendant had waived the slight deviation of the payment from the time when it was due by the terms of the policy, not only "by its prior and long continued course of dealings," but also by receiving a check for the overdue premium, upon which it was expressly stated that the check should be in payment of the premium for the full term of July, August, and September, 1915, or, in other words, the premium for that entire period; and with this condition plainly written on its face, the defendant received and kept it.

The company, knowing, of course, for what time the premium was tendered, accepted the check and cashed the same. It would seem that fairness to the insured required that if the company was unwilling to take the premium upon this offer, viz., that the premium should cover the whole period, it should not have accepted and appropriated the check. This act, when taken in connection with its previous conduct in regard to overdue permiums, was evidence of its intention to waive the provision of the policy as to prompt payment of the premiums. It was not merely a courtesy or favor extended to the insured, as in *Hay v. Assn., supra.* A

casual indulgence would not be sufficient to show a waiver, as decided in that case, and so the judge charged the jury, but he left it to them to find whether there had been such "a long continued course of dealings" on the part of the defendant as showed that it did not intend to rely (537) upon the delay in payment, but that it extended credit to the insured for the brief space of time. It was said in *Painter v. Industrial Life Assn.*, 131 Ind., 68, approving and quoting from *Sweetser v. Odd Fellows Assn.*, 117 Ind., 97: "It is abundantly settled that an insurance company will be estopped to insist upon a forfeiture if by any agreement, either express or implied by the course of its conduct, it leads the insured honestly to believe that the premiums or assessment will be received after the appointed day. The decisions which hold and enforce this view are very numerous," citing, also, *Michigan, etc., Ins. Co. v. Curtis,* 128 Ind., 25. The following authorities are cited in *Sweetser v. Assn., supra,* in support of the doctrine: *Ins. Co. v. Eggleston,* 96 U. S., 572; *Ins. Co. v. French,* 30 Ohio St., 240; *Helme v. Philadelphia L. Ins. Co.,* 61 Pa. St., 107; *Stylow v. Odd Fellows Mut. Life Ins. Co.,* 59 N. H., 541 (47 Am. Rep., 220); *Teutonia Life Ins. Co. v. Anderson,* 77 Ill., 384; *Hanley v. Life Assn.,* 69 Mo., 380; *Northwestern M. L. Ins. Co. v. Amerman,* 119 Ill., 329. Bacon on Benefit Societies, sec. 431, it is said: "In many cases the company has been held estopped, by its having on former occasions received payment of overdue premiums, from claiming a forfeiture, and also by a promise, express or implied, to receive the premium after it became due." He adopts the rule stated by the Court in *Sweetser v. Assn., supra,* that estoppel by conduct may prevent an insurance company from claiming that there has been a forfeiture of a policy because of a violation of any of its stipulations. When the insured has clearly been misled by the company's course of action in respect thereto, which is calculated to mislead him or throw him off his guard, and cause him to act otherwise than he would have done if he had not relied on the implied waiver by the company of strict performance, and the company will not afterwards be permitted to insist upon exact compliance, or to take advantage of any failure to comply on the part of the insured so that he will be prejudiced thereby; but each case, as he says, is controlled by its own peculiar facts. The Court in *Sweetser v. Assn., supra,* said: "One party to a contract will not be permitted to make a show of continued leniency, or a pretense of liberality, repeated with such uniformity as to put another off his guard, and afterwards, by a sudden change in his course of conduct, declare a forfeiture, when the other party is helpless to avert the consequences." The Court after stating that the rule would not apply to mere occasional indulgence, further says: "But such a course of dealing may be pursued as will estop the company to say that there was no agreement, after

it has permitted its policy to stand open and uncanceled, and after it has accepted payment of overdue premiums or assessments in a specified manner, which has been conformed to during the lifetime of the insured, and until the opportunity to make further collections has (538) been cut short by his death." In *N. Y. Life Ins. Co. v. Eggleston,* 96 U. S., 577, the Court said: "Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company which leads a party insured to honestly believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture."

The principle upon which the court charged the jury in this case seems to be firmly settled. It was clearly recognized, upon the authority of some of the above cited cases, in *Murphy v. Ins. Co.,* 167 N. C., 334. As bearing upon the circumstance of accepting the check for the full period of the three months, July, August, and September, this Court has held in numerous cases that when on the face of the check is stated the purpose for which it is given, or the condition of the payment which it represents, the party to whom it is given or sent cannot accept and use it and afterwards repudiate the condition. *Kerr v. Saunders,* 122 N. C., 635; *Armstrong v. Lonon,* 149 N. C., 434; *Aydlett v. Brown,* 153 N. C., 336, and cases cited therein. But the use of the check is only one of the circumstances tending to show a waiver.

As to the second contention of the defendant, in regard to notice within ten days of the accident, we are of the opinion, and in that respect we agree with the judge who presided at the trial, that notice of the death was sufficient within the meaning of this clause of the policy. In construing a similar policy in *Hoffman v. M. Accident Co.,* 56 Mo. App., 301, 306, the Court says: "The beneficiary, until the death of the insured, had, at most, only an inchoate and contingent interest in the policy. The insurer could not, until that event occurred, recognize her as a party to the contract having a present interest therein. She could have no claim under the contract until the death of the insured, and, therefore, she could give no notice of the accident or injury until that event occurred." This case was approved by the same Court in *Crotty v. Cont. Casualty Co.,* 163 Mo. App., 628. See, also, *Cont. Casualty Co. v. Colvin,* 77 Kan., 561; *Simpkins v. H. C. M. Assn.,* 148 Ia., 543; *Horsfall v. Pac. Mut. L. Ins. Co.,* 32 Wash., 132; *W. C. T. Assn. v. Smith,* 85 Fed., 401; *McFarland v. U. S. Mutual Acc. Assn.,* 124 Mo.,

204; *O. F. Fraternal Acc. Assn. v. Earl,* 70 Fed. Rep., 16. In the case last cited it was said: "An accident by a means which is external, violent and fortuitous, and which produces external, visible mark upon the body, may for a time utterly escape the attention, or even the (539) knowledge, of the person affected, and yet result eventually in mutilation or death. In an accident of the kind which killed Dr. Earl there may be, for a time, as in his case, nothing whatever to suggest the perils insured against, namely, mutilation or death, as possible results. Yet such accidents are within the scope of this policy. A requirement that notice of such an accident must be given within ten days of its occurrence would be rather a cancellation of the policy with respect to a risk distinctly specified therein than a rule of procedure to be followed by the certificate holder—an extinguishment of the insurance, rather than a limitation upon the method of ascertaining the loss to be compensated. If such a requirement be not void for repugnancy, within the rule illustrated by *In re State Fire Ins. Co.,* 32 Law J. Ch., 300, it is so far unreasonable that we cannot put it into the contract by implication. We cannot imply from the words in question a significance which they do not express, when the effect would be to annul part of the insurance specified in the certificate as the subject-matter thereof." It is said in Bacon on Benefit Societies, p. 1071, 1072: "If there was any reasonable doubt as to the proper construction to be placed upon the condition, we would adopt a reasonable one consistent with justice, and, if necessary, apply the rule applicable to a deed poll, that the words shall be taken in their strict sense against the grantor, and liberally in favor of the other party. The court must give practical and reasonable effect to all parts of the contract; not only those affecting one party, but all parties. As the limitation of ten days tends to a forfeiture, which is not favored in law, it must not be shortened by construction to deprive the beneficiary of any of the time allowed by the contract for the protection of her rights. The policy of the law is to maintain contracts and enforce rights thereunder when this can be done without offending the ascertained intention of the contracting parties or some legal principle." And in this connection Mr. Bacon favors the view of the ten days clause stated above. The clause in question here evidently contemplates that notice may be given by the insured or beneficiary according to the circumstances, that is, depending upon whether the injury is fatal or not, for it states that the failure "of the assured or the beneficiary" to comply with the requirement shall limit the liability to one-fifth the amount which would otherwise be payable under this policy. The beneficiary could not well give the notice, as he might not know of the accident, and, if he did, he could not anticipate necessarily that it would result in death, or that any right would accrue to him under the policy.

The reasonable construction of the policy is that each of them—assured and beneficiary—shall give notice of the event upon which his claim depends. The plaintiff contends that this clause is void under statute, Pub. Laws 1911, ch. 209, sec. 2, forbidding the insertion in an accident policy of a provision limiting the amount of the payment (540) "to a sum less than that of the indemnity stated in the policy and for which the premium has been paid"; but we need not decide this question, and leave it open for future consideration if it arises again.

The defendant is not in a position to complain of any failure of plaintiff to furnish it with proofs of loss. Plaintiff requested defendant to send the proper blank, as it had agreed to do in the policy, for proof of her claim on account of the death of her husband, which she stated was caused by an accident, and defendant failed to comply with the request, but sent a disability blank as if Dr. Moore had survived the accidental injury or plaintiff was applying for his indemnity. Plaintiff, though, did cause to be properly filled up the blank sent out for the attending physician to execute, and this gave all the information he had as to the cause of death; and plaintiff did not stop there, but offered, if this was not sufficient or a more detailed statement was desired, to comply with any requirements of the defendant in that respect. Upon receiving the papers returned by plaintiff, or the doctor's certificate, with explanation of the nature of the claim, the defendant answered the plaintiff's inquiry by stating, in its letter, that the "final proofs" had been received, but as Dr. Moore was taken ill on 13 September, 1915, and died on the 19th day of the same month, he was not entitled to any benefits, as his policy did not cover illness until after the first week, and then concluded: "We are, therefore, not due him any indemnity, under his policy, and will, of course, cancel his claim on our records." All this was done, notwithstanding that defendant had been informed twice that the claim was for Dr. Moore's death, first by Mrs. Moore, the beneficiary, and then by Mr. Turlington, her attorney, who stated in his letter to the company that the claim was for the death of the insured, which was caused by an accident, and the attorney offered to make the proof complete if it was not already so. The company knew on 24 September, 1915, that the claim was for Dr. Moore's death—a total loss—in favor of the beneficiary, Mrs. Moore, as her letter of 22 September, 1915, which it had received on 24 September, 1915, so informed it. It was not for indemnity for loss of time during disability caused by accidental injury.

It does not satisfactorily appear why the company should have canceled the claim or policy, under the circumstances, as it did, or at least rejected the plaintiff's claim by refusing to proceed further with her

application, instead of accepting her offer to give any further information desired, which was made through her attorney.

This was tantamount to a plain denial of the company's liability. It was said in *Life Ins. Co. v. Higson,* 112 U. S., 696: "As to the proof of loss not being filed, it is conceded that notice of the death was (541) given. If, when that was done, the agents of the company repudiated all liability and informed the parties that the policy had lapsed, then no proof of loss was required by them, and the failure to file them cannot alter the case." That case was approved in *Higson v. Ins. Co.,* 152 N. C., 206, where other cases to the same effect are cited; 1 Corpus Juris, p. 479; *Parker v. Ins. Co.,* 143 N. C., 339. The denial of liability was also a waiver of the clause in the policy forbidding the bringing of any suit upon it until three months after filing the proofs had expired. *U. S. Casualty Co. v. Hanson,* 79 Pac. Rep., 176; *Cobb v. Ins. Co.,* 11 Kan., 93; *Phillips v. U. S. Ben. Soc.,* 120 Mich., 142; *Calif. Ins. Co. v. Gracey,* 22 Am. St. Rep., 376; *Ætna Ins. Co. v. Maguire,* 51 Ill., 342. Both questions, as to waiver of proof of loss and as to time of bringing suit, are fully discussed in *Calif. Ins. Co. v. Gracey, supra.* See, also, *Willis v. Ins. Co.,* 79 N. C., 285.

In answer to the position taken by the defendant, that plaintiff cannot recover because the insured was not wholly and continuously disabled from the date of the accident, we need only refer to what is stated in regard to separate indemnities, one of which is for death caused by an accidental injury, in 1 Corpus Juris, p. 469, where the authorities are cited in the note. "When the policy provides separate indemnities for injuries which produce immediate, total, and continuous disability, and for death which results from such injuries, the question of immediate, total, and continuous disability is not involved in a suit for the death indemnity." The reference in the policy to the injuries described in Paragraph A is confined to such only as are bodily, and which were effected through external, violent, and accidental means, directly and independently of all other causes, provided the death of the insured results solely from them, and the above authorities are to this effect. The jury have found that Dr. Moore's death did result from such injuries. The other part of the clause was intended to apply to disability caused by the accident. The following authorities bear upon the several questions involved in the case and conclusively answer all material objections: *McFarland v. M., etc., Accident Assn.,* 124 Mo., 204; *Kentzler v. American, etc., Acc. Assn.,* 88 Wisc., 589; *Trippe v. Prov. F. Society,* 140 N. Y., 23; *U. S. Casualty Co. v. Hanson,* 79 Pac. Rep., 176.

The last contention is that the plaintiff was not entitled to recover anything under the accumulation clause of the policy, as the premiums had not been paid in advance for any consecutive period of twelve

months. But the jury have settled this controversy against the defendant, upon evidence sufficient to support the verdict. If there is any ambiguity as to the meaning of the policy, it should receive a construction favorable to the insured and the beneficiary. *Bray v. Ins. Co.*, 139 N. C., 390; *Willis v. Ins. Co.*, 79 N. C., 285. We conclude this part of the case with the words of *Justice Reade* in *Willis v. Ins.* (542) *Co.*, 79 N. C., at p. 289: "Insurance contracts are prepared by insurers who have at their command in their preparation the best legal talent and business capacity, and every precaution is taken for their protection. This is made necessary to prevent the frauds of bad men. But, on the other hand, the insured are generally plain men without counsel, or the capacity to understand the involved and complicated writings which they are required to sign, and which in most cases probably they never read. What they understand is that they are to pay the insurers so much money, and if they are burned out the insurers pay them so much. Where, therefore, there has been good faith on the part of the insured and a substantial compliance with the contract on their part, the courts will require nothing more."

There are objections to evidence, but they require no separate discussion. It was competent for the medical expert to state that a certain injury, fully described in the hypothetical question, which was based upon evidence, would cause death. It was the opinion of an expert upon a matter involving scientific knowledge and professional experience. *Mule Co. v. R. R.*, 160 N. C., 252.

We have examined all the material questions presented in the record, and which were learnedly and ably discussed by counsel, and we have found nothing that warrants a reversal.

No error.

Cited: Bullard v. Ins. Co., 189 N.C. 37; *DeLoache v. DeLoache*, 189 N.C. 398; *Martin v. Hanes Co.*, 189 N.C. 646; *Godfrey v. Power Co.*, 190 N.C. 32; *McCain v. Ins. Co.*, 190 N.C. 552; *Loan Asso. v. Davis*, 192 N.C. 113; *Mattox v. Ins. Co.*, 192 N.C. 612; *Foscue v. Ins. Co.*, 196 N.C. 140, 141; *Smith v. Ins. Co.*, 197 N.C. 623; *Sellers v. Ins. Co.*, 205 N.C. 356; *Misskelley v. Ins. Co.*, 205 N.C. 505; *Paramore v. Ins. Asso.*, 207 N.C. 303; *Gorham v. Ins. Co.*, 214 N.C. 530, 533; *Allen v. Ins. Co.*, 215 N.C. 72; *Durant v. Powell*, 215 N.C. 634; *Felts v. Ins. Co.*, 221 N.C. 152; *Patrick v. Treadwell*, 222 N.C. 5; *Bruce v. Flying Service*, 234 N.C. 83.

W. H. OLLIS AND WIFE, M. C. OLLIS, v. DREXEL FURNITURE COMPANY.

(Filed 16 May, 1917.)

1. Pleadings—Demurrer—Contract.

A demurrer to the complaint admits the truth of the allegation therein sufficiently pleaded; and where it alleges an amount due by the defendant for cutting timber under a contract, for which the action was brought, a demurrer thereto will be denied.

2. Same—Arbitration.

Where the complaint sets out a cause of action alleging a definite amount due under contract, a demurrer thereto on the ground that the contract providing for an arbitration as to the amount is bad, as the amount is not then in dispute; and if the defense is available it should be set up in the answer.

3. Evidence—Demurrer—Admissions—Trials.

Where in an action to recover an amount alleged to be due the plaintiff for cutting timber from his lands under a contract, with supporting evidence, the defendant admits an amount due, a motion as of nonsuit upon the evidence will be denied.

4. Contract—Timber—Assumpsit.

Where the plaintiff and defendant had entered into a contract for the latter to cut timber upon the lands of the former, and thereupon the defendant had entered upon and cut timber from the lands, he is liable upon a quasi or implied assumpsit to pay the reasonable worth of the timber which he had cut and retained.

5. Deeds and Conveyances—Contracts—Timber—Cutting Period — Grantee's Liability—Uncut Timber—Grantee of Lands.

Where the owner of lands conveys his timber thereon, to be paid for as cut within a stated period, no obligation is imposed upon his grantee to cut the timber within that time, or pay for such as may remain standing thereafter, it being merely an option to cut; and where the owner has conveyed the title to the lands to another within the cutting period, the grantee of the title acquires the title to the trees which thereafter remain standing, without obligation on the grantee of the timber to his grantor to pay for them.

6. Deeds and Conveyances—Timber—Contracts—Interpretation—Intent.

A conveyance of standing timber will be interpreted so as to ascertain the intention of the parties by a natural and not forced interpretation of all of the provisions of the writing in its entirety, and every part should be allowed its proper weight in reaching a conclusion as to the meaning.

(543) CIVIL ACTION, tried before *Lane, J.*, and a jury, at October Term, 1916, of AVERY.

Plaintiffs and defendant entered into a contract, in the form of a deed, whereby the former conveyed to the latter all the merchantable timber

on a certain area of land in said county, containing 237 acres, with the right or privilege of cutting and hauling the same within four years and six months, and a right of way over the land for hauling other timber purchased by the vendee, upon the consideration that the defendant should pay the plaintiffs $2.50 per thousand feet, board measure, for all merchantable timber cut from the tract of land, payment to be made as soon as each yard is finished.

Defendant entered upon the land and cut the timber, leaving a considerable quantity of the timber standing uncut upon the land. Plaintiffs conveyed the land to another before the time for cutting had expired, and now sue for what is due for the timber which was cut, and also for that which was not cut.

The jury returned the following verdict:

First. Did the plaintiffs and the defendant enter into the contract alleged in the complaint? Answer: "Yes."

Second. In what sum, if any, is the defendant liable to the plaintiffs on account of the timber trees cut and sawed on the land described in the complaint? Answer: "$311."

Third. What is the number of feet of uncut merchantable (544) timber remaining on the land described in the complaint? Answer: "190,000 feet."

It was agreed between the parties that the judge might reserve his opinion as to the liability of the defendant for the uncut timber, and if he held the defendant to be liable, judgment should be given for its value estimated at the contract price of $2.50 per thousand feet, or $475. The court, being of opinion that the defendant is liable for the value of the uncut timber, entered judgment upon the verdict, under the agreement of the parties as to the uncut timber, for $786, that is, $311 for the cut timber and $475 for the uncut timber, and the costs. Defendant appealed.

W. C. Newland and S. J. Ervin for plaintiffs.

W. J. Ragland and Spainhour & Mull for defendant.

WALKER, J., after stating the case: The defendant demurred to the complaint *ore tenus,* because, under the contract, the damages, if any, should have been arbitrated; but a demurrer admits all facts well pleaded, and in this complaint it is alleged how much timber was cut and the value thereof, and as this is admitted by the demurrer, there was no dispute at that stage of the case, or no disagreement, as to the amount of recovery, if there was any liability of defendant for the lumber; so that no arbitration was necessary, as it was conditional upon a dispute as to the amount. This defense, if available at all, should have

been set up in the answer, and a proper issue submitted as to it; but this was not done. Besides, there appears to be no practical difference between the parties as to the amount of timber cut by defendant, and in this respect the case has been tried upon its real merits.

The motion to nonsuit was properly overruled, as the plaintiffs were, upon the evidence, if believed, entitled to recover something, and the court, in its charge, states that the defendant admitted that after making the proper estimate of the timber which was cut and deducting the credit, or $395, they are liable for $235.74. If the plaintiffs were entitled to recover any amount, there should not have been a nonsuit, which is the correct judgment only where they are not entitled to anything. But there was evidence for the jury to consider, apart from the admission, and for this reason an involuntary nonsuit would have been erroneous.

There was sufficient evidence of the execution of the contract. Besides, the land belonged to the plaintiffs, and the timber was cut therefrom by the defendant, with plaintiffs' permission, for a stipulated price per thousand feet. There was no dispute as to the price, or value
(545) of the timber, or its reasonableness. Under these circumstances defendant would be liable to the plaintiffs for the value of the timber which was cut from the land, upon a quasi or implied assumpsit to pay what the timber was reasonably worth, he having received the benefit of the transaction and retained the same. Clark on Contracts (2 Ed.), p. 551. Keener on Quasi Contracts says, at page 24: "When it is for any reason conceded—*e. g.*, illegality, the statute of frauds, impossibility of performance—that a defendant is not liable to a plaintiff for a failure to perform a contract made with the plaintiff, and yet it is held that he is liable in assumpsit, or other contractual remedy, for benefits conferred by the plaintiff under the contract, such liability is necessarily quasi-contractual, and rests on the doctrine of unjust enrichment. Of this character also is the liability of a defendant for benefits received which, though requested by him, were not conferred under a contract, because of some misunderstanding of the parties, or other reason, preventing the creation of a contract." But we need not further consider this feature of the case, as we hold that there was evidence of the contract under which defendant cut the timber. The other objections of the appellant, except one, are overruled, as they do not relate to any material question, and are of no practical importance.

The real controversy between the parties relates to the liability of the defendant for the uncut timber, and the defendant's exception, as to this charge, is sustained. The contract does not require the defendant to cut all the timber or any designated part thereof. It amounts to no more than the grant of a right or privilege to cut timber on the land within the period specified, and to pay only for the timber so cut at a

given price per thousand feet. It does not provide for the payment of any sum except the price of the timber which is cut under it. The timber left standing at the end of the time limited for cutting belonged to the plaintiff; and if he conveyed the land, it passed to his grantee. *Hornthal v. Howcutt,* 154 N. C., 228; *Midyette v. Grubbs,* 145 N. C. at p. 90; *Bunch v. Lumber Co.,* 134 N. C., 116; *Hawkins v. Lumber Co.,* 139 N. C., 160. The vendor could not enlarge his vendee's liability by conveying the land, upon which the timber stood, to another. The contract was that for as much timber as the vendee should cut on the land he would pay to the vendor so much per thousand trees, and no more. We cannot perceive upon what sound reason can be based any claim of damages for the uncut timber. The timber left uncut at the expiration of the fixed period does not belong to the vendee, and he has no interest therein, the same having determined when his time for cutting was out. It then became the property of the vendor, or of his assignee if he has conveyed the land. *McIntyre v. Barnard,* 1 Sandford's Ch., 52; *Strasson v. Montgomery,* 32 Wis., 52; *Young v. Lego,* 36 *id.,* 394; (546) *Kemble v. Dresser,* 42 Mass. (1 Metc.), 271. The plaintiff must abide by the fair and reasonable construction of his own contract and the only one that can be put upon the terms chosen by them to express it. We must ascertain the intention of the parties by a natural, not forced, interpretation of all the provisions of the writing, so that the entire instrument will be kept in view, and every part be allowed its proper weight in reaching a conclusion as to the meaning. "If a plaintiff sue on a written or special contract, so as to make it the basis of his action, it must regulate his right to recover as well as the amount." *Bush v. Chapman,* 2 Green (Ia.), 661; *Engine Co. v. Paschal,* 151 N. C., 27; 8 A. and E. Enc., 636. "If a contract is expressed in plain and unambiguous language, neither courts nor juries may disregard it and by construction or otherwise substitute a new contract in the place of that deliberately made by the parties." *Engine Co. v. Paschal, supra;* 7 A. and E. Enc., 118; *Dwight v. Ins. Co.,* 103 N. Y., 347. It was said in *Wiley v. Lumber Co.,* 156 N. C., 210, applying the above stated rule: "When one has bought and paid for a lot of growing timber and the same has been conveyed to him with the privilege of removal within a given time, the contract as to the removal is so far unilateral that the purchaser is not obliged to cut and remove the timber. If he fails to do so within the time, his right or estate therein is forfeited and inures as a rule to the owner of the land. We have so held in two cases at the last term. *Hornthal v. Howcutt,* 154 N. C., 228; *Bateman v. Lumber Co.,* 154 N. C., 248." This case differs from *Wiley v. Lumber Co.,* because there the stipulation was that the plaintiff would cut, and deliver at log-bed of defendant's tramroad, all the timber on the land, a part of

which the latter refused to receive, although the plaintiff was ready, willing, and able to deliver it.

It follows, therefore, that the item of $475 included in the recovery for the uncut timber should be stricken out, and that plaintiff is entitled only to the balance, with costs, and it is so adjudged.

Error.

Cited: Trust Co. v. Wilson, 182 N.C. 170; *Manning v. R. R.,* 188 N.C. 663; *Eaton v. Doub,* 190 N.C. 16; *King v. Davis,* 190 N.C. 741; *Austin v. Brown,* 191 N.C. 627.

W. D. WOODRUFF, SHERIFF, v. PIEDMONT TRUST COMPANY.

(Filed 16 May, 1917.)

1. Statute of Frauds—Judicial Sales—Sheriffs—Principal and Agent.

A sheriff at an execution sale of lands under a judgment, by public outcry by his auctioneer, acts as agent for all parties therein interested, including the purchaser, and a memorandum made by him on the execution at the time of the sale of the purchaser thereat, and the price, with description of the lands in the execution, is sufficient memorandum of the transaction within the meaning of the statute of frauds.

2. Judicial Sales—Mortgages—Judgments—Equity of Redemption—Priorities.

A mortgagee of lands, purchasing at an execution sale under a judgment to which he is a stranger, sold subject to his mortgage, can acquire only the equity of redemption (Rev., sec. 629 (3)), subject to the judgment debt.

(547) APPEAL by plaintiff from *Ferguson, J.,* at January Term, 1917, of WILKES.

This is an appeal from a judgment of nonsuit in an action by the plaintiff as sheriff of Wilkes to require the defendant to comply with its bid for certain real estate purchased at execution sale, under three executions issuing from the Superior Court of said county.

It is in evidence that the auctioneer, who was employed by the plaintiff, gave notice before crying the sale that it was made by virtue of certain executions against M. M. Absher levied on the excess over the homestead, which had been duly allotted, and was made subject to a deed of trust of $6,000 to the defendant trust company, and also to a mortgage for $2,000 to one J. H. Johnson. At this execution sale E. C. Willis, who was attorney representing the Piedmont Trust Company,

became the last and highest bidder, which was announced by the auctioneer and was entered by the sheriff upon his return of execution. The sheriff applied to Willis for payment, who stated to him that he was purchasing not for himself, but for the Piedmont Trust Company. The plaintiff thereupon executed and tendered the deed to E. C. Willis as agent of the Piedmont Trust Company and demanded payment of the bid. Willis declined to make payment, but asked that his bid ($4,500) should be credited on the debt due his client, which was secured by the trust deed. The counsel for the creditors asked that the sheriff resell the property, to which Willis objected. Thereupon the plaintiff brought this action. The judge having directed a nonsuit, the plaintiff appealed.

Hackett & Gilreath for plaintiff.

Hayes & Jones, Finley & Hendren, and Hackett & Willis for defendant.

CLARK, C. J. It was in evidence, uncontradicted, and therefore must be taken as true on this appeal from a nonsuit, that the judgments, executions, advertisement, and sale were regular in all respects. There was also evidence by letters from the defendant to Willis that he was the attorney of the defendant to represent it at this sale, and there was evidence of his statements in corroboration; that as such (548) agent he made the last and highest bid for the property, which was duly knocked off to him, and that he declined payment upon the ground that the bid should be credited on the debt due the trust company.

When the plaintiff rested, the defendant moved to dismiss the case as of nonsuit, on the sole ground that the statute of fraud applied to a sale by sheriff under execution, and the court, being of that opinion, granted the motion.

When the plaintiff as sheriff offered the property for sale by virtue of the execution in his hands, this was an offer in writing, also evidenced by the advertisement duly made; and when the sheriff, through his auctioneer, cried the defendant's bid, he was acting as agent for such bidder, and when it was accepted and the property was knocked down to the bidder, the return made by the sheriff on the execution was a memorandum in writing made by him as agent for the bidder. If this were not so, there would be no means of holding the purchaser at the execution sale if he should see fit afterwards to deny his liability.

In *Cherry v. Long,* 61 N. C., 466, it was held: "An auctioneer is the agent of both seller and purchaser. Therefore, when a tract of land is bid off at auction by one who is present, the auctioneer is his agent,

and a memorandum made by the latter giving the name of the purchaser and description of the tract and the price is sufficient within the statute of frauds." This is cited with approval by *Walker, J.*, in *Burriss v. Starr,* 165 N. C., 661, in which it was held that the purchaser was bound by the action of his agents in writing, though the latter's authority was given by parol.

In *Proctor v. Finley,* 119 N. C., 536, it was held that an advertisement for sale of land at auction and the acceptance of the last and highest bid makes a complete contract; that the auctioneer is the agent of both the seller and bidder, and the signing by the auctioneer of the name of the highest bidder at an auction sale on the printed advertisement, with an entry of the price bid, is sufficient within the statute of frauds. Here the advertisement and the execution with indorsement on the latter of the report of the sale to the defendant as the last and highest bidder, is sufficient. In *Love v. Harris,* 156 N. C., 92, this case was cited and approved.

In *Stearns v. Edson,* 63 Vt., 259, it is held: "The return of an officer upon an execution of the sale of real estate is a sufficient memorandum within the statute of frauds to enable such officer to sustain an action for the purchase price, notwithstanding the officer had neglected for three months to tender a deed to the purchaser.

In *Nichols v. Ridley,* 13 Tenn., 63, it is said: "A sale of real estate by the sheriff is valid within the statute of frauds so as to bind (549) the purchaser when the sheriff has made a return of the sale, indorsed on the execution." In Browne on Statute of Frauds (5 Ed.), 469, sec. 346, it is said that "The return of the sheriff upon an execution, however informal, is a sufficient writing within the statute of frauds," citing *Nichols v. Ridley, supra,* and other cases.

In *Ruckle v. Barbour,* 48 Ind., 281, it is said: "There is some conflict in the authorities as to what will constitute a sufficient memorandum to satisfy the requirements of the statute, but all the authorities agree in holding that the return of a sheriff upon the execution or order of sale, if made and signed at the time of the sale and filed in the office from which it was issued within the lifetime of the writ, will be sufficient to take the sale out of the statute of frauds," citing many cases. In *Remington v. Linthicum,* 39 U. S. (14 Peters), 92, it is held that the return of the marshal of the sale "related back to the sale and complies with the statute of frauds."

There are many authorities which hold that "A sale of land by the sheriff under execution is not within the act of 1819 (now Revisal, 976), making void parol contracts for the sale of land." This was held by *Gaston, J.*, in a very strong opinion, *Tate v. Greenlee,* 15 N. C., 150, which has been since cited and approved in *Ingram v. Dowdle,* 30 N. C.,

456; *Grier v. Yontz,* 50 N. C., 373; *McKee v. Lineberger,* 69 N. C., 239; *Skinner v. Warren,* 81 N. C., 376; To same effect, *Watson v. Violett,* 63 Ky., 332; *Fulton v. Moore,* 25 Pa. State, 479, which held: "A judicial sale is good without writing, because it is not within the statute of frauds." *Boring v. Lemmon,* 9 Md. (5 Harr. and J.), 225; *Barney v. Patterson,* 10 Md. (6 Harr. and J.), 205; but in *Fenwick v. Floyd,* 12 Md. (1 Harr. and J.), 175, and *Hanson v. Barnes,* 16 Md. (3 Gill and J.), 368, it is held that while the return of the sheriff on the execution is a sufficient memorandum in writing within the statute of frauds, without it the sale itself would not be binding unless there was a deed.

In *Love v. Harris,* 156 N. C., 88, it is held that "By bidding at a foreclosure sale of lands the purchaser sanctioned the authority of the auctioneer whom the vendor has employed, constituting him his agent to make a written memorandum thereof; and a proper memorandum so made is binding upon the purchaser and does not fall within the inhibition of the statute of frauds."

There being some conflict as to whether a sale by a sheriff under execution is within the statute of frauds which requires a writing, we prefer to put our decision upon the first proposition above stated, that the sheriff is the agent of both parties, and that his return upon the execution is made as agent of the purchaser, and this being signed by him, it is sufficient compliance with the statute of frauds.

The sale by the sheriff, both under the advertisement and the (550) announcement at the time, was of the equity of redemption, Revisal, 629 (3), and the defendant, the *cestui que trust,* as purchaser of the equity of redemption, bought that which the trust deed did not cover, and the sheriff properly held that the proceeds must go to the plaintiff in the judgment and execution under which he sold. It would have been otherwise if the defendant had been plaintiff in the judgment as well as *cestui que trust* in the mortgage, for in that case he would have had both titles.

The judgment of nonsuit must be

Reversed.

Cited: Smith v. Joyce, 214 N.C. 605.

W. T. HUNT ET AL. V. G. W. JONES ET AL.

(Filed 23 May, 1917.)

1. Wills—Interpretation—Intent—Equality of Division.

Where it appears from the will, construed as a whole, that the dominant intent of the testator is an equality of division of the estate among his children, this intent will prevail over minor considerations in conflict with it, and where the language, in case of doubtful meaning, will permit, the early vesting of estates is favored.

2. Same—Bodily Heirs — Children — Estates — Contingent Remainders — Deeds and Conveyances.

Where from the entire will it appears that a testator intended an equal division of his estate among his children after the death of his wife, which has occurred, a devise of lands to two of his daughters "supposed to contain 535 acres, jointly, so long as they live together, and, if they should see fit to separate, then it is to be equally divided between them and their bodily heirs; and if either of them should die without bodily heirs, it is to go to the living one," etc., without residuary clause or disposition of the property if both of the daughters should die without bodily heirs: *Held*, the testator's intent was an equal division of the land between the daughters should they separate, and in the event of the death of either without children, their share would go to the other; hence a conveyance by both of them will pass a good and entire title.

CIVIL ACTION, tried by consent by *Cox, J.*, at Chambers, 21 April, 1917; from CHATHAM.

This is an action to determine the title to a tract of land.

W. A. Marcom was formerly the owner of the lands in question. He died leaving a will which was duly probated on 27 September, 1895, a copy of which is as follows:

(551) "I, W. A. Marcom, of sound mind and memory, blessed be God, and considering the uncertainty of life and the certainty of death, do make and declare this to be my last will and testament in manner and form following, to wit:

"Item First: I give and bequeath to my two daughters, Fidellia and Cora Marcom, $300 each, and a good bed and furniture each, with all the bed clothing that they have made themselves. One cow and calf each or, in lieu thereof, $20 each. This I give to them to make them equal with the rest of my children that I have given them heretofore. Also I give Fidellia the sewing machine and Cora Marcom the organ.

"Item Second: I give and bequeath to my beloved wife, Nancy Marcom, all of my home tract of land, consisting of the tract on which the dwelling stands, the Harward tract, and the Yates tract, together with all my live stock of every description. All of my farming tools of every description; buggy and carriage; all of my household and kitchen furni-

ture (except what I have given to my two daughters, Fidellia and Cora Marcom), or so much thereof as she sees proper to keep. I also give to my wife, Nancy Marcom, all the interest on my bank stock notes and money; also my stock of goods that I have on hand at my death, if she sees proper to keep it, and if she does not see proper to keep it, she has the privilege to turn it over to my executors hereinafter named, for them to dispose of to the best advantage and she to have the proceeds or as much of it as she needs. All this I give to my wife, Nancy Marcom, during her natural life, and after her death it is my will and desire that all of my property, both real and personal, shall be divided as follows, to wit:

"Item Third: It is my will and desire after my wife's death for my granddaughter, Nancy Jane Yates, and her bodily heirs to have 80 acres of land of the east end of my land, commencing at a post-oak stump, mine and William Yates' corner, thence in same direction to John Murrell's line, adjoining the land on which she now lives; also, $100 in money as her share of my estate.

"Item Fourth: I give and bequeath to my two daughters, Fidellia and Cora Marcom, the balance of my land after my wife's death (that I will to her), supposed to contain 535 acres, jointly so long as they live together; and if they see proper to separate, then it is to be divided equally between them and their bodily heirs, valued at $2,000; and if either of them should die without bodily heirs, it is to go to the living one, and $500 each in bank stock.

"Item Fifth: I give and bequeath Mary Jane Ferrell ten shares of bank stock in the Morehead Banking Company, also the surplus on the shares, also $500 in money.

"Item Sixth: I give and bequeath to my daughter Elizabeth (552) Stone ten shares in bank stock in the Morehead Banking Company, also the surplus on ten shares; also $500 in money.

"Item Seventh: It is my will and desire that my son J. W. Marcom's wife, Lana Marcom, and his bodily heirs, to have the land that I bought of the Jeffers boys, on which Peter Willis now lives, containing 215 acres and valued at $1,500, provided he pays off the Nancy Bachelor debt; and if he fails that debt, in that case there is enough to be sold off of that land to pay said debt.

"Item Eighth: It is my will and desire that after the death of my wife that all the beds and bed clothing that is on hand that I have not heretofore willed away be equally divided between my five living children.

"Item Ninth: It is my will and desire that my executors hereinafter named shall give me and my wife's body a decent burial according to the wishes of my friends and relatives, with a tombstone at the head of each and inclosed with iron railings.

"Item Tenth: It is my will and desire that my executors hereinafter named shall after the death of my wife, Nancy Marcom, sell all my personal property that I have left to her except beds and bed clothes.

"Item Eleventh: It is my will and desire that my executors shall collect all the debts due me that can be collected and after paying the amounts that I have heretofore willed away and the remainder to be equally divided between my five now living children.

"Item Twelfth: I hereby appoint my friend C. R. Scott and Harmon Sears my executors, to carry out this my last will and testament.

"All interlining made before signing.

WM. A. MARCOM. [SEAL.]

"Signed and sealed in the presence of
A. THEO. COTTON.
WILLIAM S. OLIVE."

The wife, Nancy Marcom, has since died, and one of the daughters, Cora Marcom, has married, her husband being H. W. Trollinger. To this union there have been born two children. Cora Marcom Trollinger and her sister, Fidellia Marcom, reside together.

After the death of the widow, Cora Marcom Trollinger, with H. W. Trollinger, her husband, and Fidellia Marcom, executed a deed in due form to plaintiffs.

The plaintiffs thereafter contracted with the defendants to sell a portion of the 535-acre tract. The defendants refused to comply with the terms of the sale on the ground that Cora Marcom Trollinger and Fidellia Marcom did not take a fee-simple title, and that W. T.
(553) Hunt and Brothers did not receive such title from them, and that, therefore, W. T. Hunt and Brothers are unable to convey to these defendants such title.

The matter was submitted to Judge Albert L. Cox, holding the courts of the Fourth Judicial District, and he held that Cora Marcom Trollinger and Fidellia Marcom took the land in fee and were able to convey and did convey to plaintiffs a title in fee simple, and that, therefore, W. T. Hunt and Brothers can convey to the defendants such title.

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

Percy J. Olive for plaintiffs.
J. C. Little for defendants.

ALLEN, J. The decision of the controversy depends on the construction of the fourth item of the will of W. A. Marcom, and if this stood alone it would not be free from difficulty because of the use of "bodily

heirs" twice in the same item. We must, however, look at the whole will and not at detached portions, as "The primary purpose is to ascertain the intention of the testator from the language used by him, taking the will as a whole, and not separate parts of it." *Taylor v. Brown,* 165 N. C., 161.

Again: "The first taker in a will is presumably the favorite of the testator, *Rowalt v. Ulrich,* 23 Pa., 388; *Appeal by McFarland,* 37 *ibid.,* 300; and in doubtful cases the gift is to be construed so as to make it as effectual to him as soon as possible or as soon as the language will warrant. *Wilson v. McKeethan,* 53 *ibid.,* 79. And, too, the law favors the early vesting of an estate, to the end that property may be kept in the channels of commerce. Underhill on Wills, sec. 861; *Hilliard v. Kearney,* 45 N. C., 221; *Galloway v. Carter,* 100 N. C., 111, and cases there cited." *Dunn v. Hines,* 164 N. C., 120.

It is also a rule of construction that the dominant idea pervading the whole will must control, and that minor considerations must yield if in conflict with it; and it may well be said of the will before us, as was said in *Lassiter v. Wood,* 63 N. C., 363: "It is apparent that the leading purpose of the testator was to make all his children equal. The purpose of the testator, as gathered from the will, is always to be carried out by the court, and minor considerations, when they come in the way, must yield. Especially is this so when the purpose is in consonance with justice and natural affection."

"The general and leading intention of the testator must prevail where it can be collected from the will itself; and particular rules of construction must yield something of their rigidity if necessary to effect this purpose." *Alexander v. Summey,* 66 N. C., 582.

The dominant idea in the will is equality among the children, (554) and if special solicitude is shown in favor of any, it is in behalf of the two daughters Fidellia and Cora.

In the first item of the will he gives each of these daughters $300 and certain personal property, "to make them equal with the rest of my children that I have given them heretofore."

In the second he provides for his wife and in the third for a grandchild.

He values the land in the fourth item at $2,000, and gives to each of the daughters $500 of bank stock, making the share of each $1,500, and in the fifth, sixth, and seventh items he provides for his other three children and values each share at $1,500.

This manifests a clear purpose on the part of the testator to divide his property equally among his children and to place no limitations upon their use and enjoyment of it, except in the single instance of one of the daughters dying "without bodily heir," which when used in this

connection is usually interpreted issue or children. *Faison v. Moore,* 160 N. C., 148.

In the first part of the item he gives the land in fee to the two daughters while living together. Why should he wish to change it to an estate in common with their children, "if they see proper to separate"?

The language is, "to be equally divided between them and their bodily heirs," which indicates a purpose, in the event of a separation, to have an equal division between the daughters, and that the share of each should belong to her and her heirs, with further provision that if either died without children her share should belong to the other.

This construction is also strengthened by the fact that there is no disposition of the property if both daughters should die without issue, and no residuary clause.

If, therefore, the estate in fee is in the two daughters, and upon the death of either without children her interest belongs to the survivor, it follows that the deed of both of them will convey and pass the entire title, and, if so, the plaintiffs can make a good title for the land in controversy.

Affirmed.

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(555)

FLORENCE I. KEARNES v. R. W. GRAY, EXECUTOR.

(Filed 23 May, 1917.)

1. Wills—Annuities—Rents and Profits—Pleadings—Demurrer.

Where in an action against an executor to recover the difference between the amount allowed by the will for plaintiff's support and the amount received, it is alleged that the plaintiff and her mother, during the latter's lifetime, under the terms of the will, were to receive a certain monthly amount, each, out of the rents and profits of the estate, and in the event of sickness or unforeseen circumstances the executor may allow more; and that the rents and profits had been exhausted in the mother's lifetime, the annuity was not a charge upon the corpus of the estate, and without allegation that the unforeseen circumstances had arisen or demand in this respect made upon the executor in the mother's lifetime, a demurrer should have been sustained.

2. Pleadings—Demurrer—Judgment—Appeal and Error—Statutes.

Upon overruling a demurrer to the complaint, the defendant should be permitted to answer over. Revisal, sec. 506.

APPEAL by defendant from *Long, J.,* at August Term, 1916, of GUILFORD.

King & Kimball for plaintiff.
A. Wayland Cooke and Clifford Frazier for defendant.

CLARK, C. J. This is an appeal from a refusal to sustain the defendant's demurrer to the complaint.

The complaint sets out as the basis of the action item 6 of the will as follows: "My executors hereinafter named shall *out of the rents and profits or income of my estate* pay to my wife, Nannie L. Gray, twenty-five dollars ($25) per month, and to my daughter, Florence I. Kearnes, twenty-five dollars ($25) per month, during the lifetime of my said wife; and it is my desire that they bear the expense of their support equally. However, in the event of sickness or unforeseen circumstances, if their necessities are greater, my executors may allow them or either of them a larger portion."

It is further alleged in the complaint, and is admitted by the demurrer, that the plaintiff, the daughter of the testator, lived with the widow of the testator from his death, 9 December, 1908, to the death of the widow, 21 February, 1916, and that the executor paid her the sum of $965.50; but the plaintiff claims that the full amount of $25 per month would amount to $2,133, and this action is brought for the difference.

The plaintiff further avers that according to her information, "The rents collected from the property were about equal to and (556) were exhausted by the amounts paid to the widow of the testator and the plaintiff under item 6."

The question presented, therefore, is whether under the provisions of section 6 of the will, the executors being restricted to payment of the annuity to the widow and daughter "out of the rents and profits or income of the estate," and it being admitted in the complaint that such source was exhausted by the payments made to the plaintiff and widow, whether the deficit can now be charged against the other funds or realty of the estate.

It is not alleged in the complaint that the sum paid the plaintiff was insufficient nor that the plaintiff made any application to the executor for further allowance till after the death of the mother, at which time the annuity expired, and when she would receive her share of the estate together with the other children of the testator.

The will evidently intended that the corpus of the estate was to remain intact and should not be chargeable for any arrearages of annuity. There was discretion vested in the executors only "in the event of sickness or unforeseen circumstances," if their necessities are greater, "in which case the executors might allow the widow or daughter or either of them a larger portion." The application upon that ground was one largely

addressed to the discretion of the executors, and should have been made during the period limited for the annuity.

Mitchener v. Atkinson, 62 N. C., 23; *S. c.,* 63 N. C., 585, is not in point for there was a devise absolutely of $20,000 to the widow, and the subsequent provision to pay a part of this sum out of the proceeds arising from the sale of the produce of the farm was not restricted, as here, to that as the source from which the annuity should be derived, but was held to be merely the indication of the primary source from which it is to be derived. The same is true of the other authorities cited by the plaintiff, which were all cases where the testator, as clearly appeared from the will, intended to make the annuity an absolute charge upon the corpus of the estate, and the designation of a fund was only incidental. This appears from the citation made by the plaintiff from 2 Underhill on Wills, sec. 768, p. 1088: "Where the testator gives an annuity, and it clearly appears that it was his desire and intention to make a *definite and certain provision for the support of the annuitant, an annuity is an absolute charge upon the corpus of the estate.* In such case its payment does not depend upon the amount of the income exclusively, though the testator may have given directions for investing the property and may have alluded to its payment out of the income thus produced."

(557) To the same effect is the citation made by the plaintiff from Underhill on Wills, p. 566: "And if the will shows that the testator intends the legacy *to be paid at all events,* though a particular fund is provided for its payment it is a demonstrative legacy, and will be paid with the general legacies, where the particular fund has failed."

In this case the testator strictly restricted the source from which the annuity should be derived, and being aware that in case of sickness or unforseen circumstances it might not prove sufficient, he gave authority to the executor to exceed the sum allowed, which would authorize the executors to take the amount from other sources. But such application was not made and the contingency on which the executors could exercise such discretion is not alleged by the complaint to have occurred.

In 3 A. and E. (2 Ed.), 1143, it is said: "Where a sum of money is set apart the annuity to be paid out of the dividends therefrom with a gift over of the capital sum, the *corpus* is not liable for the arrears. If it clearly appears that the annuity is to be paid only from a yearly gift of the income of an invested fund, the corpus will not be liable."

In *Brown v. Cresap* (W. Va.), 9 L. R. A. (N. S.), 997, it was held: "Where a testator charges the estate with the maintenance and support of his widow during her life, the amount set apart each year for such purpose did not constitute a debt against the estate which could be al-

lowed to accumulate and be passed by the widow to her devisee or personal representative, her right to such sum depending on her using it for the purpose of maintenance and support for which it was bequeathed."

In *DeHaven v. Sherman,* 6 L. R. A., 745, the testator devised certain property to a trustee to be leased and put in repair, and out of the rents he was to pay interest, insurance, etc. The residue of the *rents and profits* were to be paid $6,000 per annum in monthly installments to testator's widow, if living, and $3,000 per annum in monthly installments to each of his three children or the heirs of their body, and the excess to be applied on the indebtedness. This was held not a bequest of the rents themselves, but only an annuity; that the legatee acquired no interest in the particular real estate, and that there was no rent charge. "It could not be intended that the payment of these annuities are a charge against the corpus of the estate."

The demurrer on the ground that the complaint does not state a cause of action should have been sustained.

It was error, also, for the court on overruling the demurrer to render judgment against the defendant. He had the right to answer over. Revisal, 506; *Parker v. R. R.,* 150 N. C., 433; *Morgan v. Harris,* 141 N. C., 360.

Reversed.

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(558)

AMERICAN TRUST COMPANY v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 23 May, 1917.)

1. Partnership—Profits—Principal and Agent—Compensation.

Where the sharing in the profits of a business arrangement is only a method employed in determining the compensation one is to receive for services rendered another, it falls within the exception of the rule that the test of whether a partnership exists is the sharing of profits by the parties.

2. Insurance, Life—Corporations—Officers—Insurable Interests—Principal and Agent—Statutes.

Where the manager of a concern employs another to take charge of its insurance department, its soliciting agents, etc., by which a profitable business is built up, upon an agreement that the one producing the business is to receive as compensation a certain part of the profits, it is not conclusive evidence of a partnership between the two, and the corporation has an insurable interest in the life of the manager of its insurance agency, and expressly so under the provisions of our statute, chapter 507, Public Laws 1909.

3. Insurance, Life—Delivery of Policy—Health of Insured—Duty of Insurer.

If any time elapses between the application for policy of life insurance and its issuance, it is the duty of the insurer to make inquiry when the policy is delivered as to the condition of the health of the insured, and upon its failure to do so the delivery is conclusive that the policy contract is completed, and binds the parties to the mutual obligations therein imposed upon them.

4. Same—Noncontestable Clause—Defenses.

A clause in a policy of life insurance making it incontestable at the end of a year covers the defense of the alleged bad health of the insured at the time of its delivery, and also that of false and fraudulent statements alleged to have been made by the insured in his application.

5. Same—Exceptions.

Where a policy of life insurance has been issued containing a clause making it noncontestable after the expiration of a year, except for nonpayment of premiums, after that period no defense is available to the insurer, in an action upon the policy, excepting the nonpayment of the premium, as therein stated.

6. Insurance, Life—Noncontestable Clause—Insurer's Benefit.

The noncontestable clause in a life insurance policy is for the benefit of the insurer in increasing its business by assurance that after the maturity of the policy, usually upon the death of the insured, its collection will not be subject to the uncertainty and delay of litigation, or questioned except as to matters therein stated—in this case, the nonpayment of premiums.

7. Insurance, Life—Noncontestable Clause—Breach by Insurer—Rights of Insured.

Upon refusal of the life insurer to perform its part of a policy contract, and its notification thereof to the insured, the latter may elect to consider the policy at an end and recover its just value; or he may sue in equity to have the policy declared in force, or tender the premiums and treat the policy as in force and recover the amount payable according to its terms at maturity.

8. Same—Suits—Equity—Cancellation—Consent—Validity of Policy.

Where a policy of life insurance containing a clause making it noncontestable after the expiration of a year, except for nonpayment of premium, has been delivered and the premium paid therefor, an attempt by the insurer within that time, upon notification to the insured, to cancel the policy with tender of repayment of the premium upon a different ground than that stated in the clause, but not consented to or accepted by the latter, is a breach of the contract by the former; and it is necessary for the insurer, within the stated time, to bring suit in equity for the cancellation of the policy, or it will remain binding and enforcible upon the insurer's death.

(559) CIVIL ACTION, tried before *Cline, J.*, at the February Term, 1917, of MECKLENBURG.

This is an action to recover $10,000, the amount of a policy of insurance issued by the defendant upon the life of Harvey Lambeth, in favor of the plaintiff, on 4 March, 1913.

The policy contained the following clauses, among others: "This policy shall not *take effect* until the first premium is paid, nor unless on the date of said payment the insured is alive and in *sound health.*"

Incontestability.—The incontestable clause provides: "This policy shall be incontestable after one year from its date, except for nonpayment of premium."

Within twelve months from the date of the policy the defendant notified the plaintiff that it elected to cancel the policy, and tendered a return of the first premium on the ground that it had discovered facts which in its opinion rendered the policy void, but it refused, upon the request of the plaintiff, to state what the facts were.

The plaintiff declined to accept the premium and elected to treat the policy as still in force.

There is no provision in the policy giving the defendant the right to cancel it.

The plaintiff thereafter tendered the premiums as they became due, which the defendant refused to receive, and the insured died on or about 7 February, 1915.

No action was brought by the defendant to have the policy canceled.

The defendant offered evidence tending to prove that the insured was not in good health when the policy was delivered, and (560) that there were false representations in the application for the policy.

His Honor instructed the jury if they found the facts to be as testified to by the witnesses to answer the issue in favor of the plaintiff, and the defendant excepted.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Morrison & Dockery and Tillett & Guthrie for plaintiff.
Stewart & McRae and Cansler & Cansler for defendant.

ALLEN, J. The principal contentions of the defendant are:

1. That the plaintiff and the insured were partners when the policy was issued, and as such the plaintiff had no insurable interest in the life of the insured, and that, therefore, the contract of insurance is a wagering or gambling contract.

2. That the insured was not in good health at the time of the delivery of the policy of insurance, and that, therefore, the contract of insurance was never in force under the terms of the policy.

3. That the defendant rescinded the contract of insurance within twelve months after it was issued and tendered a return of the first premium, and that this being so, the incontestable clause does not prevent the defendant from alleging and proving false statements in the application for insurance and fraud in procuring its issue.

The plaintiff, on the other hand, contends:

1. That the insured was not a partner, but an agent and officer of the plaintiff, and that it had an insurable interest in his life.

2. That there is no evidence that the insured was not in good health at the time of the delivery of the policy and no evidence of false statements or fraud.

3. That the defendant had no right to cancel the policy of insurance, and did not do so, and that the same was in force at the death of the insured.

4. That the incontestable clause in the policy prevents the defendant from relying upon the fact, if it existed, that the insured was not in good health at the time of the delivery of the policy or that false and fraudulent statements were made in the application.

There is authority for the position that the incontestable clause in a policy of insurance covers every defense except that there was no insurable interest at the time of the issuing of the policy (5 Elliott on Contracts, sec. 4077), although the trend of modern authority is that the clause, when it takes effect within a reasonable time after the issue of the policy and not from date, cuts off all defenses except those specially allowed by the clause itself.

(561) "The modern rule is that a life insurance policy containing a provision that it shall be incontestable after a specified time cannot be contested by the insurer on any ground not excepted in that provision. *Williams v. St. Louis Life Ins. Co.,* 189 Mo., 70; *Massachusetts Ben. Life Assn. v. Robinson,* 104 Ga., 256; *Northwestern Life Ins. Co. v. Montgomery,* 116 Ga., 799; *Wright v. Mutual Ben. Life Assn.,* 118 N. Y., 237; *Patterson v. Natural Premium Mut. Life Ins. Co.,* 100 Wis., 118; *Mutual Reserve Fund Life Assn. v. Austin,* 142 Fed., 398; *Murray v. State Mut. Life Ins. Co.,* 22 R .I., 524; *Clement v. New York Life Ins. Co.,* 101 Tenn., 22; *Citizens Life Ins. Co. v. McClure,* 138 Ky., 138; 25 Cyc., 875." *Harris v. Ins. Co.,* Ann. Cases, 1914 C., 650.

Accepting it, however, as valid defense when established by proof, although not excepted in the clause, it is one that should not be favored when invoked by the insurer, when, as in this case, the policy was issued with full knowledge of the facts, because it convicts the insurance company of having issued a policy invalid in its inception and contrary to law, and permits it to take advantage of its own wrong.

It is not, however, necessary for us to decide whether the incontestable clause covers this defense, because it seems clear to us that the insured was not a partner of the plaintiff.

The uncontradicted evidence showing the relationship between the plaintiff and the insured is as follows:

W. H. Wood testified: "I have been secretary and treasurer of the American Trust Company since its organization, about fifteen years ago. In 1912 Harvey A. Lambeth was and had been associated with the company, as manager of the insurance department, since 1902. He was also a director in the company. We had a verbal contract with him, made by Mr. F. C. Abbott, who was the president, the vice-president, and myself as secretary and treasurer, providing that he should organize an insurance department and act as manager of it, receiving one-half of the net profits of that department as his compensation. The department belonged to the American Trust Company. He served continuously as active manager from his appointment until during 1912. During February and March, 1912, he was manager of the insurance department and director in the bank. He directed the operations of the business and was the head of it. He went out to solicit insurance and got it and brought it back. At times I saw the applications, and was coöperating with him personally, at times, in getting the business. He frequently conferred with me in getting insurance. He had charge of a large business, was principal producer of practically all the business of the insurance department. . . . The insurance department was a success from the time it was organized. He spent all his time in the insurance department. Had charge of all the force, controlled their work and their salaries. He worked incessantly at the business. He had (562) charge of employing and discharging all employees in the insurance department and fixed their salaries. The plaintiff had sub-agents all over this State and in South Carolina, and he looked after them."

There was also evidence that the plaintiff received as its share of the profits of the business conducted by the insured $7,500 per year.

The ordinary test of a partnership, as the defendant contends, is sharing in the profits, but the evidence brings this case within the well recognized exception to the rule, that there is no partnership if sharing in the profits is a mere means of ascertaining and determining the compensation for the services rendered. *Lance v. Butler,* 135 N. C., 422, and cases cited.

In this case the Court says: "In *Kootz v. Tuvain,* 118 N. C., 393, it is held that while an agreement to share profits, *as such,* is one of the tests of partnership, an agreement to receive part of the profits for his services and attention, as a means only of ascertaining the compensation, does not create a partnership."

The evidence shows that the plaintiff established an insurance department; that the insured was a director of the plaintiff, was the manager of this department, and, therefore, both an officer and an agent, and received half the profits as compensation for his services, and this brings the parties directly within the provisions of chapter 507 of the Laws of 1909, which reads as follows:

"And whenever there shall devolve upon any officer or agent of a corporation duties and responsibilities of such nature as that a financial loss would result to the corporation from the death and consequent loss of the services of such officer or agent, then in such cases the corporation shall be deemed to have an insurable interest in the life of such officer or agent, and shall have the power to insure the life of such officer or agent for its benefit."

This statute was passed in consequence of the opinion in *Victor v. Louise Mills,* 148 N. C., 107, and permits the taking out of a policy of insurance by a corporation upon the life of an officer or agent whose duties and responsibilities are of such nature that a financial loss would result to the corporation from his death, and the uncontradicted evidence conforms to all of its provisions.

The case of *Powell v. Ins. Co.,* 123 N. C., 103, relied on by the defendant, is not, therefore, in point.

Nor do we agree to the position that the defendant can avail itself of the plea that the insured was not in good health at the time of the delivery of the policy, and that for this reason, under the terms of the policy the contract never became operative.

If any length of time elapses between the making of the application and the issuing of the policy it is the duty of the defendant to
(563) make inquiry when the policy is delivered as to the condition of the health of the insured; and if it fails to do so, the delivery is conclusive against the defendant as to the completion of the contract.

It was so decided in *Grier v. Ins. Co.,* 132 N. C., 546, in which the Court said: "When the policy is not only issued, but delivered, its delivery (in the absence of fraud) is conclusive that the contract is completed (*Ray v. Ins. Co.,* 126 N. C., 166), and is an acknowledgment of payment during continuance in good health. If the agent had not delivered the policy, whether the circumstances would have justified the withholding of the delivery so as to release the company from responsibility is not a matter before us. He did deliver it, and with full opportunity to see the insured and with a suggestion that he do so, and there is no allegation of fraud and collusion, as in *Sprinkle v. Indemnity Co.,* 124 N. C., 405. The delivery of the policy closed the contract like the delivery of any other deed, and the preliminary provisions of the appli-

cation for withholding thereof ceased to be of any force. In *Kendrick's case, supra,* the money was not paid till after a lingering illness and on the very day of the death, and then by a friend; but it was held that the delivery of the policy was conclusive as to the contract being complete.

Numerous authorities can be cited in support of what is here said, but the matter has been sufficiently elaborated in *Kendrick v. Ins. Co.,* 124 N. C., 315; 70 Am. St. Rep., 592. To same purport, *Life Assn. v. Lindley,* (Texas) 68 S. W., 695; *Indemnity Assn. v. Grogan,* (Ky.) 52 S. W., 959; *Ins. Co. v. Koehlar,* 63 Ill. App., 188; *Ins. Co. v. Schlink,* 175 Ill., 284; *Ins. Co. v. Quinn,* 41 N. Y. Supp., 1060; *McElroy v. Ins. Co.,* 94 Fed., 990. In *Life Assn. v. Lindley* and *Indemnity Co. v. Grogan* the facts were identical almost with those in this case. . . . The actual delivery of the policy concludes the contract, in the absence of fraud."

It is also held that the incontestable clause covers this defense of the bad health of the insured at the time of the delivery of the policy (*Wright v. Ins. Co.,* 43 Hun., 65, affirmed in *Wright v. Ins. Co.,* 118 N. Y., 237; *Clement v. Ins. Co.,* 101 Tenn., 22; *Life Assn. v. Austin,* 142 Fed., 398; *Dibble v. Ins. Co.,* 179 Pa., 171; *Life Ins. Co. v. Briggs,* 156 S. W., 909; *Moher v. Ins. Co.,* 78 Atl., 554; *Patterson v. Ins. Co.,* 100 Wis., 118), as well as false and fraudulent statements in the application and the policy (*Dibble v. Ins. Co.,* 149 Pa., 171; *Wright v. Ins. Co.,* 118 N. Y., 237; *Patterson v. Ins. Co.,* 100 Wis., 118; *Benefit Assn. v. Robinson,* 104 Ga., 256; *Ins. Co. v. Briggs,* 156 S. W., 909; *Murry v. Ins. Co.,* 48 Atl., 800, and many other cases); and if this is not the legal effect of the clause, why insert it, except for the purpose of deceiving and misleading the insured?

As said in *Patterson v. Ins. Co., supra,* while discussing the (564) effect of the incontestable clause on the defense of false statements and fraudulent concealment: "If this clause be not altogether a glittering generality, put in for no purpose except to induce men to insure, it would seem that it must cover such misstatements or omissions as are here alleged."

This brings us to the consideration of the incontestable clause in the policy and of the effort of the defendant to cancel the policy within one year from its delivery.

The authorities are practically uniform in holding that an incontestable clause, which gives a reasonable time for the insurance company to make investigation, is valid, and that it means what it says, and that is that after the time named in the clause has expired no defense can be set up against the collection of the policy, unless it comes

within the excepted classes named in the clause itself, which in this case would be the nonpayment of premiums. See cases collected in note to *Harris v. Ins. Co.*, Ann. Cases, 1914 C., 652.

This clause, which has been generally adopted by the insurance companies, is not primarily for the benefit of the insured, but for the benefit of the insurance company itself.

It was adopted because, in many instances, insurance is taken out for the benefit of the wife and children, and frequently the hope of a reasonable income after death to those dependent upon him was defeated by defenses which could not have been sustained if the insured had been alive.

This deterred many from taking out insurance, and the companies adopted the incontestable clause for the purpose of increasing their business.

"No more tempting provision to an applicant could be introduced into a policy of life insurance than this one which guaranteed to the applicant that his policy should not be contested after the expiration of one year, provided the premiums were paid.

"Premiums upon life policies are often paid at a great sacrifice, and one of the most disturbing and unsatisfactory features of the insurance contract is the fact that, after these sacrifices and payments have been made for a number of years, and the insured has died, so that his testimony and perhaps that of others has been rendered unavailable by the lapse of time and the occurrence of death, instead of receiving the promised reward, the beneficiary will be met with a contest and a lawsuit to determine whether the insurance ever had any validity or force. Hence it has become an almost universal practice with insurance companies to provide against any contest or forfeiture of their policies after a certain length of time, greater in some cases and less in others.

"The provision in this case is very broad in its terms. There is only one condition upon which the validity of the policy can be ques-
(565) tioned after the lapse of a year, and that is the nonpayment of premiums. The meaning of the provision is that if the premiums are paid the liability shall be absolute under the policy, and that no question shall be made of its original validity. No reasonable construction can be placed upon such provision other than that the company reserves to itself the right to ascertain all the facts and matters material to its risk, and the validity of their contract for one year, and if within that time it does not ascertain all the facts, and does not cancel and rescind the contract, it may do so afterward upon any ground then in existence.

"The practical and intended effect of the stipulation is to create a short statute of limitation in favor of the insured, within which limited

period the insurer must, if ever, test the validity of the policy." *Clement v. Ins. Co.*, 101 Tenn., 22.

"It is in the nature of and serves a similar purpose as statutes of limitations and repose, the wisdom of which is apparent to all reasonable minds. . . . No doubt, the defendant held it out as an inducement to insurance by removing the hesitation in the minds of many prudent men against paying ill-afforded premiums for a series of years, and, in the end, and after the payment of premiums, the death of the insured, and the loss of his and the testimony of others, the claimant, instead of receiving the promised insurance, is met by an expensive lawsuit to determine that the insurance which the deceased has been paying for through many years has not, and never had, an existence except in name. While fraud is obnoxious, and should justly vitiate all contracts, the courts should exercise care that fraud and imposition should not be successful in annulling an agreement to the effect that if cause be not found and charged within a reasonable and specific time, establishing the invalidity of the contract of insurance, it should thereafter be treated as valid." *Wright v. The Mutual Benefit Life Assn.*, 118 N. Y., 237.

We, therefore, conclude that the policy of insurance was valid in its inception and that the incontestable clause, if in force, would prevent the defendant from showing that the insured was not in good health when the policy was delivered, or that there was fraud in procuring the issuing of the policy.

We must then determine whether the policy was in force at the expiration of one year from its delivery.

If it was, having concluded that the plaintiff had an insurable interest in the life of the insured and that the incontestable clause covers the defense of bad health at the time of the delivery of the policy and of fraud in procuring it, it would necessarily follow that the plaintiff is entitled to recover, and that there was no error in instructing the jury to answer the issues in favor of the plaintiff, and, on the (566) other hand, if the policy was not in force one year from its delivery these defenses are open to the defendant.

A policy of insurance is a contract, and is to be interpreted as other contracts (14 R. C. L., 925; *Ins. Co. v. Kearney,* 180 U. S., 132), except that if there are doubtful and ambiguous words and phrases they are to be construed in favor of the insured (Vance Ins., 430; *Bank v. Ins. Co.*, 95 U. S., 673; *Kendrick v. Ins. Co.*, 124 N. C., 320; *Gazzam v. Ins. Co.*, 155 N. C., 338); and "if there is a reasonable doubt as to the extent of the application of the 'incontestable clause,' it must be solved in favor of the beneficiary." *Mareck v. Life Assn.*, 62 Minn., 39; *Royal Circle v. Achterrath,* 204 Ill., 549.

It takes two to make a contract, and while one may cause a breach, it takes two to rescind or cancel it, unless there is some provision in the contract itself authorizing its rescission or cancellation at the option of one of the parties, which is not a feature of the policy in this case.

As said by *Justice Walker* in *Edwards v. Proctor, ante,* 41: "When parties enter into a contract for the performance of some act in the future, they impliedly promise that in the meantime neither will do anything to the harm or prejudice of the other inconsistent with the contractual relation they have assumed. The promisee it also has been said (and this seems to be the better reason), has an inchoate right to the performance of the bargain, which becomes complete when the time for such performance has arrived, and, meanwhile, he has a right to have the contract kept open as a subsisting and effective one, as its unimpaired and unimpeached efficacy may be essential to his interests. Clark on Contracts (1904), pp. 445, 447; *Frost v. Knight,* L. R., 7 Exch., 111."

"A policy is a contract between the insurer and the insured. Nothing in its nature implies that one party may at any time declare it ended." *Rothschild v. Ins. Co.,* 74 Mo., 41.

When the policy was issued mutual obligations were undertaken by the plaintiff and the defendant, the plaintiff agreeing to pay the premiums and the defendant agreeing to pay the amount of the policy upon the death of the insured; and when the defendant notified the plaintiff that it would cancel the policy, and tendered the return of the first premium, it was guilty of a breach, usually designated as a breach by renunciation. 3 Page Cont., sec. 1436.

One year is given to the defendant to make inquiry and investigation as to the health of the insured, and as to the statements made in the application and the policy as an inducement to the contract.

Within this time, if the defendant refused to perform its part of the contract, and so notified the insured, three remedies are given to the plaintiff:

(567) "(1) He may elect to consider the policy at an end and recover its just value. (2) He may sue in equity to have the policy declared in force. (3) He may tender the premiums and treat the policy as in force and recover the amount payable on it at maturity." 14 R. C. L., 1004; *Day v. Ins. Co.,* 29 Am. R., 693; *Ins. Co. v. McCormick,* 65 Am. R., 393.

The insurance company also has the right, if it concludes that the policy has been improperly procured, to institute an action for the cancellation of the policy within the year.

"The insured may maintain a suit in equity in a proper case to rescind or cancel the contract for fraud on the part of the company or its agent,

or for breach of contract. In like manner the company may maintain a suit in equity to cancel a policy because of fraud upon the part of the insured or the beneficiary, as the case may be, or because the policy is a wager policy by reason of want of insurable interest." 25 Cyc., 788; *French v. Connely,* 145 Eng. Report (reprint), 933; *Whittingham v. Thornbourgh,* 23 Eng. Report (reprint), 734; *Asso. v. Palmer,* 53 Eng. Report, 768; *Ins. Co. v. Dick,* 114 Mich., 337.

The two cases relied on by the defendant (*Ins. Co. v. Bailey,* 13 Wall., 616; *Cable v. Ins. Co.,* 191 U. S., 288) to sustain the position that the insurance company has no right to bring an action to have the policy canceled, are not in point, because in both of these cases the right was denied upon the ground that an action at law was pending upon the policy, the insured having died, and it was held that the insurance company did not have the right to go into a court of equity, as it could set up the defense in a court of law.

It follows, therefore, that the conduct of the defendant in notifying the insured that it would cancel the policy and in tendering the first premium which had been paid, did not rescind or cancel the contract, as the plaintiff did not consent thereto, and amounted to no more than a breach, and that the remedy of the defendant was to institute an action for cancellation within the year, and as it did not do so the policy was in force at the expiration of the year.

This is also in accordance with the authorities holding that if the defendant wishes to contest and to avoid the payment of the policy and the force of the incontestable clause, it must take affirmative action within the time limited by the policy.

In *Ins. Company v. McGinnis,* 45 L. R. A. (n. s.), 197, the Court said: "It seems to be a well recognized principle of insurance law that a provision in a contract of insurance limiting the time in which the insurer may take advantage of certain facts that might otherwise constitute a good defense to its liability on such contract is valid, and precludes every defense excepted in the provision itself. It also seems to be generally held that such a clause precludes the defense of (568) fraud as well as other defenses, and that it is not valid on the theory that it is against public policy, provided the time in which the defenses must be made is not unreasonably short. An examination of the following cases will show that the holding of the courts of this country has been almost universally that *every defense* to a policy of insurance embraced within the terms of the 'incontestable clause' is completely lost to the insurer, if it fails to make the defense or *take affirmative action within the time limited by the policy.*"

The language used in *Murray v. Ins. Co.,* 53 L. R. A. (R. I.), 743, speaking of the incontestable clause, is that "The practical and evidently

the intended effect of the stipulation in question was to create a short statute of limitations in favor of the insured, within which limited period the insurer must, if ever, *test the validity of the policy*" (Italics ours); and this is copied and adopted in *Clemens v. Ins. Co.*, 70 A. S. R., 653.

The meaning of the terms, "take affirmative action," "test the validity of the policy," if in doubt, is made clear by the decision in *Wright v. Benefit Assn.*, 43 Hun., 65, which was affirmed in 118 N. Y., 237, in which the Court, speaking of a policy which became incontestable after two years, says: "Its effect is not to prevent the insurer from annulling the contract upon the ground of the fraudulent representations of the insured, provided *an action is brought* in the lifetime of the insured and *within two years from the date of the policy*," and this was quoted and approved in *Ins. Co. v. Robinson*, 42 L. R. A. (Ga.), 269.

The case of *Powell v. Ins. Co.*, 153 N. C., 128, is not in conflict with these views.

In that case the defendant denied the delivery of the policy, and it was held that if the policy was not delivered and the contract was never in force, that the incontestable clause would fall with the other provisions of the contract.

We are, therefore, of opinion, as the plaintiff had an insurable interest in the life of the insured when the policy was issued, and as no action was brought by the defendant within one year from the date of the policy to have the contract of insurance canceled or rescinded, that the incontestable clause was in force at the death of the insured, and that the defendant is precluded thereby from relying on the defenses set up.

We have dealt with the case upon the theory that there is some evidence to support the defense relied on, but upon an examination of the record it appears to us that the insured acted in good faith, and, while there is some evidence that he had an incurable disease at the time of the delivery of the policy, that he had no knowledge of it, and that he was in apparent good health.

No error.

Cited: Garland v. Ins. Co., 179 N.C. 72; *Hardy v. Ins. Co.*, 180 N.C. 183; *Ins. Co. v. Grady*, 185 N.C., 352; *Underwood v. Ins. Co.*, 185 N.C. 540; *Powers v. Ins. Co.*, 186 N.C. 338; *Gurganus v. Mfg. Co.*, 189 N.C. 204; *McCain v. Ins. Co.*, 190 N.C. 552; *Wambolt v. Ins. Co.*, 191 N.C. 39; *Dawson v. Ins. Co.*, 192 N.C. 316; *Bolch v. Shuford*, 195 N.C. 661; *Urey v. Ins. Co.*, 197 N.C. 387; *Jolley v. Ins. Co.*, 199 N.C. 271; *Mauney v. Ins. Co.*, 209 N.C. 504; *West v. Ins. Co.*, 210 N.C. 236; *Mills v. Ins. Co.*, 210 N.C. 441; *Yerys v. Ins. Co.*, 210 N.C. 444; *Roth-*

rock v. Naylor, 223 N.C. 787; *Abrams v. Ins. Co.,* 224 N.C. 2, 8, 11; *Moore v. Ins. Co.,* 231 N.C. 730.

(569)

LUCY W. RYDER ET ALS. v. ELLA B. OATES ET ALS.

(Filed 23 May, 1917.)

1. Partition—Unknown Claimants—Contingent Interests—Clerks of Court—Jurisdiction.

When adversary proceedings to partition land among tenants in common, alleging fee-simple title in some of the parties and joining others for the purpose of excluding such interest, contingent or otherwise, as they may claim, whether *in esse* or otherwise (Rev., sec. 410), and for the appointment of guardians for such interest, are brought before the clerk of the Superior Court, the Superior Court, on appeal, acquires jurisdiction and can retain the cause and hear and determine all matters in controversy. Revisal, sec. 614.

2. Courts—Jurisdiction—Appeal—Contingent Interests—Sale—Statutes.

Lands subject to contingent limitations may be sold by order of the judge of the Superior Court in term, on appeal in proceedings in partition improperly brought before the clerk, by retaining jurisdiction for the purpose of settling the controversy. Revisal, secs. 1590, 614.

3. Parties—Class Representation—Service—Publication—Judgments.

Where parties are brought in by publication in proceedings to partition lands, for the purpose of excluding any interest they might claim, and are properly represented by those in the same class, the doctrine of "virtual representation" applies.

4. Judicial Sales—Courts—Private Sales.

It is within the power of the court, having jurisdiction, to order the private sale of lands for the purpose of dividing the proceeds among tenants in common.

5. Estates—Contingent Limitations—Vested Title.

A deed in trust to lands that the title vest absolutely in the children surviving the wife, and that the trustee shall do whatever is necessary to vest it accordingly, gives the surviving children an absolute and indefeasible title upon the happening of the event, which is not destroyed by a further limitation to the brothers and sisters of the donor should all of such children die without issue.

6. Trusts and Trustees—Executors and Administrators—Power of Disposition—Consent of Executors—Renouncement—Judgment—Estoppel.

A devise and bequest of real and personal property to the wife with the power of disposition given her with the consent of several executors named in the will, is one of personal confidence in each of the executors, requiring

the consent of all for the exercise of the power; and where the executors have not qualified by reason of death or renunciation under the formalities of Revisal, sec. 10, those thus renouncing may not come in and qualify after a lapse of twenty years and give valid consent to the exercise of the power, especially when they are bound by a judgment in an action to sell the lands, wherein they had been made parties.

(570) APPEAL by defendants from *Cline, J.*, at April Term, 1916, of MECKLENBURG.

This is a special proceeding for sale for partition of the "Central Hotel" property on Independence Square in Charlotte. The *feme* petitioners are the sole surviving children of M. L. Wriston, deceased (their husbands being joined).

The proceeding was begun before the clerk, the *feme* petitioners alleging that they are the owners of an indefeasible fee-simple title to an undivided one-half interest in said property, and that the devisees of R. M. Oates, who are defendants, are the owners of an indefeasible fee-simple interest in the other undivided one-half interest. The petitioners also joined as defendants their children and grandchildren, the descendants of brothers and sisters of M. L. Wriston, and J. C. Springs to represent the heirs of H. G. Springs as a class, on the ground that said defendants might by some possibility claim an interest in said property, a part of the relief sought being the exclusion of such interest.

The devisees of R. M. Oates filed an answer admitting all the allegations of the petition and joining in the prayer for relief.

All of the children of the petitioners who are of age filed an answer admitting the allegations of the petitioners, joining in the prayer for relief, and disclaiming any interest in said property in favor of said petitioners. Four of the defendants are infant children and grandchildren of the petitioners for whom C. S. Glasgow was appointed guardian *ad litem*. Advertisement was made for all parties claiming any interest who were unknown to the petitioners. None came in, but the clerk appointed A. G. Robertson guardian *ad litem* for any unknown parties. These two guardians *ad litem* filed motions to dismiss and demurrers, which being overruled, they appealed to the judge. The appeal came on at term time, and the judge sustained the action of the clerk, but at request of the petitioners he retained the cause in that court under Revisal 614, and appointed Hunter Marshall, Jr., guardian *ad litem* of all persons not *in esse* to whom by any possibility any claim to an interest in the property might accrue. He also filed certain motions and demurrers which were overruled. All the guardians *ad litem* thereupon answered the petition, admitting the allegations of fact in the complaint but denying that the *feme* petitioners were the owners of an absolute title to an undivided one-half interest in said property, and

asked that the property be sold and that the proceeds be invested in accordance with Revisal, 1590.

It appears that an offer of $361,041.50 had been made for an indefeasible fee-simple title in the property by W. S. Alexander, who had assigned his bid to the Southern Real Estate Loan and Trust Company, which duly filed the bid in writing. Upon proof the court found as a conclusion of fact and of law that an actual partition of (571) the lands could not be made without injury to all the parties interested; that the price bid was full and fair; that the terms and conditions of the bid were reasonable and just; that the interest of all parties would be served by the sale and the acceptance of the bid at that price, and appointed a commissioner to execute the deed to the purchaser; but the bidder refused to accept the deed when tendered. A rule being served upon the bidder to show cause, it filed an answer alleging that the commissioner could not convey an indefeasible fee-simple title. The petitioners demurred to this answer. The court sustained the demurrer and rendered judgment against the bidder for specific performance, and the bidder appealed.

The court also directed that the commissioner should collect the purchase money and after paying the costs should distribute the remainder among the *feme* petitioners and devisees of R. M. Oates. From this order the guardians *ad litem* excepted and appealed.

C. W. Tillett, Jr., for petitioners.
Cansler & Cansler for Ella B. Oates et als.
Glasgow & Glasgow for Bessie Durham et als.
Pharr & Bell for Trust Company, appellant.
A. G. Robertson for unknown defendants.
Hunter Marshall, Jr., for defendants not in esse.

CLARK, C. J. The appeal presents three questions: (1) Was the procedure regular and proper? (2) Are the *feme* petitioners the absolute owners of the Wriston interest? (3) Are the devisees of R. M. Oates the absolute owners of the Oates interest?

M. L. Wriston, father of the *feme* petitioners, was the owner of an undivided one-half interest in this property in fee, and R. M. Oates owned the other one-half interest in fee in said lots.

In 1876 M. L. Wriston died leaving a last will and testament, which appears in the record. He left surviving him his widow, five daughters who are the *feme* petitioners, and a son, Henry Wriston. All his other children had predeceased him, unmarried and without issue. The son, Henry Wriston, died in 1893, intestate, unmarried and without issue. In 1913 the widow of M. L. Wriston died intestate. The *feme* petition-

ers, Lucy W. Ryder, Bessie W. Durham, Ada W. Brockenbrough, Ella W. Lee, and Minnie W. Smith, are the daughters of M. L. Wriston, and his sole heirs at law and devisees, and they claim as joint owners in fee an undivided one-half interest in the Central Hotel building and lot in Charlotte, which it is sought to have sold for partition. The first three named have children and grandchildren, who are parties de-
(572) fendant and represented in this action. The other two petitioners, Ella W. Lee and Minnie W. Smith, have never had any children and the last named is a widow. All the brothers and sisters of M. L. Wriston are dead and all their descendants known to the petitioners have been named as parties defendant and those not known have been advertised for as provided in Revisal, 2490. H. G. Springs died in 1903, leaving a will wherein the defendant J. C. Springs was named as executor. H. G. Springs left a large number of heirs, many of whom are not known to the petitioners. Under the provisions of Revisal, 411, the petitioners have joined the said J. C. Springs, who is an heir of H. G. Springs, to represent the heirs of H. G. Springs as a class.

R. M. Oates died in 1897, owning an undivided one-half interest in fee in the Central Hotel property, leaving surviving him his widow, Ella B. Oates, and the following children: Lalla O. Bethel, Lucy Oates, Bertha O. Twitty, and John B. Oates. In his will R. M. Oates named his wife and three nephews as executors of his estate, and gave them certain powers over the estate. One of these nephews predeceased him. The other two renounced their right to qualify, and one of them has since died. The surviving nephew is a party to this proceeding, but has not filed any answer nor made any objection to the sale or order of disbursement. The executrix has never undertaken to exercise any of the powers conferred upon her by the will except to distribute the income from the estate among her children. She and all of her children are parties to this proceeding and have joined in the prayer for sale.

The procedure in this matter has been regular and proper. As the petitioners contend that they are the absolute owners of the Wriston interest in the land set out in the petition, and that the devisees of R. M. Oates are the absolute owners of his interest in said land, and that the *feme* petitioners and said devisees are tenants in common of said land, they are entitled to have sale of the same for partition, the court having found that actual partition of the land is impracticable. The proceeding was therefore properly begun before the clerk. In order to settle all doubt as to the title to the property the petitioners have joined as defendants all persons who might in any contingency claim an interest in said land, known and unknown, *sui juris* and *non sui juris*, including also any not *in esse* who might by possibility hereafter set up a claim, Revisal, 410. The clerk having overruled the motions and

demurrers filed by the guardians *ad litem* of all persons represented by them who claim a contingent interest, the guardians appealed to the judge, who affirmed the judgment of the clerk and, retaining the cause, as under Revisal, 614, he was authorized to do, he proceeded to hear and determine all matters in controversy. This course has been repeatedly recognized as correct. *Little v. Duncan,* 149 N. C., (573) 84. By virtue of Revisal, 1590, land subject to contingent limitations can be sold by order of the judge at term-time. Even if the proceeding had been improperly brought before the clerk, the judge had ample authority to retain jurisdiction and order the sale. Revisal, 614 and 1590; *Springs v. Scott,* 132 N. C., 548; *Smith v. Gudger,* 133 N. C., 627. Even if the proceeding before the clerk had been without authority, the judge could retain jurisdiction after the action was brought before him. *In re Anderson,* 132 N. C., 243.

Even though the parties who were brought in by publication should show that they have not been properly served, the sale under Revisal, 1590, is valid when the class of remaindermen coming next after life tenants is represented by one or more persons in being, under the doctrine of "virtual representation." *Springs v. Scott,* 132 N. C., 548. In *Hodges v. Lipscombe,* 133 N. C., 199, the court held that it would be a vain and useless thing for the law to require every conceivable individual to be summoned.

All the children and descendants of the brothers and sisters of M. L. Wriston have been summoned by publication, but several of them have been personally served, and these sufficiently represent the class.

It was entirely in the power of the court to order a private sale. *McAfee v. Greene,* 143 N. C., 411, which holds that this has been too frequently adjudged to be now an open question. *Wooten v. Cunningham,* 171 N. C., 123. In *Overman v. Tate,* 114 N. C., 571, the procedure was very much on all-fours with this, and there the sale was ordered by the clerk, though one of the interests was subject to contingent limitations.

The court properly held that the *feme* petitioners were the absolute owners of the Wriston interest and entitled to the proceeds of the sale. The guardians *ad litem* have appealed upon the ground that the proceeds should be invested, but an examination shows that the deed of settlement set out in the record, executed by M. L. Wriston, conveyed an absolute title to the *feme* petitioners which became vested at the death of his widow in 1913. It provides that at her death "The property shall *vest absolutely* in the children surviving her," and at the end of the deed of settlement it is provided that upon the condition named upon which the deed shall "vest and pass absolutely," the trustees shall do whatever is necessary to "perfect the title" in the parties entitled to the estate at that time.

The effect of these words is not destroyed by the provision in the deed of settlement: "In the event of all of his children dying without issue, then said property shall descend to the brothers and sisters of said M. L. Wriston and the heirs of those who may die leaving issue." He did not mean this as a condition of defeasance, but referred to "death (574) without issue during the life of his wife." He made the above provision to limit the estate to his brothers and sisters should his lineal descendants become extinct before the death of his wife, for the deed is clear that at his wife's death, whether his own children or their issue or his brothers and sisters would take, they should take not conditionally and defeasibly, but "absolutely."

In said deed of settlement M. L. Wriston did not reserve power to reappoint the property unless he outlived his wife. Otherwise, the reservation would be void for repugnancy. Besides, his will is not an exercise of the power to reappoint, but he followed closely in his will the terms of the deed of settlement. Item 4 of the will devises "All my estate, real and personal." In *Carraway v. Moseley,* 152 N. C., 351, it was held that a will, in order to be an exercise of a power, must contain either some reference to the power or to the property which is the subject of the power, or it will be ineffectual unless construed to be an execution of the power. In this will there is no reference to the power, nor any distinct references to the Central Hotel property, and the will is effectual without construing it to be an exercise of the power, because the testator at his death owned a large amount of property besides the Central Hotel property. Revisal, 3143, does not apply, because that refers only to general powers, and the power here reserved is special. It is the power to appoint to other "uses and trusts," while the will does not undertake to declare any uses and trusts at all, but disposes simply of the fee. It does not purport in terms, or by reasonable construction, to be an execution of the power by will.

In the deed of settlement Wriston expresses his intention in making the deed of settlement to be: "The wish and purpose of said Wriston is to settle a portion of his estate on his wife and children so as to secure a home and support for his family against the contingencies of future debts and embarrassments, retaining ample property to meet all his present liabilities."

In accordance with this expressed wish, he gave his wife the property for her life, not directly, because prior to the Constitution of 1868 this would have made it liable to the payment of his debts. He therefore placed the property in the hands of a trustee, with the provision that her estate therein should continue during the joint lives of himself and wife, and should she survive him, that this estate would terminate at her death or second marriage, when it would "vest absolutely" in the parties then

in remainder, who are these petitioners. He directed that on his wife's death or second marriage "the property is to vest absolutely," and further on he refers to the death or second marriage of his wife as the condition upon which the estate shall "vest and pass absolutely." The word "vest absolute" or "absolutely" means an indefeasible, unconditional, fee-simple title. *Bank v. Johnson,* 168 N. C., 308; *Dunn v.* (575) *Hines,* 164 N. C., 113; *Vinson v. Wise,* 159 N. C., 653; *Whitfield v. Garris,* 134 N. C., 25; *Galloway v. Carter,* 100 N. C., 121; *Price v. Johnson,* 90 N. C., 597; *McEachin v. McRae,* 50 N. C., 22; *Hilliard v. Kearney,* 45 N. C., 223; *Cox v. Hogg,* 17 N. C., 128, in all of which the phrase "absolute property" is held to mean indefeasible.

The termination of the trust estate is the time to which the death without issue will be referred. Here the trust estate terminated at the death of Mrs. Wriston. The language of the trust itself is, "These trusts to continue during coverture, and should she survive her said husband, then during her natural life or widowhood"; and it is provided that upon such death or second marriage the trustee should "convey to the parties entitled, should the same be necessary to perfect title, without the trouble and expense of applying to the court." The deed of settlement further recognizes this by providing for the removal of the trustee, and also for the change of the investment by the written consent "of the trustee and the said M. L. Wriston and wife, or the survivor of them." No power is given to change the trustee or investment except during the life of the said M. L. Wriston and his wife or the survivor of them. His object in making the trust was to protect his wife and children from his subsequent debts, and to prevent his wife's interest in the land being subject to sale for his debts, as the law then stood, the trust was created and a trustee appointed.

The rule laid down in *Hilliard v. Kearney,* 45 N. C., 221, and which has been adhered to ever since without modification is: "Where there is an intermediate period between the death of the testator and the death of the devisee, such as the expiration of the life estate or the arrival of a beneficiary at a certain age, the death without issue will be referred to this intermediate period." The courts do not refer "the death without issue" to the death of the testator, because the testator could provide by codicil for any change that might occur after making his will and prior to its probate.

The deed of settlement is expressed therein to be for the benefit of his wife and of his children who were then in being and such as might be born thereafter. The contention that the limitation over would not vest on the death of his wife, but only upon the death of all his children without leaving issue would be void, moreover, because it would be in violation of the rule against perpetuities, which is as follows: "No interest

is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." Gray on Perpetuities, sec. 201. Two of the *feme* petitioners, Lucy W. Ryder and Ella W. Lee, were born after the execution of the deed of settlement, on 12 March, 1867. Any estate created by the deed the vesting of which could (576) by any possibility be postponed for a longer time than twenty-one years after the death of Mrs. Wriston and the three petitioners who were then living would be void. The limitations over, if as contended for by the appellants, would be void for remoteness and the estate of the *feme* petitioners becomes absolute. *Porter v. Rose,* 55 N. C., 196; *Weatherly v. Armfield,* 30 N. C., 25; Gray on Perpetuities, sec. 247.

By the terms of the deed of settlement M. L. Wriston did not reserve the power to reappoint the property unless he should outlive his wife, for the second division of the deed specifies: "Should he survive his said wife." The will, besides, does not constitute an execution of the alleged power, for the reasons already stated.

Robert M. Oates by his will gave his wife, with the consent of her coexecutors (none of whom qualified), the right to sell both real and personal property, and directed that on the death of his wife, her coexecutors should divide the estate equally between his children, and if they "deemed best" they were given power to allot to his daughters a life estate in their shares, with limitations over to their children. As already stated, only the widow qualified as executor; one of the coexecutors named died before the testator and one since, and the other, who renounced, is a party to this action and makes no exception to the decree of sale and distribution.

As to the objection that the surviving coexecutor could hereafter come into court and, withdrawing his renunciation, qualify as coexecutor and exercise the power to limit the property to the daughters of the testator for life, it is to be observed that such power was conferred upon the coexecutors as a trust personal in them and to be exercised at their discretion. It cannot, therefore, be exercised by one of the coexecutors after the death of the other two. In Tiffany on Real Property, sec. 282, the principle of law is thus stated: "A statute sometimes provides that a surviving executor or trustee may exercise the powers originally given to the executors or trustees jointly; but even then the power will not, it seems, be exercisable after the death of one, if it was intended to rest in the joint personal discretion of the persons named as executors or trustees, or if it was given to them in their individual rather than their official character."

In Perry on Trusts (6 Ed.), sec. 497, it is said: "A discretionary power to four trustees and the survivors of them cannot be executed by the last survivor, for though the power may generally be held to sur-

vive, an intention to the contrary, if it can be fairly inferred, will control."

In the same work, section 273, it is said: "But if the power is given the person and not to the office, a disclaimer by one would not vest the power in the other trustees so as to enable them to exercise it." In *Dillard v. Dillard,* 97 Va., 441, where the will conferred a power (577) on the testator's two sons and her son-in-law, the Court said: "The power, as respects John T. Dillard, being conferred on the three trustees by name, without words of survivorship, and being one of personal confidence, it could only be conjointly exercised by all three of them and not by a less number. The authority, being joint, is determined by the death of one of them. Hill on Trusts, marg. pp. 211, 227, 488; 2 Perry Trusts, secs. 496, 497, 499; *Cole v. Wade,* 16 Ves., 27; *Walter v. Maunder,* 19 Ves., 424; and *Brown v. Hobson,* 3 A. K. Marsh, 380. If the law were otherwise, then upon the death of one of the trustees, the two survivors could execute the power, and upon the death of one of them the sole survivor could do so, and might dispose of the property contrary to what the other two trustees in their lifetime always opposed and prevented, and thereby frustrate the very object of the testator in intrusting its disposition to the joint judgment of all three of them, and defeat his testamentary intent."

In *O'Brien v. Battle,* 98 Ga., 766, the Court said: "Where a will confers upon two trustees a power not coupled with an interest, and no words of survivorship are used in the instrument, the presumption of law is that the grantor contemplated a joint execution of the power, and the survivor cannot execute it, quoting *Mansel v. Mansel* (Wilm. Op., 36), where *Wilmot, Lord Commissioner,* said: 'If I say I will trust two, the law will not say I shall trust one; it is a joint confidence. But if it is limited to the survivor it is saying I will trust two as long as they live, and afterwards one of them.' So, if the power be given to particular persons by name, without saying more, or adding words of survivorship, it must be exercised jointly, and upon the death of one of them the power will be gone." 1 Perry Trusts, sec. 294. To same effect, *In re Wilkins,* 86 N. Y., 360.

Wood v. Sparks, 18 N. C., 390, and *Davis v. Inscoe,* 84 N. C., 396, quoted by the appellants as authority that the power here survives to the surviving trustee, James M. Oates, is not in point, for they applied only to the power of sale, which is not a personal confidence such as is reposed by the testator in this case in the judgment of his three nephews. The Court cannot hold that he trusted to one when the will intrusted it to the judgment of three.

Our statute for the construction of statutes, Revisal, 2831 (2), which provides that a statute giving "joint authority to three or more public

officers or other persons shall be construed as giving such authority to a majority of them," unless otherwise expressly declared in the statute, recognizes the general rule as above stated, and excepts from it the authority when given by a statute, which is not personal in its nature.

A somewhat similar incident is related in 2 Campbell's Lives of
(578) Lord Chancellors, 330, as having made the fortune of *Lord Chancellor Ellsmere* when he was simply a young lawyer, Thomas Egerton. Three graziers had deposited a sum of money with an innkeeper to be returned on their joint application. One of them, fraudulently pretending he had authority to receive it, induced the innkeeper to return the money to him, and he absconded with it. The other two brought action for the money, but young Egerton said: "This money was to be returned to three, but *two* only sue. Where is the *third?* Let him appear with the others; till then the money cannot be demanded."

Revisal, sec. 10, provides: "Any person appointed an executor may renounce the office by a writing signed by him, and on the same being acknowledged or proved to the satisfaction of the clerk of the Superior Court, it shall be filed." There are decisions, it is true, that an executor who has renounced can under some circumstances come in and qualify, *Davis v. Inscoe,* 84 N. C., 401; *Wood v. Sparks,* 18 N. C., 389. But there is no case in which he renounced with the formalities of this statute, and afterwards has qualified. Certainly he should not be allowed to do so after the lapse of twenty years, as in this case.

Moreover, James M. Oates being a party to this action, and filing no answer and not appealing from the decree of the court, is bound by the judgment herein rendered.

After most careful consideration of the very able briefs filed respectively by the appellants and the appellees, we are of opinion that a good and indefeasible title can be conveyed to the purchaser and that the decree of the court below should in all respects be

Affirmed.

Cited: Kirkman v. Smith, 175 N.C. 583; *Hayden v. Hayden,* 178 N.C. 263, 264; *Cotton Oil Co. v. Grimes,* 183 N.C. 99; *Mann v. Archbell,* 186 N.C. 74; *Hall v. Artis,* 186 N.C. 106; *Bank v. Leverette,* 187 N.C. 747; *Hill v. Young,* 217 N.C. 118; *Perry v. Bassenger,* 219 N.C. 848, 849; *Wilson, Ex Parte,* 222 N.C. 104.

THOMAS B. LEE v. GREENVILLE, SPARTANBURG AND ANDERSON RAILWAY COMPANY ET ALS.

(Filed 23 May, 1917.)

Indebitatus Assumpsit—Contracts—Privity — Employer and Employee — Services.

It is not necessary to show privity of contract, or an agreement between the parties, in order to recover money had and received to the use of another; and where a civil engineer employed for a part of the time by one railroad company renders services for another, without interfering with his duties, and the former company, with his consent, renders the latter a bill for such services as a method for collection, and collects the same, in an action of *indebitatus assumpsit* the plaintiff may recover from the defendant company the money so received by it, when from the first he has insisted upon his rights and has not waived them.

CIVIL ACTION, tried February Term, 1917, of MECKLENBURG, (579) before *Cline, J.*, upon this issue:

Are the defendants indebted to the plaintiff, and if so, in what amount? Answer: "Yes; $1,000, with interest from 1 November, 1913."

From judgment rendered defendants appealed.

Tillett & Guthrie, C. W. Tillett, Jr., for plaintiff.
Osborne, Cocke & Robinson for defendants.

BROWN, J. Plaintiff seeks to recover $1,000 for money received by defendant for his use. A motion to nonsuit was made upon the ground that in no view of the evidence was the money received by defendants for plaintiff's use.

The evidence is conflicting, but that introduced by plaintiff tends to prove that he was employed by defendants as chief engineer at a salary of $400 per month, but not for his entire time; that plaintiff contracted with Durham and Southern Railroad Company to do certain engineering work. The work which the plaintiff did for the Durham and Southern Railway did not interfere with the discharge of his duties as chief engineer of the defendant; but he performed his duties as chief engineer while he was doing the work for the Durham and Southern.

A bill for the $1,000 was made out in name of defendants against Durham and Southern and approved by plaintiff, but he then informed defendants' officers that he claimed the money for his work for the Durham and Southern Railroad Company. There is evidence from which it may reasonably be inferred that the making out and transmitting to the Durham and Southern of a bill for $1,000 was merely a means of collecting the money, which money the plaintiff demanded of the defendants as soon as he learned that they had received it. There is

sufficient evidence to go to the jury from which they may draw the reasonable inference that this money received by defendants rightfully belonged to plaintiff, and that he has not waived his claim to it.

The court denied the motion to nonsuit and submitted the matter to the decision of the jury in a very clear instruction, as follows:

"That if the jury shall find, by the greater weight of evidence, that under the terms of Major Lee's contract with the defendants he was employed, not for his entire time, but at a monthly salary to discharge the duties of chief engineer for the defendants, and that he did the work for the Durham and Southern Railroad Company, under employment by Mr. Stagg, the executive officer of that company, and that the doing of the work for the Durham and Southern did not interfere with the discharge of his duties as chief engineer of the defendant, but that he performed his duties as chief engineer of the defendants while he was doing the work for the Durham and Southern, then, nothing else (580) appearing, Major Lee himself would be entitled to receive compensation for the work done by him for the Durham and Southern Company; and if the jury should find that the making out and transmitting to the Durham and Southern Company of the bill for $1,000 was merely a means of collecting the money, and that when Major Lee learned that the money had been received by the defendants, he forthwith demanded it of the defendants; and if the jury shall further find that the money which thus came into the hands of the defendants justly and rightfully belonged to Major Lee, and that he has done nothing to waive or relinquish his right to the money, then the jury are instructed to answer the issue '$1,000, and interest from the time the plaintiff demanded of the defendants the money which had been thus collected.'"

There is some difference of opinion among the courts as to when an action of *indebitatus assumpsit* may be maintained for money had and received.

Some courts adhere to the English authorities, and hold that the facts must establish that the defendant received the money by agreement for the plaintiff, or that some privity existed between the parties in relation to the money sought to be recovered. That is the judgment of the New Jersey Court in *Harris v. Stryker,* 32 Am. Dec., 404, where that side of the controversy is fully presented.

The opinion of *Lord Denman, C. J.,* in *Vaughan v. Matthews,* 66 E. C. L., 187, sustains that view, but the note at page 189 says: "The current of the American cases is in opposition to the decision in this case. There need be no privity of contract between the parties in order to support the action for money had and received except that which results from one man having another's money which he has not a right

conscientiously to retain." The commentator cites a large number of cases sustaining him.

See, also, *O'Faller v. Boismenar,* 3 Mo., 405; *Mason v. White,* 17 Mass., 563; *Bank v. Plimpton,* 28 Am. Dec., 286; *Hindmarch v. Hoffman,* 127 Pa. St., 284; *Boos v. Lang,* 71 N. E., 120. The Federal courts take same view, *Leete v. Pacific Co.,* 88 Fed., 957, and also our own Court.

In *Mitchell v. Walker,* 30 N. C., 243, it is said: "The action of assumpsit is a liberal action, and where by the obligations of justice and equity the defendant ought to refund money paid to him the action will be sustained." This case is cited and approved in the recent case of *Sanders v. Ragan,* 90 S. E., 778.

The motion to nonsuit was properly denied. We deem it unnecessary to discuss the other assignments of error.

No error.

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(581)

CHARLOTTE FREEMAN ET AL. v. RODOLPH BELFER ET AL.

(Filed 23 May, 1917.)

1. Husband and Wife—Title by Survivorship—Unity of Person.

The doctrine of title by survivorship recognized by our courts, between husband and wife holding lands in entirety, is not founded upon the common law, but upon the scriptures, declaring them to be "one flesh."

2. Same—Constitutional Law—Statutes—Married Women—Separate Property.

Our Constitution and statutes relative to the property and rights of married women do not affect the doctrine of title by survivorship in lands held by husband and wife in entirety.

3. Husband and Wife—Title by Survivorship—Divorce a Mensa.

A divorce *a mensa et thoro* does not sever the marital relationship of husband and wife so as to make them tenants in common of lands held by them in entirety, or to effect a change in the doctrine of title by survivorship between them.

CLARK, C. J., and BROWN, J., dissenting.

CIVIL ACTION, tried before *Carter, J.,* at December Term, 1916, of RANDOLPH.

This is an action to recover land, tried on the following agreed statement of facts:

1. That this action was instituted in the Superior Court of Randolph County on 16 August, 1916, for the recovery of the land described in a deed hereinafter set forth, and all the defendants were personally served with summons.

2. That prior to 31 July, 1890, Travis Smith and Louisa Smith were legally married, and at that time they were husband and wife.

3. That on 31 July, 1890, B. B. Barnes executed a deed conveying the land in controversy to the said Travis Smith and his wife, Louisa Smith, in fee by entireties, which deed was duly registered on 1 August, 1890.

4. That at March Term, 1907, the said Travis Smith obtained judgment of divorce *a mensa et thoro* from the said Louisa Smith on the ground of abandonment.

5. That said Travis Smith died intestate in the year 1912, and the plaintiffs, who are his sisters, are the only heirs at law.

6. That Louisa Smith survived her husband and died intestate in the year 1916, and the defendants, who are her brothers, are her only heirs at law.

(582) 7. The plaintiffs contend that they are the owners of said land or at least of one-half thereof as tenants in common, and the defendants deny that the plaintiffs own any interest therein, and contend that they are sole seized of said land.

His Honor held that a divorce *a mensa et thoro* severed the marriage relation and that the plaintiffs were entitled to recover one-half of the land in controversy, and the defendants excepted and appealed.

Hammer & Kelly for plaintiff.
J. A. Spence for defendant.

ALLEN, J. The idea that husband and wife are one, or, as generally expressed, of the unity of the person, does not have its origin in the common law. It dates from the Garden of Eden, when it was declared, "They shall be one flesh" (Gen., 2:14), and it has been reaffirmed and preserved in the Gospels and the Epistles. "Wherefore they are no more twain, but one flesh" (Matt., 19:5); "They twain shall be one flesh" (Mark, 10:8); "They two shall be one flesh" (Eph., 5:31).

It is on the doctrine of the Unity of Person that estates by entireties, with the right of survivorship, rest. *Motley v. Whitemore,* 19 N. C., 537; *Topping v. Saddler,* 50 N. C., 360; *Long v. Barnes,* 87 N. C., 334; *Harrison v. Ray,* 108 N. C., 216; *Bruce v. Nicholson,* 109 N. C., 204; *Gray v. Bailey,* 117 N. C., 442; *Ray v. Long,* 132 N. C., 891; *McKinnon v. Caulk,* 167 N. C., 412.

The Court says, in *Motly v. Whitmore, supra,* which is approved in the other cases cited: "When lands are conveyed to husband and wife, they have not a joint estate, but they hold by entireties. Being in law but one person, they have each the whole estate as one person; and on the death of either of them the whole estate continues in the survivor,"

and in *McKinnon v. Caulk,* after citing a number of cases: "A perusal of these and other authorities on the subject will disclose that the estate in its essential features and attributes is made dependent on oneness of person of the husband and wife."

Perhaps the fullest and clearest statement is that of the present *Chief Justice* in *Harrison v. Ray,* 108 N. C., 216, written after the adoption of the present Constitution, in which, following *Pearson, J.,* in *Tapping v. Sadler,* he advances a step beyond his predecessors and adds a fifth unity to the four common-law unities, that of the unity of the person of husband and wife. He says: "When realty is devised or conveyed to husband and wife, they take by entirety, and upon the death of one the whole belongs to the other by right of survivorship. 2 Bl., 182; *Long v. Barnes,* 87 N. C., 329; *Simonton v. Cornelius,* 98 N. C., 433. The act abolishing survivorship in joint tenancies, Act 1784, ch. 204 (The Code, par. 1326), does not apply to such cases. *Motley v. White-* (583) *more,* 19 N. C. (2 D. and B.), 537; *Todd v. Zachary,* Busbee's Eq., 286; *Woodford v. Higly,* 60 N. C. (1 Winston), 237. Indeed, it is held that a conveyance to husband and wife has a fifth unity added to the four common-law unities recognized in joint tenancy, *i. e.,* unity of person. *Topping v. Sadler,* 5 Jones, 357; Freeman on Co-tenancy and Part., par. 64."

These authorities and others also establish the principle that changes as to the property rights of married women brought about by modern constitutions and statutes have neither *destroyed* nor *altered the nature* of the estate by entireties.

Hoke, J., speaking for a unanimous Court, said in the *McKinnon case:* "It has been held in several well considered decisions of this Court that our Constitution and the later statutes relative to the property and rights of married women have not thus far destroyed or altered the nature of this estate by entireties, a 'conveyance to a husband and wife,' *Jones v. Smith,* 149 N. C., 318; *West v. R. R.,* 140 N. C., 620; *Bynum v. Wickham,* 141 N. C., 95; *Bruce v. Nicholson,* 109 N. C., 205; *Ray v. Long,* 132 N. C., 891."

There is some conflict in the authorities from other States as to the effect of the Married Woman's Property Acts on estates by entireties, but the better opinion and weight of authority is in favor of the position adopted by this Court.

The author says in 13 R. C. L., 1101: "The Married Woman's Property Acts have in some cases in this country been given the effect of abolishing the common-law estate by entireties, and under such a construction a conveyance to a husband and wife creates the same estate in the parties as if it had been made before the coverture; that, being invested with the capacity of taking by entireties, the reason of the rule of

the common-law, that they should take by entirety—*per tout*, not *per my* —has ceased to exist. This also seems to be the effect given to such statutes in England and Canada. The better opinion of this country, however, is that the operation of these statutes should be limited to the separate property of married women, leaving unaffected and unimpaired the previous law regarding the creation, existence, and essential attributes and consequences of estates by entireties," and there are more than twenty cases cited in support of the text.

Clark, C. J., calls attention in *Bynum v. Wicker*, 141 N. C., 86 (1906), to the failure of the General Assembly to change the estate by entireties into a cotenancy, and concludes that in the absence of legislative action the estate possesses the same properties as at common law. He says: "This estate by entirety is an anomaly, and it is perhaps an oversight that the Legislature has not changed it into a cotenancy, as has (584) been done in so many States. This not having been done, it still possesses here the same properties and incidents as at common law."

The same learned judge also says in *West v. R. R.*, 140 N. C., 620: "In *Long v. Barnes*, 87 N. C., 333, it is held that the Constitution, Article X, sec. 6, as to the rights of married woman, did not 'destroy or change the properties and incidents belonging to the estates' held by entireties," and adds, after discussing the incidents and properties of the estates: "These are the incidents and properties of an estate by entirety when (as in this State) there has been no change by statute, and upon the above authorities the plaintiff can maintain this action without joining the wife. She is not entitled to sue for this damage nor to share in the recovery. If any change in the incidents and properties of this anomalous estate is desirable, legislation must be had upon it."

If, therefore, the estate by entireties rests and is dependent upon the oneness of the person of husband and wife and not upon property rights, and if the changes in the rights of property of married women have not destroyed or affected the nature of the estate, it follows that no decree can change the estate to a tenancy in common, unless it severs the marriage relation and makes the husband and wife two persons and not one.

Does a decree *a mensa et thoro* have this effect?

A decree *a mensa et thoro* does not purport on its face to dissolve the bonds of matrimony, and it is in legal effect simply a decree of separation.

As said in *Evans v. Evans*, 7 L. R. A., 448 (43 Minn.), the marriage relation is merely suspended, not annulled, and in *People v. Cullen*, 44 L. R. A., 423 (153 N. Y., 629), the parties still remain husband and wife in the eye of the law, and the authorities are practically unanimous in favor of the principle, as appears from the following note to *Boykin*

v. Bain, 85 Am. Dec., 360: "A divorce from bed and board does not put an end to the marriage ties, or destroy the relation of husband and wife; *Capel v. Powell,* 17 C. B., N. S., 743; *Moore v. Barber,* 5 Giff., 43; *Barber v. Barber,* 21 How., 582; *Ellison v. Mayor,* 53 Ala., 558; *Gee v. Thompson,* 11 Ann., 657; *Kriger v. Day,* 2 Pick., 316; *Dean v. Richmond,* 5 *id.,* 461; *Barrere v. Barrere,* 4 Johns. Ch., 187; but merely suspends certain of the mutual rights and obligations of the parties: *Clark v. Clark,* 6 Watts. and S., 85; *Barrere v. Barrere, supra;* such a divorce having the effect to destroy the right of cohabitation, and if the parties again live together and become reconciled as husband and wife, the effect of a divorce *a mensa et thoro* is destroyed, and the marriage relation continued or resumed; *Liddell v. Liddell,* 22 La. Ann., 9; *Gee v. Thompson,* 11 *id.,* 657; *Hokamp v. Hagaman,* 36 Md., 511; *Kriger v. Day,* 2 Pick., 316; *Dean v. Richmond,* 5 *id.,* 461; (585) *Nathans v. Nathans,* 2 Phila., 393; *McKarracher v. McKarracher,* 3 Yeates, 356; *Tiffin v. Tiffin,* 2 Binn., 202. In case of divorce *a mensa et thoro,* the parties cannot marry again, as the relation of husband and wife has not ceased; *Barber v. Barber,* 21 How., 582; *Savoie v. Ignogoso,* 7 La., 281; *Wait v. Wait,* 4 N. Y., 95; and for the same reason such a decree does not remove incapacity to testify on the part of either; *Kemp v. Downham,* 5 Harr. (Del.), 417."

We are therefore of opinion, as the estate by the entireties rests upon the unity of person, and as this estate is not destroyed or affected by the statutes relating to the property rights of married women, and as a divorce *a mensa et thoro* does not dissolve marriage, and, therefore, does not destroy the unity of person, that it was error to hold that the plaintiffs were the owners of any part of the land in controversy, and that upon the death of the husband the estate belonged to the wife by right of survivorship and descended to the defendants as her heirs.

We would be glad to "bend out" in this case and decide in favor of the heirs of the husband, as the record shows he obtained a divorce *a mensa et thoro* from his wife because she had willfully abandoned him, but as the General Assembly after repeated suggestions has refused to change the law, we must declare it as we find it.

Reversed.

NOTE.—Petruchio was engaged in the difficult task of taming a shrew (this was in the barbarous times when there were shrews), and he adopted rough measures and intemperate language.

He succeeded where the gentler methods of father and sister had failed, and Shakespeare has him to say in conclusion:

"He that knows better how to tame a shrew
Now let him speak: 'tis charity to show."

CLARK, C. J., dissenting: The question here presented, whether a divorce *a mensa et thoro* constitutes husband and wife tenants in common of land held in entirety, has never hitherto been decided in this Court.

When an estate is conveyed to two or more persons under our law it makes them tenants in common. There is no exception to this by any statute; but in England, formerly (though not now) an exception was made, not by any statute, but by the opinion of judges who held that, as the law then stood, the property rights of the wife being suspended during coverture, that if a conveyance or devise was made to two persons who happened to be husband and wife, the husband should have the whole of the estate during his lifetime and at his death it should go to the survivor. Thus by judicial enactment was created the "estate by entireties."

(586) By our Constitution adopted in 1868—now forty-nine years ago—the former conception of the extinction of the wife's right of property during the marriage was utterly abolished and it was provided Article X, section 6, that the property of the wife, either at marriage or thereafter acquired, should be and remain her sole and separate property as if she were unmarried. It therefore follows that, if the Constitution governs, a conveyance or devise to a man and his wife stands as if the wife was still single, and they hold as tenants in common.

When the same abolition of the common law as to property rights of husband and wife was enacted elsewhere, it was held in England, Ireland, Canada, and twenty-eight States of this Union that the result was to make husband and wife, when grantees or devisees of the same property, tenants in common. 2 Lewis Bl. Com., 182, note 18; 30 L. R. A., 314-319; 21 Cyc., 1201, 1202. It should have been so held in North Carolina also, but the judges held to the contrary, when the question was first presented here, and that opinion has been followed ever since, though more than once the Court has suggested to the Legislature the propriety of abolishing entireties.

This question, however, is not raised by this appeal. But if it had been held otherwise, no judge or court is bound by an erroneous precedent, but should correct it. In *McKinnon v. Caulk,* 167 N. C., 411, the question was presented as to the effect of an absolute divorce, and it was held that in such case the husband and wife were remitted to hold the property as tenants in common. This was in accordance with the holding in all other States except two.

The question now presented is as to the effect of a divorce *a mensa et thoro.* This has not been decided in this State, and we should decide the question upon the language of the Constitution and upon the reason of the thing in analogy to *McKinnon v. Caulk, supra.* It is unrighteous for the husband to receive the rents and profits from the wife's half of the land after such divorce.

Conceding that a conveyance or devise to two persons, who happen to be husband and wife, must be construed, therefore, contrary to its language, and that the wife cannot have the constitutional right to hold her property therein as if "unmarried," the only plausible reason is that as the husband is charged with the wife's support, therefore during their joint lives the income from such property should go to the husband to be applied to their joint support. Any argument that is based upon "being one flesh" is purely fanciful, for it is untrue in fact, and, since our Constitution of 1868, untrue in law. Therefore, when there is a divorce from bed and board the husband being discharged from the support of his wife as fully as in a divorce *a vinculo* (except as to the alimony, which when allowed should be paid out of the husband's own property), it follows that the wife is entitled to her half of (587) the income from the joint property during their joint lives, and to partition. There is no precedent against this, for the matter is absolutely *res nova,* in this State at least, and we should follow the Constitution and the reason of the thing.

It has been stated by a most distinguished judge and law writer that in North Carolina, notwithstanding the provision in our Constitution of 1868 which confers equality of property rights upon married women, the Supreme Court of this State has followed in every decision the former judicially created doctrine of the inferiority of the wife and the submergence of her existence in that of the husband except and until there has been some act of the Legislature in conformity with the spirit and letter of the Constitution. A long list of authorities bearing out this statement can be easily appended. These decisions have not always been against the individual woman who was litigant, because the protection of being *non sui juris* (which is another word for being incompetent and incapable) has sometimes been claimed for her by her lawyer; but the decisions have usually, if not always, been against the claim, by whichever side and whenever set up, that the woman is by the Constitution held competent and has the same property rights as if she had remained unmarried. We have held that a man has a right to slander the good fame of his wife, though he is indictable for doing the same as to any other woman, *S. v. Edens,* 95 N. C., 693. We have held that the earnings of the wife by her needle belong to her husband, *Syme v. Riddle,*

88 N. C., 463, notwithstanding the language of the Constitution which guarantees that all property "acquired in any manner whatever, after marriage as well as before," shall remain her sole property, and even that damages for loss of her limb and physical and mental suffering belong to her husband, and cannot be recovered by her, *Price v. Electric Co.*, 160 N. C., 450. In these respects, and in some others, statutes have been passed requiring conformity to the Constitution, but statutes have not yet cured all discriminations against the wife as fully as the Constitution has done, and especially it has not yet done so as to the judge-created "estate by entireties." But no decision has until now extended that estate to a case like this, where there has been a divorce from bed and board.

The ruling by which a devise or conveyance of property jointly to husband and wife becomes the sole property of the husband during his life is without any authority in any statute here or in England, but was created solely by men judges in the barbarous days in England, and was the expression by them of the sentiment which still prevails among savages, based upon their idea of the superiority of men and the incompetence and incapacity of women, and pictured the state of
(588) such society where men are loafers and women are drudges doing all the work, which is appropriated by the men. The state of the English law as to wives, which survived to his day and far later, from those ruder times when the judges (not Parliament) created the discriminations against them, is accurately expressed by Shakespeare, a good lawyer (whether his works were written by Lord Bacon or not), when he made Petruchio say of his wife:

> "I will be master of what is mine own!
> She is my goods, my chattels; she is my house,
> My household-stuff, my field, my barn,
> My horse, my ox, my ass—my anything."

Of a piece with this was the doctrine, also judge-made, for there was never statute for it, that if a man beat his wife "with a switch no larger than his thumb" the court would not punish him. The last of these was still held law in this State (*S. v. Black,* 60 N. C., 262; *S. v. Rhodes,* 61 N. C., 455) till abolished, after the Constitution of 1868, by the decision in *S. v. Oliver,* 70 N. C., 60 (in 1874), long after this was done in England, while the doctrine as to the annihilation of the property rights of the wife by her marriage was abolished in England and everywhere else, and as clearly by our Constitution in 1868 as language could make it. *Walker v. Long,* 109 N. C., 510.

The statement of Adam (not of God), 2 Gen., 24, "that husband and wife should be one flesh" was figurative and cannot deny property rights

to married women in North Carolina contrary to our Constitution under the conditions of society which prevail since Adam's expulsion from Paradise. Adam in a moment of exaltation made a statement of his high intentions of equality with his wife in all things. As a literal fact, they were not made one flesh, and could not be. Even as to union of interests, which was meant, decrees for divorce have been signed by every Superior Court judge in North Carolina.

Indeed, the expression as quoted in Mark (ch. x, v. 8), "They *twain* shall be one flesh," and to the same purport in Matthew (ch. xix, v. 5), and "They *two* shall be one flesh"; Eph. (ch. v. verse 31, which is explained in verse 32 to apply to the church), show the equality and not the submergence of the wife in the husband as the one being resulting from the union. It would be as logical and as just to say that the wife was the one, and, therefore, that when property is conveyed or devised to her husband and herself, that she should have all the rents and profits during her lifetime, and that on the husband's death she should have the whole in fee simple, as the contrary ruling by men judges that the husband should have all the proceeds of the joint property during his lifetime. Our property rights are fixed by our Constitution and laws, and not by the law of Moses.

The obscure and utterly unknown judge who in the remote (589) past evolved the doctrine of entireties out of his own consciousness doubtless based the idea upon the above citations; but neither he nor the Mosaic Law as to property rights can control the provision of our own Constitution which confers upon married women, expressly, the same rights "as if unmarried." It would be as logical to hold that the modern enlightened laws of war should be controlled by the requirements of the old Scriptures that the captives taken in war should be utterly slain—men, women, and children, 1 Sam., ch. 15, or to follow other requirements which a sect in England and Scotland once advocated and even in admiration named some of their children *"Hew-Agag-in-Pieces."* Or, the statement, "Thou shalt suffer no witch to live," which Blackstone, as late as 1769, said (4 Com., 60) to deny the existence of whom is "to flatly contradict the revealed Word of God in various passages, both in the New and Old Testaments," and that the offense is "punishable with death by burning."

A landowner in having his land surveyed found that the distance called for between two points in his deed was greater than by a straight line between those two points, and proposed "to bend out" into his neighbor's field in order to "get his poleage." The neighbor promptly replied: "Why don't you *bend in* to get your poleage?" If it is absolutely necessary when there is a conveyance or a devise to a man and his wife of property jointly that one shall have the whole of it, why

should it not be the wife instead of the husband? There is as much reason for one as for the other.

When the Constitution of 1868 provided that upon marriage a woman should retain all her property which she then had or might thereafter by any means acquire, there remained no longer any reason to deprive the wife of her half interest in realty conveyed or devised to her and her husband jointly by confiscating it all for the benefit of the husband. This was at once so held in England, Ireland, Canada, and twenty-eight States above cited.

In *Mial v. Ellington,* 134 N. C., 131, this Court reversed the ruling in *Hoke v. Henderson,* 15 N. C., 1, though that had been made by a very strong Court (*Ruffin, Daniel, and Gaston*) and had been in force for nearly three-quarters of a century and had been cited with approval more than sixty times. If notwithstanding the express provision of the Constitution, a similar act of justice cannot be rendered to wives; still there can be no reason why the Constitution should be further disregarded by extending for the first time such ruling to cases where there is a divorce from bed and board.

At a time when women are no longer disposed to submit to enthroned wrong and to suffer in silence as their mothers did; when all five
(590) political parties have pledged themselves to confer full suffrage upon them, and in nineteen States women already have the right to vote for President and in twenty other States suffrage in lesser matters, and the President and Cabinet and the political leaders in all parties are pledged to full and equal suffrage; when the irresistible tide of long delayed justice is sweeping over all other countries as well as in ours, it is surely not an auspicious hour by judicial construction to extend in this State the discrimination against women to new fields where it has not heretofore obtained and further restrict the constitutional guarantee of their personal or property rights.

The estate by entireties is further unconstitutional because it exempts from claims of creditors property not included in the homestead allotment.

NOTE.—The utter absence of rights in the wife at common law, as against the husband correctly quoted by Petruchio, cannot be justified against all wives because *his* wife was a shrew. Even those who illogically condemn women to inferiority and indignities as punishment inherited from Eve (for men as well as women are descended from her) will not support that view. In this case the aggregate of the wife's rents and profits of which she was deprived may well have exceeded what came to her at last by the chance of her being the longest liver. Moreover, all wives do not survive their husbands.

BROWN, J., dissenting: I am of opinion that when there is a separation for life between husband and wife, sanctioned by law, as in divorce *a mensa,* the interest of the wife in property held in entirety should be enjoyed by her free from the control of the husband. There is as much justice and reason in applying this rule to a divorce *a mensa* as to one *a vinculo.* If we do not so hold, then the husband, although legally separated from the wife, will have the control of the property held in entirety and will not be accountable to her for the rents and profits. This is manifestly unjust to the wife, for it is as much her property as the husband's.

The case has never been presented before this Court before. I think it best to settle the matter by holding that when husband and wife are separated by decree *a mensa* they at once become tenants in common of property held in entirety.

For this reason I am unable to concur in the judgment of the Court.

Cited: Dorsey v. Kirkland, 177 N.C. 523; *Moore v. Trust Co.,* 178 N.C. 125; *Crowell v. Crowell,* 180 N.C. 524; *Spence v. Pottery Co.,* 185 N.C. 219; *Turlington v. Lucas,* 186 N.C. 285; *Holton v. Holton,* 186 N.C. 362; *Davis v. Bass,* 188 N.C. 203, 208; *Winchester-Simmons Co. v. Cutler,* 199 N.C. 712; *Potts v. Payne,* 200 N.C. 249; *Willis v. Willis,* 203 N.C. 519.

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(591)

G. H. GEITNER ET ALS., EXECUTORS OF A. A. SHUFORD, v. EDMUND JONES, TRUSTEE, AND MRS. ANNIE E. HALL.

(Filed 23 May, 1917.)

Parties—Mortgages—Executors and Administrators.

Where suit of foreclosure is brought, with allegation that the mortgagee of the land is dead and that his personal representative has not been made a party, a demurrer for the want of necessary parties is properly sustained. Revisal, sec. 239 (4). Such representative, when only a proper party, may be brought in at the option of either party to the suit.

CIVIL ACTION, tried upon demurrer at November Term, 1916, of CALDWELL, before *Ferguson, J.*

The court sustained the demurrer and dismissed the action. Plaintiffs appealed.

Squires & Whisnant, B. B. Blackwelder for plaintiffs.

W. C. Newland for defendants.

BROWN, J. The grounds of demurrer are:

1. For that it appears upon the face of the complaint that there is a defect of parties defendant in that the executor or administrator of J. G. Hall, the maker of the note sued on, is a necessary party.

2. In that the complaint fails to state a cause of action. The complaint alleges the making of a note for $300 to plaintiffs' testator by J. G. Hall, and sets out a copy of the note, and that there is due and unpaid on it $333.89. It alleges the execution of a deed in trust by Hall and wife, Annie E. Hall, conveying to Edmund Jones, trustee, certain lands belonging to said wife, and that "the payment of said sum is secured by the deed of trust," and asks for foreclosure.

It is manifest that the complaint states a good cause of action.

A defect of parties is ground of demurrer when apparent on face of the complaint, and it does appear upon the complaint that Hall is dead and that his personal representative is not a party to the action. That the personal representative is a *proper* party and may be brought in at the option of either party is not questioned, but the absence of a *necessary* party is ground of demurrer. Clark Code, sec. 239 (4). Whether he is a necessary party is a question that has been heretofore somewhat confused in the decisions of this Court.

In *Averett v. Ward,* 45 N. C., 195, it is held that the personal representative of a deceased mortgagor is not a necessary party to a bill for foreclosure of a mortgage on land.

(592) In that case the land belonged to Richard Ward, the debtor and mortgagor, and the ground of the decision is that no relief is prayed against the personal estate.

In *Mebane v. Mebane,* 80 N. C., 35, it is held in a case exactly like the one under consideration that "in an action to foreclose a mortgage executed by a *feme covert* and her husband upon her separate estate to secure a debt of the husband, the personal representative of the deceased husband is a necessary party."

In that case *Chief Justice Smith* states that *Averett v. Ward* is not in accord with the authorities, and says:

"So it is declared that when a wife joins her husband in a mortgage of her own estate and the money is applied for the husband's benefit, the personal estate of the husband will be first applied in payment of the mortgage. 1 Greenleaf Cruise, 648. It would seem to be peculiarly appropriate that the personal representative of the only person owing the debt and interested in reducing its amount should be before the court and be bound by its decree, and thus the measure of his liability to the plaintiff, whose property may be sold to pay it, be definitely ascertained and determined."

In *Fraser v. Bean,* 96 N. C., 328, it is held that a mortgagee has a right at once to foreclose the mortgage against the heirs at law of the mortgagor without regard to the right of the heirs to have the debt paid out of the personal property of the mortgagor and that his administrator is not a necessary party in the action to foreclose. The Court cites *Averett v. Ward,* but takes no notice of the later case of *Mebane v. Mebane.* In the *Fraser case,* also, the land belonged to the mortgagor, who contracted the debt.

The point was last before this Court in *McGowan v. Davenport,* 134 N. C., 526, where it is held that "The representative of a deceased mortgagor who joined with his wife in giving a mortgage on the wife's separate property is a necessary party to a suit against the widow and trustee for foreclosure of the mortgage." The identical case at bar. In that case *Mr. Justice Walker* says that *Averett v. Ward, supra,* was practically overruled, and refers to *Fraser v. Bean,* saying that *"Mebane v. Mebane* may yet be sustained upon its peculiar facts, namely, that the wife was but a surety for the husband, and if her property should be taken to pay his debt she would be entitled to recover over against his estate and to have his property first subjected to its payment, etc."

Following this latest precedent, we hold that the personal representative of the husband, J. G. Hall, is a necessary party and that the demurrer was properly sustained.

In view of the doubt about the matter and the apparently con- (593) flicting decisions, we will modify the judgment dismissing the action and direct that plaintiffs may now bring in the personal representative of the deceased husband.

Modified and affirmed.

The costs of this Court will be taxed against the plaintiffs.

Cited: Geitner v. Jones, 176 N.C. 544; *Morgan v. Morgan,* 215 N.C. 726.

TROY AND NORTH CAROLINA GOLD MINING COMPANY v. SNOW LUMBER COMPANY ET AL.

(Filed 23 May, 1917.)

1. Foreign Corporations—Corporate Powers—Business in Home State—Actions—Defenses.

A corporation incorporated in another State with authority to conduct business here, which has complied with our statutes, can maintain an action in our courts although its charter may not authorize it to do business in the State of its incorporation. Rev., 1193.

2. Foreign Corporations—Corporate Powers—Quo Warranto—Collateral Attack.

The right of a foreign corporation to do business in this State under its charter may only be attacked by *quo warranto* with leave of the Attorney-General.

APPEAL by defendants from *Carter, J.*, at September Term, 1916, of MONTGOMERY.

R. T. Poole, H. F. Hathaway, and U. L. Spence for plaintiff.

C. A. Armstrong, Brittain & Brittain, J. A. Spence, and Jerome, Scales & Jerome for defendants.

CLARK, C. J. This action was brought by the plaintiff, a corporation organized under the general incorporation laws of New York, to recover of the defendants four adjoining tracts of land constituting one body of 410 acres. The case came to this Court on appeal from a judgment overruling a demurrer; *Gold Mining Co. v. Lumber Co.*, 170 N. C., 273, and the judgment was sustained. The validity of the deed under which the plaintiff claims title to the lands in controversy was upheld. On this trial, if the evidence as to the lands in controversy put in by the plaintiff is true, it vests the title to the lands in the plaintiff. All the evidence introduced by the defendants in this trial, if believed to be true, is not sufficient to vest the title in the defendants by adverse
(594) possession under colorable title. A sufficient length of time does not intervene between the date of the first of their deeds and the bringing of this action. They do not contend that they have shown adverse possession in themselves for a sufficient time to vest the title in them without color. The judge, therefore, properly charged the jury that if they believed the evidence to be true, the jury would answer the issue as to the title in favor of the plaintiff.

The proposition most strenuously argued before us is that the plaintiff corporation is without capacity to sue in North Carolina because its articles of incorporation, taken out under the general statute in New York, set out that the corporators "have associated together as a mining corporation to continue in existence for the period of fifty years from date, for the purpose of carrying on and conducting the business of gold mining on lands situated in the county of Montgomery and State of North Carolina," and that the plaintiff, therefore, has no valid charter, because New York "gave it no authority to do business in that State, and being without authority to do business in the State of its creation, no other State has jurisdiction to grant it power to do business in North Carolina alone." This proposition was most earnestly contended for on

the argument here, but we cannot concur in that view, which seems to be the principal reliance of the defendant.

It is true that the plaintiff, having been incorporated by the State of New York, can only do business in this State by comity, and that foreign corporations must be domesticated here whenever so required by the laws of this State, and must designate a person upon whom service can be made and comply with any other requirements of this State as a condition precedent to doing business here. It is not shown that the plaintiff has failed in this respect, and it is by no means unusual for corporations chartered in New Jersey, or other States, to do business conducted altogether elsewhere except that the home office is in the State of its incorporation. For instance, it is well known that the Union Pacific Railroad which operates a line of railroad from Kansas City to Ogden, Utah, though without any trackage in Kentucky, holds its charter under authority of the latter State, of which it is a corporation. In this State the Southern Railway Company operates several hundred miles of railroad, though it is not a corporation of this State. The great United States Fruit Company, which does a large business in tropical fruit in the West Indies and in operating steamship lines, is a corporation chartered in New York, in which it does no business. Indeed, the practice, whether good or evil, of corporations taking out charters in one State to do business solely in others is too general and has been too long recognized to be now questioned. It is only necessary that such nonresident corporations shall comply with the requirements of the statute of the State, or States, other than that of its origin as to (595) the conditions precedent to doing business in such other States. Revisal, 1193, expressly authorizes this.

The articles of incorporation in this case are, therefore, not void on their face, as contended by the defendants. It is true that a corporation can exercise in another jurisdiction only such powers as are set forth in its articles of incorporation, *R. R. v. Gebhard,* 109 U. S., 537; and this rule the plaintiff has observed. If it had violated the same, that matter could not be set up by the defendant in this collateral way, but it would be necessary that a *quo warranto* be instituted by leave of the Attorney-General. *Banking Co. v. Tate,* 122 N. C., 313. The corporation in this case put in evidence the certificate of our Secretary of State showing that it had been duly domesticated here and had complied with the requirements of our statute to that end.

On examination of the record and exceptions we find

No error.

Cited: Cooper v. Crisco, 201 N.C. 742.

H. K. WOLFE v. THE SOUTHERN RAILWAY COMPANY.

(Filed 23 May, 1917.)

Master and Servant—Employer and Employee—Negligence — Evidence — Nonsuit—Trials.

Where in an action for damages against a railroad company for a personal injury the negligence alleged is the failure of the defendant to provide a proper ladder upon which the plaintiff was obliged, in the course of his employment, to go to the top of a water tank, and the plaintiff's evidence tends to show that the ladder had two defective rounds, and the injury was received by his catching hold of an iron pipe at the side of the ladder, which he knew was weak, and for an entirely different purpose; and without evidence as to his position on the ladder at the time or his nearness to the defective rounds: *Held*, upon the evidence the proximate cause of the injury was his catching hold of the weak pipe, and not the defective rounds of the ladder, and the defendant's motion to nonsuit was properly allowed.

CIVIL ACTION, tried March Term, 1916, of YADKIN, before *Shaw, J.*

At conclusion of the evidence a motion to nonsuit was sustained, and plaintiff appealed.

Holton & Holton, Benbow & Haynes for plaintiff.
Manly, Hendren & Womble for defendant.

(596) BROWN, J. The plaintiff sues to recover damages for a personal injury caused by falling from a water-tank ladder. The defendant introduced no evidence and the case turns upon plaintiff's own evidence.

From this it appears plaintiff had charge of defendant's pumping station at Elkin. The water-tank was set on a platform several feet from the ground and a ladder extended from this platform up to the top of the tank. The ladder was made of oak timber. The sides, or upright pieces, rested on the platform at the bottom and were fastened to the top of the tank. The ladder stood out several inches from the tank. The rungs were of oak 2 inches in diameter at their centers and tapered off to a smaller size at the point where they entered the upright pieces. About 8 or 10 inches on either side of the ladder was a 1 inch iron pipe 10 or 12 feet long, which acted as guides for the weights which controlled the movement of the waterspout. These rods were not substantial and were intended for no other purpose than to act as guides for the weights. They were held in place by being let into small sockets in scantlings at the top and at the bottom. They did not extend through the scantlings, and were not bolted at either end. One of the rungs in the ladder had a streak of sap on top that had rotted. Another rung

was described by the plaintiff as being hard-twisted and cracked. Since the plaintiff had held the position of pumper he had gone up this ladder on an average of twice a week, in the night-time as well as in the day-time. On the morning of the accident, while going up the ladder, he caught hold of one of the iron pipes beside the ladder and put some weight on it, which caused it to give way, and he was thrown off the ladder. The plaintiff had full knowledge of the condition of the ladder, and he knew the only purpose of the iron pipes was to guide the weights attached to the waterspout and to keep them from swinging from side to side as they moved up or down, and that they were not intended to climb on or to bear much weight.

We will not discuss the doctrine of assumption of risk as applicable to these facts, as in our opinion the duty to exercise reasonable care in furnishing a safe tank ladder for plaintiff's use was a primary, absolute, nondelegable duty, and plaintiff could only be held to have assumed the risk where the danger was obvious and such that a reasonably prudent man would not have taken the risk. We prefer to rest our decision upon another ground.

The alleged negligence of the defendant was not the proximate cause of plaintiff's injury. He testified: "This ladder had two defective rounds, and I stopped on the rounds and reached up to next round with my left hand and reached out with my right hand and took hold of the rod and did not put a quarter of my weight on it, and it slipped through the bottom and bent over. It slipped through because the scantling it rested on was rotten." Plaintiff further testified: "When (597) the spout came down, the weights went up, guided by these two rods. That was the only purpose these rods were intended for, to guide the two weights—simply to keep the weights from swinging from side to side as they came down or went up. I knew that was what they were for. The pulleys were right at the top of these two rods on each side. I had held to the sides of the ladder, and had held to the pipes before this. The rounds all the way up were solid. I could reach up and swing my foot over the bad rounds. I may have done this time and time again as I went up. I don't remember distinctly about this. I have never fallen before this time. I was always a little watchful; I had always tried to take care of myself. I knew the rods were not intended to climb on."

Again he says: "At the time I fell the round did not break with me. It was the iron rod that pushed down and pulled out. I don't remember what position in the ladder that round with the sap-rotten place on it was. I do not know where the one that had the crack in it was. I do not know which one I had my foot on. It was the pulling loose of the iron rod that caused me to fall."

The plaintiff does not pretend that the defective rungs had given way or were about to give way under his weight and that he grasped the iron pipe in a spasmodic effort to save himself from falling. He states quite the contrary. He admits that instead of ascending the ladder in the usual and proper way, by holding on the strong oaken sides or uprights, he reached out with one hand and grasped the iron pipe and put a part of his weight upon it. This caused his fall. The rung upon which he was standing did not give way, and he does not say that he felt it giving way. There were only two rungs claimed to be defective, one near the bottom of the ladder and one nearer the top; one had "a streak of sap on it" and the other was "hard and cracked." That they were insufficient to hold plaintiff does not appear. Which rung was near the bottom and upon which he was standing when he reached over for the iron pipe he does not say. He does not even say that he was standing on either one of the defective rungs. It is certain, however, that the rung did not break or start to break or cause plaintiff to fall. This was caused because he attempted to use an instrumentality that was not provided by the defendant for the purpose for which it was being used by him, and the purpose of which he knew full well. He admits that he could easily reach up and swing his foot over the bad rounds and that he may have done this time and again as he ascended the ladder.

Had the plaintiff ascended the ladder in the usual and proper manner and grasped its strong oaken uprights instead of the weak and unstable pipe, not intended for such purpose, it is more than probable he would not have been injured even had the rung broke.

(598) We do not think the case of *Coley v. R. R.*, 128 N. C., 534, is authority for plaintiff's contention. In that case the defects were admitted, viz., that the engine furnished for switching was unsuited for its work and the grabirons or handholds were off and the engineer had to use the drainpipes from the top of the tender (never intended to be used as handholds), and they gave way. The difference between that case and the one at bar is very manifest.

The judgment of nonsuit is

Affirmed.

J. G. BROWN ET ALS. v. ROAD COMMISSIONERS OF NORTH COVE TOWNSHIP ET ALS.

(Filed 23 May, 1917.)

1. **Constitutional Law—"Aye" and "No" Vote—Roll-call Bills—Committee Amendments—Bonds.**

A bill to authorize a county to issue bonds for highway improvements, read and referred to a committee which reported a substitute for the original measure, with a slightly different caption and retaining the number of the original bill, and put upon its second and third readings, on separate days, with "aye" and "no" vote taken on each of them, duly entered, meets the requirements of Article II, section 14, of the Constitution.

2. **Constitutional Law—Immaterial Amendments—Roll Call—"Aye" and "No" Vote—Bonds.**

Where a bill authorizing a county to issue bonds for highway improvements has passed both branches of the Legislature by a reading in each branch thereof on three separate days, with the "aye" and "no" vote duly taken and entered, except as to an amendment in the second branch, substituting the name of a commissioner, such amendment does not broaden the scope of the act or affect its financial feature, and the failure in the first branch to comply with Article II, section 14, of the Constitution as to roll calls and separate readings will not alone affect its validity.

3. **Constitutional Law—Amendments—Roads and Highways—Special Acts—Acts in Aid—Statutes.**

The amendment of 1916 to our Constitution, Article II, sec. 29, prohibiting the passage by the General Assembly of local, private, or special acts "authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys," does not include within its meaning an act authorizing a county to issue bonds for the highways of a township, and requiring the levying of the tax to pay the principal thereof and interest thereon; such being in aid to the laying out, construction, etc., of the local highways, and necessarily afforded by direct legislation, when the levy is in excess of the constitutional limitation.

ALLEN, J., dissenting.

CIVIL ACTION, pending in the Superior Court of MCDOWELL, (599) heard by *Carter, J.*, 27 April, 1917, upon motion to continue injunction to final hearing. Motion denied. Plaintiffs appealed.

W. T. Morgan for plaintiffs.

W. M. McNairy, J. W. Pless, Cansler & Cansler, Clarkson & Taliaferro for defendants.

BROWN, J. Plaintiffs seek to enjoin the issue of bonds and levying special taxes under an act of General Assembly of 1917 duly ratified 28 February, entitled "An Act to authorize the board of commissioners of

McDowell County to issue bonds for road purposes in North Cove Township in said county."

The objections are: (1) That the bill was not read on three separate days in the House. (2) That it was amended in the Senate, but the amendment was not passed by the House by recording the ayes and noes, as required by the Constitution. (3) That the General Assembly was without power to enact such law.

The record shows that the original bill, H. B. 711, passed first reading in the House of Representatives on 22 January and was referred to Judiciary Committee. On 1 February the committee reported a substitute for the original measure. The substitute with a slightly different caption, under legislative practice took the number of the original bill and was placed on the calendar. On 6th and 21st February it passed second and third readings by yea and nay vote duly entered on the journal.

The substitute was only an amendment to the original bill, which had already passed first reading on 22 January. Consequently, when the substitute passed second and third readings on different days and the ayes and noes were duly entered on both said readings the requirements of Art. II, Sec. 14, of the Constitution were duly complied with.

It is admitted the bill passed the Senate in accord with the Constitution, but it was amended, and the amendment was concurred in by the House without recording the ayes and noes. It was not necessary that the House observe the Constitutional requirement in concurring in the Senate amendment, as it was immaterial and consisted only in striking out the name of one commissioner and substituting another. The amendment did not broaden the scope of the act or affect its financial features. *Glenn v. Wray,* 126 N. C., 730; *Brown v. Stewart,* 134 N. C., 357.

The third objection is more serious, but nevertheless we do not think it fatal. The recent amendment, now Article II, Sec. 29, of the Constitution, provides that "The General Assembly shall not pass any
(600) local, private, or special act or resolution . . . authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys."

An analysis of the act shows that its primary purpose is to authorize the sale of bonds for road purposes in North Cove Township, and to require the levying of a tax to pay the interest and principal of the bonds. It appoints road commissioners to control the expenditure of the money and to supervise the work, the present road laws of the township remaining in force except where modified by the act.

The question presented is of necessity one of novel impression in this State, but we must conclude that the act is not of the character which the General Assembly is prohibited from enacting.

It contains no provision for laying out, opening, altering, maintaining, or discontinuing highways. It only provides the means for constructing and repairing them.

Counties cannot issue bonds and levy special taxes to pay them in excess of the constitutional limitations without special legislative authority. *Smathers v. Com.*, 125 N. C., 487; Connor and Cheshire on Const., p. 316.

Townships have no power and no machinery to issue bonds or levy taxes for any purpose whatever except through the authority specially conferred by the General Assembly.

It is impossible to conceive that the purpose of the recent amendment was to deprive the General Assembly of the power absolutely necessary to aid counties and townships in the construction and repair of their public roads.

The framers of the amendment no doubt intended to leave intact the long recognized and salutary power of the Legislature to supervise and control the financial affairs of the municipalities of the State.

Similar prohibitions as the one under consideration are to be found in other States, and they have not been construed so as to deprive the General Assembly of said powers.

Such provisions are construed not to destroy or weaken the power of the General Assembly in its necessary control over the subordinate divisions of the State Government, but to prevent cumbering the statute books with a mass of purely private and local legislation.

In a similar case the New York Court says: "The very purpose of the restriction upon the power of the Legislature was to remit to the local authorities such functions of government and administration as concerned the people of the locality, and which could be better determined and discharged by such authorities than by the central legislative body at the capital of the State. There was no reason why the Legislature should be permitted to deal with such a purely local question as the laying out or opening of a highway in a town, any more (601) than the election of a supervisor. There was a general system of statute law under which highways, in the ordinary sense of the term, could be laid out and opened under the direction of local officers." *In re Burns,* 49 N. E., 246; *N. Y. R. R.,* 70 N. Y., 327.

In *People v. Banks,* 67 N. Y., 568, an act entitled "An act in relation to that portion of the Great Western Turnpike Road commonly known as Western Avenue," etc., authorized a conveyance by a turnpike company, etc., and empowers the commissioners to *improve* the same as an approach to Washington Park. It was objected that the act was in conflict with Article III, Sec. 18, of the New York Constitution, forbidding the passing by the Legislature of any private or local bill "lay-

ing out, opening, altering, working, or discontinuing roads, highways, or alleys." The Court says the provision was designed to prevent any interference with the highway system of the State or with the keeping of the ordinary highways and public roads in repair under that system, the supervision of the officers designated, and in the use of the *means* and the labor provided by law. "The act under review does not in any of its provisions provide for the altering, opening, or working of a highway in the sense which those terms were used in the statutes of the State regulating highways and public roads, or the constitutional provisions now invoked." Grading, paving, sewering, and ornamenting were even provided for in this act, since it could not be done by general law. It was held to be within the discretion of the Legislature.

Speaking of such legislation as affected by a constitutional provision similar to ours, the Pennsylvania Court, *In re Sugar Notch Burrough,* 43 Atl., 985, says: "The restrictions of the Constitution upon legislation apply to direct legislation, not to the incidental operation of statutes, constitutional in themselves, upon other subjects than those with which they directly deal." So in this case, the bond issue being the direct legislation, the fact that it provides that the proceeds of the bonds are to be used for road purposes will not bring it within the prohibition of the constitutional amendment.

The case of *S. v. Lytton* (Nev.), 99 Pac. Rep., 855, resembles this case more nearly in the facts and principles of law involved. In that case the constitutionality of an act authorizing a particular county to issue bonds to build a courthouse and jail was questioned under the provision of the Nevada Constitution, which inhibits local or special laws regulating county business and requiring the county government system to be uniform, and all laws to be general and of uniform operation throughout the State. It was held that the law in question was constitutional.

(602) See, also, *Young v. Hall,* 9 Nev., 212; *Bank v. Quillen,* 11 Nev., 109.

We are of opinion that the injunction was properly dissolved.

Affirmed.

ALLEN, J., dissenting: The act of the General Assembly now before us was ratified on 28 February, 1917, after the amendment of 1916 became a part of the Constitution of the State.

It provides for the issue of bonds in the sum of $50,000 for *"road purposes"* in North Cove Township in McDowell County, and this term "road purposes" is comprehensive enough to include "the laying out, opening, altering, maintaining, or discontinuing highways."

If the money to be raised by the sale of bonds provided for in the act cannot be used for one of these purposes, how can it be expended?

And still the amendment to the Constitution says that "The General Assembly shall not pass any local, private or special act or resolution . . . authorizing the laying out, opening, altering, maintaining, or discontinuing of highways. . . . Any local, private, or special act or resolution passed in violation of the provision of this section shall be void."

It seems to me the act is in direct conflict with the amendment, and, in the language of the Constitution, is void.

This construction of the amendment, which, as I see it, is the only one that can be maintained, does not "deprive the General Assembly of the power absolutely necessary to aid counties and townships in the construction and repair of their public roads," as there is express provision in the amendment, now section 29 of Article II of the Constitution, that "The General Assembly shall have power to pass general laws regulating matters set out in this section," and in obedience thereto the General Assembly at its last session passed an act (ch. 284, Laws 1917), under which any county, township, or road district may issue bonds for road purposes whenever a majority of the voters desire it.

The General Assembly evidently thought, as the power to pass special acts was withdrawn, it was well to substitute the safeguard of a popular vote in the place of the special approval of the General Assembly.

Cited: Mills v. Comrs., 175 N.C. 217; *Parvin v. Comrs.,* 177 N.C. 510; *Guire v. Comrs.,* 177 N.C. 519; *Martin County v. Trust Co.,* 178 N.C. 33; *Comrs. v. Trust Co.,* 178 N.C. 172; *Comrs. v. Pruden,* 178 N.C. 396, 397; *Kornegay v. Goldsboro,* 180 N.C. 447; *Trustees v. Trust Co.,* 181 N.C. 308; *Comrs. v. Bank,* 181 N.C. 350; *Huneycutt v. Comrs.,* 182 N.C. 321; *In re Harris,* 183 N.C. 636; *Coble v. Comrs.,* 184 N.C. 351; *Armstrong v. Comrs.,* 185 N.C. 409; *S. v. Kelly,* 186 N.C. 373, 376; *Reed v. Engineering Co.,* 188 N.C. 44; *Storm v. Wrightsville Beach,* 189 N.C. 684; *S. v. Jennette,* 190 N.C. 102; *Hill v. Comrs.,* 190 N.C. 124; *Gallimore v. Thomasville,* 191 N.C. 653; *Day v. Comrs.,* 191 N.C. 782; *Frazier v. Comrs.,* 194 N.C. 56; *Hailey v. Winston-Salem,* 196 N.C. 23; *Penland v. Bryson City,* 199 N.C. 146.

(603)

W. J. McLENDON, JR., ET ALS. v. C. J. EBBS ET ALS.

(Filed 23 May, 1917.)

1. Statute of Frauds—Deeds and Conveyances — Letters — Inclosures — Parol Evidence.

A letter written by the purchaser to the seller of lands, fully describing the lands and inclosing a deed sufficient in form and description, for him to execute and return, providing for deferred payments of the balance of the purchase price, is a sufficient writing within the meaning of the statute of frauds, permitting a recovery of such balance; and the fact that the deed was inclosed in the letter may be proved by parol evidence, as a collateral matter to the written instrument.

2. Evidence—Letters—Duplicate Originals.

Where a letter has been duplicated by carbon and both executed as originals, the latter is not objectionable as secondary evidence.

APPEAL by defendants from *Shaw, J.*, at March Term, 1917, of MADISON.

This action was brought against C. J. Ebbs and two others to recover $500, the installment due on the purchase price of a certain tract of land.

W. J. McLendon addressed the following letter to—

MR. C. J. AND P. D. EBBS, 10 April, 1916.
Marshall, N. C.

GENTLEMEN: I hereby agree to sell you the Bridge Street property recently occupied by Morrow and McLendon and adjoining the lot of Shelton-Ebbs Company, for the sum of $2,175, payable as follows: Cash, $175, receipt of which is hereby acknowledged; $250 June 1st, $250 October, and $250 every three months thereafter till paid in full, notes to bear interest at 6 per cent after June 1st and signed by C. J. Ebbs, P. D. Ebbs, and W. E. King.

It is understood that P. B. Rector and W. B. Ramsey are to have the use of the large storeroom till June 1st, free of rent, and that I am to collect all other rents till 1 May, 1916.

The deed is to be made as soon as possible to the above signers and makers of the notes. Yours very truly,

W. J. McLENDON.

D. J. Ebbs gave McLendon a check for $175. Thereafter, on 29 May, 1916, he wrote the following letter to—

MR. C. J. EBBS, 29 May, 1916.
Marshall, N. C.

DEAR SIR: I am inclosing herewith deed for Bridge Street property and which I made to C. J. Ebbs, P. D. Ebbs, and W. E. King,

this being my understanding of the way in which you wanted (604) the deed made. If any of the names are not to be in the deed, you can erase them. You will note I have made the consideration $2,000, and which I also trust is satisfactory.

You make the notes according to the agreement as to deferred payments and forward to me at your convenience.

Yours very truly,

W. J. McLENDON.

The deed inclosed therein was for the Bridge Street property described and was signed by McLendon and his wife on 9 June, 1916. This deed was returned to him by C. J. Ebbs in the following letter:

MR. W. J. McLENDON, JR., Knoxville, Tenn. MARSHALL, N. C., 9 June, 1916.

DEAR SIR: I herewith inclose deed covering the Bridge Street property, made out in accordance with our agreement. I also inclose the deed sent to us some days ago.

Kindly execute the new deed and let us have it back at your early convenience, and we will send you the notes and check as per the contract.

Yours very truly,

C. J. EBBS.

The deed which McLendon had sent Ebbs was inclosed in this letter, and also the new deed drawn by Ebbs, for the plaintiff and wife to execute. This latter deed fully describes the property, and plaintiff testified that he and his wife executed and acknowledged the same and handed it to C. J. Ebbs, who stated that it was all right, but that P. D. Ebbs and King were not there to sign the notes, and by request of C. J. Ebbs he left the deed with Mr. White in escrow to be turned over to Ebbs when the notes for $1,750 were executed and a check for $250 delivered to him for plaintiffs. The plaintiff testified that he told Mr. C. J. Ebbs that he could take possession of the property, who said that he would do so.

There was also evidence that C. J. Ebbs took possession of the property and rented it out to the witness Rector. The court instructed the jury, "If you find the facts to be as testified to by the witnesses," to answer all the issues "Yes" in favor of the plaintiff, as against the defendant C. J. Ebbs, and directed a nonsuit as to the other two defendants.

The defendant C. J. Ebbs excepted and appealed.

Guy V. Roberts and Martin, Rollins & Wright for plaintiffs.
Gudger & McElroy for defendants.

(605) CLARK, C. J. The sole question presented is whether there was a sufficient agreement in writing, under the statute of frauds, to bind the defendant C. J. Ebbs.

The plaintiff wrote a letter to the defendants which sufficiently described the property and in his second letter inclosed a deed executed by himself and wife for the same. The defendant C. J. Ebbs thereupon wrote out a new deed fully describing the property and setting out the contract and naming the consideration, stating that the deed covered the Bridge Street property and was "made out in accordance with our agreement. . . . Kindly execute the new deed and let us have it back at your earliest convenience, and we will send you the notes and check as per the contract." This was a sufficient signing under the statute of frauds. The reference in the letter to the deed, taken in connection with the evidence of the plaintiff that the deed put in evidence was the deed that came in the envelope and is the one referred to in Ebbs' letter of 9 June, is fully sufficient.

The objection that parol evidence was required to prove that the deed put in evidence was that which was sent by Ebbs for plaintiff's signature and which was afterwards executed and acknowledged by himself and wife in no wise makes in favor of the plea that the contract was not in writing.

The contract is fully set out in the correspondence, and there is nothing as to the terms of the contract to be added. The terms of the agreement are full and complete, and entirely in writing. It is no infringement of the rule that a contract for sale of land must be in writing to prove by parol the signature of the parties, the delivery of the paper in escrow, or that the two papers came tacked together or in the same envelope. These are collateral matters and form no part of the contract itself, which is entirely in writing.

It may be that if there had been evidence that C. J. Ebbs was authorized orally as the agent of P. D. Ebbs and of King to sign the letter, that this would have made him an "agent" duly authorized to sign the contract in their behalf. But such evidence seems not to have been offered, and at any rate the plaintiff did not appeal from the direction of a nonsuit as to them. The contract, whether proven valid as to P. D. Ebbs and King or not, was binding upon C. J. Ebbs, and judgment was properly taken against him. The carbon copies of plaintiff's letters were duplicate originals and competent.

The correspondence made a sufficient contract as to C. J. Ebbs, and in his appeal there is

No error.

Cited: Gravel Co. v. Casualty Co., 191 N.C. 317; *Chair Co. v. Crawford,* 193 N.C. 533.

(606)

R. W. WINSTEAD v. HEARNE BROTHERS & CO., A CORPORATION.

(Filed 26 May, 1917.)

1. Appeal and Error—Further Findings—Reference—Additional Evidence.

Where the Supreme Court orders the Superior Court judge to make and certify additional findings in passing upon the report of a referee, he is *not required to* reopen the case for the consideration of additional evidence, but to make his findings from the evidence already taken, when no exception is taken thereto and it is sufficiently comprehensive.

2. Corporations—Receivers—Dividends—Statutes.

Semble, Laws 1915, ch. 137, amending Laws 1913, ch. 145, by the inconsistency of the provisions repeals the former law as to grounds for dissolution of a corporation not paying dividends for six years, upon motion of one owning one-fifth or more of its capital stock, so as to make the dissolution of the corporation depend upon the petition of 10 per cent of the stockholders, when the dividend has not been declared on its common stock for ten years.

3. Same—Remedial Statutes—Majority Stock—Abuse of Power.

Chapter 137, Laws 1913, as to a receivership of a corporation, upon petition of a one-fifth interest in its shares, which has not paid a dividend in six years, is a remedial statute, and intended to remedy an abuse of power by the majority shareholders by a suspension of dividends, a method at times resorted to to freeze out minority holders or depress the market value of the shares.

4. Same—Consent—Estoppel.

Where a stockholder in a corporation has actively participated in its management and consented to the increase in its capital stock from the earnings of a profitable concern, which has proven decidedly advantageous, he is thereafter estopped to assert the right given a holder of a certain amount of the stock to throw the corporation into a receiver's hands for nonpayment of dividends within a certain period.

CIVIL ACTION, tried March Term, 1916, of EDGECOMBE, before *Allen, J.,* upon exceptions to report of referee. From the judgment of the court defendant appealed.

G. M. T. Fountain & Son for plaintiff.
F. S. Spruill, T. T. Thorne for defendant.

BROWN, J. The plaintiff is a stockholder in defendant corporation and seeks to have the corporation dissolved and a receiver appointed,

not upon the ground of insolvency, but because it has not declared a dividend within six years preceding this action. Pub. Laws 1913, chap. 147.

(607) The cause was referred to a referee, Mr. James Pender, who made a lucid and comprehensive report, to which no exceptions were filed.

Upon the coming in of the report the judge, without in any wise disturbing the referee's findings, held that "Regardless of the various matters set up by the defendant and the matters and facts appearing in the receiver's report, the plaintiff is entitled to the relief demanded in the complaint." Whereupon the court entered an order dissolving the corporation, etc. From which order defendants appealed.

Upon considering the case this Court, *ex mero motu,* made an order directing the judge holding the courts of Edgecombe County to find certain facts and answer certain questions from the evidence and report to this Court. The judge made the following report:

In compliance with the certificate of the Supreme Court ordering the judge of the Superior Court holding the courts of the district to find and certify to the Supreme Court certain facts in the above case, and propounding certain questions to be answered, in obedience thereto and in response to said questions the court doth certify as follows:

Q. 1. When was the plaintiff elected a director of the corporation, and how long did he continue as such?

A. Plaintiff was elected a director of the corporation upon its organization, and seems, from the minutes, to have been such up to the time of the institution of the action. The plaintiff was also an officer of the corporation, either its general manager and secretary or its vice president, during the entire existence of the corporation up to the bringing of this action. There seems to have been no distinct meeting of the board of directors, but there seems to have been annual meetings of the stockholders. All or most of them were directors, and practically all of the business of the corporations seems to have been transacted at said meetings, except the general management of the business, which was intrusted by the by-laws to the general manager.

Q. 2. Did the plaintiff participate in the active management of the corporation, and if so, how long and to what extent?

A. Up until the year 1907 he seemed to be the active and moving spirit in the corporation, acting at one time as its general manager. After said date he was continuously vice president and seemed to have participated in all of the annual meetings. The records do not disclose that at any of these meetings he ever demanded a dividend to be declared which was not declared.

Q. 3. Did he consent to the use of the profits of the corporation to increase its capital?

A. Yes.

Q. 4. Did he object to the use of the profits of the corporation to increase its capital, and if so, when and under what circumstances?

A. The referee's report and the evidence as taken by the (608) referee shows that he raised no objection whatever to the use of the profits of the corporation to increase its capital, and seemed to be perfectly satisfied with the management of the company until after the sale of the Strickland stock to W. R. Mann.

Q. 5. Did he demand or request the directors to declare a dividend, and if so, when and under what circumstances?

A. The records do not disclose that he ever demanded that a dividend be declared.

Q. 6. Give any other facts showing the connection of the plaintiff with the business of the corporation.

A. This question seems to be answered by the replies to the foregoing questions. Since the institution of this suit a dividend has been declared and the plaintiff has received his dividend upon his stock. This dividend was declared in the year 1914.

The foregoing is respectfully submitted,

H. W. WHEDBEE,
Judge of the Superior Court.

NOTATION.—Counsel for the plaintiff asks the court to consider further evidence in respect to the questions asked by the court. The court declined to consider any other evidence, and makes all findings from a careful reading of the testimony taken by the referee and from the report of the referee. The other evidence offered was in the shape of affidavits, which are filed in the court and which the court declined to consider. To the refusal to consider the affidavits filed, plaintiff excepts.

WHEDBEE, *Judge.*

Upon the coming in of the report and findings of his Honor, Judge Whedbee, the plaintiff moves for a *certiorari* directing the judge to certify to us the affidavits and new evidence offered before him, and which he refused to consider.

This motion must be denied. It was not intended by the order hereinbefore mentioned to open up the case for a new trial before the judge or a referee.

The judge acted strictly within the scope of our order in finding the facts from the evidence already taken by the referee. These facts had not been found by the judge who rendered the judgment appealed from, and we deemed them essential to a proper determination of the case.

Coming to consider the appeal of the defendant from the order dissolving it, we find that no exceptions were filed by either party to the referee's findings of fact and that the judge based his judgment upon the facts admitted that no dividend had been declared and paid
(609) for more than six years prior to the commencement of this action, and that during that period the financial condition of the defendant had been very prosperous.

It appears from the record that the defendant corporation was organized on 17 July, 1901, (taking over the business of Hearne Bros. & Co., coffin manufacturers) with a paid-up capital of $4,000; that the incorporators were W. R. Mann, W. T. Hearne, J. O. Hearne, and the plaintiff, and on 8 January, 1904, the Hearnes sold their stock to Mann and Winstead, the plaintiff, and his wife. From this time on Mann and Winstead and Mrs. Winstead were the only stockholders until 1906, when Mann and Winstead each sold to B. A. Strickland three shares, which Strickland kept until 1911, when he sold the six shares to W. R. Mann, since which time W. R. Mann has owned thirty-three shares and R. W. Winstead twenty-six shares and Mrs. Winstead one share, and they are now the only stockholders in said corporation.

On 31 December, 1902, a stock dividend of $2,000 was declared, thereby increasing the capital stock to $6,000, at which it has since remained. On 1 October, 1903, a dividend in cash of $2,000 was declared and paid, another in May, 1906, of 6 per cent, and another in May, 1907, of 17 per cent. Since then no dividend has been declared until 1914, after commencement of this action. The referee finds:

"That the business has been prosperous from the beginning, and increased in volume from year to year, requiring more capital, especially since the additions and improvements mentioned in paragraph 9. The company has never borrowed any money (except $500 and $1,000, many years ago), but has used the profits as a working capital. No assets of the company were employed except in its own business, there being no money loaned out and no outside investments. That the use of the profits as a working capital instead of borrowing money was in good faith and resulted in great prosperity to the company.

"That the company made only a cheap grade of pine coffins up to 1906, when it began the manufacture of a higher grade, using hardwoods. This necessitated the investment of several thousand dollars in machinery, the purchase of proper hardware and cloth, and also hardwoods. As a result of the expansion it was required to carry larger stock of

material of all kinds. This policy was mutually agreed to by all the stockholders. This expansion was made without borrowing any money, the profits being used for the purpose. As a result of this increase in the plant and improvement in the quality of output, the business continued to grow; if the quality of the output had not been improved the business would have gone down. The plaintiff never objected to this policy, and there was no friction between the parties until 1910 or 1911, when W. R. Mann acquired the Strickland stock."

The present net worth of the defendant is $40,877.47. (610)

The referee also finds that "Neither of the stockholders nor the directors of this corporation have ever, by any order entered in the minutes, directed to be set aside any part of the surplus to be used as a working capital and not used in paying dividends."

It also appears from the findings reported by Judge Whedbee that plaintiff has been a stockholder, director, and officer of the defendant from its incorporation, and that he has never requested that a dividend be declared other than those declared and paid; that the stockholders and directors were one and the same and that the policy of using the earnings of the corporation to enlarge its business instead of borrowing money was agreed to by plaintiff and all the other stockholders. That in this case it was a wise policy is proven by the result.

The only allegation upon which plaintiff rests his application for a receiver and dissolution of the corporation is that defendant has paid no dividend for six years preceding the application. He does not and cannot claim that it is insolvent, for its capital stock is only $6,000 and its net assets exceed $40,000. This is a most extraordinary showing, considering the fact that in addition to a stock dividend of $2,000 it has paid its stockholders 56 per cent in cash dividends since its organization in 1901.

It is true that the act of 1913, ch. 147, provides that application may be made by stockholders owning one-fifth or more in amount of the paid-up stock of certain corporations for the appointment of a receiver where no dividend has been paid for six years preceding the application. A material amendment was made, however, to this statute by the act of 1915, ch. 137, by adding to section 1 these words: "Or whenever stockholders owning one-tenth or more in amount of the paid-up *common* stock of any such corporation shall apply to the judge of the Superior Court as aforesaid by petition containing a statement that said corporation has paid no dividend on the common stock for ten years preceding said application."

This amendment would appear to be inconsistent with the six-year clause of the original act and to require ten years complete suspension

of dividends on the common stock of a corporation before application can be made for a receiver on that ground.

The stock of the defendant is all common stock. It has issued no preferred stock. It paid a dividend of 17 per cent on its stock on 14 May, 1907. It would seem, therefore, that as this dividend was paid in less than ten years before this action was commenced, it cannot be maintained unless upon the ground that the action was commenced (611) before the enactment of the amendment. But as the point is not made in either brief, and was not argued before us, we will not decide it, but will rest our decision upon another ground.

The act of 1913 is a remedial act and must be so construed. It was intended to remedy an abuse of power by majority stockholders to the detriment of those in the minority. It is entitled "An act for the relief of minority stockholders of certain corporations in certain cases."

Suspension of dividends is a favorite method adopted when it is desired by a majority to freeze out objectionable minority stockholders or to depress the market value of the stock of the corporation.

The act was never intended to take away from the stockholders the right to manage, by unanimous consent, the business in any legitimate manner most conducive to its success.

The plaintiff during the entire life of defendant corporation has been a director and officer as well as stockholder. He consented to the use of the surplus earnings in the enlargement of the business. He has never demanded that a dividend be declared or endeavored to have one declared since May, 1907. During all that time he was actively connected with the management and consented to the financial policy of the corporation which has produced such splendid results.

It is a well settled principle of law that the complaining stockholder must first seek relief through the directorate or controlling authorities of the corporation before he can apply to the courts.

An action to compel the declaration of a dividend cannot be maintained where the stockholder has not applied to the directors, and he must allege that the directors refused to entertain such application. 2 Cook on Corp., sec. 684, p. 2091.

It would be a great wrong to the other stockholders to permit plaintiff to participate actively in all the meetings, to consent to and agree in putting back into the concern its surplus and profits for the purpose of enlarging the company's business without declaring a dividend, and then afterwards ask the interposition of this Court and the dissolution of the corporation for such conduct.

We are of opinion that the plaintiff is estopped by his conduct from asking a dissolution of the corporation upon the grounds set out in the complaint.

The order decreeing a dissolution and appointing a receiver is reversed, and the action is dismissed.

Reversed.

Cited: Coleman v. McCullough, 190 N.C. 592; *Wright v. Fertilizer Co.,* 193 N.C. 310; *Kistler v. Cotton Mills,* 205 N.C. 813; *Jordan v. Hartness,* 230 N.C. 719; *Gaines v. Mfg. Co.,* 234 N.C. 339.

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(612)

P. D. GOLD ET AL., TRUSTEES OF THE PRIMITIVE BAPTIST CHURCH OF WILSON, v. U. H. COZART ET ALS.

(Filed 26 May, 1917.)

Limitation of Actions—Religious Societies—Independent Congregations—Trustees—Deeds and Conveyances—Statutes.

A congregational church under which class each congregation is independent and not a part of a larger system, holding, as such, real property under known and visible metes and bounds for a hundred years, and using it for religious purposes, acquires a fee-simple title, independent of the validity of its deed, Revisal, sec. 2672, and its trustees, under the direction of the church or congregation properly obtained, may convey such title to the purchaser. Revisal, secs. 2670, 2671.

APPEAL by defendants from *Connor, J.,* at chambers in WILSON, 26 April, 1917.

F. S. Hassell for plaintiffs.

W. A. Lucas and J. C. Little for defendants.

CLARK, C. J. This was a controversy submitted without action. It appears from the facts agreed, and it is recited in the judgment of the court, that about the year 1802 a paper-writing was executed by John Dew and five others, which purported to be a conveyance of one acre of land, now within the limits of the town of Wilson, to the Baptist Society for the purpose of religious worship; that at that time there was no such organization as the Baptist Society, but that certain persons associating themselves together as a Baptist congregation entered into possession of said 1 acre of land about 1802, and have used the premises for religious worship continuously ever since, adversely to the claims of all other persons, under known and visible boundaries, and have for more than one hundred years maintained on said lot of land a church for religious worship and used it for that purpose; that said church,

originally known as the Toisnot Church, has been for many years known as the Primitive Baptist Church of Wilson, and the plaintiffs herein constitute the board of trustees, duly elected, of said Baptist Church, and as such trustees and in consequence of resolutions of the congregation entered into the contract to sell a part of the said lot of land to the defendants, who now decline to accept the deed and pay the purchase price, upon the ground that the plaintiffs cannot execute an indefeasible title to the same. It is further found by the case agreed and by the judgment by the court that under the policy of the Primitive Baptist Church the congregation of each church is supreme in all matters affecting their religious organization, their system being known as con-
(613) gregational, there being no higher ecclesiastical authority having control or supervision over the action of each congregation. The court below being of opinion that the instrument of December, 1802, is of no effect, because no grantee was named therein, and that the trusts suggested are too vague, indefinite, and uncertain to be capable of construction, but being further of opinion that the congregation styling itself the Primitive Baptist Church at Wilson through its members and their successors have by adverse possession of said lot for more than one hundred years acquired title to the said property, held that the trustees of the Primitive Baptist Church of Wilson, acting under the authority of the conference of the said congregation, can make an indefeasible title, and decreed specific performance of said contract.

If we should concur in the view held by the learned judge, that the paper-writing of 1802 was invalid for the reasons he gave, we are of opinion, however, that inasmuch as a congregation styling themselves the Primitive Baptist Church entered into possession of said property for religious worship and have in succession built two churches upon said premises and have continuously occupied said property for religious worship for more than one hundred years adversely to all the world, said congregation has acquired a valid and indefeasible title to said property, and can make a valid title to the same in accordance with the contract between the trustees of said church (by virtue of a resolution of said congregation) and the defendants.

Revisal 2672, which dates back to Laws 1776, ch. 107, and 1796, ch. 457, sec. 4, provides that all lands and donations of any kind of property conveyed or devised to any church or religious denomination, religious society or congregation, shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees of said churches and congregations for their several use, and if there are no trustees, then in the church or congregation; Revisal 2673, provides that the trustees of any religious body can sell or convey any property owned by such body when directed to do so by said church or congregation. Revisal 2670

and 2671, authorize such religious body to appoint and remove trustees. We are of opinion that the trustees can execute title thereto. The distinction between the congregational system of church government, under which each congregation is independent, and the connectional system, in which each congregation is a constituent part of a larger association, was pointed out and discussed in *Simmons v. Allison,* 118 N. C., pp. 770, 771.

It may well be that the paper-writing of 1802 which conveyed the property of John Dew and five others for use for religious worship, particularly the Baptist Society, but with liberty to traveling preachers of any other order or sect, might have been valid (*Keith v. Scales,* 124 N. C., at p. 510, and cases there cited), especially as there (614) was evidence showing that there was at that time a Primitive Baptist Church organization in this State. But however that may be, the fact that said grantees and their successors as trustees have continuously used said property for so long a period of time adversely to all the world for the use of the congregation of the Primitive Baptist Church makes a sufficient and complete title, irrespective of the legality or illegality of the paper-writing of 1802. The rights of an individual congregation under the congregational system is also discussed in *Conference v. Allen,* 156 N. C., 526; and the connectional system is discussed in *Kerr v. Hicks,* 154 N. C., 268; *Tilley v. Ellis,* 119 N. C., 242.

Affirmed.

Cited: Dix v. Pruitt, 194 N.C. 71.

MRS. K. E. EDWARDS v. JEFFERSON STANDARD LIFE INSURANCE COMPANY ET ALS.

(Filed 26 May, 1917.)

1. Contracts, Interpretation—Intent.

In construing a written contract, technical rules give place to the intention of the parties gathered from the language used, arrived at by transposing sentences when necessary and disregarding words without distinct meaning; and where two conflicting constructions may be reached, the one upholding the validity of the contract will be adopted; and in case of ambiguity, the words employed are taken most strongly against the party using them, and the facts existing at the time may be used as a "key" to the meaning of the contract.

2. Same—Insurance—Assignments.

An assignment of an annuity policy for the security of a debt, payable to the wife, should she survive her husband, or to the latter, the insured,

should he survive his wife, reading, "I, W. J. E. and K. E. E., do hereby assigns," etc. . . . "The object and extent of this assignment is to secure the said assignee against any and all indebtedness that I may be owing to him or his estate at my death": *Held*, the use of the expressions, "I may owe," "at my death," would indicate that the debt was that of both the assignors; but the fact that the husband was a railroad promoter and was and continued to be indebted to the assignee, and the wife never was, when considered, will affect the interpretation of the instrument, so that the intent thereof will be ascertained as securing the obligation of the husband only.

3. Equity—Contribution—Bills and Notes — Principal and Surety — Endorsers.

The equitable doctrine of contribution rests upon the maxim that equality is equity, and is enforced upon the principle that those engaged in a common hazard in the same degree or relation should bear the loss equally; and where one is surety on a note and the others indorsers thereon, the liability of the former is primary and of the latter a conditional one, being entitled to notice of dishonor; and not being in the same situation with regard to the hazard, the surety is not entitled to contribution from the indorsers.

4. Same—Husband and Wife.

Where a wife has assigned her beneficial interest in an annuity policy on the life of her husband as security to a note given by him, with indorsements thereon, she does not assume the obligations and liabilities of an ordinary surety, and no personal judgment can be obtained against her; but only the property assigned will be regarded as the surety for the payment of the obligation, and to the extent it is so used her husband becomes her creditor.

(615) CIVIL ACTION, tried before *Cox, J.*, at April Term, 1917, of LEE.

This is an action to have the plaintiff declared entitled to an annuity of $500 and to recover a part of the same alleged to be due.

On 13 January, 1903, the Security Life and Annuity Company issued its policy on the life of W. J. Edwards, providing for the payment of an annuity to the plaintiff, his wife, if she survived him, and an annuity to him if he survived his wife, and the defendant insurance company has assumed payment thereof.

On 19 January, 1915, the plaintiff and her said husband executed an assignment of said policy to the defendant bank which was assented to by the insurance company, as follows:

"For the purpose of securing any indebtedness that I may owe the assignee hereinafter mentioned, or his estate, at my death, I, W. J. Edwards and K. E. Edwards . . . do hereby assign, transfer, and set over to the Farmers Commercial Bank of Benson (describing policy) . . . and all dividends, benefits, and advantages to be had or derived

therefrom. . . . The object and extent of this assignment is to secure the said assignee against any and all indebtedness that I may be owing to him or his estate at my death.

[Here follows a power of attorney to collect.]

(Signed) W. J. EDWARDS [SEAL.]
K. E. EDWARDS [SEAL.]

The said Edwards died insolvent in April, 1916, and at the time of his death was indebted to said bank in the amounts set out in the judgment rendered, a part of the debts being contracted before and a part after the execution of the assignment, said indebtedness being evidenced by notes on which there were endorsers.

The insurance company has admitted its liability, but asks the judgment of the court determining who is entitled to the fund.

Judgment was entered in favor of the bank, directing the insur- (616) ance company to pay all amounts due under the policy to the bank until its indebtedness is paid in full, and the plaintiff excepted and appealed, contending that the assignment to the bank is so vague and ambiguous that it cannot be enforced, and, if not, that she is entitled to a contribution from the indorsers.

Hoyle & Hoyle for plaintiff.
Clifford & Townsend for defendant.

ALLEN, J. In the construction of contracts "technical rules are not so much regarded as the real meaning of the parties, where it can be gathered from the instrument itself; and to arrive at the intention, sentences may be transposed and insensible words, or such as have no distinct meaning, may be disregarded." (*Killian v. Harshaw,* 29 N. C., 498; McIntosh on Contracts, (2 Ed.), 553), and of two constructions, that will be adopted which upholds the instrument, as it is presumed "when parties make an instrument the intention is that it shall be effectual and not nugatory." *Hunter v. Anthony,* 53 N. C., 385.

Words are to be taken most strongly against the party using them, and facts existing at the time of making a contract may be used as a "key to its meaning." *Richards v. Schlegelmich,* 65 N. C., 152.

Applying these rules of construction, there is little difficulty in arriving at the intention of the parties.

The assignment says distinctly that it is executed for the purpose of securing any indebtedness to the bank existing at the death of the debtor, and the debtor must be both of those who executed the assignment, or one of them.

There is good reason for holding that it was intended to secure the indebtedness of both, rather than let it fail altogether, because, while the expressions "I may owe," "at my death" are used, the assignors also use the singular pronoun to include both of the makers of the assignment. They say, "I, W. J. Edwards and K. E. Edwards."

When, however we consider the circumstances surrounding the execution of the assignment, that W. J. Edwards is described in the policy as the insured and the plaintiff as beneficiary, that W. J. Edwards was a railroad promoter and was borrowing money and his wife not, and that he was indebted to the bank when the assignment was made and at his death, and that his wife owed nothing, it is reasonably certain that it was the purpose of the parties to secure the indebtedness of the husband, W. J. Edwards, and we so hold.

(617) Nor do we think the plaintiff, one of the makers of the assignment, is entitled to contribution as against the indorsers on the notes, as this equity only arises between persons standing in the same situation. *Moore v. Moore,* 11 N. C., 358.

The right to contribution results from the maxim that equality is equity, and is enforced upon the principle that those engaged in a common hazard should bear equally any loss. *Dawson v. Pettway,* 20 N. C., 531.

It exists between co-sureties, who are bound to a common liability, and if there is no common liability there is no foundation for the equity. Brandt Guaranty and Suretyship, secs. 221-224; Eaton on Equity, 508-9.

As said in *Moore v. Moore,* 11 N. C., 360, it is "a principle of natural equity that equality is equity among persons standing in the same situation."

If common liability, common hazard, and similarity or identity of situation is the foundation of the equity, it follows that the plaintiff, admitting that she is a surety, is not entitled to contribution as against the defendants, indorsers upon the notes.

A surety is a maker, is primarily liable for the payment of the debt, and is not entitled to notice of dishonor (*Rouse v. Wooten,* 140 N. C., 557), while the indorser is liable conditionally, and does not undertake to pay absolutely, but only after notice of dishonor (*Sykes v. Everett,* 167 N. C., 608), and is entitled to notice of dishonor. *Perry v. Taylor,* 148 N. C., 362.

The surety and the indorser are not in the same situation, nor is there a liability or hazard common to both.

A case directly in point is *Smith v. Smith,* 16 N. C., 173, in which the headnote, fully sustained by the opinion, is as follows:

"Where A., as surety, signed the note of B., payable to C., and it was indorsed by C. at the request and for the accommodation of B., there

being no contract between A. and C. whereby they agree to become co-sureties of B., it was held that A. had no right to contribution from C."

Again, the Court says in *Le Duc v. Butler,* 112 N. C., 461, which is affirmed in *Hauser v. Fayssoux,* 168 N. C., 1: "A clear distinction is marked in all of these cases, except possibly the last, between the surety and the indorser in their relation to each other. While to the holder their liability was the same, as to each other they were essentially different. If the indorser should pay the note he might still erase the indorsement and sue the surety and maker or the joint makers upon the note. If, however, the surety should pay the note, he could not call upon the indorser as a co-surety for contribution, but his payment operated as a discharge of the indorser from all liability, although by force of the statute he was liable as surety."

We have dealt with the case, conceding the correctness of the (618) position of the plaintiff, that she became a surety of the husband by transferring her property to secure his debt, but while the wife, under such conditions, is frequently referred to in the decisions as a surety, she does not assume the obligations and liabilities of the ordinary surety, and cannot be classed with indorsers.

She has not promised to pay the debt absolutely or conditionally, and no judgment can be recovered against her individually.

She has simply transferred her property to secure her husband's debt, and her property is treated as a surety. (*Hinton v. Greenleaf,* 113 N. C., 7), and to the extent it is used in payment of the debt she becomes a creditor of the husband.

We conclude that there is no error.

Affirmed.

Cited: Foster v. Davis, 175 N.C. 544; *Wellington v. Tent Co.,* 196 N.C. 751; *Corp. Com. v. Wilkinson,* 201 N.C. 348; *Bank v. Whitehurst,* 203 N.C. 309; *Bond Co. v. Krider,* 218 N.C. 363.

SHEPARD'S CHEMICAL COMPANY v. A. D. O'BRIEN.

(Filed 26 May, 1917.)

1. Contracts—Buildings—Architects—Final Certificate—Conclusiveness.

Where a final certificate of the architect has been given, which by express terms of the contract is made conclusive that the building has been completed in accordance therewith, it is not afterwards open to the architect or the builder to withdraw it or to question or impeach it as to observable defects, or those which were or could have been discovered by the

architect in the proper performance of his duties, except in cases of fraud or mistake so palpable as to indicate bad faith or gross neglect.

2. Same—Agreements—Fraud—Evidence.

Where it appears that the owner of the building and his contractor have agreed that the former would pay the latter the balance due upon his contract upon the latter making certain alterations, an objection is untenable that the certificate was given the contractor by the architect without examination, before the building was completed, and that it was fraudulent in law.

3. Contracts—Buildings—Architects—Certificates—Guarantee — Interpretation.

Where a builder's contract provides that the architect's final certificate shall be conclusive that the contractor had complied with the terms thereof, with a guarantee clause that he make good all defects, etc., in violation of his contract, arising or discovered in his work at any time within two years, and no certificate shall be construed to relieve the contractor from his obligation to make good such defects: *Held*, construing the contract as a whole, the guarantee clause refers to defects appearing after the completion of the building, which were not observable at the time the final certificate was given.

4. Appeal and Error—Motions—Diminution of Record—Pleadings—Evidence.

Pleadings in an action certified to the Supreme Court following a suggestion of the diminution of the record therein can have no force when the position they are designed to present is entirely without supporting evidence.

(619) CIVIL ACTION, tried before *Connor, J.*, and a jury, at November Term, 1916, of NEW HANOVER.

From a perusal of the record it appears that in January, 1914, defendant had entered into a contract to construct for plaintiff company a reinforced concrete building in the city of Wilmington according to certain plans and specifications, "Said work to be done in good, substantial, workmanlike manner to the satisfaction and under the direction of James F. Gause, Jr., architect," etc.; that at the completion of said building, or soon after it had been turned over to and was occupied by the owner, some differences having theretofore existed between the parties, plaintiff company instituted a suit against defendants in the Superior Court of New Hanover County, seeking to recover damages in the sum of $2,000 by reason of alleged wrongful delay in completing building and of defective construction, etc.

There was denial of liability by defendant and insistence upon full performance of contract on his part, and claimed a balance due defendant thereon of $604.50, less $401 thereof being for work done within the

specifications of the contract and $203.50 being for extra work done by authority of the architect and for which the owner was bound.

Meantime defendant instituted against plaintiff company an action in the recorder's court of the city of Wilmington to recover this balance, and plaintiff answered, denying liability and alleging the above stated breaches of contract on part of defendant. In the latter action, judgment having been entered for plaintiff O'Brien, here defendant, an appeal was taken by the company, and in the Superior Court the two actions were consolidated and submitted to the jury, who, at the term of court heretofore stated, rendered their verdict as follows:

1. Did the architect, James F. Gause, Jr., give to A. D. O'Brien a final certificate 13 July, 1914, as required by the contract? Answer: "Yes."

2. If so, was the said certificate obtained by the false and fraudulent representations of the said A. D. O'Brien? Answer: "Yes."

3. Did A. D. O'Brien fail to construct the building in accordance with the contract and specifications, as alleged by the Shepard's Chemical Company? Answer: "Yes."

4. Did the parties enter into a contract by letters that on the performance of certain specific work the Shepard's Chemical Company, Inc., was to pay A. D. O'Brien the balance of the money which he claimed to be due upon the contract, and for extras? Answer: "Yes."

5. If the subsequent agreement was entered into, did A. D. (620) O'Brien comply with the terms of that agreement, and did the architect give a final certificate of 15 April, 1915, to that effect? Answer: "Yes."

6. Was this certificate produced by the false and fraudulent representations of the said A. D. O'Brien? Answer: "No."

7. What amount, if anything, is the Shepard's Chemical Company, Inc., entitled to recover from A. D. O'Brien for breach of his contract for delay in construction of the building? Answer: "Nothing."

8. What amount, if anything, is the Shepard's Chemical Company, Inc., entitled to recover from A. D. O'Brien for damages for breach of contract? Answer: "Nothing."

9. What amount, if anything, is A. D. O'Brien entitled to recover from the Shepard's Chemical Company, Inc.? Answer: "$401, and interest from 14 August, 1914; $203.50, and interest from 15 April, 1915."

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

McClammy & Burgwin and Kenan & Wright for appellant Chemical Company.

Rountree & Davis for appellee O'Brien.

HOKE, J. We have carefully considered the case presented in the record and are of opinion that no reversible error has been made to appear. The agreement, in several places, makes the final certificate of the architect conclusive as to a completion of the building in accordance with the contract; and this certificate having been fully and formally given, the authorities are that it was not afterwards open to the architect or the builder to withdraw it nor to question or impeach it as to observable defects or those which were or could have been discovered by the architect in the proper performance of his duties except in case of fraud or mistake so palpable as to indicate bad faith or gross neglect. *McDonald v. MacArthur,* 154 N. C., 122; *Chicago, etc. R. R. v. Price,* 138 U. S., 185; *Kihlberg v. U. S.,* 97 U. S., 398; *R. R. v. Lumber Co.,* 95 Tenn., 538; *Gerisch v. Herold,* 81 N. J. L., 171; *Choctaw, etc. v. Newton,* 140 Fed., 225; *Flannery v. Sahagran,* 134 N. Y., 85; *Spink v. Mueller,* 77 Mo. App., 85; 9 Cor. Jur., pp. 767-778; Wait Engineering and Architectural Jurisprudence, sec. 445.

This being the recognized position, there is doubt if the pleadings contain anywhere allegations sufficiently definite to justify submitting the issue of fraud to the jury. *Mottu v. Davis,* 151 N. C., 238. Of a certainty, there was no testimony tending to establish it either on the part of the defendant or the architect, and his Honor was fully justified in charging the jury, as he did, that if they believed the evidence they would answer the second and sixth issues for the defendant.

(621) As we understand and interpret the record and evidence, the defendant, therefore, might well have been allowed to recover on the certificate. The court, however, submitted the further issue, No. 3, admitting all the evidence relevant to the inquiry, and the jury have found that the final certificate of the architect is true in fact and that the building has been completed by defendant according to the terms and specifications of the contract. On this finding it would seem that defendant's recovery should, in any event, be sustained. It is insisted for appellant that the certificate given by the architect is fraudulent in law by reason of the fact that the same was delivered before the building was completed and without any proper examination. The position has been approved when such a certificate had been given under circumstances amounting to a fraud on the rights of the owner, 160 Mich., p. 142; but no such principle can be applied to the facts of the present record, where it appears that the existence of certain minor defects was raised, fully considered, and the final certificate given after consultation

with the owner, and with evidence also tending to show that the parties had entered into a further definite agreement on the subject that if the defendant would do certain specified and additional work, looking to a correction of the alleged defects, and for which he denied liability, the plaintiff would pay the balance due on its note given for the building as per contract, and also a claim for other extra work done under the architect's directions and approval; evidence accepted by the jury and established by their verdict on the fourth and fifth issues.

We have not been inadvertent to the guarantee clause of the contract by which the defendant bound himself to correct and make good all defects, etc., in violation of the contract, arising or discovered in his work at any time within two years, etc., and no certificate, final or otherwise, shall be construed to relieve the contractor from his obligation to make good such defects," etc. Construing the contract in its entirety, and considering this stipulation in reference to other clauses in the agreement which make the architect's certificate final, etc., as to the proper completion of the building, and so as to give each its proper significance, the recognized rule of interpretation in such cases, *Gilbert v. Shingle Co.*, 167 N. C., 286, it is clear to our minds that this guarantee clause has reference to defects which appear after the building is completed and which were not in evidence at the time the certificate was given. So construed, the provision in question has no bearing on the facts presented.

The architect has given his certificate that in July, 1914, the building was completed by defendant according to the contract, and the jury, on a separate issue, have found this to be true. There has been no suggestion or evidence tending to show a change in the condition of the building after that date. All of the defects complained of, if (622) they existed at all, were not only in evidence at that time, but had been the subject of discussion between the parties before the final certificate was given, and, furthermore, had been the subject of a further agreement in adjustment of the respective claims of the parties concerning them.

In no aspect of the evidence, therefore, can the guarantee clause affect the question, and the exceptions based upon it are not, therefore, relevant.

The objection to the rulings of the court on questions of evidence are without material significance, and none of them can be sustained.

There is no error, and the judgment below must be

Affirmed.

Since the opinion in this case was prepared, on suggestion of diminution of the record, there has been certified from the court below additional pleadings by the Chemical Company, which had been duly filed

by leave of court, and making full allegations of fraud and misrepresentations on the part of defendant O'Brien. This addition to the record, however, may not be allowed to affect the result, as the case in this respect is disposed of on the ground that there were no facts in evidence to support the allegation.

For the reasons heretofore given, the judgment below must be affirmed. No error.

Cited: Lacy v. State, 195 N.C. 291.

W. A. YOUNG v. DR. E. P. GRUNER.

(Filed 26 May, 1917.)

1. Negligence—Instructions—Burden of Proof—Sanitariums—Intoxicating Liquors.

In an action against the owner of a private sanitarium to recover damages for injuries alleged to have resulted from his negligence in not taking care of a patient received in a practically unconscious condition from the excessive use of alcohol, there was conflicting evidence as to whether the injury was received after the plaintiff had been discharged and while permitted to sleep in a lower room at his request until the next morning, or whether the plaintiff was in such condition at the time as to be unaware of what he was doing: *Held,* a charge to the jury imposing upon the defendant the duty to exercise ordinary care under the circumstances for the plaintiff's protection was proper, as also (in accordance with his special request) his liability for willful injury, if his phase of the evidence should be accepted by the jury, placing the burden of proof on plaintiff.

2. Appeal and Error—Evidence—Pleadings—Objections and Exceptions.

Where the plaintiff has introduced parts of the defendant's answer in evidence, an objection, if valid, is rendered immaterial by the defendant's thereafter testifying thereto.

3. Appeal and Error—Evidence—Expert Testimony—Intoxicating Liquors—Favorable Testimony.

Where the effect upon the sensibilities of a patient received at a sanitarium under the excessive influence of alcohol is material in an action against the institution for its alleged negligence in failing to give the patient proper attention, the opinion of a medical expert as to the effect of giving the patient a drink of whiskey, which is favorable to the defendant's contention, is not evidence of which he can complain.

4. Evidence—Common Knowledge—Appeal and Error—Harmless Error.

When material and relevant to the inquiry, evidence as to the effect of whiskey in producing thirst after a drunken sleep, admitted to be universally known as a fact, if erroneously admitted, is harmless error.

CIVIL ACTION, tried before *Harding, J.*, at May Term, 1916, of (623) BUNCOMBE.

This is an action to recover damages for personal injury sustained while an inmate of a private sanitarium of the defendant, alleged to have been caused by the negligence of the defendant.

The evidence tended to prove that the plaintiff was taken to the Sanitarium on 15 February, 1915, by two of his friends, while he was practically unconscious, caused by the excessive use of alcohol; that he was received by the defendant as a patient and was placed in what was called a safety room; that he was treated by the defendant and went to sleep about 5 o'clock in the evening; that some time thereafter he became boisterous and was taken to a room in a lower story, where he was left without attendance until the next morning; that about 12 or 1 o'clock at night, being very thirsty, he got up, and in moving about in the dark in his search for water, fell into a concrete swimming pool 6 or 7 feet deep, and his leg was broken and he was otherwise injured; that he remained in this pool from about 1 o'clock at night until about 7 o'clock the next morning; that he made various efforts to get out of the pool, but was unable to do so, and that he called for help at different times during the night and that no one came to him.

The swimming pool was encircled with an iron railing except where the steps led down into the pool.

The defendant offered evidence tending to prove that after the plaintiff was taken from the safety room, he was discharged as a patient and was permitted to sleep in the lower room, at his request, until the next morning.

The plaintiff testified as to this, that in his condition he did not (624) know what took place, and there was evidence in his behalf that he was bordering on delirium tremens.

There was a verdict and judgment in favor of the plaintiff, and the defendant excepted and appealed.

R. M. Wells and J. E. Swain for plaintiff.
J. W. Haynes for defendant.

ALLEN, J. The questions in controversy between the plaintiff and the defendant were resolved into an issue of fact under the instructions given to the jury, and this fact has been decided against the defendant by the jury.

His Honor imposed upon the defendant the duty of exercising ordinary care under the circumstances for the protection of the plaintiff, and he charged them specifically, according to the contention of the

defendant, that "If you find by the greater weight of the evidence that for several days prior to 15 February, 1915, that the plaintiff had been on a protracted debauch, and that on said date the plaintiff was taken to the sanitarium by his friends, who asked the defendant to do what he could to sober up the plaintiff, and the defendant was not advised at the time, either by the plaintiff or his friends, the extent to which the plaintiff had indulged in the use of intoxicating liquors, and was not acquainted with the plaintiff or his habits; and if you should further find that the defendant gave the plaintiff the usual and ordinary treatment in cases of that kind; and you should further find that the plaintiff went to sleep in the late afternoon or early night and slept until near midnight, at which time the plaintiff became abusive toward the defendant, and the defendant exercised that prudence and care which an ordinarily prudent person would have exercised in the position and situation of the defendant in making such an examination of a person or patient in the condition of the plaintiff at that time of such examination, and by the careful exercise of his faculties as a result of such examination, in good faith, thought the plaintiff was in possession of sufficient mental capacity to take charge of himself, and the defendant discharged the plaintiff as a patient at his sanitarium; and later, at the request of the plaintiff, permitted him to remain in a bed or cot in the basement of his sanitarium; that after such permission, if you find that the same was given, the defendant owed the plaintiff no duty whatsoever, except not to willfully injure him—and as there is no evidence in the case that the defendant did anything to willfully injure the plaintiff, it would be your duty to answer the issue, 'No,' remembering, gentlemen, that the burden of proof is upon the plaintiff as to both the first and second issues."

(625) The exceptions to the evidence are without merit.

The first three exceptions are to the admission in evidence of parts of the defendant's answer, but this is rendered immaterial, if objectionable, because the defendant was thereafter introduced as a witness in his own behalf and testified to the same facts alleged in the answer.

The fourth exception is to the admission of the following question and answer:

"Q. Doctor, a patient whose system is saturated with alcohol to such an extent that when that alcohol is removed and taken away, ten days after it is removed he will have delirium tremens, will you state whether or not that condition of alcoholism renders him incapable of conducting himself properly, knowing what he was doing, whether that excess renders him incapable of taking care of himself?

"A. Whiskey, in delirium tremens, would ordinarily bring back the sensibilities, when the man is having the stimulation from whiskey,

bring back his normal sensibilities, which he had on the morning I saw him at the sanitarium, practically; it would do so in twenty-four or forty-eight hours, because after that, with the lack of alcohol, he was going into this delirium."

The answer is rather favorable to the defendant than otherwise, as it tends to prove that the plaintiff knew more of his condition and situation on the night he was injured and the following morning than he admitted on the witness stand.

The fifth exception is to permitting a witness to say that one who has been intoxicated and has slept for three or four hours is likely to be thirsty when he wakes up, and counsel admit that this is universally known, and "that even laymen recognize the fact."

We have examined the whole record, and find nothing that would justify disturbing the verdict.

No error.

Cited: S. v. Martin, 173 N.C. 809; *Pangle v. Appalachian Hall,* 190 N.C. 835; *Penland v. Hospital,* 199 N.C. 313.

JUNIUS W. BENNETT v. BOARD OF COMMISSIONERS OF ROCKINGHAM COUNTY.

(Filed 26 May, 1917.)

1. Counties—Highways—Taxation—Constitutional Limitation—Statutes.

Without special legislation, a county may not authorize a levy of tax, exceeding the constitutional limitation upon the poll or property, to provide for a sinking fund to pay the principal and interest on bonds to be issued by it for highway purposes. Constitution, Art. V, sec. 1. It is otherwise as to a four months period of public schools required by Article IX, sec. 3, of the Constitution.

2. Same—Bonds—Special Acts.

When the county commissioners have power to contract a debt or to provide for a valid debt already contracted, they may, in the exercise of good business prudence, issue county bonds in evidence of the obligation; but this may be done only in subservance of the constitutional limitation upon the right to tax the polls and property of its inhabitants, when no special legislative authority has been given. Constitution, Art. V, sec. 1.

3. Same—Scheme of Taxation—Constitutional in Part—Sinking Fund.

Provisions of a county pledging its faith and credit to the issuance of bonds for highway purposes in a large amount, creating a sinking fund for the payment of the principal and interest, to each successive holder, with covenant that an annual tax shall be continuously levied for those purposes, and it appears that this stipulation is in excess of the constitu-

tional limitation, Art. V, sec. 1, these conditions are mutually dependent upon each other and form an entire scheme for the purpose of the issuance; and the whole act will be declared invalid, as not coming within the principle upon which a valid portion of an act may be upheld and its unconstitutional features declared void.

4. Same—General Acts.

Subsection 27, section 1318 of the Revisal, conferring on county commissioners the power to borrow money for the necessary expenses of the county and provide for its payment, with interest, in periodical installments, comes within the terms of the section in the general enumeration of the powers conferred for ordinary governmental purposes, and is not such special enactment as to enable a county, coming within its terms, to levy a tax for highway purposes exceeding the limitation imposed by the Constitution, Art. V, sec. 1, or to issue bonds and provide a sinking fund for the payment of the principal and interest thereof.

5. Same—Annual Taxation—Legislative Control.

Chapter 581, Laws 1899, applying to certain counties, providing for the construction, improvement, and repairing the public roads by current taxation, annually levied, contains no authority to lay a tax for paying interest or providing for a sinking fund for the same, and is repealable or amendable by each Legislature, and can of itself afford no authority to a county, coming within its provisions, to issue bonds for road purposes in a large amount, necessitating a tax in excess of the constitutional limitation, which the Legislature could not control by repeal or otherwise.

6. Constitutional Law—Invalid Bonds—Rights of Purchasers—Delivery.

Where bonds, invalid for want of constitutional authority, have been issued, the proposed purchasers may not set up a valid right to have them delivered, under their agreement, as *bona fide* purchasers for value, where nothing has been paid by them thereon.

(626) CIVIL ACTION to restrain the issue and delivery of $200,000 bonds of the county of ROCKINGHAM in pursuance of a resolution of the board of commissioners, heard, by consent, before *Lane, J.*, as resident judge of the Eleventh District, at Reidsville, N. C., on 28 April, 1917.

(627) On the hearing it appeared that in January, 1917, the board of commissioners of Rockingham County, in meeting assembled, after reciting that it was necessary to build and improve the public roads of the county to have and raise $200,000, and that said sum was required for the purpose and was a necessary expense thereto, passed and spread upon the minutes a resolution to issue and sell bonds to that amount of the denomination of $1,000, numbered from one to two hundred, payable at stated periods, etc., with interest at 4½ per cent, payable semiannually, etc., establishing a form, etc., and providing for their issue and sale. Section 2 of the resolution is as follows:

"SECTION 2. It is hereby declared that all recitals and statements in the aforesaid bond are true, and the full faith and credit of the county of Rockingham are hereby pledged to each successive holder of each of said bonds and coupons for the punctual payment of the principal and interest thereof when and as the same become due. And the said county hereby covenants and agrees with each successive holder of each of said bonds and coupons that there shall be levied and collected each year on all taxable property in said county an annual tax sufficient to constitute a sinking fund for the payment of said bonds at maturity, which tax for the payment of said principal, when collected, shall be and remain a sinking fund to pay said bonds, and shall be safely and properly kept for this purpose by said county. The tax authorized for the payment of interest and principal of said bonds shall continue in force until the whole amount of principal and interest shall have been paid. The tax authorized hereby for the payment of the principal and interest of said bonds shall be and the same is hereby levied and directed to be collected each and every year while any of said bonds and coupons are outstanding and unpaid upon all the property subject to taxation by said county. There shall be and there is hereby provided a sinking fund to be kept by the treasurer of said county and his successors in office and to be designated as the 'Sinking Fund' for payment of said bonds, and the proceeds of the tax levied, above mentioned, for the purpose of paying the principal of said bonds shall be paid into said sinking fund as soon as the same has been collected, and shall remain in said sinking fund until required for the payment of the principal of said bonds, and when the respective payment of the principal and interest of the said bonds shall fall due the treasurer of said county and his successors in office shall and are hereby each respectively authorized, directed, and commanded to pay out of the money collected for the payment of the interest upon said bonds, and for payment of the principal thereof the respective amount of principal and interest of said bonds as soon as the same shall fall due." That said bonds have been bargained at par to Sidney Spitzer & Co. of Toledo, Ohio, but have not yet been issued or delivered. It further appeared, as recited in his Honor's judg- (628) ment, that the ordinary State taxes levied in Rockingham County was 47⅔ cents on the $100 valuation of property and 18⅓ cents for general county purposes, and that the county was now levying a tax of 24 cents on the $100 valuation for road purposes under chapter 581, Laws 1899, a special levy for the county home of 4 cents on the $100, and that the tax required to comply with the resolution of the board of commissioners would approximate 17 cents on the $100 valuation.

On these, the facts chiefly relevant, there was judgment denying the application for restraining order, and plaintiff, having duly excepted, appealed.

P. W. Glidewell for plaintiff.
Jno. R. Humphreys for defendant.

HOKE, J. The Constitution, Art. V, sec. 1, provides, in effect, that for ordinary purposes the State and county tax combined shall in no case exceed the sum of $2 on the poll and 66⅔ cents on the $100 valuation of property. So far as we are aware, and as to debts and obligations incurred since the provision was established, no departure from this limitation on the amount of taxation has been approved except when and to the extent required to maintain a four months school, as enjoined by Article IX, sec. 3, *Collie v. Comrs.,* 145 N. C., 170, and except when the tax is levied for a "special purpose and with the special approval of the General Assembly." *Moose v. Comrs.,* 172 N. C., 419; *R. R. v. Comrs.,* 148 N. C., 220.

In view of the constitutional provision and the decisions of the Court construing the same, we are of opinion that the county commissioners of Rockingham County are without power to incur this indebtedness of $200,000, issue the negotiable bonds of the county in evidence of their obligation, and stipulate for a continuing tax to pay the interest and provide a sinking fund which is in excess of the established limitation. *Board of Education v. Comrs.,* 107 N. C., 110; *French v. Comrs., supra; Millsaps v. Terrell,* 60 Fed., 193.

True, we have held in this jurisdiction that when county commissioners have power to contract a debt or to provide for valid debts already contracted, they may, in the exercise of good business prudence, issue county bonds in evidence of the obligation, the right of taxation, therefor, being restricted to the constitutional limitations as to debts incurred since the same was adopted. *Comrs. v. Webb,* 148 N. C., 120; *McCless v. Meekins,* 117 N. C., 34; *French v. Comrs.,* 74 N. C., 692; *Johnston v. Comrs.,* 67 N. C., 103.

It is true, also, that when the power to issue bonds exists, the mere fact that there is limit on the power of taxation will not always (629) and of itself be held to invalidate the bonds. *Comrs. of Pitt v. McDonald,* 148 N. C., 125. But neither of these rulings can be properly extended to uphold a bond issue of this magnitude when, as a part of the same proposition, it is provided that: "All recitals in the bonds are true, and the full faith and credit of the county are pledged to each successive holder, etc., for the punctual payment of principal and interest." A covenant is given that an annual tax shall be continuously

levied to pay the interest and provide a sinking fund to take up the issue as it matures, and it appears, further, that the tax to be levied and required for meeting this stipulation is in excess of the constitutional limitation above referred to. However desirable the measure may seem, these resolutions of the board of county commissioners, mutually dependent the one upon the other and constituting an entire proposition, are but a piece of local legislation which must, as in other like cases, conform to constitutional requirement, and which are subject to another recognized principle, that when an essential portion is found to be invalid, the entire scheme must fail. *Claywell v. Comrs. of Burke County,* at present term, and authorities cited.

It is contended for defendants that the power in question arises to the commissioners under and by virtue of chapter 23, sec. 1318, Rev., subsec. 27, conferring on county commissioners the power to borrow money for the necessary expenses of the county and provide for its payment, with interest, in periodical installments, termed in the brief the "inherent right of law"; but we are unable to concur in this view. The subsection appears in the general act providing for county government and in the general enumeration of powers conferred for ordinary governmental purposes, and while it might, under our decisions and in the presence of emergencies, extend to the issue of bonds, keeping the rate of taxation within the constitutional limit, the statute neither is nor does it purport to be a "special act and for a special purpose" within the meaning of the constitutional provision.

Again, it is insisted that under chapter 581, Laws of 1899, which is applicable to Rockingham County, the commissioners are now laying a road tax more than sufficient to pay the interest and provide a sinking fund for these bonds, and that defendants can, therefore, rely upon that statute as legislative authority for the present measure. The statute in question confers upon commissioners of certain counties the power to levy an annual tax for general road purposes, enjoins it upon them as a duty, and the amount specified seems to be sufficient to pay the interest and provide a sinking fund for the bonds; but the law, as stated, confers authority to levy an annual tax for road purposes. It contains no authority to issue bonds nor to lay a tax for the purpose of paying interest or providing a sinking fund for same. It is a statute to provide for the construction, improvement, and repairing of roads by current taxation, which could, at any session, be repealed or amended (630) by the Legislature, and is, therefore, a very different proposition from this proposed bond issue, which, by its contract and recitals, may become practically a fixed charge upon the county, compelling an excessive tax levy till the bonds are paid off, principal and interest. *Waite v.*

Santa Cruz, 184 U. S., 302; *Dixon Co. v. Field,* 111 U. S., 83; *Cromwell v. County of Sac,* 96 U. S., 31.

The statute of 1899, directing the levy of an annual tax for road purposes, confers no authority to issue these bonds or levy a tax therefor, and this position must also be disallowed. Constitution, Art. V, sec. 7; *R. R. v. Comrs.,* 148 N. C., 220.

We are not inadvertent to the fact stated in the record, that the proposed bond issue has been sold at par to Sidney Spitzer & Co., Toledo, Ohio. The contract is evidently executory, and the commissioners being, as we have seen, without power to issue the bonds or make a valid contract to do so, no delivery should be made. We do not understand these alleged purchasers to insist on it. Having as yet paid nothing on their bargain, they could in no event maintain the position or assert any rights growing out of it that they are bona fide holders for value. *Howlett v. Thompson,* 36 N. C., 369; Fetter's Equity, p. 95.

There is error, and this will be certified, that the restraining order shall issue as pleaded for.

Error.

Cited: Drainage District v. Comrs. of Cabarrus, 174 N.C. 740; *Mills v. Comrs. of Iredell,* 175 N.C. 218; *R.R. v. Cherokee County,* 177 N.C. 92; *Road Com. v. Comrs. of Edgecombe,* 178 N.C. 65; *R. R. v. Comrs. of Bladen,* 178 N.C. 453; *Davis v. Lenoir,* 178 N.C. 670; *Comrs. of Hendersonville v. Pruden,* 180 N.C. 498; *Proctor v. Comrs. of Nash,* 182 N.C. 59; *Huneycutt v. Comrs. of Stanly,* 182 N.C. 322; *Jones v. Board of Education,* 185 N.C. 307, 308; *Wolfe v. Mt. Airy,* 197 N.C. 451; *Penland v. Bryson City,* 199 N.C. 146; *Glenn v. Comrs. of Durham,* 201 N.C. 239, 240; *Power Co. v. Clay County,* 213 N.C. 704; *Wilson v. High Point,* 238 N.C. 20.

J. H. AND C. W. PICKELSIMER v. J. M. GLAZENER ET AL.

(Filed 26 May, 1917.)

1. Arrest and Bail—Rights of Obligors.

Where a prisoner in arrest and bail is released from custody of the law upon bail, the principal is regarded as delivered to the custody of his sureties under the original process, who may thereafter seize and deliver him in discharge of their liability, or imprison him temporarily when necessary until this can be done, exercising this right in person or by agent in this or another State, upon the Sabbath or otherwise, and, if necessary, break and enter his house for that purpose.

2. Arrest and Bail—Execution—Sureties—Judgment—Motions—Notice—Statutes.

The common-law principles under which the sureties on a bail bond in arrest and bail were released, provided the performance of its condition was rendered impossible by the act of God, the obligee, or of the law, have been somewhat modified by statute in this State; and in an action to recover upon an alleged fraudulent transaction, where the debtor is released upon bail, the creditor may proceed to judgment, and issue execution against the debtor's property, and afterwards against his person, if returned *"Nulla bona"*; and should the latter writ be returned *"non est inventus,"* the plaintiff may move on ten days notice for judgment against the bail, making available to the latter all defenses he may have as to the surrender of his principal; and a judgment rendered against him at an intermediate stage of the proceedings is reversible error. Revisal, secs. 735, 738, 751, 752, 753, 754.

3. Arrest and Bail—Object of Bond—Release—Process—Jurisdiction.

The main object of a bail bond taken to release the prisoner from custody in arrest and bail is to secure his presence to answer the process of the court and, for this purpose, to keep him within its jurisdiction, and not merely to obtain money upon his default, and while in a civil action he may be taken and imprisoned until discharged by payment of the debt or compliance with any other order or judgment of the court or otherwise discharged by law, as by taking the insolvent debtor's oath in proper cases, the obligors on his bond may, at any time before final judgment against them, be released by the defendant's voluntary surrender of his person (Rev., 751), or his production by the obligors in accordance with the terms of the bond, etc., whereupon the liability of the latter ceases.

4. Arrest and Bail—"Amenable"—Words and Phrases.

The word "amenable" as used in our statute relating to a bail bond for the release of a prisoner from the custody of the law means "answerable" or "responsive" to the process of the court having jurisdiction; and when execution is issued against the person of the debtor it is his duty to surrender himself, or of the obligors on the bond to do so, and a failure constitutes a breach of the obligation.

5. Arrest and Bail—Extradition—Executive—Governor.

Where in arrest and bail the prisoner under bail bond has been again arrested to await a warrant in extradition proceedings, and imprisoned in the jail of the county by the same sheriff, *semble*, upon the refusal of the sheriff to receive the prisoner from the obligors on the bail bond, that the trial judge upon hearing the obligors' motion should order the prisoner retained in custody pending the action of the Governor, who, upon notification, may consider the rights of our own courts as being prior to those of other jurisdiction, and hold the prisoner to answer in our courts.

CIVIL ACTION, tried before *Harding, J.*, and a jury, at Fall (631) Term, 1915, of TRANSYLVANIA.

Plaintiffs brought this suit on 12 September, 1914, to recover the sum of $543.95, alleged to have been fraudulently converted to his own use

by defendant J. M. Glazener, who was their partner in the book business. The defendant was arrested by the coroner, on 14 September, 1914, under proceedings in arrest and bail taken for that purpose, and he, and his codefendants, J. M. Allison and D. J. Glazener, as his sureties, executed an undertaking for his discharge from arrest as required by the statute, and J. M. Glazener was released. He was afterwards arrested to await a warrant in extradition proceedings from South
(632) Carolina, and was imprisoned in the county jail by the sheriff of the county. The condition of the defendants' bond is as follows: "If the defendant is discharged from arrest, he shall at all times render himself amenable to the process of the court during the pendency of this action and of such process as may be issued to enforce the judgment therein." While the defendant was in the jail there was a conference in the law office of the defendant's attorney, between said attorney, the defendant, and J. M. Allison, one of his sureties, and the South Carolina officers, and as they left the office R. N. Nicholson, the deputy sheriff who then had defendant in custody, and who was jailer and had charge of him as deputy sheriff and jailer, signed a receipt, which was delivered to defendant's attorney, and by which he acknowledged that the surety, J. M. Allison, had surrendered the body of the defendant J. M. Glazener to him, and that he had taken him in exoneration of his bondsmen in the above entitled case. In connection with the giving of this receipt the court found the following facts:

"M. J. Glazener was not present at that time, and did not then in person surrender or attempt to surrender the defendant to the said R. N. Nicholson. After the conference above referred to, and the signing of the paper, R. N. Nicholson took the defendant to the county jail. At the time the receipt was presented to the said Nicholson to be signed, he did not read it, but inquired of defendant's attorney what it was, and the attorney replied that it was just a paper showing that he held the defendant in jail without bond, for the officers of South Carolina. That R. N. Nicholson can read and write."

The court further found as facts: "On the following morning the bondsmen, M. J. Glazener and J. M. Allison, procured from the clerk of the Superior Court a certified copy of the undertaking signed by bondsmen and the defendant in the arrest and bail proceedings, and went to the office of the sheriff, where they tendered the copy of said undertaking to the sheriff and offered to surrender the defendant. At the time the copy of the undertaking was tendered to the sheriff, the defendant was in jail and not in the custody of the bondsmen. The sheriff declined to receive the copy of the undertaking, on the ground that he himself was a party to the action in which the defendant had been arrested, and in which the undertaking was given. Thereupon the bonds-

men left the certified copy of the undertaking in the office of the sheriff of the county. That immediately after the sheriff had refused to receive the certified copy of the undertaking aforesaid, the bondsmen and their attorney went with the coroner to the county jail. When they arrived there the jailer was absent, defendants' attorney, with the consent of the jailer's wife, who was there living in the jail, obtained the keys from her, went to the cell, in company with the coroner and the said bondsmen, opened the cell, and took the defendant out of it into the corridor of the jail, and there stated to the coroner that they (633) delivered to him the defendant, together with a certified copy of the undertaking. That the corridor of the jail was open. That after the bondsmen stated to the coroner that they delivered the prisoner to the coroner, together with the certified copy of the undertaking, the coroner took the prisoner back into the cell and locked the cell and returned the keys to the wife of the jailer, and notified the wife of the jailer that he had relocked the cell with the defendant inside."

On 6 April, 1915, the bondsmen notified plaintiffs that during the April term of the Superior Court they would move before the judge thereof for their exoneration as bail. This motion was submitted on 17 April, 1915, and Judge Long, who presided at that term, declined at that time to hear it, but continued it to the next term. The bondsmen then renewed their motion before Judge Harding, at July Term, 1915, and asked that it be heard before the trial of the case. This motion was refused, though the jury had not been impaneled, but the court stated that it would hear and decide the motion after the trial, and treat it as if heard before. The jury returned a verdict in favor of the plaintiff for $505.11, and also found the issue of fraud against the defendant. Plaintiffs moved for judgment, whereupon the bondsmen insisted that their motion be heard. Both motions were continued to November Term, 1915, when the court overruled the motion of the bondsmen, and gave judgment upon the verdict for the plaintiffs against the defendant and his sureties on the undertaking. The latter then excepted and appealed.

L. D. English for appellees.

Merrimon, Adams & Johnston, and W. E. Breese, Jr., for J. M. Allison and M. J. Glazener, appellants.

WALKER, J., after stating the case: We had the benefit of argument upon several questions which we deem it unnecessary to decide, as we are of the opinion that the judgment below was erroneous on another ground, and it would be premature at this time to go beyond the one upon which we rest our decision. The other points may never be again

presented. The doctrine is well settled that when bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge, and if that cannot be done at once they may imprison him until it can be done. They may exercise their right in person or by agent; they may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is (634) needed. It has long since been said that the bail have their principal on a string which they may pull whenever they please, and surrender him in their discharge (6 Modern, 231) the right of bail in civil and criminal cases being, in many material respects, the same. *Taylor v. Tainter,* 83 U. S. (16 Wall.), 366; *S. v. Lingerfelt,* 109 N. C., 775; *Sedberry v. Carver,* 77 N. C., 319; *Adrian v. Scanlin, ibid.,* 317. The books have clearly expressed this idea in regard to the relation of the principal to his bail, and the authorities are pretty well agreed as to it. "A man's bail are looked upon as his jailers of his own choosing, and the person bailed is, in the eye of the law, for many purposes esteemed to be as much in the prison of the court by which he is bailed as if he were in the actual custody of the proper jailer." 2 Hawk. P. C., 140. It is said in 1 Hale P. C., 325: "Yet the law is all one if he be under bail, for he is *in custodia* still, for the bail are, in law, his keepers." Wharton, in his work on Criminal Pleading and Practice, says: "The principal is supposed to be in the bail's constant custody, and the latter being the former's jailer, may at any time surrender him to the custody of the law." Sec. 62, Am. Anno. Cases, 1912D (note to *S. v. Hyde,* 124 Mo., 200), at p. 209. And this Court said by *Shepherd, J.,* in *S. v. Lingerfelt, supra,* quoting, in part, from *Nicholas v. Ingersoll,* 7 Johns. (N. Y.), 145: "The power of taking and surrendering is not exercised under any judicial process, but results from the nature of the undertaking by the bail. The bail-piece is not a process, nor anything in the nature of it, but is merely a record or memorial of the delivery of the principal to his bail on surety given. It cannot be questioned but that bail in the common pleas would have a right to go into any other county in the State to take his principal; this shows that the jurisdiction of the court in no way controls the authority of the bail, and as little can the jurisdiction of the State affect this right as between the bail and his principal." It was also decided that the bail might "depute to another to take and surrender their principal." In *Parker v. Bidwell,* 3 Conn., 84, it was held that "Bail, or a person deputed by him for that purpose, may take the principal in another State or wherever he may be and detain him or surrender him into the custody of the sheriff," citing, also,

S. v. Mahon, 1 Harr. (Del.), 368. It is also said that when the obligation of bail is assumed the surety becomes in law not only the jailer of his principal, as his custody is constructively a continuance of the original imprisonment, but, though he cannot confine him except where actually necessary, and temporarily, for the purpose of surrender, he is subrogated to all the other rights and means which the State possesses to make his control of him effective. 3 Am. and Eng. Enc. of Law (2d Ed.), 708, citing *Reese v. U. S.,* 19 U. S., (9 Wall.), 541; *U. S. v. Ryder,* 110 U. S., 729; *S. v. Lingerfelt, supra* (S. c., 14 L. R. A., 605). Note to *Carr v. Sutton,* 70 W. Va., 417, in Am. Anno. (635) Cases, 1913E. See, also, 5 Cyc., 126. The right of bail to arrest his principal has been likened to that of a sheriff to rearrest an escaping prisoner. 3 Blackstone, 290; *Taylor v. Tainter, supra,* and cases cited. The bail will be discharged only where the performance of the condition is made impossible by the act of God, the act of the obligee, or the act of the law. Where the principal dies before the day of the performance is a case of the first class; where the court before which the principal is bound to appear is abolished without qualification, or where the bail is released by the plaintiff, are cases of the second class; where the principal is confined in prison by judicial sentence during the period when his surrender is demandable belongs to the third class. *Sedberry v. Carver, supra; People v. Bartlett,* 3 Hill, 571; *Taylor v. Tainter, supra;* Co. Litt., 206; Bacon Abr., Title Conditions. The reason why imprisonment of the principal under judicial sentence discharges the bail is that it renders a surrender of the principal by the latter impossible; and being the act of the law, it excuses the failure. *Sedberry v. Carver, supra.* We have so far been stating the rules of the common law concerning bail. They have been somewhat modified by statute in this and other jurisdictions, as we will presently show. The bail in this case contend that they are entitled to be discharged as such, by reason of the facts found by the judge, and the clear and indisputable inferences from them. This may or may not be so, but the time has not yet arrived for its decision. They assert that they have surrendered the defendant to the sheriff, to his deputy, and, also, through the coroner, to the person in charge of the jail (who was the jailer's wife), and that if their attempted surrender, after their diligent and exhaustive efforts, was unavailing, that it, therefore, was impossible for them to surrender him, because he was in prison by order of the law or the act of the sheriff, and this impossibility of surrender exonerates them. They charge that the sheriff was in the unlawful custody of their principal, having no process for his arrest and no right to his control, and that, therefore, he acted in his own wrong in not holding and detaining the prisoner, at their request, or giving him up to them, so that they might make a

more formal surrender of him, they having not only the general right to arrest without process and surrender him, but also statutory authority to do so, because they had before secured from the clerk of the court a certified copy of the undertaking, signed by their principal and themselves, and tendered it to him, and in answer to the sheriff's reason for not accepting this paper and detaining the defendant, that he was interested as plaintiff in the action and disqualified to act, they say that he would not be serving process, but merely would, as keeper of the jail under the statute, be receiving into his custody or detaining the defendant
(636) under process held by them, or under their authority, as his bail, to act without process, there being no one except the sheriff as keeper of the jail, or his deputy in actual charge thereof, to whom the surrender could be made. They contend that process to the coroner was not required, as they had all the rights to arrest possessed by the sheriff, or by the coroner, or by any other officer having authority to serve process. They say, therefore, that as the sheriff, who is plaintiff, acted wrongfully in not detaining their principal, they are exonerated, and in this connection they rely upon the rule stated by some of the authorities, and especially in *Carr v. Sutton,* 70 W. Va., 417, "That where a creditor does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act when required by the surety, the latter will be discharged, and that he may set up such conduct as a defense to any suit brought against him, if not at law, at all events in equity," citing 1 Story Eq. Jur., sec. 325; *Leonard v. County Court,* 25 W. Va., 45; 13 Dig. Va. and W. Va. Reports, 22-24. See, also, *Taylor v. Tainter, supra.*

We have stated these several contentions, not for the purpose of passing upon them, but as preliminary to a proper consideration of the real and essential question in this appeal, and as conducive to a better understanding of it.

Our statute provides that when an action is brought for the recovery of a debt contracted by fraud, and the jury find the fact of fraud, the plaintiff as creditor, may take judgment for his debt against the defendant, as his debtor, and execution shall then issue against the latter's property. If it is returned *"Nulla bona"* (no goods or chattels, etc.), and the defendant has given bail in the action, and is at large, an execution may issue against his person. If this writ is returned *"Non est inventus"* (not to be found, etc.), the plaintiff may then move, on ten days notice, for judgment against the bail. The latter may then answer and set up any defense open to them, such as death of the principal, a legal surrender of him, release or discharge of him or them, or any other matter which if found to exist, will entitle them to an exoneration. The provisions of the statute applicable in such a case are as follows:

SEC. 735. A defendant arrested may at any time before judgment apply on motion to vacate the order of arrest or to reduce the amount of bail. And he may deny upon oath the facts alleged in the affidavit of the plaintiff on which the order of arrest was granted, and demand that the issue so raised by the plaintiff's affidavit and the defendant's denial be submitted to the jury and tried in the same manner as other issues are tried by a jury; and if the issues are found by the jury in favor of the defendant, judgment shall be rendered discharging the defendant from arrest and vacating the order of arrest, and the (637) defendant shall recover of the plaintiff all costs of the proceedings in such arrest as he shall have incurred in defending the said action.

SEC. 738. The defendant may give bail by causing a written undertaking, payable to the plaintiff, to be executed by sufficient surety to the effect that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein.

SEC. 751. The bail may be exonerated, either by the death of the defendant or his imprisonment in a State Prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, at any time before final judgment against the bail.

SEC. 752. At any time before final judgment against them, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and shall, by a certificate in writing, acknowledge the surrender.

SEC. 753. For the purpose of surrendering the defendant, the bail, at any time, or place, before they are finally charged, may themselves arrest him, or by a written authority, indorsed on a certified copy of the undertaking, may empower any person over 21 years of age to do so.

SEC. 754. In case of failure to comply with the undertaking, the bail may be proceeded against by motion in the cause on ten days notice to such bail.

It will be seen from these provisions that judgment should not be given against the bail merely upon the verdict finding the existence of the debt and that it was contracted by fraud, nor until the property of the debtor has been exhausted by execution and process has issued against his person and returned "Not found," and notice thereof of ten days has been given to the bail, and they have a day in court to answer the motion

for judgment against them. This is not only the law, but, in one form or another, has substantially been the law for centuries. Formerly, after a return of *nulla bona* and *non est inventus,* the bail was proceeded against, at one time by action, and at others by *scire facias.* The remedy by action was revived by C. C. P., sec. 160, and took the place of the former *scire facias;* the remedy at present being by motion. Revisal, sec. 754. It is a mistaken notion that in letting a defendant or a prisoner to bail, the object is not to secure his presence to answer
(638) the process of the court, but to obtain the money that may be recovered upon a defaulted bond or recognizance. It is true that if he defaults, he may finally be taken and imprisoned until, in a civil action, he pays the debt or complies with any other judgment or order of the court, or is otherwise discharged by the law, as, for instance, by taking the insolvent debtor's oath in proper cases. The primary and main object of the law is to reach his person and to keep him within the jurisdiction and the call of the court upon process issued for him. If, when the sheriff returns upon an execution against his property, "Nothing to be found," or his property is exhausted, and an execution is then issued against his person, he is then arrested, or taken in custody, the sureties are discharged, because he has rendered himself "amenable to the process of the court." The bail must see to it that he is kept within the jurisdiction of the court, where he can be taken when he is wanted, the word "amenable" as used in the statute meaning "answerable" or "responsive." This is the condition of their bond, as will be clearly seen by reading it. "When a recognizance is entered into for the appearance of a defendant, . . . said defendant, in legal contemplation, is delivered into the 'friendly custody' of his sureties, instead of being committed to jail. They have control of his person, and are bound at their peril to keep him within the jurisdiction of the court, and to have his person ready to surrender when demanded. If they become apprehensive for their own safety, they can arrest and commit him to prison at any time." *Devine v. State,* 37 Snead, 623. But it is not necessary to further discuss this question, as our cases have settled the construction of the statute. The Court, by *Justice Bynum,* asked and answered the question as to the sureties' liability, in *Sedberry v. Carver, supra,* where he said: "What constitutes a breach of this undertaking? Certainly there is no breach until the plaintiff first seeks the body of the defendant for the satisfaction of his judgment. When execution was issued against the person of Jackson, it was, and not before, the duty of the defendant to surrender himself, or of the bail to surrender him to this demand by legal process. When that execution issued, Jackson was out of prison and at large, and in legal contemplation was in the custody of his bail. The failure to surrender him then was a breach of the undertaking of the bail. This

breach was a continuous one until the bail had been charged by a final judgment against him on the undertaking. From the issuing of the execution against the body until final judgment against the bail there was a continuous demand for the body of the principal, and an increasing duty upon the bail at any and all times during that period to surrender his principal in his own discharge." If there has been a prior surrender by the bail of their principal, or if there be any other fact which exonerates them, they may plead it in defense when they are moved against, after notice, under the statute. It was held (639) in *Patton v. Gash,* 99 N. C., 280: "After judgment in an action in which the defendant might have been arrested, and in which an order of arrest was duly served, the plaintiff is entitled to a summary judgment against the sureties upon the defendant's undertaking—*it appearing that execution has been issued against his property and person without effect.*" (Italics ours.) And *Justice Shepherd* said in *S. v. Lingerfelt, supra:* "It is urged, however, that the recognizance having been forfeited by the default of the principal to appear in the Tennessee court, the right of bail to take his principal was extinguished. It will be observed that the judgment was only conditional, and that a *scire facias* was ordered to be issued. It has never been understood in this State, nor do we so understand the common law, that such a judgment has the effect contended for. The right of the bail to take his principal in a criminal case before final judgment, and to produce him in court in mitigation of the penalty, is generally recognized in North Carolina, and we have been referred to no authority where the contrary has been held. It is entirely clear that the payment by the bail in criminal cases does not discharge the principal from his obligation to appear in court, and it is intimated, even in that case, that the Government, by way of subrogation, will lend the sureties its aid 'in every proper way by process and without process to seize the person of the principal and compel his appearance.' However this may be, we are clearly of the opinion that a mere conditional judgment, like the one before us, does not deprive the sureties of the remedies which previously existed in their favor." The recent cases of *Howie v. Spittle,* 156 N. C., 180, and *Turlington v. Aman,* 163 N. C., 555, put the same construction on the statute. As another reason why judgment should not go against the bail, in the first instance, as was done in this case, is the right of the defendant to surrender himself in exoneration of his bail, when called upon by the mandate of process to do so. Revisal, sec. 751; *Dick v. Stoker,* 12 N. C., 91; *S. v. Schenck,* 138 N. C., 560, 3 R. C. L., 49, sec. 55. This was so under the old law where bail was given upon a *ca. sa. Judge Battle* said in *Mears v. Speight,* 49 N. C., 420: "As he appeared, no judgment could be rendered against him and his surety in the bond, because the surety was respon-

sible only for his appearance," citing *Watson v. Willis,* 24 N. C., 17. It was there held that no judgment can be entered upon a *ca. sa.* bond if the debtor appears, although his surety does not surrender him. It may be that the defendant will be dead or in prison under sentence, or that he will surrender himself to the sheriff. In either of these events his bail will be discharged, and in the last case he would have answered the process and, of course, have kept himself amenable thereto, and there will be no need of deciding as to whether they have been ex-
(640) onerated. The surrender mentioned in Revisal, sec. 751, is not confined to one made by the bail, but extends also to the voluntary surrender by the principal of himself, as the above authorities show. In *Dick v. Stoker,* 12 N. C., 91, *Judge Henderson* said that "The principal himself may, without the agency or knowledge of his bail, surrender himself, and the sheriff is as much bound to receive him as if surrendered by the bail."

We have been referred, in what is said above, to cases where no process has been or could issue for the defendant's apprehension before the final body execution provided for by the statute. There was no reason for issuing process against him in this case before a final execution has been issued against his person, after judgment for the debt.

We have treated the judgment in this case as virtually one against the sureties, as it provides that in case execution against the defendant's property is returned unsatisfied an execution shall issue against his person, and in case the latter is returned "unsatisfied," evidently meaning "not to be found," that execution shall issue against the bail, without providing for any motion on notice, as required by Revisal, sec. 754. The statute clearly contemplates that there shall be judgment against bail only on motion after legal notice. The court must adjudge, after hearing on notice, that the facts essential to the liability of the bail exist before subjecting them to a judgment and execution. Formerly, as we have shown, this was done first by *scire facias,* and then by a civil action, in which, of course, judgment had to be rendered before an execution could issue, and the bail might contest the plaintiff's right to a recovery against them by setting up valid defenses. The procedure now is mere summary, but in other respects is analogous to the earlier remedy. In *Turlington v. Aman, supra,* we disapproved a judgment such as was rendered in this case, and suggested a strict and regular compliance with the statute. Persons who become bail are favored by the law, and the powers given the bail over his principal are given to enable him more easily to perform the onerous duties and obligations which he has voluntarily assumed. He will not be charged unless in exact accordance with his undertaking. His lot is sometimes a hard one, and the law, though it will favor the creditor, to the extent that it is necessary

to enforce his legal rights, will ameliorate the condition of the bail when to do so will not conflict therewith. Both are to be considered, and, after all is said, it results in this, that the provisions of the statute, so far as applicable, must be followed.

It is singular that neither party, the sheriff (who was also plaintiff) nor the bail, notified the Governor that the prisoner, confined in the jail and awaiting the issue of an extradition warrant for him, upon the demand of the Governor of South Carolina, was also in the custody of his bail, who had a certified copy of the undertaking (known elsewhere as a bail-piece), and were entitled to be considered before (641) he issued his warrant for his extradition, or the same was executed if already issued. It is held by a court of high authority in such matters that he (the Governor) would have the moral right to hold the prisoner here until he paid the debt, and that no power exists to compel him to do otherwise. *Taylor v. Tainter,* 83 U. S. (16 Wall.), 366; *Beavers v. Hanbert,* 198 U. S., 77. In other jurisdictions it is held that it is his duty to refuse extradition until the bail are relieved. *In re Troutman,* 24 N. J. L., 634; *Matter of Briscoe,* 51 Hon. Pr. (N. Y.), 422, and the case of *In re Harriott,* 18 R. I., 12, would also apply, as here the warrant of extradition had not been served when the sheriff was tendered a certified copy of the undertaking by the bail. One case holds that the fact of the accused being in custody on a civil charge is no reason for a refusal to surrender him to the demanding State. *In re Rosenblat,* 51 Cal., 285. If we had to choose between these conflicting views, we would, perhaps, adopt the one indorsed by the decision of the highest Federal court, and especially as it is so well supported by the New Jersey, New York, and Rhode Island cases. When the motion to enter the exoneration was first made, the accused was still in jail, and the presiding judge, no doubt, would have ordered the sheriff, as jailer, to detain the prisoner subject to the action of the Governor, so that if not extradited he could be held as upon a surrender of his bail. In a case somewhat analogous, *Justice Bynum* said: "(1) That the statute, C. C. P., sec. 161, has no application to imprisonment of any duration whatever in another case under *civil* process, for, as was said in *Granberry v. Pool,* the bail may pay the debt and surrender his principal; (2) It has no application where the term of imprisonment under *criminal* process has expired before final judgment against the bail, for in such case the principal can be delivered; and (3) *It would seem* that no temporary imprisonment *within* the State will exonerate the bail, for in such case the court may, upon the motion of the plaintiff or bail, order the principal to be retained a prisoner until the debt is paid; and the service of the order on the jailer shall authorize him to detain the debtor; and this shall be deemed a surrender of the principal in dis-

charge of the bail." *Sedberry v. Carver, supra.* When the sheriff refused, either legally or illegally, to detain the principal, already in his custody, it would seem, under the view just stated, that the judge could have ordered the principal to be continued in his custody, as jailer, as upon a surrender by his bail, especially as the sheriff then held no process against the principal. But if this right existed, it has been lost, as the accused has been extradited. We are not now passing upon the validity of the sheriff's excuse. All these matters may be set up when a motion is made to subject the bail, if it becomes necessary to
(642) do so, that is, if the bail are not sooner discharged by the death or voluntary surrender of their principal, or released in some other way.

It does not appear what became of the prisoner after his extradition. Was he convicted and sentenced in South Carolina, and, if so, for what time; or was he released, and has he remained in the other State or returned to this State? If the case comes back to us, answers will doubtless be made to these questions, so that we may decide the difficult proposition upon a full disclosure of all the facts. It is not clearly found whether the deputy sheriff was induced by what occurred between him and the attorney to sign the paper acknowledging the surrender of the principal. The evidence is stated, but not the ultimate fact to be deduced therefrom.

The judgment will be set aside as to the bail and retained as to the principal defendant. Let execution be issued to the proper officer, and other proceedings be had thereafter according to the statute.

Error.

Cited: S. v. Finch, 177 N.C. 605; *Stepp v. Robinson,* 203 N.C. 804, 805.

C. W. HILL, RECEIVER OF THE COMMERCIAL AND SAVINGS BANK, v. J. L. SMATHERS ET ALS.

(Filed 26 May, 1917.)

1. Banks and Banking—Corporations—Receivers—Stockholders—Individual Liability—Statutes—Assets—Judgments.

Where judgment has been obtained by the receiver of an insolvent banking corporation upon a liability theretofore created against its directors by their resolution to become personally liable for a certain amount of its worthless paper in order to obtain permission from the Corporation Commission to continue its business and pay dividends upon its capital stock, with permission granted the receiver to have execution issued,

among other things, if he has "proceeded with the collection and reduction of the assets of such bank, and the same are not sufficient to discharge the obligations of said bank due to creditors and depositors as the same" may be allowed by the court, which judgment was not appealed from: *Held*, by the terms of the judgment the insufficient assets did not include the statutory liability individually placed upon the stockholders to the creditors of the bank (Rev., sec. 235), or require the receiver to collect in all the bank's assets before collecting the obligation assumed by the directors when it then appears that the bank's creditors would not be paid in full.

2. Banks and Banking—Corporations—Receivers—Shareholders—Individual Liability—"Assets."

The individual liability, created by statute, of the shareholders in a bank, beyond the amount of the stock for which they have subscribed, is an asset of the corporation available only to the creditors and depositors of the bank (Rev., sec. 235; ch. 25, Laws 1911); and where the directors of a bank have assumed obligation on certain of its worthless paper to so "relieve" the bank that it may continue in business with permission of the Corporation Commission, but upon condition that the bank's "assets" be found insufficient to pay its liabilities, they may not successfully assert that the individual liability of the stockholders were included within the meaning of the word "assets" so used by them.

CIVIL ACTION, tried before *Adams, J.*, at Spring Term, 1917, (643) of CHEROKEE.

This is a motion for leave to issue execution on a judgment rendered in this action as follows:

This cause coming on to be tried before his Honor, B. F. Long, and a jury, upon the issues which, with responses, are as follows:

1. Are the defendants indebted to the receiver, and if so, in what amount? Answer: "Yes, $13,420.50, with interest from 3 April, 1916, on the principal, to wit, $12,000."

2. Did said defendants sign the notes sued on pursuant to the resolution of 4 December, 1911, and with the representation by the Commercial and Savings Bank that same would be signed by their associates, William Griffiths, J. A. Richardson, and D. W. Deweese, so as at least to be binding not only upon these defendants in this action, but also as to the other directors of said bank? Answer: "Yes."

It is, on motion of counsel for the plaintiff, considered and adjudged by the court that the plaintiff C. B. Hill, receiver of the Commercial and Savings Bank of Murphy, have and recover of the defendants J. L. Smathers, C. M. Hickerson, C. M. Wofford, G. W. Candler, S. W. Lovingood, and C. E. Wood the sum of $13,420.50, with interest on $12,000 from 3 April, 1916, until paid, and the costs of this action, to be taxed by the clerk.

It is further considered and adjudged by the court that no execution is to issue on this judgment until the further orders of this court, and that plaintiff has leave to apply at any time for such leave, such application to be made upon not less than five days notice and to either the resident judge of the district or the judge holding the courts of the same, and if, upon such application, it is made to appear to the court that any or either of the defendants are endeavoring to make way with any of their property, or to convey or dispose of the same with intent to hinder, delay, or defeat the plaintiff in collection in any way of this judgment, or upon it being shown to the court that the plaintiff C. B. Hill, receiver of the Commercial and Savings Bank, has proceeded with the collection and reduction to cash of the assets of such bank, and that same are not sufficient to discharge the obligations of said bank
(644) due to creditors and depositors as same have been or may hereafter be allowed by the court, and if, upon such application, it is adjudged by the court that the assets of the said bank are not sufficient for such purpose, then leave to issue execution shall be ordered.

The defendants above named, or any other parties in interest, are to have the right to proceed against W. H. Griffiths, J. A. Richardson, and the estate of D. W. Deweese, deceased, upon the finding of the jury on the second issue submitted to them, as they may be advised, and the said defendants may have notice issued to said named parties and to the personal representative of D. W. Deweese, deceased, to show cause why they and such representatives should not be subjected to this judgment.

And this cause is retained for further orders.

(Signed) B. F. LONG,
Judge Presiding.

His Honor found the following facts and rendered the following judgment upon the hearing of the motion:

1. That the plaintiff C. B. Hill was duly appointed receiver of the Commercial and Savings Bank, doing business at Murphy, Cherokee County, North Carolina, on 16 March, 1914, said bank at that time being insolvent.

2. That the defendants Smathers, Hickerson, Wofford, Candler, Lovingood, and Wood, were at that time and for a considerable time prior thereto had been directors and stockholders of said bank.

3. That the stockholders in said bank numbered about forty, including the defendants, and some of said stockholders other than the defendants were also directors in said bank.

4. That on 4 September, 1911, said Commercial and Savings Bank was paying dividends to its stockholders when it was ascertained that it held unsatisfactory paper amounting to $5,607.29, known as the Carter

notes, and the Corporation Commission made an order directing said bank to cease paying dividends until this doubtful paper was made good, whereupon in a meeting of the directors of said bank the cashier was instructed to request the Corporation Commission to continue the payment of dividends upon agreeing to place in said bank a note signed by its directors for the amount of said doubtful paper, the directors stating that the bank would charge off $100 a month of said doubtful paper and apply any undivided profits twice each year to its liquidation.

5. That on 14 October, 1911, at a special meeting of the directors of said bank, and after securing the approval of the Corporation Commission, the following resolution was adopted, the following directors being present: C. E. Wood, J. A. Richardson, J. L. Smathers, (645) G. W. Candler, D. W. Deweese, W. M. Griffiths, S. W. Lovingood, and C. M. Wofford:

"It is moved and seconded that the directors would sign a note for $5,607.29 in favor of the bank in order to relieve the institution of this amount of paper composing the Carter notes and others received from the First National Bank in the consolidation and merging of their business with the Commercial and Savings Bank, and the note for $5,607.29 is given for the protection of the customers of the Commercial and Savings Bank, but should the bank liquidate or suspend for any reason or purpose, and after the customers are protected and paid in full, then the liability or obligation of the above described note shall cease, and it is agreed and understood the note is only an accommodation one given for the reason only described above.

"It is further agreed that after the institution pays its usual dividends, that all other net earnings are to be credited to a liquidation of this note. The credits are to be made at least every six months."

6. That pursuant to this resolution a note for $5,607.29 was signed by these defendants and said Wood and Deweese, in the expectation and belief that it would be signed by the other directors, and solely for the purposes set out in the resolution.

7. That it was afterwards discovered that a note for $6,537.99, which was another Carter paper, was found to be worthless, and on 4 December, 1911, the directors passed the following resolution:

"There being present the following directors: W. H. Griffiths, J. L. Smathers, G. W. Candler, S. W. Lovingood, C. M. Wofford, D. W. Deweese, and C. M. Hickerson.

"*Resolved,* That the minutes of the meeting of 14 October, 1911, be amended to read: To increase the note from $5,607.29 to $12,145.28. Therefore, it was unanimously agreed by the directors present to sign a note for $12,145.28 and to have other directors to sign for the protection of the customers of the Commercial and Savings Bank of Murphy,

North Carolina, and the note to be given for no other reason or purpose only for the protection of the customers and to place the bank in good order and to meet the requirements of the Corporation Commission. It is further agreed that should the bank liquidate or suspend, and after the customers are paid in full, then the liability or obligation of the signers shall cease.

"It is further agreed that the bank may pay its usual dividends and all of the net earnings shall be credited to the liquidation of the above described note, and credits to be made at least every six months.

"The cashier was requested to prepare the necessary papers and arrange to have the note signed at once."

(646) 8. That pursuant to this resolution, these defendants, with said Wood and Deweese, signed a note for $12,145.28, payable to said bank, in the belief that it would be signed by the other directors, and solely for the purposes set out in said resolution.

9. That afterwards the earnings of said bank to the amount of $145.28 were applied as credits on said notes, reducing same to the sum of $12,000, and at a later date the three notes, each for $4,000, were given as renewals of the original note for $12,000.

10. That these notes, after the execution thereof by the defendants, as above stated, were placed in said bank and remained in the control of said bank until the appointment of the plaintiff as receiver on 16 March, 1914, and a part of the time at least were deposited by said bank in other banks as security collateral to the indebtedness of said Commercial and Savings Bank to such other banks.

11. That the judgment rendered by his Honor, Judge Long, at April Term, 1916, of the Superior Court of Cherokee County was recovered upon the principal of said notes, to wit, $12,000, together with the accrued interest thereon, as set out in the answer to the first issue stated in said judgment.

12. That no appeal was taken from the judgment rendered by Judge Long at April Term, 1916.

13. That the plaintiff as receiver has paid out on behalf of said Commercial and Savings Bank the sum of $61,205, and that the liabilities now outstanding are at least $46,442.29, and will probably reach $50,-442.29.

14. That the assets which are collectible by the receiver, including the judgment rendered by Judge Long, amounted to about $42,650.08, and not including the judgment rendered by Judge Long and upon which the plaintiff asks leave to issue execution, the said assets amount to about $28,479.98; and in either view the assets are less than the liabilities of the bank.

15. That excluding the judgment rendered by Judge Long from the assets which are collectible in the hands of the receiver, there is a deficit of assets to the amount of about $17,000 to $18,000.

16. The plaintiff as receiver has not reduced all the assets in his hands to cash, but has proceeded with the collection and reduction to cash of the assets of said bank to such extent as to enable him to ascertain, and the court finds that he has ascertained, that assets were not sufficient, and the court finds that the assets are not sufficient to discharge the obligations of said bank due to said creditors and depositors as the same have been allowed by the court.

The court further finds as a fact that it was not denied by the parties upon the hearing that, excluding the amount due on the judgment rendered by Judge Long, the collectible and available assets of (647) said Commercial and Savings Bank are less than the outstanding liabilities by about $17,000 or $18,000, which is in excess of the amount due upon said judgment by the defendants.

17. The court finds as a fact, and so adjudges, that the assets of said bank are not sufficient to discharge the obligations of said bank due to said creditors and depositors as the same have been allowed by the court.

Among other things, it is contended by defendants that leave to issue execution upon the judgment cannot legally be granted until the assets in the hands of the receiver are actually reduced to cash and until the stockholders of said bank are assessed under section 235 of the Revisal for their statutory liability to payment for the benefit of the creditors of said bank.

It is insisted by the plaintiff that the statutory liability is an ultimate liability to which resort can be had only after the other assets of said bank are exhausted, and that it is not necessary to reduce the assets of said bank to cash.

The court is of opinion that a proper construction or interpretation of the clause in the judgment does not necessarily require the plaintiff as receiver to reduce such assets to cash, but requires the plaintiff to proceed with the collection of said assets far enough to enable him to find as a fact that the assets of the bank are not sufficient to discharge the obligations of the bank due to creditors and depositors as the same have been allowed by the court, and that the statutory liability of the stockholders is not such an asset as will postpone by operation of law the collection of the judgment rendered by Judge Long until said statutory liability is enforced.

The court, therefore, finding as facts that the plaintiff as receiver has proceeded with the collection of said assets to such extent as to satisfy him that said assets are not sufficient to discharge the obligations of said bank to creditors and depositors as the same have been allowed by the

court, and the court adjudges that the assets of said bank are not sufficient for such purposes in conformity with the provision of the judgment hereinbefore referred to.

Whereupon it is ordered and adjudged, upon motion of the plaintiff, that execution issue upon said judgment in conformity with the order of his Honor, Judge Long, against the defendants above named, who are the defendants in said judgment.

W. J. ADAMS,
Judge Presiding.

The defendants excepted and appealed.

(648) *Witherspoon & Witherspoon and Dillard & Hill for plaintiff.*
M. W. Bell for defendants.

ALLEN, J. The judgment of Judge Long, properly analyzed, contains these provisions:

1. Judgment absolute against the defendants for the sum of $13,420.50, with interest from 3 April, 1916, on $12,000.

2. Suspension of execution until the plaintiff should make it appear to the court either—

(1) That the defendants, or some of them, are endeavoring to make way with their property; or

(2) That C. B. Hill, receiver of the Commercial and Savings Bank, has proceeded with the collection of the assets of such bank, and that the same are not sufficient to discharge the obligations of said bank due to creditors and depositors.

3. An order authorizing the defendants or any other interested party to make W. H. Griffiths and others parties defendant to this action.

The plaintiff moved for execution upon the ground that he had proceeded with the reduction of the assets of said bank to cash so far as to ascertain to a certainty that, exclusive of the aforesaid judgment, the assets lack the sum of $17,000 to $18,000 of being sufficient to discharge the obligations due by said bank to its creditors and depositors.

The defendants admitted the deficit of $17,000 to $18,000 but resisted the issuance of execution on two grounds:

1. That every dollar of the assets of said bank must be reduced to actual cash before execution can issue under the terms of said judgment.

2. That the term "assets" used in said judgment includes the statutory liability of the stockholders of said bank, and that the receiver, before asking for execution, must first have an assessment laid and collected upon the stockholders.

The first position of the defendants is met by the terms of the judgment, which permit execution to issue when the receiver has proceeded

far enough to ascertain that the assets will be insufficient to pay creditors, and by the finding, which is not controverted, that this condition exists.

The second involves the construction of the judgment of Judge Long, and the ascertainment of the sense in which the word "assets" is used, the defendants contending that it includes the statutory liability of the stockholders.

The term is broad enough to cover anything which is now or may be available to pay creditors, but as usually understood it refers to the tangible property of the corporation and not to the liability of stockholders, contingent upon insolvency.

It does not include rights and property which do not belong to (649) the corporation, and the current of opinion is that the statutory liability is not for the benefit of the corporation, but is an additional security for creditors.

"A provision of this character does not increase the capital or pecuniary resources of a corporation except indirectly, by increasing its commercial credit; its object is merely to provide a security for creditors in addition to the security furnished by the company's capital." Morawetz Priv. Corp., sec. 869.

"It may be stated as a general rule that statutes making stockholders individually liable to creditors, independently of what they owe the corporation on account of their stock, create a right flowing directly from the stockholders to creditors. The sum thus secured to creditors form no part of the assets of the company, but are a supplemental or superadded security for the benefit of creditors." Thompson Corporations, sec. 3560.

"The statutory liability of the stockholders is created exclusively for the benefit of corporate creditors. It is not to be numbered among the assets of the corporation, and the corporation has no right or interest in it." Cook Stock and Stockholders, sec. 218.

These excerpts from standard treatises on corporations are quoted and approved in *Runner v. Wiggins,* 147 Ind., 243, and the court concludes that "The liability provided by statute against the stockholders is not, as we have seen, considered an asset or right of the corporation."

These authorities are very pertinent in the construction of our statute (Rev., sec. 235) which imposes the liability on the stockholders "for all contracts, debts, and engagements of such corporation," and not for the benefit of the corporation.

The subsequent act (Laws 1911, ch. 25), providing for the assessment of the stockholders, is a recognition of the distinction between ordinary assets of the corporation and the statutory liability, and is substantially a legislative construction that the former does not include the latter.

It provides for an assessment "whenever any banking corporation chartered by the State shall become insolvent, and it shall appear to the court having jurisdiction of the cause that such assets of such bank are insufficient to discharge its obligations."

Why use the word "assets" in this connection, without qualification, if it includes the personal liability of the stockholders? Why not say "other assets"?

The resolution adopted by the directors at the time they agreed to execute the notes upon which the judgment was obtained also sustains this construction of the judgment and the statute.

(650) The bank held certain Carter notes which were worthless, and upon complaint being made by the Corporation Commission, the directors executed their notes "in favor of the bank in order to relieve the institution of this amount of paper composing the Carter notes."

If the defendants executed their notes to relieve the bank of the Carter notes, is it not reasonable to assume that one note was substituted for the other, and that the notes of defendants stand as to the bank and its stockholders as did the Carter notes, which were assets and available to relieve the stockholders of liability?

We, therefore, conclude that the second position of the defendants cannot be maintained.

Affirmed.

Cited: Corporation Com. v. Bank, 193 N.C. 116; *Hood, Comr. of Banks, v. Martin,* 203 N.C. 626; *Hood, Comr. of Banks, v. Trust Co.,* 209 N.C. 373; *Hood, Comr. of Banks, v. Realty, Inc.,* 211 N.C. 589.

R. L. SMART v. TALLULAH FALLS RAILWAY COMPANY.

(Filed 26 May, 1917.)

Commerce—Federal Statutes—Carriers—Failure to Furnish Cars—Common Law—State Statutes—Courts—Jurisdiction.

The common law and State statutory remedies of a shipper for damages upon the failure of a carrier to furnish cars to be used for interstate shipments are not interfered with by the Federal statutes regulating interstate commerce, and an action therefor may be maintained in the courts of the State.

CIVIL ACTION, tried before *Harding, J.*, at Fall Term, 1916, of MACON.

This is an action to recover damages for the alleged failure of the defendant to furnish two cars for the shipment of cattle from Otto, North Carolina, to Atlanta, Georgia, within the time called for in the

written order which the plaintiff gave the defendant for the cars. Plaintiff alleged that by the failure to furnish the cars on the 20th he was compelled to incur extra expenses and was damaged in the sum of $210. The defendant denied the allegations of the complaint, and by way of affirmative relief averred that the cars requested by the plaintiff of the defendant were to be used in an interstate shipment, and that therefore the plaintiff could not maintain this action, for that Congress had entered the field covered by the State statute and the common law, upon which the plaintiff's alleged cause of action is based, by the act to regulate commerce, of 4 February, 1887, and the amendments thereto of 29 June, 1906, and 18 June, 1910, and averred that said act as amended has superseded all State legislation and common-law remedies as to damages for delay in furnishing cars to be used in interstate shipments. The jury returned a verdict for the sum of $112 in favor (651) of the plaintiff, and from a judgment rendered in favor of the plaintiff, the defendant appealed.

The question of law involved is, Whether, this being admittedly an interstate shipment, the State court had jurisdiction to hear and determine the plaintiff's claim for damages for failure to furnish stock cars at the time ordered, or whether the plaintiff should have applied for relief to the Interstate Commerce Commission.

Jones & Jones for plaintiff.
Blanton Fortson and Johnston & Horn for defendant.

ALLEN, J. The question involved in this appeal has been decided against the defendant in two recent decisions of the Supreme Court of the United States, *Penn. R. R. Co. v. Sonman Shaft Coal Co.,* decided 4 December, 1916, and *Penn. R. R. Co. v. Stineman Coal Mining Co.,* decided 18 December, 1916.

In both cases the action was brought in the State courts to recover damages for failure to furnish cars to be used in interstate commerce, and the jurisdiction of the State courts was sustained and judgment recovered, although the same defense was relied on as in this action; and upon these authorities the judgment is affirmed.

No error.

G. T. STILES v. TOWN OF FRANKLIN.

(Filed 26 May, 1917.)

1. Municipal Corporations — Cities and Towns — Streets — Discretionary Powers—Statutes—Damages.

Where the highway commissioners and the aldermen of a town are given by statute discretionary power to regrade and open the streets thereof when in their judgment required by the public interest, and damages are alleged in an action against the town, by an owner of land abutting upon a street, by reason of the widening of the street in taking the lands of opposite owners and elevating the further side of the street, leaving the original street upon its former level, but affording reasonable access to the new part of the street and original access to the other streets of the town: *Held*, the plaintiff has shown no actionable damages, and a motion to nonsuit should be allowed.

2. Municipal Corporations—Cities and Towns—Streets—Statutes—Method of Assessments—Pleadings—Demurrer.

Where a public-local statute provides a valid method for assessing damages to owners of lands abutting upon a street widened or regraded, such owner should pursue the remedy prescribed, and a demurrer to a complaint which does not state this as a basis of a cause of action should be sustained.

(652) APPEAL by plaintiff from *Harding, J.*, at Fall Term, 1916, of MACON.

At the conclusion of the evidence the court, being of opinion that there was not sufficient evidence to be submitted to the jury, entered a judgment of nonsuit. The defendant excepted and appealed.

J. Frank Ray for plaintiff.

Robertson & Angel and Sisk & West for defendant.

CLARK, C. J. Chapter 197, Public-Local Laws 1913, made it the duty of the highway commission and the board of aldermen of the town of Franklin to regrade and open streets when in their judgment required by the public interest. The street in front of plaintiff's lot, being in a low place, the defendant, in the interest of the public, graded on the side of the street opposite the plaintiff's lot a new street on the side of the hill higher up, but left to the plaintiff the use of the old street by which he went out and came in from both directions as theretofore, without any change. The defendant did not take any part of plaintiff's land, nor remove the street from in front of his property, nor interfere with the use which he had theretofore made of the former street in going out from his lot either to the right or to the left. By using the old street he comes out into the other streets of the town, whether he turns to the

right or left, at exactly the same point as heretofore. The only difference is that the public do not use the old street in front of the lot, but the new street, which has been graded on the further side of the old street, because it is higher up. This is a convenience to the public and no disadvantage to the plaintiff.

There is no evidence of negligence in grading the new street, in its construction, nor in its operation. The new street being on the side of the hill, is some 4½ to 12 feet higher than the old street. The plaintiff could reach it by throwing a bridge across the old street, but he does not need to use it unless he is willing to build the bridge, as he has the same outlet into the new street by going as heretofore along the old street until he reaches the point where the new street and the old street came together on the same grade.

We concur with his Honor that as the plaintiff has precisely the same outlet, and the same use of the old street as he had before the grading of the new street, and the old street has not been removed from in front of his lot, and none of his land has been taken for public uses, he has not shown in evidence any cause of action. The judgment of nonsuit was proper. The street in front of the plaintiff's lot is now double the width it was formerly. But there is no injury to the (653) plaintiff in this, for the extra width is not taken from his side. It is the misfortune of the plaintiff that the new part of the street, being on a hillside, is higher than the old part, which is in a bottom. There was no malice or oppression shown. The action by the town authorities was merely in pursuance of legislative authority to give the traveling public a better and drier street.

Section 15 of the act (ch. 197, Public-Local Laws 1913) provides as the remedy for the plaintiff that if he feels aggrieved at the relocation of the street he shall apply to the highway commission for assessment of damages and for the summoning of three jurors for that purpose. It was incumbent upon the plaintiff to pursue the remedy marked out by this statute, *Dargan v. R. R.*, 131 N. C., 623; *Beasley v. R. R.*, 147 N. C., 365; *Hoke, J.*, in *Porter v. R. R.*, 148 N. C., 565; and his complaint does not state a cause of action, on which ground, also, the judgment of nonsuit should be

Affirmed.

CHEROKEE COUNTY ET AL. v. B. B. MERONEY ET ALS.

(Filed 26 May, 1917.)

1. Contracts—Consideration — Nudum Pactum — Sheriffs — Principal and Surety—Judgments.

Semble, an agreement between the county officials and the sureties on the bond of a defaulting sheriff in settling his taxes, against whom judgment has been rendered, that execution thereunder should not issue within a year, is without consideration moving to the county, and being *nudum pactum*, is unenforcible.

2. Bills and Notes—Judgments—Execution — Contracts, Written — Parol Agreements—Contradiction—Evidence.

Where a county has obtained a judgment against the sureties on a sheriff's bond for his default in the settlement of his taxes, and its officials have taken a note from the defendants extending the time of payment by them for a year, in an action upon the note the defendants may not set up the defense, in the absence of fraud, accident, or mistake, that as a part of the agreement, resting in parol, contemporaneously made, they were given further time, until certain lands had been sold, for such would be in contradiction of the written instrument.

CIVIL ACTION, tried before *Adams, J.*, at April Term, 1917, of CHEROKEE.

Plaintiff sued upon an unsealed note given by B. B. Meroney and the seven other defendants, on 3 March, 1914, for $448.75, due twelve (654) months after date, with interest at 6 per cent per annum. Judgment was entered in favor of the plaintiff, and the defendants appealed.

Dillard & Hill for plaintiffs.
J. N. Moody for defendants.

WALKER, J. The defense was, and defendants propose to show, that the note did not express the true contract between the parties, and that instead of being an unconditional promise to pay the amount of money specified in the note at the time stated, there was a very different agreement, in substance and effect, and as a part of the alleged agreement it was stipulated at the time that the defendants would not be required to pay until they had sold certain real estate. The plaintiffs held a judgment against defendants, as sureties of one T. N. Bates, former sheriff of the county, who defaulted in the payment of taxes collected by him, and could have issued execution at any time against defendants and collected the money due upon the judgment. The transaction between the parties really amounted to an agreement, as stated in the note, to extend the time of payment for twelve months, and the defendants

propose to show that this was not the true agreement, but that they were to have a much longer time to pay, and, in fact, what might be an indefinite time.

We cannot see how this alleged agreement is supported by any sufficient consideration. It is really a *nudum pactum.* The county was getting nothing by the arrangement, and, if possible, less than nothing, as the benefit was all on the side of the defendants, and the disadvantage all on the side of the county, and this was reversing the order of things, as the party to whom the promise is made should have the benefit, or the other party the disadvantage. A contract has been defined as "an agreement," upon sufficient consideration, to do or not to do a particular thing. Bl. Com., 442; 2 Kent Com., 449; Clark on Contracts (2 Ed.), p. 2. And it is more particularly defined as follows: "Consideration is that which moves from the promisee to the promisor, at the express or implied request of the latter, in return for his promise. As the term is used in the law of contracts, it means a 'valuable' consideration; that is, something having value in the eye of the law. It may consist either in 'some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.'" The consideration to support a promise need not inure to the promisor; it is sufficient if it consists in a detriment to the promisee. *Bank v. Bridgers,* 98 N. C., 67. There is no detriment here to the defendants, as the benefit is all theirs, and there is nothing of value that goes to the promisors, who are the plaintiffs. There is a good consideration for the note, upon the authority of *Baker v. Walker,* 14 Exch., 468, in which it was held: "Where (655) a man who has a judgment debt takes from his debtor a promissory note for the amount, payable at a certain time, it must be inferred that he thereby enters into an agreement to suspend his remedy for that period, and, if so, that is a good condition for the giving of the note." This was approved in *Bank v. Bridgers, supra,* citing, also, *Putnam v. Lewis,* 8 Johns., 389; *Frisbie v. Larned,* 21 Wend., 450; *Harshaw v. McKesson,* 65 N. C., 688 (*S. c.* 66 N. C., 266). We need not consider in this connection the other position taken by the plaintiffs as to the lack of power in the county commissioners to make the alleged parol agreement to extend the time of payment.

But, instead of making the ground of decision the want of a consideration to support the alleged agreement, we may safely rest it upon the familiar rule that parol evidence will not be admitted to vary or contradict a written contract. The object here is to prove, not a collateral contract consistent with the written one, which was not reduced to writing, but a contemporaneous oral stipulation that varies the written contract materially, and which would tend to prove a very different

contract. This is contrary to the well-settled rule, as stated by the Chief Justice in *Walker v. Venters,* 148 N. C., 388, where he said: "It is true that a contract may be partly in writing and partly oral (except when forbidden by the statute of frauds), and that in such cases the oral part of the agreement may be shown. But this is subject to the well settled rule that a contemporaneous agreement shall not contradict that which is written. The written word abides and is not to be set aside upon the slippery memory of man," citing *Basnight v. Jobbing Co.,* 148 N. C., 350. It is not alleged that the oral agreement was omitted from the writing by fraud, accident, or mistake, but the bald proposition is that defendants should be permitted to attack the contract, as they worded it, collaterally, and show that it does not express the agreement truly, but one radically different. In *Basnight v. Jobbing Co., supra,* the Court, after stating that no rule is better established than the one which rejects parol evidence to contradict or vary a written contract, unless upon the ground of fraud or mistake, which must be set up by proper pleading, says: "Evidence, under this rule of exclusion, is never admitted, if the wording is clear, or if the evidence offered is in direct contradiction of the intrinsic meaning of the language of the contract," citing *Meekins v. Newberry,* 101 N. C., 18; Browne on Parol Ev., p. 199, secs. 55-56; *Gilbert v. Moline Plow Co.,* 119 U. S., 491; *The Delaware,* 14 Wall., (U. S.), 579; *Kean v. Davis,* 21 N. J. L., 683. If this Court should hold otherwise, we would open wide the door for the entrance of the very evil which this wise and wholesome rule was intended to bar from our jurisprudence. On the contrary, we should adhere to the rule
(656) strictly, as we are urged to do in *Moffitt v. Maness,* 102 N. C., 457, and not permit oral testimony to vary the written word, which is backed by a strong presumption of its accuracy and truth. We may already have gone so far in the other direction as to be in imminent peril of crossing the line set as the extreme limit by the rule, beyond which it is dangerous to go. Where it is permissible to hear oral evidence of a collateral stipulation, under another rule, it is but showing another part of the same contract, which was not put in writing, in order to present it in its entirety, but even then the oral part must not vary or contradict that which is in writing. *Evans v. Freeman,* 142 N. C., 61. The principle is thus stated in Clark on Contracts (2 Ed.), at p. 85: "Where a contract does not fall within the statute, the parties may at their option put their agreement in writing, or may contract orally, or put some of the terms in writing and arrange others orally. In the latter case, although that which is written cannot be aided by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing, and the whole constitutes one entire contract." Commenting on that statement of the rule, we said in *Evans v. Freeman,*

supra: "In such a case there is no violation of the familiar and elementary rule we have before mentioned, because in the sense of that rule the written contract is neither contradicted, added to, nor varied; but leaving it in full force and operation as it has been expressed by the parties in the writing, the other part of the contract is permitted to be shown in order to round it out and present it in its completeness, the same as if all of it had been committed to writing."

There are many authorities to the effect that when the terms of a promissory note are so clearly expressed as to create no doubt of their meaning, parol evidence will not be admitted to substantially change them, as, for instance, to postpone the date of payment. *Free v. Hawkins,* 1 Starkie, 361; *Getto v. Binkert,* 55 Kan., 617; *Hill v. Gaw,* 4 Pa. St., 493; *Kincaid v. Higgins,* 4 Ky. (1 Bibb.), 396; *Moseley v. Hanford,* 10 B. and C., 729 (109 Eng. Reprinted Reports, 621); *Campbell v. Upshaw,* 26 Tenn. (7 Humph.), 185; *Litchford v. Falconer,* 2 Ala., 280; *DeLong v. Lee,* 73 Iowa, 53; *Rawson v. Walker,* 1 Starkie, 361.

The substantial question was whether the defendants could engraft upon the written contract by oral proof a stipulation conflicting with the provisions already there, and believing that the ruling of the court on this proposition was correct, we affirm the judgment.

No error.

Cited: Sumner v. Lumber Co., 175 N.C. 656; *Mfg. Co. v. McPhail,* 181 N.C. 208; *Anderson v. Nichols,* 187 N.C. 810; *Exum v. Lynch,* 188 N.C. 395; *Hooper v. Trust Co.,* 190 N.C. 427; *Watson v. Spurrier,* 190 N.C. 730; *Atkinson Co. v. Harvester Co.,* 191 N.C. 296; *Clark v. R.R.,* 192 N.C. 284; *Fertilizer Co. v. Eason,* 194 N.C. 246, 248; *Roebuck v. Carson,* 196 N.C. 674; *Grier v. Weldon,* 205 N.C. 579; *Byrd v. Power Co.,* 205 N.C. 591; *Trust Co. v. Williams,* 209 N.C. 810; *Whitehurst v. FCX Fruit & Vegetable Service,* 224 N.C. 636.

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(657)

R. T. CLAYWELL ET AL. v. BOARD OF COMMISSIONERS OF BURKE COUNTY ET AL.

(Filed 16 May, 1917.)

1. Legislature—Constitutional Law—Statutes—Amendments—Bonds.

A material amendment made by one branch of the Legislature to a bill passed by the other, allowing a county to pledge its credit in issuing bonds for the improvement of the highways therein, must be concurred in according to the requirements of Article II, sec. 14, of our Constitution, providing

that it be read upon three separate days, with the roll call upon the second and third readings, for the act to be valid.

2. Same—Dependent Parts—Unconstitutional in Whole—Roads and Highways.

Where a bill is introduced in one branch of the Legislature to coördinate the road system, which provides for the issuance of bonds, the creation of main highways from the county seat, taking care of the existing debts of certain of the townships, and providing for a sinking fund, and amendments have been made by the other branch, withdrawing certain of the more wealthy and populous townships from its operation, or liability for the indebtedness to be created, except under condition requiring the approval of the voters, etc.: *Held*, the amendment is a material one, requiring for the validity of the act that it be passed in accordance with the requirements of our Constitution, Article II, sec. 14; and the principle upon which a valid portion of an act may be severed and independently upheld has no application to the facts of this case.

3. Constitutional Law—Statutes—Unconstitutional in Part—Validity of Other Portion.

The principle upholding a constitutional portion of an act and declaring it unconstitutional in part prevails only when they are severable and distinct, and it clearly appears that the constitutional provisions would have been enacted by the Legislature without the presence of the other.

4. Constitutional Law — Legislature — Statutes — Authority Conferred — Test.

The unconstitutionality of the passage of an act allowing an issue of bonds for the creation and maintenance of the highways of a county is not affected by the purpose of the commissioners to act in such manner as to avoid the constitutional inhibition, the test being whether the authority conferred by the act was passed in accordance with the constitutional provision respecting the issuance of the bonds. Constitution, Art. II, sec. 14.

CIVIL ACTION, heard, on motion to dissolve preliminary restraining order, before *Carter, J.*, holding courts of Sixteenth Judicial District, on 28 March, 1917.

The action was instituted by plaintiff, citizens and taxpayers of Burke County, N. C., in behalf of themselves and all other taxpayers of the county to restrain the board of road commissioners of said county (658) from issuing county bonds to the amount of $300,000 and from doing other specified things under a statute of the Legislature passed January, 1917, entitled "An act appointing road commissioners for road improvement of Burke County."

There was judgment that the restraining order be continued to the hearing, and defendants excepted and appealed.

Avery & Ervin and S. J. Ervin for plaintiff.
Spainhour & Mull and Self & Bagby for defendant.

HOKE, J. Prior to 1917 and under former acts of the Legislature, the improvement of the roads in Burke County seems to have been carried on chiefly under what may be termed the township system, and, pursuant to that system, Morganton Township had voted a bond issue of $50,000 for public roads, $45,000 of which had been issued and sold and much of the proceeds expended. Six other townships had voted bonds for road purposes in amounts aggregating $170,000. It does not appear whether any or what part of these bonds have been issued and disposed of. The remaining townships of the county, five in number, have been paying a special tax in aid of road improvement. Under these conditions, with a view, no doubt, of coördinating effort in this very important matter and making the same more efficient by substituting county for a township system, if this should prove feasible, there was introduced into the lower House of the recent General Assembly, 1917, H. B. No. 3, S. B. 155, a bill incorporating defendants as a road commission for improvement of roads in Burke County and giving them extensive powers over the roads and bridges of the county except the bridges over the main Catawba, authorizing them to issue bonds of the county not to exceed the sum of $300,000 and the annual levy of a tax not more than 30 cents on the $100 valuation of property and 90 cents on the poll for providing a sinking fund and to meet current expenditures for the construction and maintenance of the roads. This commission was authorized, further, to take over the available road funds of Morganton Township and to set aside $50,000 of the bonds to pay the outstanding indebtedness of that township, and to take over the road funds, etc., of any other township that had voted or issued road bonds and provide for paying its indebtedness, and unless such township, on an election called by the commission, shall decide to keep its funds and apply them under the direction of its local board, and the latter is continued in existence for the purpose if such course should be adopted. The commission are further directed to first lay out and construct twelve principal highways leading in different directions from Morganton to specified points, most of them on the lines of adjoining counties, these to be surveyed by expert surveyors and engineers and to be let out by contract if (659) this can be satisfactorily done, and that any moneys arising from said bond issue, not required for the designated roads, shall be used and expended on other public roads of the various townships, etc. This bill was passed in the House according to the constitutional requirement that bills of this character shall have three general readings on three different days, and on the second and third readings the ayes and noes shall be entered on the journal. Const., Art. II, sec. 14. Having been sent to the Senate, it passed two readings, the ayes and noes being properly entered on the second reading, and, before the third reading,

various amendments were adopted by the Senate, among others, section 10 was stricken out and an entirely new section substituted, to the effect that the six townships other than Morganton Township, which had voted for road bonds, should not be subject to the provisions of the act unless, on a vote duly taken, they or any one of them should decide to come under the law. The bill as amended in the Senate then passed its third reading, the ayes and noes being duly entered; was returned to the House and there concurred in, but without roll call and without the ayes and noes being further entered.

It is the accepted position that when a material amendment is made to a bill of this kind, one coming under this constitutional provision, the required readings and entries on the journal shall be taken anew on the bill as amended. *Cottrell v. Lenoir, ante,* 138; *Cotton Mills v. Waxhaw,* 130 N. C., 293; *Glenn v. Wray,* 126 N. C., 730.

In *Glenn's case* the principle is stated as follows: "The Constitution, Art. II, sec. 14, renders invalid any act to raise money, or create a debt, or lay a tax by the State, or to authorize any county, city, or town to do so, unless the bill shall have passed three several readings on three several days in each House, and unless the yeas and nays on the second and third readings shall have been entered on the journals. If an amendment in a material matter is made to the bill, the amended bill should be read over again three times in each House, with the yea and nay vote on the second and third readings entered on the journals."

While the many other amendments might not be so considered, the one striking out section 10 and, in effect, withdrawing six of the populous and wealthy townships in the county from any liability to taxation for the indebtedness created is clearly material within the meaning of these decisions, and we must hold that the statute as it now appears has not been enacted in accordance with the constitutional requirement.

It is contended for defendant that the act does not require that the whole $300,000 should be issued, nor does it appear that such an amount will be necessary, and the commissioners have avowed their purpose not to issue to the limit specified, but only the proportionate part of (660) the indebtedness for the remaining townships. But, as said in *Lang v. Development Co.,* 169 N. C., pp. 662-664, in reference to a similar argument: "It is no answer to this position that in the particular case before us no harm is likely to occur or that the power is being exercised in a considerate or benevolent manner, for where a statute is being squared to requirement of constitutional provision it is what the law authorizes, and not what is being presently done under it, that furnishes the proper test of its validity."

Again, it is insisted that even if the statute is unconstitutional as to the bond issue, it may and should be upheld in its other provisions. It is

well recognized that a statute which is valid in part may be upheld as to such part, though the remainder of the act must be set aside as being unconstitutional; but the principle is not allowed to prevail unless the valid and invalid portions of the law are severable and distinct and unless it clearly appears that the constitutional provisions would have been enacted by the Legislature without the presence of the others.

A very satisfactory statement of the principle and the limitations upon it is given by *Chief Justice White,* then Associate Justice, in the first *Employer's Liability cases,* 207 U. S., pp. 463-501, as follows: "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." And the decided cases here and elsewhere are in full approval of the position. *Keith v. Lockhart,* 171 N. C., pp. 451-458; *Greene v. Owen,* 125 N. C., 212; *Riggsbee v. Durham,* 94 N. C., 800; *Baldwin v. Franks,* 120 U. S., 678; *Sprague v. Thompson,* 118 U. S., 90.

Considering the present statute in the light of these accepted principles, it will appear, we think, that the $300,000 bond issue is the basis of this entire scheme for furtherance of road improvement in Burke County, and without it there is scarcely an essential feature of the law that could be successfully carried out by the commission charged with the duty of enforcing it. As stated at the outset, the law was enacted chiefly to enable the people of Burke County to change from the township to the county system of working the roads; and, in order to accomplish this purpose it was required that the board of road commissioners take over the available assets of Morganton Township and assume or pay its indebtedness, $50,000, and these bonds were to be used for the purpose. The same course was to be taken as to the six other (661) townships who had voted bonds, provided they should decide to come in under the law, and for this a portion of the bonds would also be required. The taxes authorized were devoted in great part to paying the interest and providing a sinking fund for the payment of the bond issue. And the principal duties imposed on the commissioners in the way of direct road improvement was to employ expert road surveyors and engineers and, with their aid and advice, provide by contract for the construction of eleven or twelve principal highways, leading from Morganton in different directions to the line of adjoining counties, and these

undertakings were to be paid for out of the proceeds of the bond issue, the only means available for the purpose. An endeavor, therefore, to maintain the road commission and leave them without means to carry out any of the duties imposed upon them by the law would be worse than useless, and could only serve to embarrass and impair the efforts of agencies heretofore established and which might otherwise accomplish something in the way of road improvement. Recurring, then, to the authorities heretofore cited, and giving due consideration to the statute, its purpose and circumstances relevant to its correct interpretation, we are of opinion that the propositions to create this road commission and to authorize the bond issue are not separable within the meaning of the principle, and that it is not at all clear that the Legislature would have enacted the one without the other. Indeed, it may be said of a certainty that they would not have done so. We do not hesitate to hold, therefore, that the portion of the law providing for the bond issue being invalid because the statute as it now appears was not passed in accord with constitutional requirement, that the entire act is void, and the road work of Burke County must be carried on under the law as it formerly existed.

There is no error, and, on the facts as they now appear of record, plaintiffs are entitled to a judgment that the injunction be made permanent.

Affirmed.

Cited: Snider v. Jackson County, 175 N.C. 591; *Guire v. Comrs. of Caldwell,* 177 N.C. 518; *Guire v. Comrs. of Caldwell,* 177 N.C. 519; *Allen v. Raleigh,* 181 N.C. 455; *Storm v. Wrightsville Beach,* 189 N.C. 684; *S. v. Jennette,* 190 N.C. 101; *Penland v. Bryson City,* 199 N.C. 146.

E. B. BORDEN v. CITY OF GOLDSBORO.

(Filed 30 May, 1917.)

1. Public Officers — Compensation — Quantum Meruit — Municipalities — Sinking Fund.

Where a municipal corporation engages a commissioner of its sinking fund under the provisions of its charter, by which the incumbent was employed for a term of years continuously, his employment is that of a public officer, which precludes compensation based upon a *quantum meruit*, and he may not recover for his services in the absence of express statutory provision.

2. Appeal and Error—Municipal Corporations—Sinking Fund.

Exception by a municipality to a judgment rendered upon a report of the referee and confirmed, to the effect that the commissioner of its sinking fund should have been charged with interest he should have collected, is without merit under the evidence in this case.

3. Municipal Corporations—Sinking Fund—Commissioner — Salary — Interest.

Where the authorities of a municipal corporation pass a resolution fixing the compensation of the commissioner of the sinking fund at $100 a year and 4 per cent interest, after he has served continuously for several terms, the charter of the city authorizing it, the fact that the resolution unlawfully attempted to charge the commissioner with interest on the fund which they claim he should have received does not affect the fact that the compensation was fixed by the resolution, at the stated rate; and it is erroneous to allow the commissioner the legal rate of interest.

CIVIL ACTION, heard at January Term, 1917, of WAYNE, before (662) *Cox, J.*, upon exceptions to report of referee. To the rulings of the Court both parties excepted and appealed from the judgment rendered.

A. C. Davis, D. H. Bland, Dickinson & Land for plaintiff.

D. C. Humphrey, Dortch & Barham, Langston, Allen & Taylor for defendant.

PLAINTIFF'S APPEAL.

BROWN, J. The plaintiff was appointed sinking fund commissioner by the board of aldermen, and served for nearly sixteen years. No definite salary was fixed until 3 August, 1914, when the board fixed his salary at $100 per annum for the period for which he had been commissioner, and in same resolution undertook to charge plaintiff with $2,885.05, being the difference between the interest received by plaintiff and that which defendant charges he should be chargeable with.

The plaintiff excepts because the referee and court refused to fix his compensation as upon a *quantum meruit* basis, claiming $250 per annum. This exception cannot be sustained.

The charter of defendant plainly creates the office of sinking fund commissioner, and authorizes the board of aldermen to fill it. The term is fixed at six years and the compensation is to be determined by the board.

The position filled by plaintiff was not of a temporary character, and the duties were continuous and not intermittent. The incumbent was required to perform continuous public service for a definite period and of a very responsible character. It had all the elements and characteristics of a public office as distinguished from a mere (663)

public employment. 17 A. and E. Ann. Cases, 452; *Barnhill v. Thompson,* 122 N. C., 493. Being a public officer, we think the overwhelming weight of authority precludes a recovery for compensation based upon a *quantum meruit.*

A public officer is not entitled to payment for duties imposed upon him by statute, in the absence of an express provision for such payment. 25 Cyc., 449. In 1 Dillon on Mun. Corp., 731, it is said: "There is no such implied obligation on the part of municipal corporations and no such relation between them and officers which they are required by law to elect as will oblige them to make compensation to such officers unless the right to it is expressly given by law, ordinance, or by contract. Officers of a municipal corporation are deemed to have accepted their office with knowledge of and with reference to the provisions of the charter or incorporating statute relating to the services which they may be called upon to render and the compensation provided therefor. Aside from these, or some proper by-law, there is no implied assumpsit on the part of the corporation with respect to the services of its officers. In the absence of express contract, these determine and regulate the right of recovery, and the amount." Many cases are cited in the notes in support of the text.

This rule has been applied to officers of private corporations. *Caho v. R. R.,* 147 N. C., 20; *Chiles v. Mfg. Co.,* 167 N. C., 574.

The judgment of the Superior Court upon plaintiff's appeal is

Affirmed.

The costs of plaintiff's appeal will be paid by plaintiff.

DEFENDANT'S APPEAL.

The exceptions of the defendant are based upon two propositions:

1. That the plaintiff should be charged with $2,885.05, being the difference in interest which plaintiff received upon the sinking fund and which he should have earned thereon.

This matter is very largely one of fact. The referee finds that plaintiff has been diligent and faithful and at all times exercised due care and discretion in regard to the management of the sinking fund, and that he has faithfully and honestly accounted to his successor for the whole of said fund and all interest thereon which came into his hands or ought to have been received by him on the same.

We find nothing in the record to justify any other conclusion.

2. It is contended that the board of aldermen did not fix any compensation, and, therefore, plaintiff can recover nothing for his services.

On August 3, 1914, the aldermen adopted the following resolution:

"That said commissioner be charged up with interest heretofore (664) unaccounted for and which could reasonably have been earned in

the sum of $2,885.05. That said commissioner be allowed a salary of $100 a year for the period for which he has been commissioner of the sinking fund, together with interest on such yearly salary at the rate of 4 per cent per annum, such salary with such interest amounting to $2,144.90, leaving an interest balance due to the city of Goldsboro of $740.11."

It is contended that this resolution does not fix any compensation. We think it does fix the salary or compensation of plaintiff at $100 per annum, with 4 per cent interest annually.

The fact that the aldermen undertook to charge plaintiff at same time and in same resolution with interest that he cannot legally be charged with does not alter the case. It was their duty to fix the compensation, regardless of the amount of interest plaintiff is chargeable with. That is a matter to be determined by the courts in case of a difference.

We think the judge erred in changing the rate of interest from 4 to 6 per cent. That is a part of the compensation fixed by the board of aldermen, and is supposed to have been considered by them in fixing the compensation. We think the judgment also inadvertently allows interest on interest, which is erroneous.

The cause will be remanded to the Superior Court with instructions to enter judgment in accordance with this opinion.

Modified and affirmed.

The costs of defendant's appeal will be paid by defendant.

Cited: S. v. Wood, 175 N.C. 820; *Credit Corp. v. Boushall,* 193 N.C. 607; *Grimes v. Holmes,* 207 N.C. 299; *Carolina Beach v. Mintz,* 212 N.C. 583; *Reed v. Madison County,* 213 N.C. 147; *Sams v. Comrs. of Madison,* 217 N.C. 285; *Hill v. Stansbury,* 223 N.C. 195; *Stansbury v. Guilford County,* 226 N.C. 46.

KITTY H. DREWRY v. RALEIGH SAVINGS BANK AND TRUST COMPANY ET ALS.

(Filed 30 May, 1917.)

1. Appeal and Error—Widow's Year's Support—Evidence—Statutes.

Where a widow's year's support has been allotted (Rev., sec. 3104), and the judgment of the clerk (Rev., sec. 3107) appealed from, and the court after passing upon the amount allowed changes that theretofore made, the Supreme Court on appeal will not review the facts found, when there is sufficient evidence to support them.

2. Statutes—Widow's Year's Support—Equity.

The proceedings to allot a year's support is statutory and without an element of equitable jurisdiction. Revisal, secs. 3104, 3107.

3. Statutes—Widow's Year's Support—Wills—Dissents—Equity.

The "rights" and "estate" referred to in the statute, Revisal, sec. 3080, allowed to the widow dissenting from her husband's will, is the right to a year's support, together with a child's allowance, and her estate is her dower interest, and both rest by statute without equitable cognizance, except when equity may be invoked to enforce her legal rights.

4. Statutes—Widow's Year's Support—Jury—Trials.

When the widow's right to a year's support is admitted, the amount is a question of law arising under the statute, and the statutory method must be pursued, which does not require a trial by jury; and especially so when no objection thereto is duly taken or demand therefor aptly made.

5. Statutes—Widow's Year's Support—Minor Children—Allowance.

Where a year's support is made for the widow and minor children it should be allowed to the widow, who is charged with the support of the children, and the increase of the allowance made in such instances is for that purpose.

6. Statutes—Widow's Year's Support—Allowance—Discretion—Abuse.

Where the estate of the deceased husband is large, left in good condition, with annual income of $38,000, an allowance of a year's support to the widow of $12,500, who has a minor son, less the value of the household furniture, is held not an abuse of the Superior Court's discretion which the Supreme Court will review.

(665) SPECIAL PROCEEDING for the allotment of a year's support under Revisal, sec. 3104 *et seq.*, in the Superior Court of WAKE, upon appeal from the clerk, by *Devin, J.*, at March Term, 1917.

From the judgment rendered the defendants the Wachovia Bank and Trust Company, general guardian of James G. Hanes, Jr., and Joseph B. Cheshire, guardian *ad litem* of John C. Drewry, Jr., appeal.

Manning & Kitchin for plaintiff.
Murray Allen, Francis A. Cox for defendants.

BROWN, J. The record discloses that the petitioner is the widow of John C. Drewry, who died on 2 October, 1916, leaving a will, from which she dissented. This special proceeding was instituted for the allotment of a year's support.

The judgment by the clerk, as authorized in section 3107, Revisal, was entered. The order to the sheriff was issued to summon a justice of the peace and two indifferent persons qualified as jurors. They heard testimony, examined witnesses, informed themselves as to the net annual in-

come of the deceased for the three years prior to his death, and the condition of his estate, and made their report to the clerk of the court. They allowed petitioner certain articles of household furniture, found the net annual income of the deceased for three years prior to his death to have been in excess of $38,500; that his estate was large and in good condition, and allowed the petitioner $15,000 for the support of herself and family. Exceptions were filed by the several defendants. The (666) clerk heard the exceptions, examined witnesses, confirmed the report as to the valuation of the furniture allotted to petitioner, and reduced the allotment to her to $8,000. The petitioner and defendants excepted and appealed. Judge Devin, holding the courts of the district, heard testimony, examined witnesses as to the net and annual income and the condition of the estate of deceased and as to what would be a reasonable amount to allow the petitioner for the support of herself and family. The evidence is set out in the record. His Honor found the facts and rendered the judgment set out in the record, allowing the petitioner $12,500, to be reduced by the value of the furniture allotted. To this judgment the guardian *ad litem* of John C. Drewry, Jr., and the guardian of James G. Hanes, Jr., appealed.

The contentions of the defendants, appellants, are as follows:

1. This court has jurisdiction to review all the evidence in this case for the purpose of deciding whether the allotment of $12,500 is proper under the provisions of the statute, Revisal, sections 3103 and 3110.

2. If issues of fact were raised by the appeal from the clerk's order, it was the duty of the clerk to transfer the case to the civil-issue docket for trial by jury, and the court was without jurisdiction to find the facts and render judgment.

3. Upon review of all the evidence, it will appear that the allotment of $12,500 is excessive.

4. The findings of fact by the court are not supported by sufficient evidence.

5. If the amount to be allotted is a matter of discretion, there has been an abuse of discretion in this case.

6. The court should have ordered an appointment of the amount between the widow and her minor son.

There is an abundance of evidence to support the findings of the judge, and that being so, this court will not review the facts. *Cox v. Jones,* 110 N. C., 309; *Creed v. Marshall,* 160 N. C., 394; *Travers v. Deaton,* 107 N. C., 500.

The contention that the allotment of a year's provision is an equitable proceeding, and that, therefore, this court will review the facts, cannot be sustained.

There are very few actions or proceedings, even of an equitable character, in which we undertake to review the findings of fact where supported by evidence. We sometimes do in preliminary injunctions, but in those matters, if the judge below has found the facts, we adopt them if supported by evidence.

(667) But this is not now a proceeding of an equitable character. It is purely statutory and regulated and given by the statute law, just as assignments of dower and the setting apart of a homestead and personal exemption.

When a widow dissents from the will of her husband (3080, Revisal) she "shall have the same rights and estates in the real and personal property of her husband as if he had died intestate." The estate referred to is dower; the rights referred to are the year's support and child's part as a distributee. These are all legal rights, enforcible at law, and not cognizable in a court of equity. It may be that occasion may require that to enforce her legal right she may be required to invoke the powers of equity; but her rights are simply rights at law. Her special proceeding to have her dower allotted is at law. *Efland v. Efland,* 96 N. C., 488; *Tate v. Powe,* 64 N. C., 644; *Parton v. Allison,* 109 N. C., 674; *ibid.,* 111 N. C., 429.

The defendants were not entitled to a jury trial upon the appeal to the judge.

In the first place, the statute does not provide for a jury trial. Strictly speaking, in this kind of a proceeding issues of fact are not raised by pleadings. The right to a year's support being admitted, the amount to be allowed is only a question of fact, and must be determined in the manner directed by the statute. The procedure in this proceeding is identical with that approved in *Mann v. Mann,* 91 S. E., 355.

In the second place, if defendants were entitled to a jury trial, they waived it by making no demand for it and by submitting no issues. A party to an action cannot be heard to demand a jury trial after the facts are found against him, when he has offered evidence and submitted to a trial by the court without objection.

There is abundant evidence to support the findings, and the amount allowed by the judge does not show any gross abuse of discretion.

The estate of the deceased is very large, the annual income $38,000, and the amount allowed is well within the statutory limit.

The total allowance was very properly made to the widow and none to the minor child. The allowance is for her benefit and support, as she is charged with the care and support of her child.

The fact that there are children is only a reason for increasing the allowance made to the widow. *In re Hayes,* 112 N. C., 76. In *Kimball v. Denning,* 27 N. C., 418, this Court said: "Until the case of *Cox v.*

Brown, 5 Ired., 194 (27 N. C., 194), was brought up at the last term, we had never heard that anybody supposed that if a widow died her creditors or children were entitled to claim out of the husband's estate as much as would have supported her for a year if she had lived. It seems to us to be a complete perversion of the act which makes provision for the temporary maintenance of the widow and her (668) family. . . . All this shows that the purpose was to make provision for the pressing wants of the widow personally and to enable her at that mournful juncture to keep her family about her for a short season, and prevent the necessity of scattering her children abroad until time were allowed for selecting suitable situations for them."

Affirmed.

The costs of this Court will be paid by the Raleigh Savings Bank and Trust Company, executor of the estate of John C. Drewry, out of the funds in its hands belonging to John C. Drewry, junior, and James G. Hanes, junior.

Cited: Holland v. Henson, 189 N.C. 743; *Electric Co. v. Light Co.,* 197 N.C. 770; *Trust Co. v. Waddell,* 234 N.C. 459.

E. P. READE v. CITY OF DURHAM.

(Filed 30 May, 1917.)

1. Constitutional Law—Amendments—Statutes — Elections — Approval—Prospective Effect.

While to amend the Constitution of the State it is necessary for the voters to approve the proposed amendments to be submitted to them, it is likewise necessary to the validity of the election that the Legislature enact the proposition to amend into a statute by a three-fifths vote of each branch; and the constitutional provision that they be submitted "in such manner as may be prescribed by law" includes within its intent and meaning the time at which the amendments will be effective, if approved, the Constitution being silent on this point. Constitution, Art. XIII, sec. 2.

2. Same—Governor—Result Declared.

Under the general election laws of 1916 the Board of State Canvassers are not authorized to declare the result of an election for Governor, leaving this to be done, under the provisions of Constitution, Art. III, sec. 3, by the Speaker of the House in the presence of a majority of both branches of the Legislature, then to be certified to the Secretary of State and incorporated into the organic law, with further provision of Revisal, sec. 5326, as to the time the Legislature shall act, etc.; and where a valid act

submitting proposed constitutional amendments to the voters fixes a later date than the election for their effectiveness, and provides that the vote thereon be taken in accordance with the general election law of 1916, for Governor, which method has been complied with, the Constitution and statutes contemplate that the amendments shall take effect beyond the time fixed for the election; and the fact that the ballots were silent on this point will not change the time from that declared by the act.

3. Constitutional Law—Amendments—Prospective Effect—Election—Ballots—Interpretation—Presumption.

Where proposed amendments to the Constitution, under a valid statute, have been submitted to the voters, the amendments to take effect on a day after the time of the election, the fact that this provision by the Legislature did not appear upon the ballots cast will not defeat the legislative requirement, when it appears that it was necessary for the voters to refer to the statute in order to understand their ballots, and ample provision had been therein made and carried out to disseminate among the people, by printed matter, full information as to nature of the act and the time the amendments would go into effect.

4. Constitutional Law—Statutes—Legislative Interpretation—Courts.

The courts will regard with deference an interpretation of the Constitution by the legislative branch of the State Government and in doubtful cases will follow it, unless plainly the wrong one.

(669) CIVIL ACTION tried before *Kerr, J.*, at April Term, 1917, of DURHAM.

This is an action brought by plaintiff, as a resident and taxpayer of the city of Durham, to enjoin the issue of bonds for the purchase, or construction, and maintenance of a system of water-works by said city for the purpose of supplying its inhabitants with water. The act of the General Assembly authorizing the issue of bonds for the purpose aforesaid was ratified on 9 January, 1917. The plaintiff alleges that the act is void because it was passed after the amendments to the Constitution of the State, which were adopted by the people at the election held on Tuesday, 7 November, 1916, had become of full force and effect, the contention being that the amendments took effect on the day of their adoption by the people, and when adopted, and that, this being so, the Legislature was forbidden to pass the act authorizing the issue of bonds by the city of Durham for the purposes therein set forth. There are other grounds stated upon which the appellee, city of Durham, contends that the act is a valid exercise of legislative power, but, as we will decide the case upon the single ground that the amendments were not in force at the time the act in question was passed, it is unnecessary to consider the others, and they are, perhaps, too important to be examined and passed upon before they are so directly and squarely presented that their decision will be absolutely essential.

The Constitution of the State provides in Article XIII, sec. 2: "No part of the Constitution of this State shall be altered unless a bill to alter the same shall have been agreed to by three-fifths of each house of the General Assembly, and the amendment or amendments so agreed to shall be submitted at the next general election to the qualified voters of the whole State, in such a manner as may be prescribed by law. And in the event of their adoption by a majority of the votes cast, such amendment or amendments shall become a part of the Constitution of the State."

Under this provision of the Constitution the General Assembly, (670) at the Session of 1915, and on 9 March of that year, passed, by a three-fifths vote of each house, an act to submit certain alterations or amendments of the Constitution to the people for adoption, which, in substance, at least, if not literally, are as follows:

"SEC. 1. By adding at the end of Article II a new section, to wit:

"SEC. 29. The General Assembly shall not pass any local, private, or special act or resolution:

"Relating to the establishment of courts inferior to the Superior Court; relating to the appointment of justices of the peace; relating to health, sanitation, and abatement of nuisances; changing the names of cities, towns and townships; authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys; relating to ferries or bridges; relating to nonnavigable streams; relating to cemeteries; relating to the pay of jurors; erecting new townships, or changing township lines, or establishing or changing the lines of school districts; remitting fines, penalties, and forfeitures, or refunding moneys legally paid into the public treasury; regulating labor, trade, mining, or manufacturing; extending the time for the assessment or collection of taxes or otherwise relieving any collector of taxes from the due performance of his official duties or his sureties from liability; giving effect to informal wills and deeds;

"Nor shall the General Assembly enact any such local, private, or special act by the partial repeal of a general law, but the General Assembly may at any time repeal local, private, or special laws enacted by it."

The above was the first amendment proposed for adoption by the people.

The second of the amendments provided for the passage of general laws for the selection of emergency judges of the Superior Courts, and the third amendment for the enactment of general laws concerning chartering and organizing all corporations, and for amending, extending, and forfeiting of all charters, with specified exceptions; and for altering or repealing such general laws, or special acts, where permitted at any time; and further, by the amendment, the Legislature was forbidden to

create corporations, or extend, alter, or amend their charters by special legislation, except in the cases enumerated therein.

The fourth of these amendments was as follows:

"It shall be the duty of the Legislature to provide by general laws for the organization of cities, towns, and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, (671) contracting debts, and loaning their credit, so as to prevent abuses in assessments, and in contracting debts by such municipal corporations."

The act further provides, omitting immaterial parts:

SEC. 2. That the several amendments to the Constitution hereinbefore set forth as numbered from 1 to 4, inclusive, respectively, shall be and are hereby submitted to the qualified voters of the whole State at the next general election as separate amendments to the Constitution, all amendments proposed under each number respectively being regarded as one amendment.

SEC. 3. That the said several proposed amendments shall be designated on one ballot by their appropriate article and section numbers, and also by their appropriate descriptive titles, and as so designated on said ballot shall be consecutively numbered in the manner and form hereinafter set forth.

SEC. 6. That, except as herein provided, the election upon the several amendments herein designated shall be conducted in the same manner and under the same rules and regulations as provided under the laws governing general elections and in force at the time of said general election at which these amendments shall be submitted. The said election shall be held and the votes returned, compared, counted, and canvassed, and the result announced, under the same rules and regulations as are in force at the general election in the year 1916 for returning, comparing, counting, and canvassing the votes for Governor; and if the majority of the votes cast be in favor of any amendment, it shall be the duty of the Governor of the State to certify said amendment under the seal of the State to the Secretary of State, who shall enroll the said amendment so certified among the permanent records of his office.

SEC. 7. That at least six months prior to the said election the Secretary of State shall cause to be printed not less than 500,000 copies of the amendments to be submitted at the said election, in one pamphlet, together with a copy of the Constitution as it now stands, and a form of ballot, including number, title, description, and instructions to voters as shown hereinbefore; and that at least 1,000 of said pamphlets shall be forwarded within thirty days after publication to the register of deeds of each county in the State for distribution; and that the remainder of

said pamphlets shall be distributed under the supervision of the Governor and Secretary of State.

SEC. 8. Each amendment on which the number of affirmative votes shall exceed the number of negative votes shall become a part of the Constitution; and any amendment so adopted shall take effect on the second Wednesday after the first Monday in January in the year 1917. Any provision of the amendments passed and submitted by this General Assembly and so adopted by the qualified voters incon- (672) sistent with or in conflict with any provision of the present Constitution shall be held to prevail.

SEC. 9. All laws and clauses of laws in conflict with the provisions of this act are hereby repealed.

SEC. 10. This act shall be in force from and after its ratification.

The amendments were submitted, as required by the act, at the general election in November, 1916, and all of them were adopted by the people.

The rules and regulations of the general election law of the State in force in November, 1916, for returning, comparing, counting, and canvassing the votes for Governor provide that the Board of State Canvassers shall estimate the votes cast for officers of the Executive Department from the abstracts returned to the Secretary of State, and shall publish a statement of the result, but only for public information, and it shall not have the effect of determining who has been elected to the particular office of that department of the Government, but the election of such officer shall be ascertained and declared according to section 3 of Article III of the Constitution, which provides that the returns for Governor and other executive officers shall be sealed up and transmitted to the Speaker of the House of Representatives, who shall open and publish the same in the presence of a majority of the members of both Houses of the General Assembly, and the person having the highest number of votes shall be declared to have been duly elected, with a provision for settling contested elections. The statute, Revisal of 1905, sec. 5326, as subsequently amended, enacts the provisions as contained in Article III, sec. 32, of the Constitution, and provides, further, that on the first Tuesday after the convening of the General Assembly, and after an election of executive and certain other officers mentioned, the Senate and House shall meet in joint session in the hall of the House of Representatives, at 11 o'clock in the forenoon, when and where the Speaker shall proceed, in compliance with the Constitution, to open and publish the vote for Governor, and said other officers, cast at the last preceding election, and the result thereof. Whereupon the Governor shall take the oath of office.

This method of ascertaining and declaring the result of the vote for Governor was exactly pursued in respect to that of determining and declaring the passage of the amendments, as provided by section 6 of the act under which the amendments were submitted to the people for ratification or rejection, and the said result was duly certified by the President of the Senate and Speaker of the House of Representatives under their hands, the proceedings for ascertaining the result of
(673) the vote upon the amendments having taken place in the hall of the House of Representatives on Tuesday, 9 January, 1917, the Legislature having convened on the Wednesday before that date, that is, on 3 January, 1917. The amendments, therefore, were duly and regularly adopted according to the Constitution and the statute of 1915 enacted in pursuance thereof.

The particular act now being considered is attacked upon several grounds, but they all depend upon the question whether the new amendments took effect on 7 November, 1916, or on Wednesday, 10 January, 1917. It is taken for granted, and conceded in the pleadings and case, that if the bonds will not be void on the special grounds stated, then they are valid, there being no other objection to their validity. We, therefore, have before us in this case for decision the clear-cut question, as to when the recent constitutional amendments became of full force and effect.

The Court was of the opinion, and so decided, that the amendments were not in force until Wednesday, 10 January, 1917, and as the Durham statutes were passed before that day, viz., on 9 January, 1917, they are valid enactments. He also upheld them on other grounds which we need not state here.

Judgment was entered for the defendant, refusing the injunction, and the plaintiff appealed.

William G. Bramham for plaintiff.
J. L. Morehead for defendant.

WALKER, J., after stating the case: There are several cases now before us, on appeal to this Court, which present the same question as the one which counsel agree as the decisive one in this record. They have been argued orally before us by counsel. Messrs. A. G. Mangum for defendant in *Rankin v. Gaston County, post,* 683, and J. L. Morehead for defendant in this case, who contended that the amendments did not take effect until 10 January, 1917, and by Mr. John G. Carpenter for the plaintiff in the *Rankin case,* who with equal confidence asserted that they were of full force and effect on 7 November, 1916. These arguments were able and exhaustive of the subject, and have aided us greatly in coming to a satisfactory conclusion. The question has also been

argued in briefs by other counsel, Mr. W. G. Bramham in the Durham case, Messrs. Manning & Kitchin and Charles M. Malone for defendant, and Mr. J. F. Henderson for the plaintiff, in *Highway Commission v. Malone, post,* 685, by Messrs. Squires & Whisnant for defendant, and Mr. J. T. Pritchett for plaintiff, in *Richardson v. Caldwell County, post,* 685. Messrs. Winston & Biggs, at their request, (674) were permitted to appear as *amici curiæ,* as they represented other parties interested in this question, and they have also filed a brief. The arguments, pro and con, have been of a high order, and worthy of the important and far-reaching question involved. We are informed that there are between four and five hundred acts passed between 3 January, 1917, and 10 January, 1917, depending for their validity upon our decision. Having carefully examined the case, with the aid of the oral arguments and briefs, we are now ready to state our decision and the reasons which have led us to it.

No one can read Article XIII, sec. 2, of our Constitution without concluding at once that no alteration is permitted by it without the joint action of the Legislature and the people. Amendment of the organic law of the State does not depend upon a popular vote alone, but before the people have a right to express their choice as to whether or not there shall be a change the Legislature must by a three-fifths vote of each house thereof consent and provide that the amendment shall be submitted to the people "in such manner as may be prescribed by law." The Constitution itself does not declare when, or at what particular time, an amendment submitted to the voters and adopted by them shall take effect. It does provide, it is true, that in the event of adoption the amendment shall become a part of the Constitution; and if this was all that is said in that instrument, it might well be argued that the amendment would take effect at once, or at the very time of its adoption, which, as contended by the plaintiff in this case, and those in the other cases before us who concur with him, must mean at the time when all the votes have been cast, and before they are counted. They can't say that it means "when all the votes have been cast and have been counted and the results ascertained and declared by the poll-holders, or the local board of elections, for the latter procedure will consume time, as returns may be delayed and other hindrances encountered, which may postpone the final count for some considerable time, and it may be added, if the operation of the amendment can be postponed until the final count, when there is delay, so that the amendment will not take effect for some time after the day of election, why may not the day when the amendment takes effect be postponed until the two houses of the Legislature have finally passed upon the returns made to the Secretary of State? It would seem that any argument which would sustain the former view should be

of equal weight in support of the latter. So the question is, whether the amendments took effect when the polls were closed in the evening of 7 November, 1916, or on the day fixed for that event by the act (675) providing for a vote of the people upon them. If the Legislature must take part in authorizing the submission of the question to the people, why can't this be done in a modified rather than an absolute form? Three-fifths of each house of the General Assembly may be very willing to submit an amendment to a vote of the people if it is to take effect at a certain time named in their bill, when they would not be willing to do so if the amendment must take effect on the day of the election, provided a majority of the voters have favored it. Therefore it is that the Constitution provides not only for a three-fifths vote of each house, but also that the submission should take place only "in such manner as may be prescribed by law," and this means, no more or less, than that the Legislature may have complete control of the submission, which is not confined to the mere act of voting, but embraces all measures necessary to put in force the will of the people as expressed at the ballot box. The power given to the General Assembly to submit amendments to the people is a general and unrestricted one, in the sense that they may, without any limitation, prescribe the method by which this shall be done—in other words, the procedure throughout, and from beginning to end. The time when the amendments should become effective is as much a part of the submission as the amendments themselves. No one contends that if the provision as to the time the amendments should take effect had been submitted as a part of the amendments and voted on by the people, it would be operative; but was this formality necessary when the people have virtually voted for this clause of the act? Ample provision was made for the widest dissemination among the people of full knowledge as to the provisions of the entire act, as appears in these cases, and by the act itself. The Legislature provided for the distribution among the people of 500,000 copies of this act and the Constitution. The people well knew, when they voted for the amendments, that they were not to take effect until 10 January, 1917. The terms of the amendments were not set out in full in the official ballot, but only the briefest synopsis of them, and it was impossible for the people to know or understand what was submitted to them unless they referred to the act for the information. How could they know how it was proposed to restrict local, private, and special legislation, or to prevent delays in trials by providing emergency judges, or to grant special charters to corporations, or to grant such charters to towns, cities, and villages, without reading the act of the Legislature? So that when they voted for the amendments it was necessarily an approval of the time fixed for their taking effect.

The position that when the people voted for the amendments they thereby assented to the provision that they should take effect on 10 January, 1917, is strongly supported by the recent decision of (676) this Court in *Keith v. Lockhart,* 171 N. C., 451. In that case the question of "stock law" or "no stock law" was submitted to the people. The act required that if a majority voted against a stock law, a certain tax should be levied to build a fence around the county; but this provision of the statute was not mentioned in the submission, nor did it in any way appear on the ballots. The Court held that a majority vote against the stock law was, necessarily, a vote in favor of the fence and the tax, although the latter was not submitted as a separate and distinct proposition to be voted on by the people, and there was no reference to it on the ballots. That case was followed and approved in *Faison v. Comrs.,* 171 N. C., 411. We said in the *Faison case:* "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 was a dissenting opinion in *Keith's case,* but it did not extend to or affect that part of the decision, for, in respect to it, the Court, as appears in the report of the cases, was entirely unanimous. It seems to us that those cases are decisive of the question we now have under consideration, or, at least, are very closely analogous to this case, and sufficiently so to have great weight with us.

But the rule of reason favors the construction of the Constitution that the Legislature could fix the time for the amendments to take effect. Can it be supposed that it was intended to change the organic law by a mere vote of the people, the final result of which could not be officially known until declared by the two houses in the manner prescribed by the Constitution? During the long period between the election and the assembling of the Legislature we might be under the operation of an important amendment, affecting vitally our interests, without even knowing it, if the amendments take effect automatically when the ballots have all been cast. It was to prevent such a result that the Legislature was empowered to prescribe completely the method of submission to the people, including the power to appoint the time when the amendments, if adopted, should become effective as a part of the Constitution. The form of the submission was substantially that the Legislature had passed the amendments to take effect on 10 January, 1917, and referred them to the people for their adoption in this way.

(677) But it is useless to advance further argument in favor of the proposition, as there is abundant authority to sustain the contention of the defendant in this case that the amendments did not take effect until 10 January, 1917.

One of the first rules in construing constitutions, and it applies to all written instruments, is to ascertain the intention of the people in adopting it. 6 Am. and Eng. Enc., 921, Ann. cases, 1915-B, p. 381. There can be no question, we think, as to what was the intention of the framers and the people in respect to this provision.

In *Real v. People,* 42 N. Y., 270, it appeared that several amendments to the Constitution were submitted to the people, and among them one concerning the judiciary and another as to the time (1 January, 1870) from which the amended Constitution should take effect. All the amendments were rejected except the one concerning the judiciary, and it was held that, notwithstanding the rejection of the amendment as to the time, and all the others, the judiciary amendment took effect from and after 1 January, 1869. The Court said: "By the 5th section of the 14th article it was provided that this Constitution shall be in force from and including the 1st day of January next after its adoption by the people. This section related to the entire proposed Constitution, the judiciary article included; and, had the proposed Constitution been adopted, would, of course, have determined the time when all its provisions would have taken effect. But that portion containing this provision was rejected, and it is, therefore, insisted by the counsel for the plaintiff that it never had any operation. But its insertion shows clearly that the convention intended that no part of the proposed Constitution should take effect until that time. The fact that the Legislature submitted the judiciary article to a separate vote could not affect this intention. Those voting for the proposed Constitution, or any part of it, saw the time therein limited for its taking effect, and must have voted for it, or any part of it, in reference to such time. To suppose that those voting for the judiciary article and against the residue of the instrument intended that the former should take effect, if adopted, upon the announcement of the result, would be absurd. All must have understood that such parts, if any, as were adopted should take effect at the time prescribed, irrespective of what might be rejected. This manifest intention of the framers of the article, and of those adopting it, controls the time of its taking effect. That time was 1 January, 1870, as to the provision in question." That Court, composed of some of the ablest and most learned of the judges, one afterwards a justice of the Supreme Court of the United States, unanimously held, without the slightest hesitation or doubt, that even when the amendment as to time (678) was rejected, the clear intention of the Legislature which passed

the act of submission, and of the people, was that the amendments should take effect 1 January, 1870, and that this intent could be gathered from the statute and the vote of the people, including the manner of submission; and this shows that the case is directly in point.

It should be added that we have carefully examined the New York Constitution, and find that its language in regard to amendments is almost identical with ours, if not literally so. The provision is that an amendment shall be submitted "at the time and in the manner prescribed" by the Legislature, and, when adopted, shall become a part of the Constitution. This provision was enacted in 1846 or earlier, and was in force, it seems, when *Real's case* was decided. See American Constitutions (Ed. of 1894), vol. 2, p. 45 (Const. of New York, Art. XIII, sec. 1). Another case to the same effect as *Real's case* is *S. v. Kyle,* 166 Mo., 287, where the Constitution was worded like ours, viz., that amendments should be submitted "in such manner as the General Assembly may provide," and that if a majority vote for the amendments "they shall be valid and binding to all intents and purposes as a part of the Constitution." It also provided for a canvass of the vote just as ours does, and it was held that the amendments did not take effect until the vote was canvassed and the result ascertained. The Court, quoting from and approving *Real v. People, supra,* said: "The result of the election showing the adoption of this article by a majority of the votes cast, must, within the meaning of the rule, be deemed its passage. The canvass of the votes cast by the various boards of canvassers as required by law, and announcing the result and certifying the same as required by law, is as much a part of the election as the casting of the votes by the electors. The election is not deemed complete until the result was declared by the canvassers as required by law. When the result was declared by the State Board of Canvassers, the article was adopted and, under the rule, became operative at once, unless from the nature of the provisions themselves, or those of some other law, it appears that it was to take effect at some future period, or unless it clearly appears that the intention of the framers of the article, and of those by whom it was adopted, was that it should not take effect until some definite future time."

Of like import is the case of *Sewell v. State,* 15 Tex. App., 56, where, by statute, a canvass of the vote was required to be made on the fortieth day after the election, no time being fixed by the Constitution for amendments to take effect. It was held that the amendments adopted by the people at the election became operative when the returns were canvassed and the result declared, as this was the clear implica- (679) tion from the fact that a canvass of the vote was required. The same was decided in *Ellis v. Cerburne,* 35 S. W., 495. And the case of

City of Duluth v. Duluth St. Rwy. Co., 60 Minn., 178, is equally strong as an authority for the same position. The Constitution of that State provided that if it shall appear that a majority of the votes were cast for the amendment, "it shall be valid, to all intents and purposes, as a part of the Constitution," with a provision for ascertaining the result of the election "in a manner to be provided by law." The Legislature provided for a canvass of the vote and a proclamation of the result, and it was held that the amendment did not take effect, at least until the result was ascertained by a canvass of the vote.

In *S. v. Kyle, supra,* the Court further said: "Now, in the absence of a canvass of the vote upon these amendments, courts having criminal jurisdiction had no means of ascertaining the result of the vote of the people upon them, whether adopted or not, and were simply groping in the dark as to whether or not felonies might be prosecuted by information as well as by indictment, or whether, as the Constitution was before the amendment, grand juries were usually convened at each regular term, or, under the amendment, they could only be convened except by an order of a judge of a court having the power to try and determine felonies, and we are satisfied that in order to avoid any embarrassment or complications that might arise under such circumstances, the Legislature intended that the amendments should take effect and be operative from the time of the canvass of the vote therein."

In *Farrar v. Street, etc., Ry. Co.*, 149 Mo. App., 188, it is said: "The general rule that constitutions and constitutional amendments take effect upon their ratification by the people, unless otherwise provided in the instrument itself or *the resolutions submitting them,* applies to sovereign States possessing within themselves the power to make and unmake constitutions." (Italics ours.) The text-writers are equally pronounced in stating this principle. "If by provision of statute the vote on a constitutional amendment is regulated by the general election law of the State and, by such law, election returns are to be canvassed by the Secretary of State and the result certified by him to the Executive, to be proclaimed by him, a constitutional amendment that has been adopted by the necessary vote shall not take effect until such vote is canvassed." 8 Cyc., 745. "When from all of the several proposed amendments it clearly appeared that it was the intention of the Legislature, and was so understood by the voters, that such amendments should not take effect until a future date, and all but one of said amendments were defeated, the one receiving the sanction of the votes will not take effect
(680) until such future date, though in itself it contained no such provision." 6 Am. and Eng. Enc., 910. In none of the cases cited by those who contend that the amendments were in force 7 November, 1916, was there any day fixed in the act submitting the amendments, for

them to take effect, and the language of the Constitution therein construed was substantially different from that in our Constitution. In *Seneca Mining Co.*, 82 Mich., 573, amendments by prior provision of the Constitution took effect on January 1st after the election in the fall. The time of the election was changed to the spring, and the Court held that the amendments took effect at once, as the clear intention was that the next Legislature pass laws to meet the object to be accomplished by the change, and if this was not so, there was no reason for making the change. There was nothing in *Scholl v. Bowman,* 62 Ill., 321, to take the case out of the usual rule. No time was fixed by the Legislature for the operation of the articles separately submitted. The Court in *Boston and Colo. S. Co. v. Elder,* 20 Col. (77 Pac. Rep., 258), merely held that the amendment took effect on the date of the Governor's proclamation, and the same may be said of *City and County of Denver v. Adams Co.,* 33 Col., 11-12. In the *Florida case* (34 Fla., 500), which was an advisory opinion of the Court to the Governor of that State, there was nothing in the Constitution or the statute to take the case out of the ordinary rule, and the Court so declared.

We come now to the case of *S. v. Campbell,* 115 N. E. Rep., 29, so much relied on by counsel to sustain the position that our amendments took effect from 7 November, 1916. It is not analogous to this case, as the language of the Constitution there construed is materially different from that now under consideration. It belongs to the class of cases we already have distinguished.

The Constitution of Ohio provides absolutely that any amendment should take effect, or become a part of the Constitution, at the time of its adoption. The Court takes pains to state that, in this respect, it differs from other State constitutions where language is used that does authorize the legislatures, in the act of submission, to prescribe the time when the Constitution, or amendments thereto, shall take effect; and our Constitution is one of this kind. The only discretion given to the General Assembly of Ohio was to determine whether amendments should be submitted at a general or a special election. We rather think that *S. v. Campbell, supra,* when properly considered, in all its bearings, is an authority sustaining our conclusion.

The case of *Pemberton v. McRae,* 75 N. C., 502, would seem to be an authority for the position that the legislative body submitting the amendments may prescribe the time when they shall take effect. (681) But the question there was whether, in the absence of any time being fixed in the ordinance of submission, the Constitution of 1868 took effect at the time of its adoption by the people, or when Congress approved it, and the former date was accepted as the time, there being nothing else to prevent the application of the ordinary rule. We have

not overlooked *S. v. Am. Sugar Ref. Co.,* 68 So. Rep. (La.), 742, where the Court said: "When the people, acting under a proper resolution of the Legislature, vote in favor of calling a convention, they are presumed to ratify the terms of the call which thereby become the basis of the authority delegated to the convention." If the Legislature, in a call for a constitutional convention, can limit the subject which the convention may consider, it would seem to follow that it may, *a fortiori,* prescribe the time when a constitutional amendment submitted by it shall take effect.

It is a part of our legislative history that the act calling the Convention of 1835 imposed certain restrictions upon the subjects to be considered, which were tacitly assented to by its delegates under the lead and advice of that eminent statesman and jurist, Judge William Gaston. The act of 1874-5, calling the Convention of 1875, also limited the subjects to be acted on, to which that body gave its tacit consent. And the act of 1913, submitting amendments, which were identical with some of those now under consideration, fixed the date for them to take effect, just as has been done in the present case.

The last Legislature, it was said in the argument, had passed four hundred and two (402) acts prior to 10 January, 1917, which will be affected, one way or another, by the date on which the amendments took effect. We recite these facts to show that the legislative department of the Government has given a practical interpretation to this clause of the Constitution for many years, and while we are not bound by it, but may construe it according to our notion of what was intended, the legislative view as to what it means will not be disregarded, but allowed its proper weight. In *Hedgecock v. Davis,* 64 N. C., 650, *Chief Justice Pearson,* in referring to the meaning which the Legislature had, in a single instance, given to a section of the Constitution, said: "But suppose the matter to be doubtful; the General Assembly has put a construction upon this section which the Court does not feel at liberty to depart from, unless it be clearly wrong." Where the practical construction is opposed to the clear meaning, it will not be adopted, *Stuart v. Wrightson,* 56 N. J. L., 126, though some courts, even in such a case, have given preference to the legislative view. *Johnson v. Joliet, etc., R. R. Co.,* 23 Ill., 202; *Bingham v. Miller,* 17 Ohio, 446; *Rogers* (682) *v. Goodwin,* 2 Mass., 475; *Stuart v. Laird,* 1 Cranch (U. S.), 299. But this course may be considered as of doubtful wisdom or expediency. It is fairly well settled, however, that "the legislative construction is, under certain circumstances, of no little importance in constitutional exegesis." 6 Am. and Eng. Enc., 932; *West River Bridge v. Dix,* 6 How. (U. S.), 507; *Cooley v. Board of Wardens,* 12 How. (U. S.), 299; *Moers v. Reading,* 21 Pa. St., 1888; *Burgess v. Pue,* 2 Gill (Ind.),

11; *Faribault v. Misener,* 20 Minn., 396; *Jackson v. Washington County,* 34 Neb., 680. *Chief Justice Elliott* said substantially in *Hovey v. State,* 119 Ind., 640, that while the Court was far from asserting that the plain provisions of the Constitution may be broken down or overleaped by practical exposition, it did assert that where there are provisions not entirely clear and free from doubt, such an exposition is of great force, and it was there thought to be controlling. It is not necessary, in this case that we should go so far in our view, though we do not mean to discredit the opinion so ably expressed and fortified by that Court, but merely to keep within the bounds of the case in hand. The construction of the section now being considered has been uniform, and, in such a case, we pay great respect and deference to the opinion as to its meaning held and so expressed by the other departments of the Government, and in doubtful cases will follow it, unless plainly the wrong one; and this has been the usual course pursued by the courts. 8 Cyc., 736, and cases in notes. *Cohens v. Virginia,* 6 Wheat. (U. S.), 418, where *Chief Justice Marshall* said that great weight has always been attached, and very rightly so, to contemporaneous exposition by other departments.

The rule generally accepted is well stated in 8 Cyc., 736, as follows: "Contemporaneous and practical construction of constitutional provisions by the executive and legislative departments of the Government will be considered by the courts in passing upon constitutional questions; and while they are not bound by such constructions, except as to questions of a discretionary character, they often yield to them as matters of policy; and in doubtful cases will follow such construction as of course, unless they are clearly erroneous." In *City v. Adams Co.,* 33 Cal., 1, the Court said that a contemporaneous legislative construction of a constitution, while not conclusive upon the courts, is, nevertheless, quite persuasive. It was held in *Gill v. Comrs.,* 160 N. C., 176: "The construction of a statute by the officers charged with executing it is entitled to great consideration, especially if made by the highest officer in the executive department, or acted upon for many years, and should not be disregarded unless clearly erroneous." See, also, *Board, etc., of Winston v. Board, etc., of Forsyth County,* 163 N. C., 404.

We are, therefore, constrained to hold, not only by clear (683) precedent, but by a fair and reasonable construction of the Constitution, without the aid of it, and also by a proper yielding to the contemporaneous and continuous interpretation of the Legislature and the executive department of the State, that when the amendments were submitted to the people last November the Legislature intended, and the people understood, that the question to be considered by the voters was not merely whether they should be adopted and without qualification, but also whether, if adopted, they should take effect on 10 January, 1917

—the time when they should take effect being an essential and integral part of the question submitted to the voters. 6 Am. and Eng. Enc. (2 Ed.), p. 910.

We may say generally, before closing this opinion, that the decisions which have been cited to show that the amendments took effect on the day of election, either when the polls were closed or when the vote was then counted, refer to cases where there was nothing in the Constitution and act of submission to control the time of operation. Some of the expressions by the courts, even in these cases, give decided color to the belief that in a case of this kind the decision would have been different, and would have accorded with the views we have stated and the conclusion we have reached.

The result is that there was no error in the judgment of the court.

Affirmed.

Cited: Rankin v. Gaston County, 173 N.C. 684; *Richardson v. Comrs. of Caldwell,* 173 N.C. 685; *Woodall v. Highway Com.,* 176 N.C. 388; *Freeman v. Lide,* 176 N.C. 435; *Comrs. of Wilkes v. Pruden,* 178 N.C. 398; *Riddle v. Cumberland,* 180 N.C. 327; *Watts v. Turnpike Co.,* 181 N.C. 134; *In re Harris,* 183 N.C. 634; *Day v. Comrs.,* 191 N.C. 782; *Freeman v. Board of Elections,* 217 N.C. 69; *Valentine v. Gill, Comr. of Revenue,* 223 N.C. 399; *S. v. Emery,* 224 N.C. 583; *Perry v. Stancil,* 237 N.C. 448.

L. E. RANKIN v. GASTON COUNTY.

(Filed 30 May, 1917.)

Roads and Highways—General Statutes—Local Laws—Prospective Acts—Bonds—Constitutional Law.

Chapter 284, Laws 1917, requiring that the proposition for issuing bonds for public roads should first be approved at an election by a majority vote, is prospective in its effect, and by section 62 does not purport to repeal or modify local laws "enacted for the purpose of constructing, altering, or improving the public roads of a county." As to the time of the effectiveness of the constitutional amendments of 1916, see *Reade v. Durham, ante,* 668.

CIVIL ACTION, tried before *Cline, J.,* at Spring Term, 1917, of GASTON. Plaintiff appealed.

Carpenter & Carpenter for plaintiff.

Mangum & Woltz for defendant.

WALKER, J. This action was brought to enjoin the defendant, (684) through its board of commissioners, from issuing bonds to the amount of $100,000 for the building of necessary bridges in the county and funding and liquidating indebtedness contracted for that purpose. The court refused the injunction, and plaintiff appealed.

The same question is raised in this case, as to the time when the recent constitutional amendments took effect, as was presented in *Reade v. City of Durham, ante,* 668. We there decided that they were not of force until 10 January, 1917, and the act of the Legislature authorizing the bond issue in this case was passed 9 January, 1917. This case, in the respect mentioned, is governed by that decision.

It is contended that if the bond act is otherwise valid, the act of 1917, chapter 284, to provide for the issuing of bonds for the improvement of the public roads of the State requires that the issue of these bonds should first be approved at an election by a majority vote; but chapter 284 was evidently intended to be prospective in its operation, and does not purport to repeal or modify local acts. Section 62 of the act provides: "This act shall not be construed so as to repeal any private or local law enacted for the purpose of construction, altering, or improving the public roads of any county." The general rule is thus stated in Black on Interpretation of Laws, p. 117: "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." It was said in *Bramham v. Durham,* 171 N. C., 196, adopting the quotation from Black on Interpretation of Laws, *supra:* "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 exclude such a construction. *Rodgers v. U. S.,* 185 U. S., 83; Black on Interpretation of Laws, p. 117."

This answers the points raised in defendant's brief.

There was no error in the ruling of the court.

Affirmed.

Cited: Reade v. Durham, 173 N.C. 673; *Richardson v. Comrs. of Caldwell,* 173 N.C. 685; *Young v. Davis,* 182 N.C. 203; *Armstrong v.*

Comrs., 185 N.C. 408; *Hammond v. Charlotte*, 205 N.C. 472; *Fletcher v. Comrs. of Buncombe*, 218 N.C. 7; *Cox v. Brown*, 218 N.C. 355.

(685)

S. A. RICHARDSON v. BOARD OF COMMISSIONERS OF CALDWELL, COUNTY.

(Filed 30 May, 1917.)

(For digest, see *Reade v. City of Durham, ante*, 668, and *Rankin v. Gaston County, ante*, 683.)

CIVIL ACTION, tried before *Carter, J.*, holding the courts of the Sixteenth District, on 21 March, 1917, at chambers. Plaintiff appealed.

J. T. Pritchett for plaintiff.
Squires & Whisnant and Mangum & Woltz for defendant.

WALKER, J. This is an action brought to enjoin the defendant from issuing bonds to the amount of $50,000, the proceeds to be used for repairing and improving the public roads of the county and building a county home, and other necessary county purposes. It presents the same questions as were decided, at this term, in *Reade v. City of Durham, ante*, 668; *and Rankin v. Gaston County*, and is governed by those decisions.

There was no error in Judge Carter's ruling sustaining the bond issue. Affirmed.

Cited: Reade v. Durham, 173 N.C. 673.

HIGHWAY COMMISSION OF ELKIN TOWNSHIP v. C. N. MALONE & CO.

(Filed 30 May, 1917.)

(For digest, see *Reade v. City of Durham, ante*, 668.)

CIVIL ACTION, tried before *Shaw, J.*, at Spring Term, 1917, of BUNCOMBE. Defendants appealed.

J. F. Hendren for plaintiff.
Charles N. Malone and Manning & Kitchin for defendants.

WALKER, J. This was a controversy submitted without action, under the provisions of the statute, to determine the validity of certain bonds to the amount of $5,000, issued for public road and street purposes, by the highway commission of Elkin Township, Surry County. The defendants contracted to purchase the bonds, but there being doubt as to their validity, the matter was submitted for the decision of the court upon facts agreed.

The courts held that the bonds were valid, and entered judgment (686) accordingly. The act authorizing the issue of these bonds was passed 9 January, 1917. The single question stated for the opinion and judgment of the court is whether the recent amendments to the Constitution took effect on 7 November, 1916, or 10 January, 1917, it being the same question decided, in *Reade v. City of Durham, ante,* 668, which shows that the decision of the court in this case was correct, and this being so, we must affirm the same.

Affirmed.

Cited: Reade v. Durham, 173 N.C. 673.

WOFFORD-FAIN & CO. ET AL. v. M. A. HAMPTON AND WIFE, MATTIE J. HAMPTON.

(Filed 30 May, 1917.)

1. Venue—Actions—Statutes—Residence of Parties—Lands.

Revisal, sec. 424, providing that the venue of causes of action shall be where the plaintiffs or defendants or any of them reside, is general in its terms and subject to the provisions of Revisal, sec. 419, subsec. 1, specifying the venue for the recovery of real property or of an estate or interest therein, or for the determination in any form of such right or interest, etc., shall be in the county in which the subject of the action or some part thereof is situated.

2. Same—Creditors' Bill — Principal Relief — Deeds and Conveyances — Fraud.

Where the wife of a debtor is made party defendant in an action in the nature of a creditors' bill in order to set aside his deed to her for fraud and subject the land to the satisfaction of the demands of his creditors, the suit to establish the plaintiffs' claims will be considered as incident to the essential and controlling purpose of setting aside the deed, and the venue governed by Revisal, sec. 419, requiring that the suit be brought in the county wherein the land, etc, is situated.

3. Corporations—Venue—Statutes—Deeds and Conveyances—Fraud.

Revisal, sec. 422, is for the purpose of determining the residence of domestic corporations, and does not affect the question of the venue of an action in the nature of a creditors' bill to set aside a husband's deed to his land to his wife alleged to be fraud of the creditors' rights.

APPEAL by defendants from *Harding, J.*, at November Term, 1916, of CHEROKEE.

In the case on appeal the question is stated as follows: "This was a civil action heard before his Honor, W. F. Harding, at November Term, 1916, of Cherokee, upon the motion of the defendants for a change of venue under section 419 of the Revisal. The suit was a creditors' (687) bill. The plaintiffs ask judgment against the defendants for the amounts of their several claims and ask that a deed from the defendant M. A. Hampton to his wife, Mattie J. Hampton, his co-defendant, be set aside on the grounds set out in the complaint. His Honor held that Cherokee County, which is the residence of two of the plaintiffs, is the proper venue, although the defendants live in Clay County, and the land embraced within the deed attacked lies in Clay County, and declined to remove the case. To the ruling of the court that Cherokee County was the proper venue, and to its refusal to remove the case to Clay County, the defendants excepted and assign same for error."

W. M. Axley, E. B. Norvell and M. W. Bell for plaintiffs.
O. L. Anderson and Dillard & Hill for defendants.

HOKE, J. This is an action in the nature of a creditors' bill, instituted by several corporations as plaintiffs, two of them at least resident in Cherokee County, against M. A. Hampton and wife, Mattie J., seeking to establish their claims against the individual male defendant and to set aside a deed for land executed by said defendant to his said wife, on the ground that the same was fraudulent and void as to creditors, said defendants being resident in the county of Clay and the land being situate in that county.

It is established that, under our present system of procedure in which the principles of law and equity are administered in one and the same court, a suit of this character can be maintained by creditors and without having first reduced their claims to judgment and issued ineffective execution thereon, as formerly required. *Smith v. Summerfield,* 108 N. C., 284; *Bank v. Harris,* 84 N. C., 206. But, on the facts presented in this record, we are of opinion that the proper venue for prosecuting such a suit is in the county of Clay, and that the defendants' motion for removal should have been allowed.

In Revisal, 1905, sec. 419, subsec. 1, the portion of the statute on venue more directly relevant, it is provided that actions for the recovery of real property or of an estate or interest therein or for the determination in any form of such right or interest and for injuries to real property shall be held in the county in which the subject of the action or some part thereof is situated. And the general statute, after establishing a venue for this and other specified causes, in section 424 enacts "That in all other cases the action shall be tried where the plaintiffs or defendants or any of them reside," etc. By the express terms of the statute, therefore, this general provision is made subject to the others, and under the section localizing actions which affect real estate or determine any interest therein, this present suit, which, in its controlling purpose, seeks to declare that the *feme* defendant (688) holds no title to the property under her deed, but that the same is owned by her husband, must be instituted in the county of Clay, where the real estate is situate. While the precise question does not seem to have been as yet presented in this jurisdiction, there are many well considered decisions elsewhere, on statutes similar to our own, which directly approve the position, *Acker v. Leland,* 96 N. Y., 383; *Castleman v. Castleman,* 184 Mo., 432; *McDonald v. Asay,* 139 Ill., 123; *Krolich v. Bulkely,* 58 Mich., 407; *Campbell v. Securities Co.,* 12 Col. App., 544; and the case in this State of *Councill v. Bailey,* 154 N. C., 54, an action to enforce a specific lien on real property in the nature of a mortgage, and *Bridgers v. Ormond,* 148 N. C., 375, an action to compel delivery of a deed held in escrow on allegation of conditions performed and which, in effect, determined the ownership of realty, are in recognition of the principle.

It is urged for plaintiff that, as the suit is to establish the claims of plaintiffs as well as to set aside the deed, the action could therefore be maintained in Cherokee under section 424, two of the plaintiff corporations having their residence in that county. While plaintiffs have an undoubted right to litigate and establish their claims in this suit, and their right to do so is sometimes referred to as a separate action, it is clear that the action, in its essential and controlling purpose, is to establish the title in their debtor and to destroy that of the *feme* defendant. There is no other reason or justification for making the latter a party, and as against the husband alone there would be no right of joinder in plaintiffs against him except as it grows out of their prayer to set aside this deed and the facts alleged in support of that position. As a matter of fact, some of the claims, being under $200, are not within the original jurisdiction of the Superior Court and could not be maintained there except for the common purpose of assailing the deed. On the facts of this record, therefore, the suit to establish plaintiffs' claims may be con-

sidered as incident to the essential and controlling purpose of setting aside the deed, and should be so interpreted and dealt with in reference to our statute localizing the trial of actions affecting real property. We are referred by counsel for plaintiff to the case of *Baruch v. Long,* 117 N. C., 509, and to 5 Enc. Pl. and Pr., 438, as authorities in support of their position, that a suit to set aside a deed for fraud is not one coming within the powers of our statute localizing actions as to real estate. *Baruch v. Long* was a suit, among other things, to set aside a judgment lien, and was so decided on the ground that such a lien did not create an interest in the property within the meaning of the statute, but it does not apply to a case of this kind, where the deed purports to convey the property to *feme* defendant, and the main purpose is, as stated, to destroy her title. The citation to Pl. and Pr. seems to be in direct (689) support of plaintiffs' position, but we cannot concur in the statement of that valuable and usually accurate publication that "a suit to set aside a fraudulent conveyance of land" is not within the constitutional and statutory provisions requiring that actions affecting interest in reality shall be brought in the county where the land is situate, assuredly not in reference to statutes as broad and inclusive as our own. And an examination of the authorities cited by the author, *Vandefœr v. Furman,* 20 Texas, 333, and *Beach v. Hoezdon,* 66 Cal., 187, and others will show that the decisions are on statutes much more restricted in their terms.

The section of our Revisal, 422, to which we were also referred, is only for the general purpose of determining the residence of domestic corporations and must be construed in reference and subordination to other sections of the act establishing the proper venue for special classes of actions.

There is error in the ruling of the court, and this will be certified, to the end that the defendants' motion be allowed.

Error.

Cited: Lumber Co. v. Lumber Co., 180 N.C. 14; *Vaughan v. Fallin,* 183 N.C. 321; *Williams v. McRacken,* 186 N.C. 382; *Robinson v. Williams,* 189 N.C. 257; *Bank v. Broadhurst,* 197 N.C. 369; *Watson v. King,* 200 N.C. 9.

FRANK WALDO ET AL. v. W. L. WILSON.

(Filed 30 May, 1917.)

1. State's Lands—Grants—Regularity.

A grant is regular upon its face when the record discloses that it was duly entered and surveyed, and bonds for the purchase money filed as required by law, which was subsequently paid by the assignee of the surety of the purchaser and issued to the one under whom a party to the controversy claims title.

2. Same—Same Entry.

Where the parties to a controversy to recover lands claim under a senior and junior grant based upon the same entry, the latter may not claim that the land was not open to entry at the time; and the oldest grant will take priority unless it is successfully attacked, which cannot be done collaterally for irregularity or fraud.

3. State's Lands—Grants—Presumptions — Collateral Attack — Fraud — Trusts and Trustees.

There is a presumption that a grant of State's lands, regular on its face, is valid, required by law, has been taken, and a senior grant may be attacked for fraud by an adverse claimant, that being a matter for the State, his remedy being to have the grantee declared a trustee for his benefit.

4. State's Lands—Limitation of Actions—Adverse Possession—Diminutive Extent—Color—Grants—Deeds and Conveyances.

Occupation by an adjoining owner of a very small part of lands claimed by another, as a fiftieth part of an acre from a 640-acre tract, does not presume such adverse possession of the larger tract as will ripen title under color of a deed or grant, and the issue was, in this case, properly left to the jury under a charge of the court which was approved on appeal.

CIVIL ACTION to recover certain lands tried at September Term, (690) 1916, of GRAHAM, before *Harding, J.*, upon these issues:

1. Are the plaintiffs the owners and entitled to the possession of the lands described in the complaint? Answer: "No."

2. Is the defendant's possession of said land unlawful and wrongful? Answer: "No."

3. What damage, if any, are the plaintiffs entitled to recover? Answer:

4. Is the defendant the owner and entitled to the possession of the lands described in this answer? Answer: "Yes."

From the judgment rendered, plaintiffs appealed.

James H. Merrimon, J. S. Adams for plaintiffs.

Martin, Rollins & Wright for defendant.

BROWN, J. This action is brought to recover damages for a trespass upon a certain tract of land described as Entry No. 6317, Grant No. 8032, plaintiffs alleging that they are the owners in fee and in possession of said tract, and that defendant has wrongfully entered and cut valuable timber growing thereon. Plaintiffs further aver that defendant claims an interest in said land adverse to plaintiffs, which pretended claim of title constitutes a cloud on plaintiffs' title and prevents them from selling or disposing of the same.

The defendant denies the unlawful trespass, sets up title to and possession of the land, and pleads statute of limitations.

The plaintiffs claim the land under Grant No. 8032, dated 30 March, 1887, issued to plaintiffs on Entry 6317. Defendant claims the land under Grant 3093, dated 14 March, 1877, issued on same Entry 6317 to Joseph L. Stickney, and by mesne conveyances from him to defendant.

The plaintiffs make two contentions:

1. That the grant under which defendant claims the land is void, and that the court should have so declared.

2. That plaintiffs have been in adverse possession of the lands covered by defendant's grant or entry 6317 under color of title for more than seven years prior to commencement of this action.

We fail to see the force of plaintiffs' contention that the defendant's grant is void and that the court should have so declared.

(691) The grant appears to be regular, so far as the record discloses. The lands were duly entered and surveyed and bonds for the purchase money filed as required by law, and the purchase money paid 15 April, 1865.

There is evidence that this payment was made by the assignee of the surety of David Christy, purchaser, and the grant issued to Joseph L. Stickney under whom the defendant claims in pursuance of such payment and assignment.

It cannot be denied by plaintiff that the land was open to entry and that the entry was legal, for he bases his grant upon the same entry. As the defendant's grant is oldest and based upon the same entry, it will take priority unless it is successfully attacked, and that cannot be done collaterally, as is now attempted. A grant cannot be attacked collaterally for fraud *or irregularity.* There is a presumption that a grant is valid and that all preliminary steps have been taken which are required by law. *Westfelt v. Adams,* 159 N. C., 420.

The rules regulating the issue of patents by the State are directory, and a compliance with them is presumed. As said by *Chief Justice Marshall:* "That every prerequisite has been performed is an inference properly deducible and which every man has a right to draw from the

existence of the grant itself." *Polk v. Wendal,* 9 Cranch (U. S.), 87; *Stanmire v. Powell,* 35 N. C., 312; *Janney v. Blackwell,* 138 N. C., 439.

It is true that a junior grantee may collaterally attack a senior grant in cases where the land was not open to entry and grant at the time the senior grant was issued, but both grants were issued on same entry, and if the land was not open to entry when entered, both grants would be void. This could not help plaintiffs, for the burden is on them to show a valid title to the land.

There are no allegations of fraud set out in the complaint, and if there were, plaintiffs could not attack the issuing of the senior grant for fraud. That is a matter for the State. *Crow v. Holland,* 15 N. C., 417; *Henry v. McCoy,* 131 N. C., 586.

If plaintiffs ever had a remedy against defendant it was an action based upon proper pleadings to have defendant declared a trustee for their benefit, and such action must have been brought within ten years of registration of the senior grant. *Ritchie v. Fowler,* 132 N. C., 789; *McAden v. Palmer,* 140 N. C., 259.

His Honor properly instructed the jury that although plaintiffs' grant was junior, it was good as color of title, and that if plaintiffs had been in adverse and continuous possession, open and notorious, of the land covered by it for seven years preceding the commencement of the action they should find the first issue for them.

It must be admitted that the evidence of adverse possession is (692) not very satisfactory, but as the judge submitted it to the jury, and they found against plaintiffs, we are not called upon to pass on its sufficiency.

There was evidence that plaintiffs' cattle in varying numbers ranged over the land covered by 6317 and upon any other uninclosed lands, and that the cattle and hogs of others ranged over same lands. The lands were not fenced, and the cattle ranged at will. Also, that plaintiffs cut some timber on those lands and put up some trespass notices. There was also evidence that said entry adjoins Entries 376 and 1002, both older than 6317, and that plaintiffs had a valid title to the lands covered by them.

There was evidence offered by the plaintiff tending to show that if the line of 376 was located as surveyed by the witness Denton, then a portion of a field cleared in 1895 and used by the plaintiffs' tenant extended over into Entry 6317, and covered a very small portion thereof, estimated by one witness to be one twenty-fifth of an acre; and there was further evidence that if the line of 376 was located as surveyed by the witness Crisp, then about one-fiftieth of an acre of the field along 376 and 1002 extended over into 6317. There was evidence of a marked line running between Entry 1002 and Entry 376, and then extending on north be-

tween Entry 376 and Entry 6317 to a black oak a short distance west of a corner of Entry 376 as laid down on the plat, and that if this marked line was the true line of 376, then no part of the field referred to was situated on 6317.

The plaintiffs' witnesses describe No. 6317 as "a rough mountain land, most of it being open woods. It is a well timbered tract and not suitable for agricultural purposes."

We do not think the actual possession of so minute a part of a 640 acre tract as the little clearing described by plaintiffs' witness Denton was of itself necessarily notice to defendant that plaintiffs claimed adversely the entire tract.

The possession of this little clearing may have been accidental, or unintentional, growing out of some error in running the division line, and with no purpose to claim title to the whole. If so, such possession would not be adverse and would not constitute a disseisin. *Parker v. Banks,* 79 N. C., 480; *Snowden v. Bell,* 159 N. C., 497.

Upon this evidence the court properly and clearly instructed the jury as follows:

"If the jury find from the testimony that the plaintiffs' alleged possession of the small field near the corner of 1002 extended to the extent of one-twenty-fifth part of an acre or less into the boundary of 6317, and the jury further find that such possession of the plaintiffs was accidental or unintentional, and taken and held with no intent and purpose (693) to claim title to the lands in controversy by reason of such possession, then they will find that such possession was not adverse to the defendant nor sufficient to vest title in the plaintiffs to the land in dispute.

"When two persons own adjoining land and one runs the fence so near the line as to induce the jury to find that any slight encroachment was inadvertently or unintentionally made, and that it was the purpose to run the fence on the line, the possession constituted by such inclosure may be regarded as permissive, and not adverse even for the land inside the inclosure. (*Green v. Harman,* 15 N. C., 163.)

"If the possession taken by the plaintiffs under their claim of title at or near the corner of 1002 was of a portion of the lands covered by the defendant's paper title so very minute that the true owner in the exercise of ordinary diligence might remain ignorant that such possession included his land, or might fairly mistake the character of the possession and the intention of the occupants, then the jury may, if they are so satisfied from all the evidence, find that such possession of so small a part of the land in dispute was not adverse to the true owner.

"If you find from the testimony and by its greater weight that the extent of the possession of the plaintiffs and their agents, if any posses-

sion they had of any part of the land covered by Entry 6317 at or near the corner of Entry 1002 was so limited or small as to afford a fair presumption that the plaintiffs' agents and tenants mistook their boundaries or did not intend to set up a claim within the lines of the grant or deeds under which the defendant Wilson claims, then you would be justified in finding that such possession was not adverse."

It is well settled that where the possession is so limited in area as to afford a fair presumption that the party mistook his boundaries and did not intend to set up a claim within the lines of the other's deed, it is proper ground for presuming that the possession is not adverse. *Bynum v. Carter,* 26 N. C., 310, 314; *King v. Wells,* 94 N. C., 344; *Green v. Harman,* 15 N. C., 158; *McLean v. Smith,* 106 N. C., 172, 181; *Currie v. Gilchrist,* 147 N. C., 654.

The contentions of the plaintiffs upon this feature of the case were clearly stated to the jury, but it is unnecessary to quote more fully to show that the court correctly understood and charged the nature and legal effect of such limited possession.

We have examined the fifty-two exceptions assigned as error, and we find nothing to justify another trial.

No error.

Cited: Gibson v. Dudley, 233 N.C. 258.

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(694)

N. R. McHAN v. J. H. DORSEY.

(Filed 30 May, 1917.)

Deeds and Conveyances—Mortgages—Registration—Simultaneous Filing—Priorities.

It is required for a valid filing of a mortgage that it be delivered at the register of deeds' official office, and until then it can acquire no priority over one theretofore executed; and where two mortgages given to different persons on the same subject-matter are delivered to the register of deeds out of his official office, carried by him to that place and marked by him filed at the same time, the filing and registration are regarded as being simultaneous, and the mortgage first executed will have priority of lien.

CIVIL ACTION to recover a horse, tried at October Term, 1917, of SWAIN, before *Harding, J.*

From a verdict and judgment for plaintiff, defendant appealed.

Bryson & Black for plaintiff.

Frye & Frye, F. H. Woodard, Manning & Kitchin for defendant.

BROWN, J. Upon the undisputed and admitted facts the judge should have held that the plaintiff is not entitled to recover.

The mortgage under which plaintiff claimed the horse was dated 23 April, 1914. To this mortgage was appended the certificate of the register of deeds of Swain County, which contained the notation "Filed for registration at 9 o'clock a.m., 28 April, 1914, and recorded 28 April, 1914, in book 11, page 110, *et seq.*"

The defendant claimed that his right to the horse was superior to that of plaintiff, for the reason that the mortgage under which he had purchased antedated the plaintiff's mortgage, and that although it bore the same notation as to filing and registration, to wit, at 9 o'clock a. m., 28 April, 1914, that it had been placed on record by the register prior to the actual registration of the plaintiff's mortgage.

All the evidence shows that both the mortgages were delivered to the register outside of his official office, and that he carried them both to the office at once and entered the date of filing as above set out and recorded defendant's mortgage first.

To constitute a valid filing for record, the instrument must be delivered at the register's office, where the law requires it to be filed. The delivery of these mortgages to the register of deeds outside of the register's office was not a filing. The filing took place when that officer carried them within the office and made the notations. 34 Cyc., p. 587.

It therefore appears that the filing and registration was simultaneous, and the judge should have so instructed the jury.

(695) The registration being simultaneous, the defendant is entitled to the horse, as the mortgage under which he purchased the animal was executed and delivered prior in date to plaintiff's mortgage.

Where the registration is simultaneous, the first mortgage will be given priority. The only way a second mortgage can acquire priority over a first mortgage is by showing that his mortgage was duly filed for record first.

New trial.

MRS. ADELL MIZELL v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 21 February, 1917.)

CIVIL ACTION, tried before *Whedbee, J.*, at August Term, 1916, of WASHINGTON. Defendant appealed.

This is an action in which the plaintiff recovered $75 damages because of the unreasonable delay of the defendant in transporting her as a passenger from Hoke Station to Plymouth and on account of the failure

of the defendant to supply her with sufficient and proper accommodations while in its station at Mackeys Ferry, in which she was detained several hours.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Ward & Grimes for plaintiff.
Small, MacLean, Bragaw & Rodman for defendant.

PER CURIAM. There was ample evidence to sustain the verdict in favor of the plaintiff, and the judgment of nonsuit was properly overruled.

We have examined the other exceptions, and find nothing in them which would justify a new trial or which require discussion.

The son of the plaintiff, about 8 years of age, accompanied the plaintiff at the time of her injury, and he instituted an action in which he recovered $25, and as the same questions arise, the same disposition is made of the appeal in the action in which he is the plaintiff.

No error.

(696)

MARY GODFREY v. ELIZABETH CITY.

(Filed 21 February, 1917.)

Municipal Corporations—Cities and Towns—Negligence—Evidence—Trials—Nonsuit.

Evidence that a city maintained a drainway 18 inches deep across its street in an unfrequented section, then being developed, without description as to its construction, and which was covered by a bridge a greater part of the distance, is not of itself sufficient showing of actionable negligence on the part of the city to sustain a verdict for damages for a personal injury sustained there.

CIVIL ACTION, tried before *Whedbee, J.*, at September Term, 1916, of PASQUOTANK.

This is an action to recover damages for physical injury caused by the alleged negligence of the defendant in failure to keep one of its streets in proper repair and sufficiently lighted.

At the close of the plaintiff's evidence, on motion of the defendant, there was judgment of nonsuit, and the plaintiff excepted and appealed.

W. L. Cohoon and Ward & Thompson for plaintiff.
Thomas J. Markham for defendant.

PER CURIAM. We have carefully examined the evidence and are of opinion that giving it the most favorable construction for the plaintiff, there is no evidence of negligence unless we hold that maintaining a drainway 15 or 18 inches deep, in an unfrequented section of the city, which was then being developed, without further description as to how it is constructed, which runs across the street and is covered by a bridge a greater part of the distance, itself establishes negligence, which we cannot do.

Affirmed.

J. F. RICKS v. ATLANTIC COAST LINE RAILROAD.

(Filed 21 February, 1917.)

Railroads—Depots—Bad Condition—Negligence—Trials—Evidence—Nonsuit—Questions for Jury.

In an action against a railroad company to recover damages for the negligent killing of plaintiff's horse, there was evidence tending to show that the plaintiff had driven on defendant's premises to unload fertilizer and his horse stepped upon a nail in a plank covered by mud and water, owing to the bad condition of the place, immediately resulting in lockjaw, from which the horse died: *Held*, sufficient to take the case to the jury upon the issue of defendant's actionable negligence.

(697) CIVIL ACTION, tried at October Term, 1916, of BEAUFORT, before *Whedbee, J.*, upon these issues:

1. Was plaintiff's horse killed by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

2. Was plaintiff guilty of contributory negligence as alleged in the answer? Answer: "No."

3. What damages, if any, is plaintiff entitled to recover of defendant? Answer: "$300."

From the judgment rendered, the defendant appealed.

Stewart & Bryan for plaintiff.

Small, MacLean, Bragaw & Rodman for defendant.

PER CURIAM. The defendant moved for a judgment of nonsuit: first, upon the ground that there is no sufficient evidence of negligence; second, that the negligence was not the proximate cause of the injury.

The evidence tends to prove that the plaintiff drove his double team, consisting of a horse and a mule, upon the premises of the defendant company up to a car for the purpose of unloading fertilizer. His horse stuck a nail in its foot, from which lockjaw ensued, causing its death.

The nail was sticking up through a piece of plank under water and could not be seen by the plaintiff.

The mere fact that a horse stuck a nail in its foot upon the premises of the defendant would not be sufficient evidence to hold the defendant guilty of negligence, taken by itself; but the evidence in this case tends to prove that there was mud and water over the yard, and trash, and "that the general condition of the yard was bad." We think this evidence entitled the plaintiff to go to the jury, and that the question of negligence was submitted in a proper charge by the court.

We fail to see any force in the contention that the evidence does not indicate necessarily that the horse died from the effects of the nail in its foot. The testimony proves that the horse had lockjaw immediately; that this lockjaw was caused by getting a nail in its foot; that the animal was treated for lockjaw and lived about nine days and died. We are of opinion that there was no error.

No error.

(698)

PICKERELL & CRAIG COMPANY v. WHOLESALE COMPANY.

(Filed 21 February, 1917.)

CIVIL ACTION, tried before *Allen, J.*, at November Term, 1916, of WILSON.

Defendant appealed.

F. J. Swindell for plaintiff.

F. S. Hassell for defendant.

PER CURIAM. This case was before us at a former term, 169 N. C., 381. At the last trial, when the judgment from which this appeal is taken was rendered, the court seems to have followed the principles stated in the first appeal, and we see no substantial error in the case. The exceptions are taken mostly to questions of evidence, but neither party appears to have been really prejudiced by that which was admitted, or by any of the rulings. *Young v. Mfg. Co.*, 151 N. C., 272. A fair opportunity was given to present the case on both sides, and we must decline to disturb the judgment.

No error.

MARTHA H. LEGGETT, EXECUTRIX OF JAMES D. LEGGETT, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 28 February, 1917.)

Appeal and Error—Instructions—Harmless Error.

In this action against a railroad company to recover damages for a death alleged to have been caused by the defendant's negligence involving the usual issues, the principal negligence relied on was the defendant's failure to properly light its depot, which the jury answered in the negative under a charge free from error, and construing the charges as a whole, it is *Held*, that the court's reference to certain matters affecting the second issue, as to contributory negligence, was not reversible error to the plaintiff's prejudice.

CIVIL ACTION, tried before *Daniels, J.*, and a jury, at June term, 1916, of MARTIN.

The cause was before this Court on a former appeal by plaintiff from a judgment of nonsuit in the Superior Court, the judgment being set aside here, and the general facts tending to fix responsibility on defendant will be found stated in the opinion on that appeal, reported in 168 N. C., 366.

(699) The opinion having been certified down, the cause was tried, as stated, before Judge Daniels and a jury, on the three ordinary issues in suits of this character:

1. Was the death of plaintiff's testator caused by the negligence of defendant company?

2. If so, did deceased, by its own negligence, contribute to the injury?

3. What damages is plaintiff entitled to recover?

Both sides offering testimony, the court charged the jury, who rendered their verdict on the first issue, "No."

Judgment for defendant, and plaintiff excepted and appealed.

Critcher & Critcher, Winston & Biggs, Wheeler & Martin, and Winston & Matthews for plaintiff.

F. S. Spruill and H. W. Stubbs for defendant.

PER CURIAM. We have carefully considered the record and the exceptions noted, and are of opinion that the cause has been tried in substantial accord with the principles laid down in the former appeal, and that no reversible error has been shown. The reference of the court, in the charge on the first issues, to certain facts in evidence tending to establish contributory negligence should not be allowed to affect the result. The principal negligence alleged against the defendant was a failure of the defendant to provide adequate lights at the station where

the testator was present as a passenger, intending to take its next schedule train, and the court, in such clear and explicit terms, instructed the jury, and more than once, that if there was negligent breach of duty in this respect, and such negligence was the proximate cause of testator's death, to answer the issue "Yes," that the jury could not possibly have been misled, and the reference suggested, if mistaken, should not be held for reversible error.

It has often been held with us: "The charge to a jury must 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 presents the law fairly and correctly, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous." *Kornegay v. R. R.*, 154 N. C., 389; *S. v. Exum*, 138 N. C., 600; and considering the record and charge in the light of this recognized and wholesome principle, we are of opinion, as stated, that no prejudicial error appears and the cause has been correctly tried.

No error.

Cited: S. v. Wentz, 176 N.C. 749; *Milling Co. v. Highway Com.*, 190 N.C. 697; *Pulverizer Co. v. Jennings*, 208 N.C. 235; *Ryals v. Contracting Co.*, 219 N.C. 495.

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(700)

R. Q. BROWN v. S. C. TAYLOR.

(Filed 28 February, 1917.)

Appeal and Error—Service of Case—Extension of Time—Written Agreement—Unanswered Affidavit.

The ruling that a *certiorari* will not be allowed in the Supreme Court to bring up a record on the ground that the agreement to extend the time for serving case was not reduced to writing, has no application where the applicant files his affidavit to the effect that the time had been extended and the case served therein, and it is not denied by counter affidavit; and motion to dismiss the appeal will be denied.

W. S. O'B. Robinson & Son for plaintiff.
Langston, Allen & Taylor, and Stevens & Beasley for defendant.

PER CURIAM. The plaintiff moves in this Court to strike out from the record the case on appeal on the ground that it was not served in time, and to affirm the judgment. The defendant moves for a *certiorari* in order that the case on appeal may be settled, and filed affidavits show-

ing an agreement of one of the counsel for the plaintiff extending the time for service of case on appeal.

No affidavit of counsel with whom the agreement is alleged to have been made has been filed.

The motion of the plaintiff is denied and the motion for a *certiorari* is allowed because, while we will not pass on affidavits and determine whether an oral agreement which is denied has been made we do consider affidavits showing an agreement, which are uncontradicted. *Sondley v. Asheville,* 112 N. C., 694.

The plaintiff is allowed twenty days after this opinion is certified to the Superior Court to serve his case on appeal, or exceptions to the defendant's case.

Cited: Justice v. Lumber Co., 181 N.C. 391.

MARY VAN DYKE v. ÆTNA LIFE INSURANCE COMPANY.

(Filed 7 March, 1917.)

Insurance, Life—Beneficiaries—Conflicting Claimants—Payment Into Court—Parties—Release.

Where an insurance company admits its liability on a policy matured by the death of the insured, and therein made payable to his children, and the insured has left a will appointing his wife his executrix and directing that his debts be paid out of its proceeds, and in an action thereon all the parties in interest are before the court, the payment into court of the moneys due under the policy will protect the insurer, and render immaterial the question as to the rightful beneficiaries, so far as it is concerned.

(701) CIVIL ACTION, tried before *Cooke, J.,* at October Term, 1916, of VANCE.

This is an action to recover upon an insurance policy issued upon the life of Robert L. Van Dyke, and payable to his children.

The said Robert L. Van Dyke died in 1916, leaving a will in which he bequeathed the money arising from the insurance to his wife for the payment of his debts, and appointing his wife his executrix.

The wife is a party to the action individually and as executrix, and all of the children of the said Robert L. Van Dyke are also parties.

The defendant insurance company does not deny its liability, but contends that the money arising from the insurance ought to be paid to the children and not to the executrix.

Judgment was rendered in favor of Mary Van Dyke, and the defendant insurance company excepted and appealed.

The children were duly represented, and do not appeal.

T. T. Hicks for plaintiff.

J. H. Bridgers for defendant.

PER CURIAM. All persons who have any interest in the insurance money for which the defendant is liable are parties to this action and are bound by the judgment, and it follows that the defendant will be fully protected by the payment of the money, which it admits to be due.

As was said in *Hocutt v. R. R.*, 124 N. C., 217, the probability of a controversy between the wife and the children does not concern the defendant.

It is therefore unnecessary to consider the questions discussed in the briefs as to the right of the insured to change the beneficiary by his will.

Affirmed.

Cited: Surety Corp. v. Sharpe, 236 N.C. 44.

A. C. HOUSE v. R. B. BOYD, ET ALS.

(Filed 7 March, 1917.)

1. Issues—Pleadings—Appeal and Error.

When the issues submitted relate to the disputed matter arising from the pleadings, whereunder all competent evidence can be submitted to the jury for their determination, they are sufficient.

2. Courts—Recall of Witness—Discretion—Appeal and Error.

The permission by the court for a party to recall a witness who has already testified is within the sound discretion of the trial court, and is not reviewable on appeal unless it has been grossly abused.

3. Principal and Agent—Commissions—Evidence—Trials—Questions for Jury.

In this action to recover agent's commission under contract for the sale of timber, it is *Held*, that the evidence of agency, and that of the efforts of the alleged agent to sell the timber, were sufficient; as to the former, of the fact of agency, and as to the latter, that the agent's acts were the efficient cause of the sale, and that he performed his contract.

CIVIL ACTION, tried at August Term, 1916, of HALIFAX, before (702) *Winston, J.*, upon these issues:

1. Was plaintiff the agent of the defendants in procuring the memorandum of 4 January, 1913, called the Palmer Camp contract? Answer: "Yes."

2. If he was not, did the defendants ratify the said contract of 4 January, 1913? Answer:

3. Was the plaintiff the agent of the defendants in the sale of the timber described in the complaint and on the terms therein stated? Answer: "Yes."

4. Did plaintiff contract with defendants to sell and estimate the timber in question as the agent of the defendants? Answer: "Yes."

5. If so, did the plaintiff render all the services to defendants called for in the contract with the defendants? Answer: "Yes."

6. What necessary and reasonable expense did defendants incur in estimating the said timber which plaintiff agreed to pay? Answer: "None."

7. What sum, if any, is plaintiff entitled to recover of the defendants? Answer: "$2,000."

From the judgment rendered, defendants appealed.

G. E. Midyette, Peebles & Harris, W. L. Knight, W. E. Daniel for plaintiff.

T. T. Hicks, Tasker Polk, George C. Green for defendants.

PER CURIAM. The foundation of plaintiff's cause of action is an alleged agreement by defendants to pay him a commission of three-eighths of all the purchase price over $30,000 for effecting the sale of standing timber on the lands purchased by defendants from G. E. Ransom.

The defendants excepted to the issues submitted and tendered other issues.

(703) We think the issues submitted present for decision of the jury such disputed matters of fact as arise upon the pleadings and not upon the evidence. When such is the case, objection will not be entertained to the mere form in which issues are submitted. If the issues are so formulated that each party to the action can introduce pertinent and competent evidence upon any material matter in controversy, and put at issue by the pleadings, they are sufficient. Clark's Code, ch. 2, pp. 311-393.

The defendants excepted to the introduction of the deposition of P. D. Camp, upon what ground we are not informed in the brief. We see no irregularity set out in the record, and the objection was properly overruled.

Defendants except to the court allowing the recall of plaintiff for further examination.

This is a matter resting in the sound discretion of the court, and not reviewable unless grossly abused, as has been repeatedly held by this Court. The defendants moved to nonsuit at close of the evidence. The motion was properly overruled.

The evidence of plaintiff, taken in its most favorable light for him, tends to prove that the defendants purchased the land and timber from G. E. Ransom for $60,000; that they contracted with one Palmer and plaintiff to sell the timber on the land; that the final and last agreement was to pay Palmer two-eights and plaintiff three-eights of the purchase money received for the timber over and above $30,000. The evidence tends to prove that the timber was sold to P. D. Camp, trustee, and the Camp Manufacturing Company, and $39,007.44 received by the defendants therefor.

It is earnestly contended that plaintiff was not the agent of defendants in the sale of the timber and not an efficient cause in effecting the sale. There is evidence upon the part of plaintiff disclosing his efforts to sell the timber, from which the jury had a right to infer that he materially assisted in effecting a sale of the timber and that he fully performed the agreement upon his part.

There are no assignments of error relating to the evidence, but quite a number to the charge and to the refusal of the court to give certain prayers for instruction. We have examined the charge as applied to each issue and think the learned judge presented the case to the jury fully and clearly and with perfect fairness to both plaintiff and defendants.

The whole controversy seems to be largely one of fact, and in the trial of it we find

No error.

Cited: House v. Boyd, 222 N.C. 35.

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(704)

J. H. LEE v. A. J. MELTON.

(Filed 7 March, 1917.)

Landlord and Tenant—Sale of Crop—Landlord's Consent—Contracts.

In an action against a tenant to recover damages for his failure to deliver a crop under his contract of sale, the defense that the tenant had not settled with his landlord, and that the contract was therefore illegal, is

not available, when it is shown that the landlord had consented to the sale and had thereafter taken possession of the crop at the tenant's request.

CIVIL ACTION, tried before *Daniels, J.*, at October Term, 1916, of HERTFORD.

This is an action to recover $30.22 damages for failure to deliver certain peanuts according to contract.

The action was heard in the Superior Court on appeal from a justice of the peace, and the plaintiff was there awarded $6.95 damages, and the defendant appealed.

It was in evidence that the defendant was a tenant of one Weaver at the time the contract of sale was made, and that the peanuts were raised on the land of Weaver.

No counsel for plaintiff.
Roswell G. Bridger for defendant.

PER CURIAM. The principal exception relied on by the defendant is to the refusal of his Honor to charge the jury that the plaintiff could not recover because of the illegality of the contract, in that the defendant was a tenant and had not settled with his landlord and had no right to sell or remove the peanuts.

We find, however, that his Honor gave the defendant the full benefit of the principle for which he contends.

He charged the jury, among other things, as follows:

"Ordinarily a tenant has no right to sell any part of the crop until he has paid his rents and advances; and a person making a contract with him to buy, knowing that he is a tenant and knowing that rents and advances had not been paid, could not enforce such a contract. The contention of the plaintiff is that the landlord consented that the tenant should deal with those peanuts.

"The plaintiff contends that the landlord consented; that he had been his tenant for some years, and had been in the habit of selling the
(705) peanut crop, and this year he was selling the peanuts just as he had been doing before, and the landlord says he made no objection, and the reason the landlord took charge was because the tenant asked him.

"If you are satisfied from the testimony and by its greater weight that the tenant had the consent of the landlord to sell the peanuts, then you are to disregard their relations as landlord and tenant."

There was evidence tending to prove that the landlord had given his consent to the sale by the defendant, and it was only upon this view of the case that his Honor permitted the recovery by the plaintiff.

There is

No error.

MISSOURI WHITE v. NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 14 March, 1917.)

Carriers of Passengers—Negligence—Schedules—Local Agent.

The liability of the defendant railroad company in this case is held the result of the local agent misdirecting the plaintiff as to train schedules.

PETITION to rehear this case, reported 172 N. C., 31.

I. M. Meekins for plaintiff.

C. M. Bain, J. Kenyon Wilson, W. B. Rodman for defendant.

PER CURIAM. In the petition to rehear this case it is said: "The amount of money involved in this appeal is very little, and if that was all that was involved, this company would not have appealed the case to this Court. The real question is one that is vital to the proper operation of trains in the real interest of the traveling public; that question is this: May any and all local agents of railroads abolish or change the published schedules of its trains?"

We think the learned counsel for defendant have misconstrued our opinion. We have not decided that local agents of railroads may abolish or change the published schedules of trains. The decision in this case is made to rest exclusively upon the unwarranted negligence of the defendant's agent in misdirecting plaintiff in respect to the schedules of its trains. A cursory reading of the opinion, we think, makes that manifest.

Petition dismissed.

(706)

MRS. LENA FORBES ET AL. v. W. A. SAVAGE, GUARDIAN.

(Filed 14 March, 1917.)

Descent and Distribution—Collateral Relation—Blood of Ancestor.

Held, collateral relations to inherit lands must be of the blood of the ancestor who died seized and possessed thereof, and the judgment below in this case is affirmed under authority of *Noble v. Williams*, 167 N. C., 112.

CIVIL ACTION, tried before *Stacy, J.*, at January Term, 1917, of PITT.

This is an action to determine the rights of the parties to certain money derived from the sale of land. The facts are stated in full in the judgment, which is as follows:

This cause coming on to be heard, before W. P. Stacy, judge presiding, at January Term, 1917, of Pitt Superior Court, and being heard on the following agreed facts:

1. That W. L. Anderson married Laura Smith, and as the result of said marriage four children were born, to wit, Louis Anderson, Ella Anderson, Georgia Anderson, and Lena Anderson.

2. That after the birth of said children the said W. L. Anderson died, and at the time of his death owned a tract of land, known as "The 285-Acre Tract," leaving surviving him the above named four children and the widow, Laura Anderson.

3. That after the death of W. L. Anderson, his widow, Laura Anderson, married W. A. Savage, and to them were born Juanita Savage, the petitioner in this case.

4. That after the death of said W. L. Anderson, as above named, the said Ella Anderson, one of the survivors of W. L. Anderson, married one Tucker, and died intestate, leaving no children or child or issue of such.

5. That the children now surviving W. L. Anderson, to wit, Louis Anderson, Lena Anderson Forbes, and Georgia Anderson Gilbert, have in this special proceeding (Louis Anderson being a *non compos mentis* acting through his next friend, C. C. Pierce) effected a sale of the said land described in the petition; that W. A. Savage in behalf of his ward, Juanita Savage, did not oppose the sale of the same, but asks that one-sixteenth of the funds arising from the sale of the said land be held for her, to be paid to her if the court shall decide that she is entitled to the same, but if the court should decide that she is not entitled to it as heir at law of Ella Anderson Tucker, then that it shall be turned over to the original petitioners herein.

It is now, therefore, ordered, adjudged and decreed that Juanita Savage is not an heir at law of Ella Anderson Tucker; that she
(707) has no interest in the tract of land described in the pleadings, or fund arising from the sale thereof; that said one-sixteenth being held to abide the claim of Juanita Savage be delivered to the said Louis Anderson, Georgia Anderson Gilbert, Lena Anderson Forbes, heirs at law of Ella Anderson Tucker. That Juanita Savage take nothing by this action; and that original petitioners recover their costs of the said guardian, to be taxed by the clerk of this court.

W. P. STACY,
Judge Superior Court, Presiding.

The defendant excepted and appealed.

F. M. Wooten for plaintiffs.
S. J. Everett for defendants.

PER CURIAM. The judgment is affirmed on the authority of *Noble v. Williams,* 167 N. C., 112.

Affirmed.

Cited: Ex Parte Barefoot, 201 N.C. 397.

PERCY McGEORGE v. F. F. NICOLA ET AL.

(Filed 14 March, 1917.)

1. Reference—Independent Findings—Evidence—Appeal and Error.

The referee's findings of fact, upon legal evidence, approved and accepted by the court, and the court's independent findings of fact, upon legal evidence, are not reviewable on appeal.

2. Reference—Exceptions Sustained—Evidence—Greater Weight—Appeal and Error—Presumptions.

Where an action to recover lands, involving the location thereof under State's grants, is referred, and the judge sustains plaintiff's exceptions to the report, which states the facts on which they are based, it will be presumed that the judge found the statement of facts as true, by the greater weight of the evidence; and where there is supporting evidence, his action is not reviewable on appeal.

CIVIL ACTION, from McDOWELL, heard by *Justice, J.,* at chambers by consent, 23 March, 1916, upon exceptions to the report of a referee.

Pless & Winborne and S. J. Ervin for plaintiff.
W. B. Councill, Avery & Ervin for defendants.

PER CURIAM. Plaintiff sued for the recovery of a large body of land, containing about 10,000 acres, claimed under several grants from the State. The defendants denied the plaintiff's title, which involves the question of the location of the several State grants and mesne (708) conveyances which cover the *locus in quo.* After the pleadings were filed and the issues were raised, the case was by consent referred to Hon. W. D. Turner of Statesville, N. C., and after taking evidence and hearing counsel for both plaintiff and defendant, the referee, on 25 November, 1915, filed his report, which is set out in the record. The plaintiff filed exceptions to the report of the referee, both as to the findings of fact made by him and to his conclusions of law. Defendant also filed exceptions to the report of the referee, both as to the facts found by the referee and as to his conclusions of law. Upon the exceptions filed by

plaintiff and defendant the case was heard by Judge Justice, with the consent of the parties, at chambers in Rutherfordton, N. C., on 23 March, 1916, and upon the hearing the exceptions filed by the plaintiff were sustained and those filed by the defendant were overruled and judgment rendered in favor of the plaintiff, as appears in the record, the material part of which is as follows: "It is considered, ordered, and adjudged that the plaintiff's exceptions to the findings of fact set out in said report numbered from one (1) to fourteen (14), both inclusive, and plaintiff's exceptions to the conclusions of law set out in said report numbered from one (1) to three (3), both inclusive, be and the same are hereby sustained, and that said report be and the same is amended in accordance with said exceptions. It is further considered, ordered, and adjudged that the defendant's exceptions to said report be and the same are hereby overruled, except in so far as the same are sustained by the foregoing order sustaining the plaintiff's exceptions. It is further considered, ordered, and adjudged that the report of the said W. D. Turner, referee, be and the same is in all respects approved and confirmed, except in so far as the same is modified by the order sustaining the plaintiff's exceptions thereto and by this judgment. It is further considered, ordered and adjudged that Percy McGeorge, plaintiff, is the owner of and entitled to the possession of the said land described in the complaint, and that the defendants have no title to any of the lands described therein, and that the claim asserted thereto by the defendants is not sustained and constitutes a cloud thereon, and that said defendants be and they are hereby enjoined and restrained from asserting any claim thereto. It is further considered, ordered, and adjudged that the plaintiff recover of the defendants and the surety on their defense bond the cost of this action, to be taxed by the clerk."

The defendants filed numerous assignments of error based upon exceptions previously entered by them to the referee's report, and also upon the rulings of the judge upon the exceptions of both parties
(709) thereto. Many of these assignments are framed substantially alike, and it will be necessary to state only three of them, the first being correct types of all the others except the last of them now set forth.

The defendants assign as errors, and as ground of exception to the judgment, the following:

"1. Error in sustaining No.....of plaintiff's exceptions to the report of the referee, and the attempted amendment to the report in accordance therewith, on the ground that said exception is not warranted or sustained by the evidence or the law applicable thereto.

"2. Error in overruling No..... of defendant's exceptions to the report of the referee on the ground that the said exception was warranted

by the evidence and the law applicable thereto as set out in said exception.

"3. Defendants further assign error in said judgment in that while the rulings of the court on plaintiff's exceptions are tantamount to holding that there was some evidence to be considered by the referee tending to establish the contentions of the plaintiff, the court fails to find that the grants of the plaintiff have been located by the greater weight of the evidence so as to vest title in the plaintiff to the land described in said grants, and fails to find any facts to warrant said judgment."

There are a few exceptions to conclusions of law, but we think they are really involved in the other exceptions and raise the question whether there was any evidence to sustain the location of the land as claimed by the plaintiff.

We have often held that when a case is heard upon exceptions to a referee's report and his findings of fact are accepted and approved by the judge upon evidence that tends to support them, we will not review the judge's findings in this Court. As said in *McCullers v. Cheatham,* 163 N. C., 63: "The misfortune of defendants in this case is that the referee has found all the essential facts against them, and when these findings were reviewed and approved by the judge, upon consideration of the report and exceptions, there being evidence to warrant them, we are precluded from changing the report in this respect, but must decide the case upon the findings of fact as made by the referee and approved by the court. . . . We will not review the referee's findings of fact, which are settled, upon a consideration of the evidence, and approved by the judge, when exceptions are filed thereto, if there is some evidence to support them." This was approved in *Spruce Co. v. Hayes,* 169 N. C., 254, and applies to those rulings in which the judge has approved the referee's findings. It also applies to the judge's independent findings and to such as he made when overruling those of the referee. We adopt the facts as stated in the final judgment, if there is any evidence to support them. *Adickes v. Drewry,* 171 N. C., 667; *Sturtevant v. Cotton Mills,* 171 N. C., 119; *Usry v. Suit,* 91 N. C., 406; *Buie v.* (710) *Kennedy,* 164 N. C., 290; *Lumber Co. v. Lumber Co.,* 169 N. C., 80; *Henderson v. McLain,* 146 N. C., 329; *Baggett v. Wilson,* 152 N. C., 182; *Bailey v. Hopkins, Ibid.,* 750. This disposes of nearly all of the exceptions, as we think there is evidence upon which the findings of the judge can well be based.

It is conceded in the third of the assignments above set out (No. 44 in the record, it being the last one of all) that "the rulings of the court are tantamount to a holding that there was some evidence to be considered by the referee tending to establish the plaintiff's contentions." We have said that this "holding" of the court was correct. The defend-

ants further except in that assignment upon the ground that "the court fails to find that the grants of the plaintiff have been located by the greater weight of the evidence." It would, perhaps, have been more formal and regular to have set out the specific findings of the court in its judgment, but as the judge was passing upon the plaintiff's exceptions and the facts were therein stated, that is, those which he evidently thought the evidence warranted, we must, of course, presume that he found those to be the facts without setting them out fully in the judgment. His general conclusion, as embodied in the judgment, clearly implies that he found "that the grants of the plaintiff had been located by the greater weight of the evidence, so as to vest the title in the plaintiff to the lands described in them." The fact that the judge set aside the referee's decision as to the location of the grants, to which plaintiff filed exceptions, shows that he found there were facts sufficient to support the plaintiff's contention as to the proper location of the land described in the grants.

We have carefully examined the record, and find that there is ample evidence of the location of the lands claimed by the plaintiff under the grants, and further, that there is nothing unusual, in the legal aspects of the case, to require any detailed discussion of the matters in controversy in addition to what we already have said about it, as in the view we take of the record the principles of law are well settled.

No error.

Cited: S. v. Jackson, 183 N.C. 700; *Lumber Co. v. Anderson,* 196 N.C. 474; *Martin v. Bush,* 199 N.C. 101.

(711)

THE WORTH COMPANY v. INTERNATIONAL SUGAR FEED COMPANY.

(Filed 28 March, 1917.)

CIVIL ACTION, tried at December Term, 1916, of NEW HANOVER, before *Connor, J.,* upon these issues:

1. What amount, if any, is plaintiff entitled to recover of defendant feed company? Answer: "$106.50, with interest."

2. Is the intervenor, Bank of Commerce and Trust Company, owner of the proceeds of the draft offered in evidence, and entitled to possession of same? Answer: "No."

From the judgment rendered the intervenor appealed.

J. O. Carr, Rountree & Davis for plaintiff.

John D. Bellamy & Son and Emmett Bellamy for intervenor.

PER CURIAM. This case was before us at last term, 172 N. C., 335. The questions of law involved are fully discussed in the opinion of the Court. A new trial was directed. The second issue was properly submitted and there is sufficient evidence to support the verdict.

The case appears to have been tried in full accord with our opinion.

No error.

Cited: Bank v. Rochamora, 193 N.C. 7.

IN RE WILL OF A. J. D. CROSS.

(Filed 4 April, 1917.)

Wills—Undue Influence—Fraud.

Upon a trial *devisavit vel non,* the evidence upon an issue as to undue influence upon the testator must be of a fraudulent character to invalidate the will.

ISSUE of *devisavit vel non,* tried at December Term, 1916, of WAKE, before *Bond, J.,* upon the following issues:

1. Was the paper-writing propounded, signed, witnessed, and executed according to formalities required by law to make a valid last will and testament? Answer: "Yes."

2. Did the said A. J. D. Cross, at time said paper-writing was executed, have sufficient mental capacity to make a valid last will and testament? Answer: "Yes."

3. Was the execution of said paper-writing procured by undue influence over said deceased, as alleged? Answer: "No."

4. Is the paper-writing propounded the last will and testament (712) of A. J. D. Cross, deceased? Answer: "Yes."

The court answered the fourth issue as legal inference from answers to 1, 2, and 3.

From the judgment rendered, the caveator, W. F. Cross, appealed.

Percy J. Olive, J. C. Little, R. N. Simms for propounders, appellees.

H. E. Norris, Armistead Jones & Son, Douglass & Douglass for caveator, appellant.

PER CURIAM. The paper-writing offered as the last will and testament of the testator, A. J. D. Cross, was proven with all the formalities required by law, and the court very properly permitted it to be offered in evidence and read to the jury.

The only assignments of error relate to the second and third issues. There are sixty-five assignments of error, forty-four of them relating to the evidence. Nearly all of them are briefly noticed in the brief of the learned counsel for the caveator. We have concluded that it is unnecessary to discuss them seriatim, and it would answer no good purpose. Suffice it to say that a careful examination discloses no substantial or reversible error.

The one prayer for instruction relates to the third issue, and was properly refused. The undue influence essential to invalidate this will must be of a fraudulent character, and we find no evidence sufficient to support that contention.

His Honor might well have so charged the jury. It is, therefore, unnecessary to consider the charge upon that issue. The exceptions to the charge upon the second issue relating to mental capacity are without merit. The learned judge clearly followed the well settled decisions of this Court in presenting that issue to the jury.

No error.

Cited: In re Will of Efird, 195 N.C. 85; *Greene v. Greene,* 217 N.C. 653; *In re Will of Franks,* 231 N.C. 26.

R. B. CROMARTIE v. VIRGINIA-CAROLINA LUMBER COMPANY.

(Filed 4 April, 1917.)

Deeds and Conveyances — Timber — Extension Period—Consideration — Waiver.

Where a grantee conveys his standing timber, estimated at 3,000,000 feet, in consideration of $1.50 per thousand feet, to be cut and removed within a stated period, and the timber within the period has been ascertained as one-half of the quantity estimated, and agrees to an extension of the period upon consideration of payment of interest upon the original purchase price, but thereafter, in view of the shortage of the timber, foregoes the payment of the interest and gives his vendee *bona fide* to understand that he will not be required to pay it, which otherwise he would have done: *Held,* the vendor may not recover the value of the timber his vendee has cut during the time extended, and a judgment permitting a recovery of the interest is not to his prejudice.

CIVIL ACTION, tried before *Winston, J.*, at October Term, 1916, (713) of BLADEN.

This is an action to recover the value of certain timber cut and removed from the land of the plaintiff by the defendant, heard upon exceptions to the report of a referee.

The facts, not excepted to, show that in 1907 plaintiff sold the timber and received $4,500 therefor. This consideration was based upon an estimated quantity of 3,000,000 feet at $1.50 per thousand, which was the then agreed value of the timber. This original deed carried a five-year right to cut and remove, but in 1910 plaintiff executed a deed extending the original period for three additional years, the consideration therefor being 5 per cent annually on the original purchase price. When the original period expired only one-third of the timber had been cut, but within the time limited in the extension deed the other two-thirds was cut and removed by defendant. The referee and court found that the two-thirds of all the timber which was cut after the expiration of the original period was 1,000,000 feet, and, therefore, the entire timber on the land when the original deed was made was necessarily only 1,500,000 feet.

Defendant admitted that it had not paid the extension money, but offered evidence to show that it offered to pay it, and would have paid it but for the fact that the plaintiff said he would not charge it; that he had already been paid for 3,000,000 feet; that defendant was going to lose and that he would not collect it.

The defendant offered the following evidence in support of this contention:

O. C. Benbow, officer of defendant, who conducted the negotiations with plaintiff, testified: "Prior to the expiration of the original period in 1912 I offered to pay the extension money more than once. Plaintiff said he was satisfied there was not going to be 3,000,000 feet there, and that I had paid enough, was going in the hole, and he was not going to exact it of me. At that time I was able and ready and willing to pay it. I would have paid it but for plaintiff's statement. I had cut only one-third of the timber, and would have been foolish not to offer it. . . . I talked with plaintiff as many as four times, and he always said he was not going to charge it; that he had been paid for the timber; was satisfied the timber would not cut 3,000,000 feet that was paid for, and would not require anything more."

F. J. Tyson testified: "Plaintiff said he thought Benbow was (714) doing all he could to get the timber off; that he had had a hard time over there, and he did not expect to charge any extension. . . . Just before I left, plaintiff asked what I would do if I was in his place in regard to charging extension. . . . At this last conversation

plaintiff appeared to be undecided as to whether he would charge the extension money."

The plaintiff himself testified: "Tyson was in my store. . . . and I asked his advice as to what I ought to do. . . . I suppose that conversation was after the expiration of the original period, but I am not positive."

Upon this testimony his Honor found as a fact: "Defendant was led to believe, and did in good faith believe as the result of negotiations entered into between himself and plaintiff that plaintiff would not exact the extension money or require it to be paid; and had it not been for this honest and bona fide belief upon the part of said Benbow the extension money would have been duly paid by the defendant."

The court held that plaintiff could still collect the extension money, but that he could not, after leading defendant to believe that he would waive the extension money, treat it as a trespasser and sue for the value of the timber cut during the extension period. The court, therefore, entered judgment against defendant for the extension money due under the deed, to wit, $281.25 and interest, and plaintiff excepted and appealed.

Bayard Clark for plaintiff.

T. C. Hoyle, and McIntyre, Lawrence & Proctor for defendant.

PER CURIAM. The plaintiff sold his timber at the price of $1.50 per thousand feet and received therefor $4,500, the timber being estimated to be 3,000,000 feet.

It turns out, according to the report of the referee, that there were only 1,500,000 feet of the timber, and the plaintiff has therefore, been paid $2,250 more than the contract price.

In addition to this, he seeks to recover the value of the timber again upon the ground that as the timber was not cut within the first five-year period, and as the extension money was not paid or tendered at the time provided for in the extension deed, the timber belonged to him as owner of the land when it was cut and removed.

His Honor finds as a fact that the extension money was not paid or tendered because the defendant was led to believe by the conduct of the plaintiff that it would not be exacted, and denied relief to the plaintiff except as to the extension money, and in this there is no error of which the plaintiff can complain.

(715) In 16 Cyc., 805, it is said: "While waiver is not in the proper sense of the term a species of estoppel, yet where a party to a transaction induces another to act upon the reasonable belief that he had waived *or will waive* certain rights, remedies, or objections which

he is entitled to assert, he will be estopped to insist upon such rights, remedies, or objections to the prejudice of one misled"; and in *Lumber Co. v. Price,* 144 N. C., 54: "A right can only be forfeited by such conduct as would make it fraudulent and against conscience to assert it. If one acts in such a manner as intentionally to make another believe that he has no right, or has abandoned it, and the other, trusting to that belief, does an act which he would otherwise not have done, the fraudulent party will be restrained from asserting his right."

It is true, there is no consideration for the promise on the part of the plaintiff not to enforce payment of the extension money, and for this reason he can recover it as provided in the judgment; but he had the right, without consideration, to surrender his right of recovery to the defendant, and having led the defendant to believe he would not collect it, he cannot claim a forfeiture brought about by the failure of the defendant to pay or tender the extension money.

Affirmed.

Cited: Mote v. Lumber Co., 192 N.C. 465; *Craig v. Price,* 210 N.C. 740.

J. W. TIMBERLAKE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 4 April, 1917.)

CIVIL ACTION, tried before *Winston, J.,* at October Term, 1916, of CUMBERLAND.

This is an action for damage on account of personal injury. The evidence tended to prove that the plaintiff was overtaken, struck, and injured by defendant's engine while he was walking alongside the track in the city of Fayetteville on September 11, 1915. At the close of the evidence a motion to nonsuit was sustained. Plaintiff appealed.

Q. K. Nimocks, F. T. Bennett for plaintiff.

Rose & Rose for defendant.

PER CURIAM. Upon the evidence in this case, following the well settled decisions of this Court, we are of opinion that the motion to nonsuit was properly allowed.

Affirmed.

MIKE COWARD ET AL. v. JOHN A. MANLY ET AL.

(Filed 18 April, 1917.)

1. Instructions—Evidence—Appeal and Error—Harmless Error.

Exceptions to the charge of the court upon the question of undue influence in an action to set aside a deed are not considered in this case in which the deed was sustained, there being no evidence thereof.

2. Instructions—Contentions—Appeal and Error—Harmless Error.

Exception that the court did not state certain contentions of the appellant is not sustained, it appearing that the charge as a whole was fair to both parties, the judge having directed the attention of the jury to all of the material positions taken by them and reasonably arising from the evidence.

CIVIL ACTION, tried before *Lyon, J.*, at December Term, 1916, of GREENE.

This is an action to set aside a deed executed by Anne Coward to her daughter, upon the ground of want of mental capacity and undue influence.

The jury returned the following verdict:

1. Did Mrs. Martha Ann Coward, on 12 September, 1913, have sufficient mental capacity to execute deed set out in pleadings? Answer: "Yes."

2. Was the execution of the deed from Martha Ann Coward to Nancy Manly procured by the exercise of undue influence upon the part of the defendant? Answer: "No."

3. What is the annual rental value of said land? Answer:——.

There was a judgment in favor of the defendant, and the plaintiffs excepted and appealed.

N. J. Rouse, E. M. Land, John G. Anderson, Robert H. Rouse, and William T. Joyner for plaintiffs.

Albion Dunn for defendant.

PER CURIAM. All of the exceptions that are considered in the briefs are to the charge of the court. Two of these bear upon the question of undue influence, but as we find no evidence of undue influence in the record, it is not necessary to consider them.

The other exceptions are to the failure of the court to state certain contentions of the plaintiffs, but upon an examination of the charge we find that while some particular view may not have been pre-
(717) sented, the charge taken as a whole is fair to both parties and directed the attention of the jury to all of the material positions

taken by the plaintiffs and the defendant, and reasonably arising upon the evidence.

We see no reason for disturbing the verdict.

No error.

Cited: Michaux v. Rubber Co., 190 N.C. 619.

FLORENCE I. KEARNES v. R. W. GRAY, EXECUTOR.

(Filed 18 April, 1917.)

Appeal and Error—Rules of Court—Record—Requisites.

Under Rule 19 of the Supreme Court, the record on appeal should contain an index and should set forth the name of the judge before whom the case was tried and the term of court. Upon failure therein the appeal may be dismissed by the Court under Rule 20. But in this case a date is named by which time the necessary corrections must be sent up or the appeal will stand dismissed. The costs of additional matter are taxed against appellant, irrespective of the final result of the appeal.

APPEAL by defendant from GUILFORD.

King & Kimball for plaintiff.

A. Wayland Cooke and Clifford Frazier for defendant.

PER CURIAM. The transcript of the record fails to comply with the requirements of Rule 19, among other respects, in that it has no index of the record. It is further defective for it does not set forth by what judge or at what term the judgment appealed from was rendered.

Under Rule 20 the Court might dismiss the appeal for the defects in the record, but it will put the case at the end of the fourteenth District, with leave to the appellant to send up the corrections necessary in the record, but without leave for further argument. If the corrections are not printed and sent up by the time prescribed, the appeal will stand dismissed. The clerk will send notice of this order to the appellant.

The requirements in regard to the transcript on appeal have been made as simple as possible, and only those matters are prescribed which are necessary for the consideration of appeals. But what is set out in the rule is deemed by us essential, and cannot be dispensed with. The costs of this amendment to the transcript will be taxed against the

appellant, without right of recovery against the appellee, whatever may be the final result of the action.

Order accordingly.

Cited: Millwood v. Cotton Mills, 215 N.C. 525.

(718)

WALTER JOHNSON v. JOHN A. McKAY.

(Filed 2 May, 1917.)

Limitation of Actions—Deeds and Conveyances—Color of Title—Adverse Possession—Trials—Evidence—Instructions.

Where in an action to recover lands the plaintiff shows title out of the State, and a junior deed to that under which the defendant claims, creating a lappage, the *locus in quo*, and there is evidence tending to show that the plaintiff had entered into possession under his junior deed and exercised exclusive and continuous ownership to the boundaries of his deed, and under color thereof, for seven years, it is sufficient to ripen an absolute fee-simple title in him; and when the defendant's evidence is corroborative, the court may instruct the jury to answer the issues in plaintiff's favor as a matter of law.

CIVIL ACTION, tried before *Cline, J.,* at October Term, 1916, of SCOTLAND.

This is an action to recover land, the part in controversy being 20 acres of a tract of 40 acres claimed by the plaintiff.

There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

Russell & Weatherspoon for plaintiff.

E. H. Gibson and Cox & Dunn for defendant.

PER CURIAM. We have examined all of the exceptions appearing in the record, and find no error.

The plaintiff introduced a grant from the State, which it was admitted covered the land in controversy.

He then introduced a deed from J. M. McPherson to Banister John, of date 22 November, 1902, for the 40 acres of land described in the complaint, and a deed for the same land from Banister John and wife to himself, dated 3 February, 1914.

The defendant introduced deeds older in date than those introduced by the plaintiff, conveying 500 acres of land, and the evidence for the

plaintiff and the defendant showed that there was a lappage of about 20 acres in the deeds under which the plaintiff and the defendant claim.

The plaintiff introduced evidence, which was not contradicted, that at the time the deed to Banister John was executed, the 40 acres described therein was surveyed and the lines and corners marked, and particularly that the northern line next to the land of the defendant was run and marked as indicated on the plat B C D and formed in part the southern line of a tract of land conveyed by the defendant to Spencer Gibson.

The plaintiff also introduced evidence that Banister John (719) entered into possession of the land after the execution of the deed to him and cleared a part of it, and that he had been in possession under his deed of about a half-acre on the lappage for more than seven years, and that while he did not intend to claim any land belonging to the defendant, that he did intend to claim the land within the boundaries of his deed.

The defendant introduced no evidence that he had been in possession of the lappage since 1903, and, on the contrary, he testified as follows: "Banister John and McLaughlin have been working on this 40 acres. They have been working on that little cleared piece. They might have been getting straw and wood. I don't know about that. Sometimes I casually walk through the woods. I am acquainted with the boundaries as claimed by the plaintiff of the 40 acres. I knew where the Banister John place was, but I didn't know where the corners were. I first knew that Banister claimed a corner with Spencer Gibson when Mr. Matthews ran off the Spencer Gibson tract. I think that was in 1903. At that time I knew that Banister was claiming a corner at the point C. I knew that he was claiming his line as a continuation of the Spencer Gibson line. I knew then that Banister's line leaving the point D ran towards Watery Branch and turnpike. Did not know how far it ran. I knew in 1903 that he was claiming corners at C and D. I did not interfere with his possession from 1903 until about 1912 or 1913. . . . From 1903 to 1912, nine years, I knew that Banister was claiming certain lines, and I didn't interfere with his possession to those lines. I didn't pay any attention to it. I thought that the line that they had run of McPherson lines were run right. I didn't know. I recognized the line from B to C as the line between me and the McPherson land, and conveyed land according to that line. I conveyed to Spencer Gibson and Arch Kennedy according to that line. I don't recollect about Arch Kennedy. Since 1903 I have not exercised any right of ownership inside those lines until the survey about five years ago. I don't recollect that I recognized this line as late as 1910. Yes, on 27 December, 1910, when I made the deed to Arch Kennedy, I recognized that line from C to D

as the McPherson line. Banister John had been claiming it from 1903 up to that time."

On this evidence by the defendant, considered in connection with the evidence of the plaintiff as to possession, his Honor might have instructed the jury to answer the issues in favor of the plaintiff, as it shows title out of the State and an adverse possession in the plaintiff and those under whom he claims for seven years under color.

No error.

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(720)

W. A. SMITH v. J. L. PRITCHARD ET AL.

(Filed 2 May, 1917.)

1. Evidence—Nonsuit—Waiver—Statutes.

A motion for nonsuit upon the evidence is waived by the movant thereafter introducing evidence. Revisal, sec. 539.

2. Contracts—Interpretation—Annulment.

Where the parties to a written contract, upon consideration, thereafter enter into a written agreement respecting the same subject-matter, without allegation of omission, fraud, or mistake, their rights will depend upon the construction of the instruments as written.

3. Same—Trials—Evidence.

Where the controversy is over the right of the parties to a lien by judgment against another, and it appears by written contract or agreement that the plaintiff had, for a consideration, sold and transferred his rights thereto to the defendant, and subsequently the defendant by another written agreement, upon consideration, surrendered and annulled the first agreement, it is *Held*, that upon the contracts in evidence the plaintiff is entitled to a verdict.

4. Contracts—Extension of Time—Consideration—Estoppel.

An extension of time granted a debtor is a sufficient consideration between the parties to support a new contract with reference to the same subject-matter; and upon the acceptance of the terms by the debtor, he may not thereafter question its validity for lack of consideration.

CIVIL ACTION, tried before *Cline, J.*, at October Term, 1916, of ANSON.

This is an action to subject the homestead of B. F. Pritchard to two judgments which the plaintiff claimed to own. The second judgment was adjusted. The defendant John L. Pritchard claimed to own individually the first judgment, and the only question at issue was whether this judgment was owned by the plaintiff or the defendant John L. Pritchard. There is no dispute as to the amounts due upon the judg-

ments. On 12 April, 1906, plaintiff and defendant entered into the following agreement:

This agreement of sale of land and judgment made 12 April, 1906, by and between W. A. Smith, vendor, and John L. Pritchard, vendee, both parties of Anson County, North Carolina, Witnesseth:

That the vendor has sold and bargained to the vendee that tract of land on Richardson Creek, a part of the Joshua Allen land and known as the Smith land, containing 148 acres by estimate, and also the judgment obtained by Smith & Dunlap v. B. F. Pritchard in the Superior Court for Anson County, the sum total to be paid by the vendee, being $1,125, and the vendee has paid the vendor $25 in cash and (721) promises to pay the balance, $1,100, on the 1st day of January next, with interest from date at 6 per cent per annum. When said $1,100 and interest is fully paid, then W. A. Smith binds himself, his heirs and executors to execute to said vendee a good quitclaim deed to said 148 acres of land and transfer the same judgment to said John L. Pritchard, without recourse on him on the judgment docket of said county in Wadesboro, N. C.

Witness our hands and seals this day and date above written.

(Signed) W. A. SMITH [SEAL.]
(Signed) JOHN L. PRITCHARD [SEAL.]

Witness: B. F. Pritchard.
(Signed) FRANK TYSON.

Certain payments were made upon this and entered upon the agreement as follows: 12 February, 1907, received interest on above to 1 January, last $52.20; 12 February, 1907, part of principal $75.80; 17 February, 1908, received on the above contract $69.30, interest to date, and $201 principal money.

The defendant John L. Pritchard having failed to comply with his agreement, being unable to make the payments, came to Wadesboro to have the original agreement recorded. The clerk of the court advised him that it would be better for him to have a deed and mortgage, and as a result of this he returned to the plaintiff and plaintiff and his wife executed to him the deed set out in the record and took from him a mortgage, and wrote the following upon the agreement of 12 April, 1906, which was executed by J. L. Pritchard:

STATE OF NORTH CAROLINA—COUNTY OF ANSON.

This day John L. Pritchard, for and in consideration of extension of time in the payment of the above contract, he having failed to make payment as contracted to do, and the further consideration of $1 paid to

said John L. Pritchard by the said W. A. Smith, the vendor in the above contract, the receipt whereof is here acknowledged, the said John L. Pritchard doth surrender the above contract and agrees to its annulment, and in lieu thereof accepts a deed in fee simple from W. A. Smith of the above land and executes his note for the sum of $825 in payment of the said land and a mortgage on said land to secure the payment of said note.

As witness my hand and seal hereto affixed, this 17 February, 1908.

J. L. PRITCHARD [SEAL.]

B. F. PRITCHARD.
W. H. WILHOIT.
E. F. MCLENDON.

(722) The judgment referred to in the agreement of 12 April, 1906, is the one in controversy.

The defendant moved for judgment of nonsuit at the conclusion of the introduction of evidence for the plaintiff, which was overruled and he excepted, and he then introduced evidence in his own behalf.

His Honor, in substance, instructed the jury if they believed the evidence, to find that the plaintiff was the owner of the judgment, and the defendant excepted.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

James A. Lockhart and Frank L. Dunlap for plaintiff.
McLendon & Covington and Fred J. Coxe for defendants.

PER CURIAM. The exception to the refusal to enter a judgment of nonsuit at the conclusion of the plaintiff's evidence was waived by the introduction of evidence by the defendant (Rev., sec. 539), and as there is neither allegation of fraud in procuring or executing the agreement of 17 February, 1908, nor allegation that any stipulation was omitted therefrom by mistake, the rights of the parties depend upon a construction of the two writings entered into by the plaintiff and the defendant.

The contract of 12 April, 1906, is an agreement on the part of the plaintiff to sell to the defendant J. L. Pritchard the judgment in controversy and 148 acres of land in consideration of the payment of $25 in cash and $1,100 on the first day of January, 1907, with interest from date.

The agreement of 17 February, 1908, by express language surrenders and annuls the contract of 12 April, 1906, and contains an agreement to accept in lieu of said contract a deed in fee simple for the land and to execute a mortgage on the same to secure the payment of $825 to the plaintiff.

There is in this second agreement no reference to the judgment, and as there is no contention that there was any other contract between the plaintiff and the defendant, and as the agreement of 12 April, 1906, in which it was agreed that the judgment should be sold, was surrendered and annulled, there is nothing to show that the defendant has acquired any right or title to the judgment.

The extension of time, which is recited in the latter agreement, is a sufficient consideration to support it (*Lowe v. Weatherly,* 20 N. C., 353; *Chemical Co. v. McNair,* 139 N. C., 326), and if this were not so, the defendant, having accepted the deed and executed the mortgage pursuant to its terms, cannot be heard to question its validity.

We are therefore of opinion that there was no error in instruct- (723) ing the jury to answer the issues in favor of the plaintiff, and this renders it unnecessary to discuss the other exceptions raised in the record.

No error.

Cited: Public Utilities Co. v. Bessemer City, 173 N.C. 485; *Harper v. Supply Co.,* 184 N.C. 205; *Wooley v. Bruton,* 184 N.C. 439; *Nowell v. Basnight,* 185 N.C. 147; *Gentry v. Utilities Co.,* 185 N.C. 286; *Hancock v. Southgate,* 186 N.C. 282; *Grant v. Power Co.,* 196 N.C. 618; *Lee v. Penland,* 200 N.C. 341; *Mewborn v. Smith,* 200 N.C. 534.

D. C. MILLIKIN v. R. H. SESSOMS.

(Filed 9 May, 1917.)

1. Issues—Ejectment—Burden of Proof—Title—Possession.

In an action of ejectment the plaintiff must show title in himself to the land in controversy, and that the defendant is in possession, and objection to an issue that it covers more than the land in controversy will not be sustained when the issue is raised by the pleadings, and thereunder the parties are afforded opportunity to introduce all pertinent evidence, and apply it fairly.

2. Issues—Courts—Appeal and Error.

The framing of issues must be left to the sound discretion of the trial judge, and generally will not be interfered with on appeal when sufficient to fall within the rule required.

3. Deeds and Conveyances—Survey—Agreed Lines—Course and Distance.

A line surveyed, marked out and agreed upon by the parties at the time of the execution of a deed to the lands will control, when established, the course and distance set out in the instrument.

MILLIKIN *v.* SESSOMS.

CIVIL ACTION, tried at September Term, 1916, of RICHMOND, before *Cline, J.*, upon this issue:

Are the plaintiffs the owners and entitled to the possession of the land designated on the court map as included within the boundaries from "T" to the point marked "stake old gum witness," and thence to the edge of Mark's Creek and thence down Mark's Creek to its intersection with the line from "II" to "GG" and then to "GG" and thence towards "Q" to interception of the line from "N" to "T" and thence to "T"? Answer: "Yes."

From the judgment rendered, defendants appealed.

Cox & Dunn for plaintiff.

Russell & Weatherspoon, Walter R. Jones for defendant.

PER CURIAM. The defendants in apt time requested the court to submit the following issue to the jury: "Are the plaintiffs the owners and entitled to the possession of the lands designated on the court map as included within the boundaries from 'S' to the point marked 'GG'
(724) thence toward 'Q' to its interception of line from 'N' to 'S' and thence to 'S.' The court declined to submit the issue, and the defendants except.

It is admitted that the issue submitted by the court covers all the land in controversy between the plaintiffs and the defendants. It is immaterial that the issue covers more land than is in controversy. In order to recover in an action of ejectment, the burden is upon the plaintiff to show by affirmative evidence title to the land in controversy as well as that the defendants are in possession of some part thereof. The plaintiff cannot recover from the defendants any more land than the evidence shows the defendants have in their possession. These are familiar rules governing actions of ejectment.

Under the issues submitted to the jury either party to the action could submit pertinent evidence tending to prove the title and possession of the land in controversy. The test to be applied to the issues is, did the issues submitted afford the parties opportunity to introduce all pertinent evidence and apply it fairly? *Black v. Black,* 110 N. C., 398; *Pretzfelder v. Ins. Co.,* 123 N. C., 164.

The framing of issues must necessarily be left to the sound discretion of the trial judge, and generally they will not be interfered with by this Court if it appears that upon such issues as have been submitted each party is given opportunity to present their evidence and the law applicable thereto to the jury, provided, of course, that the issues are such as are raised by the pleadings. *Cuthburtson v. Ins. Co.,* 96 N. C., 480.

It appears from the evidence in this case that the plaintiffs claim as the devisees of one Pros. D. Millikin, and that the defendants claim as the heirs at law of one William B. Smith. These two ancestors were adjoining landowners; the one living on the western side of Yellow Branch and the other on the eastern side. In 1885 a dispute arose between them as to their dividing line. An action was instituted between the two parties for the purpose of settling this controversy. It appears that this suit was compromised and settled by the establishment of an agreed dividing line so that Millikin should have the land on the western side of the said line and Smith the land on the eastern side. It appears that Smith and wife executed a deed to Millikin for the lands on the western side and Millikin and wife executed a deed to Smith for the lands on the eastern side.

The only matter in issue in the present action is the true location of this compromised line agreed upon and established in December, 1888, between Millikin and Smith. The plaintiffs claim that this line ran from the point "T" along a hedgerow, an old fence and a marked line to the buzzard nest corner in the edge of Yellow Branch, where there is a stake and an old gum marked. The defendants claim that the agreed line ran from "Q" to "GG." The land in controversy lies between these two contentions and contains about 24 acres.

There is abundant evidence in the record that this agreed line (725) was run and marked by a surveyor named Graham and that the quitclaim deeds between the parties were made in accordance with this survey. The defendants contend that the line claimed by the plaintiff ignores the calls and course of the deed. There is evidence tending to prove that this line was run and surveyed and agreed upon by the parties at the time the said deeds were made and contemporaneous therewith, and that seems to have been established by the verdict of the jury. It is settled beyond controversy in this State that a line surveyed and marked out and agreed upon by the parties at the time of the execution of the deed will control the course and distance set out in the instrument. *Addington v. Jones,* 52 N. C., 582; *Safret v. Hartman,* 50 N. C., 185; *Williams v. Kivett,* 82 N. C., 111.

We have considered carefully all of the numerous assignments of error in the record and are of opinion that they are without merit. The matter seems to be largely a question of fact and to have been settled by the verdict of the jury. The charge of his Honor presented the different contentions of the parties clearly and fully, and we find no reversible error in it.

No error.

Cited: Dudley v. Jeffress, 178 N.C. 113; *Walker v. Burt,* 182 N.C. 329; *Watford v. Pierce,* 188 N.C. 433; *Realty Co. v. Boren,* 211 N.C. 447; *Clegg v. Canady,* 217 N.C. 435.

E. L. JENKINS v. C. S. CARSON ET ALS.

(Filed 9 May, 1917.)

Appeal and Error—Settlement of Case—Statutes.

Revisal, sec. 591, prescribing the manner of service and settlement of cases on appeal to the Supreme Court must be strictly or at least substantially complied with, or the case may be dismissed. The Court examined the record in this appeal and found no substantial or reversible error.

CIVIL ACTION, tried before *Cline, J.,* at January Term, 1917, of GASTON.

Whitney & Whitney for defendant.
No counsel for plaintiff.

PER CURIAM. There is no case on appeal in this record of which we can take notice. There is a paper purporting to be a case prepared and signed by defendants' attorneys, but it does not appear to have been served on the plaintiff or his counsel, or even tendered. There is no acceptance of service, and no return of an officer as to service, and no other compliance with statutory requirements. Revisal, sec. 591. (726) We have held that there must be strict, or at least substantial, compliance with the statute. Pell's Revisal, pp. 591, 592, and cases cited. There are no assignments of errors based upon exceptions. The charge of the court, though exceptions were taken to it, is not in the paper assumed to be a case. Plaintiff has not appeared in this Court or filed a brief.

But notwithstanding these irregularities, we have examined the record, and the statements and exceptions contained in the case prepared for tender to the plaintiff, and find no substantial or reversible error. The case appears to have been properly tried on its legal merits.

No error.

W. C. MOORE, JR., RECEIVER OF CORPENING & CO., ET ALS., v. WATAUGA AND YADKIN RAILROAD COMPANY.

(Filed 16 May, 1917.)

1. Appeal and Error—Reference—Evidence—Findings.

Facts found by the referee, when there is any evidence, and approved by the judge, are not reviewable on appeal.

2. Receivers—Corporations—Interest.

The appointment of a Federal receiver for an insolvent railroad company does not stop the running of interest for debts it had incurred to contractors and subcontractors in the building of the road, when there are sufficient funds to pay it without disturbing the equalization of payment among claimants of the same dignity.

CIVIL ACTION, tried before *Ferguson, J.*, at August Term, 1916, of CALDWELL.

Two actions involving same controversy pending in Superior Court of Caldwell County were consolidated under above title and referred to W. D. Turner as referee to take and state an account and determine all issues of fact and law. The defendant filed exceptions to the report of the referee which were heard by his Honor, Judge Ferguson, at August Term, 1916.

The court overruled the exceptions and confirmed the report with some modifications not necessary to particularize, and rendered judgment against defendant for $4,567.63, with interest from 21 August, 1916. The court further adjudged that Hemphill & Wilson, subcontractors, recover of Corpenning & Co., contractors, and of the railroad company, $1,615.85, with interest from 23 December, 1913, to be paid out of the sum adjudged in favor of Corpenning.

The defendant excepted to the judgment and appealed. One of (727) the plaintiffs, T. J. Gibbs, a member of the copartnership of Corpenning & Co., also excepted and appealed.

W. C. Newland, M. N. Harshaw for W. C. Moore receiver.

Edmund Jones and Lawrence Wakefield for Florence Corpenning, Administratrix of W. G. Corpenning.

Pless & Winborne for Hemphill & Wilson.

William P. Bynum, Mark Squires for defendant railroad company.

J. W. Whisnant for T. J. Gibbs.

PER CURIAM. The matters in controversy determined by the referee are largely questions of fact and his findings were adopted and approved

by the court. As there is abundant evidence to support them, they are not the subject of review by this Court.

The conclusions of law follow from the findings of fact and are of a character that need not be discussed by us, as they involve no principles of general importance. The action is brought to recover upon the part of Corpenning & Co. a balance due on contract for construction of defendant's railroad. Hemphill & Wilson claim as subcontractors of Corpenning & Co.

The entire controversy is covered by the report of the referee and the amounts due each claimant specifically determined.

The defendant lays much stress upon the assignment of error relating to interest allowed upon the sums adjudged to be due under the contract. The amounts adjudicated would bear interest as against an individual debtor under our statute, and we see no reason why the same law does not apply to defendant.

It is claimed that defendant is an insolvent corporation in hands of a receiver appointed by the Federal Court, and that "as a general rule after property of an insolvent passes into the hands of a receiver interest is not allowed on claims against the fund."

Under the law of this State the appointment of a receiver for a corporation does not have the effect *eo instanti* to stop the interest upon all of its interest-bearing obligations.

The defendant relies on the above quotation from *Thomas v. Car Co.*, 149 U. S., 95-116. The question there presented was whether interest should be allowed on car rentals *accruing during receivership,* and the ground for not allowing interest was because the funds fell far short of paying the mortgage debt.

In a subsequent case of *Iron Co. v. S. A. L. Ry.,* 233 U. S., 267, this case is commented on and explained, and it is held that "The general rule that interest is not allowed after property of the insolvent is *in custodia legis* is not based on loss of interest-bearing quality, but is a neces-
(728) sary and enforced rule incident to equality of distribution between creditors of assets which in most cases are insufficient to pay all debts in full." The Court further says: "For manifestly the law does not contemplate that either the debtor or the trustee can by securing the appointment of a receiver stop the running of interest on claims of the highest dignity."

The debts established against this defendant are of high dignity and take precedence under our law of many other classes of indebtedness, as they are based upon construction work and labor and material furnished and are properly adjudged to be liens upon the property. That such indebtedness continues to bear interest after appointment of a receiver is

expressly adjudicated in *Iron Co. v. S. A. L. Ry., supra,* where the claim was of somewhat similar character.

Upon a review of the record, we find no error of law, and the judgment is

Affirmed.

The costs of this Court will be taxed against the defendant.

W. C. NEWLAND AND A. A. KENT, ADMINISTRATORS OF D. M. PUETT, v. F. P. MOORE ET AL.

(Filed 16 May, 1917.)

1. Bills and Notes—Non-Negotiable Instruments—Notice of Dishonor.

A note not payable to order or bearer is not a negotiable paper, and an indorser thereon is not entitled to notice of dishonor.

2. Same—Peremptory Instructions.

Where in an action against an indorser of a non-negotiable paper the ownership thereof has not been put at issue, its execution is admitted and the only defense relied on was the failure to give notice of dishonor, an instruction to answer the issue for plaintiff, if the jury believed the evidence, is correct.

CIVIL ACTION, tried before *Carter, J.,* at February Term, 1917, of CALDWELL.

This is an action on a note for $100,000, payable to D. M. Puett.

The plaintiff alleged the death of D. M. Puett and the qualification of the plaintiffs as his administrators, the execution of the note by the defendant F. P. Moore as a maker, and by the defendants W. C. Moore and W. C. Moore, Jr., as indorsers.

The defendant W. C. Moore, Jr., against whom alone the action was tried, the other defendants having been discharged in bankruptcy, admitted the execution of the note and his indorsement, (729) the death of Puett and the qualification of the plaintiffs as administrators, and the only defense set up is that no notice of the nonpayment and dishonor of the note was given to him.

At the conclusion of the evidence the defendant moved for judgment of nonsuit, which was refused, and defendant excepted.

His Honor instructed the jury to answer the issue in favor of the plaintiffs if they believed the evidence.

There was a verdict and judgment in favor of the plaintiffs, and the defendant appealed.

Squires & Whisnant and Thomas H. Calvert for defendant.
M. N. Harshaw and Edmund Jones for plaintiff.

PER CURIAM. If the ownership of the note had been put in issue it may be that the defendant would have ground of complaint as to the peremptory instruction given to the jury, but no issue of this character is raised by the pleadings, and the defendant relies on the failure to give him notice, as indorser, of the dishonor of the note.

The note is nonnegotiable, because not payable to order or bearer, and being nonnegotiable, the defendant was not entitled to notice. *Johnson v. Lassiter,* 155 N. C., 50; 8 C. J., 635; 3 R. C. L., 1220.

No error.

Cited: Hunt v. Eure, 188 N.C. 718.

W. E. McNEIL v. VIRGINIA-CAROLINA RAILROAD COMPANY.

(Filed 23 May, 1917.)

1. Appeal and Error—Rules of Court—Statutes—Laches—Motions.

Where appellee fails to immediately send case, counter-case, or exceptions to the trial judge (Rev., sec. 59), and afterwards the counsel agree that the judge settle the case, with disagreement as to this settlement, which was finally settled by the judge, without appellant's consent, and docketed too late under the Supreme Court rules, appellee's motion to dismiss under Rules 5 and 17 will be allowed.

2. Same—Certiorari.

Where the appellant can show good and sufficient cause why his case on appeal had not been docketed in the Supreme Court in the time required by the rules, or that he was not therein at fault, he should file a transcript of the record proper and move for a *certiorari* for the statement of the case, which may be done at any time during the term before appellee moves to dismiss it.

3. Appeal and Error—Laches—Agreements—Docketing—Rules of Court.

The Supreme Court will not consider appellant's alleged verbal agreement between the parties as to delay in docketing his case after the time required by the rules, when such is denied.

4. Same—Subsequent Terms.

In the absence of written agreement between the parties, or an affidavit of such agreement, not denied, an appellant may not docket his appeal at a subsequent term to that at which the rule requires it to be docketed.

McNEIL *v.* R. R.

APPEAL by defendant from *Long, J.*, at July Term, 1916, of (730) ASHE.

C. B. Spicer and G. L. Park for plaintiff.
T. C. Bowie for defendant.

PER CURIAM. The judgment in this case was entered at July Term, 1916, of Ashe. The appeal should have been docketed a week before the call of the district, 28 November, 1916, at Fall Term, of this Court. It appears that the case on appeal was served on 25 September, 1916, and the counter-case on 28 September, 1916. The statute, Revisal 591, required that these papers should be *immediately* sent by appellant to the judge for settlement of case on appeal. *Stroud v. Tel. Co.*, 133 N. C., 253; *Comrs. v. Chapman*, 151 N. C., 327. The appellant did not do this. In December it appears that counsel on both sides agreed upon a settlement of the case on appeal, but even this was not sent up. It seems that there was afterwards some disagreement between counsel as to this settlement and the case was then settled by the judge of 23 March, 1917, without appellee's assent.

On 28 March, 1917, the appellee filed motion to dismiss under Rules 5 and 17. The appellee was entitled to have this allowed. The appellant now moves to reinstate. This latter motion must be denied. The case having been tried in July, 1916, should have been docketed here before the district to which it belonged was called, 28 November, 1916. This was not done, and no excuse was then shown for the delay. It was the duty of the appellant at that time, if there was any good reason (and no fault on its part) why the appeal was not settled and docketed, to file a transcript of the record proper and have moved for a *certiorari* for the statement of the case on appeal. This was not done. The appellee might have moved then, or at any time during that term before such action by the appellant, to dismiss, but he forebore to do so.

When the appellee moved in this Court on 28 March, 1917, to dismiss the case because it had not been docketed at last term, he was entitled to have same allowed. The appellant offers no excuse except an allegation of some verbal agreement between counsel which is denied by the appellee's counsel, and which, therefore, the Court cannot consider. *Sondley v. Asheville*, 112 N. C., 694. The Court will not pass (731) upon the veracity or accuracy of recollection of counsel as to oral agreements when denied. Such agreements cannot be considered unless put in writing. Indeed, it appears that though the case settled by the judge was filed in the clerk's office of Wilkes on 24 March, 1917, even then it was not sent up to this Court by 6 April. Under the well settled practice of this Court the appeal could have been dismissed at the call

of the district to which it belongs, 28 November, 1916, or at any time thereafter during that term unless the appellant had filed at the time the motion was made the transcript of the record proper and moved, on proper cause shown, for a *certiorari* for the statement of the case on appeal. The appellant was not entitled to docket the case at this term at all unless upon a written agreement between counsel or an affidavit of such agreement not denied by the appellee.

The requirements above stated have been repeatedly and uniformly adhered to, as stated in *Pittman v. Kimberly,* 92 N. C., 562, down to *S. v. Trull,* 169 N. C., 370, and many cases cited, *Burrell v. Hughes,* 120 N. C., 277, and in a great many cases in which no opinion was written. Such negligence as was shown by the appellant in this case cannot deprive the appellee of his legal rights.

The motion to docket and dismiss the appeal was properly allowed, and the motion to reinstate is denied.

Motion to reinstate denied.

BOB BUCHANAN v. WRIGHT LUMBER COMPANY.

(Filed 23 May, 1917.)

CIVIL ACTION, heard before *Lane, J.,* at November Term, 1916, of MITCHELL, upon the report of a referee and exceptions filed by the defendant, and from the judgment overruling the exceptions and confirming the report defendant appealed.

Black & Wilson, W. L. Lambert, John C. McBee and Pless & Winborne for plaintiff.

L. D. Lowe for defendant.

PER CURIAM. The matters involved in the controversy appear to us entirely those of fact. The findings of fact of the referee have been adopted by the court and cannot be reviewed by us. In the conclusion of law we find no error.

Affirmed.

(732)

W. J. GRANDIN v. W. A. TRIPLETT

AND

THE GRANDIN LUMBER COMPANY v. W. A. TRIPLETT.

(CONSOLIDATED CAUSES.)

(Filed 23 May, 1917.)

Deeds and Conveyances—Evidence—Fraud—Declarations—Hearsay.

Where adverse possession of a party claiming lands under a deed to his father and from his father to himself, as color of title, has been sufficiently established, declarations of the deceased father, made long subsequent to the time the son had entered into possession under his deed, that he had not signed the deed, is incompetent as hearsay.

CIVIL ACTION of trespass, involving also the issue of title, tried before *Lane, J.*, and a jury, at Fall Term, 1916, of WATAUGA.

The two actions, presenting and dependent, practically, upon the same facts and conditions, the lands being contiguous and same map being used as to location, etc., were consolidated below and tried together by consent of parties. There was verdict for defendant, and plaintiffs excepted and appealed.

(509) *Edmund Jones, W. C. Newland, and E. S. Coffey for plaintiff.*
M. N. Harshaw for defendant.

(510) *Edmund Jones, W. C. Newland and E. S. Coffey for plaintiff.*
F. A. Linney and Cansler & Cansler for defendant.

PER CURIAM. We have carefully examined the record, and find no reversible error in the trial and disposition of these cases.

The plaintiff company exhibited a proper paper title by grant from the State and mesne conveyances, the former bearing date in 1882, and the individual, also, his grant bearing date in 1872.

Defendant relied upon adverse possession maintained by his father, William Triplett, Sr., and after by himself for the required period, and, in support of such claim, introduced and relied in part upon a deed purporting to have been made by his father to himself, and occupation thereunder.

Plaintiffs contended that this deed was forged, and in support of this position offered to show by LeRoy Triplett and Ida Triplett that a short time before his death the father, William Triplett, Sr., made declarations to them tending to show that he had never signed a deed that William, Jr., had brought to him to sign. The proposed testimony was excluded by the court and this appears to be the only exception made to

the validity of the trial. Putting aside the objection that
(733) the statement of these witnesses does not point to this particular deed with sufficient definiteness to constitute reversible error, and that its bearing on the verdict, for a like purpose, is not sufficiently disclosed in the record, the evidence, we think, is clearly incompetent. Made a long time after the alleged deed was in existence and when defendant was in possession, asserting ownership under it, these declarations were clearly hearsay, and on authority, were properly excluded. *In re Shelton's Will,* 143 N. C., pp. 218-224; *Maddox v. R. R.,* 115 N. C., 642; *Hodges v. Spicer,* 79 N. C., 223; *McConnell v. McConnell,* 73 N. C., 338; *Cowan v. Tucker,* 30 N. C., 426.

In *Shelton's* case the declarations were admitted because the question involved concerned the validity of a will, and *Associate Justice Brown,* distinguishing between a deed and a will, said: "Declarations of this kind (by a testator) are admitted as an exception to the general rule rejecting hearsay because the testator has peculiar means of knowledge and is supposed to be without motive to speak other than the truth; he differs from a grantor in a deed because, when his declarations are made, he has not parted with his property, but retains control over the subject-matter till his death." It is not required to deal with the question, very fully argued in the brief of counsel, as to whether the declarations were incompetent under 1631 of Revisal, excluding testimony by interested parties as to transactions with deceased persons, the proposed evidence being inadmissible on other grounds.

There is no error, and the judgment is affirmed.

No error.

Cited: Gill v. Porter, 176 N.C. 453; *Bunting v. Salisbury,* 221 N.C. 35.

McGEORGE v. NICOLA ET ALS.

(Filed 30 May, 1917.)

Appeal and Error—Petition to Rehear—Commencement of Time Allowed.

The time begins to run against a petition to rehear in the Supreme Court from the time the opinion was filed in the office of the clerk of that Court.

PER CURIAM. The petition to rehear was submitted to the Court in conference by the justices to whom it was referred.

This Court is of opinion that the time within which a petition to rehear may be filed begins to run on the day the opinion is filed in the

office of the clerk of the Supreme Court. The opinion in the above entitled case was filed 14 March, 1917, and more than forty days having expired between then and 17 May, 1917, when the petition to rehear was filed in this Court, the same is denied.

Cited: Cooper v. Comrs., 184 N.C. 615.

(734)

STATE v. ED BURNETTE.

(Filed 21 February, 1917.)

1. Judgment Suspended—Conditions — Waiver — Intoxicating Liquors — Criminal Law.

A defendant who has been convicted of selling intoxicating liquors in violation of our prohibition laws before a court of competent jurisdiction may waive his right of appeal and consent to a judgment suspending the sentence upon condition that he appear before the court from time to time and show that he has not since violated the law.

2. Same—Orders—Execution of Sentence—Courts—Jurisdiction—Statutes.

A trial justice, under the statute, is but the presiding officer of his court, and where the court has suspended judgment against the prisoner upon condition that he report to the court from time to time and show his good behavior, he may not thereafter cause the defendant to be imprisoned or sent to the roads for violating the conditions imposed, except in open court regularly sitting for the transaction of business, and the court must afford him opportunity to be heard, and to employ counsel, if he so desires; and a proceeding held privately in the office of the justice, wherein he attempts to order the execution of the judgment, is without warrant of law and of no effect.

3. Courts—Proceedings—Presumptions—Regularity—Habeas Corpus.

Proceedings before a court of competent jurisdiction will be presumed to be regular and valid, unless upon their face they plainly appear to be void; and when they do not so appear, they are not subject to review in *habeas corpus* proceedings.

4. Same — Jurisdiction — Suspended Judgment — Intoxicating Liquors — Judge—Sentence.

The rule that the proceedings of a court of competent jurisdiction are not reviewable in *habeas corpus* proceedings does not apply when it appears that the justice before whom the case had been determined had convicted the applicant of violating the prohibition law, suspended judgment upon condition of good behavior, and ordered the execution of the sentence and the arrest of the defendant in proceedings privately had in his office, and not in open court, as the law requires.

5. Judgment Suspended — Conditions — Good Behavior — Sentence — Unlawful Procedure—Appeal and Error.

It appearing in this case that the trial court suspended judgment in a criminal action upon certain conditions, without adjudication of the fact whether the defendant had complied therewith, and had ordered the execution of the sentence and the arrest of defendant without warrant of law, it is *Held*, that the defendant give a bond in a certain sum for his appearance before the criminal court at a time to be fixed by it, giving him reasonable opportunity to be heard, employ counsel, etc.; and in default of his giving the bond, the court issue a warrant or capias for the purpose of investigation.

6. Appeal and Error—Criminal Law — Habeas Corpus — Evidence — Certiorari.

Evidence or other matters adjudicated in a criminal case will not be reviewed by the Supreme Court on appeal in *habeas corpus* proceedings; but only the jurisdiction of the court and the validity of the judgment. In this case the Attorney-General waived the irregularity, and by agreement it was regarded as if upon a formal return to a writ of *certiorari*.

(735) APPEAL from an order of *Bond, J.*, refusing to discharge the defendant in a habeas corpus proceeding, heard 5 August, 1916, from PASQUOTANK.

The defendant was charged before the criminal court of Pasquotank County with importing into the State from another State more than one quart of intoxicating liquor, and also with having in his possession a quantity of such liquor in excess of one gallon, for the purpose of sale, contrary to the statute. The case was heard by the court and the defendant was convicted. He was sentenced to work on the public roads, in the first case, for one month, and in the second case for three months. He appealed, and afterwards abandoned his appeal, with the understanding that he should pay a fine of $200 in the first case, which he did, and that judgment would be suspended in the other case and he be required to appear on the first of April, 1916, and every three months thereafter for one year and show that he had not violated the law regulating the importation and use of intoxicating liquors. Judgment was suspended accordingly. The following facts were found by the judge and stated in the case: "The defendant, when three months were out, started to see the trial justice and to show that he had had no dealings with liquor, when he was met by the said trial justice and told that 'it was all right, and he could go.' The defendant understood from this that he was released from further attending court. On the 1st day of August, 1916, while the defendant was at his work on the streets of Elizabeth City, he was taken into custody by one of the policemen of Elizabeth City and carried into the private law office of the trial justice, who is a practicing attorney in Elizabeth City, and after hearing certain statements of

policemen, was sentenced to the common jail of Pasquotank County, and in a few minutes was taken to the public roads and there worked with convicts. No testimony was produced of any selling or having for sale any liquor since the judgment was suspended. There was no hearing in court, except as above stated, and the defendant had no counsel to take any steps for his defense. The act creating the criminal court, chapter 180, Public Laws 1907, directs that the court shall be held at the courthouse or at the town hall. Said act is made part of these findings, for reference. The defendant had been living in Elizabeth City from the time of his conviction to the time of his arrest, draying on the streets and passing by the policemen of Elizabeth City and the trial justice every day. He had not dealt with liquor from 18 De- (736) cember, 1915, to 1 August, 1916, so far as any evidence appeared. Nothing more than enough to create some suspicion on the part of policemen."

The judge refused to discharge the defendant, and the latter appealed, and was released from custody on a bail bond of $75, conditioned to abide with the result of the appeal.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

Aydlett & Simpson and C. W. Brown for defendant.

WALKER, J., after stating the case: The Legislature, by Public Laws 1907, ch. 180, created and established the criminal court of the county of Pasquotank, presided over by a trial justice, and gave it jurisdiction of criminal cases therein specified, the offenses charged against the defendant being of the prescribed class. When the defendant, upon his conviction in that court of unlawfully importing spirituous liquor into this State, and of having in his possession for sale more than one gallon of such liquor, consented to waive his right of appeal and also consented to a suspension of the judgments upon the terms and conditions stated therein, he was bound by his consent thus given, and the proceedings up to this stage of the case were regular and valid and according to established precedents. *S. v. Crook,* 115 N. C., at p. 760; *S. v. Everitt,* 164 N. C., 399; *S. v. Hilton,* 151 N. C., 687; *S. v. Tripp,* 168 N. C., 150. The matter is so fully considered in those cases that we deem it useless to attempt any further discussion of it. Defendant did not question the power of the court to suspend the judgments in the criminal prosecutions upon the terms imposed, but when he was brought before the justice of the criminal court for the purpose of enforcing the suspended judgments, he sued out a writ of *habeas corpus* and attacked the validity of the sentence upon the ground that there was, in law, no real investi-

gation of the question as to whether the defendant had violated the terms of the suspension. If those proceedings were merely irregular or erroneous, they cannot be assailed collaterally by the writ of *habeas corpus,* and in order to do so defendant must show that they are absolutely void and of no effect in law. *Ex Parte McCown,* 139 N. C., 95. It was there said: "We cannot decide whether there was any merely erroneous ruling of the court or any irregularities in respect to judgment and procedure, as the writ of *habeas corpus* can never be made to perform the office of a writ of error or of an appeal. We are confined in our investigation to the question of jurisdiction or power of the judge to proceed as he did, and cannot otherwise pass upon the merits of the controversy. There must have been a want of jurisdiction over (737) the person or the cause or some other matter rendering the proceeding void, as this is the only ground of collateral attack. The law in this respect has been definitely settled, we believe, by all the courts." *Ex Parte Terry,* 128 U. S., 289; *Ex Parte Savin,* 131 U. S., 267; Rapalje on Contempts, sec. 155. The Court held in *Ex Parte Reed,* 160 U. S., 13, that a writ of *habeas corpus* cannot be made to perform the functions of a writ of error, and "to warrant the discharge of the petitioner the judgment under which he is held must be not only erroneous, but absolutely void." In this case, therefore, the range of our inquiry is narrowed to the question of jurisdiction and the legal validity of the sentence in other respects. If the proceedings were either irregular or erroneous, the remedy is not by *habeas corpus,* and if they do not appear plainly on their face to be void, we should presume that they are valid until the contrary is shown, as the principle is that "Where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favor of their due execution. In these cases the ordinary rule is *omnia præsumunter, etc.:* everything is presumed to be rightly and duly performed until the contrary is shown." Broom's Legal Maxims, 909.

But while this is the general rule, we must inquire as to the jurisdiction of the court to proceed in the cause, and in doing so here we may properly start from the suspension of the judgment, as there is nothing in controversy back of it. A careful perusal of the statute creating the criminal court of Pasquotank County leads us to the conclusion that the Legislature never intended that important proceedings such as the one under review in this case should be conducted by the trial justice (who is merely its presiding officer) except in open court, while the court is regularly sitting for the transaction of its business, and the order for the appearance of the defendant at stated intervals, under the suspended judgment, and his showing that he had obeyed the law as to the possession and transportation of liquor was intended to require his appearance

in open court; and it was further the purpose that the investigation should be publicly conducted there, and the proceeding before the trial justice acting privately in his office was not warranted by the law and was of no effect. It was not without some reluctance that the practice of suspending judgments upon certain conditions was sanctioned, and it was only done because of its being beneficial to the prisoner, and further because his rights may be properly safeguarded. The proceedings to enforce suspended judgments should, therefore, be had in open court, where he will have fair and reasonable opportunity, with the aid of counsel, if he desires it, to show that he has not violated the terms of the suspension, and where his other rights may be preserved by a public hearing. The trial justice does not sit as a committing (738) magistrate to bind the prisoner over to court, but as the presiding officer of the court regularly organized as provided by the statute. He is but an integral part of the court, and in his individual person does not embody its corporate authority. The court must act as a court, and not merely the individual who is appointed by law to preside over it. The defendant was entitled to a public hearing in the court, and this he has not had. There was intimation substantially to this effect in *S. v. Tripp,* 168 N. C., at pp. 152, 153, where it was said: "The power of the court, having jurisdiction, to suspend judgment on conviction in a criminal case for determinate periods and for a reasonable length of time has been recognized and upheld in several decisions of our Court, as in *S. v. Everitt,* 164 N. C., 399; *S. v. Hilton,* 151 N. C., 687; *S. v. Crook,* 115 N. C., pp. 760, etc.; and we see no good reason why it should not be intrusted to the sound discretion of these municipal courts. It may be well to note that while it has been sanctioned in this State to a somewhat greater extent than it existed at common law, there has been decided intimation given in some of the cases that the practice should not be hastily enlarged, as it may be susceptible of great abuse to the injury of the citizen. Thus, in *Hilton's case* the Court said: 'In this State, as shown in *Crook's case, supra,* the power to suspend judgment and later impose sentence has been somewhat extended in its scope, so as to allow a suspension of judgment on payment of costs, or other reasonable condition, or continuing the prayer for judgment from term to term to afford defendant opportunity to pay the cost or make some compensation to the party injured, to be considered in the final sentence, or requiring him to appear from term to term, and for a reasonable period of time, and offer testimony to show good faith in some promise of reformation or continued obedience to the law. These latter instances of this method of procedure seem to be innovations upon the exercise of the power to suspend judgment as it existed at common law; and while they are well established with us by usage, the practice should

not be readily or hastily enlarged or extended to occasions which might result in unusual punishment or unusual methods of administering the criminal law." While the proceedings are not valid, this does not necessarily entitle the petitioner to an absolute discharge, as the court may hold him to bail in order that he may answer, in a proper way, the allegation that he has violated his parole or the conditions of his release. It does not appear that he reported to the court at each of the times appointed for his appearance, and showed that he had complied with the conditions of the suspension of judgment. We, therefore, direct that he give bond in the sum of $100 for his appearance before the criminal court of Pasquotank County at a time to be fixed by that court (739) for the investigation of the matter, when he may have the benefit of counsel, if desired, and a reasonable opportunity to be heard in his defense, and so that then and there the case may further proceed agreeably to the forms and requirements of the law. If the defendant does not furnish bail as herein required, the criminal court may issue a warrant or capias to bring him before the court for the purpose of the investigation, giving him reasonable opportunity to be heard by counsel, if desired, and otherwise respecting his constitutional rights.

An appeal does not lie from a judgment or order in a *habeas corpus* proceeding like this one, but the Attorney-General very properly agreed to waive this irregularity and to treat the appeal as if it were a formal return to a writ of *certiorari* which had regularly been issued from this Court, upon application therefor by the petitioner. And we have so dealt with it. This course was taken and approved by us in *Ex Parte McCown,* 139 N. C., 95. See, also, *In re Holley,* 154 N. C., 163; *S. v. Dunn,* 159 N. C., 470. As held in the case last cited, we cannot review the evidence or other matters in a criminal case in *habeas corpus* proceedings, but only the jurisdiction of the court and the validity of the judgment which is attacked, and we have not attempted to do so.

There was error in the ruling of the judge, and the case will be remanded with directions to proceed in the original case as herein indicated. The State will recover costs in this Court, to be taxed by the clerk, against defendant and his sureties.

Modified.

Cited: S. v. Vickers, 184 N.C. 678; *S. v. Phillips,* 185 N.C. 616, 622; *S. v. Schlichter,* 194 N.C. 279; *S. v. Henderson,* 207 N.C. 260; *S. v. Anderson,* 208 N.C. 789; *S. v. Jackson,* 226 N.C. 68; *In re Thompson,* 228 N.C. 75; *In re Taylor,* 229 N.C. 299, 303.

STATE v. WESLEY CLARK.

(Filed 21 February, 1917.)

Arson—Trials—Evidence—Questions for Jury—Nonsuit.

Evidence, upon a trial for arson, which tended to show that a dwelling-house was burned about 3 o'clock in the morning, and thereafter, on the same morning a frying-pan was found beneath it in which balls of cotton had been saturated with kerosene, from which the house had caught fire, some of which were found partly charred, is sufficient evidence of arson; and evidence tending to show that the prisoner had threatened the life of the occupants of the dwelling on the previous day; that he dwelt with his wife near by, and had left his room about five minutes before the fire occurred, was seen under suspicious circumstances near the place, just before the time, left home without explanation and gave no reasonable explanation thereafter, and was arrested in a neighboring State and brought back for trial, etc., is sufficient to sustain a verdict of the prisoner's guilt; and a motion as of nonsuit thereon was properly denied.

INDICTMENT for arson, tried before *Allen, J.*, and a jury, at (740) September Term, 1916, of EDGECOMBE.

As the prisoner moved to nonsuit the State, under the statute, upon the ground that there was no evidence of his guilt, it will be necessary to set forth a part of the testimony as given by the State's witnesses, which is as follows:

Nancy Buckner testified: "I am 60 years of age; have lived in Tarboro most of my life; am a widow, my husband having been dead many years. On 21 August, 1915, I owned a lot and dwelling-house thereon, situated on corner of Water and Trade streets of the town of Tarboro; it was a one-story three-room frame house, with ell and kitchen behind, and back and front porch with fence around portion on Water Street; and porch of said house was right on Water Street, the sill of which rested on ground; the lots along here dropped to the lowgrounds of the river and the back part of the house was on posts or pillars high enough for me to walk under the same; my house fronted on Water Street and was on the south side of the same; I kept firewood beneath the back part of the same. I rented two front rooms to Florence Peyton and her grandmother, Lidia Olus, and they with Florence's child slept there at nights, but worked out during the day. There had been no fire in the house that day except in the kitchen. I knew prisoner, Wesley Clark; he and his wife were living at that time on Albemarle Avenue of the town, above the cotton yard, which is next street west from Trade. East of my house on side of Water Street was an open space about 80 feet to next house. Florence Peyton slept in room next to cotton yard. On Saturday morning, 21 August, 1915, I saw Wesley Clark in Florence's

room; I ordered him out and told him not to come back there any more, and he said that I had nothing to do with his being in Florence's room and Lidia's room, their part of the house; he got mad and was quarreling, and said if he got mad something would be done; that he would belch and everybody would know it; told him not to belch in there or he might turn the house over; appeared like he was mighty mad; said if he got mad every one would know it; that he would go to the electric chair for me. I told him that I would have him put out, and he said he would slay any one who would try to put him out. I told him to get out; I was tired of hearing him run his mouth. He left. This was about 9 o'clock a. m., Saturday, 21 August, 1915. I saw Wesley again that night about 8 o'clock. He came up Trade Street from river, but did not come nearer than street and did not speak. I have not seen him since until case was tried today. He had been at my house before and I had ordered him away, but he did not listen to me. That night my house was burned up just before day; think between 3 and 4 a. m. I was in bed and Florence waked me up; ran outside and fire was on
(741) outside of building next to cotton yard; fire was blazing up outside and was over in a few minutes. I did not go back to see if fire was on inside, there was so much smoke. Alarm given and fire company came; the house was practically destroyed by flames; had no insurance; my policy had lapsed. I was at house next morning about 10 o'clock, when Mr. McCabe and Bob Cosby came there. They found a frying-pan on sill of the house next to cotton yard and a round box like you buy toilet powder in. We did not know what was in box. The frying pan was not mine; did not smell it; no children about it; don't know how long prisoner has been here; do not know what he does; known him right along. I don't know what he said would happen. Florence Peyton and her grandmother had been living with me two years or longer; Florence was a single woman; had one child; no children born to her in my house; had had quarrels with prisoner before this, but he kept on coming to my house. Wesley brought me a watermelon that Saturday morning."

Bert Shaw testified: "I am a single woman and do washing; came home early on morning of 21 August, 1915; I think about 3 a. m. I saw Wesley Clark on the railroad in front of my house; the railroad ran along Albemarle Avenue, a street of Tarboro; electric light there and saw him distinctly. He went and sat down on steps of William Ann Avis. Came home at 3 a. m. that morning from picnic. I was in buggy with two men; did not know them; I was tired, undressed and went to bed and to sleep. My mother woke me at the sound of the alarm of fire. Don't know exactly what hour; did not get up or go to fire. William Ann Avis and the prisoner and his wife lived in the same house—double

house with four rooms on Albemarle Avenue; the railroad runs down the avenue; cotton yard on railroad and in front of the house in which prisoner lived."

William Ann Avis testified: "On 21 August, 1915, I was living in a four-room house on Albemarle Avenue. I occupied two rooms of the house and Wesley Clark and his wife occupied the other two. There was a lathed and plastered partition between us. I could hear them talk from my rooms and they could hear me. I remember I was sick on the night that Nancy Buckner's house was burned and was up most of the night. About 3 a. m. I heard Wesley Clark leave his house and about five minutes thereafter the fire alarm bell was rung. I called Wesley's wife, and when she came out she was fastening her dress. We went to the fire to Nancy Buckner's house; Wesley was not there, I did not see him and have not seen him since. I have one bastard child now, grown and married. I have no ill or bad feeling against Wesley Clark; the cotton yard was south of my house; cotton yard was open and ground path ran across same to Water Street; I heard the fire alarm bell five minutes after Wesley went out of room. I have been sen- (742) tenced to the county home for sixty days for cutting my husband, and served my time."

Florence Peyton testified: "I am 21 years old; work at washing and ironing; I was born in New York; lived a while at Chapel Hill; have been here some time. I have had rooms with my grandmother, Lidia Olus, for two years or more at Nancy Buckner's house. Worked out and slept there. I had no fire in or about my room 21 August; there may have been a can of kerosene in my room. About 9 a. m. that day I was asleep in my room and Wesley Clark woke me up. I asked him what he was doing in my room and I in my night clothes; he said, 'Can't I talk to you? I have treated you too much like a lady to talk about me to my back to that man at the spring.' I told him I had not talked about him to any man anywhere. He quarreled some. He pulled out his knife and drew it across my throat. I told him to cut my throat, and he said he did have a great mind to do it. He then went out of my room, and Nancy Buckner asked him what he was doing in there. He replied that it was none of her business; that he was tired of fooling with Tarboro negroes, and that he was going to belch and everybody in Tarboro would know it. He said that he would go to the electric chair for Nancy. Nancy told him to get out and he told her she could not put him out. She said she would send uptown and have him put out. He said he would cut any one sent in cracks. He said he is all right. 'I have treated you too nice and bad luck will follow your tracks.' He told me, 'You treat me wrong,' and that I would soon fall in hell. Wesley left after that, and I have not seen him since until the trial. Wesley was never

in my room before. There was nothing improper between us. He had never given me any money. I was never afraid of his cutting my throat. He has visited at Nancy's before. The New Year before she had him to come through the hall; said it would give her good luck. I had no insurance. When I waked up that night my room was full of smoke; saw flames in wall. I aroused Nancy; went out and fire was outside of house; my room was on the corner next to the cotton yard. The house was burned in a few minutes. There was so much smoke that I could not get back in the house to save anything. The fire occurred just before day; believe between 3 and 4 a. m. Fire company came after the alarm."

Lidia Olus testified: "I am the grandmother of Florence Peyton and at the time of the fire had rooms with her at Nancy Buckner's; was cooking for Mr. Savage. About 10 o'clock Saturday morning, 21 August, 1915, Wesley Clark came by where I was working and said: 'Old Buck is mad with me; told me to get out of her house.' He said she was a mean negro. I told him not to pay any attention to
(743) that. He did not seem mad. I had lived at Nancy Buckner's two years or more, and Wesley Clark frequently visited the house. I worked out as a cook and stayed at Nancy's at night."

Paul McCabe testified: "I am a member of Tarboro Fire Company and make reports to Raleigh. I was at fire at Nancy Buckner's Sunday morning, 22 August, 1915. I was back there at 10 a. m. with Bob Cosby and L. E. Fountain. I found frying-pan on sill next to Trade Street and also some burnt cotton under the house. The pan was about 10 inches in diameter and 2 inches deep and would hold two quarts. I smelled oil on the same and saw partly burnt bunches of cotton; the cotton appeared to be in balls or as if same had been compressed slightly. There was a train that passed Tarboro for Norfolk, Virginia, at 4 a. m., at this time. The cotton yard was about a half block away on north side of Water Street, northwest from Nancy's house. Behind Nancy's house and along Water Street the land sloped sharply to river low-grounds, and they are overflowed at high water. Wind might blow cotton from cotton yard to back lots. Fire would burn up kerosene oil, but what I meant to say was that I smelt the odor of burnt oil." (There was other testimony to the effect that cotton could be blown to place where fire started.)

Bob Cosby testified: "I was present on Sunday a. m. after fire at Nancy Buckner's house with Paul McCabe and L. E. Fountain. Saw the frying-pan as described by Mr. McCabe and saw where it was. It was where McCabe said it was. It had the appearance of being a new one and had never been used before; smelt of burnt oil. There was a train that passed Tarboro going to Norfolk via Hobgood about 4 o'clock in the morning."

P. F. Pulley testified: "I am chief of police of Tarboro, and at request of Sheriff Hyatt I went last March to Norfolk for Wesley Clark. I knew him and I found him in jail. I spoke to him. At first he did not speak, but later did. The only thing he said to me coming from Norfolk to Tarboro, on the railroad cars, was that as the train was near or approaching Hobgood, Wesley looked out of the window and remarked that 'Right along here is where I was at sunrise on the Sunday morning that I am charged with burning Nancy Buckner's house.'"

There was testimony that the prisoner had worked for Harry Anthony in Halifax County and that he walked to Anthony's home from Tarboro the morning on which the fire occurred, arriving there about 10 o'clock a. m. and a day before he was expected. He worked for Anthony for several months and was engaged in ditching. He gave as his reason for coming a day ahead that "he wanted to be on the job (744) in time"; that he had money and could have come by train, but he preferred to walk. He arrived on Sunday.

The prisoner moved for a nonsuit, the motion was denied, and he excepted. There were other rulings to which he took exceptions, but they will be noticed hereafter. He was convicted by the jury and appealed from the sentence of the court.

Attorney-General Manning and Assistant Attorney-General Sykes for State.

James M. Norfleet for defendant.

WALKER, J. It will be necessary to consider only one question, as the others are, in our opinion, without substantial merit. The prisoner, at the proper time, moved for a judgment of nonsuit upon the evidence, which the court refused to grant, and properly so, as there were facts and circumstances which tended to show his guilt. The crime of arson is one usually committed with great secrecy and not infrequently under the cover and concealment of night. The State, therefore, in most of the cases is compelled to rely on circumstantial evidence for a conviction.

The undisputed facts in this case tend very strongly, though not unerringly, to implicate the prisoner as the guilty party. He had made threats against the owner of the house, Nancy Buckner, the day before the burning, which clearly implied that he would take the earliest opportunity to avenge what she had said and done to him. It is true that the threats were general in their character and did not indicate that his purpose was to burn her house, but they were at least sufficient to show that he had a motive for the act. That the burning was the act of an incendiary appears from the manner in which it was done. The cotton was no doubt taken from the adjoining yard, where cotton was to be

found, and saturated with oil or kerosene, which would soon start a fire, and this fact accounts for the short interval of time after the prisoner left his house and the fire alarm. The facts that he arose before day, at 3 o'clock in the morning, when there was no good reason for his doing so, and was seen by Bert Shaw on the railroad near the house at that early hour, under suspicious circumstances, and that he was not at the fire, but immediately after it was started he left afoot for another county, without apparently telling his wife or any one else where he was going, and that he stayed away and out of reach of the officers for many months, and was finally found in jail at Norfolk, where he was captured—these and other circumstances, while they may not produce absolute certainty of his guilt, are yet sufficient for the consideration of the jury. We said in *S. v. Bridgers,* 172 N. C., 879, (745) in a similar case: "It does not appear that any other person had a motive to commit the crime, or the opportunity, but, on the contrary, the combination of motive, threat, time, place, and circumstance, as detailed by the witnesses, all tend to establish the guilt of the prisoner," citing *Brown v. State,* 11 Ga., 5 (80 S. E., 320). See, also, *S. v. King,* 162 N. C., 580; *S. v. Barrett,* 151 N. C., 665; *S. v. Thompson,* 97 N. C., 496; *S. v. Gailor,* 71 N. C., 88.

The facts in this case are not substantially weaker than those in *S. v. King, supra,* and *S. v. Goings,* 101 N. C., 706, where convictions were sustained. Here we have the presence of the prisoner at a place very near the house that was burned, at an unusual hour; the occurrence of the fire almost immediately after he was seen; his sudden departure from his home when the alarm of fire was given; his absence for many months, and, finally, the motive to commit the incendiary act.

We are mindful of the rule that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises only a conjecture that it is so, is an insufficient foundation, for a verdict of guilty, and should not be left to the jury (*Byrd v. Express Co.,* 139 N. C., 276; *S. v. Vinson,* 63 N. C., 335); but this evidence is of stronger probative force than conjecture and furnishes a much more substantial basis for a conviction. It was for the jury to pass upon its weight, and they could reasonably infer the prisoner's guilt therefrom. *S. v. Lytle,* 117 N. C., 803; *S. v. Carmon,* 145 N. C., 481; *S. v. Adams,* 138 N. C., 688; *S. v. Walker,* 149 N. C., 527; *S. v. McGlammery, post,* 748. These cases, and those already cited, fully sustain the ruling of the court. The evidence in this case is really stronger against the prisoner than it was in some of the cases we rely on, where convictions were sustained.

The prisoner's explanation of his sudden departure from Tarboro for Halifax County at 3 o'clock in the morning was not a very creditable one. He could have left much later in the day and reached the home of

the witness Harry Anthony early in the afternoon of Sunday, the day before Anthony says he was expected by him. After making his threats, it was a singular coincidence that the prisoner should have left Tarboro at the very moment when the fire broke out. But it is not this fact, nor the motive or the threats or any other single circumstance, taken singly or by itself, that tends to prove his guilt, but all of the facts, considered as a whole, and in relation to each other, which warranted the jury in deciding the issue against him. There was no reversible error in the other rulings.

No error.

Cited: *S. v. Martin,* 182 N.C. 849; *S. v. Moses,* 207 N.C. 141; *S. v. Stamey,* 207 N.C. 855.

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(746)

STATE v. JOHN W. GULLEDGE.

(Filed 21 February, 1917.)

1. Embezzlement—Criminal Law—Principal and Agent—Banks and Banking.

An indictment charging that the defendant was the president of a certain bank, and by virtue of his position received and feloniously appropriated the bank's money, sufficiently alleges an act of embezzlement; and it is not necessary for it to charge that the funds alleged to have been embezzled had been committed to his custody, or any breach of trust or confidence except that which grew out of his official relationship with the bank.

2. Indictment—Embezzlement—Bill of Particulars—Conviction.

A bill of particulars in a criminal action is not a part of the indictment for the offense charged, and can supply no defect therein; and the defendant has no legal right to demand that separate issues be submitted to the jury on each of the particulars furnished, upon indictment for embezzlement; and a conviction is proper when there is a verdict of guilty upon the issue and there is evidence of embezzlement upon one or more of the specifications furnished in the bill of particulars.

3. Embezzlement—Trials—Evidence—Nonsuit—Instructions.

Where upon a trial for embezzlement there is evidence that the defendant was the president of a bank and as such he received sums of money and evidences of debt belonging to the bank, for which he failed to account and which he appropriated to his own use, it is sufficient for conviction of the offense, under a charge by the court that the jury must find that the defendant intentionally and fraudulently converted the money to his own use.

STATE *v.* GULLEDGE.

INDICTMENT for embezzlement, tried at criminal term, July, 1916, of RICHMOND, before *Cline, J.*

The defendant was convicted, and from the judgment and sentence pronounced appeals.

Attorney-General Manning, Assistant Attorney-General Sykes for the State.

H. H. McLendon and Vann & Pratt for defendant.

BROWN, J. The defendant is indicted for embezzling $6,500 and other large sums of money, the property of the Southern Savings Bank of Wadesboro, of which he was president. The bill charges that by virtue of his position, and while holding it, the defendant, knowingly, willfully, fraudulently, and feloniously, and with intent to cheat and defraud, feloniously misapplied and appropriated to his own use the said sums of money.

(747) The defendant was convicted by the jury and moved in arrest of judgment upon the ground that the bill of indictment does not sufficiently charge the offense, in that it does not charge that the money came into the possession of the defendant by virtue of his fiduciary relationship to the bank.

The motion was properly overruled. The bill is drawn in almost the exact language of the statute, and is practically the same bill as was passed on by this Court in *S. v. Wilson,* 101 N. C., 730, and sustained.

We think the bill does sufficiently aver that the defendant was the president of the bank, and that by virtue of his position received and feloniously appropriated the bank's money. It is not necessary to aver or prove that the property charged to have been embezzled had been committed to the custody of the defendant by the bank, nor to charge any breach of trust or confidence except that which grew out of the relation of the bank and its servant or agent. *S. v. Wilson, supra.*

In an indictment for embezzlement it is generally sufficient to charge four averments: first, that the defendant was the agent of the prosecutor; second, that he received the property of his principal by the terms of his employment; third, that he received it in the course of his employment; and fourth, that he intentionally and wrongfully converted it to his own use, knowing that it was not his own. *S. v. Blackley,* 138 N. C., 620.

These elements of the offense of embezzlement have all been charged in the bill, as well as supported by the evidence. The defendant excepts to the refusal of the court to instruct the jury to render a verdict of guilty or not guilty on each separate item of the bill of particulars in order that the jury might pass on them separately, and to his Honor's

refusal to have the jury state specifically the items in the bill of particulars upon which their verdict was based.

The ruling of the court was proper. A bill of particulars is not a part of an indictment. In this case it was furnished at the request of the defendant and for his information as to the items of money and property relied upon by the State, and to prove the embezzlement of which the State proposed to offer evidence. A bill of particulars cannot be substituted for a bill of indictment, nor can it supply a defect in the indictment. *S. v. Van Pelt,* 136 N. C., 633.

"The object of a bill of particulars is to enable the defendant to properly prepare his defense in cases where the bill of indictment is so indefinite that it does not afford the defendant a fair opportunity to procure his witnesses or prepare his defense." *S. v. R. R.,* 149 N. C., 508.

The granting of a bill of particulars is within the discretion of the trial judge. *S. v. Hinton,* 158 N. C., 625; *S. v. Dewey,* 139 N. C., 556. (748)

It was sufficient to justify a conviction if the evidence proved beyond reasonable doubt that the defendant embezzled any money belonging to the bank, as set forth in the bill of particulars.

The motion to nonsuit the State upon the ground that there was no sufficient evidence offered to sustain the allegations of the bill was properly denied. The evidence tended to prove that the defendant was the president of the Southern Savings Bank and that as such president he received sums of money and evidences of debt belonging to the bank; that he failed to account for the same and appropriated the money to his own use.

There is evidence tending to prove that the defendant received and appropriated over $14,000 in nine different items, set out in the bill of particulars and submitted by the court to the jury, and that it was the property of the savings bank. There is most abundant evidence that the defendant knew that he was appropriating the funds of the institution of which he was the president, and that he used this money for his own benefit. The facts and circumstances fully justify the court in submitting the question of intent to the jury. He was given the full benefit of the opinion of this Court in *S. v. McDonald,* 133 N. C., 688, when his Honor instructed the jury that they must find that the defendant intentionally and fraudulently converted this money to his own use.

A careful reading of the evidence must convince any impartial mind that its probative force is amply sufficient to justify the court in submitting the question of the defendant's guilt to the jury, as well as to justify the verdict of guilty which was rendered.

We have examined the exceptions to the evidence and the charge of the court, and we find no error. The case seems to have been carefully

tried and submitted to the jury in a very clear and comprehensive charge, which is not only free from error, but very fair and just to the defendant.

No error.

Cited: S. v. Flowers, 184 N.C. 692; *S. v. Eubanks,* 194 N.C. 320; *S. v. Wadford,* 194 N.C. 338; *S. v. Maslin,* 195 N.C. 539; *S. v. Ray,* 207 N.C. 645; *S. v. Ward,* 222 N.C. 320.

STATE v. COON McGLAMMERY.

(Filed 21 February, 1917.)

1. Criminal Law—Fornication and Adultery—Evidence—Two Years—Corroborative.

Upon trial for fornication and adultery, evidence of illicit conduct prior to the two years is competent in corroboration of admissible evidence thereof occurring within the two years; as in this case, conduct between the defendants, a Negro man and a white woman, forbidden to marry by the statute, he being the only Negro man in the community, colored children born of the woman, the acts and conduct of the Negro man towards the children, and the acts and conduct of the defendants toward each other.

2. Appeal and Error—Evidence—Restrictive—Objections and Exceptions.

Evidence competent for some purposes but not for all is not, upon exception, reviewable on appeal, unless the objecting party asks, at the time of its admission, that it be restricted to the purposes for which it is competent. Rule 27, 164 N. C., 548.

(749) APPEAL by defendant from *Lane, J.,* at August Term, 1916, of WILKES.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

H. C. Caviness for defendant.

CLARK, C. J. This was an indictment for fornication and adultery. The evidence of illicit conduct prior to the two years was competent in corroboration. *S. v. Dukes,* 119 N. C., 782. The chief question presented is as to the sufficiency of the evidence of illicit acts within two years prior to the finding of the bill. Revisal, sec. 3147.

The evidence in such cases is rarely direct, and we think there was sufficient to justify the submission of the case to the jury. It was in

evidence that the defendant is a negro and the codefendant is a white woman, Creola Bullis; that she lived half a mile from McGlammery's mother's house and that she had had three children, who were all black; the defendant within a year past had pictures of the children made by witness and paid for them and gave them to these children; that he had also paid for taking other pictures of them. Another witness testified that he passed Creola's house one night and heard some one talking; that he knew Coon McGlammery's voice and thought that it was him, but will not swear positively that it was; that he heard Creola's little boy say, "Mamma, did he come home drunk?" This was within the two years. The taking of the pictures above detailed was about a year before the trial.

It was further in evidence that the last child of Creola died about a month before the trial, and was born March, 1916, and that all her children were black. Another witness testified that he had seen Creola at the home of Coon McGlammery's mother, and that he had seen them there together in conversation. Another witness testified that "All of Creola's children were dark skinned; that the last one was born about March, 1916; that she had no way, that the witness knew of, of making a living; that he had seen both defendants at Coon's mother's house on Sunday; that Coon was the only colored man in that section, or that was seen there."

There was testimony in denial of the charge, but the jury have (750) found upon the above that the defendants were both guilty. The defendant Coon appealed from the judgment. This being the only colored man in that section, and the parties being seen together, taken with corroborative testimony of conduct prior to the two years, was sufficient to submit the case to the jury, in view of the color of the children and the fact that under the laws of this State there could have been no legal marriage between the parties.

The exception of the defendant that the judge did not instruct the jury to consider the testimony prior to the two years as corroborative only and not substantive would have been good prior to the amendment of Rule 27 of this Court, 164 N. C., 548, that it is "not ground of exception that evidence competent for some purposes but not for all, is admitted generally unless the appellant asks at the time of admission that its purpose shall be restricted." This rule was adopted in March, 1904, and has been sustained by uniform decisions of this Court since that time. *Westfeldt v. Adams,* 135 N. C., 600; *Hill v. Bean,* 150 N. C., 437; *Tise v. Thomasville,* 151 N. C., 283. Besides, the judge did state that it was not substantive evidence.

No error.

Cited: S. v. Clark, 173 N.C. 745; *Stanley v. Lumber Co.,* 184 N.C. 308; *S. v. Springs,* 184 N.C. 776; *Leonard v. Davis,* 187 N.C. 473; *S. v. Steele,* 190 N.C. 508; *S. v. Walker,* 226 N.C. 460.

STATE v. ELIZABETH BURNETT.

(Filed 28 February, 1917.)

1. **Appeal and Error—Interlocutory Orders—Inferior Courts—Jurisdiction—Statutes.**

An order of the Superior Court requiring the defendant to answer over to an indictment, transferred to it by an inferior court, on the ground that the latter court could only have final jurisdiction under a statute creating it, is interlocutory, from which an appeal does not immediately lie to the Supreme Court.

2. **Courts—Jurisdiction—Statutes—Discretionary—Transfer of Causes.**

Where a statute creating a county court gives it "final original" jurisdiction over certain criminal offenses, and also authority to transfer the trial of them to the Superior Court when the trial judge deems it proper that a particular case should be tried there, the act should be construed as a whole, and, so construed, it is *Held*, that the authority of the trial judge to transfer the particular cause is not in conflict with the other part of the act, and in such instances the Superior Court thereby acquires jurisdiction. As to the validity of a transfer of a case from the Superior Court to the county court under authority of the same statute, *quære.*

(751) INDICTMENT tried before *Stacy, J.,* at November Term, 1916, of WAYNE.

The defendant was charged in the "county court of Wayne County" with the crime of keeping a bawdy house. The county court was created by Public-Local Laws 1913, ch. 697, and by section 4 is given "final original" jurisdiction of all misdemeanors committed in the county," "to wit: of all crimes the jurisdiction of which is now or may hereafter be given to justices of the peace," and, in addition thereto, of the offenses specially named, and among them that of keeping a bawdy house; and at the end of section 4 it is provided as follows: "All offenses enumerated above are hereby declared to be petty misdemeanors; and all crimes which under the common law are misdemeanors, wherein the punishment is in the discretion of the court, are hereby declared by this act to be petty misdemeanors, and final, exclusive, original jurisdiction thereof is hereby given to the said county court of Wayne County." Section 3 of the act provides that "the judge of said court shall have power to transfer causes, civil and criminal, pending therein to the Su-

perior Court of Wayne County for trial, and the judge of the Superior Court shall have like power to transfer to said county court for trial criminal and civil actions pending in the Superior Court that are within the jurisdiction of the county court." When this case was called for trial in the county court the judge of said court transferred it to the Superior Court without the consent of the defendant and notwithstanding her objection thereto. In the Superior Court the defendant moved to quash the indictment upon the ground that the Superior Court had no jurisdiction of the offense, the county court having original, exclusive, and final jurisdiction of the same. The motion was overruled. Defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

Langston, Allen & Taylor for defendant.

WALKER, J., after stating the case: An appeal does not lie in this case, the judgment of the Superior Court being interlocutory and requiring the defendant to answer over to the indictment (*respondeat ouster*). It has been so held from the earliest period. *S. v. Robinson,* 8 N. C., 188; *S. v. McDowell,* 84 N. C., 799; *S. v. Pollard,* 83 N. C., 597; *S. v. Bailey,* 65 N. C., 426; *S. v. Webb,* 155 N. C., 426. But we will consider the question raised by the exception as if it were properly before us, but merely for the purpose of deciding it as being important to the due administration of the law in the courts of the county and as we were specially requested by counsel to do so.

We are of the opinion that the ruling of Judge Stacy was cor- (752) rect. By the Public-Local Laws of 1913, ch. 697, the jurisdiction to hear and determine criminal causes is given to the county court, subject to the provision of section 3 for a transfer of any case to the Superior Court when the presiding judge deems it proper that the particular case should be tried in the latter court. The clauses with reference to the "final original" and the "original, exclusive, and final" jurisdiction of the court as used in section 4 of the statute are to be read in connection with the latter part of section 3 in regard to the transfer of cases from one court to the other. In other words, the Legislature simply created the county court and conferred jurisdiction upon it of certain criminal offenses, and this jurisdiction was made "original, exclusive, and final," unless the county court, in its sound discretion, should deem it expedient that any particular case should be sent to the Superior Court for trial. This was intended to be, and is, a qualification of the broad jurisdiction given by the words of the statute above quoted. Under the statute permitting the removal of a case pending in the Su-

perior Court of one county to that of another county, the county in which the suit was first brought may well be said to have original, exclusive, and final jurisdiction of any case removed by it; but this only means if it retains the case for trial to its end, and, if it is removed its exclusive and final jurisdiction passes to the other court. This power of transfer was given in order to promote the more convenient and expeditious trial of criminal cases in the courts of the county of Wayne. If this cause had originated in the Superior Court and that court had, on proper objection to its jurisdiction, proceeded to try the case to final judgment against the defendant, a serious question might be presented which is not now before us, and the decision of which we need not anticipate. Nor is it necessary for us to say whether the county court had exclusive jurisdiction of this offense, for if it had jurisdiction at all, the power to transfer the cause to the Superior Court was vested in that court, and the Superior Court acquired jurisdiction by virtue of the transfer.

It is obvious from what we have said that *S. v. Collins,* 151 N. C., 648, has no application to this case. There was no such clause respecting transfers in the statute construed in that decision. The rules for ascertaining the meaning of the Legislature are well settled. "The object of all interpretation and construction of statutes is to ascertain the meaning and intention of the Legislature, to the end that the same may be enforced. This meaning and intention must be sought, first of all, in the language of the statute itself, for it must be presumed that the means employed by the Legislature to express its will are adequate for the purpose, and do express that will correctly." *S. v. Barco,*
(753) 150 N. C., 796. "There can be no doubt about the intention of the Legislature, and it is the duty of the Court to so construe the act as to effectuate that intention. And in construing it, every part should be viewed in connection with the whole, so as to make all its parts harmonize, if practicable, and give a sensible, intelligent effect to each. It is not to be presumed that the Legislature intended any part of a statute to be without meaning." *Tabor v. Ward,* 83 N. C., 293.

We must examine the statute as a whole. It cannot be supposed, when we do so, that the Legislature intended by the last words of section 4 to repeal the provision, so carefully framed and made an essential part of the legislation by section 3, especially when the two provisions can be so easily reconciled, and we are required to harmonize them if it can be done.

There was no error in the judgment of the court, but for the reasons stated, the appeal is dismissed.

Appeal dismissed.

STATE v. SOUTHERN EXPRESS COMPANY.

(Filed 14 March, 1917.)

1. Intoxicating Liquors—Statutes—Commerce—Carriers of Goods.

Since the passage of the Webb-Kenyon Act of Congress, a State statute which makes it a misdemeanor to transport, deliver, etc., any intoxicating beverage in a prescribed locality is valid as to interstate shipments, and enforceable against common carriers violating it. *Express Co. v. High Point*, 167 N. C., 103, cited and distinguished.

2. Intoxicating Liquors—Beverage—Definition—Local and General Law.

Where a statute prohibits the transportation to and delivery of "intoxicating beverages" in a certain prescribed locality, the language employed includes all the different kinds of liquors named in the general prohibition law, *i.e.*, "spirituous, vinous, fermented, or malt liquors, or intoxicating bitters."

INDICTMENT tried at April Term, 1916, of RANDOLPH, before *Ferguson, J.* A special verdict was rendered, upon which the court pronounced the defendant not guilty, and the State appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

Roberson, Barnhart & Smith for defendant.

BROWN, J. The substance of the special verdict is that the (754) defendant delivered to Matthew Hargrove one quart of whiskey on 25 November, 1915, shipped from Lynchburg, Va., and intended for the personal consumption of said Hargrove, and that the delivery was made within the corporate limits of the town of Trinity.

The prosecution is based on a local statute, chapter 267 of the Public-Local Laws of the Extra Session of 1913, the first section of which declares: "That the manufacture, sale, delivery, or transportation for the purpose of delivery of any intoxicating beverage in the corporate limits of the town of Trinity, Randolph County, shall be unlawful, except as herein provided."

It is admitted that the delivery is not within the proviso of the statute. This statute, operating as it does upon a carrier engaged in interstate commerce, is a direct burden upon such commerce, and conflicted with the power of Congress. The statute, therefore, could not be used to prevent interstate shipments from Virginia into North Carolina. This proposition has not been open to question since the decision in *Leisy v. Hardin*, 135 U. S., 100. But since that decision the Webb-Kenyon law has been enacted and its constitutionality sustained by the

Supreme Court in *Clark Distilling Co. v. West Virginia et al.,* 8 January, 1917. In that case the Court says: "As the State law forbade the shipment into or transportation of liquor in the State, whether from inside or out, and all receipt and possession of liquor so transported without regard to the use to which the liquor was to be put, and as the Webb-Kenyon Act prohibited the transportation in interstate commerce of all liquor 'intended to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State,' there would seem to be no room for doubt that the prohibitions of the State law were made applicable by the Webb-Kenyon law. If that law was valid, therefore, the state law was not repugnant to the commerce clause."

It is contended that the decision of the Supreme Court in *Adams Express Co. v. Kentucky,* 238 U. S., 190, conflicts with the *West Virginia case.* As the latter is the latest utterance of the Court, we must follow it, and are not concerned with a supposed conflict in its decisions. But referring to such contention, the Court says in the *West Virginia case:* "The case in this Court relied upon to establish the contrary (*Adams Express Co. v. Kentucky,* 238 U. S., 190) clearly does not do so. All that was decided in that case was that as the court of last resort of Kentucky into which liquor had been shipped had held that the State statute did not forbid shipment and receipt of liquor for personal use, therefore, the Webb-Kenyon Act did not apply, since it only applied to things which the State law prohibited."

(755) The statute under which this indictment is brought differs very materially from the High Point statute, construed in *Express Co. v. High Point,* 167 N. C., 103. In that case we said: "The General Assembly of North Carolina has not, up to this time, undertaken to prohibit the introduction of liquor into this State for individual consumption. . . . It is not contended, so far as we know, by any one, where the State permits the importation of liquor for the individual consumption of its citizens or for any other lawful purpose, that the Webb-Kenyon law has any effect."

We were referring to the High Point act and the general law of this State, and not to any merely local act. As we construed the High Point act, it did not forbid the delivery of liquor for personal consumption. That the Trinity act forbids the delivery of liquor for personal consumption is manifest. It is not confined to deliveries for purposes of sale. The delivery "of any intoxicating beverage" is prohibited, whether for sale or personal use.

The word "beverage" means "liquid for drink; drink; usually applied to drink artificially prepared and of an agreeable flavor; as, an intoxi-

cating beverage. Specifically, a name applied to various kinds of drink." Webster's International Dictionary.

"Drink of any kind; liquor for drink; as, water is the common beverage; intoxicating beverages." The Century Dictionary.

The words in the above statute, "intoxicating beverage," should be understood as a general term including all the different kinds of liquors named in the general prohibition law, namely, "spirituous, vinous, fermented or malt liquors or intoxicating bitters." Public Laws, Extra Session 1908, ch. 71, sec. 1.

The word "beverage" is to be understood as indicating the use of such liquors as distinguished from their use as a medicine. See *People v. Hichman,* 75 Mich., 587.

We are of opinion that the defendant is guilty under the facts found in the special verdict. The cause is remanded with direction to proceed to judgment.

Reversed.

STATE v. SHEPARD ROGERS.

(Filed 28 March, 1917.)

Appeal and Error—Courts—Expression of Opinion.

A remark to a defendant by the trial judge, when testifying in his own behalf under indictment for cruelty to animals, to answer the questions asked him concisely, "and not be dodging," is an expression of opinion on the credibility of the evidence, forbidden by the statute, and constitutes reversible error, though the judge withdraws the remark, and endeavors to eradicate the impression made by it.

CRIMINAL ACTION, before *Bond, J.,* at September Term, 1916, (756) of WAKE.

Defendant appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

R. N. Simms, J. G. Mills, Armistead Jones & Son for defendant.

WALKER, J. Indictment for cruelty to animals, two mules, the property of Samuel Rogers. We are compelled to grant a new trial because of a remark of the judge to the defendant while testifying as a witness for himself. The cruelty alleged was in not feeding the mules properly or sufficiently. On cross-examination of the defendant he was directed by the court to answer the questions concisely, "and not be dodging," and defendant excepted to the use of the words, "and not be dodging."

The judge then, and afterwards in his charge, explained to the jury that he did not intend to reflect upon the witness, and if he used the word "dodging," that they should not consider it. The judge further stated that "The witness had been cautioned before to make direct answers to the solicitor's questions instead of making a detailed statement about matters not responsive to the questions, and remarked that the court could not take a whole week to try this case, and then asked the witness to listen to the questions and give direct answers to them, if he could." The defendant again excepted. The court also told the jury that when he used the word "dodging" he meant no reflection upon the witness, but he spoke to him as he did because, "instead of answering the question, he was talking about something else." Defendant again excepted.

The use of the word, especially when it was addressed by the court to the witness while testifying for himself, was calculated, though not intended, to seriously disparage him, and in its usual and ordinary meaning, even though used or intended in a different sense, was a reflection upon him. It clearly implied that he was trying to evade telling the truth, if it did not, in its correct sense and as popularly understood, mean more. The learned judge, always fair and just in his rulings and conduct of a case, did all that could possibly be done, after using the word, to undo, or neutralize, the harm that it caused to the defendant, and if the case turned upon the explanation alone, we would not hesitate to overrule the exception, for it was explicit and ample, provided it was something that could be explained away or retracted.

But we do not think it was of that character. It is difficult, if
(757) not impossible, to remove the prejudice created by such a remark from the bench. It obviously impeached the witness, as it imputed that he was trying not to tell the truth, if he could help it, or, in other words, that he was "dodging" the truth, which would be strong evidence of his guilt, because if he was innocent the truth could not hurt him. The impression thus made on the jury against the defendant could not be eradicated by any explanation, or even a withdrawal of the word. In *S. v. Cook,* 162 N. C., 586, indictment for murder, the expression of the judge was: "What difference does it make if Pittman was advancing on him with a stick? That would not give him the right to kill Ben Coley." This was held to be an expression of opinion, under the statute, and that it could not well be recalled so as to remove the prejudice caused by it. The court then said: "While the statute refers in terms to the charge, it has always been the accepted construction that it applies to any such expression of opinion by the judge in the hearing of the jury at any time during the trial. Pell's Revisal, sec. 535; *Park v. Exum,* 156 N. C., 228; *Withers v. Lane,* 144 N. C., 184; *S. v. Dick,* 60 N. C., 440. The learned and usually careful judge was evidently con-

scious that he had probably, and by inadvertence, prejudiced the prisoner's case, for he added: 'But the court has no right, nor has it the inclination, to express an opinion about the case'; but the forbidden impression had already been made, and as to the vital portion of prisoner's plea, and on authority, the attempted correction by his Honor must be held inefficient for the purpose." *S. v. Dick, supra; S. v. Caveness,* 78 N. C., 484. In *S. v. Dick* the Court held: "Any remark made by a judge, on the trial of an issue by a jury, from which the jury may infer what his opinion is as to the sufficiency or insufficiency of the evidence or any part of it pertinent to the issue, is error, and the error is not corrected by his telling the jury that it is their exclusive province to determine on the sufficiency or the insufficiency of evidence, and that they are not bound by his opinion in regard thereto." We said in *Withers v. Lane,* 144 N. C., 184, regarding an intimation of opinion by the judge upon the evidence adverse to one of the parties: "This may be done by the manner or peculiar emphasis or by so arraying and presenting the evidence as to give one of the parties an undue advantage over the other; or, again, the same result will follow the use of language or a form of expression calculated to impair the credit which might otherwise and under normal conditions be given by the jury to the testimony of one of the parties. *S. v. Dancy,* 78 N. C., 437; *S. v. Jones,* 67 N. C., 285. It can make no difference in what way the opinion of the judge is conveyed to the jury, whether directly or indirectly. The statute forbids an intimation of opinion in any and every form, the intent of the law being that each of the parties shall have an equal and a fair chance before the jury." And *Judge Nash,* construing the statute, (758) in *Nash v. Morton,* 48 N. C., 3, said: "We all know how earnestly, in general, juries seek to ascertain the opinion of the judge who is trying a cause upon the controverted facts, and how willing they are to shift their responsibility from themselves to the court. The governing object of the act was to guard against such results and to throw upon the jurors themselves the responsibility of responding to the facts of the case. Nor is it proper for a judge to lead the jury to their conclusion on the facts."

The general result is that the defendant has been made to carry a greater burden during the trial than the law imposed upon him. As again said in the *Withers case*: "The books disclose the fact that able and upright judges have sometimes overstepped the limit fixed by the law; but as often as it has been done this Court has enforced the injunction of the statute and restored the injured party to the fair and equal opportunity before the jury which had been lost by reason of the transgression, however innocent it may have been; and we must do as our predecessors have done in like cases. Our view that the charge violated

the statute is sustained by the cases already cited, to which the following may be added: *S. v. Bailey,* 60 N. C., 137; *S. v. Thomas,* 29 N. C., 381; *S. v. Presley,* 35 N. C., 494; *S. v. Rogers,* 93 N. C., 525; *S. v. Dick,* 60 N. C., 440; *Reel v. Reel,* 9 N. C., 63; *Reiger v. Davis,* 67 N. C., 185; *S. v. Davis,* 15 N. C., 612; *Sprinkle v. Martin,* 71 N. C., 411; *Powell v. R. R.,* 68 N. C., 395."

The error is one of the unguarded slips, or casualties, which may happen to the fairest, most impartial, and most circumspect in the progress of a trial on the circuit. "When once committed, however," said *Judge Manly,* "it is irrevocable, and the prisoner was entitled to have his case tried by another jury." *S. v. Dick, supra. Chief Justice Taylor* used similar language in *Reel v. Reel, supra:* "We are not unaware," said that able and learned judge, "of the difficulty of concealing all indication of the conviction wrought on the human mind throughout a long and complicated cause; but the law has spoken, and we must obey." It may be that all prejudice was removed from the jury box by the judge's full and careful explanation, but we cannot know that this is true. It is not because we are sure that harm was actually done, and continued to have its effect upon the jury even after the caution given by the judge, but it is because it may have prejudiced the defendant, that another trial is ordered. We commend the earnest effort of the judge to eradicate the harmful word, which we know was accidentally and unintentionally used without at the time realizing its meaning or injurious effect.

New trial.

Cited: Harris v. Turner, 179 N.C. 325; *S. v. Jones,* 181 N.C. 547; *Morris v. Kramer,* 182 N.C. 90; *S. v. Hart,* 186 N.C. 588; *S. v. Bryant,* 189 N.C. 114; *S. v. Sullivan,* 193 N.C. 756; *Keller v. Furniture Co.,* 199 N.C. 418; *S. v. Buchanan,* 216 N.C. 35; *McClamroch v. Ice Co.,* 217 N.C. 109; *Gold v. Kiker,* 218 N.C. 207; *S. v. Auston,* 223 N.C. 205; *S. v. Owenby,* 226 N.C. 522; *S. v. Cantrell,* 230 N.C. 48; *S. v. Perry,* 231 N.C. 47; *S. v. Shinn,* 234 N.C. 398.

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(759)

STATE v. MARY GREER.

(Filed 18 April, 1917.)

1. Courts—Criminal Law—Judgment Suspended—Execution Suspended—Good Behavior.

Where conviction is had in a municipal court for violating the prohibition laws, and the defendant sentenced to a fine and imprisonment, execu-

tion against the person not to issue within two years on condition that the defendant should not again violate them, the question as to whether there was a technical suspension of the judgment or execution is immaterial as affecting the right of the court to pass upon the fact of a further violation of the laws, and order the execution of the sentence.

2. Courts—Judgment Suspended—Good Behavior—Execution of Sentence—Discretion—Trial by Jury—Appeal and Error.

Where judgment in a criminal action conditioned upon good behavior is suspended and not appealed from, subsequent proceedings to determine whether the defendant has complied with these conditions are addressed to the reasonable discretion of the trial judge, and not reviewable on appeal unless such discretion has manifestly been grossly abused; and where the defendant has again been tried and convicted of the same offense, before a municipal court, and thereupon the court orders the execution of the former sentence, the fact that on appeal the defendant was acquitted by the jury of the second offense has no effect upon the principle stated.

CRIMINAL ACTION, tried before *Stacy, J.*, at October Term, 1916, of FORSYTH.

This is an appeal by Mary Greer, who was convicted in the municipal court of the city of Winston on 7 June, 1916, for retailing, the sale being made to one Henry Lemons. The judgment of the court was that the defendant pay a fine of $25 and costs and be imprisoned in the county jail for six months. The execution against the person was not to issue for two years, on condition that the defendant should not violate any of the prohibition laws of the State. There was no appeal from that decision of the municipal court.

On 23 July, 1916, this defendant was again indicted in the municipal court for retailing, the sale being made to Millard Creech. She pleaded not guilty, but was adjudged guilty on 24 July, 1916, and sentenced to nine months in the county jail. From this judgment she appealed to the Superior Court and in default of the required $200 bond was committed to jail. After the defendant had appealed from this second sentence, the court called up the case which had been tried in June preceding, and made the following entry:

"24 July, 1916. The court finds as a fact that the defendant violated the conditions of this judgment by selling intoxicating liquor to one Millard Creech on or about the 16th of July, 1916. It is, (760) therefore, ordered that execution at once issue on the sentence heretofore entered in this case and the defendant be committed to jail for a term of six months."

Upon the trial of the Millard Creech case, this being the second case and the one in which an appeal was taken from the municipal court, the jury in the Superior Court found the defendant not guilty. The fol-

lowing day, to wit, 26 July, 1916, a motion was made before the judge of the municipal court, asking that he revoke the order putting the execution in the case of June 7th into effect, for the reason that the defendant had been found not guilty of making the sale to Millard Creech. The judge of the municipal court declined to revoke his order of 24 July, 1916, directing the execution to issue against the person of the defendant. The defendant gave notice of appeal from this ruling, and the judge of the municipal court held that an appeal would not lie. Thereupon the defendant, on application for a writ of *certiorari*, filed a petition and bond and the writ was subsequently granted. The hearing on the writ was had before Judge Stacy at the October term of the Superior Court of Forsyth County, who sustained the findings of the judge of the municipal court, dismissing the *certiorari*. From that judgment an appeal was taken to the Supreme Court.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

Louis M. Swink and Gilmer Korner for defendant.

BROWN, J. The question of whether there was technically a suspension of the judgment or a suspension of the execution cannot affect the result of this case. The defendant contends that it was a suspended judgment, and if we adopt her contention we have many authorities to the effect that trial judges have the power to suspend judgments upon certain conditions, and to later give them effect upon the breach of condition. *S. v. Hilton,* 151 N. C., 687; *S. v. Sanders,* 153 N. C., 624; *S. v. Everitt,* 164 N. C., 399; *S. v. Tripp,* 168 N. C., 150.

The verdict of the jury acquitting the defendant of the sale to Millard Creech was not binding on the judge of the municipal court. It was his right to find the facts in respect to that matter according to his own convictions upon the evidence before him, and not according to the evidence before the jury in Superior Court.

When judgment is suspended in a criminal action upon good behavior, or other conditions, the proceedings to ascertain whether the terms have been complied with are addressed to the reasonable discretion of the judge of the court, and do not come within the jury's province.

(761) The findings of the judge and his judgment upon them are not reviewable upon appeal unless there is a manifest abuse of such discretion. *S. v. Everitt, supra.*

Affirmed.

Cited: S. v. Hoggard, 180 N.C. 679; *S. v. Strange,* 183 N.C. 776; *S. v. Hardin,* 183 N.C. 818, 824; *S. v. Shepherd,* 187 N.C. 611; *S. v.*

Edwards, 192 N.C. 323, 324; *S. v. Calcutt,* 219 N.C. 562; *S. v. Pelley,* 221 N.C. 496, 500; *S. v. King,* 222 N.C. 141; *S. v. Miller,* 225 N.C. 215; *S. v. Jackson,* 226 N.C. 68.

STATE v. J. A. TERRY.

(Filed 25 April, 1917.)

1. Venire—Another County—Court's Discretion—Appeal and Error.

The refusal of a motion to summon a venire from another county for the trial of a capital felony is within the sound discretion of the trial judge, and not reviewable by the Supreme Court on appeal.

2. Trials—Impartiality—Homicide—Witnesses.

Where the plea of insanity as a defense in the trial of a capital felony is made and relied on, objection to the fairness or impartiality of the trial, that the solicitor had subpœnaed and had not examined as a witness a specialist in mental diseases, cannot be sustained on appeal.

3. Appeal and Error—Trials—Attorney and Client—Improper Remarks—Exceptions.

Where on appeal exception is taken to improper remarks made by counsel in their argument to the jury, it must be made to appear by the record that the alleged remarks had been made; and then considered on appeal only when such had been promptly called to the attention of the trial judge, and exception made to his refusal to correct them.

4. Jurors—Qualifications — Court's Discretion — Homicide — Appeal and Error.

Where jurors in the trial of a capital felony had largely read the newspaper accounts of the killing, admit forming an opinion of the prisoner's guilt, one of them stating that unless the prisoner proved he was innocent he would render a verdict of guilty; and upon examination by the counsel and judge the witness stated he could eliminate all he had heard, be governed by the evidence, and give the State and the prisoner an absolutely fair trial, and the prisoner having exhausted all his peremptory challenges, the jurors were permitted to serve: *Held,* the matter was within the reasonable discretion of the trial judge, and not reviewable.

5. Homicide—Murder—Insanity—Instructions—Burden of Proof.

Where the evidence in the trial of a capital felony tends strongly to prove a willful, deliberate, and premeditated killing, with evidence tending to show insanity on the part of the prisoner at the time, and the judge has correctly charged the jury as to what in law constitutes the offense of murder in the first degree, it is proper for him to submit to them the finding of fact as to insanity, putting the burden thereof on the defendant to satisfy the jury of this fact.

6. Homicide—Murder—Insanity—"Moral Insanity"—Impulse.

The degree of insanity required for an acquittal of a charge of murder is the lack of mental ability of the accused to be conscious of the wrong at the time he committed the homicide, or his inability to know whether the consequences of his act were right or wrong; and it does not include "moral insanity" or a supposed uncontrollable impulse to commit the act notwithstanding.

(762) INDICTMENT for murder, tried at September Term, of GUILFORD, before *Webb, J.*

The prisoner was convicted of murder in first degree, and from the judgment sentencing him to death, appeals.

Attorney-General Manning, Assistant Attorney-General Sykes for the State.

S. Clay Williams, Oscar L. Sapp, Jerome & Jerome for prisoner.

BROWN, J. In apt time, after rendition of the verdict, the prisoner filed a written motion for a new trial, "for that he has not had a fair and impartial trial and such as is guaranteed to him by the laws of the land":

1. Because the special venire from which the jurors were chosen to try the prisoner should have been summoned from some other county than the county of Guilford.

We fail to find in the record any motion by prisoner to summon a venire from an adjoining county. Had such motion been made and denied, it could not be reviewed by us, as it is a matter within the sound discretion of the judge of the Superior Court.

2. Because the State had under subpoena and in attendance Dr. McCampbell, an acknowledged expert in diseases of the mind, and failed to offer him as a witness.

The State solicitor had the right to select his witnesses and use such only as he thought best. There is no law that compels the solicitor to place all of the State's witnesses on the witness stand. If the prisoner desired the testimony of Dr. McCampbell, he should have called and examined him.

3. Because one of the attorneys for State, in concluding the argument, was permitted to make improper and prejudicial remarks to the jury.

There is nothing in the record to substantiate such statement, no finding in the case on appeal that such improper remarks were made, and no exception taken to them at the trial. Had such remarks been made, it was the duty of the prisoner's counsel to call the attention of the court to them in order that the judge may correct them. For failure to do so, an exception should have been taken.

4. Because the prisoner was required to assume the burden of (763) proof as to his insanity.

This will be considered later in the course of this opinion.

There are numerous assignments of error, all of which relate to three subjects, viz.: the composition of the jury; the charge of the court, and to the burden of proof.

The prisoner excepted to the ruling of the court declaring that three jurors were duly qualified. The peremptory challenges of the prisoner were exhausted and the challenged jurors could not be stood aside. Upon a very exhaustive examination, these jurors admitted that they had read much about the case in the local papers and had heard a great deal about it in public rumors, and had formed an opinion that the prisoner was guilty. They further stated that they would go into the jury box under the belief that the prisoner was guilty, and that it would take evidence to remove that impression. One of the jurors stated that in his opinion the burden of proof would be on the defendant to prove his innocence, and that unless he did so, he, the juror, would return a verdict of guilty.

Upon a cross-examination as well as upon examination by the court the juror testified that he could "eliminate from his mind all that he had heard or read, and that he could go into the jury box and be governed solely by the evidence produced upon the trial and by the charge of the court, and that he could give the State and the prisoner an absolutely fair trial. Upon examination by the judge, the juror stated again that he could render a verdict uninfluenced by any opinion he may have formed or anything that he may have heard or read. The court in his discretion found the said jurors to be impartial, and had them tendered and sworn.

This ruling of his Honor was in exact accord with the decisions of this Court in the very recent case of *S. v. Foster,* 172 N. C., 960, which cites with approval the case of *S. v. Banner,* 149 N. C., 519, in which the same questions were asked and like answers returned as in the case now before this Court. The decision there was that a juror having been tested according to the standard used in the present case was a competent juror, and that his admission to the jury box was in the sound discretion of the judge. *S. v. English,* 164 N. C., 498.

The prisoner excepts to the charge of the judge upon the plea of insanity and tenders several prayers for instruction in respect thereto which the court refused to give. It is unnecessary to consider these assignments of error *seriatim.*

The prisoner is charged with the murder of one John R. Stewart on 15 of July, 1916. All the evidence tends to prove that on that day the prisoner went to the residence of the deceased armed with a pistol;

(764) at the time the deceased and his wife were in the cow barn, milking a cow; that the deceased was sitting on a box milking a cow at the time when the prisoner approached; the prisoner said, "Hello, Mr. Stewart." The deceased turned around and said, "Hello, Terry." The prisoner leaned forward with a pistol in his hand and shot and killed the deceased. At the time the prisoner was so close to the deceased that the face of the latter was burned by the power. There is also evidence of some ill feeling upon the part of the prisoner about some money which he claimed the deceased owed him and had not paid.

It is not questioned that the evidence tends strongly to prove a willful, deliberate, and premeditated killing. The plea of insanity interposed by the prisoner is undoubtedly supported by much evidence, although strongly combatted by the State. In his charge to the jury the learned judge below, upon this plea, stated the contentions and the evidence relied upon by the prisoner, as well as by the State, with great clearness, fullness, and fairness, and instructed the jury very carefully as to what constitutes insanity, and its effect when the plea is established. In his instruction the judge carefully followed the numerous and well settled decisions of this Court. He instructed the jury fully as to what constitutes murder in the first degree, and that it is necessary for the State to show from the evidence beyond a reasonable doubt that the prisoner prior to the time of the killing formed a purpose to kill the deceased, and that such design to kill was formed with deliberation and premeditation, and that in pursuance of such design the prisoner killed the deceased.

The court further instructed the jury that the terms "deliberation" and "premeditation" involved a mental process embodying a specific, definite intent to kill, and that such definite intent must have been conceived at some time before the deceased was killed.

His Honor further instructed the jury: "In this case the defendant interposes a plea of insanity, and he says by this plea that he did the killing, but the act is not one for which he can be held responsible. The court instructs you that whether or not the defendant had a mental disease is a question of fact to be determined by the jury; that it is as much a question of fact as to whether or not he had a bodily disease, if such a question was raised. The court charges you further that it is also a question of fact for the jury to determine whether the killing of the deceased by the defendant was the product of mental disease of the defendant.

"The court instructs the jury that if you find from the evidence at the time of the killing of the deceased, the prisoner was not of sound mind, but affected with mental disease, that is, insanity, and that this unsoundness of mind or affection of insanity was of such a degree as to

create an uncontrollable impulse to do the act charged, by over- (765)
riding the reason and judgment and to obliterate the sense of right and wrong as to that particular act, and deprive the prisoner of the power of choosing between them, then and in that event the prisoner would not be guilty of murder in the first degree, and the jury should so find."

The court further charged: "If the prisoner at the time he committed the homicide was in a state to comprehend his relations to other persons, the nature of the act and its criminal character, or, in other words, if he was conscious of doing wrong at the time he committed the homicide, he is responsible in law; but if, on the contrary, the prisoner was under the visitation of God, or had a diseased mind to such an extent that he could not distinguish between good and evil, and did not know what he did, or if he knew what he did, he did not know right from wrong of the consequences of his act, he is not guilty of any offense against the law, for guilt arises from the mind and wicked will."

The instructions appear to follow very closely those which are approved in *S. v. Haywood,* 61 N. C., 377, which have been approved in many subsequent opinions of this Court. *S. v. Potts,* 100 N. C., 458; *S. v. Spivey,* 132 N. C., 989.

S. v. English, supra, is a recent case dealing with the degree of insanity requisite for a defense upon a charge of homicide. The rule is very clearly defined and the law well stated, and it is unnecessary to do more than to refer to that and the decision cited therein.

In several prayers for instruction the prisoner requested the court to charge the jury, in substance, that although his mental condition was such that he could distinguish right from wrong and understood the wrongful character of the act which he committed, yet if he was impelled by an uncontrollable impulse which he could not resist to commit the act, he would not be guilty of murder. This doctrine of "moral insanity" is supported by authority in the courts of some of the States.

The case of *S. v. Parsons,* 60 American Reports, 193, is a leading case in which the whole subject is discussed and the cases reviewed. In that case the Supreme Court of Alabama holds that "One who by reason of mental disease has lost the power of will to control his actions and choose between right and wrong is not responsible to the criminal law for an act which is solely the product of such disease, although he may know right from wrong." This decision is reviewed at length by the reporter at page 212 and a full summary given of the substance of judicial decisions. The learned commentator states his conclusion as follows: "It is a perfect defense to an accusation of crime if the accused at the time he committed the act was afflicted with a mental disease to such extent as to render him incapable of determining between right and

wrong, or of perceiving the true nature and quality of the act done."

(766) Again, "No form of moral or emotional insanity is a defense against a criminal accusation." This is a very clear statement of what we understand the law of North Carolina to have been without change since *S. v. Haywood, supra.*

This doctrine of "moral insanity" is expressly repudiated in the learned opinion of *Justice Manly* in *S. v. Brandon,* 53 N. C., 468. In that case the learned judge says: "The law does not recognize any moral power compelling one to do what he knows is wrong. 'To know the right and still the wrong pursue' proceeds from a perverse will brought about by the seductions of the evil one, to which, nevertheless, with the aids that lie within our reach, as we are taught to believe, may be resisted and overcome; otherwise, it would not seem to be consistent with the principles of justice to punish any malefactor. There are many appetites and passions which by long indulgence acquire a mastery over men more or less strong. Some persons, indeed, deem themselves incapable of exerting strength of will sufficient to arrest their rule, speak of them as irresistible, and impotently continue under their dominion; but the law is far from excusing criminal acts committed under the impulse of such passions."

This case is cited with approval in *S. v. Potts, supra,* wherein *Chief Justice Smith* says: "We have not allowed as exempting from the consequences of crime what is called 'moral insanity'; that is, an alleged uncontrollable impulse to commit an act with the mental faculties in full force to comprehend its criminality and wrong."

His Honor instructed the jury that the burden of proof upon the plea of insanity is on the defendant, not to satisfy the jury beyond a reasonable doubt, but to satisfy them that at the time he committed the offense he was insane. The prisoner excepted to this charge.

We understand it to be well settled in this and other States that in a criminal prosecution where the defense is insanity the burden of proof is always on the defendant to prove such insanity, not beyond a reasonable doubt, but to the satisfaction of the jury. *S. v. Hancock,* 151 N. C., 699; *S. v. Starling,* 51 N. C., 366; *S. v. Brandon, supra.*

Upon a review of the entire record, we find

No error.

Cited: S. v. Bailey, 179 N.C. 727; *S. v. Falkner,* 182 N.C. 804; *S. v. Montgomery,* 183 N.C. 753; *S. v. Winder,* 183 N.C. 777; *S. v. Campbell,* 184 N.C. 766; *S. v. Journeyman,* 185 N.C. 708; *S. v. Levy,* 187 N.C. 584; *Speas v. Bank,* 188 N.C. 528; *Hunt v. Eure,* 189 N.C. 492; *S. v. Jones,* 191 N.C. 758; *S. v. Walker,* 193 N.C. 490; *S. v. Wilson,*

197 N.C. 548; *S. v. Jones,* 203 N.C. 377; *S. v. Stafford,* 203 N.C. 602; *S. v. Vernon,* 208 N.C. 342; *S. v. Bowser,* 214 N.C. 254; *S. v. Cureton,* 218 N.C. 495; *S. v. Hairston,* 222 N.C. 461; *S. v. Harris,* 223 N.C. 703; *S. v. DeGraffenreid,* 224 N.C. 518; *S. v. Davenport,* 227 N.C. 492; *S. v. Swink,* 229 N.C. 125, 126.

(767)

STATE v. R. L. CARPENTER AND THOMAS PROPST.

(Filed 2 May, 1917.)

1. Intoxicating Liquor—Statutes—Separate Offenses—Criminal Law.

Section 2, chapter 97, Public Laws 1915, creates two offenses, one for receiving more than one quart of spirituous liquor at one time or at one delivery, and the other for receiving more than one quart in one package; and as to each the statute is constitutional and valid.

2. Indictment—Criminal Law—Constitutional Law—Judgment—Statutes.

Our Constitution, Art. I, secs. 11 and 12, requires that the accused be informed of the charge against him, but not in any special form or particular words, except it must be by presentment or indictment; and a motion in arrest of judgment will be denied if the charge in the indictment is sufficient for the court to proceed to judgment. Revisal, sec. 3254.

3. Same—Motion in Arrest—Intoxicating Liquor.

Where the indictment charges a violation of the prohibition law in receiving a greater quantity of spirituous liquor in one package than one quart at one time, within the State, it is sufficient to sustain a judgment of guilty under the statute, Public Laws 1915, ch. 97, sec. 2, and a motion in arrest thereof will be denied.

4. Statutes—Interpretation—Intent—Language Used.

Where a statute is clearly expressed, and is without doubtful meaning, an interpretation beyond the meaning of the expressions used therein is not permissible.

CRIMINAL ACTION, tried before *Justice, J.,* at August Term, 1916, of GASTON.

The defendants were indicted for receiving more than 1 quart of spirituous liquor, under Public Laws 1915, ch. 97, sec. 2, which is as follows: "That it shall be unlawful for any person, firm, or corporation at any one time or in any one package to receive at a point within the State of North Carolina for his or her use or for the use of any person, firm, or corporation, or for any other purpose, any spirituous or vinous liquors or intoxicating bitters in a quantity greater than 1 quart, or any malt liquors in a quantity greater than 5 gallons." They were convicted and appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

S. J. Durham for defendants.

WALKER, J. The verdict is well supported by the evidence, even the defendants' own testimony. They admitted that they had bought (768) a glass jug containing 1 gallon of whiskey, and also 4 quarts in separate bottles, from a man who was driving an automobile about 3 miles from Cherryville in Gaston County, and that it was delivered to and received by them. They put it in their buggy and it was found in their possession by the officers, who were searching for them, having received information that they had the liquor. The defendants contend, though, "that the context of the act indicates that receiving as an aid to the unlawful transportation of liquor is the evil which the Legislature intended to prohibit." But the first section of the chapter provides that "It shall be unlawful for any one to 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 the State,* to any other person, firm, or corporation *in this State,* any spirituous liquors . . . in a quantity greater than 1 quart . . . and it shall be unlawful for any spirituous liquors . . . so shipped, transported, carried, or delivered in any one package to be contained in more than one receptacle." (Italics ours.) It will be observed in reading the statute, that in section 2 there is no reference to section 1, and it is contended, therefore, that it creates a separate and distinct offense; but whether this be true or not, the receiving of liquor under the circumstances stated in the indictment and detailed in the proof would be an aid to the unlawful transportation, carriage, or delivery of the liquor. We do not perceive how the statute can be unconstitutional and void, even if the receipt of the liquor is "incidental to a purchase of it," where the sale was an unlawful one, as it was in this instance. The case falls within the plain and unmistakable terms of the statute. It is not necessary that the receipt should have been from one who had transported, carried, or delivered the liquor in *interstate* commerce, because the statute clearly embraces a carriage and delivery when they are acts done wholly within the State. It would seem that the person in the automobile, from whom the defendants purchased the liquor, was an itinerant dealer, acting in open violation of the law. While this does not play any very important part in the determination of the case as to its legal aspects, it discloses an evil against which the Legislature was evidently providing.

We have often held that a statute, even one of a criminal nature, when ambiguous, should receive a reasonable construction, so as to ascer-

tain the intention of its framers and to suppress the mischief against which it is directed. When the meaning is plain, as in this case, there is no room for construction. We merely interpret it as it is written and clearly expressed.

The Court recently said in *Caminetti v. U. S.*, 37 Supreme Court Rep., 193: "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, (769) and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms," citing numerous cases. And again: "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion. *Hamilton v. Rathbone,* 175 U. S., 414-421." There is no ambiguity in the terms of this act.

If the proof had shown that defendants had merely bought and *received* the 4 quarts, each quart in a separate bottle, for themselves and others, the result might have been different (*S. v. Little,* 171 N. C., 805) though this question is not before us. It is here charged substantially that defendants received one package containing more than 1 quart and at one time. It was not necessary that both of the latter elements should have coexisted, as it was sufficient that they received more than 1 quart at one time, or in one package, for themselves, as there are two offenses created by section 2, one for receiving more than 1 quart at one time, or at one delivery, and the other for receiving more than 1 quart in one package, as the language is virtually the same as that in the first section, which has been held to create two offenses as to transporting, carrying, or delivering liquor. *S. v. Little, supra.*

There was an objection to the form of the bill, but we think, as against a motion to arrest the judgment, it is sufficiently definite to inform the defendants of the charge preferred against them. By fair and reasonable intendment, it charged a receipt of more than 1 quart of liquor in one package—that is, 1 solid gallon of liquor, not 4 quarts or 8 pints.

We have held that in order to sustain a motion in arrest of judgment, after verdict, for defects in the indictment, it must appear that the bill is so defective that a judgment cannot be pronounced upon a verdict thereunder. *S. v. Moses,* 13 N. C., 452; *S. v. Smith,* 63 N. C., 234; *S. v. Francis,* 157 N. C., 612; *S. v. Barnes,* 122 N. C., 1031; *S. v. Ratcliff,* 170 N. C., 707. The act of 1811, ch. 809 (Rev., sec. 3254), provides: "Every criminal proceeding by warrant, indictment, information, or impeachment shall be sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and

explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding sufficient matter appears to enable the court to proceed to judgment." This Court construed the act of 1811 in *S. v. Moses, supra,* where *Judge Ruffin* said: "This law was certainly designed to uphold the execution of public justice by freeing the courts from those fetters of form, technicality, and refinement which do not concern the
(770) substance of the charge, and the proof to support it. Many of the sages of the law had before called nice objections of this sort a disease of law, and a reproach to the bench, and lamented that they were bound down to strict and precise precedents, neither more brief, plain, nor perspicuous than that which they were constrained to reject. In all indictments, as especially those for felonies, exceptions extremely refined, and often going to form only, have been, though reluctantly, entertained. We think the Legislature meant to disallow the whole of them, and only require the substance, that is, a direct averment of those facts and circumstances which constitute the crime, to be set forth. It is to be remarked that the act directs the court to proceed to judgment without regard to two things—the one, form, the other, refinement. The first can embrace, perhaps, only the mode of stating the fact. If the fact be one essentially entering into a crime, it must be set forth; but it need not be set forth in any particular words, if other words can be found which will convey the whole requisite legal idea. Pleaders are much to be commended for pursuing the ancient, settled, approved precedents. They are the best evidence of the law itself; and it is a becoming modesty in us, the emblem of merit, to evince a marked veneration for the sages who have preceded us. But it has pleased the Legislature not to require, as a matter of duty, in all cases, what is certainly a matter of prudence and propriety. Allowing it to be necessary that a certain fact shall be stated, they have dispensed with the necessity for stating it in a certain manner." And in *S. v. Smith, supra, Judge Settle* said: "It is evident that the courts have looked with no favor upon technical objections; and the Legislature has been moving in the same direction. The current is all one way, sweeping off, by degrees, 'informalities and refinements,' until, indeed, a plain, intelligible, and explicit statement of the charge against the defendant is all that is now required in any criminal proceeding. The act of 1811, Rev. Code, ch. 35, sec. 14, has received the almost universal approbation of the bench and bar. It needs no higher indorsement than that of the late *Chief Justice Ruffin.* He says, in *S. v. Moses,* 2 Dev., 452: 'This law was certainly designed to uphold the execution of public justice by freeing the courts of those fetters of form, technicality, and refinement, which do not concern the substance of the charge and the proof to support it.' This act has received a very liberal

construction, and its efficacy has reached and healed numerous defects in the substance as well as in the form of indictment." *Judge Ashe* in *S. v. Parker,* 81 N. C., 531, expresses the following views: "Ever since 1811 it has been the evident tendency of our courts as well as our law-makers to strip criminal actions of the many refinements and useless technicalities with which they have been fettered by the common (771) law, the adherence to which often resulted in obstruction of justice and the escape of malefactors from merited punishment."

These cases, and there are a number of others, show conclusively the strong trend towards giving the act of 1811 a liberal construction with a view of facilitating the administration of criminal justice without, of course, impairing the just rights of the accused under the Constitution, which only requires that he be informed of the charge against him, but not in any special form or particular words, except that it must be by presentment or indictment. Const., Art. I, secs. 11 and 12.

In *S. v. Francis, supra,* which was an indictment for manufacturing liquor in violation of the statute, *Justice Brown* said, referring generally to the statute: "Had the defendant moved to quash this bill or for a bill of particulars to supply him with any needed information, it is probable that one motion or the other would have been allowed. The defendant has not been taken at any disadvantage, for he allowed the trial to proceed and attacked the bill only after he had been convicted. To arrest the judgment it must appear that the bill is so defective that judgment cannot be pronounced upon it. . . . The bill, while defective in form, is sufficient to sustain the judgment of the court."

It is usually safe to follow the language of a statute when drawing an indictment upon it, as a departure from it may raise a doubt as to the sufficiency of the allegations. *S. v. Hall,* 93 N. C., 571; *S. v. Bryant,* 111 N. C., 693. "This is laid down by all the authorities as the true and safe rule." *Ashe, J.,* in *S. v. George,* 93 N. C., 567. Sometimes the bill is required to be drawn according to the words of the act defining the offense. *S. v. Deal,* 92 N. C., 802. But we do not see how the defendant could have failed to understand the particular accusation against him in this case, as the bill of indictment describes but one offense, and substantially alleges that of receiving 1 gallon of liquor and at a stated time. It is sufficient, even within the rule laid down in *S. v. Lewis,* 93 N. C., 581.

There can be no question as to the constitutionality of this statute. It was recognized in *S. v. Little, supra,* and the cases recently decided in the highest Federal Court affirm the validity of similar enactments. *J. C. Distilling Co. v. W. M. Railway Co. and West Virginia,* and *Same v. Am. Express Co.* (8 January, 1917). The case of *S. v. Burchfield,*

149 N. C., 537, will be found to have some bearing upon the question. *S. v. Williams,* 146 N. C., 618, is not in point.

It must be remembered that defendants received this liquor from an unlicensed dealer or an unlawful vender of it.

No error.

Cited: *S. v. Efird,* 186 N.C. 484; *S. v. Ballangee,* 191 N.C. 701; *S. v. Howley,* 220 N.C. 117; *S. v. Johnson,* 220 N.C. 776; *S. v. Greer,* 238 N.C. 327.

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(772)

STATE v. W. B. SMITH.

(Filed 9 May, 1917.)

1. Municipal Corporations—Cities and Towns — Ordinances — Peddlers — Privilege Tax—Exceptions—Statutes—Farm Products—Meat.

The general law of 1915, with regard to selling by itinerant merchants or peddlers, excepts those who sell or offer for sale "any articles of the farm or dairy," excludes meat butchered by a farmer from cattle he has raised on his own farm; and where a town ordinance makes it a misdemeanor for such venders to sell meat within its limits without first obtaining a town privilege tax, except those who are exempt under the general law, a farmer selling meat upon the streets of the town butchered from cattle he had raised comes within the exception made in the ordinance.

2. Municipal Corporations—Cities and Towns—Ordinances — Peddlers — Privilege Tax—Exceptions—Burden of Proof.

Where there is evidence tending to show that the defendant had peddled meat upon the streets of a town, without a license, prohibited by ordinance, with certain exceptions, the burden is upon the defendant to show he comes within the exceptions, when this defense is relied upon.

3. Same—Trials—Evidence—Questions for Jury—Instructions.

Where the defendant seeks to avoid the charge of violating a town ordinance in peddling meat upon the streets without paying the privilege tax upon the ground that the meat he sold was obtained from his own cattle he had raised upon his farm, and there is evidence that he bought and butchered cattle in the regular way, and peddled the meat, several times a week, cutting it up for customers and weighing it upon his wagon, the question of his good faith and the real character of the transaction, under proper instructions, is properly submitted to the jury.

DEFENDANT was tried and convicted at January Term, 1917, of GASTON, before *Cline, J.,* upon a warrant charging him with violating the following ordinance of the city of Gastonia:

"Fresh Meat Peddler. That every itinerant merchant or peddler selling or offering to sell, beef, pork, mutton, or any other fresh meat in the city of Gastonia shall pay a privilege tax of $25 per annum; and that any itinerant merchant or peddler selling or offering to sell pork, beef, mutton, or any other fresh meat of any kind in the city of Gastonia without having first paid the privilege tax required in this section and obtained a license for the same shall be guilty of a misdemeanor, and on conviction thereof before the judge of the municipal court shall be subject to a fine of $25 for each offense: *Provided,* the provisions of this section shall not be so construed as to apply to such persons as are exempt under the general laws of the State."

The defendant appealed.

Attorney-General Manning and Assistant Attorney General (773) *Sykes and Mangum & Woltz for the State.*

Carpenter & Carpenter for defendant.

BROWN, J. It is admitted that the exemption "under the general laws of the State" referred to in the ordinance is as follows: "Any person who shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same, or actually sells or barters the same, shall be deemed to be a peddler, and shall pay a license tax as follows: . . . This section shall not apply to those who sell or offer for sale books, periodicals, printed music, ice, fuel, fish, vegetables, fruits, or any articles of the farm or dairy or articles of their own individual manufacture, except medicines or drugs." Chapter 285, sec. 44, Public Laws 1915.

The evidence of the State tended to prove that the defendant in November, 1916, and many times theretofore, brought beef into the city of Gastonia on a wagon and drove from house to house, cut up and weighed the beef, and sold it by retail on the streets of the said city without license. The evidence of the defendant tended to prove that he is a farmer, and had cattle on his farm, where he lived, 5 or 6 miles from the city; that the cattle which he owned were born on his farm, or which he purchased when suckling calves, and which he kept and raised on his farm, and that he would kill one of such cattle occasionally and cut it up and haul it in his wagon to the city of Gastonia, and sell the same out at retail on the streets of said city.

The contention that beef does not come within the terms of the exception above quoted cannot be sustained. The words "or any articles of the farm" are evidently used to embrace all the products of the farm, and cattle, sheep, and hogs, when raised on the farm, are as much articles or products of the farm as the corn and grass upon which they are fed.

It is the well known custom of farmers to bring to the adjacent cities and towns dressed beef, mutton, hogs, and other farm products and sell them out of their carts and wagons upon the public streets. It was not the purpose of the General Assembly to exact a peddler's license tax when the farmer is selling beef and other products of his own raising. *S. v. Spaugh,* 129 N. C., 564.

The contention of the defendant that the court erred in the charge as to the burden of proof cannot be sustained. When the State proved to the satisfaction of the jury that the defendant was engaged in peddling beef regularly two or three times every week on the public streets without license, a *prima facie* case was made, and, nothing else appearing, the State would be entitled to a verdict. It was then incumbent upon the defendant to offer evidence to the satisfaction of the jury
(774) to bring himself within the terms of the exception, for when the defendant relies upon the exception as a defense to the charge he must show that he comes within it.

The court, among other instructions, charged: "So, the court instructs you, gentlemen of the jury, that if you find or are satisfied beyond a reasonable doubt from the evidence in this case that the defendant, William B. Smith, did butcher and bring upon the market in Gastonia and sell at retail along the streets of the city fresh beef from time to time between the last of September and the latter part of November of last year, and that he failed to pay the license tax as required by the ordinance, when it was demanded of him, it would be your duty to find him guilty in this case, unless at the same time you are satisfied that the meat that he sold was the product of his own farm or that it was meat, that is to say, beef that was killed by him and put upon the market from cattle that were owned by him there on the farm in the ordinary course of his business and used there in good faith as a part of the property and products of his farm.

"I have tried to explain that to you before. I have said I think that would include calves or steers which were born or dropped upon his farm where the mother belonged to him or was one that he had purchased or more than one that he had purchased, if he had purchased it in the ordinary course of business, and, as I told you before, to milk or use or to eat up the surplus products of the farm, grass, grain, or whatever it may be or things of that sort.

"(I) But if, on the other hand, you find from the evidence, gentlemen of the jury, that the cattle or some of the cattle that were marketed here as beef by the defendant were purchased by him with a view to reselling for beef—in other words, if they were cattle that he was procuring and later on was slaughtering in the nature and character of a butcher for commercial purposes, as distinguished from his ordinary work as a

farmer, why then, as to such cattle, he would not fall within the exemption of the statute; and, if you find that he was engaged in that kind of business, as charged by the State, it would be your duty to find him guilty." (J.)

To that part of his Honor's charge between the letters (I) and (J) the defendant excepted.

We see no error in the charge of the court. It is a full and clear presentation of the case to the jury. There is no question about the right of a farmer to raise cattle on his farm and sell it out when butchered upon the streets of the cities and towns of the State without paying a license tax, and he may buy calves, beeves, hogs, and sheep with which to stock his farm and consume its surplus crops, and he may likewise kill and sell those without a license.

The judge presented this view very clearly. But it must be (775) done in good faith as a farmer selling the products of his farm, and not as a regular business of butchering cattle for market. If he wishes to conduct a regular butcher shop on his wagon and go into the business, the farmer must pay the license tax required of others in the butcher business.

There is evidence offered by the State tending to prove that defendant conducted a butcher shop on his wagon, peddling out beef by the small quantity, cutting it up and weighing it on his wagon; that he did this regularly two or three times each week for several months during the fall of 1916; that when he listed his taxes in May he had only one cow; that he was not raising cattle; that he butchered cattle for others and sold it out on his wagon and received pay for his services. There is evidence for defendant that he purchased the calves and raised them on his farm and sold the beef so procured at retail from his wagon. He admits that he butchered and sold beef on the streets for others and was paid for it.

We think the good faith of defendant and the real character of the transaction was properly left to the jury in a charge of which defendant cannot justly complain.

No error.

STATE v. J. W. SUMMERS.

(Filed 9 May, 1917.)

1. Homicide—Physicians—Abortion—Evidence—Instructions.

Where a physician is on trial for a homicide charged as a result of his treatment of his patient to cause an abortion, and there is evidence on the part of the State that the treatment itself caused the abortion resulting in death, and on the defendant's behalf that the patient had theretofore used certain means to bring on the abortion, which he had refused to do, but yielded to her request to attend her as a physician under the condition she had herself produced, a request for instruction that there was no evidence sufficient to convict the prisoner apart from the dying declarations of the deceased is properly refused, is objectionable in giving undue emphasis to the evidence of a single witness, restricting the jury to the State's evidence alone, and in requiring them to accept the entire statement contained in the dying declarations, when they had the right to reject or accept any portion of it.

2. Appeal and Error—Instructions—Contentions—Objections and Exceptions.

Exception as to the manner of stating contention of counsel in the charge will not be sustained unless the attention of the court is called to it at the time and opportunity afforded of making proper correction.

3. Instructions—Admissions—Evidence—Appeal and Error—Homicide—Abortion—Physicians—Guilty Knowledge.

Where exception to the charge is made upon the ground that certain of defendant's admissions were allowed the weight of substantive evidence when they were only admissible in impeachment, and it appears from the charge that it was capable of the correct interpretation, a new trial will not be granted on appeal upon the principle that reversible error must appear. In this case, where a physician was charged with a homicide as the result of an abortion produced by him, *semble*, admission that in other of his cases he had used the same treatment which tends to produce an abortion, is competent as to his guilty knowledge in adopting the treatment.

4. Evidence—Text-Books—Physicians—Experts.

Where the evidence of a medical expert witness is material to the inquiry, and he has testified, on cross-examination, that he would not pursue a certain treatment for his patient, the reading from a medical work on the subject for the purpose of contradiction is properly excluded from the jury.

5. Evidence—Character—Qualifications.

Where a character witness has been properly qualified and has given his evidence as to bad character, he may of his own volition qualify his testimony and state in what respect it was bad.

(776) INDICTMENT for murder, tried before *Justice, J.*, and a jury, at August Term, 1916, of MECKLENBURG.

The solicitor having entered a *nol pros* as to the charge of murder in the first degree, defendant was convicted of the crime of manslaughter and from sentence thereon, appealed to this Court.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

John M. Robinson and F. I. Osborne for defendant.

HOKE, J. There was evidence on the part of the State tending to show that, on 27 June, 1916, in the city of Charlotte, the patient named in the bill, being quick with child, applied to the defendant for treatment and with a view and purpose of procuring an abortion; that for a fee of $75 defendant undertook the case, effected the desired purpose, packing the womb with gauze, and, as a result of the treatment, the patient died about sixteen days thereafter.

The defendant, as a witness in his own behalf, among other things, testified that on the day in question the patient applied to him for treatment for the purpose as stated, and that he positively declined, advising her against the course suggested; that she left and, later in the day, returned to his office and entered, saying: "I have done it." Witness inquired: "What have you done?" She answered: "I've fixed it." Witness said: "What have you done?" and she replied: "I (777) used one of those tapering pen stocks first, and then I used a lead pencil." That, yielding to her entreaty, he then undertook to look after her case, and, on examination, no other person being present, he found that she had so injured herself with some instrument that an abortion was inevitable, and he packed the womb with sterilized gauze with a view of relieving her in the best way and as soon as possible, and that this was entirely in the line of proper medical treatment under the conditions presented.

On cross-examination the defendant said that, five years before, he was up before the Medical Society under a charge of having committed an abortion; that he was exonerated of the charge, but censured for unethical conduct in reference to the case, and that in the course of his practice he had treated a dozen cases of this kind, and in every one the abortion was committed before he was called in. There was supporting evidence for the defense that, under the conditions as described and testified to by defendant, he had taken the proper course in the treatment of the case.

Under a comprehensive, clear, and impartial charge the jury, accepting the State's version of the occurrence, have convicted the defendant of the crime of manslaughter, and we find no reason for disturbing the results of the trial.

It is chiefly urged for error that the court refused a prayer for instructions by the defendant as follows: "The State relies upon the dying declaration of the deceased, and without such declaration there is no evidence introduced by the State to connect the defendant with the criminal charge; and if you have a reasonable doubt as to the truth of such alleged dying declaration, it is your duty to acquit the defendant."

Taken in connection with defendant's admission that he undertook the treatment of the case and packed the patient's womb with gauze, together with testimony on the part of the State that this treatment was sufficient to produce the abortion, and thus causing the death, and that there was no indication of any mechanical injury otherwise, there were facts in evidence sufficient to justify the conviction of the defendant without reference to the dying declarations. The defendant's position is, therefore, objectionable in giving undue emphasis to the evidence of a single witness, *S. v. Weathers,* 98 N. C., pp. 685-687; in its tendency to improperly restrict the jury to a consideration of the State's evidence alone, and in requiring them to accept the entire statement contained in the dying declaration, when they had a right to accept or reject any portion of it as it might impress them. The prayer, therefore, is rather a hindrance than an aid to a true conclusion, and could only serve to give defendant an undue advantage in the discussion of the case before the jury.

(778) It is further objected that in his Honor's charge prejudicial error was committed in stating certain contentions of the State, as follows: "The State contends that he packed the uterus of the defendant with gauze; and the State contends, further, that the result of that would be, whether the gauze is sterile or not, to produce an abortion; and the State contends that the reason of that is because it is introducing a foreign substance, and that nature comes to the relief of the woman and attempts to expel foreign substances, and in order to expel that foreign substance that there is contraction of the muscles of the uterus, and that the same process naturally follows in order to rid the womb of that foreign substance that would follow in case of natural birth at full time.

(A) "So the State contends, gentlemen, that the defendant did that; and the State contends, further, gentlemen, that he has a habit of doing that; that that was his character and reputation; and that when he did that he did it for the purpose of relieving this young woman who had become in that condition unfortunately and illegally, of relieving her unlawfully of the child that she carried in her womb." (B).

The exception is to that portion of the charge between the letters (A) and (B), and the objection being, as we understand the argument, that his Honor here gave his sanction to the consideration of the defendant's

admissions on this subject as substantive evidence when the only legitimate use was in impeachment of his character as a witness.

It is very generally held that an exception as to the manner of stating contentions of counsel will not be sustained unless attention is called to it at the time, thus giving the judge opportunity to make the proper correction. *S. v. Fogleman,* 164 N. C., 461; *Jeffress v. R. R.,* 158 N. C., 215. If it be conceded, as contended by defendant, that this position only applies to statements of fact and relevant inferences thereupon, and does not extend to a case where a court should sanction an erroneous use and estimate of testimony as a matter of law, it does not sufficiently appear, from a perusal of the charge, that the judge committed error in the respect suggested. The charge permits the interpretation, certainly, that the court referred to defendant's admissions in impeachment of his evidence and standing as a witness, and in favor of maintaining the validity of trials unless error is shown, we think this interpretation should be given it. Apart from this, it is not at all clear that these admissions of defendant, "that in the course of his practice, he had attended as many as twelve cases where a criminal abortion had been committed," permitting the inference that he was a participant, are not substantive evidence in so far as they may be interpretative of the act he admits doing, to wit, "packing the womb of a pregnant woman with gauze."

While it is the accepted position that the commission of one (779) crime is not evidence on a prosecution for another, there are recognized exceptions to the rule. These exceptions usually appear on charges involving the *crimen falsi,* as to show guilty knowledge in cases of counterfeiting or a guilty purpose or intent in indictments for fraud and deceit or of receiving stolen goods, etc.; but they are not necessarily confined to such cases. In Roscoe's Cr. Ev., p. 100, the author puts the case of *Rex v. Mogg,* reported in 19 E. C. L., p. 420, where, on indictment for administering sulphuric acid to eight horses with intent to kill them, claim by the prisoner that the acid was administered with intent to improve them, etc., the administering of the acid at different times was admitted as relevant on the question of intent. And in same work, p. 100, case of *Rex v. Winkworth,* indictment for robbery, prosecutor was advised by prisoner to give something to a mob to get rid of them, which he did, to show that this was not bona fide advice, but only a mode of committing the offense charged, it was allowed in evidence to prove other demands for money made by the same mob at other houses at different times of the same day. 19 E. C. L., p. 465.

In the case at bar defendant admits "packing a pregnant woman with gauze," a treatment calculated and likely to produce an abortion. He claims and testifies that this packing was done with a beneficent intent

and in the line of proper medical treatment. The State contends it was done with criminal intent. It would seem that the fact that he was in the habit of doing this may be evidenced in interpretation of an admitted act capable of a criminal or an innocent intent. Without final conclusion on the question, however, we rest our decision here on the proposition, as stated, that the charge of the court, being capable of a construction clearly correct, such interpretation should be properly allowed it on the exception as presented.

It was insisted further for error that on the cross-examination Dr. John R. Erwin, who had testified for the State as a medical expert, the defendant's counsel was not allowed to read to the witness, in the hearing of the jury, an extract from Peterson on Obstetrics, under circumstances as follows: In answer to question, the doctor stated that he had heard of Peterson on Obstetrics; that he had it in his library.

Q. "Don't this man Peterson describe this method, in his opinion as the best way to do it? Another method? And that it can be performed in a thoroughly aseptic manner, and without any assistance, and without an anæsthetic?" A. "I wouldn't do it."

Q. "Doesn't he say it?" A. "I don't know about that."

Q. "Let me show it to you." The State objects. Sustained. Defendant excepts.

(780) This ruling is clearly sustained, we think, by recent decisions of the Court on the subject. *Tilghman v. R. R.*, 171 N. C., 652; *Lynch v. Mfg. Co.*, 167 N. C., 98, 101. In *Lynch's case* the position is stated as follows: "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 has 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 textbook and asking the witness if it is or is not true, for this would have the effect of putting the statement 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. Easeley*, 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 proposition to read an extract from this medical author under the circumstances stated is contrary to the principles declared in these and other cases, and the exception must be disallowed.

Objection is also made that the court refused to strike out the answer of certain other witnesses as to character, Dr. John R. Erwin and others, who, after saying they knew the character of defendant, qualified their further answer by saying in what respect it was bad. It is the accepted rule that a witness may do this of his own volition, and these exceptions also must be disallowed. *Edwards v. Price,* 162 N. C., 243; *S. v. Hairston,* 121 N. C., pp. 579-582.

Having given the cause most careful consideration, we find no error to defendant's prejudice, and the judgment of the Superior Court is affirmed.

No error.

Cited: S. v. Butler, 177 N.C. 586; *Price v. Edwards,* 178 N.C. 503; *S. v. Mills,* 184 N.C. 699; *S. v. Reagan,* 185 N.C. 713.

STATE v. CHARLES WALKER.

(Filed 9 May, 1917.)

1. Homicide—Murder—Premeditation.

The killing of a human being after the fixed purpose to do so has been formed, for however short a time, is sufficient for the conviction of murder in the first degree.

2. Same—Evidence.

The premeditation or fixed purpose to kill a human being may be shown by the surrounding circumstances; as where the deceased and prisoner were sweethearts, and as a result of a lovers' quarrel in the morning the deceased broke off her engagement, refusing to go with the prisoner again, and in the afternoon the prisoner met her, repeatedly urged her to go with him, which she refused to do, and after following her three-fourths of a mile she began to run, refusing to stop at his command, whereupon, at a secluded place, he drew his pistol from his pocket and fired three times, at the last of which she fell, and death resulted.

INDICTMENT for murder, tried at November Term, 1916, of (781) CALDWELL, before *Ferguson, J.*

The prisoner was convicted of murder in the first degree and from the sentence of death appeals to the Supreme Court.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

M. N. Harshaw and J. H. Burke for the prisoner.

BROWN, J. The only question presented upon this appeal is to the sufficiency of the proof that the homicide of which the defendant was convicted was premeditated and whether the evidence is sufficient to show that degree of deliberation and premeditation necessary to constitute murder in the first degree. All the evidence tends to prove that the prisoner and the deceased, Florence Sutphin, were cousins and sweethearts; that at one time they had been engaged to be married and had been a great deal in each other's company for some months preceding the homicide. A number of letters are in evidence, from one of which it appears that a few days before the homicide the deceased wrote the prisoner declaring that she would not marry him, and terminating the engagement.

On Sunday, 1 October, 1916, the day of the homicide, the prisoner went to the home of the deceased between 7 and 8 o'clock in the morning. At that time they had a lovers' quarrel and the deceased told the prisoner that she would not go with him any more. Between 1 and 2 o'clock of that day the deceased left her home to visit at Mr. Hagler's. According to the testimony of Glennie Martin and Willie Martin, who went with the deceased, they met the prisoner on the way. He spoke to the deceased and asked if he could go with her. On being refused, he took hold of her arm and said: "Come on, Florence." She replied: "Charlie, I am not going with you." The deceased and her two companions walked on, the prisoner following. The prisoner again directed the deceased to stop, and they had some conversation about a (782) watch. He demanded that she tell him the reason why she refused to go with him any more, and she replied that she did not have any reason. The testimony is that the party walked on and the prisoner carried his right hand in his hip pocket all the time. The girls started to run and the prisoner ran after them, crying out to the deceased: "Florence, I say do not run!" She replied: "You have not got anything to do with me, and I will run if I want to." The prisoner said: "Florence, I say do not run!" The girls walked a few steps and the prisoner fired three shots at the deceased, who fell at the third shot. After firing the third shot, the prisoner turned and ran. Where he shot the deceased was the darkest place in the woods. The testimony is that he met up with the girls in an open place and followed them three-quarters of a mile.

Upon searching the person of the prisoner, the sheriff found a knife and a pistol in his pocket. The defendant through his counsel admitted that he fired the shot that killed the deceased.

We are of opinion that there is abundant evidence in this record tending to prove that the prisoner killed the deceased deliberately and premeditatedly. The numerous cases in our own reports upon this subject

all declare that when the purpose or design to kill is formed with deliberation and premeditation, it is not necessary that such purpose or design shall be formed any definite length of time before the killing. No particular time is required for this process of premeditation or deliberation. When a fixed purpose to kill is deliberately formed, it is immaterial how long after that the purpose to kill is put into execution. It is as much a deliberate and willful murder if it is committed within five minutes after the fixed design and purpose to kill is formed as it would be five hours. *S. v. Teachey,* 138 N. C., 598; *S. v. Spivey,* 132 N. C., 989; *S. v. Daniel,* 139 N. C., 552; *S. v. Lipscomb,* 134 N. C., 694.

This premeditation and deliberation, like any other fact, may be shown by circumstances, and in determining as to whether there was such premeditation and deliberation the jury may consider the entire absence of provocation and all the circumstances under which the homicide is committed. *S. v. Roberson,* 150 N. C., 837; Carr on Homicide, sec. 72.

If the circumstances show a formed design to take the life of the deceased, the crime is murder in the first degree. This subject is so fully discussed in the many cases in our reports that it is useless to pursue the matter further.

No error.

Cited: S. v. Coffey, 174 N.C. 816; *S. v. Cain,* 178 N.C. 729; *S. v. Benson,* 183 N.C. 799; *S. v. Evans,* 198 N.C. 85; *S. v. Macon,* 198 N.C. 486; *S. v. Buffkin,* 209 N.C. 125, 126; *S. v. Bell,* 212 N.C. 22; *S. v. Taylor,* 213 N.C. 523; *S. v. Hammonds,* 216 N.C. 75; *S. v. French,* 225 N.C. 284; *S. v. Wise,* 225 N.C. 749; *S. v. Stewart,* 226 N.C. 320, 303; *S. v. Blanks,* 230 N.C. 504.

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(783)

STATE v. FRED A. PERLEY AND W. H. CROCKETT.

(Filed 23 May, 1917.)

1. Constitutional Law—Statutes—Police Powers—Municipal Corporations—Watersheds.

Chapter 56, Laws 1913, requiring the owners of land to remove tree-tops, boughs and laps, etc., within 400 feet of the boundary line of a municipal watershed, left from cutting timber thereon, "so as to prevent the spread of fire from such cut-over area and the consequent damage to such watershed," making its violation a misdemeanor, falls within the police powers of the State, within its legislative discretion, and not within the inhibition of the XIVth Amendment to the Federal Constitution as to due process of law and a denial of the equal protection of the law.

2. Statutes—Police Powers—Relative Rights.

A citizen deriving title to real property from the State acquires it upon condition that he holds it subject to necessary or reasonable regulations in promotion of the public interest, the rights, duties, and advantages of each being reciprocal with those of adjoining owners of lands, and beneficial to all.

3. Criminal Law—Statutes—Intent—Municipal Corporations—Watersheds.

The intent to violate a criminal statute is the criminal intent punishable by its terms; and where the intent to violate our statute making it a misdemeanor to leave the tree-tops, etc., within 400 feet from a municipal watershed, etc., is shown, the defendant, having violated it, may not avoid the consequences of his act by showing that his motive was not a bad one.

4. Constitutional Law—Statutes—Interpretation.

A statute will not be declared unconstitutional by the courts unless it clearly appears to be in conflict with the organic law, and such conclusion is unavoidable after removing every reasonable doubt as to its incompatibility with the Constitution.

5. Statutes—Municipal Corporations—Watersheds—Timber Interests.

One having logging interests upon lands is amenable to the provision of our statute requiring the removal of the tree-tops, etc., from the cutting-over of the land within 400 feet of a municipal watershed affording the means of a water supply to its inhabitants.

INDICTMENT tried before *Adams, J.*, and a jury, at April Term, 1917, of BUNCOMBE.

Defendants were indicted for a violation of Public Laws 1913, ch. 56, by cutting down timber on lands of another, and leaving thereon the tree-tops, boughs, laps, and other portions of timber not fit for commercial purposes within 400 feet of the boundary line of the watershed of the Asheville water-works plant owned by said city and used as a public supply for its citizens. Defendants were duly notified, more (784) than three months before indictment found, to remove the same, and failed and refused to do so. The requirement of the law was declared to be for the prevention of the spread of fire from the timber lands to the watershed, and its injury from the destruction of timber growing thereon. There was a motion to quash, which was overruled, and a special verdict. The defense was that the statute is contrary to the fourteenth amendment to the Constitution of the United States, as it deprives the defendants of their property without due process of law, and denies to them the equal protection of the law. There was no denial that the prohibited acts were committed, but the defendants alleged that the statute is void, and that they are, by the peculiar facts, exempt from its provisions. The special verdict found "that on 1 July, 1916, the city of Asheville, a municipal corporation, did own a certain large boundary

of land, situated in the county of Buncombe and State of North Carolina, which said boundary of land consists of about 16,000 acres, the outside boundary of which is about 12 miles in length; that on 1 July, 1916, prior thereto, and since that time, the said city of Asheville held and used said property as a watershed, from which it derived water which was furnished to the inhabitants of the city of Asheville, North Carolina, for domestic and other purposes, which said property was known as the city watershed. That the defendants Fred A. Perley and W. H. Crockett, on or about 1 July, 1916, were owners of standing and fallen timber on certain lands situated in Yancey County, North Carolina, which said lands lie within 400 feet of the said watershed belonging to the city of Asheville, and adjoining said watershed on the north about 4 miles, but did not own the land on which said timber stood, and that water did not drain from said timber, or the land on which it stood, on to said watershed; that said watershed extends to the north to the top of ridges and mountains on one side, and the timber owned by the defendants, which was cut as herein found, stood on land extending to the south which reached the tops of the ridges and mountains on the opposite side, and that said lands and timber were in all respects substantially similar on both sides of the line of said city watershed, both within and without."

The court not agreeing with the defendants in their contention, the jury in submission to its opinion found the defendants guilty on the special verdict, and from the judgment of the court thereon they appealed.

Attorney-General Manning, Assistant Attorney-General Sykes, J. E. Swain, and Marcus Erwin for the State.

Martin, Rollins & Wright for defendants.

WALKER, J., after stating the case: The possession and enjoy- (785) ment of all rights are subject to such reasonable conditions and regulations as may be deemed by the Legislature essential to the public welfare, and especially are they held in subordination to the exercise of the police power, which extends and relates to the preservation of the peace, good order, safety, health, morals, convenience and comfort of the people. It is not confined to the suppression of what is offensive, disorderly, or unsanitary, but embraces those rules and regulations designed to promote the public good and general prosperity of the community, provided that the legislation of whatever kind has a real or substantial relation to those objects, and is not a palpable invasion of individual rights secured by the fundamental law. In its broadest sense, as sometimes defined, it includes nearly all legislation and almost every func-

tion of civil government. *New York v. Miln,* 11 Peters (U. S.), 102; *Barbier v. Connelly,* 113 U. S., 27; *L. and N. R. R. v. Kentucky,* 161 U. S., 677; *Lockner v. New York,* 198 U. S., 45; *Lawton v. Steele,* 152 U. S., 133; *Hennington v. Georgia,* 163 U. S., 299; *Bacon v. Walker,* 204 U. S., 311.

It is held that this power is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. *Canfield v. U. S.,* 167 U. S., 518. The fourteenth amendment to the Federal Constitution does not restrict the subjects upon which the police power may be lawfully exerted. *Jones v. Brim,* 165 U. S., 180. In *Lockner v. New York, supra, Justice Peckham* said of it: "There are, however, certain powers, existing in the sovereignty of each State in the union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the fourteenth amendment was not designed to interfere," citing *Mugler v. Kansas,* 123 U. S., 623, and other cases. The regulation of the use of land comes within the scope of the police power. Tiedeman on Limitations of Police Powers, sec. 122, says at page 423: "It is not every use which comes within this constitutional protection. One has a vested right to only a reasonable use of one's lands. It is not difficult to find the rule which determines the limitations upon ways or manner of using lands. It is the rule which furnishes the solution of every problem in the law of police powers, and which is comprehended in the legal maxim, *Sic utere tuo ut alienum non lædas.* One can lawfully make use of his property only in such a manner as that he will not injure an-
(786) other." We held in *Durham v. Cotton Mill,* 141 N. C., 615, (*s. c.* 144 N. C., 705); that the statute (Rev., sec. 3051) for the protection of streams from which the public is supplied with drinking-water, was a valid exercise of this power, and that act required the riparian owner to subject sewage on his own land to a system of purification before discharging it into such a water-course. We there said, at page 636: "The extent to which such interference with the injurious use of property may be carried is a matter exclusively for the judgment of the Legislature when not controlled by fundamental law. Nor is there anything to render such legislation objectionable because in some instances it may restrain the profitable use of private property, when such use in fact does not directly injure the public in comfort or health; for to limit such legislation to cases where actual injury has occurred

would be to deprive it of its most effective force. Its design is preventive, and to be effective it must be able to restrain acts which tend to produce public injury. Many instances of such an exercise of this power can be found. The State regulates the use of property in intoxicating liquors by restraining their sale, not on the ground that each particular sale does injury, for then the sale would be prohibited, but for the reason that their unrestricted sale tends to injure the public morals and comfort. The State is not bound to wait until contagion is communicated from a hospital established in the heart of a city; it may prohibit the establishment of such a hospital there, because it is likely to spread contagion." The question has undergone discussion in *Daniels v. Homer*, 139 N. C., 219; *S. v. R. R.*, 169 N. C., 295; *Shelby v. Power Co.*, 155 N. C., 196; *Skinner v. Thomas*, 171 N. C., 98; and more recently in *State Board of Health v. Comrs., ante*, where it was held: "Even vested rights having reference to the ordinary incidents of ownership must yield to reasonable interference in the exercise of police power. In that field, as stated, the judgment of the Legislature is to a great extent decisive, and must be upheld unless the statute in question has no reasonable relation to the end or purpose in view and is manifestly an arbitrary and palpable invasion of personal and private rights," citing numerous authorities. It is said in Russell on Police Powers of the State, p. 95: "Regulations to prevent fires are within the scope of the police power, as has been frequently determined. The removal of buildings for the purpose of preventing the spread of fires is authorized. Relating to this subject are laws prohibiting the keeping of explosive substances or highly inflammable substances within certain limits. The subject of building laws is also a related topic. Municipalities are very generally authorized to control the construction of buildings and to prevent the erection or maintenance of unsafe buildings. Such regulations are purely police regulations." We could multiply examples of the kind indefinitely, in illustration of the extent to which the (787) courts have gone in sustaining legislation of the sort we are now considering, where private property has been controlled and regulated in its use for the protection of the public health and safety, and other things so essential to the common welfare. Every citizen derives his title to the property from the sovereign, which with us is the State, and he acquires it upon the implied condition that it shall be held subject to all necessary or reasonable regulations in promotion of the public interest. Each citizen reaps an advantage, or substantial benefit, from the fact that all property is thus held, as the principle is a protection to his own as well as to that of others. It enhances its value, too, because his neighbor must so use his premises as not to injure him in the enjoyment of rights pertaining to his ownership of adjacent land. The rights,

the duties, and the advantages, therefore, are all reciprocal. The enforcement of this law is a distinct benefit to all as much so, though not always in the same degree, as laws enacted for our personal safety and freedom from the annoyance of others. Private convenience must consequently give way to the public good in the interest of all, and in order that government may be administered, not for one, or even a few, but to benefit all who have equally a claim upon its protection. In *Cusack v. City of Chicago,* 37 Sup. Ct. Rep., 190, *Justice Clarke* said for the Court: "The principles governing the exercise of the police power have received such frequent application and have been so elaborated upon in recent decisions of this Court, concluding with *Armour & Co. v. North Dakota,* 240 U. S., 510, that further discussion of them would not be profitable, especially in a case falling as clearly as this one does within their scope. We, therefore, content ourselves with saying that while this Court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the State enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the State whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare," citing *Jacobson v. Massachusetts,* 197 U. S., 11. In the case of *L. S. & M. So. Railway Co. v. Clough,* 37 Sup. Ct. Rep., 144, speaking of the application of this law to a drainage case, *Justice Pitney* said: "It is requiring them merely to bear the cost of constructing crossings for their railroad lines over the proposed new channel and outlet, 'so as not to interfere with the free use of the same,' and 'in a sufficient manner not to unnecessarily impair its usefulness.' With respect to this duty, (788) if the State has a right to impose it in aid of the drainage project, the remoteness or proximity of the area to be drained is wholly immaterial." But the question we have here, upon the special facts of this case, seems to have been decided by that same high court, in *Mo. & C. R. R. Co. v. May,* 194 U. S., 267, upon facts not materially dissimilar to those in this record, and the law was upheld notwithstanding that it was confined to railroads, and was apparently discriminative with respect to that particular class. The statute of Texas which was considered in that case provided that it should be unlawful for railroad companies to permit Johnson grass, or Russian thistle, to mature and go to seed upon its right of way. The law was sustained, as the act forbidden would, if committed, be injurious to owners of contiguous land, as the grass was a menace to crops, and is propagated only by seed. The

Court was divided in opinion, but all the justices concurred that the law would clearly be valid if not discriminative in its restricted application to railroads, the majority holding that it was not even discriminative. In the opinion of the Court *Justice Holmes* well said: "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." That case was affirmed at the present term of the Court in *Chicago, etc. R. R. Co. v. Anderson,* 37 Sup. Ct. Rep., 124, where it held a statute valid which provided that all railroad corporations in Indiana should "cause all thistles, briars, docks, and other noxious weeds growing on lands occupied by them in any city, village, or township of the State, to be cut down and destroyed"; and annexed a penalty for its violation. The Court held that the statute was valid as applied in favor of contiguous landowners, stating that "as thus limited, we think its validity must be admitted under the doctrine of the *May case.*"

Applying these well settled principles to the facts of this case, we do not see why this statute is not a perfectly valid exercise of the State's police power. The object in view when it was passed appears so clearly to be the protection of the forests on the watershed belonging to the city and used by it in connection with its water-works, that what was the real intention of the act is not the subject of argument. Where premises are in such condition and location that the proper maintenance of forests on them, or wooded land which is a part of them, will remove or diminish the danger of floods or landslides, the protection of the water basin, or other source of supply, from such consequences is of such great importance to the public, who use the water for domestic purposes and are dependent solely upon it, and the loss and inconvenience from any impairment of it might be so incalcuable that it can hardly (789) be conceived why the Legislature may not intervene by an exercise of the police power and prevent such a catastrophe. The loss to be averted would so considerably outweigh the injury resulting to the owner of contiguous lands and it would be so negligible when compared with the public damage, that the restriction imposed upon him will be disregarded as too insignificant to be set off against the great public benefit and pressing public necessity involved in the continued and proper maintenance of the watershed. It is no hardship for the landowner to clear his land of rubbish which he has made himself, and which, when it becomes dry, is so combustible in its nature as to be a standing menace to the adjacent forests. We have held that it is negligent for a railroad company to permit such inflammable matter as tree-tops, etc., to accumulate on its premises, which, if ignited, will spread fire to adjoining

premises. *Craft v. Timber Co.*, 132 N. C., 152. We have also enforced the provisions of our statute, Revisal, sec. 3346, against setting fire to woods without due notice to adjoining proprietors. Such restrictions upon the use of property have frequently been sustained by the courts, one writer stating that the books are full of such cases. Many of our municipal ordinances depend for their validity upon the existence of this power to preserve and promote the safety and welfare of the community. Considering a county ordinance requiring each landowner to rid his premises of the pesky ground-squirrel, by their extermination, which was held to be invalid because of the impossibility of executing it, the Court said, in *Ex Parte Hodges*, 87 Cal., 162, 165: "Such an ordinance differs materially from laws requiring an occupant of land to keep them free from noxious weeds, or such as make it the duty of an owner of diseased domestic animals to kill them in order to prevent the spread of the disease. These are matters over which the property owner has control, and the requirements are reasonable and just." See, also, Freund on Police Powers, sec. 618.

A nuisance at common law is whatever is injurious to a large class of the community, or annoys that portion of the public which necessarily comes in contact with it. Prentice on Police Powers, p. 137; 2 Wh. Cr. Law, sec. 2370. There are several different classifications of nuisances, one of which is this: "First, those which are nuisances *per se*, denounced as such by common law or statute; second, those which in their nature are not nuisances, but may become such by reason of locality or management; third, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds. As to the first and third, the municipal declaration is conclusive, but as to the second, the municipal power is confined to such as are nuisances in fact." Freund on Police Powers, p. 30.

(790) We can scarcely hesitate to declare that to be a nuisance which threatens the main if not the only source of water supply to a thickly settled community, containing a large and progressive city, which has attracted many to its borders in search of pleasure, health, or prosperity, because of its many natural advantages, its salubrious climate, the beautiful scenery of its surrounding mountains, from one of which it derives its water supply, and which are covered with virgin forests and porous soil, which hold in check the heavy rains and protect the streams from sudden and violent disturbances. Recent experience has demonstrated the necessity of keeping these forests intact, and the National Government has purchased and established near there a large reservation partly for this purpose.

In the case before us the defendant, perhaps, did not intend to injure any particular persons, or to expose them to harm, but he was guilty of

the criminal act in doing that which was prohibited, and which was calculated to produce injurious results, without regard to his particular intent. When a statute forbids a certain thing to be done, the intent to do the forbidden thing is the criminal intent, whether it be an immoral or evil one, *per se,* or not. Here the purpose of the law is to prevent the injury, and the gist of the crime is the effort to frustrate this intent. It is as much the duty of the State to protect the health of its citizens as it is to safeguard their lives and limbs against the acts of wrong-doers. Ethically considered, it is as culpable to endanger the safety and comfort of an entire community as it is to jeopardize the life of one of its members against whom a particular wrongful act is directed, and concededly more so. It is not the bad motive present in the mind, and which prompts the commission of the injurious act, but the doing of the act itself, that makes it indictable under the statute. Forest fires are not infrequent even in this section of the country, and they are caused generally by the dry and inflammable material lying upon the ground, and they spread with great rapidity and leave the destruction of vast areas in their wake. It was against the happening of such an event the statute was intended to provide. When such interests are involved as the safety and health of a large community, we cannot stop to speculate upon chances, or to take risks, as to what will happen, but we must keep on the safe side, so that if what would otherwise end in disaster does come, we will be prepared for it, and the public welfare will thereby be surely conserved. *Durham v. Cotton Mill, supra; Bd. of Health v. Comrs., supra.*

When a statute is assailed as unconstitutional, every presumption of validity should be indulged in its favor, and it should not be declared void except upon the clearest showing that it conflicts with the organic law. The conclusion that it is invalid should be unavoidable, and reached only after removing every reasonable doubt as to its in- (791) compatibility with the Constitution. Between the two there should be an irreconcilable conflict. Therefore it is that the highest Federal Court said: "In the exercising of the police power the means to be employed to promote the public safety are primarily in the judgment of the Legislature, and the courts will not interfere with duly enacted legislation which has a substantial relation to the purpose to be accomplished, and does not arbitrarily interfere with personal and private rights." It was said in *Skinner v. Thomas, supra:* "The police power is an attribute of sovereignty, possessed by every sovereign State, and is a necessary attribute of every civilized government. 'It is the power to protect the public health and the public safety, to preserve good order and the public morals, to protect the lives and property of the citizens, the power to govern men and things by any legislation

appropriate to that end.' '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.' The exercise of this power 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," citing 6 Rul. Case L., 183 and 236; 9 Enc. of U. S. Reports, 473; *Slaughterhouse cases,* 16 Wall., 36, 21 L. Ed., 394. It may be true that, let a statute be ever so charitable and the Legislature ever so generous, if the property of the subject is thus given away, or it is taken without any resultant benefit to the public, the legislation should not be countenanced; but such is not the case here. The defendant is not the owner of the soil, but had only some logging rights in the timber growing upon it. When he cut and removed the timber, it was a comparatively easy matter for him to carry off the tree-tops and other débris, or, at most, no great burden or hardship, and his failing to do so created a constant menace to the local public. If there is any reasonable doubt of it, that doubt should be resolved in favor of the latter and against him.

The question is a very important one, and we have given to it most careful consideration. It was argued before us by Mr. Martin with his usual ability and learning, which means that the case has been presented for the defendant most strongly from its every angle; but, after all he has said, we have not discovered any error in the record.

No error.

Cited: R. R. v. Cherokee County, 177 N.C. 101; *S. v. Kelly,* 186 N.C. 377; *Reed v. Engineering Co.,* 188 N.C. 42; *Hinton v. State Treasurer,* 193 N.C. 500; *S. v. Lattimore,* 201 N.C. 34; *S. v. Correll,* 232 N.C. 697.

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(792)

STATE v. JOHN KILLIAN.

(Filed 23 May, 1917.)

1. Criminal Law—Evidence—Demurrer—Statutes.

Where the defendant in a criminal action introduces evidence, after the court has overruled his motion to nonsuit upon the State's evidence, to which ruling he has excepted, he loses his right to have his motion considered only upon the State's evidence; and where his motion to nonsuit after all the evidence is in has been overruled and excepted to, the Supreme Court, on appeal, will consider the whole evidence under the

second motion, to see if it is sufficient to support the verdict and judgment. Gregory's Supplement, sec. 3265a.

2. Criminal Law—Trials—Evidence—Instructions—Burden of Proof.

The charge of the judge to the jury should be considered as a whole, and where in a criminal action he has told them that, for conviction, they must be satisfied of the guilt of the prisoner beyond a reasonable doubt, it is not required that he repeat this rule of law every time he refers to any finding from the evidence.

3. Evidence—Character—Witnesses—Impeachment—Cross-examination.

The character of one witness may be impeached by the testimony of another, except as to specific acts, subject, however, to cross-examination as to particular facts so as to attack his estimate of character or to contradict him for the purpose of testing his accuracy.

4. Appeal and Error—Witnesses—Evidence—Character—Harmless Error.

Where the bad character of a witness has been established, other evidence in impeachment thereof, though erroneously admitted, will be regarded as harmless error, if not prejudicial, as in this case.

5. Criminal Law—Statutes—Sentence—Court's Discretion.

Construing chapter 80, section 6, Laws 1907, with section 3632, Revisal (Hinsdale Act), to ascertain the legislative intent, upon consideration of the inherent nature of the subject-matter with the mischief and the proposed remedy, it is *Held*, that the later act was not intended to take away the discretion of the trial judge, upon conviction of manslaughter, to sentence the prisoner to a three-year term in the State's prison, and to wear a felon's stripes, when in his opinion a sentence to the roads will result in the prisoner's escape.

CIVIL ACTION, tried before *Adams, J.*, and a jury, at October Term, 1916, of BUNCOMBE.

The prisoner was indicted with one Andy Bates for the murder of George Bates, and was convicted of manslaughter, the other defendant being acquitted. The prisoner, John Killian, appealed.

Attorney-General Manning and Assistant Attorney-General (793) *Sykes for the State.*

W. P. Brown and Jones & Williams for defendant.

WALKER, J. When the State closed its testimony and rested its case, the prisoner, John Killian, moved that a nonsuit be entered under the statute, Gregory's Supplement, sec. 3265a. This the court refused to do, and the prisoner excepted. It is contended that when this motion was made there was no evidence against the prisoner, John Killian, and if this be correct, and he had rested his case there, we would have sustained his motion and reversed the lower court. He was not content to stop and risk his case upon the State's testimony, but himself introduced

witnesses, and from their testimony and other testimony in the case we are of the opinion that there was some evidence of his guilt. It is perfectly clear that the deceased was killed either by Andy Bates, his father, or the prisoner, John Killian. The former testified that he did not cut his son, and there was some evidence tending to show that a knife was found near or at the place where the homicide was committed which corresponded somewhat with one that John Killian had. There was other evidence tending to connect him with the act of killing, but it is needless to review all of it, as, if there was any at all, the motion was properly denied.

But the prisoner does not rely so much upon the absence of proof as to his guilt as he does upon the position taken by him in argument and his brief, that notwithstanding the fact that he introduced evidence after moving for a nonsuit when the State rested, he is entitled to have his motion considered upon the evidence as it was at that time, and that he did not waive his motion, or the exception to its denial by the court, by introducing evidence in his own behalf, even if the latter does tend to establish his guilt. We cannot accept this construction of the statute. The latter provides that the prisoner, at the close of the State's evidence, when it has rested its case, may move to dismiss or for judgment of nonsuit, and if the motion is allowed it shall have the force and effect of an acquittal, but if it is refused, the prisoner may except, and if he introduces no evidence, the case shall be submitted on the evidence introduced by the State, and he shall have the benefit of his exception on appeal to this Court. But he shall not be prevented from introducing evidence after his motion has been overruled, and may again move for judgment of nonsuit after all the evidence has been concluded, and if this motion is also refused, upon consideration of all the evidence, he may except, and if convicted, he shall have the benefit of his exception on appeal, and the motion, if allowed at the time, or in this Court on appeal, shall in all cases have the force and effect of a verdict of (794) "Not guilty." There would seem to be no doubt as to the meaning of this statute. The prisoner's counsel argued that it was not like the "Hinsdale Act" (Laws 1897, ch. 109; Laws 1899, ch. 131; Laws, 1901, ch. 594; Revisal of 1905, sec. 539), because that act provides expressly that if the defendant introduces evidence, he waives any previous exception to the refusal of his motion to nonsuit upon the plaintiff's evidence; but while the phraseology is different, the meaning of the two acts is substantially the same. It will be noted that the second motion, or renewal of the first, must rest upon a consideration of all the evidence in the case. This plainly excludes the idea that the State's evidence first introduced may be considered alone or separate from the entire mass. The object of the statute in permitting the prisoner to

introduce evidence after moving for a nonsuit was to preserve to him a right which did not exist before the statute was passed. The present *Chief Justice* said in *Prevatt v. Harrelson,* quoting from *Means v. R. R.,* 126 N. C., 429: "The rule stands now just as it did before the passage of chapter 109, Laws 1897, and the amendment of 1899, except that under this legislation it is discretionary with the defendant whether he will introduce evidence after the motion to dismiss, or not; while, before these acts, it was discretionary with the court whether it would allow the defendant to introduce evidence after resting his case and making the motion." *Justice Hoke* said in *S. v. Andrews,* 166 N. C., 349, referring to the statute under consideration (Gregory Suppl., sec. 3265a): "The statute, as its terms import, was no doubt passed to enable a defendant to present the question of his guilt or innocence, on the State's testimony, as a legal proposition to the judge, and thus, if successful, avoid the risk of an adverse jury verdict, and, if the ruling was against him and no further evidence is offered, to preserve the point on appeal from a final judgment in the trial then pending, a course not open to him before its enactment," citing *S. v. Moody,* 150 N. C., 847. And again, quoting the statute: "The very statute under which defendant now endeavors to proceed is in full recognition of the principle. Thus, when the motion is made on the State's evidence, 'the case shall be submitted to the jury as in other cases, and the defendant shall have the benefit of his exception on appeal, etc.,' and 'if further evidence is introduced and the motion is renewed on the entire testimony and refused, the defendant may except and, after the jury shall have rendered its verdict, defendant shall have the benefit of the latter exception on appeal, etc.'" It may further be said that if the prisoner's contention is right, there would be no necessity of a second motion or exception, as, according to his own view, the point must be decided upon the State's evidence alone which was introduced prior to his first motion. The statute did not contemplate such a procedure, but, on the contrary, requires us to review the whole of the proof upon the last motion entered by the prison- (795) er. We must not be understood as conceding that there was no evidence against the prisoner when the State rested, but have assumed, for the sake of the discussion, that there was not.

The objection to the charge is without real merit. The judge, in opening his charge, told the jury that the burden of proof was upon the State, and that they must be satisfied of the guilt of the prisoner beyond a reasonable doubt before they could convict him. It was not necessary that he should repeat this rule of law every time he referred to any finding from the evidence, as he had sufficiently instructed them as to the burden and the quantum of proof, and this applied to his charge throughout. We should construe the charge as a whole. *McCurry v. Purgason,*

170 N. C., 463; *Kornegay v. R. R.*, 154 N. C., 389; *McNeill v. R. R.*, 167 N. C., 396. We said in *McCurry v. Purgason, supra:* "The exceptions addressed to a portion of the charge of the court to the jury cannot be sustained. If we consider this excerpt from the charge alone, it is not subject to the criticism that it omitted any reference to the evidence, or to the rule as to its weight or preponderance, while instructing the jury as to the burden on plaintiff of proving the facts necessary to a recovery by her. We think it sufficiently states the correct rule, and with reasonable distinctness it told the jury that the burden of proof was upon the plaintiff to make out her case and to offer evidence 'sufficient by its greater weight to *satisfy* them' of the truth of her allegation. But it is certainly clear and full enough, when construed with other parts of the charge, it having been long since settled that the latter should be considered as a whole. We are not permitted to construe away the plain meaning of a charge, when thus viewed, by any process of dissection which dismembers it and leaves only its separate parts before us," citing *Aman v. Lumber Co.*, 160 N. C., 374. And the same was held in *S. v. Jim Cooper,* 170 N. C., 719, as to an exception almost identical with this one. We there said: "The prisoner excepted to an instruction of the court to the effect that if he had failed to satisfy the jury that he did not have mental capacity sufficient to commit a crime the verdict would be guilty, the particular objection being that the court should have said if he had failed to satisfy the jury 'from the evidence' of his mental incapacity he should be convicted; but in the sentence immediately preceding the court had instructed the jury that 'If the defendant has satisfied you from the evidence that he did not have sufficient mental capacity to commit a crime, he should be acquitted.' The two instructions are so intimately connected with each other that no intelligent jury could have misunderstood what was meant, nor can we reasonably suppose that they would find the fact one way or the other without any evidence, or otherwise than 'from the evidence.' The charge of (796) the court must be considered as a whole, in the same connected way as given to the jury, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly to the jury, there is no ground for reversing the judgment, though some of the expressions, when standing alone, may be regarded as erroneous," citing Thompson on Trials, sec. 2407; *S. v. Robertson,* 166 N. C., 356; *S. v. Lance,* 149 N. C., 551, and other cases.

There are some objections to evidence, but they are not at all tenable. It is competent, of course, to impeach one witness by another if evidence is confined to his general character, but you cannot descend into particulars or show specific acts of wrong doing. *S. v. Holly,* 155 N. C., 485; *S. v. Wilson,* 158 N. C., 599; *S. v. Thornton,* 136 N. C., 310. The

rule is different when you are testing the credibility of the witness himself. He may be asked questions tending to disparage him within certain limitations. (*S. v. March,* 146 N. C., 320), and when the witness has testified to the character of another he may be cross-examined as to particular facts in order to attack his estimate of character or to contradict him, or for the purpose of testing his accuracy. *S. v. Austin,* 108 N. C., 780; *S. v. Perkins,* 66 N. C., 126; *S. v. Holly, supra.*

Chief Justice Pearson said in *S. v. Perkins, supra:* "It is settled that a witness who swears to the general bad character of another witness on the other side may, upon cross-examination, be asked to name the individuals whom he heard speak disparagingly of the witness, and what was said. This is everyday practice, and the exception was taken under a misapprehension as to the difference between an examination in chief and a cross-examination, when the party endeavoring to sustain the witness, whose general character is attacked, may go into particulars as to persons and what they said."

But if there was any error committed in respect to evidence, it was harmless, as the bad character of the participants in this tragedy was more than fairly well established. It was a "sorry lot" and their debauchery and nocturnal orgies culminated, as might have been expected, in this midnight tragedy, the perpetrator being, no doubt, inflamed by jealousy, of which there was some evidence. The father may have slain his son, but the jury might well have inferred from the circumstances, apart from the father's positive denial of his guilt, that the prisoner, under the guise of a peace-maker, had taken advantage of the situation and dealt the fatal stab. But in any view it was for the jury to say what was the truth of the matter.

The prisoner complains that the sentence is illegal and excessive. The court entered the following judgment: "It appearing to the satisfaction of the court that there is good reason to believe that the safe custody of the defendant will be imperiled by working him on the roads, and good reason to fear that a sentence to the roads will possibly (797) lead to his escape, it is adjudged that the defendant, John Killian, be imprisoned in the State Prison for a term of three years, to wear a felon's stripes," the prisoner excepted.

Revisal, sec. 3632, provides: "If any person shall commit the crime of manslaughter, he shall be punished by imprisonment in the county jail or State's Prison not less than four months nor more than twenty years." Public Laws 1909, ch. 80, sec. 6, declares: "That all male persons confined in the county jail, either under a final sentence of the courts of the State of North Carolina or the police or city court of the city of Asheville, for crime or imprisonment or nonpayment of fines and costs, or under final judgment in cases of bastardy or under the vagrant

acts, and all persons sentenced from said county to prison for a term of less than ten years, shall be worked upon said public roads under the provisions of this act." But the latter act was not intended to take away the discretion of the judge, under section 3632 of the Revisal, to sentence to the State's Prison instead of the jail of the county. It will be noted that the act of 1909, ch. 80, sec. 6, refers to persons imprisoned in the county jail for certain offenses, and in order to enlarge the number of cases where the prisoners might be worked on the roads, the operation of the act in this respect was extended to all crimes where the persons convicted were sentenced to a term of less than ten years in prison, meaning the county jail. It surely was not the purpose to repeal the general law allowing the judge to impose alternative punishment by confinement at hard labor in the penitentiary. In order to reach the conclusion that such was the intention, the language should be clear and explicit to that effect. The judge might have sentenced the convict to the county jail, and in that event the local statute would have applied, but he elected to imprison him in the State's penitentiary for the reason assigned by him, and this was a proper and legal sentence. We must ascertain the legislative intent from a consideration of both statutes and the inherent nature of the subject dealt with, including the mischief proposed to be remedied or the new remedy to be applied. *Abernethy v. Comrs.*, 169 N. C., 631. Thus considered, we are of the opinion that the judge adopted the right course.

We find no error in the record, after a careful examination of it.

No error.

Cited: S. v. Orr, 175 N.C. 777; *S. v. Helms,* 181 N.C. 570, 571; *S. v. Brinkley,* 183 N.C. 722; *S. v. Smith,* 183 N.C. 729; *S. v. Pasour,* 183 N.C. 794; *Harper v. Supply Co.,* 184 N.C. 205; *S. v. Whisnant,* 185 N.C. 611; *S. v. Reagan,* 185 N.C. 712; *S. v. Sleen,* 185 N.C. 778; *Hancock v. Southgate,* 186 N.C. 282; *S. v. Hayes,* 187 N.C. 491; *S. v. Hilton,* 188 N.C. 832; *S. v. Rideout,* 189 N.C. 160; *S. v. Brodie,* 190 N.C. 557; *S. v. Colson,* 193 N.C. 239; *S. v. Nelson,* 200 N.C. 72; *S. v. Bittings,* 206 N.C. 802; *S. v. Smoak,* 213 N.C. 94; *S. v. Caper,* 215 N.C. 671; *S. v. Norton,* 222 N.C. 420; *S. v. Church,* 229 N.C. 720; *S. v. Tyndall,* 230 N.C. 175.

(798)

STATE v. DAVE MOONEY.

(Filed 26 May, 1917.)

1. **Constitutional Law—Statutes—Pledge—Representation of Ownership.**

Revisal, sec. 3434, making it a misdemeanor for a party representing in writing his ownership of certain property and therein agreeing to apply the same to a debt then created, and failing to apply the property so pledged accordingly, is constitutional and valid.

2. **Same—Indictment—Language of Statute—Motion to Quash.**

In an indictment under a statute creating the offense, the essential words creating the offense must be given, and when the terms used have acquired a technical significance, for which there is no just equivalent, such words must be given with exactness; and where an indictment is drawn under Revisal, sec. 3434, it should charge the written representation of existent ownership or wages earned, etc., and that the writing contained an agreement to apply them, etc., for in thus failing to follow the written terms employed in the statute the indictment is fatally defective, and should be quashed.

INDICTMENT, heard on motion to quash the same before *Justice, J.*, at February Term, 1917, of ROWAN.

The indictment was as follows: "The jurors for the State, upon their oath, present, that Dave Mooney, late of the county of Rowan, on the 20th day of March, A. D. 1916, with force and arms, at and in the county aforesaid, willfully, unlawfully, and feloniously, with intent to cheat and defraud, did obtain from W. L. Kluttz goods, wares, and merchandise to the amount of $30, asserting at the time that he was the owner of a chose in action against the Southern Railway Company for wages earned by him in the month of March, 1916, and agreeing in writing to apply said wages, or the proceeds, to the amount of $30 to the discharge of said debt; whereas the said Dave Mooney has failed and refused to so apply said wages, but disposed of the same in some other manner than agreed in said representation, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The motion to quash was allowed, and the State excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

No counsel for defendant.

HOKE, J. The statute on which this bill of indictment is framed, Revisal, sec. 3434, provides as follows: "If any person shall obtain (799) any advances in money, provisions, goods, wares, or merchandise of any description, from any other person or corporation, upon

any written representation that the person making the same is the owner of any article of produce, or of any other specific chattel or personal property, which property or the proceeds of which the owner in such representation thereby agrees to apply to the discharge of the debt so created, and the owner shall fail to apply such produce or other property, or the proceeds thereof, in accordance with such agreement, or shall dispose of the same in any other manner than is so agreed upon by the parties to the transaction, the person so offending shall be guilty of a misdemeanor, whether he shall or shall not have been the owner of any such property at the time such representation was made." The validity of this statute as a constitutional enactment has been upheld in *S. v. Torrence,* 127 N. C., 550, and the decision was made to rest on the ground that the crime included the act of unlawfully and wrongfully disposing of property which defendant had dedicated or pledged in writing to the payment of a claim for advancements made thereon. The *ratio decidendi* is very clearly stated in the opinion by the present *Chief Justice* as follows: "It is not the failure to pay the debt which is made indictable, but the failure to apply certain property which, in writing, has been pledged for its payment, and advances made on the faith of such pledge. It is on the same footing as Code, sec. 1089, for disposing of mortgaged property. It is the fraud in disposing of or withholding property which the owner has in writing agreed shall be applied in payment of advances made on the faith of such quasi mortgage, to one who has thus *pro tanto* become the owner thereof, and the subsequent conversion of said property, and diversion of the proceeds to the detriment of the equitable owner and in fraud of his rights. The evident object of the statute was to enable persons to obtain advances upon articles whose nature, or whose value, would not justify the execution of a formal mortgage thereon." This principle was later recognized and approved in *S. v. Williams,* 150 N. C., 802, and made the reason for distinguishing such an indictment from those where it was attempted to convict a defendant for mere breach of promise to pay for advances and without the element of fraud being present in the transaction.

While we must hold, therefore, that the statute creates an indictable offense, we are of opinion that the ruling of his Honor must be sustained on the ground that the crime is not sufficiently charged in the bill.

It is well recognized that in indictments on a statute the essential words descriptive of the offense or their just equivalent must be given, and when the terms used have acquired a technical significance, for which there is no just equivalent, such words must be given with exact-
(800) ness. The correct position is very well stated in Clark's Cr. Procedure as follows: "It is generally necessary, subject to exceptions which we shall explain, not only to set forth all the facts and circum-

stances which go to make up the offense as defined in the statute, but also to pursue the precise and technical language of the statute in which they are expressed. If the words are technical and have no equivalent, it is well settled that no others can be substituted for them, for no others are exactly descriptive of the offense." And our own decisions fully approve the principle. *S. v. Clark Liles,* 78 N. C., 496; *S. v. Stanton,* 23 N. C., 424. In *Liles' case* it is held: "In an indictment under a statute where the words of the statute are descriptive of the offense, the indictment should follow the language and expressly charge the described offense so as to bring it within the material words of the statute." In the present case the statute, in order to the creation of the offense, requires that there should be *written representations* of existent ownership or wages earned, etc.; also the writing should contain a written agreement to apply, etc. Trenching as it does upon the ordinary incidents attendant upon a breach of contract, it was the design and intent of the statute to withdraw from the uncertainties of parol testimony this assertion as to present existence and ownership usually occurring between the parties alone, and having expressly required that both assertion of ownership and agreement to apply should be in the writing, they are made essential words descriptive of the offense, and must be alleged in the bill and proved on the trial in order to convict of the crime. It is nowhere alleged in this bill that the writing contained any assertion of ownership on the part of the defendant, and such an allegation being one of the essential requisites of the offense, the judgment of his Honor quashing the bill must be affirmed. We are not inadvertent to the fact that the present bill seems to be an exact copy of the one in *S. v. Torrence,* but while the point may have appeared in the record, it was not pressed in the argument, and the question presented and disposed of was on the constitutionality of the statute.

There is no error, and the judgment of the Superior Court is affirmed.

No error.

Cited: S. v. Ballangee, 191 N.C. 702; *S. v. Cole,* 202 N.C. 595, 596; *S. v. Jackson,* 218 N.C. 375; *S. v. Loesch,* 237 N.C. 612.

(801)

STATE v. JOHN R. HERREN.

(Filed 26 May, 1917.)

Criminal Law—Marriage and Divorce—Bigamy—Statutes—Suits in Another State—Decrees—Copies—Identity—Evidence, Prima Facie.

Where the parties to an action for a divorce, brought in another State, and the place and the time of the marriage alleged are the same as appear in the marriage record here, it affords *prima facie* evidence of identity of a defendant tried for living in this State after a bigamous marriage in another State inhibited by the Laws of 1913, ch. 26; and it is reversible error for the trial court to exclude duly certified copies of the divorce suit and proceed to conviction upon the ground that defendant had not sufficiently identified himself as the plaintiff in the suit for divorce theretofore granted.

CRIMINAL ACTION, tried before *Shaw, J.*, at January Term, 1917, of BUNCOMBE.

The defendant is indicted under the act of 1913, chapter 26, which defines bigamy and makes cohabitation in North Carolina following a bigamous marriage in another State indictable and punishable as bigamous.

The State did not offer any evidence.

When the case was called for trial, the defendant admitted:

a. That defendant and Lizzie V. Hunsucker were married in the State of North Carolina.

b. That subsequently defendant went to the State of Georgia.

c. That defendant obtained a divorce in Georgia.

d. That defendant was thereafter married in Georgia to Stella Taylor.

e. That defendant, subsequent to said second marriage, returned to the State of North Carolina, and has been living in North Carolina with said Stella Taylor as man and wife prior to this indictment.

The defendant then offered in evidence the record in a suit for divorce in the Superior Court of Fulton County, Georgia, wherein *John R. Herren* was plaintiff and *Lizzie V. Herren* was defendant. The record duly certified under the act of Congress, was allowed as evidence, but after the defendant had rested, his Honor excluded the record, holding that the defendant had not offered evidence of his identity with the plaintiff in the Georgia suit. Defendant excepted.

The complaint in the Georgia suit alleged that the plaintiff, John R. Herren, and the defendant, Lizzie V. Herren, were married in *Buncombe County, North Carolina, on* 28 *March,* 1896.

The marriage record of Buncombe County shows that John R. Herren, the defendant, and Lizzie V. Herren, the prosecutrix, were married in *Buncombe County, North Carolina, on* 28 *March,* 1896.

A decree was rendered in the action in Georgia dissolving the (802) bonds of matrimony prior to the second marriage of the defendant.

There was a verdict of guilty, and the defendant appealed from the judgment pronounced thereon.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

J. W. Haynes and Mark W. Brown for defendant.

ALLEN, J. The defendant in this indictment is John R. Herren, and it is charged in the indictment that his first wife was named Lizzie V. Herren, and the plaintiff in the proceeding for divorce in Georgia was John R. Herren and the defendant therein was Lizzie V. Herren.

This identity of names, nothing else appearing, furnishes evidence of the identity of person.

"Identity of name is prima facie evidence of identity of person, and is sufficient proof of the fact, in the absence of all evidence to the contrary." 10 R. C. L., 877; *Wilson v. Holt,* 83 Ala., 528; *Estate of Williams,* 128 Cal., 553; *Summer v. Mitchell,* 29 Fla., 179; *Brown v. Metz,* 33 Ill., 339; *Jackson v. King,* 5 Cow. (N. Y.), 237; *Chamblee v. Tarbox,* 27 Tex., 139.

There was also other evidence of the identity of the person. The complaint in Georgia alleged the marriage of plaintiff and Lizzie V. Herren in Buncombe County, North Carolina, on 28 March, 1896, and the record of marriages of Buncombe County shows the marriage of the plaintiff and the defendant in Buncombe County, the day alleged.

The defendant also introduced evidence tending to prove that he left North Carolina in the fall of 1912, intending to make his home in Georgia, and that he did not thereafter live in North Carolina until some time during the year 1916; that he was seen in Atlanta, where the decree for divorce was rendered, and that while there he showed to a witness copies of the decree for divorce in the action entitled John R. Herren against Lizzie V. Herren.

There was, therefore, error in excluding the record of the action in Georgia and in refusing to permit the jury to consider it, and a new trial must be ordered.

New trial.

Cited: S. v. Herron, 175 N.C. 760.

(803)

STATE v. ROBERT BRYSON.

(Filed 26 May, 1917.)

1. Appeal and Error—Objections and Exceptions—Brief—Rules of Court.

Exceptions not brought forward in the brief are deemed abandoned on appeal, Rule 34.

2. Homicide—Murder—Premeditation—Verdict—Second Degree—Instructions—Appeal and Error.

In a trial for homicide exceptions to the charge as to premeditation and deliberation are eliminated by a verdict of murder in the second degree.

3. Judgments—Motions in Arrest—Indictment—Accessory—Statutes.

A motion in arrest of judgment is permissible only where the indictment is insufficient upon its face; and where the charge therein is murder, it is sufficient to sustain a conviction in a less degree, Revisal, sec. 3269; and a motion in arrest that upon the evidence the accused was an accessory and not a principal will not be granted.

4. Homicide—Murder—Accessory—Sentence—Remanding Case—Statutes.

Upon conviction of murder in the second degree, and sentence to twenty years in the State's Prison, upon an indictment for murder, when it appears from the evidence that the accused was only an accessory, the case will not be remanded to the Superior Court for resentence, as the statute provides a sentence for life. Revisal, sec. 3290.

5. Homicide—Murder—Accessory—Substantive Felony — Statutes — Former Jeopardy—Appeal and Error—Harmless Error.

An accessory before the fact of murder may now be independently tried as for a substantive felony, Revisal, secs. 3287, 3289; and where such accessory has been indicted and tried as a principal to a murder, convicted of murder in the second degree and sentenced to a twenty-year term of imprisonment in the State's Prison, he may not complain that he should have been tried as an accessory, for which a greater sentence can be imposed, Revisal, sec. 3290; or demand that, having once been in jeopardy, he may not now be tried as an accessory, and should therefore be discharged.

APPEAL by prisoner from *Harding, J.*, at Fall Term, 1916, of JACKSON.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

Bryson & Black and Sisk & West for prisoner.

CLARK, C. J. The appellant, Robert Bryson, and Sallie Bryson, his daughter, were indicted for the murder of Alice Bryson, wife of the prisoner and mother of his codefendant.

(804) Upon arraignment, Sallie Bryson, through her counsel, tendered a plea of "guilty of murder in the second degree," which

was accepted by the State and she was sentenced to twenty years in the State's Prison. Upon the trial Robert Bryson was found guilty of murder in the second degree and sentenced to twenty years in the State's prison, and appealed.

Exceptions 1, 2, and 3 are specifically abandoned in the brief, and 7 and 8 not being brought forward in the brief, are, therefore, deemed to be abandoned. Rule 34 of this Court. Exception 4 is to the charge in regard to premeditation and deliberation, and has been eliminated by the verdict of murder in the second degree. Exception 12 is for the refusal to arrest the judgment upon the ground that the prisoner could not be convicted of murder in the second degree because the evidence disclosed that he was an accessory before the fact, and not a principal. A motion to arrest can be allowed only for a defect appearing upon the face of the indictment, and the charge here is of murder and the conviction is of murder in the second degree. Under Revisal, 3269, it is provided: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein, or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of same crime." There is no defect, therefore, in the indictment or in the record which would justify an arrest of judgment. Indeed, Revisal, 3271, authorizes the conviction of murder in the second degree upon an indictment for murder in the first degree. Nor would the prisoner be entitled to a remand for resentence, for Revisal, 3290, provides: "Any person who shall be convicted as an accessory before the fact in either of the crimes of murder, arson, burglary, or rape, shall be imprisoned for life in the State's Prison." The prisoner has been sentenced to twenty years, which certainly cannot exceed the punishment for life, to which he would have been subject if convicted of being accessory before the fact.

The prisoner's contentions are presented by Exception 5 for refusal to charge, as requested, that only those who are present at the commission of the crime are deemed principals therein, and that one who was not present at the time the crime was committed, which he counseled, procured, or commanded, would be an accessory before the fact and could not be convicted under a charge of murder, and that the jury must be satisfied beyond a reasonable doubt that Robert Bryson was actually present at the time the deceased came to her death as the result of a gunshot wound inflicted upon her by said Sallie Bryson; and if the State fail to satisfy the jury beyond a reasonable doubt of the presence of said prisoner, Robert Bryson, at the time of the infliction of the wound, then it would be the duty of the jury to return a verdict of not guilty. As a corollary to this, the prisoner further insists on Exception 13,

(805) that he "has been placed in jeopardy upon a bill of indictment, regular in its form, charging him as principal with the murder of Alice Bryson, and that he duly entered a plea of not guilty upon an arraignment properly had, and that a jury had been regularly selected, chosen, and impaneled to try the issue joined between himself and the State upon such bill of indictment, and that the evidence having disclosed the fact that he could in no view be deemed as principal, and that, therefore, any verdict rendered upon said bill is void, and he having been placed in jeopardy under the charge preferred against him, and there being no charge against him as accessory, either before or after the fact, the court should have sustained his motion and ordered his discharge." The prisoner's contention is that he should have been tried as accessory before the fact for the murder (for which a higher sentence could be imposed than that which he received), and that having been in jeopardy upon this charge as sharing in the murder, he cannot hereafter be tried for having been connected in any way with the murder of his wife, and should be discharged.

Formerly there was a technical distinction between principals in the murder and accessories before the fact which required that accessories should not be tried before the conviction of principals, and this often led to a miscarriage of justice for which statutes have been passed in this and probably in all jurisdictions. The correctness of the prisoner's contentions depends upon Revisal, 3287, which, omitting the parts not material to this appeal, reads as follows:

"*Accessories to felonies before the fact; when, where, and how tried and punished.* If any person shall counsel, procure, or command any other person to commit any felony . . . the person so counseling, procuring, or commanding shall be guilty of a felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, *or* may be indicted and convicted of a substantive felony . . . and may be punished in the same manner as an accessory before the fact to the same felony, if convicted as an accessory, may be punished; and the offense of the person so counseling, procuring, or commanding, *however indicted,* may be inquired of, tried, determined, and punished by any court . . . in the same manner as if such offense had been committed at the same place as the principal felony . . . *Provided,* that no person who shall be once duly tried for any such offense, whether as an accessory before the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offense."

The proviso in the above section gives force to the prisoner's motion for an absolute discharge and exemption from liability if it was error (806) to try him for the substantive felony of murder in counseling,

procuring, or commanding his daughter to slay her mother, of which the jury, upon evidence which they found sufficient beyond a reasonable doubt, have found him guilty.

The statute having authorized the conviction upon an indictment for murder of any person guilty of a less degree of the crime than that charged, and the jury having found that the prisoner participated therein, upon evidence that he counseled, procured, and commanded the commission of the crime by his daughter, and the sentence imposed being less than that to which he was liable if he had been tried and convicted of being accessory to the fact, it is not for him to complain that the jury convicted him of a "lesser degree" than murder in the first degree, for which he was indicted and tried.

In that excellent work, Wharton on Homicide (Bowlby's 3 Ed., sec. 66), it is said: "Under statutes existing in many of the States, providing that one who counsels, procures, or instigates another to commit a felony, whether present at its commission or not, may be tried, convicted, and punished as a principal, all distinction between principals and accessoriess before the fact is abolished, and an accessory before the fact can be tried and convicted as principal," with a long list of authorities to that effect.

We think that this was the object and the effect of Revisal, 3287, and though this Court has said that it was erroneous to "indict and convict those who are guilty of being accessories before the fact under an indictment in which they and others are charged as principals," *S. v. Dewer,* 65 N. C., 572, and that under Revisal, 3269, "A defendant charged as principal in an indictment for an assault with the intent to kill cannot be convicted as accessory," *S. v. Green,* 119 N. C., 899, we are of opinion that the indictment and conviction of the prisoner in this case comes within the language and intent of Revisal, 3287, and 3269, which made accessory before the fact the "substantive felony," and which were intended to destroy the technical distinctions which had so often led to such miscarriages of justice as would be caused here if the prisoner, who has been tried and convicted upon evidence of his active participation in causing the death of his wife by counseling, aiding, and procuring his daughter to slay her, should be discharged of all liability. In *S. v. Chastain,* 104 N. C., 900, the Court held the appellant guilty as principal, though he was 150 yards in the rear of the other, who, under cover of darkness, committed a secret assault with intent to kill, though the appellant did not shoot at all, and did not actively participate in the attack made.

No good purpose can be served by a construction which would make the enactment of Revisal, 3287, purposeless, nor should the Court adhere to the construction, if erroneous, which happened to be (807) put upon the statute when first presented, and possibly without

full argument, which would have the effect to destroy the efficiency of the statute evidently intended. We are not going ahead of legislation, but accepting it in its true intent and meaning.

The prisoner has been tried for the murder, of which he has been convicted in a lesser degree, and without error in the admission of evidence, in the charge of the court, or the instructions. He has suffered no prejudice by being tried jointly with his codefendant, his daughter, who committed the murder of her mother, according to the evidence, by the counsel, procurement, and command of the prisoner. She has accepted the punishment for her crime. There is no reason that the prisoner should escape, when he has been duly tried and the evidence in his favor has been duly and fully presented to the jury. The prisoner was indicted for the substantive felony of murder of his wife, whose commission he caused. He cannot complain that he was not convicted in the first degree, but only of the second degree.

In *S. v. Moses,* 13 N. C., 463, *Ruffin, C. J.,* said, speaking of a statute to cure technical objections in criminal proceedings: "This law was certainly designed to uphold the execution of public justice, by freeing the court from those fetters of form, technicality, and refinement which do not concern the substance of the charge and the proof to support it. Many of the sages of the law had before called nice objections of this sort a disease of the law, and a reproach to the Bench, and lamented that they were bound down to strict and precise precedents, neither more brief, plain, nor perspicuous than that which they were constrained to reject. In all indictments, especially those for felonies, exceptions extremely refined, and often going to form only, have been, though reluctantly, entertained. We think the Legislature meant to disallow the whole of them, and only require the substance, that is, a direct averment of those facts and circumstances which constitute the crime, to be set forth." Revisal, 3287, made the facts which formerly had been called "accessory before the fact" the substantive felony (whether in murder or any other felony), and the guilt of the prisoner was, if anything, greater than that of his daughter, whom he procured to commit the murder. He was guilty of the substantive felony created by the statute, though convicted of a lesser degree, and the former refinements as to accessory before the fact cannot avail to withdraw him from liability for his share in the murder, which he counseled, procured, and commanded. Indeed, there is strong evidence of incest as the moving cause. The indictment charges "substantive felony." It was a participation in the murder, though as in *S. v. Chastain, supra,* the prisoner was not actually present at its commission, and did not fire the shot. As in *Chastain's*
(808) *case,* he should be held, and cannot complain that he is punished no more severely than his daughter, who fired the shot, and less

severely than if he had been tried and convicted of being accessory before the fact.

No error.

ALLEN, J., dissenting.

Cited: S. v. Evans, 177 N.C. 569; *S. v. Simons,* 179 N.C. 703; *S. v. Walton,* 186 N.C. 489; *S. v. Johnson,* 193 N.C. 705; *In re Malicord,* 211 N.C. 686; *S. v. McKeon,* 223 N.C. 405.

STATE v. CARL MARTIN.

(Filed 26 May, 1917.)

1. **Criminal Law—Evidence—Threats—Trials.**

In the trial of an indictment for injury to property, Revisal, sec. 3673, a question asked a witness, if he had not heard his father say to another witness that if the latter did not swear to the defendant's guilt he would send him to the penitentiary, is properly excluded as irrelevant and hearsay.

2. **Evidence—Footprints—Identification—Appeal and Error.**

Evidence that foot tracks leading to defendant's dwelling from a crib which the defendant was on trial for destroying (Rev., sec. 3673), when shown to correspond with those of the defendant, is competent; and were it otherwise in this case, its subsequent exclusion by the court and his caution to the jury not to consider it cured the error.

3. **Appeal and Error—Evidence Withdrawn—Error Cured—Instructions.**

Where a competent question is ruled out by the trial judge, but afterwards answered by the same witness, the error is cured.

4. **Instructions—Reasonable Doubt—Evidence—Criminal Law.**

Where the charge by the court as to reasonable doubt of the defendant's guilt is sufficient, and it appears from the whole charge that the jury were instructed that they must convict the defendant upon the evidence, if at all, it is not objectionable that the judge failed to repeat, in each instance, that they could only convict him upon the evidence.

5. **Appeal and Error—Contentions.**

The failure of the trial judge to fully and correctly state the contentions of a party should be brought to the attention of the court at the time, and exception should be taken to his refusal to correctly state them.

6. **Appeal and Error—Specific Instructions—Requests.**

Exception that more definite instructions were not given by the court in his charge to the jury is untenable, in the absence of special requests upon the subject.

STATE *v.* MARTIN.

INDICTMENT, tried before *Harding, J.*, and a jury at Fall Term, 1916, of CLAY.

(809) Defendant was indicted under the statute (Revisal, sec. 3673) for injury to property, in that he destroyed a crib of the prosecutor by an explosion of dynamite. He was convicted, and appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

J. N. Moody for defendant.

WALKER, J. First. The defendant, on cross-examination of Bryan Brackens, a witness for the State, asked him this question: "Did you not hear your father testify yesterday that he had said, if Ras Martin did not swear that Carl did it, he would send him (Ras) to the penitentiary?" On objection by the State, the question was excluded. It was plainly irrelevant and, besides, was mere hearsay. It did not appear that the witness Bryan Brackens had been influenced by his father to give false testimony, nor was there any evidence of any threats against him, and no connection was shown between him and Ras Martin, nor can we see how any threat against the other man affected the testimony of the witness in the least degree. It was pure hearsay, irrelevant and inadmissible. McElvey on Evidence, 165, 167, and 521; *S. v. Barfield,* 29 N. C., 299; *S. v. Davis,* 77 N. C., 483; *S. v. Hargrave,* 97 N. C., 457.

Second. It was competent to show that there were tracks leading from the crib to the place where the defendant lived, and that they corresponded with those of the defendant. *S. v. Daniels,* 134 N. C., 641; *S. v. Freeman,* 146 N. C., 615; *S. v. Adams,* 138 N. C., 688. The answer of the witness was that he had tracked the parties to their home, which was at first admitted, was afterwards excluded by the court, with a proper caution to the jury that they should not consider it. This was sufficient and cured the error, if one was committed. *S. v. May,* 15 N. C., 331; *S. v. Collins,* 93 N. C., 564.

Third. The question put to the witness E. L. Martin, as to his "offer of $20 to some one if he would swear that Carl Martin committed the crime," was substantially answered by the witness after the court had ruled out the question. The subsequent questions are not given, but the answers, stated in narrative form, indicate that the defendant made his questions most specific and covered the entire field of inquiry. It does not cure an error in excluding a question, if it is afterwards answered by another witness, but does so if answered fully by the same witness. *S. v. Rollins,* 113 N. Y., 722; *Young v. Gruner, ante,* 622.

Fourth. The charge as to reasonable doubt was quite sufficient. An intelligent jury could not fail to understand that they must try the

defendant by the evidence and acquit or convict him accordingly. The judge, in other parts of the charge, had told the jury that they must be fully satisfied "from the evidence" of the defendant's (810) guilt before they could convict him, and it was unnecessary that the quoted words should be repeated, if from the whole charge the law was correctly stated and there was nothing to mislead the jury as to what was meant. A similar objection was made at this term in another case, and we overruled it. *S. v. Killian, ante,* 792. But the part of the charge to which objection was taken does clearly refer to the evidence.

Fifth. If defendant thought that his contentions were not fully and correctly stated, he should have called the court's attention to it, and also asked for special instructions if those given were deemed not sufficient. *Simmons v. Davenport,* 140 N. C., 407; *S. v. Blackwell,* 162 N. C., 672; *S. v. Cox,* 153 N. C., 638; *S. v. Fogleman,* 164 N. C., 458; *Jeffress v. R. R.,* 158 N. C., 215. We are of the opinion, though, that there was a fair and impartial explanation of the evidence to the jury, with an accurate statement of the law arising thereon, and that the charge is not subject to any valid objection or criticism. The other exceptions are without any merit.

No error.

Cited: S. v. Spencer, 176 N.C. 715; *S. v. Harden,* 177 N.C. 581; *Price v. Edwards,* 178 N.C. 503; *S. v. Love,* 187 N.C. 39; *S. v. Young,* 187 N.C. 700; *S. v. Steele,* 190 N.C. 510; *S. v. McLeod,* 198 N.C. 652; *S. v. Jessup,* 219 N.C. 623; *S. v. Palmer,* 230 N.C. 213.

STATE SANATORIUM v. B. R. LACY, STATE TREASURER.

(Filed 30 May, 1917.)

1. Statutes—Repeal—Implication.

The repealing of a statute by a subsequent one by implication is not favored by interpretation, and where two laws on the same subject are both affirmative in terms, the latter will not be held to repeal the former unless and to the extent that the two are clearly repugnant, or unless the latter, covering the entire subject, gives clear indication that it was intended as a substitute for the former.

2. Same—State Sanatorium—Appropriations.

A statute was enacted incorporating a department of the State Government for treatment of "persons afflicted with tuberculosis," appointing directors and making appropriation and apportioning the same for establishment and maintenance, and later, at a different session, a statute was

enacted making appropriation for these stated purposes. At a still later session a statute was enacted abolishing or removing the old directorate, substituting the State Board of Health as such *ex officio*, continued the corporation and created and made annual appropriations for a new feature for "extension work," distinct and separate from those theretofore existing. At a still later session a statute was enacted for a bond issue to provide for permanent improvements on the principal State institutions, apportioning a certain amount to the one in question, without repealing clause. *Held*, the appropriation for the "extension work" being distinct, and so recognized by the statute, was not repealed by implication by the last enactment, it being with reference only to the maintenance of the institution.

3. Same—Annual Appropriations—"Extension Work."

Where in a general act appropriating money to State institutions there appears in the same section three distinct appropriations, separately stated, to the State Sanatorium, two of which were embraced in former statutes, but adding a third for the dissemination of knowledge concerning tuberculosis, with specific annual appropriation, the placing of the appropriations in such act, ordinarily effective for the two intervening years from the date of the legislation, does not control the interpretation that the repeal of statutes by implication is not favored; and a later statute making appropriations for the first two items, and leaving out the third, will not be held to repeal the third, in the absence of a repealing clause, and especially when it appears that such would leave the institution without means to carry on this important work.

4. Same—Laboratory of Hygiene—State Board of Health.

The principle upon which it is held in this case that appropriation of 1915 for "extension work" or disseminating knowledge throughout the State as to tuberculosis was not repealed by the laws of 1917 is not affected by the provisions of Revisal, sec. 3057, directing the examination for suspected sputum by the State Laboratory of Hygiene, or by the Laws of 1909, providing an assistant, such being an aid to the main purpose of the statute of 1915, and not coming within the appropriations to the State Board of Health, as a part of that department.

BROWN, J., dissenting.

(811) CONTROVERSY submitted on case agreed and heard before *Devin, J.*, at April Term, 1917, of WAKE.

The question at issue was whether the sum of $10,000, "annually," appropriated by the General Assembly of 1915 (chapter 98) for "extension work" by the "Bureau of Tuberculosis," a special bureau of plaintiff corporation created by chapter 40, Extra Session 1913, should be set apart and made available by defendant for the purpose indicated.

There was judgment for plaintiff, and defendant excepted and appealed.

Winston & Biggs; Oates & Herring for plaintiffs.
James S. Manning and R. H. Sykes for defendant.

HOKE, J. By Chapter 964, Laws 1907, the General Assembly incorporated plaintiff corporation for treatment of "persons afflicted with tuberculosis," appointed a directorate and made appropriation of $15,000 for establishment, and $5,000 for maintenance, and thereafter, at its biennial sessions, made appropriations for this institution for the two designated purposes of improvement and repairs and current maintenance, till the special session of 1913. At that session, by (812) chapter 42, the Legislature abolished or removed the old directorate and substituted therefor the members of the State Board of Health as directors *ex officio* of the institution, continuing the corporation, and created in the same statute, as a feature of its corporate activities, the Bureau of Tuberculosis, charged with the duty of "extension work," the nature of this work and the relevant facts attendant on its execution being set forth in the case agreed as follows: "That the State appropriation for said extension work is kept and expended separately and is supplemented with an amount approximately the same by the Metropolitan Life Insurance Company of New York, which supplemental amount is likewise used and expended from the sanatorium along with the said extension fund and for the same purpose. The said "extension work fund" is used to furnish the "tuberculin test" treatment free to physicians throughout the State; to distribute at prime cost "sputum cups" without distribution expense added; to assist in community nursing work; to distribute literature upon the subject of tuberculosis; to furnish appropriate articles to the press of the State of North Carolina upon tuberculosis; to give stereopticon and moving picture exhibitions on the prevention and treatment of tuberculosis; to maintain a correspondence department with the physicians of North Carolina in regard to the diagnosis and treatment of tuberculosis, and for other means for the education of the people concerning the disease." That in the general act of 1915, ch. 98, sec. 7, the Legislature appropriated $25,000 annually for support and maintenance, $60,000 for permanent improvements, one-half each year, this amount being charged with certain outstanding debts of the institution, and $10,000 annually for extension work.

In 1917 the Legislature, at its regular session, chapter 193, section 8, this being the general act on the subject, appropriated to this institution, for support and maintenance, $30,000 for 1917 and $40,000 for 1918, and, in chapter 154, directed a bond issue of $3,000,000 to provide for permanent improvements on the principal State institutions, $150,000 being set apart for such purpose for plaintiff and to be available one-sixth annually. In neither of these two statutes, nor in any other legislation on the subject, is there any appropriation made for this extension work nor any reference thereto, nor do the statutes contain any repealing clause, general or special.

Upon these, the facts chiefly relevant, it is insisted for defendant that the appropriation of $10,000 annually for extension work made by the law of 1915 was repealed by the legislation on the subject in 1917, and that said amount is no longer available to plaintiff; but we are of opinion that the position cannot be maintained. It is a well recognized principle of statutory construction, here and elsewhere, that implied repeals (813) are not favored, and where two laws on the same subject are both affirmative in terms, the latter will not be held to repeal the former unless and to the extent that the two are clearly repugnant or unless the later, covering the entire subject, gives clear indication that it was intended as a substitute for the former. The accepted position is very well stated by *Associate Justice Avery* in *Winslow v. Morton,* 118 N. C., 486, as follows: "These rules of law for the construction of statutes are well established: (1) The law does not favor the repeal of an older statute by a later one by mere implication. (2) The implication which will work the repeal of a statute must be necessary, and if it arises out of repugnancy between the two acts the later act abrogates the older only to the extent that it is inconsistent and irreconcilable with it. A law will not be deemed repealed because some of its provisions are repealed in a subsequent statute. (3) Where a later or revising statute clearly covers the whole subject-matter of antecedent acts, and it plainly appears to have been the purpose of the Legislature to merge into it the whole law on the subject, a repeal by necessary implication is effected." And there are many decisions of our Court in approval of the principle. *S. v. Johnson,* 171 N. C., 799; *S. v. Perkins,* 141 N. C., 797; *S. v. R. R.,* 141 N. C., pp. 846-853; *College v. Lacy,* 130 N. C., 364; *S. v. Davis,* 129 N. C., 570; 36 Cyc., p. 1077. In *Johnson's case* it was held: "That 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." In *S. v. Perkins, supra,* a similar ruling was upheld and *Associate Justice Walker,* delivering the opinion, quotes from Sedgwick on Statutory Construction, p. 127, as follows: "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 reasonable to conclude that the Legislature, in passing a statute, did not intend to abrogate or interfere with 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." In 36 Cyc., *supra,* it is said further: "When two statutes cover, in whole or in part, the same subject-matter, and are not absolutely irreconcilable, the court will, if possible, give effect to both."

Considering the record in the light of these principles, it appears that this extension work, provided for by the act of 1913 and to be managed by a separate bureau specially created for the purpose, has no natural or necessary connection with the current maintenance of the sanatorium or the construction and repair of its buildings, but is a separate and distinct work, designed and intended to help the State and its people generally to a better knowledge of the nature of this dread disease (814) and how best to treat it and prevent its spread. When a statute, therefore, recognizing that they are distinct, provides for the two purposes of maintenance and improvement separately and adds a third appropriation of "$10,000 annually for extension work," a third purpose, this we think should not be repealed by subsequent statutes containing no repealing clause which make adequate provision for maintenance and improvement and no reference of any kind to extension work. From the nature and importance of this work it would not be readily inferred that it was to be abandoned, and the legislation should be so construed as to give the terms "$10,000 annually" the meaning that such words naturally import, and continue its payment unless and until it is clearly withdrawn.

The case of *College v. Lacy,* 130 N. C., 364, is very similar to the one before us, so much so that it may be regarded as decisive of the question presented. In that case the General Assembly of the State, at its session 1891, established an agricultural and mechanical college for the colored race "and appropriated $2,500 annually" for the purpose of carrying out the provisions of the act. In 1895, chapter 146 appropriated "$5,000 annually for the support, maintenance, equipment, and enlargement and extension of the college," etc. For some years after the enactment of the second statute the Treasury Department, interpreting the statutes as cumulative or additional, the one to the other, paid the college authorities the sum of $7,500 for the purposes specified in the law. In 1901, however, the department took the position that the act of 1895 was in substitution for that of 1891, and that only $5,000 annually was available. On action brought, the claim of the State Treasurer was disapproved, and *Cook, J.,* delivering the opinion, stated the correct principle as follows: "Was section 10 of chapter 549, Acts of 1891, repealed by chapter 146, Acts of 1895? This is the issue raised by the facts agreed and presented for our decision by the case on appeal. Defendant contends that while the repeal is not in express terms, yet it is by necessary implication. This contention is handicapped in the outset with the presumption against it. A statute will not be construed as repealing a prior one on the same subject (in the absence of express words to that effect) unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supersede the prior one upon

the subject and to comprise in itself the sole and complete system of legislation on the subject. Black on Interpretation of Laws, p. 112; Endlich on Interpretation of Statutes, sec. 210; Sutherland on Statutory Construction, sec. 138. The two acts now being construed being affirmative, and the subject being such that both may stand together, they both should have concurrent efficacy (1 Blk., 90), unless they be repug-
(815) nant or inconsistent, or it should appear that the Legislature intended to cover the whole subject embraced in both and to prescribe the only rule in respect of that subject in the latter act. *S. v. Davis,* 129 N. C., 570."

We are not inadvertent to the argument for defendant that this appropriation for extension work appeared in the general appropriation act of 1915, designed to provide support for the principal institutions of the State for the two years of the legislative life; that the term "annually" in the statute is in the main used whenever the appropriation is the same for each of the two years; that it should not, therefore, be allowed its ordinary significance because its placing and a perusal of the entire statute show that the appropriation, with the others, was to terminate at the end of the two years. The position is not without force, but, in our opinion, it may not be allowed to prevail in view of the settled principles of law governing the question of implied repeals and the considerations to which we have adverted requiring these applications to the principal case.

As heretofore stated, there being no repealing clause in the legislation of 1917, general or special, and the two principal purposes of support and maintenance having been fully and adequately provided for by these later statutes, it is clear that the General Assembly intended the subsequent provision for those two purposes to be in substitution for the former; but, having made no provision whatever for extension work nor any reference to it, the appropriation must continue until it is recalled. It cannot well be that this omission was an inadvertance on the part of the Legislature of 1917 and its committee on appropriations. The appropriation to plaintiff, in the act of 1915, of $25,000 for maintenance, $60,000 (one-half) each year, for improvements and $10,000 annually for this extension, were in the same section, No. 7, and when the appropriations committee of 1917, known to be alert, diligent, and capable, made specific and definite change as to the two purposes of maintenance and improvement and left the appropriation of $10,000 annually entirely unchanged, and inserted no repealing clause whatever, it is the fair deduction that they supposed their act would be interpreted according to the prevailing rules of statutory construction in case of implied repeals, and the appropriation for extension work would continue, as stated, till it was otherwise provided. Nor can we approve the further

suggestion, that this extension work has been in fact made a department of the State Board of Health and should be supported from the liberal appropriation to that department. It is true that in Revisal, sec. 3057, direction is given that examinations for suspected sputum, in case of tuberculosis, shall be made in the State Laboratory of Hygiene. It is true, also, that in chapter 793, Laws 1909, it is provided that the State Board of Health may, in its discretion, elect a special (816) assistant to the State Health Officer in certain matters appertaining to tuberculosis work; but these special provisions were clearly designed and intended as an aid to the main purpose, and can, by no rule of interpretation, be held to repeal a statute explicit in terms and plain of meaning which created this bureau as a department of the State Sanatorium, gives full and specific enumeration of its duties, and there has nowhere been any legislation which does or purports to change or abolish it. We are confirmed in the view we take of the question by the consideration stated on the argument and unchallenged, so far as we heard, that unless plaintiff's position is maintained this important work, designed and well calculated to be of the greatest value to the State at large, would necessarily be discontinued for entire lack of funds, and by the further fact that if this appropriation of $10,000 is withdrawn from plaintiff, it will, in the face of larger burdens and very extended scope of activity and usefulness, suffer a positive reduction in the amount allowed it of $5,000 annually, and this from a Legislature which has shown throughout a disposition to deal most liberally with the deserving public institutions of the State, including the plaintiff.

There is no error, and the judgment for plaintiff will be

Affirmed.

BROWN, J., dissenting: I think it is manifest from reading the act of 1915 making the appropriation of $10,000 that it was the purpose of the General Assembly that the act should be operative like all other appropriations for State institutions, for two years only. This is evidenced by the fact that appropriations are made for the State Hospital for the colored race at Goldsboro for the year 1915 and the year 1916, and for the support and maintenance of the State Hospital at Morganton, for the support of the North Carolina School for the Deaf at Morganton, for the support of the State Laboratory of Hygiene at Raleigh; and it is clear by using the word "annually" in those sections in which it appears that the General Assembly meant only for each of two years—that is, for the years 1915 and 1916, the term of the General Assembly. It has been the unvarying rule of the General Assembly of North Carolina at each regular session to pass a general appropriation bill covering the two years until its next session.

The appropriation for tuberculosis extension work from its very character ought not to be taken out of the general rule that limits such appropriations to the two years intervening between the sessions of the General Assembly. The need for such appropriation and the (817) amount required must of necessity vary, and it is proper that each recurring Legislature should pass on the amount required to continue such work and also whether it shall be continued at all or not.

The appropriation act for State institutions enacted by the Legislature of 1917 indicates by its title that it was an act to make provision for the Tuberculosis Sanatorium and its work as well as all other State institutions. The fact that the previous appropriation of $10,000 for tuberculosis extension work was not embraced in the act is conclusive evidence, to my mind, that the General Assembly did not intend to continue it. The lawmakers may have concluded that results did not justify it.

Cited: Markham v. Simpson, 175 N.C. 140; *S. v. Mull,* 178 N.C. 752; *Litchfield v. Roper,* 192 N. C. 206; *S. v. Calcutt,* 219 N.C. 557.

PRESENTATION OF THE PORTRAIT

OF

HON. GEORGE HOWARD

TO THE

SUPREME COURT OF NORTH CAROLINA

BY

HON. H. G. CONNOR

13 FEBRUARY, 1917

May it Please Your Honors: George Howard, a native of the city of Baltimore, just past his majority, and his wife, Alice Clark Thurston, a native of Caroline County, Virginia, March 25, 1824, made their home in the town of Halifax, North Carolina. They brought with them mental and physical health, moral integrity, and steadfast purpose. They practiced industry, economy, and patiently abided results. Upon these primary conditions, and by adherence to these essential virtues, they laid the foundation upon which they builded their life work, bringing to themselves, and their children, success, happiness, and the esteem of those among whom they spent their lives.

Mr. Howard established, edited, printed and published a weekly newspaper, which he called the *Free Press.* Two years thereafter he moved to the town of Tarboro, Edgecombe County, where he continued the publication of his paper, under the same name, until 1836, when he called it the *Tarboro Press.* He continued its publication under this name until 1852, when, for reasons easily understood by those familiar with our political history and the drift which, at that time, gave direction to party divisions, he changed it to the *Tarboro Southerner,* and so it has continued until this day—enjoying the distinction of being the oldest newspaper in the State. Mr. Howard resided continuously in the town of Tarboro, having, in an unmeasured degree, the esteem and confidence of the people of the town and county, until his death, 25 March, 1863. He was survived many years by his wife, a woman of marked force of character, strong intellect, and high moral qualities.

George Howard, the first son of Mr. and Mrs. Howard, was born in Tarboro, N. C., 22 September, 1829, where, with the exception of ten years, he resided until his death, 24 February, 1905. I am commissioned by his sons and daughters to present to the Court, and request that it be placed in association with the portraits of other eminent citizens of the State, the portrait of their father, one of Edgecombe's honored sons and of the State's most patriotic and loyal citizens. May I say to your Honors that this privilege gives me peculiar pleasure

because, in addition to my admiration for his character, his mental and moral qualities, I hold his memory in sacred keeping as a dear and loyal friend. Although many years my senior, I enjoyed and returned, for more than twenty-five years, his manly affection and perfect confidence. His friendship and wise counsel were to me, at all times, never failing sources of strength, and of unalloyed pleasure. He was no summer friend, but one whose grip strengthened with the stress of the storm.

In accordance with the custom which, with the approval of your Honors, prevails on such occasions, I desire to speak regarding the life and character of this man, citizen, lawyer, judge; to set forth what he was, and what he did, which makes it appropriate that his portrait be given place with those of other citizens who in his and their day and generation did the State some service.

It is instructive and interesting to make inquiry concerning the environment, social, industrial, political, and religious, in which a man, in the study of whose character we are concerned, was born and spent the plastic period of his life. The opinions, views, and conduct of every man, and especially every strong man, is, to a degree, the result of his environment. It is no disparagement of what we term personality, or force of individual character, to find in a man's opinions, conduct, attitude towards his fellow-men, and questions regarding his social, political, or business relations, the influence of environment or association. It is in this sense that we speak of representative men, those men who, by force of intellect, character, and effort, stand out, with more or less prominence, as representative of the whole.

The county of Edgecombe, from every viewpoint, was in its early settlement, its growth and development during the first half of the last century, a fertile soil and congenial climate for the development of a strong political and social democracy. It was not settled so early as the coastal section of the State. Its population was drawn largely from those who first settled in Virginia, and instead of moving into the higher regions of that State, sought fertile lands, accessible to the markets by means of rivers and creeks. They found, on the banks of Tar River and the creeks flowing into its waters, a pleasant country in which to dwell. The lands were easily cleared, yielding kindly to tillage and intelligent cultivation. The ridges, or what were then regarded as the uplands, were well timbered with the long-leaf pine, which at an early period became valuable for the gathering of turpentine and its distillation into rosin. After the counties of Nash and Halifax were set off from its territory, Edgecombe included, until 1855, in its boundaries the larger portion of the county of Wilson.

When the troubles with England disturbed the peace of the Colony, the people of Edgecombe promptly and actively took part in the cause

of independence. Her delegates to the Congresses at New Bern, Hillsboro and Halifax were actively patriotic, some of them later serving in high civil position and others giving their lives to their country. William Haywood, Elisha Battle, Thomas Hunter, and others were delegates, while Col. Henry Irwin fell by the side of Gen. Francis Nash at the battle of Germantown, and Col. Jonas Johnson, wounded at Stono, died on his way home. Exum Lewis, Sherwood Haywood, and Henry Horn and others served as officers in the Army. In civil life, after the war, Thomas H. Hall, Thomas Blount, James W. Clark, and Richard H. Hines of Edgecombe represented the district in the Federal Congress. The county developed its agricultural resources in marked degree, and at the outbreak of the Civil War led all of its neighbors in the cultivation of its lands. An intelligent observer says: "Those who, at an early age, assisted or directed nature in the use of her forces and by the skillful application of fertilizers and by the careful husbanding and manipulation of all domestic stores of fertility made Edgecombe conspicuous as one of the best and most profitably cultivated counties of the State." This condition is worthy of note because in it we find the expression of the high order of intelligence and sound judgment of the citizens of the county. While there was a steady growth in wealth, as the reward of intelligent industry, it was so equitably distributed that there were but few very wealthy men in the county. The people lived in comfort, but without extravagant or useless display. They educated their children at home, and at the academy in the county town, until their sons were prepared for the University and their daughters for the schools at Salem and Raleigh. The prevailing religious thought was Calvinistic, as held by the Primitive Baptist Church, of which many of the people were members and a number were elders. They were not interested in the work of "internal improvement," and in those days public sentiment had not become largely interested in education by the State. These came later. They valued and promoted education by individual and community effort, rather than through the agency of the State. One who by heredity, birth, residence, and intelligent study understands the genius of the people of Edgecombe County, writes: "They were a people whose word was their bond and whose democracy was the expression of their freedom and independence. Edgecombe County was for years the banner Democratic county of the State. The purest democracy, as practiced and lived, is found only among a pastoral and home-loving people, and such were the people of Edgecombe. Living and working along the lines of principle that required the citizen, when demanding the protection and enforcement of his rights, to recognize and regard the rights of the other man, they resisted monopoly and decried preferment by special privilege; they wanted every man to have a fair

and equal show. This being assured, the result of his life work was his concern. . . . The basic principles of democracy had been so successfully practiced and lived that a high degree of civilization had been attained, assuring the right of personal liberty, the appreciation of respectability, and the even administration of justice; the sun shone on an enlightened, contented, and happy people." It was in this environment that George Howard was born, educated, lived his life, did his work, expressed and illustrated its dominant thought and qualities. It is in the light of this fact that we may interpret his character and attitude towards life, its privileges, duties, and responsibilities. He received his education at the Tarborough Male Academy, a school like many others of those days in the county towns, maintained by the leading citizens, controlled by a board of trustees, and conducted by teachers having liberal education. It was here that, with those of his age, who in peace and in war maintained the honor and promoted the welfare of the county and State, he was prepared for the work and service into which he was called. At an early age we find him assisting in and later assuming the editorial control of his father's paper. Coming into the editorial work in the early fifties, he was confronted with, and engaged in, the study and discussion of the questions which united the South, but divided parties, resulting in the secession of the Southern States and the Civil War. The *Southerner,* true to its past, and expressing the convictions of its editors, father and son, stood strongly for the adoption of the free suffrage amendment to the State Constitution (1856), removing the provision which required the ownership of land to entitle a citizen to vote for a State Senator. An editorial written by him when a very young man discovers a remarkably clear understanding of the distinction between the alleged right of the State to nullify an act of Congress, and to secede from the Union, and the status of a citizen in respect to his allegiance to the State and Federal governments. In those days questions of public interest were discussed by intelligent citizens in articles, and by the editors of the local papers, to a much larger extent than now. The editorial work on a weekly paper did not offer a sufficiently large field for his purpose in life; hence, we find him at the University, studying law under Judge William H. Battle and Hon. Samuel F. Phillips, for both of whom he ever retained a high esteem. Of Judge Battle he always spoke in affectionate terms.

At the Spring Term, 1850, he received his license from the Supreme Court and was at the next succeeding term of the county court of Edgecombe admitted to the bar, receiving his Superior Court license a year thereafter. He was immediately elected county solicitor by the Court of Pleas and Quarter Sessions of Greene County.

At this time the people living in that portion of Edgecombe now within the county of Wilson, by reason of the distance from Tarboro and the expense and time required to attend the courts, inaugurated a movement for the establishment of a new county. The town of Wilson, recently chartered, had begun to grow in population and importance, attracted the attention of the young lawyer, resulting in his settling there in 1854. He at once became one of its leading citizens, giving to the new county movement his earnest and enthusiastic support. He went to Raleigh at the opening of the Legislature, November, 1854, for the purpose of urging the passage of the bill establishing the county, when, without solicitation and against his wish, the Democrats having a majority, he was elected Reading Clerk of the House of Commons. By his attractive manners and efficiency in the discharge of the duties of the office he made friends for himself and the measure in which he was so deeply interested so that, overcoming the opposition, the bill establishing the county, commemorating the name and services of Gen. Louis D. Wilson, one of Edgecombe's distinguished citizens, legislators, and soldiers, was passed and ratified, February 15, 1855. He at once became one of its most popular citizens, taking an active part in the organization of the new county and assisting in launching it upon its successful career. At that time the population was but 9,000. He lived to see it equal the population of the mother county, being in 1905 more than 25,000. He was actively interested in and promoted the growth of the town of Wilson, and, although guided by a sense of duty to and in accordance with the wish of his widowed mother, at the end of the Civil War he returned to Tarboro, Judge Howard always retained a strong affection for the county and town of Wilson, rejoicing in their growth and prosperity. Between the older citizens and himself there existed a warm attachment. Of this I speak from personal knowledge, derived from long association with both. He secured a large and lucrative practice in Wilson, Wayne, Edgecombe, and adjoining counties. He shared with William Norfleet, John L. and Robert R. Bridgers, William H. Johnston, and L. D. Pender of Edgecombe, William T. Dortch, George V. Strong, and W. T. Faircloth of Wayne, Edward Conigland of Halifax, and William H. Bunn of Wilson, the practice in the courts which he attended. While not seeking political position, he took an active interest in the questions which were stirring the thought and, to some extent, the passions of the people in the State and Nation, giving cordial and active support to the Democratic Party, its policies and candidates. Upon the resignation of Judge Ruffin, and the promotion of Judge Manly to the Supreme Court (1858) he was tendered the appointment, by Governor Ellis, and his council, as one of the judges of the Superior Court. At the next session (1859) of the General Assembly he was

elected to the position for life. He was at this time thirty years of age, receiving from his practice an annual income of more than $5,000, which he surrendered to accept the judgeship, with the salary of $1,950. At the same time Judge Osborne of Charlotte and Judge Heath of Edenton were appointed to the bench. Major Moore in his history, written years afterwards, says: "Judge Howard was much younger than his colleagues, but had for several years divided with Hon. William T. Dortch the honors and emoluments of the Goldsboro district, then presenting the richest legal harvest to be found in eastern North Carolina. His fine presence, quickness of apprehension, and legal abilities gave him large success upon the bench, while his personal qualities brought troops of friends wherever he was known." His elevation to the bench met with general approval and, as was prior to 1860, the custom in this State, would probably, but for the Civil War, have resulted in his remaining in that field of labor during the remaining years of his active life. While in the usual sense of the term Judge Howard was not a "close student" of the law or literature, he was well grounded in the principles of the Common Law, its procedure and practice. An opportunity to be familiar with the books which he gathered during these years of preparation shows that his reading, in the sphere of law, history, and polite literature, was well chosen and diligently pursued. His conversation in later years gave unmistakable evidence of careful, intelligent study. He maintained on the bench his reputation as a lawyer, and as a presiding and administrative judicial officer he was not excelled by any. The political conditions resulting, soon after his appointment, in the secession of the State and the Civil War, overshadowed judicial work and reduced litigation in the courts. Such of his decisions as found their way to the Supreme Court are reported in 52, 53, 59, and 60 N. C. Reports. They compare favorably with the record made by our ablest Superior Court judges.

Judge Howard's mind was too well poised, his judgment too clear, his moral and intellectual convictions too firmly fixed upon principle to carry him to the support of radical men or measures. He favored the nomination of and at the election of 1860 voted for Stephen A. Douglas for President. When the State Convention, May, 1861, was called, Judge Howard and Hon. William S. Battle were elected delegates by the people of Edgecombe and that portion of Wilson then voting with the mother county. When we recall the fact that such men as William A. Graham, Thomas Ruffin, George E. Badger, E. J. Warren, Bedford Brown, Col. Dennis D. Ferebee, John Manning, John A. Gilmer, Kenneth Rayner, Asa Biggs, William S. Ashe, Robert H. Cowan, Gen. Bryan Grimes, David S. Reid, Dr. Kemp P. Battle, Governor Holden, and Weldon N. Edwards were delegates, it is manifest that, without

regard to the final outcome of what was done, North Carolina called into her service her choice men in this her day of trial. Judge Howard accepted the doctrines of the State's Rights school of constitutional construction. He believed that, as "by the exercise of the sovereignty of the people of the State in Convention assembled" the State had entered into the Union, "when, in like manner, they chose to exercise their sovereign right again, they could withdraw from the Union, and that, in doing so, they could not be guilty of treason to either State or Federal government." Holding this opinion, he voted against the ordinance introduced by Mr. Badger, justifying the separation of the State from the Union upon the course pursued by Mr. Lincoln, and basing its action upon the right of revolution, and voted for the substitute offered by Mr. Craig, whereby the ordinance of November, 1789, was "repealed, rescinded, and abrogated," thus asserting, as an act of sovereignty, residing in the people of the State the right to withdraw from the Union and reassume the status of an independent sovereign State. It is well known to those familiar with the State's history that this ordinance received the unanimous vote of the delegates. This fact has an interesting relation to later events. In the organization of the Convention, Judge Howard was made chairman of the Committee on Military Affairs. It is difficult to repress the query why a judge of the State court should be placed at the head of this committee. That he served acceptably is evidenced by the journal of the Convention, which, with several adjournments, continued in session until May, 1862. He made a number of important reports, which were uniformly sustained. He was also made chairman of the Committee on "The Executive Department." His personal relations with Governor Henry T. Clark, of Edgecombe, who, as President of the Senate, succeeded Governor Ellis, were intimate. While a number of amendments were debated, and several adopted, they were never incorporated into the Constitution. The war, with its incidents and demands, absorbed the time and thought of the delegates.

At the conclusion of the war, and the organization of the Provisional Government by President Johnson, the State officers were superseded by his appointees, and, of course, Judge Howard was not of those appointed. That his course as their delegate in the Convention of 1861 met with the approval of the people of Edgecombe and Wilson counties is evidenced by his election, with Mr. John Norfleet, a delegate to the Convention called by the President, which met in Raleigh, October 2, 1865. This Convention was representative, in the majority of its members, of the Union sentiment then existing in the State, although there was a strong minority of men who, while recognizing that the State was to be restored to its place in the Union, with an acceptance of the prac-

tical results of the war, were unwilling to renounce their honest convictions or, by any act of theirs, place these whom they represented in a false position. The Convention contained a large number of the State's strongest, ablest men. Of the Whig and Union element, the most prominent were Bartholomew F. Moore, Edwin G. Reade, Lewis Thompson, Patrick H. Winston, Samuel F. Phillips, Nathaniel Boyden, Gen. Alfred Dockery. Of the Democrats were Judge Matthias E. Manly, Judge Allmand A. McKoy, Col. William A. Allen, Edward Conigland, Bedford Brown, Judge E. J. Warren, Col. Dennis D. Ferebee, Giles Mebane, Judge D. H. Starbuck, Judge R. P. Dick, and Judge Howard had been members of the Convention of 1861. William P. Bynum, Thomas J. Jarvis, William Eaton, Judge Robert B. Gilliam, Montford McGhee, were also members of this Convention.

Mr. Boyden introduced an ordinance declaring that "The ordinance of 21 November, 1789, was now and had at all times since its adoption been in full force and effect, notwithstanding the supposed ordinance of 20 May, 1861, which is now and hath at all times been null and void." Colonel Ferebee at once introduced a substitute providing that the ordinance of 20 May, 1861, "is hereby repealed, rescinded, and abrogated." This at once launched the delegates into a spirited, and on the part of some, bitter debate. Mr. Moore, Mr. Phillips, Judge Warren, Mr. Thompson, supporting the ordinance, Judge Manly, Judge Howard, Colonel Ferebee, Mr. Conigland, Mr. Mebane, Mr. Eaton, Mr. Brown, defending the substitute. This is, probably, the last occasion in a parliamentary body in North Carolina on which the legal and political effect of the ordinance of secession was debated. The speeches of several of the delegates were published in full in the Raleigh *Sentinel* and *Standard*. Mr. Moore's was, probably, the best considered argument for the ordinance and Judge Manly's for the substitute. It was rejected by a vote of 94 to 19. The original ordinance was adopted, 105 to 9. It is a matter of interest to note the names of the nine who refused to vote what they deemed a "renunciation of their convictions." They are William A. Allen, Thomas J. Faison, D. D. Ferebee, George Howard, H. Joyner, M. E. Manly, A. A. McKoy, H. F. Murphy, and R. H. Ward. Of course, there was room for honest difference of opinion in regard to the "logic of the situation"—novel and difficult at best. Probably it is not far from the truth to conclude that the American people had for nearly a century been dealing with it without much regard to logic.

When it was proposed to submit the ordinance to the people for ratification several of the delegates insisted that the question should be so submitted that the people should be required to vote "Secession" or "No secession." In regard to this proposition, Judge Howard said:

"It is not my purpose to prevent the ordinance being submitted to the people; I hope it will be—nor is there any reluctance on my part, or on the part of my constituents, to comply with the wishes of the General Government. We submit to its requirements without complaint. But the ungenerous action of several members of the Convention, representing constituencies so lately engaged in a common cause with my own, requires, at my hands, a word in behalf of the citizens of my county. For myself, when this ordinance was under discussion, I besought no leniency, but pursued the course which my judgment dictated and my conscience approved. I hoped that when submitted to the people whom I represented they would be allowed to vote 'Ratification' or 'No Ratification,' as they might be willing to accept it, or not, as a part of the terms of readmission to our rights as a State in the Union. *Here,* it was open as a question of principle; with them, it would be presented as a proposition for reconciliation. But gentlemen seem to be unwilling to permit them to show their submission, and I cannot sit quietly by and witness, unmoved, this attempt to place them in a false light or to insult them. They stand ready to ratify the ordinance and to abide by it in good faith as a settlement, now and ever, of this question. . . . But they will vote no falsification of their principles. I am proud of my constituency. They are true men; they stood nobly by their principles in the past, and it is the best guaranty of their faithfulness in the future. He that is false once, knowingly, will ever be uncertain when moved by ambition or interest. . . . In the noblest and most republican of all pursuits they brought themselves, by their soundness of head and heart, to the position of the banner county of the State, and with every characteristic of true, conservative republicanism, through self-reliance, seeking neither position nor place, nor power, with no airs of superiority, cherishing always great veneration for law and order, an earnest devotion to the Constitution of our fathers and faithful adherence to what they believed to be the true interests of their country. Amid the wreck of their prosperity and the desolation of their homes, they stand ready to bury the past and to devote their energies to rebuilding the waste places and to developing the new civilization by which they are surrounded. Thus situated, it can but bestir my indignation when I see them pardoned by their Government and generously treated by such Union men, Union men always, as the delegate from Wake (Mr. Moore) and the delegate from Forsyth (Mr. Starbuck); proffered insult by the proscriptive action of men who if during the Confederacy they ever spoke or acted for the Union it was never known, even to persons who, like myself, traveled over nearly every portion of the State. As in the past, they respected the rights of all, . . . so, in the present, they demand immunity from insult and wrong."

Without hesitation, he voted for the ordinance abolishing slavery. The work of the Convention, otherwise than in disposing of the questions relating to the admission of the State and to her status in the Union, was not satisfactory to nor ratified by the people.

Judge Howard represented Edgecombe and Wilson in the Senate of 1865-66. While he maintained, with perfect consistency his attitude towards questions relating to the status of the people of the State during and immediately subsequent to the war, he actively participated in and was the author of legislation necessary to the adjustment of their relations to the conditions created by the results of the war. He voted for Judge Manly for the Supreme Court, for whom he always entertained a high regard and profound respect. He strongly favored and supported Governor Graham for the United States Senate, and opposed John Pool. He was the author of the "Stay Law," rendered necessary by the conditions existing at that time. It delayed the enforcement of the collection of "old debts." Later it was declared by the Supreme Court to be unconstitutional. He advocated and voted for the statute permitting negroes to testify in the courts and the enactment of "Lord Denman's Act," enabling persons interested in litigation to testify. His attitude, as expressed by himself, was "In all things true to the honor of the South and to Democracy; he believed in burying the past and promptly adjusting our laws to the civilization of freedom; without hesitancy sustained all measures necessary to that end." He said that he "was conscious of his own good faith to the Government. He neither approved nor would he follow the course of those who stood ready to defame any portion of the people of the State. He believed they were all loyal and their character would ultimately stand vindicated before the Nation. He had always acted, and he should continue hereafter to act, while representing his constituency as a freeman, representing freemen." During this session the lines which have for fifty years divided political parties in North Carolina were established, and men assumed, with more or less regard to past alignment, their political positions. The conservatives, representing those who stood for the old order, adjusted to new conditions, supported Jonathan Worth, a consistent Union Whig, for Governor, and those who stood for the new order upon radical lines of change ranged themselves under the lead of W. W. Holden. Judge Howard stood firmly, constantly, consistently with the former. Events so well known and so unhappy in their effect upon the welfare of the State that we would willingly forget them, rendered the work of the Legislature of 1865-66 of but little permanent value. Those who, like Judge Howard, did not see their way clear to accept the "new order" as worked out through the reconstruction acts, and their supporters, found themselves unable to exert any political influence on the dominant

and governing element, especially in the eastern counties, in which the negroes were in overwhelming majorities. They found such estates as they had gathered either endangered or encumbered, and the necessity for meeting obligations and providing for their families demanding their attention. Before the change came, many of them had passed the age at which men are willing to undergo the labor involved in practical politics, and younger men had taken control.

Judge Howard gave close attention to the practice of his profession until he had accumulated a fair estate, when he gave a larger share of his time to his business interest. While he conducted the trial of causes in the court with skill and success, he preferred the work of counselor, adviser, and manager of large business transactions, in which he was unsurpassed and had but few equals. He had a remarkable capacity for seeing quickly and clearly all of the phases of controversies and their relation to each other, and suggesting terms upon which settlements, compromises, and adjustments should be made, avoiding litigation. His judgment in regard to present and prospective values, especially of real estate, was remarkably accurate. Knowing the people, their characteristics and habits, his counsel in so adjusting their affairs that they might work out of the debts and embarrassments resulting from the Civil War was of immense value to them. In the preparation of legal instruments, setting forth lucidly and concisely terms and provisions of transactions, avoiding unnecessary technical terms, he was well-nigh perfect.

In his relations with the court he never merged his manhood, nor sacrificed his sense of duty as a citizen, to the office of attorney. He regarded them as not only harmonious, but that he rendered the best service to his client by securing for him justice according to law. He was intolerant of indirection or questionable methods in the practice of the law. He had no confidence in nor patience with "picking juries." I was of counsel for him in a case in which he felt strongly that his rights had been invaded, under the forms of law, by a public officer. When the cause was on for trial, the regular panel being in the box, his counsel asked him if its members were satisfactory to him, with some suggestion of local or other influence. He cast his eye over the jury and, with that quickness of perception and conclusion so usual with him, he replied: "They are fair-minded men; that's all I want. I am content." His faith was justified.

Referring to his early retirement from the active pursuit of his profession, one who from boyhood knew him well, spending some time as a student in his office, says:

"It seemed to me that his financial success deprived the State of one of its greatest lawyers and judges. His intellect was capacious, his mind

clear, vigorous, active, and accurate in its processes; his will strong and masterful and his judgment singularly sound and balanced. He was skilled in the system of pleading and practice of the Common Law, and a strenuous opponent of the men and the methods by which the changes of 1868 were brought about. Yet he fully recognized many improvements and advantages of the new system, and was one of the first men of the old régime whom I heard commend the Code of Civil Procedure."

Another who, though many years younger than Judge Howard, practiced at the same bar and was intimately associated with him, thus concludes his estimate of him as a lawyer: "Having an active, comprehensive, and reflective mind, most excellent common sense, it is difficult to say whether he was most successful as a business man or lawyer, having attained great success in both vocations."

While Judge Howard did not, after 1866, hold public office, he was deeply interested in all questions and movements concerning the welfare of the State. He attended, as a delegate from the State at large, with R. C. Puryear, George Davis, and William A. Graham, the Convention which met at Philadelphia for the purpose of uniting the supporters of the President's policy in regard to the Southern States. He was also a delegate to the National Democratic Convention of 1868 and at Cincinnati, 1880. He served upon a commission with Maj. John W. Graham and Thomas W. Patton, appointed by Governor Scales, to consider and recommend reforms in the revenue system of the State. In 1878 his friends presented his name to the Democratic Convention for nomination as Associate Justice of the Supreme Court, at which he received a substantial vote; but with quite a number of strong candidates from the east, the nomination went to another section of the State. On this occasion he wrote a friend: "While it is true, as I stated to you, that the position of Supreme Court Justice will, if conferred, come very opportunely and turn my life into a channel very agreeable to my wishes, it is equally true that I shall not permit an adverse result to disturb me." He was a member of the board of trustees of the University, and for many years a director of the Wilmington and Weldon, and its successor, the Atlantic Coast Line Railroad Company. In the town of Tarboro and its welfare he was always actively interested—serving as a commissioner, president of the board of trustees of the Academy, president of the Pamlico Banking and Insurance Company, and director of the Tarboro Cotton Mills and Fountain Mills. He advocated and supported all measures promotive of public education.

Judge Howard was, in his political convictions and sympathies, intensely Democratic—in the largest sense of that frequently misunderstood term. His democracy was based upon his faith in his fellow-men. He held with unswerving tenacity to the belief which he ever wished to

be given practical effect, that political sovereignty rested in the people, and that governmental power was delegated by them to their agents by means of a written constitution, which, he thought, should contain a well defined, clearly expressed Bill of Rights and the framework of the system of government, leaving to the Legislature the power and duty of providing, within constitutional limitations, for the changing conditions and expanding demands of the State. He held strongly and uncompromisingly to the necessity of clearly defining and rigidly enforcing the limitations within which each department of the Government should serve the people. He also held that it was essential to the protection of the life, liberty, and property of the citizen that, whenever either was threatened by the enforcement of a statute the Judicial Department should, upon his appeal, declare and enforce his constitutional right and protect it from invasion by the exercise of power not granted to either department of the Government. This he regarded as a perfect representative—constitutional democracy—so far as human wisdom and experience could provide, a perfect form of government. He rejected, and had but little patience with, the theory that the State existed separate from the people; that the people existed for the State or that there was any place in a democracy for a governing class. He denied the power of the Legislature to create any corporation, either aggregate or sole, or grant any franchise, or bestow any office or privilege, with attributes of sovereignty, free from the power of governmental visitation, or withdrawal when required by the public welfare. To him the assertion of such power violated the basic conception upon which the American State was founded. He thought that Judge Ruffin, for whose ability, learning, and character he had the highest regard, fell into error in *Hoke v. Henderson*[1], in failing to note the distinction between the tenure by which public office and private property was held. He was greatly gratified when the Court overruled the decision[2]. He thought that all private property should contribute to the support of the Government, and, therefore, although a director of the largest and wealthiest corporation in the State, claiming immunity from taxation, cordially concurred in the decision which resulted in its surrender. He refused to recognize a different standard of obligation or morals for the conduct of the State and the citizen. He, therefore, insisted that public obligations should be faithfully discharged. He regarded the laws as the recorded morality of the people, and patriotism manifested by cheerful obedience to them. While, by precept and example, he practiced and taught obedience to law and upheld its enforcement, he was jealous of his legal rights and prompt to resist, by legal methods, any infringement of them.

[1]15 N. C. Rep., 1.
[2]*Mial v. Ellington*, 134 N. C., 156.

Believing so strongly that the Government, its laws and their enforcement, should be an expression of the will of the people, should rest upon the consent of the governed, regarding as undemocratic any other restriction upon the suffrage than experience had taught to be necessary to the protection of the public welfare, he favored the largest practicable freedom of suffrage. He regarded the enforced enfranchisement of the negroes, without preparation, as a grave mistake. He thought that if freed from outside interference, the selfish greed of political adventurers, and left to the people of the State, they could, after the negroes were made free, by wise and gradually enlarging laws, bring the more intelligent, virtuous, and thrifty of the race into the electorate with safety. That their influence over the others would have been conservative and the prospect by education, economy, and obedience to law of securing the right to vote have stimulated them to preparation. He favored, even under the unfortunate and unfavorable conditions with which the people were confronted, an effort to reason with, and appeal to, the negroes to accept the leadership of and coöperate with the white people. As were many of our wisest citizens, who concurred with him, he was forced to the conclusion, after honest effort, that this was impossible. He, therefore, fully concurred in the policy adopted by the Democracy of the State to maintain white supremacy. Recognizing the evil effect upon the white race of suppressing the negro vote, he welcomed the Amendment of 1900 to the Constitution, which placed the suffrage upon an educational qualification. A few days before the election, November, 1898, he wrote: "The victory of Tuesday week will be but the getting in position for the most important work. In the present conflict the drift must be followed, but afterwards it will require the exercise of the highest quality of manhood for the guidance of the currents into wholesome channels. . . . The negroes are bound to us by so many ties, and have been led or forced into their present position so little of their own choice, I do pray for their deliverance from destruction, or further degradation, and hope that enough good, strong men may be found to protect them from the vile ambitions and low instincts of men of our race. The problem is an awful one, with so many tendencies to the degradation of both races; yet I feel hopeful that our Christian civilization will be able to master it." While the amendment was under discussion in the Legislature he wrote: "I do not see that you could do better than what you have done. Not that I think it the best, but it is the best that general public opinion will approve. . . . The proposed measure should certainly be passed."

He was always deeply concerned in the educational, moral, material welfare of the negroes, and opposed any measures or policy hostile to

their advancement. Regarding them and the duty of the white race, he wrote:

"The first of all duties resting on the Southern whites, in justice on all whites, is to remedy this great wrong by upholding every movement so as to establish them (the negroes) in their proper places, . . . placing the colored races, as races, secondary. This, I believe, is the only settlement that can be permanent, even if this can be so. . . . Whatever may result, I am in thorough accord with Aycock in his clear enunciation of the duty of the democracy to carry out in good faith the two leading pledges of the campaign. I hope politics may not lower his standard. He is a true man. His inaugural is exactly the thing, and I enjoyed very much its wholesomeness." His faith in the ultimate outcome of Democracy was shaken at times by his fear of the influence of the political "boss," the demagogue and "concentrated wealth" misleading and prostituting the moral and political standards of the people. Of the latter he wrote: "So many multimillionaires, such vast rivalry in luxury, so strong materialistic tendencies, all conspire to destroy the better elements of our Christian civilization, I can but have doubts of the stability of the two great fundamentals—Liberty and Justice." But his faith sustained his optimism. He writes: "The great sweep of Providence through the world, constantly though slowly elevating and purifying, is, on the whole, making for better . . . It must be so . . . It is wonderful how the world is liberalizing, how Christian civilization, especially its chief characteristic, altruism, is pervading all society. It may become sufficiently potent to counteract the oppressive use of concentrated wealth." His faith in democracy, as he understood and interpreted it, made him patient, hopeful. He did not overestimate, or, indeed, attach great value to mere political mechanism or hastily enacted radical laws to meet temporary conditions.

His political philosophy has been well stated by another: "It is always necessary to keep fresh in memory theoretical truth in its utmost purity, and to conform institutions to it as nearly as possible. But nothing is perfect which is the work of man, and the radical who makes war upon everything in which he can discern a fault becomes a destructive. . . . It is always necessary to keep bright in our recollection the eternal principles of justice, but instead of warring against all existing institutions, the wise statesman does not attempt impossibilities, but decides every question, as it presents itself, on the side of freedom, and in this manner assists to bring the actual state nearer to the best possible state."

His was a well poised, steadfast faith in an enlightened, educated, conservative democracy, inspired and controlled by a deep, pervading patriotism. This faith he always taught and practiced, and in this

service his life and example add to the glory, honor, and welfare of the Commonwealth.

An intimate association, and admission into his confidence, for more than twenty-five years, impressed me strongly with the consistency of his life and conduct, of his mental and moral integrity; his adherence to principle as he saw it. While tenacious of the basic belief upon which his philosophy of life, its relationships, privileges, and duties were founded, "he had great intellectual generosity, power to entertain new truths and to see new relations of things." Referring to the reconstruction period and its effect upon the State, one who was in close association with him says: 'In that period of transition it was difficult to tell what would be the ultimate result of the changes introduced into our Constitution and laws. He had the clearest view of any man I have ever known of what those results were to be. . . . He once said to me that, on the whole, he approved the changes made as to the status of married women as to their property rights. There was, he said, an element of justice in them. But, he added, it indicates a change in the conception of the whole place and relationship of woman. It means that the unity of man and wife is being lost sight of."

In his social relations Judge Howard was one of the most attractive men I have known. "His mind was well stored with information of the affairs of life, incidents of interest, occurring with the many people he had met and known, his conversation was amusing, interesting, and instructive," absolutely pure and elevating. He was singularly free from personal antagonisms. His public life left no ungratified personal ambitions, no unrealized personal aspirations. He was, in all respects, a healthy man, healthy in body, mind, and heart. His sympathies were keen and warm. He took a large view of life, its problems and experiences; he saw events as the expression of an orderly, divine economy, in which the eternal forces were working out the Divine purpose. Says he: "Of the wisdom of man, outside of simple trust, and present faithfulness to duty, I have a very poor opinion." On his seventy-fourth birthday he wrote: "The Great Adjuster is indeed merciful. He mingles with every trial some compensating comfort." That a man of faith should be gladsome, cheerful, pleasant, is assured. There was nothing secretive in his mind or conduct; his life was an open book to be seen and read of all men; he was intolerant of indirection and concealments.

His independence of character and ever-present desire to see justice done and a fair show given to every one was of controlling force in his conduct. "He possessed, in a marked degree, a most estimable and rare trait, the power and capacity to express himself clearly with great lucidity. When he had formed his mental conception of a subject or propo-

sition, the very illuminating and clear way in which he stated it, so plain and direct that all could comprehend and understand." He did not pass through the more than three score and ten years allotted to him without trials and afflictions. He met them with fortitude and patience in a manly fashion.

Bishop Cheshire, from boyhood living within speaking distance of his home, enjoyed his confidence and esteem, says: "He had strong religious convictions, founded upon principles of Christian truth and a high sense of personal honor and dignity." His religious faith was manifested in his life and conduct. He was for many years a member and elder of the Presbyterian Church. He held strongly to Christian truth as set forth in the standards of this church, with an inclusive, catholic sympathy with the truth as held by all Christian people.

Judge Howard married Miss Anna Ragland Stamps, daughter of Dr. William L. Stamps, of Milton, Caswell County, North Carolina. In no event of his life was he so abundantly blessed as in this union. It was my privilege to visit often and be much in their home. Her deep, quiet, unobtrusive and yet pervading Christian faith and life impressed all who came within its influence—husband, children, servants, friends, church, and community. She passed away June 11, 1901, to the great sorrow of her husband and family. An appropriate memorial was erected by her husband at the Barium Springs Orphanage.

Judge Howard, on February 24, 1905, within a few minutes walk of the spot upon which he was born seventy-five years before, surrounded by his children, loved and honored by those and the descendants of those among whom he had lived his long, honorable, and useful life, passed away. He left surviving six children—George Howard, William Stamps Howard, Mrs. Julian Baker, Mrs. Job Cobb, Mrs. George A. Holderness of Tarboro, and Mrs. William T. Clark of Wilson, N. C.

He was of striking personal appearance, dignified and yet easy of manner. His features were strong, open, frank, inviting confidence. The portrait, the work of Mrs. Marshall Williams, to whose talent and accomplishment the State is so much indebted, presents and preserves his features and expression after he had passed middle life. In it we, who knew and loved him, see delineated the features of the strong, splendid man that we know him to have been.

ACCEPTANCE BY CHIEF JUSTICE CLARK

The address to which we have listened is a valuable contribution to the history of the State as well as a worthy tribute to the memory of the distinguished dead. Judge Howard early attained eminence and was one of the youngest judges who has ascended our Superior Court Bench. He filled so large a space in the public eye and was so much in touch with every public movement during his long and distinguished career that to portray its features is to touch upon the essential elements of our history for nearly three-quarters of a century.

In 1776, at Halifax, we established what the restricted ruling class of that day deemed a republican form of government, but sixty years passed before any citizen was permitted at the polls to express his wishes as to the government of the State or counties save in the election of the members of the House of Commons, as the lower branch of the Legislature was styled. Judge Howard was 7 years of age when the extension of suffrage to the people was granted of voting for Governor, in 1836. Twenty years more elapsed before any man was permitted to vote for Senator unless he was a landed proprietor of 50 acres. Nearly thirty-three years passed before he was allowed to vote for the other State officers and judges. The democratic demand for the extension of suffrage, for greater confidence in the people, and a larger share by them in the Government was not entirely repressed until it found expression in these successive acts of liberation. In 1832 the Legislature, voicing its inherent control over the offices created by it, changed the tenure of the Superior Court clerks, previously appointed for life by the judges, into a term of years, and made them elective by the people. On this the Supreme Court promptly placed its judicial veto in an opinion—*Hoke v. Henderson**—by one of the ablest courts of this or any other State—Ruffin, Gaston, and Daniel. This decision, inherently defective because a denial of the right of the people to control through their Legislature the offices created by that body, remained an obstruction in government for nearly seventy years, until at last the uneasy ghost was laid by an opinion in *Mial v. Ellington*† from this Bench, written by the distinguished judge who has just stated that Judge Howard had always deemed that the doctrine then overruled was in contravention of the constitutional rights of the people.

During the thirty years from 1820-1850 the population of this State remained almost stationary, for opportunity was not sufficiently open for those seeking to better their condition, and the West and South-

*15 N. C., 1.
†134 N. C., 156.

west were filled up with the eager, earnest, and intelligent younger element of our population, whose descendants are now to be found from Tennessee to California. The order of things in this State, so comfortable only to those in the possession of power, could not last. In 1861 the storm burst. During the next ten years Judge Howard lived in the most critical and stressful period of our history. 1871 was removed one hundred years from the condition of affairs and of our ideas of 1861.

First, during four years the flower of the youth of our State fell before the fiery breath of battle like ripened wheat before the blade of the mower. Then came the emancipation of the slaves and the tearing up by the roots of our entire social system, which in every ramification was based upon it, and then with scarcely a breathing spell there burst upon us the black simoon of Reconstruction, when a military officer at Charleston was the dictator and Governor of the twin States of the Carolinas. An ignorant and deluded race, but recently emancipated, led by designing adventurers, made government a riot of plunder, one of whose effects was the vast issuance of fraudulent State bonds, whose validity has just been finally denied.

When, as was necessarily the case, the intelligent and moral forces of the State and the inherent vigor of the Anglo-Saxon race resumed control, there were those who wished to return as nearly as possible to the former state of things. The emancipation of the slaves could not be revoked, the slaughter and the devastation of the war could not be replaced by legislative enactment; but there were two cataclysmal changes which withstood strenuous efforts to revert. One was the absolute destruction of the legal practice and procedure, the growth of hundreds of years, under which form was more material than the merits of a cause and it was more important to decide whether an action was brought in covenant or debt when it should have been entitled in assumpsit or some other form, or whether a party should be turned out of court when he had sued in equity if his writ should have been issued in law, or *vice versa,* with privilege to come back again before the same judge in the same courtroom to debate the same controversy, after the loss of time and great expense. The mysteries of this learning were dear to the hearts of those who had learned it and wished to restore it. The young lawyers naturally opposed this, and Judge Howard, though then in middle age, with his broad catholic view, sustained them and aided them in their victory. Another great change which in its social effect was little short of that of the abolition of slavery was that made as to the property rights of women. Up to that time upon marriage, except in the rare cases of a special contract, the property of the wife became that of her husband, and in law her legal existence was merged in his. To those who feared this change and desired its abolition Judge Howard, as has been stated this

morning, said that it was founded on justice, and whatever the prophecies of evil, the change should remain. About forty years previously the movement to give that half of the race equal education with the other had caused similar alarm, and similar prophecies of evil. Today the two halves of our population have equal education and an equal share of the property of the State. The irresistible and inevitable result is close at hand, for all history shows that when government is controlled either by an aristocracy or by a restricted suffrage, the demand of any excluded class which is possessed of equal intelligence, education, character, and property for an extension to them of an equal share in the Government can never be long denied, for power—the ultimate power of the State—abides in these things.

Judge Howard was a man of commanding appearance, attractive manners, of the highest personal character, a lawyer of great learning and a man of affairs. His influence on his times and the respect which he commanded cannot easily be overestimated. He was one of the directors of the Wilmington and Weldon Railroad, since expanded into the Atlantic Coast Line System. He had the breadth of view to see that the exemption of that great property from all taxation could not endure, and advised its abandonment. In the pursuit of business he achieved financial success. But he has left to his children and to the State more than this, a name above reproach and an influence and a memory which have served the best welfare of the people among whom he lived, and he has achieved, in the splendid address of presentation, the eulogy of the Roman—

"Laudari a viro laudato."

This lifelike portrait is by the brush of a painter the excellence of whose work has shown that talent and capacity are individual and not limited by sex.

The Court is glad to add this portrait to those of the other noble sons of the State who have merited well of the Republic, and the marshal will hang it in its appropriate place on the walls of the Library of this Court.

PRESENTATION OF THE PORTRAIT

OF

HON. DAVID FRANKLIN CALDWELL

(LATE A JUDGE OF THE SUPERIOR COURTS OF LAW AND EQUITY)

TO THE

SUPREME COURT OF NORTH CAROLINA

BY

HON. THEO. F. KLUTTZ

1 MAY, 1917

MR. KLUTTZ said:

May it Please Your Honors: It is a far cry from 1844 to 1917.

Many, and strange, and great have been the happenings in that time. In the judicial history of North Carolina great reputations have been made, great judges have lived and died, and we yet have great judges with us; but I question if the Judiciary of the State has ever been stronger than when the Supreme Court sat for the December Term, 1843.

Ruffin, the great Chief Justice, whose bronze effigy guards the portals of this great fane, was then in the zenith of his powers; and with him sat the able and indefatigable Daniel, and the brilliant statesman and jurist, Gaston.

Of this illustrious legal triumvirate, Dr. Kemp Battle in his "History of the Supreme Court" says: "No State of the Union, perhaps not even the United States, has ever had a superior Bench; few ever had its equal. At home and abroad their decisions, as a rule, had the weight of established and unquestioned law."

Nor was the Superior Court Bench hardly less able or striking. On it sat those veteran sages of the law, Frederick Nash, John L. Bailey, Thomas Settle, (the elder), and John M. Dick; with their able associates, Richmond M. Pearson, William Horn Battle, and Matthias E. Manly. Of these, Nash, Pearson, Battle, and Manly were destined to deserved promotion to the Supreme Bench; and two of them, Nash and Pearson, to long and distinguished service as Chief Justice.

It was a halcyon day in the judicial history of the State, and it was to this great galaxy that David Franklin Caldwell was presently to be worthily added. Lamented as few men have been, Gaston after a day's illness, died during the sitting of the Court, 23 January, 1844, and Frederick Nash was appointed by Governor and Council as his successor.

The consequent vacancy upon the Superior Court Bench was filled by Governor Morehead and his Council on 10 July, 1844, by the appoint-

ment of Hon. David Franklin Caldwell of Rowan, and these temporary appointees were regularly elected by the General Assembly of 1844-1845.

David F. Caldwell, who thus came to the Bench, was already well known to the people of the State by his long and honorable public service, and was in every way worthy of the high accession.

Though many years have elapsed, and the judges and lawyers of his generation have passed away, his name and fame, and his unique personality, are yet familiar by memory and tradition to many of the older citizens of the State; and it is a pleasant duty to set down here a brief appreciation of his life, character, and service.

He was born of sturdy Scotch-Irish-Welsh ancestry, in the county of Iredell, 12 March, 1791, the son of Col. Andrew Caldwell, a stern patriot of the Revolution, who later often represented his county in the General Assembly both in House and Senate; and who was a warm friend and kindred spirit to the great but somewhat erratic John Sevier, and stood bravely by him in his troubles.

His mother was born Ruth Sharpe, a daughter of Hon. William Sharpe, himself a distinguished patriot of the Revolution, who was a member of the Provincial Congress at New Bern and Hillsboro in 1775, and also of the Constitutional Convention or Congress at Halifax in 1776, and was also a member of the Continental Congress at Philadelphia, 1779-1782.

Col. David Caldwell, his paternal grandfather, also fought in the Revolutionary War, and commanded several expeditions against the Cherokee Indians, and he was also often a member of the General Assembly.

His maternal great-grandfather was David Reese, a signer of the Mecklenburg Declaration of Independence. This bold, patriotic, and independent ancestry accounts for the manner of man that David F. Caldwell was.

His younger brother, Hon. Joseph Pearson Caldwell, was elected to the Thirty-first and Thirty-second Congresses of the United States, dying while brilliantly serving his second term, leaving one son, Joseph P. Caldwell, Jr., who became the founder and great editor of the *Charlotte Observer*.

Another brother was Dr. Elam Caldwell, a learned and beloved physician of Lincolnton. Judge Caldwell was twice married, first to Fannie, daughter of William Lee Alexander, and, after her death, to Mrs. Rebecca M. Troy, a sister of the wealthy philanthropist, Maxwell Chambers. Of the second marriage there was no issue. The children of the first were William Lee, Archibald Henderson, Richard Alexander, Dr. Julius Andrew, Fannie Macay, who married Mr. Peter W. Hairston, a wealthy and prominent planter and business man and a gallant Confederate

soldier, and Elizabeth Ruth, who married Col. Charles F. Fisher, who fell while gallantly leading the Sixth North Carolina Regiment at Manassas, and of this union came the gifted author, Mrs. Frances C. Tiernan, whose pen-name, "Christian Reid," is known world wide.

Judge Caldwell's early education was acquired at Bethany Academy, in Iredell County, a classical school of much note, where under the tutelage of that noted teacher, Hugh R. Hall, he was prepared for college. He then entered the University of North Carolina, where he took a literary course, but was not graduated because of financial inability.

Returning from college, he studied law with Hon. Archibald Henderson, whom Judge Murphey eulogizes as one of the greatest men and best lawyers of his time.

Upon his licensure in 1815 he began the practice of the law in Statesville, but after a few years removed to Salisbury, where he continued to reside until his death in 1867.

He soon acquired an extensive practice, but being young, patriotic, and ambitious, he was early drawn into politics, representing Iredell County in the House of Commons, 1816-17-18-19, and the Borough of Salisbury in 1825. He was a member of the State Senate from Rowan 1829-30-31, and was twice honored by election as Speaker of the Senate.

Speaking of the assembling of the House of Commons in 1816, Moore, in his History of North Carolina, says: "David Franklin Caldwell of Iredell County was also a new member. He, too, was an able young lawyer, and was to become prominent alike in political and legal circles. He was remarkable in many respects. No man could be more charming or more terrible. The frown and thunders of Jove were seen on his clouded brow, while, like Shakespeare's Richard III, the blandishments which followed were all the sweeter for the contrast. He was able, luminous in statement, and the embodiment of truth and honesty. He could terrify the crowded courthouse from the bench all day long, but with the evening's privacy no gentleman in all the land was more genial or entertaining."

As Speaker of the Senate, his legal ability, his legislative experience, his firmness, fairness, and fearlessness all combined to make him a model presiding officer, and to add to his already great and growing reputation.

After this service he continued in the lucrative practice of his profession until his elevation to the judgeship in 1844.

As a lawyer he was well grounded in the fundamental principles of the law, and was possessed of a logical and analytical mind. He was untiring in the preparation of his cases, was always courteous to bench and bar, of direct and forceful but never of verbose or grandiose address, and of commanding person; and his success at the bar was commensurate with his great capabilities.

Political feeling in that day was strenuous and rancorous, and many were the personal rencounters between rival candidates for popular favor. I have seen political pamphlets of those nullification times which were Rooseveltian in their objurgations, and in which Andrew Jackson was either defied or damned. Judge Caldwell, prior to his elevation to the bench, was the leader of the old Whigs in Rowan and surrounding counties, while his fellow-townsman, Hon. Charles Fisher, a distinguished citizen, of high character and great ability, was the Democratic leader. They were often opposed to each other, and, unfortunately, there grew up very bitter personal feeling between them. This culminated at Mocksville, at the first term of the Superior Court for Davie County after it was established in 1836. Mr. Fisher had an appointment to speak, to which Judge Caldwell publicly announced that he would reply; but Mr. Fisher consumed the entire afternoon in a bitter political speech, to which Caldwell vainly sought opportunity to reply, and he and his friends were consequently indignant. After supper, in the public room of the hotel kept by Mr. Lemuel Bingham, Judge Caldwell, talking to himself as was his wont, used an opprobrious expletive, referring to the leanness of the court, which Mr. Fisher overheard, and mistakenly understood as applying to himself, and, becoming enraged, so violently assaulted Caldwell that he was only saved from great and perhaps fatal injuries by the interference of Mr. Bingham and others.

Brooding over what he considered an outrageous and humiliating wrong, Judge Caldwell, yielding to the then current notions of the requirements of honor, challenged Mr. Fisher to mortal combat, naming as his second Hon. Sam P. Carson of Burke (now McDowell) County, a leading Democrat, a prominent citizen, who had in a duel killed Hon. Robert B. Vance, an uncle of Senator Z. B. Vance.

Mr. Fisher promptly accepted the challenge and through his second, Hon. Burton Craige, named broadswords as weapons for the fray. To this Mr. Carson strenuously objected, pointing out that it was contrary to the code duello, and that owing to the greatly superior size and strength of Mr. Fisher, it would be simply exposing his principal to barbarous butchery, ending by proposing firearms at close range.

Mr. Fisher remained obdurate, and after considerable correspondence, Mr. Carson, after fully setting forth his reasons, refused to allow the duel to proceed, announcing his determination to challenge any one who dared impugn the courage or conduct of Judge Caldwell; and so, happily, ended this unfortunate episode, without bloodshed. It is somewhat romantic that while the fathers were thus at deadly enmity the gallant son of one wooed and won the fair daughter of the other—Col. Charles F. Fisher wedding Ruth Elizabeth Caldwell.

PRESENTATION OF CALDWELL PORTRAIT.

When Judge Caldwell came to the bench at the age of 53, it was with a ripe knowledge of the law, a clear understanding of its principles, a rich experience of men and affairs, a vast fund of common sense, and a profound sense of the dignity and responsibility of his position. He was reasonably patient in the hearing of causes, but detested unnecessary waste of time. He had no favorites at the bar, allowed no familiarity, and was always sympathetic to the young lawyer who showed himself at all deserving.

He was quick to protect an honest witness from browbeating or badgering, and was severe in his deprecation of such practices. Attempted fraud and perjury fared poorly at his hands. His austere and commanding personality instinctively compelled respect and silence in his courts.

Except in cases of great moral turpitude, he was not unduly severe in his sentences, and often in the case of small offenders, after a terrific exposition of the heinousness of the offense and an awful warning against its repetition, he would astonish the thoroughly alarmed culprit by an unexpectedly light punishment; but he had taught him a lesson which he would never forget.

Once at a winter term of Rowan Superior Court, when the witnesses had been ordered from the courtroom until called to the stand, a poor fellow when called was found crouching beside the stove. Indignant at the violation of his order, Judge Caldwell said nothing until the case had been given to the jury, when he called the offender before him and lectured him severely upon his flagrant contempt of the orders of the court. The poor fellow begged for mercy, explaining that he was freezing out of doors, and had only crept in to warm. The judge, winding up his excoriation, thundered: "It is represented to me that you are a poor man, and have a large and dependent family, and I will therefore not fine or imprison you, but I will inflict a worse punishment upon you": (then sternly, after a pause, while the culprit cowered before him) "I leave you in the hands of Almighty God!"

His personal courage and awe-inspiring dignity were well illustrated in his treatment of one Hopkins, who had been severely punished by him. Hopkins entered the stage coach in which the judge was traveling to one of his courts, and, recognizing him, said abruptly: "Judge Caldwell, you punished me outrageously, and I am going to whip you for it, right now!" "Whip me?" said the judge, indignantly. "How dare you insult a judge of the Superior Courts of Law and Equity for discharging his sworn duty? Get out of this stage at once, sir!" And, according to Hopkins' own story, he did get out at once, without knowing how, and the stage drove on, leaving him in the road.

It is said that while practicing law he once trailed a fellow-townsman, who had absconded with a considerable amount of trust funds for which he felt himself morally responsible, to New Orleans (then a considerable journey), and *vi et armis* compelled him to discharge.

These are a few of the many characteristic reminiscences of this great and unique judge which yet linger in popular tradition.

The State was then divided into seven judicial "circuits," and the judges were selected from the State at large, but were appointed for some particular circuit, and required to reside in one of its counties. They were required, after about 1856, to ride all the circuits in rotation, beginning from the first. The courts were held twice a year in each county, spring and fall, and the terms were, except in a few of the large counties, one week each.

The munificent salary was $1,950 per annum, payable semiannually, with nothing for expenses. Ninety dollars per week was allowed for special terms, for each second week of court, and for each week over twelve on the circuit.

There were only two railroads in the State then, the Raleigh and Gaston and the Wilmington and Weldon; there were few bridges and no good roads; so that the judges rode the circuits for the most part in their own two-wheeled "gigs" or in sulkeys; by stage coach where available, and in the mountain counties often by horse- or mule-back, traveling long distances, often on Sunday, to reach the next court. Yet with these hardships it is reliably said that Judge Caldwell in all his fifteen years service was never late in opening court on Monday morning, except on rare occasions, when prevented by sickness or impassable waters.

In 1859, when 68 years old, while in the full possession of his faculties, but sensitively, almost morbidly, fearing that advancing age might, imperceptibly to himself, impair his usefulness, he resigned from the bench and retired to his spacious and beautiful home in Salisbury.

He was then given the honorable but almost honorary position of President of the Branch Bank of North Carolina at Salisbury, which he held until the collapse of the bank as a result of the War Between the States.

He was brought up in the atmosphere of the "Westminister Confession of Faith" and the Assembly's "Shorter Catechism," with their stern Calvanistic theology, but in mature years became a communicant of the Protestant Episcopal Church, and died in that communion. He was never an emotional religionist, but he had an abiding faith in the great truths of the Christian religion, and a profound sense of his own personal accountability.

He had strong convictions and followed them relentlessly, but he had tender sympathies, and was always heedful of the call of suffering or

distress. When a boy, in the sixties, I frequently saw Judge Caldwell upon the streets of Salisbury. He was then in his declining years, but he was still erect and alert, walking slowly, yet with great dignity of carriage. He was an inch or two over 6 feet in height, of slender build, with blue eyes and dark hair then tinged with gray.

He was always neatly dressed, wearing a long coat of best broadcloth, a high silk hat, and his linen was always immaculate. I never met him without instinctively raising my sometimes shabby hat, and the salutation was always gravely and courteously returned by raising his own. On the 4th day of April, 1867, at the age of 77 years, he succumbed to the infirmities of age, and was laid to rest in the hallowed old Lutheran Cemetery in Salisbury, near the tomb of his old friend, Archibald Henderson.

Preserved and gathered here by loving hands, the faces of his mighty compeers look down upon us from the walls of this courtroom and library, and it is meet that his, as he looked and moved in life, should join them, that "He, being dead, may yet speak."

Fortunately for posterity, he was persuaded when about 60 years old, to sit to William Garle Brown for his portrait, and that portrait, true to life, I am now commissioned by his reverent grandchildren, Mr. Peter W. Hairston and Miss Ruth W. Hairston of Cooleemee Plantations, Davie County, to present to the Supreme Court.

May these mute yet eloquent portraitures of the Law's great dead, with the splendid judicial history which they recall, ever serve to incite and inspire the commemoration and emulation of bench and bar through long ages yet to come.

I thank your Honors.

ACCEPTANCE BY CHIEF JUSTICE CLARK

The interesting and instructive sketch of the life of Judge Caldwell by Mr. Kluttz is a valuable addition to the history of the Judiciary of the State.

Rowan County has never been lacking in lawyers of ability. When on the death of Judge Gaston of New Bern, Judge Nash of Hillsboro was promoted to the vacancy, Governor Morehead of Greensboro, who was himself one of the ablest lawyers in the State and knew well the standing and character of all the leading lawyers in the State, selected David F. Caldwell, of his neighboring town of Salisbury, for the vacant place on the Superior Court Bench. He could not have chosen more wisely.

Judge Caldwell at once achieved the confidence and the esteem of the people, and never lost it. He had many of the characteristics of the strong man* who went from the same town of Salisbury to the Presidency at Washington. Tall, spare, quick in his decisions, and relentless in his enforcement of the right as it was given him to see the right, he feared the face of no man, and, turning neither to the right nor to the left, he pursued the path of duty and made the law a terror to evildoers.

Prior to 1856 the judges did not rotate the entire State, but each year they allotted the districts among themselves, with the sole restriction by statute that they should "not ride the same circuit twice in succession." It was not long after the change was made which required the judges to ride all the districts of the State in succession that Judge Caldwell resigned. At that time the office was held for life, and as he lived for many years thereafter his resignation was doubtless caused by this change, which imposed unnecessary hardship and expense upon the judges. This was changed in 1868 to the system in force everywhere else (save in our adjoining State of South Carolina) of each judge riding his own district only. In 1878 this was unfortunately changed back to rotation.

In maintaining respect for the law there is no influence greater than that of those judges who, in the language of Scripture, "sit in the gates" and administer justice in the sight of all people. And there are no public officials whose character, conduct, and capacity are more closely scrutinized and more quickly and accurately estimated.

During the time that Judge Caldwell was on the Bench there were many able and learned men upon both Superior and Supreme courts, but it may well be doubted if among them there was one whose personality more thoroughly impressed itself upon the minds of the people or whose memory will abide longer. Many anecdotes of him were long current among the people and Bar, and are not yet forgotten.

Learned, inflexibly just, of commanding person, courteous in his manner, decided in his opinions, and vigorous in his execution of the law, he was an honor to the profession and to the Bench.

The Marshal will hang his portrait in its appropriate place on the walls of the Library of the Court.

*Andrew Jackson.

INDEX.

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 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 Insurance, 7, 9; Municipal Corporations, 13.

ABATEMENT. See Actions, 1.

ABORTION. See Homicide, 3; Instructions, 7.

ACCESSORY. See Judgments, 25; Homicide, 7, 8.

ACCORD AND SATISFACTION. See Plea in Bar, 1.

1. *Accord and Satisfaction—Compromise—Intent — Trials — Evidence — Questions for Jury.*—In applying the rule that accepting a check in full for a disputed account will conclude the party, the intent of the party as ascertained by the jury will control when the evidence is conflicting, and more than one inference can be drawn therefrom, as, in this case, where the check did not refer to the particular account or express itself to be in full settlement thereof, and had been refused as such a year or two previous, and then transmitted in the course of dealings between the parties relating to other transactions, and the evidence was conflicting as to whether a statement to that effect had been sent or received with the check, or whether the debtor had indorsed the check supposing it was in the general course of settlement for other matters. *Mercer v. Lumber Co.*, 49.
2. *Accord and Satisfaction—Tender—Court Costs.*—Where a plea in accord and satisfaction, Revisal Sec. 859, has been made in bar to an action that defendant had paid an agreed amount and costs into the clerk's office, the fact that a witness ticket of a small amount, which the plaintiff had refused to receive, was not taxed in the costs, will not affect the validity of the tender. *McAuley v. Sloan*, 80.

ACCOUNTING. See Partnership, 1.

ACQUIESCENCE. See Constitutional Law, 1.

ACTIONS. See Contracts, 2; Limitation of Actions, 4; Parties, 1; Corporations, 16; Venue, 6; Criminal Law, 7.

ACTIONS.

1. *Actions—Abatement—Statutes—Supreme Court—Counties.*—A county and its commissioners having been ordered by the court, in mandamus to build certain fences and borrow the necessary funds to pay for them (Revisal, 1310, 1), appealed to the Supreme Court, pending which an act was passed authorizing a bond issue for the purpose, upon approval of the voters. *Held*, the action abates in the Supreme Court upon presentation of a certified copy of the act. The costs of the Superior Court will be paid by defendant and those of the appeal equally divided between the parties. *Brinson v. Duplin County*, 137.
2. *Actions—Joinder—Pleadings—Issues—Equity—Cloud on Title—Nonsuit—Trials—Statutes.*—Where the plaintiffs allege they are entitled

ACTIONS—*Continued.*

to the possession of certain lands as the heirs at law of the deceased owner, and that the defendant is in wrongful possession claiming under a void sheriff's deed by execution sale, and the answer denies plaintiff's allegation of ownership and asserts the defendant's title: *Held*, the matters in defense come within the meaning of Revisal, sec. 481 (1), permitting joinder of causes of action; and Revisal, sec. 1589, affording an owner of lands a remedy to establish and quiet his title, giving the defendant a legal right to have the issues tried; and plaintiffs' motion for a voluntary nonsuit should be denied. *McLean v. McDonald*, 430.

ACT OF GOD. See Carriers of Goods, 8.

ADDITIONAL EVIDENCE. See Appeal and Error, 24.

ADMISSIONS. See Appeal and Error, 2; Health, 3; Instructions, 4, 7; Evidence, 8.

ADMITTED LINES. See Deeds and Conveyances, 4.

ADVANCED BID. See Sales, 2.

ADVANTAGES. See Condemnation, 3.

ADVERSE POSSESSION. See Processioning, 2; Appeal and Error, 1; Cities and Towns, 1; Limitations of Actions, 3; Tenants in Common, 6.

AFFIDAVIT. See Appeal and Error, 31.

AGREEMENT. See Corporations, 13; Contracts, 16; Appeal and Error, 37.

AGREEMENT WITH SURETY. See Principal and Surety 1.

ALIMONY. See Divorce, 1, 3, 4; Marriage and Divorce, 1.

ALLEGATIONS. See Pleadings, 2.

ALLOWANCE. See Statutes, 8, 9.

AMBIGUITY. See Insurance, 17.

AMENABLE. See Arrest and Bail, 4.

AMENDMENTS. See Pleadings, 1; Constitutional Law, 5, 7, 8, 9, 11, 15, 17.

ANNUITIES. See Wills, 17.

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ANSWER. See Judgments, 14.

APPEAL. See Justices' Courts, 2; Constitutional Law, 1; Recorder's Court, 1.

APPEAL AND ERROR. See Injunction, 3; Instructions, 2, 5, 6, 7; Carriers of Goods, 7; Jurors, 3, 4; Municipal Corporations, 3; Master and Servant, 10, 13; Insurance, 1; Divorce, 3; Judgments, 14, 24; Tenants in Common, 6; Evidence, 5, 10, 15; Vendor and Purchaser, 5; Reference, 2, 3, 4; Marriage and Divorce, 1; Pleadings, 7; Issues, 1, 3; Courts, 2, 7; Homicide, 6, 8.

APPEAL AND ERROR—*Continued.*

1. *Appeal and Error—Cities and Towns—Streets—Adverse Possession—Evidence—Trials—Municipal Corporations.*—Title to land used by a town for street purposes cannot be acquired by adverse possession, and the question as to whether the *locus in quo* was ever made a public street and so claimed and used by the town, when it arises in the controversy, is important, rendering the admission of incompetent evidence as to such matters reversible error. *White v. Edenton*, 32.

2. *Appeal and Error—Appellant—Burden of Proof—Admissions.*—Where the controversy is over a disputed account in the settlement with the plaintiff for timber cut by him upon the defendant's land, and the defendant offers to introduce in evidence a memoranda his agent had made of lumber it received, on the appeal of the latter, it is incumbent upon him to show error in the exclusion of this evidence, which does not appear when the plaintiff has admitted the delivery of timber to the extent accounted for on defendant's books and claims he should be paid a further sum for additional lumber cut and delivered under this contract. *Mercer v. Lumber Co.*, 49.

3. *Appeal and Error—Harmless Error—Evidence—Instructions.*—Where evidence as to the recital in certain deeds with relation to a controversy concerning lands is erroneously admitted, an instruction to the jury that they must not consider the recital renders the error harmless. *Miller v. Johnston*, 62.

4. *Appeal and Error—Trials—Issues.*—The refusal of the court to submit issues tendered by a party to the action will not be held as reversible error when the issues submitted present every contention raised by the pleadings therein. *Williams v. May*, 78.

5. *Appeal and Error—Trials—Evidence—Nonsuit.*—On appeal from a disallowance of defendant's motion to nonsuit upon the evidence, the evidence introduced for plaintiff must be taken as true, and that for the defendant not considered. *Ibid.*

6. *Appeal and Error—Evidence—Objections—Motions to Strike Out.*—Evidence admitted without objection or subsequent motion to strike it out will not be considered for error on appeal. *Hux v. Reflector Co.*, 97.

7. *Appeal and Error—Reference—Findings.*—Findings of fact by the referee, approved by the judge, upon supporting evidence, are not reviewable on appeal, especially in this case, where the parties have agreed that they should be conclusive. *Lewis v. May*, 100.

8. *Appeal and Error — Record — Issues — Mistake — Remanding Case.*—Where in the record on appeal in an action for malicious prosecution the issues set out therein are: (1) "Did the defendant cause the arrest and prosecution of the plaintiff?" (2) "Was the same done without probable cause?" (3) "Was the same done without malice?" to each of which it appears that the jury has responded in the affirmative; upon which the defendant moved for judgment in the Supreme Court, but the plaintiff (appellee) contends there had been error in copying the third issue, and that in fact it was submitted as to whether the act was done "with" malice; and it further appears that the charge referred to the issue in conformity with appellee's contention, and the issues submitted had been lost and cannot be supplied: *Held*, the case is remanded for the Superior Court to ascertain the fact as to

APPEAL AND ERROR—*Continued.*

the issue, upon proper evidence, correct its record, and enter judgment in accordance with its findings. *Holton v. Lee*, 105.

9. *Appeal and Error—Issues Tendered.*—The refusal of the court to submit issues tendered is not erroneous, when those submitted are fully sufficient to present adequately and properly every matter involved in the controversy. *Harris v. R. R.*, 110.

10. *Appeal and Error—Trials—Evidence—Harmless Error.*—The rejection of evidence on the trial of the cause which could not have had any appreciable effect on the result will not be held for reversible error. *Ibid.*

11. *Appeal and Error—Newly Discovered Evidence—Opinion—Discussion.* Upon motion in the Supreme Court to set aside the judgment appealed from for newly discovered evidence, the Court will grant or refuse the motion without discussion. *Johnson v. R. R.*, 163 N. C., 453, cited as decisive of this appeal. *Odom v. Lumber Co.*, 124.

12. *Appeal and Error—Court's Discretion—Recall of Witness—Consent.*—Where a party has rested his case it is within the unreviewable discretion of the trial judge, in the absence of abuse thereof, to permit him to recall a witness to testify as to certain facts, which had been ruled out on objection and again offered. *McDonald v. McLendon*, 172.

13. *Appeal and Error—Court's Discretion—Presumptions.*—Where there is doubt whether the trial judge refused to permit a witness, after the party introducing him had rested his case, from again going on the stand, in his discretion or as a matter of law, the remedy is by *certiorari* or remand, to have the doubt reversed. The Court finds in this case that the judge did exercise his discretion. *Ibid.*

14. *Appeal and Error—Conflict—Record—Recall of Witness—Court's Discretion.*—Where in an action of *devisavit vel non* it is contended, on appeal, that a certain witness was a caveator in the action and should have been permitted to testify after the propounder had rested his case, and that the refusal of the trial judge was not in his discretion in permitting the propounder to recall him to the stand after he had already testified, and it is suggested incidentally in the appeal bond, case on appeal, and brief that the witness was a caveator, but it otherwise appears in the record, the record will control. *Ibid.*

15. *Appeal and Error—Wills—Devisavit Vel Non—Single Issue—Objections and Exceptions.*—Where an action *devisavit vel non* has been tried without objection, as to the validity of the will as a whole, the Supreme Court will not order another trial upon separate issues as to the validity or invalidity of several devises. *Ibid.*

16. *Appeal and Error—Improper Remarks—Correction—Attorney and Client.*—Improper remarks of counsel should be corrected by the trial judge in the exercise of his discretion, and his prompt intervention in this case, in explicit and positive language, is held to have rendered such remarks harmless. *Massey v. Alston*, 215.

17. *Appeal and Error—Exclusion of Evidence—Harmless Error.*—Evidence excluded at the trial which could not appreciably have affected the verdict rendered will not be held as reversible error on appeal. *Elliott v. Smith*, 265.

18. *Appeal and Error—Judgment—Excusable Neglect—Terms Agreed—Willful Refusal.*—Where the trial judge has found as facts that a

APPEAL AND ERROR—*Continued.*

defendant who had obtained a continuance of his case upon terms that he had agreed upon and willfully refused to perform, and that his answer had been stricken out and judgment as for contempt rendered against him, the claim of mistake, inadvertence, surprise, or excusable neglect is excluded, and will not be sustained on appeal. *Lumber Co. v. Cottingham*, 323.

19. *Appeal and Error—Excusable Neglect—Trial Court—Findings of Fact—Evidence.*—Upon appeal from a motion to set aside a judgment for excusable neglect, the finding of facts by the trial court, when supported by evidence, is conclusive. *Ibid.*

20. *Appeal and Error—Courts—Findings of Fact—Executors and Administrators—Parties.*—Where the heirs at law of a grantee of lands sue to recover them, and it is found by the jury that the deed was given merely as security for a debt, a judgment rendered for the amount by the trial judge, not based upon admissions or agreement of the parties, and without waiver of the right to a jury trial, is erroneous, and a new trial on this issue will be granted by the Supreme Court, with order to make the administrator of the deceased grantee a party plaintiff. *Ray v. Eason*, 337.

21. *Appeal and Error—Conflict—Record—Objections and Exceptions—Questions and Answers—Evidence.*—On appeal, the record will control in case of conflict, as to whether the answer to a question by a witness at the trial was excepted to as well as the question asked him; and where the answer is only incompetent in part, an exception to the whole thereof will not be considered. *Howard v. Wright*, 339.

22. *Appeal and Error—Premature Appeal—Opinion.*—In this action of ejectment and for possession of lands it is *Held*, the appeal was prematurely taken before the assessment of damages by the jury under that issue; but the Court indicates its opinion upon the merits of the case. *Yates v. Ins. Co.*, 473.

23. *Appeal and Error—Reference—Findings—Evidence.*—It will be presumed on appeal to the Supreme Court that the referee's findings of fact, approved by the lower court, were based upon sufficient evidence, where the evidence is not set out in the record, and the referee's findings will be adopted. *Public Utilities Co. v. Bessemer City*, 482.

24. *Appeal and Error—Further Findings—Reference—Additional Evidence.* Where the Supreme Court orders the Superior Court judge to make and certify additional findings in passing upon the report of a referee, he is not required to reopen the case for the consideration of additional evidence, but to make his findings from the evidence already taken, when no exception is taken thereto and it is sufficiently comprehensive. *Winstead v. Hearne*, 606.

25. *Appeal and Error—Motions—Diminution of Record—Pleadings—Evidence.*—Pleadings in an action certified to the Supreme Court following a suggestion of the diminution of the record therein can have no force when the position they are designed to present is entirely without supporting evidence. *Chemical Co. v. O'Brien*, 618.

26. *Appeal and Error—Evidence—Pleadings—Objections and Exceptions.* Where the plaintiff has introduced parts of the defendant's answer in evidence, an objection, if valid, is rendered immaterial by the defendant's thereafter testifying thereto. *Young v. Gruner*, 622.

APPEAL AND ERROR—*Continued.*

27. *Appeal and Error—Evidence—Expert Testimony—Intoxicating Liquors —Favorable Testimony.*—Where the effect upon the sensibilities of a patient received at a sanitarium under the excessive influence of alcohol is material in an action against the institution for its alleged negligence in failing to give the patient proper attention, the opinion of a medical expert as to the effect of giving the patient a drink of whiskey, which is favorable to the defendant's contention, is not evidence of which he can complain. *Ibid.*

28. *Appeal and Error—Municipal Corporations—Sinking Fund.*—Exception by a municipality to a judgment rendered upon a report of the referee and confirmed, to the effect that the commissioner of its sinking fund should have been charged with interest he should have collected, is without merit under the evidence in this case. *Borden v. Goldsboro*, 661.

29. *Appeal and Error—Widow's Year's Support — Evidence — Statutes.* Where a widow's year's support has been allotted (Rev., sec. 3104), and the judgment of the clerk (Rev., sec. 3107) appealed from, and the court after passing upon the amount allowed changes that theretofore made, the Supreme Court on appeal will not review the facts found, when there is sufficient evidence to support them. *Brewery v. Bank*, 664.

30. *Appeal and Error—Instructions—Harmless Error.*—In this action against a railroad company to recover damages for a death alleged to have been caused by the defendant's negligence involving the usual issues, the principal negligence relied on was the defendant's failure to properly light its depot, which the jury answered in the negative under a charge free from error, and construing the charges as a whole, it is *Held*, that the court's reference to certain matters affecting the second issue, as to contributory negligence, was not reversible error to the plaintiff's prejudice. *Liggett v. R. R.*, 698.

31. *Appeal and Error—Service of Case—Extension of Time—Written Agreement—Unanswered Affidavit.*—The ruling that a *certiorari* will not be allowed in the Supreme Court to bring up a record on the ground that the agreement to extend the time for serving case was not reduced to writing, has no application where the applicant files his affidavit to the effect that the time had been extended and the case served therein, and it is not denied by counter affidavit; and motion to dismiss the appeal will be denied. *Brown v. Taylor*, 700.

32. *Appeal and Error—Rules of Court—Record—Requisites.*—Under Rule 19 of the Supreme Court, the record on appeal should contain an index and should set forth the name of the judge before whom the case was tried and the term of court. Upon failure therein the appeal may be dismissed by the Court under Rule 20. But in this case a date is named by which time the necessary corrections must be sent up or the appeal will stand dismissed. The costs of additional matter are taxed against appellant, irrespective of the final result of the appeal. *Kearnes v. Gray*, 717.

33. *Appeal and Error—Settlement of Case—Statutes.*—Revisal, sec. 591, prescribing the manner of service and settlement of cases on appeal to the Supreme Court must be strictly or at least substantially complied with, or the case may be dismissed. The Court examined the record in this appeal and found no substantial or reversible error. *Jenkins v. Carson*, 725.

APPEAL AND ERROR—*Continued.*

34. *Appeal and Error—Reference—Evidence—Findings.*—Facts found by the referee, when there is any evidence, and approved by the judge, are not reviewable on appeal. *Moore v. R. R.*, 726.

35. *Appeal and Error—Rules of Court—Statutes—Laches—Motions.*—Where appellee fails to immediately send case, counter-case, or exceptions to the trial judge (Rev., sec. 59), and afterwards the counsel agree that the judge settle the case, with disagreement as to this settlement, which was finally settled by the judge, without appellant's consent, and docketed too late under the Supreme Court rules, appellee's motion to dismiss under Rules 5 and 17 will be allowed. *McNeil v. R. R.*, 729.

36. *Same—Certiorari.*—Where the appellant can show good and sufficient cause why his case on appeal had not been docketed in the Supreme Court in the time required by the rules, or that he was not therein at fault, he should file a transcript of the record proper and move for a *certiorari* for the statement of the case, which may be done at any time during the term before appellee moves to dismiss it. *Ibid.*

37. *Appeal and Error—Laches—Agreements—Docketing—Rules of Court.*—The Supreme Court will not consider appellant's alleged verbal agreement between the parties as to delay in docketing his case after the time required by the rules, when such is denied. *Ibid.*

38. *Same—Subsequent Terms.*—In the absence of written agreement between the parties, or an affidavit of such agreement, not denied, an appellant may not docket his appeal at a subsequent term to that at which the rule requires it to be docketed. *Ibid.*

39. *Appeal and Error—Petition to Rehear—Commencement of Time Allowed.*—The time begins to run against a petition to rehear in the Supreme Court from the time the opinion was filed in the office of the clerk of that Court. *McGeorge v. Nicol*, 733.

40. *Appeal and Error—Criminal Law—Habeas Corpus—Evidence—Certiorari.*—Evidence or other matters adjudicated in a criminal case will not be reviewed by the Supreme Court on appeal in *habeas corpus* proceedings; but only the jurisdiction of the court and the validity of the judgment. In this case the Attorney-General waived the irregularity, and by agreement it was regarded as if upon a formal return to a writ of *certiorari*. *S. v. Burnette*, 734.

41. *Appeal and Error—Evidence—Restrictive—Objections and Exceptions.* Evidence competent for some purposes but not for all is not, upon exception, reviewable on appeal, unless the objecting party asks, at the time of its admission, that it be restricted to the purposes for which it is competent. Rule 27, 164 N. C., 548. *S. v. McGlammery*, 748.

42. *Appeal and Error—Interlocutory Orders—Inferior Courts—Jurisdiction—Statutes.*—An order of the Superior Court requiring the defendant to answer over to an indictment, transferred to it by an inferior court, on the ground that the latter court could only have final jurisdiction under a statute creating it, is interlocutory, from which an appeal does not immediately lie to the Supreme Court. *S. v. Burnett*, 750.

43. *Appeal and Error—Courts—Expression of Opinion.*—A remark to a defendant by the trial judge, when testifying in his own behalf under indictment for cruelty to animals, to answer the questions asked him concisely, "and not be dodging," is an expression of opinion on the

APPEAL AND ERROR—*Continued.*

credibility of the evidence, forbidden by the statute, and constitutes reversible error, though the judge withdraws the remark, and endeavors to eradicate the impression made by it. *S. v. Rogers*, 755.

44. *Appeal and Error—Trials—Attorney and Client—Improper Remarks—Exceptions.*—Where on appeal exception is taken to improper remarks made by counsel in their argument to the jury, it must be made to appear by the record that the alleged remarks had been made; and then considered on appeal only when such had been promptly called to the attention of the trial judge, and exception made to his refusal to correct them. *S. v. Terry*, 761.

45. *Appeal and Error—Instructions—Contentions—Objections and Exceptions.*—Exception as to the manner of stating contention of counsel in the charge will not be sustained unless the attention of the court is called to it at the time and opportunity afforded of making proper correction. *S. v. Summers*, 775.

46. *Appeal and Error—Witnesses—Evidence—Character—Harmless Error.* Where the bad character of a witness has been established, other evidence in impeachment thereof, though erroneously admitted, will be regarded as harmless error, if not prejudicial, as in this case. *S. v. Killian*, 792.

47. *Appeal and Error—Objections and Exceptions—Brief—Rules of Court.* Exceptions not brought forward in the brief are deemed abandoned on appeal, Rule 34. *S. v. Bryson*, 803.

48. *Appeal and Error—Evidence Withdrawn—Error Cured—Instructions.* Where a competent question is ruled out by the trial judge, but afterwards answered by the same witness, the error is cured. *S. v. Martin*, 808.

49. *Appeal and Error—Contentions.*—The failure of the trial judge to fully and correctly state the contentions of a party should be brought to the attention of the court at the time, and exception should be taken to his refusal to correctly state them. *Ibid.*

50. *Appeal and Error—Specific Instructions—Requests*—Exception that more definite instructions were not given by the court in his charge to the jury is untenable, in the absence of special requests upon the subject. *Ibid.*

APPLICANT. See Register of Deeds, 3.

APPROPRIATIONS. See Statutes, 14, 15.

APPROVED MACHINERY. See Master and Servant, 3.

ARBITRATION. See Pleadings, 6.

ARCHITECTS. See Contracts, 15, 17.

ARREST AND BAIL.

1. *Arrest and Bail—Rights of Obligors.*—Where a prisoner in arrest and bail is released from custody of the law upon bail, the principal is regarded as delivered to the custody of his sureties under the original process, who may thereafter seize and deliver him in discharge of their liability, or imprison him temporarily when necessary until this can be done, exercising this right in person or by agent in this or

ARREST AND BAIL—*Continued.*

another State, upon the Sabbath or otherwise, and, if necessary, break and enter his house for that purpose. *Pickelsimer v. Glazener*, 630.

2. *Arrest and Bail—Execution—Sureties—Judgment—Motions—Notice—Statutes.*—The common-law principles under which the sureties on a bail bond in arrest and bail were released, provided the performance of its condition was rendered impossible by the act of God, the obligee, or of the law, have been somewhat modified by statute in this State; and in an action to recover upon an alleged fraudulent transaction, where the debtor is released upon bail, the creditor may proceed to judgment, and issue execution against the debtor's property, and afterwards against his person, if returned "*Nulla bona*"; and should the latter writ be returned "*non est inventus*," the plaintiff may move on ten days notice for judgment against the bail, making available to the latter all defenses he may have as to the surrender of his principal; and a judgment rendered against him at an intermediate stage of the proceedings is reversible error. Revisal, secs. 735, 738, 751, 752, 753, 754. *Ibid.*

3. *Arrest and Bail—Object of Bond—Release—Process—Jurisdiction.*—The main object of a bail bond taken to release the prisoner from custody in arrest and bail is to secure his presence to answer the process of the court and, for this purpose, to keep him within its jurisdiction, and not merely to obtain money upon his default, and while in a civil action he may be taken and imprisoned until discharged by payment of the debt or compliance with any other order or judgment of the court or otherwise discharged by law, as by taking the insolvent debtor's oath in proper cases, the obligors on his bond may, at any time before final judgment against them, be released by the defendant's voluntary surrender of his person (Rev., sec. 751), or his production by the obligors in accordance with the terms of the bonds, etc., whereupon the liability of the latter ceases. *Ibid.*

4. *Arrest and Bail—"Amenable"—Words and Phrases.*—The word "amenable" as used in our statute relating to a bail bond for the release of a prisoner from the custody of the law means "answerable" or "responsive" to the process of the court having jurisdiction; and when execution is issued against the person of the debtor it is his duty to surrender himself, or of the obligors on the bond to do so, and a failure constitutes a breach of the obligation *Ibid.*

5. *Arrest and Bail—Extradition—Executive—Governor.*—Where in arrest and bail the prisoner under bail bond has been again arrested to await a warrant in extradition proceedings, and imprisoned in the jail of the county by the same sheriff, *semble*, upon the refusal of the sheriff to receive the prisoner from the obligors on the bail bond, that the trial judge upon hearing the obligors' motion should order the prisoner retained in custody pending the action of the Governor, who, upon notification, may consider the rights of our own courts as being prior to those of other jurisdiction, and hold the prisoner to answer in our courts. *Ibid.*

ARSON.

Arson—Trials—Evidence—Questions for Jury—Nonsuit.—Evidence, upon a trial for arson, which tended to show that a dwellinghouse was burned about 3 o'clock in the morning, and thereafter, on the same morning a frying-pan was found beneath it in which balls of cotton

ARSON—*Continued.*

had been saturated with kerosene, from which the house had caught fire, some of which were found partly charred, is sufficient evidence of arson; and evidence tending to show that the prisoner had threatened the life of the occupants of the dwelling on the previous day; that he dwelt with his wife near by, and had left his room about five minutes before the fire occurred, was seen under suspicious circumstances near the place, just before the time, left home without explanation and gave no reasonable explanation thereafter, and was arrested in a neighboring State and brought back for trial, etc., is sufficient to sustain a verdict of the prisoner's guilt; and a motion as of nonsuit thereon was properly denied. *S. v. Clark*, 739.

ASSESSMENTS. See Drainage Districts, 1, 2, 3, 4; Constitutional Law, 4; Municipal Corporations, 16.

ASSETS. See Partnership, 3; Banks and Banking, 4, 5.

ASSIGNMENTS. See Contracts, 14.

ASSUMPSIT. See Contracts, 12.

ASSUMPTION OF RISKS. See Negligence, 2; Instructions, 2; Master and Servant, 6, 8, 12.

ATTORNEY AND CLIENT. See Judgments, 3; Appeal and Error, 16, 44; Insurance, 1.

AUTOMOBILES. See Pleadings, 1; Negligence, 4.

Automobiles—Negligence—Evidence—Nonsuit.—In an action to recover damages for the alleged negligent running of the defendant's automobile, evidence tending to show that defendant owned the automobile for family use, and has employed another as his agent to teach his minor daughter to run it, and that the injury resulted in the latter's negligence, is sufficient to take the case to the jury upon the issue of defendant's actionable negligence, and a motion to nonsuit thereon was properly overruled. *Linville v. Nissen*, 162 N. C., 95, cited and distinguished. *Williams v. May*, 78.

"AYE" AND "NO." See Constitutional Law, 7, 8.

BALANCE. See Corporations, 12, 13, 14, 15.

BALLOTS. See Constitutional Law, 17.

BANKS AND BANKING. See Principal and Surety, 1; Embezzlement, 1.

1. *Banks and Banking—Deposits—Set-offs—Equity—Fraud—Insolvency.* While ordinarily the requirements at common law, or under statutes applicable, forbid a debt due by a partnership to a bank, or by a principal on a note, to be set off by the bank against a deposit of one of the partners or of a surety, this doctrine is modified in equity when by reason of the insolvency of the parties the question is reduced, as a matter of fact, to one of mutual indebtedness between the bank and its depositor, and it is necessary to allow the set-off to the bank, in whole or in part, to prevent a palpable miscarriage of justice. *Moore v. Bank*, 180.
2. *Same—Partnership—Husband and Wife.*—Where a husband has deposited his own money in a bank in his wife's name, and accepted by

BANKS AND BANKING—*Continued.*

the latter without knowledge of the fact, and he and another, as partners, have become indebted to the bank on a partnership note, signed by each as sureties, and the partnership and the individual members are insolvent, in an action brought against the bank to recover the deposit, it is *Held*, that the defendant may off-set the indebtedness due to it on the note; and were the same not strictly permitted as a set-off, such defense will be considered as a bill in the nature of an equitable *fi. fa.* as property not available to creditors under ordinary legal process. *Ibid.*

3. *Banks and Banking—Deposits—Fraudulent Gifts—Husband and Wife—Statutes.*—Where the wife participates in her husband's depositing his money in her name at a bank for the purpose of defrauding his creditors, the attempted appropriation is void by our statute to prevent fraudulent gifts, Revisal, secs. 960-962; and in an appropriate action the deposit will be considered and dealt with as if it stood in the name of the husband. *Ibid.*

4. *Banks and Banking—Corporations—Receivers—Stockholders—Individual Liability—Statutes—Assets—Judgments.*—Where judgment has been obtained by the receiver of an insolvent banking corporation upon a liability theretofore created against its directors by their resolution to become personally liable for a certain amount of its worthless paper in order to obtain permission from the corporation Commission to continue its business and pay dividends upon its capital stock, with permission granted the receiver to have execution issued, among other things, if he has "proceeded with the collection and reduction of the assets of such bank, and the same are sufficient to discharge the obligations of said bank due to creditors and depositors as the same" may be allowed by the court, which judgment was not appealed from: *Held*, by the terms of the judgment the insufficient assets did not include the statutory liability individually placed upon the stockholders to the creditors of the bank (Rev., sec. 235), or require the receiver to collect in all the bank's assets before collecting the obligation assumed by the directors when it then appears that the bank's creditors would not be paid in full. *Hill v. Smathers*, 642.

5. *Banks and Banking—Corporations—Receivers—Shareholders—Individual Liability—"Assets."*—The individual liability, created by statute, of the shareholders in a bank, beyond the amount of the stock for which they have subscribed, is an asset of the corporation available only to the creditors and depositors of the bank (Rev., sec. 235; ch. 25, Laws 1911); and where the directors of a bank have assumed obligation on certain of its worthless paper to so "relieve" the bank that it may continue in business with permission of the Corporation Commission, but upon condition that the bank's "assets" be found insufficient to pay its liabilities, they may not successfully assert that the individual liability of the stockholders were included within the meaning of the word "assets" so used by them. *Ibid.*

BENEFICIARIES. See Wills, 5; Master and Servant, 9; Insurance, 25.

BENEFITS. See Deeds and Conveyances, 14; Statute of Frauds, 3; Insurance, 13, 16, 22.

BEVERAGE. See Intoxicating Liquors, 2.

BIGAMY. See Criminal Law, 7.

BILL OF PARTICULARS. See Indictment, 1.

BILLS AND NOTES. See Contracts, 8; Equity, 8.

1. *Bills and Notes—Indorsement—Evidence.*—An indorsement on a negotiable instrument must be made thereon, or some paper attached thereto, by the indorser himself or by his duly authorized agent; and in an action thereon such indorsement does not prove itself, but the fact must be established by proper testimony. Revisal, secs. 2179, 689a, 2168. *Midgette v. Basnight*, 18.

2. *Same—Partnership.*—In an action upon a draft cashed by the plaintiff, on which the defendant's name appears as an indorser, and which was duly protested for nonpayment, there was evidence in plaintiff's behalf tending to show that the defendant introduced the drawer to the plaintiff, saying he was all right, and to let him have any goods they might wish to purchase, and on that occasion advanced for the purpose two checks and some money; that the drawer presented the draft in controversy to the plaintiff within a week or two, with a note appearing to be from the defendant, requesting the plaintiff to cash the draft and retain for him the moneys he had advanced on the former occasion, which was done, and the moneys retained afterwards, paid to the defendant; that the drawer told the defendant the plaintiffs were to cash the draft and to write the plaintiffs to retain the moneys he had advanced, and the defendant asked the drawer to write the note for him. There was evidence *per contra*, and on motion to nonsuit upon the evidence it is *Held*, it was sufficient to sustain the inference by the jury that the indorsement was made by the defendant's authority, and the motion was properly disallowed. *Ibid.*

3. *Bills and Notes—Release—Burden of Proof.*—Joint makers upon the face of a negotiable instrument are deemed to be primarily liable thereon, Revisal, sec. 2342; and in an action upon the note the burden is upon the defendants to prove any matter in release, if brought within three years. *Roberson v. Spain*, 23.

4. *Same—Extension of Time—Notice—Statutes.*—In an action upon a negotiable instrument the defendants on its face being joint makers, the mere fact that the plaintiff had told one of the defendants, without the knowledge of the other, "that he would take up and carry the note until fall," is not an extension of payment for a "fixed and definite" period, which would operate as a release to such other from liability (Revisal, sec. 2270); whose remedy is by *quo timet* notice under Revisal, sec. 2846. *Ibid.*

5. *Bills and Notes—Principal and Surety—Release—Trials—Evidence—Instructions.*—When in an action upon a negotiable instrument a defendant claims that he was in fact a surety, though he thereon appears to have signed as coprincipal, and contends that he has been released from liability thereon by reason of an extension of time given his principal by the holder, and fails to introduce evidence that he, in fact, signed as surety, it is proper for the court to instruct the jury to answer the issue for the plaintiff if they believe the evidence. *Ibid.*

6. *Bills and Notes—Negotiable Instruments—Presumptions—Statutes—Due Course—Equities.*—The admission by the maker of a promissory note that it had been indorsed to the plaintiff in due course raises the presumption *prima facie* that he is a holder in due course, acquired the instrument before maturity, without notice of any equity; that he is the owner and is entitled to sue thereon (Pell's Rev., secs. 2201,

BILLS AND NOTES—*Continued.*

2208); and the *prima facie* case is not rebutted by a denial in the pleadings. *Steel Co. v. Ford*, 195.

7. *Bills and Notes—Judgments—Execution—Contracts, Written—Parol Agreements—Contradiction—Evidence.*—Where a county has obtained a judgment against the sureties on a sheriff's bond for his default in the settlement of his taxes, and its officials have taken a note from the defendants extending the time of payment by them for a year, in an action upon the note the defendants may not set up the defense, in the absence of fraud, accident, or mistake, that as a part of the agreement, resting in parol, contemporaneously made, they were given further time, until certain lands had been sold, for such would be in contradiction of the written instrument. *Cherokee County v. Meroney*, 653.

8. *Bills and Notes—Non-Negotiable Instruments—Notice of Dishonor.*—A note not payable to order or bearer is not a negotiable paper, and an indorser thereon is not entitled to notice of dishonor. *Newland v. Moore*, 728.

9. *Same—Peremptory Instructions—Trials.*—Where in an action against an indorser of a nonnegotiable paper the ownership thereof has not been put at issue, its execution is admitted and the only defense relied on was the failure to give notice of dishonor, an instruction to answer the issue for plaintiff, if the jury believed the evidence, is correct. *Ibid.*

BILLS OF PEACE. See Injunction, 4.

BLANKS. See Deeds and Conveyances, 13.

BOND ISSUES. See Municipal Corporations, 2.

BONDS. See Constitutional Law, 3, 4, 11; Municipalities, 1; Judgments, 15; Constitutional Law, 7, 8, 10; Counties, 2; Arrest and Bail, 3; Roads and Highways, 1.

BOUNDARIES. See Deeds and Conveyances, 3.

BREACH. See Deeds and Conveyances, 12; Insurance, 23.

BRIDGES. See Public Officers, 1, 3.

BRIEF. See Appeal and Error, 47.

BUILDINGS. See Liens, 1; Contracts, 15, 17.

BURDEN OF PROOF. See Bills and Notes, 3; Corporations, 3; Appeal and Error, 2; Tenants in Common, 2; Malicious Prosecution, 1, 2; Deeds and Conveyances, 8; Municipal Corporations, 5, 20; Carriers of Passengers, 4; Mortgages, 9; Judgments, 20; Railroads, 5; Contributory Negligence, 1; Homicide, 1; Negligence, 5; Issues, 2; Criminal Law, 5.

CALLS. See Deeds and Conveyances, 1, 2.

CANCELLATION. See Insurance, 24.

CARE OF ANOTHER CARRIER. See Carriers of Goods, 7.

CARRIERS. See Commerce, 1.

CARRIERS BY WATER. See Carriers of Goods, 9.

CARRIERS OF GOODS. See Intoxicating Liquors, 1.

1. *Carriers of Goods—Negligence—Measure of Damages—Arrival of Shipment—Misstatement of Agent—Cost of Output—Parties—Principal and Agent.*—The owner of a sawmill ordered repairs therefor which would reduce the cost of output and eliminate employment of an extra man, and sold the mill under contract that the repairs would be made, turned over the bill of lading to the vendee, who, upon notification by the railroad of their arrival, sent for them and was informed by the agent that the repairs were there and he would find them. The vendee told the agent what the repairs were and why they were needed, and continued to operate the mill at a loss for about a month, when he applied again, and was then told that the repairs were not there and he would have to sue the railroad. The repairs were then reordered, and in an action by the original owner and his vendee against the railroad, *Held*, that the loss occasioned by decreased output of the mill was recoverable by the vendee. *Rawls v. R. R.*, 6.
2. *Carriers of Goods—Connecting Lines—Commerce—Negligence—Unreasonable Delay—Perishable Goods.*—Where a water transportation company and a railroad company have traffic arrangements for shipment of goods beyond the terminal of the former company, which accordingly accepted car-load shipments of potatoes and had delivered the same at the latter's depot, with notification thereof, the latter company is responsible for damage to the potatoes caused by its unreasonable delay in furnishing cars and transporting the potatoes, and leaving goods of such perishable quality exposed to the sun and weather upon its wharves for several days. *Gallop v. R. R.*, 21.
3. *Same—Through Bills of Lading—Carmack Amendment.*—Where a connecting carrier has accepted an interstate shipment of goods for transportation on a through bill of lading from the initial carrier, and by its negligent delay to forward the same the shipment has become damaged, it cannot avoid liability to the consignor on the ground that the initial carrier had no authority from it to issue the through bill of lading. This principle is not affected by the Carmack amendment. *Ibid.*
4. *Carriers of Goods—Commerce—Connecting Lines—Unlawful Rates—Negligence.*—A forbidden rate of carriage made for carriage by connecting roads in interstate shipment of goods does not affect the question of the carrier's liability for damages caused to the shipment by its negligent act, but only the rate charged. *Ibid.*
5. *Carriers of Goods—Live Stock—Facilities—Unloading—Negligence.*—A carrier of goods, handling live stock for transportation, owes the consignee the duty to provide proper facilities for transportation and for unloading them at destination; and where, having been warned of the lack of such facilities, the carrier transports a carload of sheep and goats, and upon the refusal of the consignee to unload them for the reason stated, the agent attempts to do so by means of a plank, and the animals, attempting to leave the car upon its being opened, rush out, injuring some of them in jumping or falling to the ground, actionable negligence is established for which the carrier is liable. *Meeder v. R. R.*, 70.
6. *Carriers of Goods—Live Stock—Damages—Evidence.*—Where the carrier has failed to provide proper facilities for unloading a carload of

CARRIERS OF GOODS—*Continued.*

goats and sheep, resulting in injury to them in jumping 10 feet from the car to the ground, admission of testimony that, in consequence, lambs were born dead next morning, was proper; and that it was harmful for such animals carrying young to jump this distance, was not prejudicial to the defendant, it being common knowledge to persons of intelligence. *Ibid.*

7. *Carriers of Goods—Order, Notify—Connecting Carrier—Care of Another Carrier—Officious Transportation—Penalty Statutes—Appeal and Error.*—Where a carrier by water transports a shipment past its destination under an order, notify, bill of lading, "care of" A., etc., railroad operating at that point, and delivers it to another railroad, N., etc., the latter company should deliver the cotton to the consignor upon demand and exhibition of the bill of lading (*Myers v. R. R.*, 171 N. C., 193); and when it refuses to do so, but carries it to the original destination at additional charges for carriage, which the consignor has been obliged to pay, he may recover, of the carriers thus acting, the additional charges so paid; and a judgment as of nonsuit should not be granted. *Hall v. R. R.*, 108.

8. *Carriers of Goods—Warehousemen—Act of God—Concurring Negligence—Proximate Cause.*—While a wind and rainstorm of such unusual violence that it could not reasonably have been anticipated, and which solely caused damage to goods stored in the warehouse of a common carrier, is regarded as an act of God, for which the carrier may not be held responsible, the carrier may not escape liability when its own negligence, in regard to improper construction or ill-repair of its warehouse concurred as a proximate cause of the loss or damage sustained, or without which it would not have occurred. *Harris v. R. R.*, 110.

9. *Carriers of Goods—Connecting Lines—Carriers by Water—Negligence—Commerce—Federal Statutes—Loss of Vessel—Railroads.*—Where loss or damage is caused an interstate shipment of goods by a connecting carrier by water in its designated or usual route of shipment, and suit is brought in the State court having jurisdiction of the parties and subject-matter to recover therefor against the initial carrier by rail, the defendant may avail itself of the defense under the Federal Statute (34 St. at Large, 594) limiting liability in case of carriers by water, where the same properly applies; and where it is shown on behalf of the defendant that the carrier by water undertook the transportation of the goods upon a seaworthy vessel, properly manned and equipped, and that the vessel with the cargo was an entire loss, without privity or knowledge of the owner or owners, a recovery for such loss will be denied. *Price v. R. R.*, 394.

10. *Same Verdict—Inconsistency—Interpretation.—Held,* on the present record, and having due regard to the pleadings, testimony, and charge, there is no such conflict in the issues as to prevent the defendant from securing his judgment on the verdict. *Ibid.*

CARRIERS OF PASSENGERS.

1. *Carriers of Passengers—Through Trains—Local Station—Rules of Company.*—Railroad companies, in the regulation of their passenger traffic, may make reasonable rules as to their trains not stopping at local stations, where they have otherwise provided for local travel; and where a passenger has brought his action for damages in being carried on a through train by a local station at which, under such

CARRIERS OF PASSENGERS—*Continued.*

regulations, the train did not stop, it must appear that the local travel at such station had not been sufficiently provided for, in order for him to recover solely on that account. *Meeder v. R. R.*, 57.

2. *Same—Punitive Damages—Trials—Evidence.*—Evidence is insufficient upon which to base a recovery for punitive damages for the conduct of the conductor on a through train towards a passenger thereon while carrying him past a station where, under the reasonable regulations of the company, such stop was not made, when it tends only to show that the passenger was informed that the train would not stop there, repeatedly insisted that his ticket was to that place and the conductor should stop it there or put him off, whereupon the conductor, "in a rash and unbecoming manner," said he would have to get off at a certain station, and told the passenger that he would pay his 10-cent fare to the station beyond, a regular stopping place for the train, if the plaintiff "was that kind of a man." *Ibid.*

3. *Carriers of Passengers—Railroads—Negligence.*—A large bolt of the kind used for fastening rails together, loose in the aisle of a passenger coach, which caused a passenger therein to fall and injure himself while going for a drink of water, is sufficient evidence of the defendant's negligence in the passenger's action for damages against the carrier. *Lindsey v. R. R.*, 390.

4. *Same—Safety of Passenger—Duty of Carrier—Prima Racie Case—Burden of Proof—Trials—Nonsuit.*—Under its contract of carriage a railroad company owes its passengers a high degree of care for their safety, and where in the passenger's action for damages there is evidence tending to show that the plaintiff was injured by stepping upon a large bolt in the aisle of the coach, negligently left there by defendant's employees, a *prima facie* case is made out, imposing the burden of proof on the defendant to show that it was not in default of this duty. *Ibid.*

5. *Same—Instructions—Proximate Cause.*—In a passenger's action against a railroad company for damages for an injury received by him from stepping upon a large bolt in the aisle of the defendant's passenger coach, a charge is proper that, the coach being under the management and control of the defendant, it would afford evidence of negligence and proximate cause should they find the accident would not have occurred in the ordinary course of things or in the defendant's exercise of proper care. *Ibid.*

6. *Carriers of Passengers—Station Platforms—Safety of Passengers—Duty of Carrier.*—One who is on the passenger platform of a railroad company at its station with the purpose of becoming a passenger on its expected train is entitled to the protection due a passenger from dangerous conditions and usages there. *Thomas v. R. R.*, 494.

7. *Same—Mail Agents—Negligence—Notifying Government.*—Where the mail agent on the trains of a railroad company has continuously failed to use a crane provided for taking mail therefrom while rapidly passing its station, but has habitually thrown the bags on the passenger platform, to the danger of the passengers thereon, knowledge of such conditions will be imputed to the company, and the failure of the company to duly notify the proper Government officials of this fact is its own negligence, for which it is liable in damages for an injury

CARRIERS OF PASSENGERS—*Continued.*

to a passenger thereby proximately caused, and evidence that the required notice had been given is for the defendant to introduce. *Ibid.*

8. *Carriers of Passengers—Negligence—Schedules—Local Agent—Principal and Agent.*—The liability of the defendant railroad company in this case is held the result of the local agent misdirecting the plaintiff as to train schedules. *White v. R. R.*, 705.

CARS. See Commerce, 1.

CASE. See Appeal and Error, 33.

CERTIFICATES. See Corporations, 11; Contracts, 15, 17.

CERTIORARI. See Constitutional Law, 1; Appeal and Error, 36, 40.

CHARACTER. See Evidence, 13.

CHILDREN. See Wills, 10, 16; Divorce, 4.

CITIES AND TOWNS. See Statutes, 1; Appeal and Error, 1; Municipal Corporations, 3, 6, 7, 8, 9, 11, 14, 15, 18, 19, 20; Constitutional Law, 7.

Cities and Towns—Streets—Adverse Possession—Maps—Trials—Evidence. Testimony that a map of a town had hung for thirty years or more in the office of the register of deeds of the county and generally used, without evidence as to who had made it, by what authority, or that the town had recognized it as official, is incompetent to show, by omission, that the street had not been made and used by the town, in an action against the town wherein a citizen claims title by adverse possession. *White v. Edenton*, 32.

CITIZENSHIP. See Removal of Causes, 1.

CLAIMANTS. See Partition, 1; Insurance, 25.

CLAIMS. See Receivers, 1, 2; Corporations, 14.

CLERKS OF COURT. See Judgments, 19, 21; Partition, 1.

CLOUD ON TITLE. See Equity, 1, 6; Actions, 2.

CODICILS. See Deeds and Conveyances, 5; Wills, 7.

COLLATERAL ATTACK. See Judgments, 4, 14, 21; Corporations, 17; State's Lands, 3.

COLOR. See State's Lands, 4; Limitation of Actions, 6.

COMMERCE. See Carriers of Goods, 2, 4, 9; Telegraphs, 1; Intoxicating Liquors, 1.

Commerce—Federal Statutes—Carriers—Failure to Furnish Cars—Common Law—State Statutes—Courts—Jurisdiction.—The common-law and State statutory remedies of a shipper for damages upon the failure of a carrier to furnish cars to be used for interstate shipments are not interfered with by the Federal statutes regulating interstate commerce, and an action therefor may be maintained in the courts of the State. *Smart v. R. R.*, 652.

COMMINGLING OF GOODS. See Liens, 1.

COMMISSIONER. See Municipal Corporations, 17.

COMMISSIONS. See Principal and Agent, 3.

COMMON KNOWLEDGE. See Evidence, 10.

COMMON LAW. See Commerce, 1.

COMPENSATION. See Public Officers, 4; Condemnation, 1; Partnership, 6.

COMPLAINT. See Judgments, 16.

COMPROMISE. See Accord and Satisfaction, 1; Insurance, 1.

CONCLUSIVENESS. See Contracts, 15.

CONDEMNATION.

1. *Condemnation—Compensation—Constitutional Law—Statutes.*—A statute for the relocation and construction of a public highway which provides that "the jurors shall in considering the question of damages take into consideration the benefits to the landowner and shall render a verdict for such amount, if any, as the damages may exceed the benefits," awards just compensation to the owner upon striking the balance, and is constitutional. *Campbell v. Comrs.*, 500.
2. *Same—Legislative Discretion.*—The Legislature, in conferring the right of condemnation of lands for public use, may, in its discretion, and as compensation to the owner, require all the benefits or a specified part of them, or forbid any of them to be assessed as offsets against the damage. *Ibid.*
3. *Same—Offset—Special Advantages.*—The defendant in condemnation proceedings, where the statute permits, is entitled to offset against the value of the land taken and the owner's damage, if any, to the rest of the land, the benefits the plaintiff has derived by reason of the additional value, if any, of his tract of land caused by the special advantage thereto which is not general to the other landowners. *Ibid.*

CONDITIONS. See Insurance, 10; Judgments, 22, 24.

CONDONATION. See Divorce, 2.

CONFIRMATION. See Sales, 1, 3.

CONFLICT. See Appeal and Error, 14.

CONFLICTING LAWS. See Venue, 5.

CONGREGATIONS. See Limitation of Actions, 5.

CONNECTING LINES. See Carriers of Goods, 2, 4, 7.

CONSENT. See Criminal Law, 1; Appeal and Error, 12; Judgments, 13, 18; Insurance, 24; Trusts and Trustees, 3; Corporations, 20.

CONSIDERATION. See Principal and Surety, 1; Statute of Frauds, 2; Contracts, 18, 21; Deeds and Conveyances, 20.

CONSTITUTION, STATE.

ART.

I, secs. 11, 12. No special form in which to inform accused of charge against him, except it be by presentment or indictment. *S. v. Carpenter*, 767.

CONSTITUTION, STATE—*Continued.*

ART.

II, sec. 14. A material amendment to an act allowing a county to pledge its credit for highway bonds must meet the constitutional requirement; and the intention of the commissioners is immaterial. *Claywell v. Comrs.*, 657.

II, sec. 14. An amendment to an act allowing a county to pledge its credit does not destroy the validity of the act by not meeting the constitutional requirement, when it does not broaden the financial features, and the act itself has properly passed. *Brown v. Comrs.*, 598.

II, sec. 29. Amendment prohibiting special acts with relation to highways does not exclude special acts to aid therein, or the authorization to counties to issue bonds for the purpose. *Brown v. Comrs.*, 598.

IV, sec. 1. Judgment lien is not prior to chattel mortgage lien on personalty, prior registered. *Hardware Co. v. Lewis*, 290.

V, sec. 1. Counties, unauthorized by legislation, may not levy tax exceeding constitutional limit to provide sinking fund for highway bonds. it is otherwise as to four months term of schools. *Bennett v. Comrs.*, 625.

VII, sec. 7. Municipalities are under legislative control in contracting debts for necessary expenses. *Swindell v. Belhaven*, 1.

VII, sec. 7. Expenditures for erection of dividing fences for township are not "necessary expenses." *Archer v. Joyner*, 75.

VII, sec. 14. Act permitting municipalities to pledge its credit for necessary expenses must meet requirement as to "aye" and "no" vote; otherwise, charter provisions control. *Cottrell v. Lenoir*, 138.

XI, sec. 7. Building a house for county home is recommended by this section and is a necessary expense. *Comrs. v. Spitzer*, 147.

XIII, sec. 2. The words, "in such manner as the law may prescribe," include the time in which constitutional amendments are to be effective. *Reade v. Durham*, 668.

XIII, sec. 3. Statute submitting proposed constitutional amendments in accordance with election law of 1916, and Revisal, 5326, contemplates effectiveness of the act beyond that on which votes are taken. *Reade v. Durham*, 668.

CONSTITUTIONAL LAW. See Municipalities, 1; Health, 1; Mortgages, 7; Condemnation, 1; Drainage Districts, 3; Municipal Corporations, 1; Statutes, 2, 3; Husband and Wife, 3; Roads and Highways, 1; Indictment, 2.

1. *Constitutional Law — Courts — Appeal — Acquiescence — Certiorari.* — Where the statute establishing a recorder's court does not provide for an appeal, the remedy to obtain trial in the Superior Court is by *certiorari;* but where the case has been duly docketed therein and regularly set on the trial calendar for several succeeding terms with appellee's consent, he will lose his right to dismiss it by his delay and acquiescence. *Drug Co. v. R. R.*, 87.

2. *Constitutional Law—Statutes—Conditions—Vote of People—Municipalities—Elections.*—A statute which authorizes a municipality to pledge its faith and credit or issue bonds for street improvements, requiring the approval of the voters, is constitutional, and becomes effec-

CONSTITUTIONAL LAW—*Continued.*

tive and existent only when the voters have regularly and affirmatively passed thereon. *Cottrell v. Lenoir*, 138.

3. *Constitutional Law—Municipal Corporations—Faith and Credit—Bonds—Several Readings—Necessaries—Legislation.*—A legislative enactment authorizing a municipality to pledge its faith and credit, or issue bonds for improvements therein, is required by our Constitution, Art. II, sec. 14, to have been read three several times in each branch of the Legislature, on three different days, whether for necessaries or otherwise, and a statute passed for such purposes without meeting these requirements is invalid. *Ibid.*

4. *Constitutional Law—Statutes—Municipal Corporations—Faith and Credit—Bonds—Assessments—Collateral Bonds.*—Where a municipality is authorized by statute to issue bonds for street improvements and to hypothecate therewith assessment bonds from the adjoining property owners, made a lien on their lands, and assessed in certain proportions, the bonds of the municipality are regarded as its separate and independent bonds, although they may ultimately be paid out of the proceeds of the collateral or assessment bonds. *Ibid.*

5. *Constitutional Law—Statutes—Invalid Amendments—Municipalities—Faith and Credit.*—Where a valid charter of a municipality authorizing the issuance of its bonds has been subsequently amended with regard thereto, but upon condition that the proposition be submitted to the voters, which was never done, and the Legislature attempts to pass a still later law amending the former act, but which has not been done in accordance with the requirements of Article II, sec. 14, of our Constitution, the later acts are of no effect, leaving the charter of the town as to these provisions open, under the terms of which the bonds may yet be issued. *Ibid.*

6. *Constitutional Law—Judicial Sales—Mortgages—Equities—Courts.*—Article IV, section 1, of our Constitution does not affect the rights of a prior lienor by a registered chattel mortgage in favor of a judgment creditor who has sold the personal property by execution under a judgment subsequent to the mortgage lien, or give the creditor a right to levy his execution instead of pursuing the equitable remedy. *Hardware Co. v. Lewis*, 290.

6½. *Constitutional Law—Municipal Corporations—Cities and Towns—Discrimination—Health—Ordinances.*—An ordinance of a municipality passed under legislative authority, prohibiting the existence of hospitals, for pay, within a certain distance of dwellings therein, etc., is not objectionable as discriminative in favor of strictly charitable institutions of this character, or class legislation prohibited by fourteenth amendment to the Federal Constitution. *Lawrence v. Nissen*, 359.

7. *Constitutional Law—"Aye" and "No" Vote—Roll-call Bills—Committee Amendments—Bonds—Statutes.*—A bill to authorize a county to issue bonds for highway improvements, read and referred to a committee which reported a substitute for the original measure, with a slightly different caption and retaining the number of the original bill, and put upon its second and third readings, on separate days, with "aye" and "no" vote taken on each of them, duly entered, meets the requirements of Article II, section 14, of the Constitution. *Brown v. Comrs.*, 598.

CONSTITUTIONAL LAW—*Continued.*

8. *Constitutional Law—Immaterial Amendments—Roll Call—"Aye" and "No" Vote—Bonds.*—Where a bill authorizing a county to issue bonds for highway improvements has passed both branches of the Legislature by a reading in each branch thereof on three separate days, with the "aye" and "no" vote duly taken and entered, except as to an amendment in the second branch, substituting the name of a commissioner, such amendment does not broaden the scope of the act or affect its financial feature, and the failure in the first branch to comply with Article II, section 14, of the Constitution as to roll calls and separate readings will not alone affect its validity. *Ibid.*

9. *Constitutional Law—Amendments—Roads and Highways—Special Acts—Acts in Aid—Statutes.*—The amendment of 1916 to our Constitution, Art. II, sec. 29, prohibiting the passage by the General Assembly of local, private, or special acts "authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys," does not include within its meaning an act authorizing a county to issue bonds for the highways of a township, and requiring the levying of the tax to pay the principal thereof and interest thereon; such being in aid to the laying out, construction, etc., of the local highways and necessarily afforded by direct legislation, when the levy is in excess of the constitutional limitation. *Ibid.*

10. *Constitutional Law—Invalid Bonds—Rights of Purchasers—Delivery.*—Where bonds, invalid for want of constitutional authority, have been issued, the proposed purchasers may not set up a valid right to have them delivered, under their agreement, as *bona fide* purchasers for value, where nothing has been paid by them thereon. *Bennett v. Comrs.*, 625.

11. *Legislature—Constitutional Law—Statutes—Amendments—Bonds.*—A material amendment made by one branch of the Legislature to a bill passed by the other, allowing a county to pledge its credit in issuing bonds for the improvement of the highways therein, must be concurred in according to the requirements of Article II, sec. 14, of our Constitution, providing that it be read upon three separate days, with the roll call upon the second and third readings, for the act to be valid. *Claywell v. Comrs.*, 657.

12. *Same—Dependent Parts—Unconstitutional in Whole—Roads and Highways.*—Where a bill is introduced in one branch of the Legislature to coordinate the road system, which provides for the issuance of bonds, the creation of main highways from the county seat, taking care of the existing debts of certain of the townships, and providing for a sinking fund, and amendments have been made by the other branch, withdrawing certain of the more wealthy and populous townships from its operation, or liability for the indebtedness to be created, except under condition requiring the approval of the voters, etc.: *Held*, the amendment is a material one, requiring for the validity of the act that it be passed in accordance with the requirements of our Constitution, Article II, sec. 14; and the principle upon which a valid portion of an act may be severed and independently upheld has no application to the facts of this case. *Ibid.*

13. *Constitutional Law—Statutes—Unconstitutional in Part—Validity of Other Portion.*—The principle upholding a constitutional portion of an act and declaring it unconstitutional in part prevails only when they

CONSTITUTIONAL LAW—*Continued.*

are severable and distinct, and it clearly appears that the constitutional provisions would have been enacted by the Legislature without the presence of the other. *Ibid.*

14. *Constitutional Law — Legislature — Statutes — Authority Conferred—Test.*—The unconstitutionality of the passage of an act allowing an issue of bonds for the creation and maintenance of the highways of a county is not affected by the purpose of the commissioners to act in such manner as to avoid the constitutional inhibition, the test being whether the authority conferred by the act was passed in accordance with the constitutional provision respecting the issuance of the bonds. Constitution, Art. II, sec. 14. *Ibid.*

15. *Constitutional Law — Amendments — Statutes—Elections—Approval—Prospective Effect.*—While to amend the Constitution of the State it is necessary for the voters to approve the proposed amendments to be submitted to them, it is likewise necessary to the validity of the election that the Legislature enact the proposition to amend into a statute by a three-fifths vote of each branch; and the constitutional provision that they be submitted "in such manner as may be prescribed by law" includes within its intent and meaning the time at which the amendments will be effective, if approved, the Constitution being silent on this point. Constitution, Art. XIII, sec. 2. *Reade v. Durham*, 668.

16. *Same—Governor—Result Declared.*—Under the general election laws of 1916 the Board of State Canvassers are not authorized to declare the result of an election for Governor, leaving this to be done, under the provisions of Constitution, Art. III, sec. 3, by the Speaker of the House in the presence of a majority of both branches of the Legislature, then to be certified to the Secretary of State and incorporated into the organic law, with further provision of Revisal, sec. 5326, as to the time the Legislature shall act, etc.; and where a valid act submitting proposed constitutional amendments to the voters fixes a later date than the election for their effectiveness, and provides that the vote thereon be taken in accordance with the general election law of 1916, for Governor, which method has been complied with, the Constitution and statutes contemplate that the amendments shall take effect beyond the time fixed for the election; and the fact that the ballots were silent on this point will not change the time from that declared by the act. *Ibid.*

17. *Constitutional Law—Amendments—Prospective Effect—Election—Ballots—Interpretation—Presumption.*—Where proposed amendments to the Constitution, under a valid statute, have been submitted to the voters, the amendments to take effect on a day after the time of the election, the fact that this provision by the Legislature did not appear upon the ballots cast will not defeat the legislative requirements, when it appears that it was necessary for the voters to refer to the statute in order to understand their ballots, and ample provision had been therein made and carried out to disseminate among the people, by printed matter, full information as to nature of the act and the time the amendments would go into effect. *Ibid.*

18. *Constitutional Law—Statutes—Legislative Interpretation—Courts.*—The courts will regard with deference an interpretation of the Constitution by the legislative branch of the State Government and in doubtful cases will follow it, unless plainly the wrong one. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

19. *Constitutional Law—Statutes—Police Powers—Municipal Corporations —Watersheds.*—Chapter 56, Laws 1913, requiring the owners of land to remove treetops, boughs and laps, etc., within 400 feet of the boundary line of a municipal watershed, left from cutting timber thereon, "so as to prevent the spread of fire from such cut-over area and the consequent damage to such watershed," making its violation a misdemeanor, falls within the police powers of the State, within its legislative discretion, and not within the inhibition of the XIVth amendment to the Federal Constitution as to due process of law and a denial of the equal protection of the law. *S. v. Perley*, 783.

20. *Constitutional Law—Statutes—Interpretations.*—A statute will not be declared unconstitutional by the courts unless it clearly appears to be in conflict with the organic law, and such conclusion is unavoidable after removing every reasonable doubt as to its incompatibility with the Constitution. *Ibid.*

21. *Constitutional Law—Statutes—Pledge—Representation of Ownership.*—Revisal, sec. 3434, making it a misdemeanor for a party representing in writing his ownership of certain property and therein agreeing to apply the same to a debt then created, and failing to apply the property so pledged accordingly, is constitutional and valid. *S. v. Mooney*, 798.

22. *Same—Indictment—Language of Statute—Motion to Quash.*—In an indictment under a statute creating the offense, the essential words creating the offense must be given, and when the terms used have acquired a technical significance, for which there is no just equivalent, such words must be given with exactness; and where an indictment is drawn under Revisal, sec. 3434, it should charge the written representation of existent ownership or wages earned, etc., and that the writing contained an agreement to apply them, etc., for in thus failing to follow the written terms employed in the statute the indictment is fatally defective, and should be quashed. *Ibid.*

CONSTITUTIONAL LIMITATIONS. See Counties, 1.

CONTENTIONS. See Instructions, 6; Appeal and Error, 45, 49.

CONTINGENT INTERESTS. See Corporations, 5; Statute of Limitations, 1.

CONTINGENT LIMITATIONS. See Wills, 2; Estates, 2.

CONTINGENT REMAINDERS. See Wills, 12.

CONTINUANCE OF CASE. See Judgments, 15.

CONTRACTS. See Municipal Corporations, 1, 12, 14; Mortgages, 3; Deeds and Conveyances, 2, 12, 17, 18; Equity, 4; Vendor and Purchaser, 1, 2; Receivers, 2; Judgments, 4, 16, 18; Railroads, 3; Master and Servant, 15, 16; Parties, 1; Evidence, 6; Corporations, 10; Insurance, 17; Pleadings, 5; Indebitatus Assumpsit, 1; Bills and Notes, 7; Landlord and Tenant, 1.

1. *Contracts, Executory—Implied Promise—Mutual Rights.*—Parties to an executory contract for the performance of some act to be done in the future impliedly promise not to do anything to the harm or the prejudice of the other inconsistent with their contractual relations; and the promisee has an inchoate right to the enforcement of his bargain,

CONTRACTS—*Continued.*

which becomes complete when the time for such performance arrives and the promisor prevents it. *Edwards v. Proctor*, 41.

2. *Same—Renunciation—Rights of Action.*—Where the promisor of an executory contract announces to the promisee that he will not perform the conditions or pay the agreed consideration for the promisee's performance of his part thereunder assumed, and the renunciation is positive, distinct, and unequivocal, the promisee may regard the contract as breached and immediately bring suit for damages therefrom arising. *Ibid.*

3. *Same—Trials—Evidence—Nonsuit.*—In an action for damages arising from defendants' alleged renunciation of their contract, whereunder the plaintiff was to cut their timber at a stipulated price, evidence is insufficient of an unequivocal renunciation which tends only to show that the defendants instructed the plaintiff to stop cutting the timber, which plaintiff refused to do, and was then told to shut down cutting for a few days, until they returned and let him know; that the plaintiff did so, and not hearing again from the defendants, began sawing for other parties. In this case it appears that plaintiff was operating at a loss and was indebted to the defendants at the time of the alleged breach. *Ibid.*

4. *Contracts, Executory—Cutting Timber—Renunciation—Options—Evidence.*—An option given on defendants' lands whereon the plaintiff was cutting their timber under a contract with them is not of itself a renunciation by the defendants of their contract that will justify the plaintiff in stopping the performance of his obligation thereunder and sue for damages he claims to have sustained by reason of the alleged breach thereof by the defendants, unless it appears that the optionee has availed himself of the privilege of purchase, has acquired the title, or in some way the plaintiff has been thereby prevented from performance of his part of the contract. *Ibid.*

5. *Contracts—Written—Interpretation—Intent.*—The courts will consider a written contract as a whole, where the writing admits of interpretation, in order to arrive at the intent of the parties, and will give every part thereof its legitimate effect. *Lewis v. May*, 100.

6. *Same—Drainage Districts—Petitioner—"Dismissed."*—Where in view of establishing a drainage district under the statute, the petitioners enter into a written contract with a surveyor, for his services required thereunder, that he should be paid "out of the first proceeds from the sale of drainage bonds," but that should the action to establish the district be "dismissed," a certain less sum should be paid out of the funds of the petitioners, and the proceedings are regularly prosecuted, but dismissed by the clerk, from which no appeal was taken: *Held*, the use of the word "dismissed," without qualification, includes the dismissal thereof by the clerk within its intent; and the amount stipulated in that event only is recoverable against the petitioners and the sureties on their bond. *Ibid.*

7. *Contracts—Parol Evidence—Deeds and Conveyances—Principal and Agent—Escrow—Statute of Frauds.*—Where the vendor of lands has executed a deed reciting the consideration and expressed in conformity with a parol contract of sale theretofore made, and has given the deed to his agent to be delivered upon payment of the agreed purchase

CONTRACTS—*Continued.*

price, it is a sufficient writing within the meaning of the statute of frauds. *Vinson v. Pugh*, 189.

8. *Contracts—Wagering—Bills and Notes—Courts.*—A note given for margins upon an illegal contract for cotton futures, without intention of delivery of the cotton, cannot be collected by suit in our courts, and the promisor's repeated promise to pay it cannot impart any validity to it. *Orvis v. Holt*, 231.

9. *Contracts—Criminal Law—Statutes—Business—Assumed Name.*—The law of 1913, chapter 77, making it punishable as a misdemeanor for a person to conduct his business under an assumed name, without filing a certificate with the clerk of the court of the county, etc., giving the name of the business and the full name or names, with post office address of the persons owning or conducting the same, etc., was enacted as a police regulation to protect the general public from fraud and imposition, and a person violating the same may not enforce a contract in our courts made in the course of such business, though the statute does not expressly invalidate such transactions. *Courtney v. Parker*, 479.

10. *Same—In Pari Delicto.*—One who is conducting a business under an assumed name in violation of our statute is not *in pari delicto* with another who has contracted with him in the course of such business, so as to permit a recovery on the contract therein by the one violating the law. *Ibid.*

11. *Contracts — Criminal Law — Statutes — Business — Assumed Name—Quantum Meruit—Damages.*—Our statute prohibiting the conduct of a business under an assumed name without complying with certain conditions makes the transactions criminal, and the one violating the law may not recover, as upon a *quantum meruit*, for breach by another of a contract made with him in the course of the unlawful conduct of the business. *Ibid.*

12. *Contract—Timber—Assumpsit.*—Where the plaintiff and defendant had entered into a contract for the latter to cut timber upon the lands of the former, and thereupon the defendant had entered upon and cut timber from the lands, he is liable upon a *quasi* or implied *assumpsit* to pay the reasonable worth of the timber which he had cut and retained. *Ollis v. Furniture Co.*, 542.

13. *Contracts, Interpretation—Intent.*—In construing a written contract, technical rules give place to the intention of the parties gathered from the language used, arrived at by transposing sentences when necessary and disregarding words without distinct meaning; and where two conflicting constructions may be reached, the one upholding the validity of the contract will be adopted; and in case of ambiguity, the words employed are taken most strongly against the party using them, and the facts existing at the time may be used as a "key" to the meaning of the contract. *Edwards v. Ins. Co.*, 614.

14. *Same—Insurance—Assignments.*—An assignment of an annuity policy for the security of a debt, payable to the wife, should she survive her husband, or to the latter, the insured, should he survive his wife, reading, "I, W. J. E. and K. E. E., do hereby assign," etc. . . . "The object and extent of this assignment is to secure the said assignee against any and all indebtedness that I may be owing to him or his estate at my death": *Held*, the use of the expressions, "I may owe,"

CONTRACTS—*Continued.*

"at my death," would indicate that the debt was that of both the assignors; but the fact that the husband was a railroad promoter and was and continued to be indebted to the assignee, and the wife never was, when considered, will affect the interpretation of the instrument, so that the intent thereof will be ascertained as securing the obligation of the husband only. *Ibid.*

15. *Contracts—Buildings—Architects—Final Certificate—Conclusiveness.*—Where a final certificate of the architect has been given, which by express terms of the contract is made conclusive that the building has been completed in accordance therewith, it is not afterwards open to the architect or the builder to withdraw it or to question or impeach it as to observable defects, or those which were or could have been discovered by the architect in the proper performance of his duties, except in cases of fraud or mistake so palpable as to indicate bad faith or gross neglect. *Chemical Co. v. O'Brien*, 618.

16. *Same—Agreements—Fraud—Evidence.*—Where it appears that the owner of the building and his contractor have agreed that the former would pay the latter the balance due upon his contract upon the latter making certain alterations, an objection is untenable that the certificate was given the contractor by the architect without examination, before the building was completed, and that it was fraudulent in law. *Ibid.*

17. *Contracts—Buildings—Architects—Certificates — Guarantee—Interpretation.*—Where a builder's contract provides that the architect's final certificate shall be conclusive that the contractor had complied with the terms thereof, with a guarantee clause that he make good all defects, etc., in violation of his contract, arising or discovered in his work at any time within two years, and no certificate shall be construed to relieve the contractor from his obligation to make good such defects: *Held*, construing the contract as a whole, the guarantee clause refers to defects appearing after the completion of the building, which were not observable at the time the final certificate was given. *Ibid.*

18. *Contracts—Consideration—Nudum Pactum—Sheriffs — Principal and Surety—Judgments.*—*Semble*, an agreement between the county officials and the sureties on the bond of a defaulting sheriff in settling his taxes, against whom judgment has been rendered, that execution thereunder should not issue within a year, is without consideration moving to the county, and being *nudum pactum*, is unenforcible. *Cherokee County v. Meroney*, 653.

19. *Contracts—Interpretation—Annulment.*—Where the parties to a written contract, upon consideration, thereafter enter into a written agreement respecting the same subject-matter, without allegation of omission, fraud, or mistake, their rights will depend upon the construction of the instruments as written. *Smith v. Pritchard*, 719.

20. *Same—Trials—Evidence.*—Where the controversy is over the right of the parties to a lien by judgment against another, and it appears by written contract or agreement that the plaintiff had, for a consideration, sold and transferred his rights thereto to the defendant, and subsequently the defendant by another written agreement, upon consideration, surrendered and annulled the first agreement, it is *Held*, that upon the contracts in evidence the plaintiff is entitled to a verdict. *Ibid.*

CONTRACTS—*Continued.*

21. *Contracts—Extension of Time—Consideration—Estoppel.*—An extension of time granted a debtor is a sufficient consideration between the parties to support a new contract with reference to the same subject-matter; and upon the acceptance of the terms of the debtor, he may not thereafter question its validity for lack of consideration. *Ibid.*

CONTRACTS TO CONVEY. See Husband and Wife, 1.

CONTRIBUTION. See Equity, 8.

CONTRIBUTORY NEGLIGENCE. See Instructions, 2; Master and Servant, 5; Municipal Corporations, 5.

Contributory Negligence—Evidence—Burden of Proof—Trials—Nonsuit.—Revisal, sec. 483, places the burden of proof on defendant to show contributory negligence by the preponderance of the evidence, and defendant's motion to nonsuit on this issue should not be granted unless it appears from the plaintiff's evidence that the plaintiff contributed to his own injury as the proximate cause thereof. *Smith v. Electric R. R.*, 489.

CONTROVERSY. See Removal of Causes, 1.

CONVERSION. See Statute of Limitations, 1.

CONVICTION. See Indictment, 1.

COPIES. See Criminal Law, 7.

CORPORATION COMMISSION. See Judgments, 18; Railroads, 3.

CORPORATIONS. See Deeds and Conveyances, 9; Evidence, 3; Receivers, 1, 2, 3, 4; Statute of Limitations, 1; Insurance, 18; Banks and Banking, 4, 5.

1. *Corporations—Torts—Principal and Agent—Respondeat Superior.*—Corporations are held liable for negligent or malicious torts committed by their agents in the course or scope of their employment, or therein directed to be done; and when such conduct constitutes an actionable wrong, the corporation principal, as in other cases of principal and agent, is liable, not only for the act itself, but for the ways and means in the performance thereof by the agent. *Ange v. Woodmen*, 33.

2. *Same—Insurance—Fraternal Orders—Initiation—Rituals—Damages.*—Where an incorporated fraternal order does an insurance business as a principal or controlling feature, with branch or subordinate lodges through which members are admitted under an initiation or ceremony as prescribed by a ritual from the sovereign lodge, the latter is regarded as a principal, nothing else appearing, operating through the subordinate lodges, as its agents; and where, as a part of this initiation ceremony, an applicant for membership is led blindfolded in a room, and told that as a test of his strength, he must pull upon a lever of a certain machine upon which he is placed, which results in his serious damage from a shock of electricity, throwing him upon the floor, etc.: *Held*, the tort of the subordinate lodge will be imputed to the sovereign one, and the latter will be held answerable for the damage proximately caused. *Ibid.*

CORPORATIONS—*Continued.*

3. *Same—Trials—Evidence—Burden of Proof.*—Where it is made to appear that a sovereign lodge is liable for the negligence or malicious torts of a subordinate lodge, causing serious damage to an applicant for membership while undergoing a prescribed ritual, evidence which takes the case from without the rule, or tends to show that they were not prescribed by the ritual, or consent given, or of which the defendant has peculiar knowledge, and relevant to the defense, should be shown by it. *Ibid.*

4. *Corporations—Evidence of Incorporation.*—Testimony of a witness to the fact of incorporation of a party to the action is *prima facie* evidence of such fact, and sufficient. *Steel Co. v. Ford*, 195.

5. *Corporation — Shares — Transfer — Trusts — Rights of Shareholders—Notice—Executors and Administrators—Contingent Interests.*—Officials of a corporation upon whose books its shares are transferable act as trustees for the shareholders, and as such owe them the duty of exercising care and diligence therein; and where such transfer has been made at the instance of an executor to a devisee owning a contingent interest, with limitation over, the officials of the company making the transfer and issuing the shares thereon, and their successors, are fixed with knowledge both of the terms of the will and the fact that it was not done in the proper course of administration, which knowledge is imputed to the corporation; and the corporation is liable to the ulterior owner, upon the happening of the contingency, for the value of the shares thus wrongfully transferred. *Baker v. R. R.*, 365.

6. *Corporations — Stockholders — Resolutions—Individual Liability.*—The minutes of a specially called meeting of the stockholders, showing only that a motion had been duly made for the stockholders to assume the debts of the corporation beyond its assets, is not sufficient evidence that it had been voted upon or carried. *Asbury v. Mauney*, 454.

7. *Same—Special Meetings—Notice.*—Notice of a specially called meeting of the stockholders of a mercantile corporation, stating as its object the fixing of the value of its merchandise in view of closing out an unprofitable enterprise, limits the scope of the meeting to this special purpose, and will not bind an absent stockholder, who had received the notice, to a resolution attempting to fix individual liability among them; and such action will be void unless all the members of the corporation are present or give their consent, or they thereafter ratify it. *Ibid.*

8. *Corporations—Shareholders—Resolutions — Individual Liability.* — Action by the stockholders to assume personal liability for the debts of a corporation is not a corporate act, but a personal one to each of them, dependent upon the agreement by them all; and where a general resolution of this character is passed by a majority of them, it is not binding upon those present when those absent refuse to consent thereto. *Ibid.*

9. *Corporations—Shareholders—Meetings — Resolutions — Individual Liability—Principal and Agent—Statute of Frauds.*—Where the shareholders of a corporation have passed a resolution attempting to fix individual liability among themselves for the corporation's debts, and one of them has signed the minutes in the capacity of secretary, his signing is not, in effect, a corporate act, and he will not be regarded

CORPORATIONS—*Continued.*

as the duly authorized agent for the shareholders within the meaning of the statute of frauds. *Ibid.*

10. *Same—Contracts—Parties.*—Where the secretary of a meeting of the shareholders of a corporation signs the minutes of the meeting containing a resolution attempting to fix individual liability among them, and afterwards sues on a corporate debt which he has paid and upon which he was secondarily liable, claiming in subrogation, he will not be considered as the duly authorized agent of the other shareholders within the meaning of the statute of frauds, upon the principle that one of the parties to the writing required may not be the agent of the other who is sought to be bound therewith. *Ibid.*

11. *Corporations—Subscription Lists—Application for Certificate—Evidence—Method of Payment.*—Where some of the subscribers to the capital stock of a proposed corporation, upon agreement with the others to act for them, sign the application for the certificate apportioning the capital stock equally among the incorporators, the application for the certificate is the only subscription to the capital stock, and the subscription list theretofore taken is only evidence of the method of payments to be made, and is not objectionable on the ground that it varied the application upon which the charter was later obtained. *Drug Co. v. Drug Co.*, 502.

12. *Same — Receivers — Unpaid Balance — Incorporation Credits.*—Where some of the subscribers to the capital stock of a proposed corporation sign an application for the certificate apportioning the capital stock among themselves, under agreement with the other subscribers that they, in so doing, should act for them all, and the corporation, accordingly formed, accepts the subscription list as an asset and collects from the other subscribers thereon, in an action by the receiver to recover of the incorporators the unpaid balance of their subscription, it is *Held*, that the receiver in seeking to enforce the equity arising from the doctrine that such balance is in the nature of a trust fund for the creditors' benefit is required to do equity, and therein the incorporators are entitled as a credit not only to what they may have paid on their own subscriptions, but also such sums as the other subscribers may have paid. *Ibid.*

13. *Corporations — Subscriptions — Secret Agreement—Receivers—Unpaid Balance.*—Subject to lienors, in accordance with their priorities, the unpaid subscriptions to the capital stock of a corporation are to be collected and held in the nature of a trust fund for the creditors and other stockholders; and where suit is brought for them by the receiver of an insolvent corporation, an incorporator may not vary the written terms of his subscription by showing a secret agreement whereby he was only required to take a less amount of the shares. *Ibid.*

14. *Corporations—Insolvency—Unpaid Balance—Subscribers—Claims—Offsets.*—A shareholder of a corporation, since having become insolvent, and in the hands of a receiver, cannot offset, as against his unpaid balance due upon his shares, a debt alleged to be due him by the corporation. *Ibid.*

15. *Corporations—Insolvency—Subscriptions—Unpaid Balance—Other Subscriptions.*—Where a subscriber to the capital stock of a corporation is sued by the receiver of the corporation, having become insolvent, for an unpaid balance on his subscription, such sums as he may have

CORPORATIONS—*Continued.*

paid on the subscription of others will not be allowed him as a credit on his own subscription. *Ibid.*

16. *Foreign Corporations—Corporate Powers—Business in Home State—Actions—Defenses.*—A corporation incorporated in another State with authority to conduct business here, which has complied with our statutes, is not deprived of its right to maintain an action in our courts solely because its charter did not authorize it to do business in the State of its incorporation. *Mining Co. v. Lumber Co.*, 593.

17. *Foreign Corporations—Corporate Powers—Quo Warranto—Collateral Attack.*—The right of a foreign corporation to do business in this State under its charter may only be attacked by *quo warranto* with leave of the Attorney-General. *Ibid.*

18. *Corporations—Receivers—Dividends—Statutes.—Semble,* Laws 1915, ch. 137, amending Laws 1913, ch. 145, by the inconsistency of the provisions repeals the former law as to grounds for dissolution of a corporation not paying dividends for six years, upon motion of one owning one-fifth or more of its capital stock, so as to make the dissolution of the corporation depend upon the petition of 10 per cent of the stockholders, when the dividend has not been declared on its common stock for ten years. *Winstead v. Hearne*, 606.

19. *Same—Remedial Statutes—Majority Stock—Abuse of Power.*—Chapter 137, Laws 1913, as to a receivership of a corporation, upon petition of a one-fifth interest in its shares, which has not paid a dividend in six years, is a remedial statute, and intended to remedy an abuse of power by the majority shareholders by a suspension of dividends, a method at times resorted to to freeze out minority holders or depress the market value of the shares. *Ibid.*

20. *Same—Consent—Estoppel.*—Where a stockholder in a corporation has actively participated in its management and consented to the increase in its capital stock from the earnings of a profitable concern, which has proven decidedly advantageous, he is thereafter estopped to assert the right given a holder of a certain amount of the stock to throw the corporation into a receiver's hands for nonpayment of dividends within a certain period. *Ibid.*

21. *Corporations—Venue—Statutes—Deeds and Conveyances—Fraud.*—Revisal, sec. 422, is for the purpose of determining the residence of domestic corporations, and does not affect the question of the venue of an action in the nature of a creditors' bill to set aside a husband's deed to his land to his wife alleged to be fraud of the creditors' rights. *Wofford v. Hampton*, 686.

CORRECTION. See Judgments, 5; Appeal and Error, 16.

CORROBORATIVE. See Criminal Law, 2.

COSTS. See Accord and Satisfaction, 2; Recorder's Court, 1.

COTTON FUTURES. See Instructions, 3.

COUNTIES. See Mortgages, 4; Actions, 1; Municipalities, 1; Sheriffs, 1; Judgments, 21.

1. *Counties — Highways—Taxation—Constitutional Limitation—Statutes.* Without special legislation, a county may not authorize a levy of tax, exceeding the constitutional limitation upon the poll or property, to

COUNTIES—*Continued.*

provide for a sinking fund to pay the principal and interest on bonds to be issued by it for highway purposes. Constitution, Art. V, sec. 1. It is otherwise as to a four months period of public schools required by Article IX, sec. 3, of the Constitution. *Bennett v. Comrs.*, 625.

2. *Same—Bonds—Special Acts.*—When the county commissioners have power to contract a debt or to provide for a valid debt already contracted, they may, in the exercise of good business prudence, issue county bonds in evidence of the obligation; but this may be done only in subservance of the constitutional limitation upon the right to tax the polls and property of its inhabitants, when no special legislative authority has been given. Constitution, Art. V, sec. 1. *Ibid.*
3. *Same—Scheme of Taxation—Constitutional in Part—Sinking Fund.*—Provisions of a county pledging its faith and credit to the issuance of bonds for highway purposes in a large amount, creating a sinking fund for the payment of the principal and interest, to each successive holder, with covenant that an annual tax shall be continuously levied for those purposes, and it appears that this stipulation is in excess of the constitutional limitation, Art. V, sec. 1, these conditions are mutually dependent upon each other and form an entire scheme for the purpose of the issuance; and the whole act will be declared invalid, as not coming within the principle upon which a valid portion of an act may be upheld and its unconstitutional features declared void. *Ibid.*
4. *Same—General Acts.*—Subsection 27, section 1318 of the Revisal, conferring on county commissioners the power to borrow money for the necessary expenses of the county and provide for its payment, with interest, in periodical installments, comes within the terms of the section in the general enumeration of the powers conferred for ordinary governmental purposes, and is not such special enactment as to enable a county, coming within its terms, to levy a tax for highway purposes exceeding the limitation imposed by the Constitution, Art. V, sec. 1, or to issue bonds and provide a sinking fund for the payment of the principal and interest thereof. *Ibid.*
5. *Same—Annual Taxation—Legislative Control.*—Chapter 581, Laws 1899, applying to certain counties, providing for the construction, improvement, and repairing the public roads by current taxation, annually levied, contains no authority to levy a tax for paying interest or providing for a sinking fund for the same, and is repealable or amendable by each Legislature, and can of itself afford no authority to a county, coming within its provisions to issue bonds for road purposes in a large amount, necessitating a tax in excess of the constitutional limitation, which the Legislature could not control by repeal or otherwise. *Ibid.*

COURSE AND DISTANCE. See Deeds and Conveyances, 21.

COURTS. See Instructions, 1; Deeds and Conveyances, 3; Pleadings, 1, 4; Plea in Bar, 1; Constitutional Law, 1; Jurors, 1, 4; Master and Servant, 11; Contracts, 8; Divorce, 3; Constitutional Law, 6, 18; Receivers, 1; Judgments, 16, 19, 23; Statutes, 9; Appeal and Error, 20, 42, 43; Municipal Corporations, 9; Wills, 14; Railroads, 3; Sales, 4; Commerce, 1; Insurance, 25; Issues, 3; Venire, 1; Criminal Law, 6.

1. *Courts—Jurisdiction—Appeal—Contingent Interests—Sale—Statutes.*—Lands subject to contingent limitations may be sold by order of the

COURTS—*Continued.*

judge of the Superior Court in term, on appeal in proceedings in partition improperly brought before the clerk, by retaining jurisdiction for the purpose of settling the controversy. Revisal, secs. 1590, 614. *Ryder v. Oates*, 569.

2. *Courts—Recall of Witness—Discretion—Appeal and Error.*—The permission by the court for a party to recall a witness who has already testified is within the sound discretion of the trial court, and is not reviewable on appeal unless it has been grossly abused. *House v. Boyd*, 701.
3. *Courts — Proceedings — Presumptions — Regularity—Habeas Corpus.*—Proceedings before a court of competent jurisdiction will be presumed to be regular and valid, unless upon their face they plainly appear to be void; and when they do not so appear, they are not subject to review in *habeas corpus* proceedings. *S. v. Burnette*, 734.
4. *Same — Jurisdiction — Suspended Judgment — Intoxicating Liquors — Judge—Sentence.*—The rule that the proceedings of a court of competent jurisdiction are not reviewable in *habeas corpus* proceedings does not apply when it appears that the justice before whom the case had been determined had convicted the applicant of violating the prohibition law, suspended judgment upon condition of good behavior, and ordered the execution of the sentence and the arrest of the defendant in proceedings privately had in his office, and not in open court, as the law requires. *Ibid.*
5. *Courts — Jurisdiction — Statutes—Discretionary—Transfer of Causes—Removal of Causes.*—Where a statute creating a county court gives it "final original" jurisdiction over certain criminal offenses, and also authority to transfer the trial of them to the Superior Court when the trial judge deems it proper that a particular case should be tried there, the act should be construed as a whole, and, so construed, it is *Held*, that the authority of the trial judge to transfer the particular cause is not in conflict with the other part of the act, and in such instances the Superior Court thereby acquires jurisdiction. As to the validity of a transfer of a case from the Superior Court to the county court under authority of the same statute, *quære*. *S. v. Burnett*, 750.
6. *Courts—Criminal Law—Judgment Suspended—Execution Suspended—Good Behavior.*—Where conviction is had in a municipal court for violating the prohibition laws, and the defendant sentenced to a fine and imprisonment, execution against the person not to issue within two years on condition that the defendant should not again violate them, the question as to whether there was a technical suspension of the judgment or execution is immaterial as affecting the right of the court to pass upon the fact of a further violation of the laws, and order the execution of the sentence. *S. v. Greer*, 759.
7. *Courts—Judgment Suspended—Good Behavior—Execution of Sentence—Discretion—Trial by Jury—Appeal and Error.*—Where judgment in a criminal action conditioned upon good behavior is suspended and not appealed from, subsequent proceedings to determine whether the defendant has complied with these conditions are addressed to the reasonable discretion of the trial judge, and not reviewable on appeal unless such discretion has manifestly been grossly abused; and where the defendant has again been tried and convicted of the same offense, before a municipal court, and thereupon the court orders the execution of the former sentence, the fact that on appeal the defendant

COURTS—*Continued.*

was acquitted by the jury of the second offense has no effect upon the principle stated. *Ibid.*

COURT'S DISCRETION. See Sales, 1; Appeal and Error, 12, 13, 14.

CREDITORS. See Partnership, 2; Judgments, 13; Trusts and Trustees, 2.

CREDITORS' BILL. See Venue, 7.

CREDITS. See Corporations, 12.

CRIMINAL ACTIONS. See Malicious Prosecution, 4.

CRIMINAL LAW. See Contracts, 9, 11; Judgments, 22; Appeal and Error, 40; Embezzlement, 1, 2; Courts, 6; Intoxicating Liquors, 3; Indictment, 2; Instructions, 8.

1. *Criminal Law—Consent—Damages.*—No consent of the party injured will bar a prosecution or prevent a civil recovery for acts causing damage which involve a breach of the criminal law. *Ange v. Woodmen*, 33.
2. *Criminal Law—Fornication and Adultery—Evidence—Two Years—Corroborative.*—Upon trial for fornication and adultery, evidence of illicit conduct prior to the two years is competent in corroboration of admissible evidence thereof occurring within the two years, as in this case, conduct between the defendants, a Negro man and a white woman, forbidden to marry by the statute, he being the only Negro man in the community, colored children born of the woman, the acts and conduct of the Negro man towards the children, and the acts and conduct of the defendants towards each other. *S. v. McGlammery*, 748.
3. *Criminal Law—Statutes—Intent—Municipal Corporations—Watersheds.* The intent to violate a criminal statute is the criminal intent punishable by its terms; and where the intent to violate our statute making it a misdemeanor to leave the tree-tops, etc., within 400 feet from a municipal watershed, etc., is shown, the defendant, having violated it, may not avoid the consequences of his act by showing that his motive was not a bad one. *S. v. Perley*, 783.
4. *Criminal Law—Evidence—Demurrer—Statutes.*—Where the defendant in a criminal action introduces evidence, after the court has overruled his motion to nonsuit upon the State's evidence, to which ruling he has excepted, he loses his right to have his motion considered only upon the State's evidence; and where his motion to nonsuit after all the evidence is in has been overruled and excepted to, the Supreme Court, on appeal, will consider the whole evidence under the second motion, to see if it is sufficient to support the verdict and judgment. Gregory's Supplement, sec. 3265a. *S. v. Killian*, 792.
5. *Criminal Law—Trials—Evidence—Instructions—Burden of Proof.*—The charge of the judge to the jury should be considered as a whole, and where in a criminal action he has told them that, for conviction, they must be satisfied of the guilt of the prisoner beyond a reasonable doubt, it is not required that he repeat this rule of law every time he refers to any finding from the evidence. *Ibid.*
6. *Criminal Law—Statutes—Sentence—Court's Discretion.*—Construing chapter 80, section 6, Laws 1907, with section 3632, Revisal (Hinsdale Act), to ascertain the legislative intent, upon consideration of the inherent nature of the subject-matter with the mischief and the

CRIMINAL LAW—*Continued.*

proposed remedy, it is *Held*, that the later act was not intended to take away the discretion of the trial judge, upon conviction of manslaughter, to sentence the prisoner to a three-year term in the State's prison, and to wear a felon's stripes, when in his opinion a sentence to the roads will result in the prisoner's escape. *Ibid.*

7. *Criminal Law—Marriage and Divorce—Bigamy—Statutes—Suits in Another State—Decrees—Copies—Identity—Evidence, Prima Facie—Actions.*—Where the parties to an action for a divorce, brought in another State, and the place and the time of the marriage alleged are the same as appear in the marriage record here, it affords *prima facie* evidence of identity of a defendant tried for living in this State after a bigamous marriage in another State inhibited by the Laws of 1913, ch. 26; and it is reversible error for the trial court to exclude duly certified copies of the divorce suit and proceed to conviction upon the ground that defendant had not sufficiently identified himself as the plaintiff in the suit for divorce theretofore granted. *S. v. Herren*, 801.

8. *Criminal Law—Evidence—Threats—Trials.*—In the trial of an indictment for injury to property, Revisal, sec. 3673, a question asked a witness, if he had not heard his father say to another witness that if the latter did not swear to the defendant's guilt he would send him to the penitentiary, is properly excluded as irrelevant and hearsay. *S. v. Martin*, 808.

CROSSINGS. See Judgments, 18.

CUSTODY. See Divorce, 4.

DAMAGES. See Carriers of Goods, 1, 6; Corporations, 2; Criminal Law, 1; Carriers of Passengers, 2; Deeds and Conveyances, 12; Statute of Frauds, 1; Judicial Sales, 1; Railroads, 2; Municipal Corporations, 8, 15; Vendor and Purchaser, 3, 5; Contracts, 11; Trespass, 1.

Damages—Evidence—Mortuary Tables.—In an action to recover damages for a personal injury, the expectation of life tables, Revisal, 1626, are not conclusive, but merely evidential on the issue as to damages. *Odom v. Lumber Co.*, 134.

DANGEROUS EMPLOYMENT. See Master and Servant, 14.

DANGEROUS WORK. See Master and Servant, 15.

DEATH. See Insurance, 13.

DECISIONS. See Telegraphs, 1.

DECLARATIONS. See Wills, 5; Evidence, 4, 5; Negligence, 3; Deeds and Conveyances, 22.

DECREES. See Judgments, 5; Criminal Law, 7.

DEEDS AND CONVEYANCES. See Wills, 2, 11, 16; Trusts, 1; Limitation of Actions, 1, 5, 6; Judgments, 7; Contracts, 7; Principal and Agent, 1; Equity, 2; Partnership, 1; Tenants in Common, 4; Statute of Frauds, 1, 5; Mortgages, 9; Homestead, 2, 4; Evidence, 6; Husband and Wife, 1; Venue, 7; Corporations, 21; State's Lands, 4.

1. *Deeds and Conveyances—Description—Reverse Calls.*—In this action involving title to land, the controversy depended upon the location

DEEDS AND CONVEYANCES—*Continued.*

of certain land described in defendant's deed, involving the location of a call from a stake, the beginning call therein, by reversing the calls etc., and it is *Held*, that the case was correctly tried in the court below under instructions free from error. *Jarvis v. Swain*, 9.

2. *Deeds and Conveyances—Descriptions—Stake—Uncertain Beginning—Reverse Calls.*—Where in an action involving the title to land it is necessary to locate it within the descriptions contained in a deed, which recites the beginning point as a stake which is unknown or uncertain, and the second corner is known and established, the first line may be reversed in order to find the beginning; and the same rule prevails as to the other corners and lines. *Ibid.*

3. *Deeds and Conveyances—Boundaries—Courts—Trials—Matters of Law—Questions for Jury.*—What are the termini or boundaries in a deed or grant is a matter of law, and upon conflicting evidence, it is for the jury to determine where these termini or boundaries are; but where the court declares what the boundaries are, and this is not disputed, the whole resolves itself into a question of law. *Miller v. Johnston*, 62.

4. *Same—Admitted Lines—Further Specifications.*—In a controversy over lands, a fixed and established line is dealt with as a natural object and will control course and distance; and descriptive specifications cannot prevail against a known and controlling call, nor will the addition of further description defeat a full and perfect description which fully identifies and ascertains the property conveyed or devised. *Ibid.*

5. *Same — Wills — Devises — Codicils—Variant Descriptions—Residuary Clause.*—A testator devised certain part of his lots to his wife with description calling for certain known and established lines, and by codicil he referred to the death of his wife, and devised the lands to his daughter, under whom the plaintiff claims, but terminating with a known and admitted line within that specified in the description of the lands devised to the wife. The will contained a residuary clause. The court, after pointing out the difference in the description in the devise in the will and that in the codicil held that by knowingly using a different designation of the known boundaries, the intent of the devisor was that the codicil pass to the daughter a smaller acreage than devised to the wife or he would have given the same description; and the boundaries or objects in both descriptions being admitted, the defendants were entitled to recover as a matter of law; and a particular description as to the location of an orchard, as affecting the line claimed by the plaintiff, must give way to the boundary admitted to be that designated. *Ibid.*

6. *Same—"Including."*—Where a testator owned more than five lots along a street, and devised some of them by description beginning at a fixed point and running south along the street to the northern boundary of the fifth lot, his intent is construed to include only the five lots from the beginning point and the northern boundary of the fifth lot, and under the facts in this case it is held that those claiming under the devise could not go beyond the northern line of the fifth lot. *Ibid.*

7. *Deeds and Conveyances—Title—Evidence—Mortgages—Payment—Presumptions.*—Where the plaintiff, in an action to recover lands, has to rely exclusively upon his paper chain of title, a writing therein which acknowledges an indebtedness of the maker, and to be void

DEEDS AND CONVEYANCES—*Continued.*

if it should be paid without evidence that the debt had not been paid, and which shows that the title to the lands described was in others, is insufficient. In this case the presumption of payment arose from the long lapse of time. *Olds v. Cedar Works*, 161.

8. *Deeds and Conveyances—Warranty—Rebutter—Estoppel—Burden of Proof.*—Where in an action to recover lands the plaintiff claims by paper title to his ancestor, without claim of possession, and it appears that his ancestor has conveyed the land to a stranger with full covenants and warranty of title prior to his having acquired it: *Held*, the burden of proof is on the plaintiff to establish his title, and he cannot recover, for his ancestor's deed to the stranger, with covenant and warranty, destroys his right of action by rebutter, and passes the title to the grantee by estoppel. *Lumber Co. v. Price*, 144 N. C., 53, cited and distinguished. *Semble*, this would apply to a deed without covenant and warranty. *Ibid.*

9. *Deeds and Conveyances—Registration—Notice—Corporations—Set-off.* Where the owner of lands, subject to an unrecorded mortgage, has conveyed the same by deed to a corporation, which he and another practically owned, and to whom he afterwards sold his remaining shares, and subsequently became manager, and then the mortgage is recorded, it is *Held*, that the corporation were purchasers for value without notice of the unrecorded instrument, and the evidence was insufficient upon the question of fraud; and, further, a debt due the corporation from the mortgagees could not be allowed as a set-off to the mortgage debt. *Fertilizer Co. v. Lane*, 184.

10. *Deeds and Conveyances—Registration—Notice.*—A contract to convey lands signed by the life tenant, who also purported to sign it for his son, the remainderman, without his authority, acquiescence, or ratification, is not enforcible against a valid contract therefor subsequently made but prior registered. *Alston v. Savage*, 213.

11. *Deeds and Conveyances—Description—Parol Evidence—Identification.* A description in a contract to convey lands as a certain tract in a designated township, "now being advertised for sale," further stating in the contract that the obligor "owns the land in fee simple, and has a right to sell it and deed it," is sufficient to admit of parol evidence of identification, it appearing that this was the only land owned by the obligor in the township and was being advertised in a paper published in the county at the time. *Ibid.*

12. *Deeds and Conveyances—Contracts—Breach—Damages.*—The obligee, under a contract to convey title to lands in fee, paid $190, entered into possession and enjoyment, and was dispossessed by reason of the failure of the obligor's title. Under the circumstances of this case, a verdict awarding 25 cents as the measure of his damage is not disturbed on appeal. *Ibid.*

13. *Deeds and Conveyances—Blanks—Grantors.*—Where the names of the grantors in a conveyance of land are left in blank, with the name of the grantee therein properly appearing, the deed, otherwise sufficient, is not invalid when the names of the grantors are designated by the final clause, their signatures appearing thereunder, with proper certificate of the probate officer to that effect. *Yates v. Ins. Co.*, 473.

14. *Same—Benefit—Mesne Conveyances.*—A conveyance of land, with easement in an alleyway, reducing the width of the alley to the benefit

DEEDS AND CONVEYANCES—*Continued.*

of the adjoining land of a party whose name has been omitted from the conveyance: *Held*, such party and those claiming by *mesne* conveyances describing the reduced width of the alleyway and deriving benefit from the change are bound by the description of the alleyway in the original conveyance. *Ibid.*

15. *Same—Ratification.*—Where the name of one of the owners of land with right in an adjoining alleyway is omitted from a conveyance making a reduction of the width of the alleyway to the advantage of the dominant tenement and reserving to the dominant tenement the right to erect an arch thereover to connect buildings on either side, a later conveyance by the owners of the dominant tenement is a ratification of the one from which he was omitted, and the privilege thus acquired is conveyed by the later deed. *Ibid.*

16. *Deeds and Conveyances—Description.*—A deed to lands, or standing timber thereon, referring for description to a former deed, incorporates the description referred to, and it will be considered as if therein embodied. *Hutton v. Cook*, 496.

17. *Deeds and Conveyances — Contracts — Timber — Cutting Period — Grantee's Liability—Uncut Timber—Grantee of Lands.*—Where the owner of lands conveys his timber thereon, to be paid for as cut within a stated period, no obligation is imposed upon his grantee to cut the timber within that time, or pay for such as may remain standing thereafter, it being merely an option to cut; and where the owner has conveyed the title to the lands to another within the cutting period, the grantee of the title acquires the title to the trees which thereafter remain standing, without obligation on the grantee of the timber to his grantor to pay for them. *Ollis v. Furniture Co.*, 542.

18. *Deeds and Conveyances—Timber—Contracts—Interpretation—Intent.*—A conveyance of standing timber will be interpreted so as to ascertain the intention of the parties by a natural and not forced interpretation of all of the provisions of the writing in its entirety, and every part should be allowed its proper weight in reaching a conclusion as to the meaning. *Ibid.*

19. *Deeds and Conveyances—Mortgages—Registration—Simultaneous Filing—Priorities.*—It is required for a valid filing of a mortgage that it be delivered at the register of deed's official office, and until then it can acquire no priority over one theretofore executed; and where two mortgages given to different persons on the same subject-matter are delivered to the register of deeds out of his official office, carried by him to that place and marked by him filed at the same time, the filing and registration are regarded as being simultaneous, and the mortgage first executed will have priority of lien. *McHan v. Dorsey*, 694.

20. *Deeds and Conveyances—Timber—Extension Period—Consideration—Waiver.*—Where a grantee conveys his standing timber, estimated at 3,000,000 feet, in consideration of $1.50 per thousand feet, to be cut and removed within a stated period, and the timber within the period has been ascertained as one-half of the quantity estimated, and agrees to an extension of the period upon consideration of payment of interest upon the original purchase price, but thereafter, in view of the shortage of the timber, foregoes the payment of the interest and gives his vendee *bona fide* to understand that he will not be required to pay it, which otherwise he would have done. *Held*, the vendor may not

DEEDS AND CONVEYANCES—*Continued.*

recover the value of the timber his vendee has cut during the time extended, and a judgment permitting a recovery of the interest is not to his prejudice. *Cromartie v. Lumber Co.*, 712.

21. *Deeds and Conveyances—Survey—Agreed Lines—Course and Distance.* A line surveyed, marked out and agreed upon by the parties at the time of the execution of a deed to the lands will control, when established, the course and distance set out in the instrument. *Milliken v. Sessoms*, 723.

22. *Deeds and Conveyances—Evidence—Fraud—Declarations—Hearsay.*—Where adverse possession of a party claiming lands under a deed to his father and from his father to himself, as color of title, has been sufficiently established, declarations of the deceased father, made long subsequent to the time the son had entered into possession under his deed, that he had not signed the deed, is incompetent as hearsay. *Grandin v. Triplett*, 732.

DEFAULT. See Judgments, 14.

DEFECTIVE LOCOMOTIVES. See Railroads, 1, 2.

DEFENSES. See Insurance, 20; Corporations, 16.

DELAY. See Carriers of Goods, 2.

DELIVERY. See Equity, 2.

DELIVERY OF POLICY. See Insurance, 19.

DEMURRER. See Health, 3; Pleadings, 2, 5, 7; Evidence, 8; Wills, 17; Municipal Corporations, 16; Criminal Law, 4.

DEPENDENTS. See Master and Servant, 10.

DEPOSITIONS. See Evidence, 3.

DEPOSITS. See Banks and Banking, 1, 3.

DEPOTS. See Railroads, 11.

DESCENT. See Estates, 1.

DESCENT AND DISTRIBUTION.

Descent and Distribution—Collateral Relation—Blood of Ancestor.—Held, collateral relations to inherit lands must be of the blood of the ancestor who died seized and possessed thereof, and the judgment below in this case is affirmed under authority of *Noble v. Williams*, 167 N. C., 112. *Forbes v. Savage*, 706.

DESCRIPTIONS. See Deeds and Conveyances, 1, 2, 5, 11, 16.

DEVISES. See Deeds and Conveyances, 5.

DIMINUTION OF RECORD. See Appeal and Error, 25.

DISCRETION. See Statutes, 9; Courts, 2; Criminal Law, 6.

DISCRIMINATION. See Constitutional Law, 7.

DISCUSSION. See appeal and Error, 11.

DISHONOR. See Bills and Notes, 8.

DISSENTS. See Statutes, 6.

DISSOLUTION. See Partnership, 3, 4.

DISTRIBUTION. See Master and Servant, 9, 11.

DIVIDENDS. See Corporations, 18.

DIVISION. See Wills, 13.

DIVORCE. See Husband and Wife, 4.

1. *Divorce—Alimony—Motions—Notice—Statutes.—Feme* plaintiff's motion for alimony and attorney's fees in an action for divorce, made upon complaint and resisted upon an answer during the pleadings term, does not require previous notice to be given; and when the judge hears it upon one day's postponement, the last day of the term, five days after complaint filed demanding such relief, his order granting it will not be disturbed for lack of sufficient notice, Rev., secs. 1566, 877; and when it appears that the defendant is about to remove his property and effects from the State to defeat plaintiff's rights, notice of any kind is not required. Rev., sec. 1556. *Jones v. Jones*, 279.
2. *Divorce—Pleadings—Verification—Knowledge—Six Months—Condonation—Breach.*—A verification to the complaint in an action for divorce *a mensa*, that the facts set forth therein as grounds for a divorce have existed to the plaintiff's knowledge at least six months prior to the filing of the complaint, is sufficient, though coupled with averments as to matters in condonation and breach occurring within that period, and the trial will be proceeded with as to all. *Ibid.*
3. *Divorce—Alimony—Court's Discretion—Appeal and Error.*—The allowance to a *feme* plaintiff of alimony *pendente lite* and attorney's fee in an action for divorce *a mensa* is within the discretion of the trial court, and not reviewable on appeal, in the absence of its abuse. *Ibid.*
4. *Divorce—Children—Custody—Alimony.*—Where in passing upon a motion of *feme* plaintiff in her action for divorce *a mensa* for alimony, etc., *pendente lite*, the trial judge has found facts sufficient upon the evidence, he may award the custody of the minor children, who have been removed by the defendant from the State, to the plaintiff, with an additional allowance for them from the time they may be placed in her custody. *Ibid.*

DOCKETING. See Appeal and Error, 37.

DOMICILE. See Venue, 1; Executors and Administrators, 3.

DOWER. See Limitation of Actions, 2.

DRAINAGE DISTRICTS. See Contracts, 6; Judgments, 4.

1. *Drainage Districts—Assessments—Summons — Parties — Injunction — Statutes—Mortgages.*—The provision of our drainage law that summons be served on defendant landowners within a proposed drainage district is mandatory, and when it appears that one of them, having an interest within the meaning of the statute, has not been served, and it does not appear that he was an apparent party, an order laying an assessment on his property is void, and the proceedings as they relate to him are a nullity, and the assessment may be restrained. *Banks*

DRAINAGE DISTRICTS—*Continued.*

v. Lane, 170 N. C., 14, holding a mortgagee not a necessary party, cited and distinguished. *Lumber Co. v. Comrs.*, 117.

2. *Drainage District—Timber Deeds—Assessments—Standing Timber—Personalty.*—With regard to our drainage statutes, a conveyance of the timber, under the usual deed, providing for its cutting and removal from the land within a stated period, is regarded as a severance thereof from the land, and the grantee in the deed is not liable for an assessment for drainage purposes laid thereon; though theretofore, and for the purposes of the conveyance, it is regarded as realty, while standing. *Ibid.*

3. *Drainage Districts—Constitutional Law—Assessments—Appeal—Due Process.*—Where a statute relating to a drainage district provides for the assessment on the lands therein, and an appeal therefrom by the owner within ten days after the amount has been fixed, does not deprive the owner of "due process" guaranteed by the Constitution. *Drainage Dist. v. Huffstetler*, 523.

4. *Drainage Districts—Assessments—Liens — Personal Liability — Judgments—Limitation of Actions.*—An assessment upon the lands of an owner within a statutory drainage district, made only a lien upon the lands, does not impose a personal liability on the owner; and where the statute declares the lien "as a special tax on the land," the action provided by the statute to collect the assessment is as one upon a judgment to foreclose a lien, Revisal, sec. 2866, and is not barred within ten years. *Ibid.*

DUE PROCESS. See Drainage Districts, 3.

DUPLICATE ORIGINALS. See Evidence, 9.

DUTIES. See Public Officers, 3; Master and Servant, 14.

EJECTMENT. See Issues, 2.

ELECTIONS. See Constitutional Law, 2, 15, 17.

ELECTRICITY. See Municipal Corporations, 13.

ELECTRIC LIGHT. See Municipal Corporations, 2; Statutes, 1.

EMBEZZLEMENT. See Indictment, 1.

1. *Embezzlement—Criminal Law—Principal and Agent—Banks and Banking.*—An indictment charging that the defendant was the president of a certain bank, and by virtue of his position received and feloniously appropriated the bank's money, sufficiently alleges an act of embezzlement; and it is not necessary for it to charge that the funds alleged to have been embezzled had been committed to his custody, or any breach of trust or confidence except that which grew out of his official relationship with the bank. *S. v. Gulledge*, 746.

2. *Embezzlement — Trials — Evidence — Nonsuit — Instructions.* — Where upon a trial for embezzlement there is evidence that the defendant was the president of a bank and as such he received sums of money and evidences of debt belonging to the bank, for which he failed to account and which he appropriated to his own use, it is sufficient for conviction of the offense, under a charge by the court that the jury must find that the defendant intentionally and fraudulently converted the money to his own use. *Ibid.*

EMOLUMENTS. See Sheriffs, 1.

EMPLOYER AND EMPLOYEE. See Master and Servant, 1, 15, 16, 17; Insurance, 1; Negligence, 4; Indebitatus Assumpsit, 1.

ENDORSERS. See Equity, 8.

ENTRY. See State's Lands, 2.

EQUALITY. See Tenants in Common, 4; Railroads, 3; Actions, 2; Vendor and Purchaser, 3.

EQUALITY OF DIVISION. See Wills, 15.

EQUITY. See Injunctions, 4; Judgments, 7; Bills and Notes, 6; Statute of Frauds, 1; Liens, 1; Constitutional Law, 6; Judicial Sales, 2; Insurance, 24; Statutes, 5. 6.

1. *Equity—Cloud on Title—Wills—Devise—Remaindermen—Statutes—Estates.*—A court of equity may entertain a suit to remove a cloud upon the title of one claiming lands in fee simple under a devise against those who assert that he had only a life estate with remainder to themselves, under a proper construction of the will. Revisal, sec. 1589. *Smith v. Smith*, 124.

2. *Equity—Deeds and Conveyances—Delivery of Deed—Promise of Payment—Fraudulent Intent.*—Where a grantor of lands has relied upon the promise of a grantee in a deed that he would make immediate payment of the consideration, and delivered the deed to him in consequence, and it is shown that the grantee had no intention of making the payment, but gave the promise as a means of only securing the deed, it is *Held*, that the promise so made is a false representation which will entitle the grantor to equitable relief, and it can make no difference that he could have secured the purchase price at the time. *Massey v. Alston*, 215.

3. *Same—Trusts and Trustees.*—Where the owner of lands has been induced to part with his deed owing to the fraudulent promise of the grantee of immediate payment of the consideration therefor, which the latter had no intention of keeping, equity is not confined to the relief of rescinding the contract and canceling the deed, but under the circumstances of this case may compel the defrauding party to make his representations good so that the other be placed in the same situation as if the fact stated were true; as, in this case, convert the grantee into a trustee to hold the land subject to the payment of the consideration as a charge thereon. *Ibid.*

4. *Same—Contracts—Enforcement—Partnership.*—Where partners enter into an agreement to purchase lands and hold them as a partnership asset, and one of them pays therefor, takes deed to himself, and delivers a deed to the other for a one-half interest, induced thereto by his fraudulent representation that he would immediately pay his part, it is *Held*, equity may regard the purpose for which the transaction was made, and decree a lien upon the land as a security for the consideration due by the defrauding partner. *Ibid.*

5. *Equity—Estoppel in Pais—Mortgages—Judgments—Judicial Sales.*—In order to create an estoppel by matter *in pais* the other party must be put to some disadvantage, and a mortgagee under an existing registered and unpaid chattel mortgage is not estopped to assert his rights

EQUITY—*Continued.*

because he participated in the bidding and received possession of the property at an execution sale thereof, under a judgment obtained after his lien by the prior mortgage has attached thereto, where his rights under the mortgage were known and recognized at the time of sale. *Hardware Co. v. Lewis*, 290.

6. *Equity—Cloud on Title—Suits to Remove—Statutes.*—Our statute has enlarged and broadened the old doctrine of permitting suit to remove a cloud upon title to lands, and affords the remedy wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner, whether by way of claim of an enforcible parol trust, leases not required to be in writing, existent records or written instruments, that are reasonably calculated to burden and embarrass such owner in the full enjoyment or disposition of his property at a fair market value; the statute affording a remedy by disclaimer when the party does not in fact claim the "adverse interest" which is alleged to be a cloud on the title of the true owner. Revisal, sec. 1589; Public Laws 1903, ch. 763. *Satterwhite v. Gallagher*, 525.

7. *Same—Husband and Wife—Separate Examination—Registration.*—A contract to convey the lands of the wife signed by her and her husband, but without having taken her privy examination, when recorded is a cloud upon her title to the lands and subject to her suit to remove the same, as such, within the intent and meaning of our statute, Revisal, sec. 1589; though she be and remain in possession of the land. *Ibid.*

8. *Equity—Contribution—Bills and Notes—Principal and Surety—Indorsers.*—The equitable doctrine of contribution rests upon the maxim that equality is equity, and is enforced upon the principle that those engaged in a common hazard in the same degree or relation should bear the loss equally; and where one is surety on a note and the others indorsers thereon, the liability of the former is primary and of the latter a conditional one, being entitled to notice of dishonor; and not being in the same situation with regard to the hazard, the surety is not entitled to contribution from the indorsers. *Edwards v. Ins. Co.*, 614.

9. *Same—Husband and Wife.*—Where a wife has assigned her beneficial interest in an annuity policy on the life of her husband as security to a note given by him, with indorsements thereon, she does not assume the obligations and liabilities of an ordinary surety, and no personal judgment can be obtained against her; but only the property assigned will be regarded as the surety for the payment of the obligation, and to the extent it is so used her husband becomes her creditor. *Ibid.*

ESCROW. See Contracts, 7; Statute of Frauds, 1.

ESTATES. See Wills, 2, 4, 8; Equity, 1; Judgments, 7.

1. *Estates Tail—Statutes—Fee Simple—Tenants in Common—Descent.*—A devise of lands for life, followed by a separate paragraph, to the "bodily heirs" of the devisees named after their death, creates an estate in fee tail, which is enlarged into a fee simple under our statute (Rev., sec. 1578), creating a tenancy in common, which, although the

ESTATES—*Continued.*

land is undivided, would descend to the heirs at law of the deceased devisees. *Keziah v. Medlin*, 237.

2. *Estates—Contingent Limitations—Vested Title.*—A deed in trust to lands that the title vest absolutely in the children surviving the wife, and that the trustee shall do whatever is necessary to vest it accordingly, gives the surviving children an absolute and indefeasible title upon the happening of the event, which is not destroyed by a further limitation to the brothers and sisters of the donor should all of such children die without issue. *Ryder v. Oates*, 569.

ESTOPPEL. See Mortgages, 1; Deeds and Conveyances, 8; Judgments, 9; Equity, 5; Homestead, 4; Statute of Frauds, 3; Trusts and Trustees, 3; Corporations, 20; Contracts, 21.

EVIDENCE. See Reference, 3, 4; Injunction, 3; Bills and Notes, 1, 5, 7; Homicide, 2, 3, 5; Processioning, 1, 3; Master and Servant, 1, 3, 4, 8, 17; Appeal and Error, 1, 3, 5, 6, 10, 17, 19, 21, 23, 25, 26, 27, 29, 34, 40, 41, 46, 48; Cities and Towns, 2; Limitation of Actions, 6; Corporations, 3, 4, 11; Contracts, 3, 4, 7, 16, 20; Accord and Satisfaction, 1; Justices' Courts, 2; Insurance, 14; Carriers of Passengers, 2; Carriers of Goods, 6; Automobiles, 1; Negligence, 1, 3; Malicious Prosecution, 2, 3, 4; Arson, 1; Malice, 1; Damages, 1; Criminal Law, 2; Deeds and Conveyances, 7; Wills, 6; Principal and Agent, 3; Judgments, 10; Deeds and Conveyances, 11, 22; Tenants in Common, 4; Embezzlement, 2; Vendor and Purchaser, 1; Principal and Surety, 1; Railroads, 1, 2, 4, 9, 11; Contributory Negligence, 1; Instructions, 4, 5, 7, 8; Municipal Corporations, 14, 18, 21; Criminal Law, 4, 5, 7, 8.

1. *Evidence—Memoranda of Transactions.*—Memoranda of entries made as to receipt of lumber under a contract to cut and deliver it, if in strictness it is not a part of the *res gestæ*, can only be admitted as substantive evidence in an action to recover under a contract for payment when the person making them is dead at the time of trial or unavailable as a witness, and he made them in the line of his duties, or custom, contemporaneously with the act to be proved, and he had knowledge of the relevant facts which they purport to contain; and the evidence in this case, not falling within the rule, was properly excluded. *Mercer v. Lumber Co.*, 49.

2. *Evidence—Issues—Trials—Wills.*—In an action concerning the boundary to lands devised, testimony which has no bearing upon the issue, but is at most an expression of doubt as to the construction of the will, is properly disallowed. *Miller v. Johnston*, 62.

3. *Evidence — Depositions — Objections—Trials—Corporations.*—Where a witness in his depositions has testified to the fact of incorporation of a party, evidence thereof may not for the first time be objected to on the trial, when the depositions have theretofore remained in the clerk's office a sufficient time for the purpose. *Steel Co. v. Ford*, 195.

4. *Evidence—Declarations—Wrongful Death—Negligence—Executors and Administrators—Trusts and Trustees—Statutes.*—While the statute requires the personal representatives of the deceased to bring action for damages for his negligent killing, he acts in such respect in the nature of a trustee for the beneficiaries under the statute, the right of action depending entirely upon the statute, operating after the death, in which the decedent can have no interest; therefore, his

EVIDENCE—*Continued.*

declarations made as to the character or cause of the occurrence are inadmissible as substantive evidence. *Dowell v. Raleigh*, 197.

5. *Evidence—Hearsay—Declarations—Appeal and Error—Determinative Issues.*—In an action upon a contract for the payment of money, controverted upon the ground that the defendant and his wife had paid a certain sum of money to the plaintiff's husband at her request and for her benefit, declarations of the defendant's wife, not made in plaintiff's presence, as to this controlling feature of the case, are incompetent, not falling within the exceptions as to the admissibility of hearsay evidence (*King v. Bynum*, 137 N. C., 495), and their admission constitutes reversible error. The court frames issues to be used upon the new trial awarded, which will be terminative under a former opinion. *Chandler v. Jones*, 427.

6. *Evidence—Deeds and Conveyances—Contracts.*—A grantor may not, as against his grantee, contradict the written terms of his deed, or deny its legal force and effect by evidence of inferior solemnity, while it remains in force as a conveyance, and unimpeached for fraud, accident, or mistake. *Hutton v. Cook*, 496.

7. *Evidence—Witnesses—Medical Experts—Opinion—Hypothetical Questions.*—The opinion of a medical expert given upon a proper hypothetical question, based on the evidence, as to the cause of death from an injury, is competent, when material and relevant to the inquiry. *Moore v. Accident Assur. Corporation*, 532.

8. *Evidence—Demurrer—Admissions—Trials.*—Where in an action to recover an amount alleged to be due the plaintiff for cutting timber from his lands under a contract, with supporting evidence, the defendant admits an amount due, a motion as of nonsuit upon the evidence will be denied. *Ollis v. Furniture Co.*, 542.

9. *Evidence—Letters—Duplicate Originals.*—Where a letter has been duplicated by carbon and both executed as originals, the latter is not objectionable as secondary evidence. *McLendon v. Ebbs*, 603.

10. *Evidence—Common Knowledge—Appeal and Error—Harmless Error.*—When material and relevant to the inquiry, evidence as to the effect of whiskey in producing thirst after a drunken sleep, admitted to be universally known as a fact, if erroneously admitted, is harmless error. *Young v. Garner*, 622.

11. *Evidence—Nonsuit—Waiver—Statutes.*—A motion for nonsuit upon the evidence is waived by the movant thereafter introducing evidence. Revisal, sec. 539. *Smith v. Pritchard*, 719.

12. *Evidence—Text-Books—Physicians—Experts.*—Where the evidence of a medical expert witness is material to the inquiry, and he has testified on cross-examination, that he would not pursue a certain treatment for his patient, the reading from a medical work on the subject for the purpose of contradiction is properly excluded from the jury. *S. v. Summers*, 775.

13. *Evidence—Character—Qualifications.*—Where a character witness has been properly qualified and has given his evidence as to bad character, he may of his own volition qualify his testimony and state in what respect it was bad. *Ibid.*

14. *Evidence—Character—Witnesses — Impeachment — Cross-Examination.* The character of one witness may be impeached by the testimony of

EVIDENCE—*Continued.*

another, except as to specific acts, subject, however, to cross-examination as to particular facts so as to attack his estimate of character or to contradict him for the purpose of testing his accuracy. *S. v. Killian*, 792.

15. *Evidence—Footprints—Identification—Appeal and Error.*—Evidence that foot tracks leading to defendant's dwelling from a crib which the defendant was on trial for destroying (Rev., sec. 3673), when shown to correspond with those of the defendant, is competent; and were it otherwise in this case its subsequent exclusion by the court and his caution to the jury not to consider it cured the error. *S. v. Martin*, 808.

EXCEPTIONS. See Reference, 1, 2; Venue, 4; Insurance, 21; Appeal and Error, 44; Municipal Corporations, 19, 20.

EXCUSABLE NEGLECT. See Judgments, 3, 16; Appeal and Error, 18, 19.

EXECUTION. See Judgments, 7, 11; Homestead, 1; Arrest and Bail, 2; Bills and Notes, 7; Courts, 6, 7.

EXECUTORS AND ADMINISTRATORS. See Evidence, 4; Appeal and Error, 20; Corporations, 5; Venue, 1, 2, 3, 4; Trusts and Trustees, 3; Parties, 3.

1. *Executors and Administrators—Year's Support—Statutes.*—The assignment of a year's provisions to the widow under Revisal, sec. 3098, is made at a time when the value of the decedent's estate may not be known, and does not preclude her right to an increase thereof under Revisal, sec. 3103, when it appears that the personal estate exceeds the value of the $2,000 prescribed, and her petition states the value of the allowances already made and the value of the articles consumed by her. *Mann v. Mann*, 20.

2. *Executors and Administrators—Letters—Proper County—Statutes.—Semble*, Revisal, sec. 16 (1), requiring letters of administration to be taken out in the county of the death of deceased, means such county wherein this locality is situate at the time of taking out the letters, when by statute such change has been affected. *Hannon v. Power Co.*, 520.

3. *Executors and Administrators—Venue—Domicile of Intestate.*—Where an administrator sues to recover for the death of his intestate transpiring in a different county from that of his own residence, he may bring his action in the latter county; though it is otherwise when the personal representative is the party defendant. *Ibid.*

EXEMPTIONS. See Trusts and Trustees, 2.

EXPERT EVIDENCE. See Negligence, 1.

EXPERTS. See Evidence, 7, 12; Appeal and Error, 27.

EXTRADITION. See Arrest and Bail, 5.

FAITH AND CREDIT. See Constitutional Law, 4, 5.

FEDERAL CONTROL. See Telegraphs, 1.

FEDERAL COURTS. See Railroads, 3; Removal of Causes, 1.

FEDERAL EMPLOYERS' LIABILITY ACT. See Master and Servant, 9, 10, 11.

FEE SIMPLE. See Estates, 1.

FEES. See Sheriffs, 1.

FELONY. See Homicide, 8.

FENDERS. See Railroads, 4, 5, 7, 10.

FINDINGS. See Injunction, 3; Appeal and Error, 7, 23, 34; Wills, 14; Marriage and Divorce, 1.

FINDINGS OF FACT. See Appeal and Error, 19, 20.

FIRES. See Railroads, 1, 2.

FOREIGN CORPORATIONS. See Venue, 2.

FOOTPRINTS. See Evidence, 15.

FORFEITURES. See Insurance, 5, 6.

FORMER JEOPARDY. See Homicide, 8.

FORNICATION AND ADULTERY. See Criminal Laws, 2.

FRATERNAL ORDERS. See Corporations, 2.

FRAUD. See Banks and Banking, 1; Deeds and Conveyances, 2, 22; Partnership, 1; Vendor and Purchaser, 1; Contracts, 16; Venue, 7; Corporations, 21; State's Lands, 3; Wills, 18.

FRAUD AND MISTAKE. See Sales, 3.

FRAUDULENT GIFTS. See Banks and Banking, 3.

GOVERNOR. See Arrest and Bail, 5; Constitutional Law, 16.

GRANTS. See State's Lands, 1, 3, 4.

GUARANTEE. See Contracts, 17.

HABEAS CORPUS. See Courts, 3; Appeal and Error, 40.

HARMLESS ERROR. See Master and Servant, 13; Evidence, 10; Instructions, 5, 6; Appeal and Error, 10, 17, 30, 46.

HEALTH. See Municipal Corporations, 9, 11; Constitutional Law, 7; Insurance, 19.

1. *Health—Sewage—Police Powers—Constitutional Law—Statutes.*—Our statute prohibiting the discharge of sewage above the intake into any drain, brook, creek, or river from which a public drinking-water supply is taken, unless the same shall have passed through some well-known system of sewage purification approved by the State Board of Health, and that the prohibited act may be enjoined "on the application of any person," is a constitutional and valid exercise by the Legislature of its police power. Revisal, sec. 3057; Laws 1911, ch. 62, sec. 33. *Board of Health v. Commissioners*, 250.

2. *Same—State Board of Health.*—It appearing in this suit to enjoin a town from emptying its untreated sewage in a stream 75 miles above the intake of another town for purpose of water supply; that sworn statements were made by the State Board of Health and its Secre-

HEALTH—*Continued.*

tary that under the conditions, and especially in times of epidemic, the discharge of the untreated sewage by defendant imports a menace to the inhabitants of the lower towns, it is *Held*, that the statutes prohibiting the town so emptying its sewage is constitutional as applied to this case, and the defendant must comply with its provisions. *Ibid.*

3. *Health—Pleadings — Demurrer — Statutes — Admissions.* — In a suit brought to enjoin a town of several thousand inhabitants from emptying its untreated sewage into a river, contrary to the provisions of Revisal, sec. 3057, and chapter 62, Laws 1911, sec. 33, a demurrer to an answer alleging that owing to the distance to the next town below on the stream, natural conditions, etc., the stream was not polluted or the water rendered harmful for use there, does not admit the truth thereof, the statute controlling the matter necessarily implying the contrary. *Ibid.*

4. *Health—Statutes—Prescriptive Rights.*—The unlawful emptying of untreated sewage into a stream prohibited by statute, Revisal, sec. 3057; ch. 62, Laws 1911, sec. 33, without hindrance or question on the part of the health authorities or others, cannot confer upon a town the right to continue therein contrary to the express provision of the statutes, or acquire for it a prescriptive right as against the public, however long the same may have continued; nor can the town acquire a vested right therein to defeat the enforcement of the provisions of the statute subsequently passed. *Ibid.*

5. *Health—Sewage—Statutes—Injunctions—Parties.*—In this suit to enjoin a town from emptying untreated sewage into a stream, etc., under the provisions of Revisal, sec. 3057, and chapter 62, Laws 1911, sec. 33, it is *Held*, that the Secretary of the State Board of Health, in his individual name, comes within the meaning of the statute, that the act "may be enjoined on the application of any person," and the question is not presented as to the authority of the board, acting as such, to maintain the action. *Ibid.*

6. *Health—State Board—Sewage—Regulations—Advice of Board.*—Revisal, sec. 3057, Laws of 1911, ch. 62, sec. 33, does not require that an arbitrary or fixed method of treating sewage before emptying into a stream, etc., should be established in advance, but that the defendant confer with the State Board of Health and obtain and follow the reasonable requirements prescribed for the conditions presented. *Ibid.*

HEIRS AT LAW. See Limitation of Actions, 2.

HIGHWAY COMMISSIONERS. See Public Officers, 1, 3.

HIGHWAYS. See Counties, 1.

HOME PLACE. See Injunction, 5.

HOME STATE. See Corporations, 16.

HOMESTEAD.

1. *Homestead—Right—Judgments—Execution.*—The mere right of homestead is not such an estate or interest in lands as is subject to a lien by judgment. *Kirkwood v. Peden*, 460.

HOMESTEAD—*Continued.*

2. *Homestead—Right—Reservation—Deeds and Conveyances.*—A reservation of an indefinite right of homestead in lands from a conveyance thereof is valid. *Ibid.*

3. *Same—Limitation of Actions—Judgments—Liens—Statutes—Suspension.*—Where a judgment debtor had previously conveyed his lands, subject to an indefinite right of homestead therein, before the lien of the judgment attached, and his homestead laid off thereunder, Revisal, sec. 685, suspending the operation of the statute of limitations, has no application; and where he has acquired the reversionary interest in the land after the judgment has been barred, the plea of the statute is a complete defense. Revisal, sec. 574. *Ibid.*

4. *Homestead—Deeds and Conveyances—Reservation of Right—Judgment—Estoppel.*—A judgment debtor is not estopped to show that prior to the time of laying off his homestead under judgment he had conveyed the lands with reservation of his bare right to a homestead exemption therein, though he may not collaterally attack the validity of the allotment proceedings. *Ibid.*

HOMICIDE. See Trials, 1; Jurors, 4; Instructions, 7.

1. *Homicide—Murder—Insanity—Instructions—Burden of Proof.*—Where the evidence in the trial of a capital felony tends strongly to prove a willful, deliberate, and premeditated killing, with evidence tending to show insanity on the part of the prisoner at the time, and the judge has correctly charged the jury as to what in law constitutes the offense of murder in the first degree, it is proper for him to submit to them the finding of fact as to insanity, putting the burden thereof on the defendant to establish this as a fact by the preponderance of the evidence. *S. v. Terry*, 761.

2. *Homicide—Murder—Insanity—"Moral Insanity"—Impulse—Evidence.* The degree of insanity required for an acquittal of a charge of murder is the lack of mental ability of the accused to be conscious of the wrong at the time he committed the homicide, or his inability to know whether the consequences of his act was right or wrong; and it does not include "moral insanity" or a supposed uncontrollable impulse to commit the act notwithstanding. *Ibid.*

3. *Homicide—Physicians—Abortion—Evidence—Instructions.*—Where a physician is on trial for a homicide charged as a result of his treatment of his patient to cause an abortion, and there is evidence on the part of the State that the treatment itself caused the abortion resulting in death, and on the defendant's behalf that the patient had theretofore used certain means to bring on the abortion, which he had refused to do, but yielded to her request to attend her as a physician under the condition she had herself produced, a request for instruction that there was no evidence sufficient to convict the prisoner apart from the dying declarations of the deceased is properly refused, is objectionable in giving undue emphasis to the evidence of a single witness, restricting the jury to the State's evidence alone, and in requiring them to accept the entire statement contained in the dying declarations, when they had the right to reject or accept any portion of it. *S. v. Summers*, 775.

4. *Homicide—Murder—Premeditation.*—The killing of a human being after the fixed purpose to do so has been formed, for however short a

HOMICIDE—*Continued.*

time, is sufficient for the conviction of murder in the first degree. *S. v. Walker*, 780.

5. *Same—Evidence.*—The premeditation or fixed purpose to kill a human being may be shown by the surrounding circumstances; as where the deceased and prisoner were sweethearts, and as a result of a lover's quarrel in the morning the deceased broke off her engagement, refusing to go with the prisoner again, and in the afternoon the prisoner met her, repeatedly urged her to go with him, which she refused to do, and after following her three-fourths of a mile she began to run, refusing to stop at his command, whereupon, at a secluded place, he drew his pistol from his pocket and fired three times, at the last of which she fell, and death resulted. *Ibid.*

6. *Homicide—Murder—Premeditation—Verdict—Second Degree—Instructions—Appeal and Error.*—In a trial for a homicide exceptions to the charge as to premeditation and deliberation are eliminated by a verdict of murder in the second degree. *S. v. Bryson*, 803.

7. *Homicide—Murder—Accessory—Sentence—Remanding Case—Statutes.* Upon conviction of murder in the second degree, and sentence to twenty years in the State's Prison, upon an indictment for murder, when it appears from the evidence that the accused was only an accessory, the case will not be remanded to the Superior Court for resentence, as the statute provides a sentence for life. Revisal, sec. 3290. *Ibid.*

8. *Homicide — Murder — Accessory—Substantive Felony—Statutes—Former Jeopardy—Appeal and Error—Harmless Error.*—An accessory before the fact of murder may now be independently tried as for a substantive felony, Revisal, secs. 3287, 3289; and where such accessory has been indicted and tried as a principal to a murder, convicted of murder in the second degree and sentenced to a twenty-year term of imprisonment in the State's Prison, he may not complain that he should have been tried as an accessory, for which a greater sentence is imposed, Revisal, sec. 3290; or demand that, having once been in jeopardy, he may not now be tried as an accessory, and should therefore be discharged. *Ibid.*

HOSPITALS. See Municipal Corporations, 9.

HOUSEHOLD FURNITURE. See Mortgages, 7, 8.

HUSBAND AND WIFE. See Wills, 3; Banks and Banking, 2, 3; Liens, 1, 2; Mortgages, 7, 8; Equity, 7, 9.

1. *Husband and Wife—Deeds and Conveyances—Contracts to Convey—Separate Examination.*—A contract to convey lands of a married woman cannot be specifically enforced against her unless her privy examination has been taken to the instrument, though, on breach established, an action for damages may lie. *Satterwhite v. Gallagher*, 525.

2. *Husband and Wife — Title by Survivorship — Unity of Person.*—The doctrine of title by survivorship recognized by our courts, between husband and wife holding lands in entirety, is not founded upon the common law, but upon the scriptures, declaring them to be "one flesh." *Freeman v. Belfar*, 581.

HUSBAND AND WIFE—*Continued.*

3. *Same—Constitutional Law—Statutes—Married Women—Separate Property.*—Our Constitution and statutes relative to the property and rights of married women do not affect the doctrine of title by survivorship in lands held by husband and wife in entirety. *Ibid.*

4. *Husband and Wife—Title by Survivorship—Divorce, a Mensa.*—A divorce *a mensa et thoro* does not sever the marital relationship of husband and wife so as to make them tenants in common of lands held by them in entirety, or to effect a change in the doctrine of title by survivorship between them. *Ibid.*

IDENTIFICATION. See Deeds and Conveyances, 11; Evidence, 15.

ILLEGAL CONTRACT. See Instructions, 3.

IMPEACHMENT. See Evidence, 14.

IMPLICATION OF LAW. See Judgments, 12.

IMPROPER REMARKS. See Appeal and Error, 16.

INCLOSURES. See Statute of Frauds, 5.

INCOME. See Trusts and Trustees, 1.

INDEBITATUS ASSUMPSIT.

Indebitatus Assumpsit—Contracts—Privity—Employer and Employee—Services.—It is not necessary to show privity of contract, or an agreement between the parties, in order to recover money had and received to the use of another; and where a civil engineer employed for a part of the time by one railroad company renders services for another, without interfering with his duties, and the former company, with his consent, renders the latter a bill for such services as a method for collection, and collects the same, in an action of *indebitatus assumpsit* the plaintiff may recover from the defendant company the money so received by it, when from the first he has insisted upon his rights and has not waived them. *Lee v. R. R.*, 578.

INDEMNITY. See Insurance, 1.

INDEPENDENT CAUSE. See Pleadings, 1.

INDEPENDENT CONTRACTOR. See Master and Servant, 15, 16.

INDICTMENT. See Constitutional Law, 22; Judgments, 25.

1. *Indictment—Embezzlement—Bill of Particulars—Conviction.*—A bill of particulars in a criminal action is not a part of the indictment for the offense charged, and can supply no defect therein; and the defendant has no legal right to demand that separate issues be submitted to the jury on each of the particulars furnished, upon indictment for embezzlement; and a conviction is proper when there is a verdict of guilty upon the issue and there is evidence of embezzlement upon one or more of the specifications furnished in the bill of particulars. *S. v. Gulledge*, 746.

2. *Indictment—Criminal Law—Constitutional Law—Judgment—Statutes.* Our Constitution, Art. I, secs. 11 and 12, requires that the accused be informed of the charge against him, but not in any special form or

INDICTMENT—*Continued.*

particular words, except it must be by presentment or indictment; and a motion in arrest of judgment will be denied if the charge in the indictment is sufficient for the court to proceed to judgment. Revisal, sec. 3254. *S. v. Carpenter*, 767.

3. *Same—Motion in Arrest—Intoxicating Liquor.*—Where the indictment charges a violation of the prohibition law in receiving a greater quantity of spirituous liquor in one package than one quart at one time, within the State, it is sufficient to sustain a judgment of guilty under the statute, Public Laws 1915, ch. 97, sec. 2, and a motion in arrest thereof will be denied. *Ibid.*

INDORSEMENTS. See Bills and Notes, 1.

INJUNCTION. See Drainage Districts, 1; Health, 5; Municipal Corporations, 11; Vendor and Purchaser, 3.

1. *Injunction—Issues of Fact.—Semble*, where judgment has been rendered that defendant deliver to plaintiff certain certificates of stock of original issue of a corporation or pay their par value, a tender of certificates not of the original issue would be insufficient; and where upon alleged default of defendant to deliver the certificates an execution for the payment of the many has been enjoined upon plea of tender, the injunctive remedy being the main issue, the injunction should be continued to the hearing so that the controverted fact of tender of the original certificates may be first determined by the jury. *Seip v. Wright*, 14.

2. *Same—Probable Cause.*—An injunction will be continued to the final hearing when a serious issue of fact is raised, or where no harm will be done to the defendant and great harm may be caused to the plaintiff, or it is reasonably necessary to protect his rights; or he has shown probable cause or that it can reasonably be seen that he will be able to make out his case at the final hearing. *Ibid.*

3. *Injunction—Appeal and Error—Evidence—Findings.*—Where on appeal in injunction proceedings it does not appear whether a material matter affecting the relief sought has not been presented to the lower court, or that it had been decided there adversely to the appellant, the Supreme Court may pass upon the question originally; but should it have been decided below the Supreme Court will not be disposed to change the ruling, in matters of fact, though it may do so in proper cases. *Ibid.*

4. *Injunction—Statutes—Stock Law—Bills of Peace—Equity.*—Where citizens and residents of a township are about to enforce the provisions of a stock-law statute alleged to be unconstitutional in its controlling provisions, as to whether, in proper cases, residents of adjoining townships, liable to injury, can maintain an action in the nature of a bill of peace, and procure an injunction for their protection, *quære*. *Archer v. Joyner*, 75.

5. *Injunction—Railroads—Public Interests—Right of Way—Home Place—Title.*—Where a railroad company claims title to land for a parallel line or double track as a part of its original right of way, taking part of the land occupied and claimed as a home by an adjoining owner, and in a suit by the company an order is sought to restrain the owner from interference with work of such public character, which is continued to the hearing by the trial court upon findings from the evidence

INJUNCTION—*Continued.*

that the question of title was *bona fide* involved; and it appears on appeal that the company had entered upon the lands, built its track, and was operating its trains thereon: *Held*, the restraining order will not be disturbed, though the proper order would have been to restrain both parties and preserve the original status of the property. *R. R. v. Thompson*, 258.

INQUIRY. See Register of Deeds, 1, 2; Partnership, 5.

INSANITY. See Homicide, 1, 2.

INSOLVENCY. See Banks and Banking, 1; Corporations, 14, 15.

INSTRUCTIONS. See Bills and Notes, 5, 9; Appeal and Error, 3, 30, 45, 48, 50; Wills, 6; Municipal Corporations, 3, 21; Master and Servant, 13; Carriers of Passengers, 5; Insurance, 7; Tenants in Common, 6; Railroads, 7; Negligence, 5; Limitation of Actions, 6; Embezzlement, 2; Homicide, 1, 3, 6; Criminal Law, 5.

1. *Same—Instructions—Contentions—Expression of Opinion—Courts.*—Where in stating the contention of a party to a controversy involving the title to lands, the court tells the jury that the party contends that the jury should begin at a certain point and reverse the calls, etc., it is not objectionable as an instruction that they must do so. *Jarvis v. Swain*, 9.

2. *Instructions—Contributory Negligence—Assumption of Risks—Appeal and Error.*—Where in an action for damages for a personal injury the defendant's liability depends upon the issues of negligence and contributory negligence, it is not error for the court to refuse to submit an issue as to assumption of risk; and were it otherwise, the error was cured, under the facts of this case, by his charging upon this doctrine under the issue as to contributory negligence. *Hux v. Reflector Co.*, 97.

3. *Instructions—Illegel Contract—Cotton Futures—Special Requests—Trials—Statutes.*—The trial judge is required by our statute to state in a plain and correct manner the material portions of the evidence given in the case and explain the law arising thereon, Rev., sec. 535; and where in an action upon contract it is alleged in defense, with evidence to support it, that the contract was a wagering one in cotton futures (Rev., secs. 1689, 3823, 3824) the judge should to some extent explain the statute, the consideration of the contract which would make it illegal, and the law applicable; and his merely placing the burden on defendant, and instructing the jury to answer the issue "Yes" if the defendant had shown it was illegal, but if it had failed in this respect to answer it "No," is insufficient and constitutes reversible error, though no special requests were tendered on this phase of the case. *Orvis v. Holt*, 231.

4. *Instructions—Trials—Pleadings—Admissions—Evidence—Nonsuit.*—In an action for trespass, where the plaintiff has introduced in evidence a portion of his complaint alleging his deed from the defendant to timber standing upon lands, allowing fifteen years for its cutting and removal, and a portion of the answer admitting this allegation and that defendant had cut shingle blocks therefrom; and defendant denies that his deed, as given, allowed more than five years for the cutting and removal of the timber, and alleges that his act complained

INSTRUCTIONS—*Continued.*

of occurred after that time, without introducing evidence as to the alteration alleged to have been made in his deed, an instruction to the jury is proper that if they believe the evidence, to find for the plaintiff; and defendant's motion for nonsuit is properly disallowed. *Hutton v. Cook*, 496.

5. *Instructions—Evidence—Appeal and Error—Harmless Error.*—Exceptions to the charge of the court upon the question of undue influence in an action to set aside a deed are not considered in this case in which the deed was sustained, there being no evidence thereof. *Coward v. Manly*, 716.

6. *Instructions—Contentions—Appeal and Error—Harmless Error.*—Exception that the court did not state certain contentions of the appellant is not sustained, it appearing that the charge as a whole was fair to both parties, the judge having directed the attention of the jury to all of the material positions taken by them and reasonably arising from the evidence. *Ibid.*

7. *Instructions—Admissions—Evidence—Appeal and Error—Homicide—Abortion—Physicians—Guilty Knowledge.*—Where exception to the charge is made upon the ground that certain of defendant's admissions were allowed the weight of substantive evidence when they were only admissible in impeachment, and it appears from the charge that it was capable of the correct interpretation, a new trial will not be granted on appeal upon the principle that reversible error must appear. In this case, where a physician was charged with a homicide as the result of an abortion produced by him, *semble*, admission that in other of his cases he had used the same treatment which tends to produce an abortion, is competent as to his guilty knowledge in adopting the treatment. *S. v. Summers*, 775.

8. *Instructions—Reasonable Doubt—Evidence—Criminal Law.*—Where the charge by the court as to reasonable doubt of the defendant's guilt is sufficient, and it appears from the whole charge that the jury were instructed that they must convict the defendant upon the evidence, if at all, it is not objectionable that the judge failed to repeat, in each instance, that they could only convict him upon the evidence. *S. v. Martin*, 808.

INSTRUMENTALITIES. See Master and Servant, 4.

INSURANCE. See Corporations, 2; Judgments, 17; Contracts, 14.

1. *Insurance—Master and Servant—Employer and Employee—Indemnity—Policy—Employment of Counsel—Compromise—Appeal and Error—Attorney and Client.*—A policy of employer's indemnity giving the insurer the right to employ counsel and defend or compromise an action brought thereunder by an employee is for the benefit of the insurer, and it is not liable in damages sustained by the employer for refusing to compromise the employee's action for a less sum than that indemnified against, and for compromising a judgment in a large amount rendered in the employee's action, without appeal, in the absence of suggestion that the insurer was negligent in the proper prosecution of that action, or had acted in bad faith. *Lumber Co. v. Ins. Co.*, 269.

2. *Insurance, Life—Premium Notes—Payment—Stipulations.*—The stipulation on the form of note given for a premium of life insurance that

INSURANCE—*Continued.*

the policy shall be void if the note is not paid at maturity is a valid one, and a recovery on the policy contract will be denied when the note has not been paid accordingly, unless the insurer has waived this provision. *Owens v. Ins. Co.*, 373.

3. *Insurance, Life—Premium Notes—Interest.*—A premium note for life insurance at 6 per cent interest draws that rate from its date unless otherwise specified (Rev., sec. 1915). *Ibid.*

4. *Same—Tender—Grounds for Refusal.*—Where the money for the face value of a premium note without interest from its date has been tendered the insurer, before maturity, who refuses to receive it, stating that the insured, who was then sick, must first get well enough to come and arrange it himself, the failure to tender the interest on the note as well as the principal will not avail as a defense for the insurer in an action against it upon the policy since matured by the death of the insured, the refusal being based upon an entirely different statement. *Ibid.*

5. *Insurance, Life — Forfeiture — Premium Notes—Tender—Judgments—Deduction.*—A valid tender made for the payment of a premium note for life insurance before its maturity is for the purpose of saving a forfeiture, and when refused by the insurer it is not required to be kept good *pro hac vice*, in the sense that the money must always be ready and available, as in cases where the stopping of interest or court costs, etc., are involved; and it is sufficient if the principal of the note and proper interest is deducted from the amount of the recovery on the policy in the Superior Court. *Ibid.*

6. *Insurance, Life — Forfeiture — Notes — Statutes.*—*Semble*, our statute, Gregory's Supplement, 4779a, would prevent a forfeiture under a life insurance policy, within a year, under the circumstances of this case. *Ibid.*

7. *Insurance—Policy—Abandonment—Instructions—Trials—Questions for Jury.*—Where the facts are ascertained, the question as to whether a party seeking to enforce a contract had abandoned it is one of law, and, upon conflicting evidence, is a mixed one of law and fact for the determination of the jury under proper instruction from the court as to what, in law, constitutes an abandonment. *Aiken v. Ins. Co.*, 400.

8. *Insurance, Life—Premiums—Notice—Statutes.*—An insurer may not declare its policy of life insurance forfeited or void for nonpayment of premium within the time therein specified for it to be made, when such has solely resulted from its own error in failing to properly address the notice required by the statute; and where upon receipt of the notice the insured promptly tendered payment of the premium, and keeps his tender good, and the policy remains in his possession until its maturity by death, without demand or action of the insurer, and without notification of further premiums becoming due, as the statute requires, the defense may not successfully be maintained, in an action by the beneficiary under the policy, that it had become forfeited for nonpayment of premiums. Gregory's Supplement, sec. 4779a. *Ibid.*

9. *Same—Reinsurance—Statements—Abandonment—Questions for Jury.*—A statement made for the reinstatement of a life insurance policy, that it had lapsed for nonpayment of premium, may not be declared an abandonment thereof as a matter of law, when there is evidence

INSURANCE—*Continued.*

tending to show that a sufficient tender of payment had been duly made and wrongfully refused by the insurer, who continued to insist upon his rights. *Ibid.*

10. *Insurance, Life—Premiums—Tender—Conditions.*—Where the insurer has erroneously declared a policy of life insurance forfeited for the nonpayment of a premium, and has refused a good tender of payment thereof duly made, which the insured continues to insist upon and make good, and, acting upon the insistence of the insurer, the insured makes application for reinstatement of the policy under protest, remitting the premiums therewith, the insurer, having itself annexed the condition, may not successfully maintain that the tender of the insured was upon condition and therefore not sufficient in law. *Ibid.*

11. *Insurance, Accident—Premiums—Payment.*—A provision in a policy of accident insurance requiring prompt payment of the premiums as they fall due or that the insurer will not be liable for an injury received during a period within which the premium has not been paid, so pertains to the essence of the contract as ordinarily to require strict observance of it, unless the assurer waives compliance of the assured therewith in some recognized manner. *Moore v. Accident Assur. Corporation*, 532.

12. *Same—Waiver.*—Where the insurer has so habitually failed for such time in the past to insist upon prompt payment of the premiums of an accident insurance policy as to have misled the insured to believe that strict compliance would not be enforced, and an accident covered by the policy occurs a day after a premium has become due, which was remitted to the company on the day thereafter, stating on the check that it was for the payment of a three months period, the acceptance of the check by the insurer and its premium receipt duly issued, taken in connection with the evidence of the "prior and long-continued course of dealing," is sufficient to be submitted to the jury upon the question of the waiver by the insurer of the condition stated in the policy, and to sustain a verdict in favor of the beneficiary after the death of the insured. *Ibid.*

13. *Same—Separate Benefits—Death—Notice.*—Where under the provisions of a policy of accident insurance certain benefits are to be paid to the insured, with distinct provision that in case of accident resulting in death a certain sum is to be paid a beneficiary, the latter, during the lifetime of the insured, is not required to give the ten days notice of the injury which resulted in his death, but only the notice provided for from the time of the latter event; the interpretation of the policy being that the assured and the beneficiary shall each give notice of the event upon which his claim depends. *Ibid.*

14. *Same—Proof of Death—Evidence—Questions for Jury—Trials.*—Where the beneficiary under an accident policy promptly notifies the insurer of the death of the insured from an accident, and of his claim under the policy, requesting the proper blanks furnished for the proof of death; and the insurer sends only a diability blank, but which the beneficiary has filled out and returned, containing the statement of the attending physician, with all necessary information, and though informed of its mistake the insurer continues therein in its correspondence, and does not send the blank applicable, the beneficiary offering at all times to supply whatever information the insurer required:

INSURANCE—*Continued.*

Held, evidence sufficient of a compliance with the provision of the policy requiring notice within ten days, and the filing of process, to be submitted to the jury. *Ibid.*

15. *Insurance, Accident—Proof of Death—Stipulations as to Suit—Waiver.* Where an insurer denies all liability under its policy of accident insurance, covering the death of the insured, and refuses to proceed with the investigation respecting it, its action is a waiver of its requirements as to the proof of death and the clause in the policy forbidding the bringing of any suit upon it until after the three months from the filing of the proofs. *Ibid.*

16. *Insurance, Accident—Benefits—Independent Provisions.*—Where a policy of accident insurance by its terms prohibits a recovery of the insured was not wholly and continuously disabled from the date of the accident, and there is also an independent liability created for a beneficiary in case the accident results in death, in an action upon the latter brought by the beneficiary the question of immediate, total, and continuous liability is not included, it applying only to the insured and to his life benefits. *Ibid.*

17. *Insurance, Accident—Policy Contracts—Ambiguity—Interpretation—Premiums—Payment in Advance.*—A policy of accident insurance, in case of ambiguity, is construed favorably to the assured and beneficiary. Where there is evidence that the insurer has accepted payment of quarterly premiums for one year, as in this case, and there is a provision for additional benefits when premiums have been paid in advance for that time, the question of additional benefits was properly left to the jury. *Ibid.*

18. *Insurance, Life—Corporations—Officers—Insurable Interests—Principal and Agent—Statutes.*—Where the manager of a concern employs another to take charge of its insurance department, its soliciting agents, etc., by which a profitable business is built up, upon an agreement that the one producing the business is to receive as compensation a certain part of the profits, it is not conclusive evidence of a partnership between the two, and the corporation has an insurable interest in the life of the manager of its insurance agency, and expressly so under the provisions of our statute, chapter 507, Public Laws 1909. *Trust Co. v. Ins. Co.*, 558.

19. *Insurance, Life—Delivery of Policy—Health of Insured—Duty of Insurer.*—If any time elapses between the application for policy of life insurance and its issuance, it is the duty of the insurer to make inquiry when the policy is delivered as to the condition of the health of the insured, and upon its failure to do so the delivery is conclusive that the policy contract is completed, and binds the parties to the mutual obligations therein imposed upon them. *Ibid.*

20. *Same—Noncontestable Clause—Defenses.*—A clause in a policy of life insurance making it incontestable at the end of a year covers the defense of the alleged bad health of the insured at the time of its delivery, and also that of false and fraudulent statements alleged to have been made by the insured in his application. *Ibid.*

21. *Same—Exceptions.*—Where a policy of life insurance has been issued containing a clause making it noncontestable after the expiration of a year, except for nonpayment of premiums, after that period no defense

INSURANCE—*Continued.*

is available to the insurer, in an action upon the policy, excepting the nonpayment of the premium, as therein stated. *Ibid.*

22. *Insurance, Life—Noncontestable Clause—Insurer's Benefit.*—The noncontestable clause in a life insurance policy is for the benefit of the insurer in increasing its business by assurance that after the maturity of the policy, usually upon the death of the insured, its collection will not be subject to the uncertainty and delay of litigation, or questioned except as to matters therein stated—in this case, the nonpayment of premiums. *Ibid.*

23. *Insurance, Life—Noncontestable Clause—Breach by Insurer—Rights of Insured.*—Upon refusal of the life insurer to perform its part of a policy contract, and its notification thereof to the insured, the latter may elect to consider the policy at an end and recover its just value; or he may sue in equity to have the policy declared in force, or tender the premiums and treat the policy as in force and recover the amount payable according to its terms at maturity. *Ibid.*

24. *Same—Suits—Equity—Cancellation—Consent—Validity of Policy.*—Where a policy of life insurance containing a clause making it noncontestable after the expiration of a year, except for nonpayment of premium, has been delivered and the premium paid therefor, an attempt by the insurer within that time, upon notification to the insured, to cancel the policy with tender of repayment of the premium upon a different ground than that stated in the clause, but not consented to or accepted by the latter, is a breach of the contract by the former; and it is necessary for the insurer, within the stated time, to bring suit in equity for the cancellation of the policy, or it will remain binding and enforcible upon the insurer's death. *Ibid.*

25. *Insurance, Life—Beneficiaries—Conflicting Claimants—Payment Into Court—Parties—Release.*—Where an insurance company admits its liability on a policy matured by the death of the insured, and therein made payable to his children, and the insured has left a will appointing his wife his executrix and directing that his debts be paid out of its proceeds, and in an action thereon all the parties in interest are before the court, the payment into court of the moneys due under the policy will protect the insurer, and render immaterial the question as to the rightful beneficiaries, so far as it is concerned. *Van Dyke v. Ins. Co.*, 700.

INTENT. See Wills, 1; Accord and Satisfaction, 1; Contracts, 5, 13; Equity, 2; Statutes, 10.

INTEREST. See Insurance, 3; Parties, 1; Partition, 1; Courts, 1; Municipal Corporations, 17; Receivers, 4.

INTERPRETATION. See Wills, 13, 14; Constitutional Law, 17, 18; Contracts, 19; Statutes.

INTERVENOR. See Mortgages, 1.

INTOXICATING LIQUORS. See Negligence, 5; Appeal and Error, 27; Judgments, 22; Courts, 4; Indictment, 3.

1. *Intoxicating Liquors—Statutes—Commerce—Carriers of Goods.*—Since the passage of the Webb-Kenyon Act of Congress, a State statute which

INTOXICATING LIQUORS—*Continued.*

makes it a misdemeanor to transport, deliver, etc., any intoxicating beverage in a prescribed locality is valid as to interstate shipments, and enforcible against common carriers violating it. *Express Co. v. High Point*, 167 N. C., 103, cited and distinguished. *S. v. Express Co.*, 753.

2. *Intoxicating Liquors—Beverage—Definition—Local and General Law—Statutes.*—Where a statute prohibits the transportation to and delivery of "intoxicating beverages" in a certain prescribed locality, the language employed includes all the different kinds of liquors named in the general prohibition law, *i.e.*, "spirituous, vinous, fermented, or malt liquors, or intoxicating bitters." *Ibid.*

3. *Intoxicating Liquor—Statutes—Separate Offenses—Criminal Law.*—Section 2, chapter 97, Public Laws 1915, creates two offenses, one for receiving more than one quart of spirituous liquor at one time or at one delivery, and the other for receiving more than one quart in one package; and as to each the statute is constitutional and valid. *S. v. Carpenter*, 767.

ISSUES. See Injunction, 1; Processioning, 1; Evidence, 2, 5; Appeal and Error, 4, 8, 9, 15; Plea in Bar, 1; Tenants in Common, 1; Deeds and Conveyances, 1; Reference, 1; Master and Servant, 13; Municipal Corporations, 6; Actions, 2.

1. *Issues—Pleadings—Appeal and Error.*—When the issues submitted relate to the disputed matter arising from the pleadings, whereunder all competent evidence can be submitted to the jury for their determination, they are sufficient. *House v. Boyd*, 701.

2. *Issues—Ejectment—Burden of Proof—Title—Possession.*—In an action of ejectment the plaintiff must show title in himself to the land in controversy, and that the defendant is in possession, and objection to an issue that it covers more than the land in controversy will not be sustained when the issue is raised by the pleadings, and thereunder the parties are afforded opportunity to introduce all pertinent evidence, and apply it fairly. *Milliken v. Sessoms*, 723.

3. *Issues—Courts—Appeal and Error.*—The framing of issues must be left to the sound discretion of the trial judge, and generally will not be interfered with on appeal when sufficient to fall within the rule required. *Ibid.*

JOINDER. See Actions, 2.

JOINT WILLS. See Wills, 3.

JUDGMENTS. See Recorder's Court, 1; Mortgages, 6; Equity, 5; Receivers, 3; Appeal and Error, 18; Insurance, 5; Railroads, 3; Removal of Causes, 1; Homestead, 1, 3, 4; Drainage Districts, 4; Judicial Sales, 2; Pleadings, 7; Parties, 2; Trusts and Trustees, 3; Arrest and Bail, 2; Banks and Banking, 4; Contracts, 18; Bills and Notes, 7; Courts, 4, 6, 7; Indictment, 2.

1. *Judgments, Consent—Out of Term—Computation of Time.*—Where a consent judgment is entered out of court and out of term, as of the previous term, requiring the defendant to deliver to the plaintiff certain certificates of stock "within sixty days after final judgment," and if not done the plaintiff should recover the par value, the time

JUDGMENTS—*Continued.*

within which the certificates are required to be delivered should be counted from the actual signing of the judgment, and not from the former term or the record entry of the judgment. *Seip v. Wright*, 14.

2. *Judgments Final.*—A judgment is final which decides the case upon its merits without reservation for other and future directions of the court. *Sanders v. May*, 47.

3. *Excusable Neglect—Judgments—Employment of Counsel—Attorney and Client.*—Excusable neglect to set aside a judgment regularly rendered by default of an answer is not shown by the facts that the defendant employed to represent him as attorney of another county, who did not regularly attend the courts or practice in the county of the venue, or promise to go there specifically, but who informed the defendant that it was unnecessary; nor by the further fact that the defendant did not know the date of the term to which the action was returnable when he had been served regularly with summons, stating the time. *Lumber Co. v. Lumber Co.*, 172 N. C., 320, cited and distinguished. *Ham v. Person*, 72.

4. *Judgments—Collateral Attack—Contracts—Drainage Districts.*—Where the liability of petitioners to lay off a drainage district depends, according to their contract with the defendants upon the "dismissal" of the proceedings, and it appears that the proceedings were regularly had in conformity with the statute and dismissed by the clerk, from whose judgment no appeal was taken, the judgment of the clerk cannot be collaterally attacked in an action against the petitioners upon the contract. *Lewis v. May*, 100.

5. *Judgments—Decrees—Middle Names—Correction.*—Where a decree, in a proper action, converts a deed absolute upon its face into a mortgage or deed in trust to secure borrowed money, and it is ascertained that therein the money has been paid, and the mortgagor, holding the equitable title with the naked legal title outstanding, has directed the decree to be made to his wife, but whose middle initial has therein been incorrectly stated by mistake, but her identity as the one intended established as a fact: *Held*, the variation in the middle letter of the name is immaterial, the law recognizing only one Christian name, and it is not required that suit be first brought to correct the decree. *Evans v. Brendle*, 149.

6. *Same—Naked Legal Title—Transferee of Title—Parties.*—As to whether the decree in this case had the effect of vesting the legal title in the holder of the equitable title, not declaring in conformity with the requirements of Revisal, secs. 566, 567, that "it shall be regarded as a deed of conveyance," *quære;* but it appearing from the decree that a mere naked title was outstanding in a mortgagee, and that the mortgage debt had been said: *Held*, the mortgagor, the owner of the equitable title, had a right to demand the conveyance of the legal one, or that it be decreed to himself or to such other as he might designate, in this case his wife, though she had not been made a party to the suit, and their deed would pass a complete title to their purchaser. *Ibid.*

7. *Judgments—Equity—Trusts—Estates—Rights—Execution—Deeds and Conveyances—Sales.*—Where it is shown on the face of the writing that one person holds the legal title to lands in trust for another, in whole or in part, the latter has an equitable estate, which is subject

JUDGMENTS—*Continued.*

to execution under judgment against him, though it may be necessary for him to enforce his claim in equity; but where there is no declaration of the trust appearing in the instrument, and the holder of the legal title denies the equitable one, requiring a decree to enforce it, the latter, until the decree is entered in his favor, has a mere right, and no estate subject to execution. *Ibid.*

8. *Same—Purchaser.*—Where pending a contested suit to declare a deed absolute upon its face into a mortgage, a judgment has been obtained against the one asserting his right, and the lands sold under execution, and thereafter the equity sought in the suit has been established by decree of the court: *Held*, the purchaser at the execution sale, or his grantee, acquired no title to the lands, as the judgment had no estate in the lands at the time of the sale. *Ibid.*

9. *Judgment—Partition—Tenants in Common—Title—Estoppel.*—Judgment in proceedings to partition lands will not operate to estop the parties from denying that the several tenants in common had an estate in fee, when the question of title was not therein involved or put at issue. *Weston v. Lumber Co.*, 162 N. C., 165; *s. c.*, 169 N. C., 399, cited as controlling. *Olds v. Cedar Works*, 161.

10. *Judgments—Pleadings—Evidence.*—When judgment is rendered against a litigant upon the pleadings, the averments in his favor will be taken as true and interpreted in a light most favorable to his claim. *Moore v. Bank*, 180.

11. *Judgments—Mortgages—Execution—Trusts—Statute of Uses—Statutes.* Revisal, sec. 629, subsection 4, permitting execution under judgment against personalty held in trust, does not apply when the trustee holds under a mixed trust, as where the instrument is existent and the debt it secures remains unpaid; but only where the naked title is outstanding with the right of the *cestui que trust* to demand it as a matter of right under the Statute of Uses. *Hardware Co. v. Lewis*, 290.

12. *Judgments—Implication of Law—Beginning of Term.*—A judgment rendered against a corporation does not relate back, by implication of law, to the beginning of the term, so as to create a lien on the corporate property as against the vesting of the title in a receiver, under the statute (Revisal, sec. 1224), who had in the meanwhile been appointed. Revisal, secs. 573, 574. *Hardware Co. v. Holt*, 308.

13. *Same—Consent of Corporation—Rights of Creditors.*—The consent of a defunct corporation that a judgment rendered should relate back to a preceding term of court cannot affect the vesting of the title in the receiver, representing the general creditors, who has been appointed in the meanwhile. *Ibid.*

14. *Judgments—Default—Answer Stricken Out—Collateral Attack—Appeal and Error.*—The legal authority of the trial court to strike out defendant's answer and render judgment against him cannot be collaterally attacked on appeal from a refusal of that court to set aside the judgment for mistake, etc., arising from a different and later matter. *Lumber Co. v. Cottingham*, 323.

15. *Judgments—Continuance of Case—Terms—Bonds—Duty of Client—Neglect of Counsel.*—It is the duty of a party to an action, or his duly authorized agent, who is present and acting for him, to comply with agreed terms of an order granting him a continuance, and not the duty of his attorneys, and the neglect of the latter therein is not sufficient

JUDGMENTS—*Continued.*

ground to set aside the judgment rendered against him in consequence. *Ibid.*

16. *Judgments Set Aside—Offer of Party—Contracts—Complaint—Excusable Neglect—Courts.*—An offer privately made by the plaintiff that a judgment *pro confesso* in his favor will be set aside upon the defendant's giving a mortgage on the lands described in the complaint to indemnify him against damages, etc., must be complied with according to its terms, and the courts, in passing upon the question of defendant's excusable neglect therein, are without power to vary the terms of the offer, and set aside the judgment previously rendered. *Ibid.*

17. *Judgments—Verdict—Interpretation—Insurance, Life—Premium Note—Tender.*—While the verdict of the jury must, as a general rule, establish the facts required to support the judgment, it may be interpreted and allowed significance by reference to the pleadings, testimony, and charge of the court; and where upon an issue as to tender of payment for a premium note for life insurance the jury has responded "Yes," and in the principal sum of the note, leaving off 65 cents interest, and in applying the principle referred to: *Held*, the verdict was sufficient to support a judgment in the plaintiff's favor, especially as the issue was inadvertently answered under the direction of the court. *Owens v. Ins. Co.*, 373.

18. *Consent Judgments—Contracts—Corporation Commission—Police Powers—Railroads—Crossings—Switches—Public Safety.*—A consent judgment is regarded as a contract between the parties; and when thereunder one railroad company is permitted by another to cross its track upon condition that it will put in such switch system as the other may designate, and the system has been designated accordingly, the Corporation Commission has no power to set aside the contract, when it is found by the Commission that the systems contended for by each of the railroad companies are equally safe and that the interests of the public are not involved. *R. R. v. R. R.*, 413.

19. *Judgments—Presumptions—Inferior Courts—Clerks of Court—Probate.* The presumption of the regularity of proceedings terminating in judgment in the Superior Court having jurisdiction of the parties and the subject-matter applies to courts of inferior or more limited jurisdiction, as, in this case, the action of the clerk of the Superior Court of the proper county admitting a will to probate in common form. *Starnes v. Thompson*, 466.

20. *Same—Burden of Proof.*—Where a party seeks to set aside the probate of a will as a cloud upon his title to lands, the burden of proof is upon him to show, in a proper suit, such substantial defects in the proceedings as would avoid the action of the clerk in admitting the will to probate. *Ibid.*

21. *Judgments—Clerks of Court—Probate—Collateral Attack—New Counties.*—The action of the clerk of the Superior Court of the proper county admitting a will to probate cannot be attacked collaterally, in a suit brought to declare the probate void for irregularity, as a cloud upon the plaintiff's title to lands; and the fact that the lands, a part of a larger body, were situate and suit was brought within a new county cut off in part from the original one in which the probate was allowed, does not alter the application of the principle, there being *bona notabilia*, in the county, when the probate was had. *Ibid.*

JUDGMENTS—*Continued.*

22. *Judgment Suspended—Conditions — Waiver — Intoxicating Liquors — Criminal Law.*—A defendant who has been convicted of selling intoxicating liquors in violation of our prohibition laws before a court of competent jurisdiction may waive his right of appeal and consent to a judgment suspending the sentence upon condition that he appear before the court from time to time and show that he has not since violated the law. *S. v. Burnette*, 734.

23. *Same—Orders—Execution of Sentence—Courts—Jurisdiction—Statutes.* A trial justice, under the statute, is but the presiding officer of his court, and where the court has suspended judgment against the prisoner upon condition that he report to the court from time to time and show his good behavior, he may not thereafter cause the defendant to be imprisoned or sent to the roads for violating the conditions imposed, except in open court regularly sitting for the transaction of business, and the court must afford him opportunity to be heard, and to employ counsel, if he so desires; and a proceeding held privately in the office of the justice, wherein he attempts to order the execution of the judgment, is without warrant of law and of no effect. *Ibid.*

24. *Judgment Suspended—Conditions—Good Behavior—Sentence—Unlawful Procedure—Appeal and Error.*—It appearing in this case that the trial court suspended judgment in a criminal action upon certain conditions, without adjudication of the fact whether the defendant had complied therewith, and had ordered the execution of the sentence and the arrest of defendant without warrant of law, it is *Held*, that the defendant give a bond in a certain sum for his appearance before the criminal court at a time to be fixed by it, giving him reasonable opportunity to be heard, employ counsel, etc., and in default of his giving the bond, the court issue a warrant or capias for the purpose of investigation. *Ibid.*

25. *Judgments—Motions in Arrest—Indictment—Accessory—Statutes.*—A motion in arrest of judgment is permissible only where the indictment is insufficient upon its face; and where the charge therein is murder, it is sufficient to sustain a conviction in a less degree, Revisal, sec. 3269; and a motion in arrest that upon the evidence the accused was an accessory and not a principal will not be granted. *S. v. Bryson*, 803.

JUDICIAL SALES. See Mortgages, 2.

1. *Judicial Sales—Mortgages—Purchasers — Destroyed Property — Negligence—Damages.*—Where chattels are sold under execution of a judgment, subsequent to the lien of a prior registered mortgage, and the mortgagee has become the successful bidder under the mistake that his debt was first to be paid; and it appears that the value of the property was insufficient to pay his debt; he is not liable to the judgment creditor for damages for the destruction of the property thereafter by fire, while in his possession, in the absence of evidence of negligence on his part. *Hardware Co. v. Lewis*, 290.

2. *Judicial Sales—Mortgages—Judgments—Equity of Redemption—Priorities.*—A mortgagee of lands, purchasing at an execution sale under a judgment to which he is a stranger, sold subject to his mortgage, can acquire only the equity of redemption (Rev., sec. 629 (3)), subject to the judgment debt. *Woodruff v. Trust Co.*, 546.

JUDICIAL POWERS. See Municipal Corporations, 8.

JURISDICTION. See Pleadings, 4; Partition, 1; Courts, 1, 4, 5; Arrest and Bail, 3; Commerce, 1; Judgments, 23; Appeal and Error, 42.

JURORS.

1. *Jurors—Talesmen—Selection—Call from Outside—Sheriffs — Courts — Statutes.*—The primary duty of selecting tales jurors for the trial of a cause is with sheriffs, and their deputies acting for them, under the control and supervision of the court; permitting these executive officers so acting to go outside for the purpose or notify them in advance when such course is best promotive of the ends of justice. Revisal, sec. 1967. *Lupton v. Spencer*, 126.

2. *Jurors—Sheriffs—Relationship to Parties—Interest.*—Whenever it is made to appear that the sheriff has an interest, direct or indirect, in the cause of action for the trial of which tales jurors are to be called, or bears such a relation to the parties thereto as to render him an improper or unsuitable person to perform this duty, the court may designate another for the purpose. Revisal, sec. 1968. *Ibid.*

3. *Same—Appeal and Error—Objections and Exceptions—Laches—New Trials—Impartial Panel.*—Where objection has been made to the sheriff's calling in tales jurors for the trial of a cause on the grounds that he is a cousin of one of the parties, and that the action involved title to lands, which his brother had warranted, and the court designates his deputy for the purpose, who reads the names of jurors from a list, informing counsel, in reply to his question, that he, the deputy, has made it; and the jury being selected, the trial proceeds to verdict, after which the sheriff, in the presence of the court, counsel, and parties, states that he had made the list of jurors, whereupon the injured party insists upon his right to an impartial panel, it is *Held*, under the facts stated, he was not guilty of laches, and his motion to set aside the verdict, and for a new trial, should be sustained as a matter of right. *S. v. Maultsby*, 130 N. C., 664, cited and distinguished. *Ibid.*

4. *Jurors — Qualifications — Court's Discretion — Homicide—Apppeal and Error.*—Where jurors in the trial of a capital felony had largely read the newspaper accounts of the killing, admit forming an opinion of the prisoner's guilt, one of them stating that unless the prisoner proved he was innocent he would render a verdict of guilty; and upon examination by the counsel and judge the witness stated he could eliminate all he had heard, be governed by the evidence, and give the State and the prisoner an absolutely fair trial, and the prisoner having exhausted all his peremptory challenges, the jurors were permitted to serve: *Held*, the matter was within the reasonable discretion of the trial judge, and not reviewable. *S. v. Terry*, 761.

JURY. See Statutes, 7; Venire, 1.

JUSTICE'S COURT. See Recorder's Court, 1.

1. *Justices' Courts—Pleadings—Verified Statements—Oral—Pleadings.*—The requirements of Revisal, sec. 488, that pleadings filed subsequent to a verified pleading, excepting demurrer, shall likewise be verified, applies only to courts of record, and has no application to pleadings in a justice's court, which is not a court of record, and as to which the statute, Revisal, sec. 488, provides that they may be "written or oral." *Building Co. v. Hardware Co.*, 55.

JUSTICE'S COURT—*Continued.*

2. *Same—Appeal—Superior Court—Trials—Evidence—Questions for Jury.* A paper writing introduced before a justice of the peace, purporting upon its face only to be a verified account upon which judgment is sought, lacking the requisites of a complaint, under the provisions of Revisal, 467, in failing to state the title of the cause, the name of the county and parties, will not be considered as a verified complaint on the trial in the Superior Court, requiring the answer thereto be verified; and upon an oral answer denying the liability and raising the issue, the question is for the determination of the jury under proper evidence. *Ibid.*

KNOWLEDGE. See Malicious Prosecution, 5; Deeds and Conveyances, 2.

LABORATORY OF HYGIENE. See Statutes, 16.

LACHES. See Jurors, 3; Appeal and Error, 35, 37.

LANDLORD AND TENANT.

Landlord and Tenant—Sale of Crop—Landlord's Consent—Contracts.—In an action against a tenant to recover damages for his failure to deliver a crop under his contract of sale, the defense that the tenant had not settled with his landlord, and that the contract was therefore illegal, is not available, when it is shown that the landlord had consented to the sale and had thereafter taken possession of the crop at the tenant's request. *Lee v. Melton*, 704.

LANDS. See Trusts, 1; Deeds and Conveyances, 17.

LEGISLATION. See Constitutional Law, 3.

LEGISLATIVE CONTROL. See Counties, 5.

LEGISLATIVE DISCRETION. See Condemnation, 2.

LEGISLATURE. See Constitutional Law, 11, 14.

LETTERS. See Executors and Administrators, 2; Statute of Frauds, 5; Evidence, 9.

LEVY. See Mortgages, 6.

LIABILITY. See Public Officers, 2.

LICENSE. See Register of Deeds, 1, 2; Statutes, 4.

LIENS. See Homestead, 3; Drainage Districts, 4.

1. *Liens—Buildings—Loans—Resulting Trusts—Husband and Wife.*—The loan of money by a wife to her husband and used by him in building a house upon his own land does not, in the absence of contract or statute, give the wife a lien upon the house or the land for its repayment, or create a resulting trust in her favor. *In re Gorham*, 272.
2. *Liens—Commingling of Goods—Husband and Wife—Equity.*—Where the wife has permitted the husband to use her money indiscriminately with his own in erecting a building on his own land, so that the amount may not be ascertained, the doctrine of the admixture of goods would prevent her acquiring a lien for its repayment, were she otherwise entitled to it. *Ibid.*

LIMITATION OF ACTIONS. See Tenants in Common, 3, 6; Homestead, 3; Drainage Districts, 4; State's Lands, 4; Statute of Limitations.

1. *Limitation of Actions—Parol Trusts—Deeds and Conveyances.*—This suit upon a parol agreement made in 1911, and brought in 1916, to enforce a parol trust in land thereunder is held not to be barred by the statute of limitations. *Allen v. Gooding*, 93.
2. *Limitation of Actions—Possession—Dower—Heirs at Law—Title—State.* The possession of the widow under dower in the lands of her husband's estate may be tacked to that of her husband for the purpose of perfecting title in the heir claiming by adverse possession under the deed to his ancestor as color of title; and when sufficient for twenty-one years will take the title out of the State. *Jacobs v. Williams*, 276.
3. *Same—Adverse Possession—Continuity.*—Evidence in this case of getting turpentine from the *locus in quo*, cultivating the lands, etc., on the entire tract, by the grantee under the deed, relied upon as color, also by the widow after his death, as to her dower and other lands, and by the heirs at law, claiming title by continuous adverse possession for more than twenty-one years in all, is held sufficient to take the title out of the State. *Ibid.*
4. *Limitation of Actions—Nonsuit—Payment of Costs—Second Action.*—Revisal, sec. 370, is an extension of time beyond that allowed by the general statute, in the instances stated, including nonsuit, and the amendment in the laws of 1915 (Greg. Rev., Biennial, 1915, p. 350) requiring the payment of costs has no application when the second action has been brought within the time permitted by the general law. *Summers v. R. R.*, 398.
5. *Limitation of Actions—Religious Societies—Independent Congregations—Trustees—Deeds and Conveyances—Statutes.*—A congregational church under which class each congregation is independent and not a part of a larger system, holding, as such, real property under known and visible metes and bounds for a hundred years, and using it for religious purposes, acquires a fee-simple title, independent of the validity of its deed, Revisal, sec. 2672, and its trustees under the direction of the church or congregation properly obtained, may convey such title to the purchaser. Revisal, secs. 2670, 2671. *Gold v. Cozart*, 612.
6. *Limitation of Actions—Deeds and Conveyances—Color of Title—Adverse Possession—Trials—Evidence—Instructions.*—Where in an action to recover lands the plaintiff shows title out of the State, and a junior deed to that under which the defendant claims, creating a lappage, the *locus in quo*, and there is evidence tending to show that the plaintiff had entered into possession under his junior deed and exercised exclusive and continuous ownership to the boundaries of his deed, and under color thereof, for seven years, it is sufficient to ripen an absolute fee-simple title in him; and when the defendant's evidence is corroborative, the court may instruct the jury to answer the issues in plaintiff's favor as a matter of law. *Johnson v. McKay*, 718.

LIVE STOCK. See Carriers of Goods, 5, 6.

LOAN. See Wills, 4; Liens, 1.

MAIL AGENTS. See Carriers of Passengers, 7.

MALICE. See Malicious Prosecution, 1.

Malice—Probable Cause—Evidence.—Malice in prosecuting a criminal action may be inferred by the jury from a want of probable cause, in an action for damages for malicious prosecution. *Bowen v. Pollard*, 130.

MALICIOUS PROSECUTION.

1. *Malicious Prosecution—Trials—Malice—Burden of Proof.*—The plaintiff, in his action for malicious prosecution, must show malice of the defendant in having prosecuted the criminal action against him, and where the lack of probable cause is admitted, testimony, in the civil action, of the magistrate before whom the criminal case had been tried, "that said prosecution was frivolous and malicious, and he taxed the plaintiff with cost," is incompetent, and its admission constituted reversible error to the defendant's prejudice. *Holton v. Lee*, 105.
2. *Malicious Prosecution—Probable Cause—Burden of Proof—Trials—Evidence—Nonsuit.*—In an action for damages for malicious prosecution the burden is on the plaintiff to show the institution and termination of the criminal action, that it was without probable cause and with malice, and that the defendant participated therein; and if there is evidence in plaintiff's behalf which, taken in the light most favorable to him, tends to establish the requisite facts, a judgment of nonsuit should not be granted. *Bowen v. Pollard*, 129.
3. *Malicious Prosecution—Probable Cause—Evidence—Prima Facie Case.* Probable cause, in an action for malicious prosecution, is *prima facie* established by the fact that the committing magistrate in the criminal action required a bond for the appearance of the defendant therein at the Superior Court, and there the grand jury found a true bill against him, which the defendant may rebut by his own evidence in his action for malicious prosecution. *Ibid.*
4. *Malicious Prosecution—Probable Cause—Criminal Action—Evidence—Prosecutors.*—Where a plaintiff in an action for damages for malicious prosecution has been arrested for using a part of a crop under attachment, and there is evidence tending to show that he owed defendants nothing, or had replevied the crop, or that the officer had not taken possession, but left it exposed for several weeks, when the plaintiff's wife, without his knowledge, had it housed and fed some to his team; that the officer who swore out the criminal warrant knew of these facts, offered to take $5 for the damages, which was agreed to by the lienee, etc., who, after conviction by the magistrate, refused to go on plaintiff's bond, with statement he would not do this and prosecute him, too: *Held*, sufficient upon the question of want of probable cause in the criminal case, and that both the officer and lienee, defendants in the civil action, participated therein. *Ibid.*
5. *Malicious Prosecution—Partnership—Knowledge.*—A partner who is not aware of a criminal prosecution by the other, and was absent and did not know thereof until after its termination, is not liable, by the mere fact of partnership, in an action for damages for malicious prosecution. *Ibid.*

MANDAMUS. See Municipal Corporations, 6.

MAPS. See Cities and Towns, 1.

MARRIAGE AND DIVORCE. See Criminal Law, 7.

Marriage and Divorce—Alimony—Findings—Appeal and Error—Statutes. To sustain on appeal an order of the trial judge allowing alimony to the wife *pendente lite*, in an action for divorce *a mensa*, it is necessary for the judge to have found the facts, upon conflicting evidence, upon which he had based his order; and his finding only that the plaintiff had made out a *prima facie* case of abandonment is insufficient. Revisal, sec. 1566. *Easeley v. Easeley*, 530.

MARRIED WOMEN. See Husband and Wife, 3.

MASTER AND SERVANT. See Negligence, 2, 3, 4; Insurance, 1.

1. *Master and Servant—Employer and Employee—Trials—Evidence—Negligence—Nonsuit.*—Where an employee of a telephone company is engaged in attaching its cables to a messenger wire, 20 feet from the ground, and the proximity of a high-power wire from another company has made it dangerous for him to work between a "span" of poles, to which he has called the attention of his foreman, who instructs him to leave that "span" and work beyond, necessitating his working around a pole of the power company which does not appear to him to be dangerous to do, and there is evidence that the foreman knew of the danger at this pole at the time; in his action against the telephone company for damages he received at the power company's pole, it is *Held*, that a judgment of nonsuit was properly disallowed, the negligence of the foreman in failing to warn the employee being that of a vice-principal of the defendant company and attributable to it. *Sumner v. Telephone Co.*, 28.

2. *Same—Trespasser.*—Where a telephone and power company are sued for damages by an employee of the former arising from an injury from shock of electricity occasioned by the latter's imperfectly insulated wires, and received by the employee of the telephone company while acting under the instruction of his foreman, in attempting to get around the pole of the power company while hanging his principal's cable on a messenger wire 20 feet above the ground: *Held*, both the telephone company and its employee were trespassers upon the pole of the power company, and the latter company being only liable for injuries willfully or wrongfully inflicted, a judgment of nonsuit upon the evidence in this case should have been rendered as to that company. *Ibid.*

3. *Master and Servant—Evidence—Negligence—Approved Machinery—Trials—Nonsuit.*—Where the plaintiff, employed to operate and care for defendant's printing press, has been injured by his hand having been caught into its cog-wheels, while removing paper caught therein, and which it was his duty to do, and there is evidence tending to show that the press was antiquated and the cogs should have been shielded and the machine supplied with a safety lever, either of which would have avoided the injury: *Held*, sufficient upon the issue of defendant's actionable negligence, and motion to nonsuit was properly overruled. *Hux v. Reflector Co.*, 97.

4. *Master and Servant—Safe Place to Work—Approved Instrumentalities—Negligence—Evidence.*—Upon evidence tending to show that the defendant had employed the plaintiff, a skillful and experienced mechanic, to look after and keep in repair his piping, engines, boilers, and other machinery, and that the plaintiff had informed him that a

MASTER AND SERVANT—*Continued.*

certain joint, L, made of cast-iron, was unsafe for the purpose for which it was used; that it should be malleable iron or brass, which the defendant disregarded, and it resulted in the injury complained of and received by the plaintiff in the discharge of his duties, it is sufficient to be submitted to the jury upon the issue of defendant's actionable negligence, though the L joint and other instrumentalities used in connection therewith are shown to be those which were known, approved, and in general use for like purposes at the time. *Taylor v. Lumber Co.*, 112.

5. *Same—Independent Cause—Proximate Cause—Contributory Negligence.* While employed by the defendant to look after its engines, pipes, boilers, etc., the plaintiff was working at the back of a boiler, and hearing an explosion, he went to investigate. He was prevented from seeing his way by the escape of steam occasioned by the defendant's negligent use of an improper elbow in the piping in front of the boiler, and he stepped or slipped into the boiler pit, in which hot water had accumulated from the escaping steam, which he could not see for the steam, resulting in the injury complained of. *Held*, the slipping of plaintiff's foot was not an independent cause, relevant in this case only to the issue of contributory negligence; and the negligent use of the elbow, resulting in the escape of the steam, was a continuing cause and proximate to the injury. *Ibid.*

6. *Master and Servant—Dangerous Employment—Negligence—Assumption of Risks.*—The fact that an employee engaged in helping to load a skidder on defendant's train, in the course of his employment, was aware of the danger of such work does not preclude his recovery for an injury resulting from the negligent and unexpected movement of the train, without the signal or warning customarily given under the circumstances. The instructions of this case upon the questions of negligence and proximate cause approved. *Pritchard v. R. R.*, 157 N. C., 102; *Mill Co. v. R. R.*, 160 N. C., 221. *Odom v. Lumber Co.*, 134.

7. *Master and Servant—Negligence—Scope of Employment—Orders—Volunteer.*—The plaintiff, an employee of the defendant, while engaged, in the course of his employment, in loading a skidder upon a logging train, attempted to get a chisel for his superior, under his order, and was injured by the negligent movement of the train without signal or warning: *Held*, he was not a volunteer in so acting; and, if otherwise, the defendant had no right to negligently injure him. *Ibid.*

8. *Master and Servant—Negligence—Assumption of Risks—Evidence—Trials—Questions for Jury.*—In an action for damages to an employee sustained while loading, in the course of his employment, logs upon a truck with skid poles, etc., the evidence tending to show that his superior officer was directing the work and did not furnish skid poles flattened at the end, and nail them down in the customary or usual manner, but furnished those which were round at the end, and not fastened, and the injury complained of resulted: *Held*, sufficient upon the issue of defendant's actionable negligence, and that the doctrine of assumption of risk is inapplicable, the injury having been caused by the defendant's own and independent negligence. *Hickman v. Rutledge*, 178.

9. *Master and Servant—Federal Employers' Liability Act—Negligent Death—Beneficiaries—Distribution—Statutes.*—The Federal Em-

MASTER AND SERVANT—*Continued.*

ployers' Liability Act creates three classes, separate and distinct from each other, who may recover damages for the negligent death of an employee, the existence of one to be benefited in any preceding class excluding those in next class following, etc., and the first such class being the surviving widow and the child or children of such employee, and the act not providing for the method of distribution, it is governed by the State statute, and when there is only a widow and one child, the former receives one-third and the latter two-thirds of the amount. *In re Stone*, 208.

10. *Master and Servant—Federal Employers' Liability Act—"Dependents" —Enlarged Recovery—Appeal and Error—Objections and Exceptions.* When under the Federal Employers' Liability Act a recovery in the third class is enlarged by erroneously including those not "dependents," exceptions thereto should be aptly and duly taken upon the trial; but where the amount of the recovery has been admitted, as by compromise in this case, the question of the method of its distribution in the first and second class depends upon the State statute of distribution. *Ibid.*

11. *Master and Servant—Federal Employers' Liability Act—Distribution—Courts—Questions of Law—Trials.*—Under our statute, the method of distribution of a recovery under the Federal Employers' Liability Act among the widow and children of the deceased employee is one of law, not requiring the intervention of the jury. *Ibid.*

12. *Master and Servant—Negligence—Assumption of Risks.*—The defense of assumption of risk is one growing out of the contract of employment and extends only to the ordinary risks naturally and usually incident to the work that the employee has undertaken to perform, and does not include risks and dangers incident to a failure on the part of the employer to perform his own nondelegable duties. *Howard v. Wright*, 339.

13. *Same—Issues—Instructions—Appeal and Error—Harmless Error.*— Where the issues are presented in an action for damages against an employer for failing to provide his employee a safe place to work in the performance of his duties, as to negligence, contributory negligence, and assumption of risk, the defense of assumption of risk is referable to the issue as to contributory negligence, and where the judge has properly charged the jury on that issue, it will not be held for reversible error that he failed to charge them upon the issue as to assumption of risks. *Ibid.*

14. *Master and Servant—Dangerous Employment—Nondelegable Duties.*— The owner, who is employing his workmen, under the superintendence of another, to build his dwelling, may not escape liability for damages caused by the negligent failure of his superintendent to provide a safe scaffold for his employees to work on, as such duty may not be delegated to another to perform and escape such liability. *Ibid.*

15. *Master and Servant—Employer and Employee—Independent Contractor —Dangerous Work—Contracts.*—A contract to erect a reinforced concrete bridge for a railroad company is not necessarily for work so inherently dangerous as to fix liability upon the company, when the relation of independent contractor has been established, for a negligent injury inflicted upon an employee of the contractor in the course of his employment. *Gadsden v. Craft*, 418.

MASTER AND SERVANT—*Continued.*

16. *Master and Servant—Employer and Employee—Independent Contractor—Respondeat Superior—Contracts.*—The relation of independent contractor for the building of a bridge for a railroad company does not arise under the terms of the contract, reserving to the company's engineer the authority to direct the work and issue certificates of payment therefor when done to his satisfaction; and discretionary right to employ and pay laborers and others having claims, upon conditions relating to the progress of the work, and to such additional work to that specified as may thereafter be determined upon, with the right to terminate the contract in whole or in part; and the doctrine of *respondeat superior* applies in an action brought by an employee of the contractor to recover damages for a personal injury negligently inflicted upon him while engaged in the course of his employment. *Ibid.*

17. *Master and Servant—Employer and Employee—Negligence—Evidence—Nonsuit—Trials.*—Where in an action for damages against a railroad company for a personal injury the negligence alleged is the failure of the defendant to provide a proper ladder upon which the plaintiff was obliged, in the course of his employment, to go to the top of a water tank, and the plaintiff's evidence tends to show that the ladder had two defective rounds, and the injury was received by his catching hold of an iron pipe at the side of the ladder, which he knew was weak, and for an entirely different purpose; and without evidence as to his position on the ladder at the time or his nearness to the defective rounds: *Held*, upon the evidence the proximate cause of the injury was his catching hold of the weak pipe, and not the defective rounds of the ladder, and the defendant's motion to nonsuit was properly allowed. *Wolfe v. R. R.*, 595.

MATTERS OF LAW. See Deeds and Conveyances, 3; Municipal Corporations, 7.

MEETINGS. See Corporations, 7, 9.

MEMORANDA. See Evidence, 1.

MENTAL CAPACITY. See Wills, 5.

MESSAGES. See Telegraphs, 1.

MISTAKE. See Appeal and Error, 8.

MORTGAGES. See Drainage Districts, 1; Deeds and Conveyances, 7, 19; Equity, 5; Judgments, 11; Constitutional Law, 6; Judicial Sales, 1, 2; Tenants in Common, 5; Parties, 3.

1. *Mortgages—Sales—Agreements to Purchase—Statute of Frauds—Res Judicata—Estoppel—Intervenor—Subsequent Encumbrance.*—Where a mortgagor of lands has attempted to carry out an alleged arrangement with another that he will bid in a part of the land at a price sufficient to pay off the lien, and it appears that there was no writing to bind such other person to the alleged transaction, and it results in his denying the right of such other to bid in the land for him, which the court sustains without appeal taken, resulting in a resale of the land to pay the mortgage debt; thereafter a second encumbrancer may not intervene and set up the same matter, contending that the first

MORTGAGES—*Continued.*

mortgage had been satisfied, and ask that the junior mortgage and the sale thereunder be accordingly set aside. *Sanders v. May*, 47.

2. *Mortgage Sales—Proceeds—Judicial Sales—In Custodia Legis.*—The proceeds of a sale of lands under a power thereof contained in a mortgage are not in *custodia legis*, or subject to its control, as in judicial sales. *Ibid.*

3. *Mortgages—Sales—Places of Sales—Contracts—Statutes.*—The requirement of Revisal, sec. 641, refers to sales under a foreclosure of a mortgage by order of court, and when made solely under the power of sale directed by the mortgage, the place of the sale therein designated controls; nor is this affected by Revisal, sec. 1042, which omits any requirements as to the place of sale, but provides for the advertisement at the courthouse door of the county wherein the land is situated, and is directory only. *Palmer v. Latham*, 60.

4. *Same—New Counties.*—Where before the creation of a new county a mortgage is given on lands directing that the sale under the power thereof, be made, on default, at the courthouse door of that county, and the lands fall within a new county thereafter created, objection to the validity of the sale merely because it was made at the designated place cannot be sustained. *Ibid.*

5. *Mortgages—Place of Sale—Subsequent Statutes.*—Statutes changing the place of sale of lands under a mortgage cannot apply to mortgages or deeds of trust executed prior to the enactment. *Ibid.*

6. *Mortgages, Chattel—Levy—Judgments.*—A sale under levy of an execution on personal property subject to a prior registered, existent, and unpaid mortgage is a nullity. *Hardware Co. v. Lewis*, 290.

7. *Mortgages—Household Furniture—Husband and Wife—Statutes—Constitutional Law.*—Revisal, sec. 1041, providing that a mortgage on the household and kitchen furniture shall be void unless the wife join therein and her privy examination taken in the manner prescribed by law as on conveyances of real estate, is in the exercise of the police power of a State and promotive of its economic welfare and public convenience and comfort, and designed for the protection of the home, and is a constitutional and valid enactment. *Thomas v. Sanderlin*, 329.

8. *Mortgages—Husband and Wife—Household Furniture—Pianos—Statutes.*—A piano owned by the husband and placed in his home for the use of his wife and daughters, and so used by them, is included under the statutory terms, "Household and kitchen furniture," as used in Revisal, sec. 1041, and a chattel mortgage thereof by the husband is invalid unless the wife signs as directed by the statute. *Ibid.*

9. *Mortgages—Foreclosure Sale—Deeds and Conveyances—Recitals—Presumptions—Burden of Proof.*—Where a deed made in pursuance of a sale of land by foreclosure under a mortgage sufficiently recites the facts thereof, it will be presumed to have been regularly made, and the burden of proof is on the party attacking its regularity to establish to the contrary. *Troxler v. Gant*, 422.

MORTUARY TABLES. See Damages, 1.

MOTION IN ARREST. See Indictment, 3.

MOTIONS. See Sales, 3; Appeal and Error, 6, 25, 35; Divorce, 1; Arrest and Bail, 2; Constitutional Law, 22; Judgments, 25.

MUNICIPAL CORPORATIONS. See Statutes, 1, 12; Appeal and Error, 1, 28; Constitutional Law, 3, 4, 7, 19; Statute of Frauds, 2; Venue, 1, 3, 4; Criminal Law, 3.

1. *Municipal Corporations—Contracts—Debts—Necessary Expenses—Constitutional Law—Statutes.*—Our Constitution, Art. VII, sec. 7, authorizes municipal corporations to contract debts for their necessary expenses, and to make provision therefor without the approval of the voters therein, subject, however, to legislative control. *Swindell v. Belhaven*, 1.

2. *Same—Electric Lights—Water-works—Sewerage—Bond Issues—Special Statutes.*—The right given by the Constitution to municipalities to contract debts for their necessary expenses without the approval of the voters therein has been construed by our Supreme Court to include within the meaning of such words, expenses for acquiring and installing electric lights, water-works, and sewerage; and by the adoption of the same words in the Act of 1915, ch. 131, sec. 1, it will be presumed that the Legislature was aware of the former decisions and had adopted the same meaning, and bonds issued by a municipality for such purposes are regarded as for necessary purposes, and their validity does not depend upon the approval of the voters, unless required by its charter or other special or local legislation. *Ibid.*

3. *Municipal Corporations—Cities and Towns—Negligence—Defective Streets—Instructions—Appeal and Error.*—In an action against a municipality for the alleged negligent killing of an intestate, who was thrown from his falling wagon, caused by a defective street, indefinite evidence was admitted without objection tending to show other defects in the street. *Held*, it should be confined to similar defective conditions in the immediate vicinity of the occurrence as tending to show the existence of the particular defect causing the injury, and actual or constructive notice thereof to the municipal authority; but an instruction that entirely excludes such evidence, which was admitted without objection, from the consideration of the jury is reversible error to the plaintiff's prejudice. *Dowell v. Raleigh*, 97.

4. *Municipal Corporations—Negligence—Defective Streets — Notice.* — A municipality is not liable in damages caused by a defective condition of its street unless it is shown that it had actual or constructive notice thereof. *Fitzgerald v. Concord*, 140 N. C., 10. *Ibid.*

5. *Same—Contributory Negligence—Burden of Proof.*—In an action against a municipality to recover damages for an alleged negligent death of an intestate, where there is supporting evidence, the jury must find that there was a dangerous defect in the street, there by reason of defendant's negligence, or its failure to repair, after actual or constructive notice, and that it, and not the defective wagon, from which the intestate was thrown, if such was defective, was the proximate cause; the burden being upon plaintiff to show negligence, and upon defendant to show contributory negligence. *Ibid.*

6. *Municipal Corporations—Cities and Towns—Building Permits—Issues—Mandamus.*—Where a city, under an ordinance, with legislative authority in such matters, has issued a permit to build an additional room to a residence, and thereafter has recalled the permit pending

MUNICIPAL CORPORATIONS—*Continued.*

the settlement of a dispute as to whether it would be situate upon an alley claimed to have been widened, the word "unlawful" used in the issue as to the refusal of the city authorities to grant the permit is a matter of law and surplusage; and upon the finding by the jury that the alley had not been widened and that the room would not be thereon, a mandamus is the proper remedy, though the form of the issue was incorrect. *Clinard v. Winston-Salem*, 356.

7. *Municipal Corporations—Cities and Towns—Building Permits—Threats—Trials—Matters of Law.*—Where under a valid ordinance a city has recalled a permit to build an additional room to a residence, and its officer has informed the owner that he would be liable under the ordinance if he built it until a certain matter in dispute as to the width of the alley had been settled, the circumstances afford no evidence that the owner had been prevented from using his own property by threats of indictment arbitrarily made, and an issue to this effect, in an action by the owner, should be answered "No" as a matter of law. *Ibid.*

8. *Municipal Corporations—Cities and Towns—Building Permits—Judicial Powers—Damages.*—The exercise of the power by a municipality, under valid ordinance, to grant or refuse a building permit or license, is a governmental function, for which the city cannot be held liable in damages; though liability may attach to the officials, individually, in acting corruptly or oppressively in refusing it. *Ibid.*

9. *Municipal Corporations—Cities and Towns—Police Powers—Health—Ordinances—Hospitals—Courts.*—An ordinance of a municipal corporation declaring hospitals within the city limits, where surgical operations are performed, etc., for pay, a nuisance to adjacent property owners and prohibiting them within 100 feet of a building or house used or occupied as a residence, when within the powers conferred by the Legislature, will not be declared unreasonable or invalid by the courts. *Lawrence v. Nissen*, 359.

10. *Same—Presumptions.*—There is a strong presumption of the validity of an ordinance passed, with legislative authority, looking to the health of the residents within a municipality; and the courts will not pass upon the reasonableness of the ordinance with reference to existing conditions, when such could exist and justify it. *Ibid.*

11. *Municipal Corporations—Cities and Towns—Health—Ordinances—Nuisance—Injunction.*—Where the enforcement of an ordinance prohibiting the erection of a hospital is sought to be enjoined, and the authority to enforce it has been given by statute, it is not necessary for the courts to pass upon the question as to whether a hospital is a nuisance *per se* in order to refuse the injunction. *Ibid.*

12. *Municipal Corporations—Contracts—Annullment — New Contracts.* — The duly authorized officials of a municipal corporation may by agreement annul an existing contract for the furnishing of electricity for street lighting purposes by entering into a new contract of more definite terms as to payment, when for the public benefit. *Public Utilities Co. v. Bessemer City*, 482.

13. *Same—Electricity—Abandonment—Debts.*—Where a municipal corporation had entered into a contract for furnishing electricity for street lights at as low a price as the electric lighting company charged other towns, and thereafter entered into a new and complete contract with

MUNICIPAL CORPORATIONS—*Continued.*

the same company to furnish the electricity at a certain price per lamp, expressly annulling the older contract, except as it may be evidence of the amount then due thereunder by the city: *Held*, the rights acquired under the former contract are abandoned and relinquished, except for the purpose of recognizing and collecting the debt. *Ibid.*

14. *Municipal Corporations—Minutes—Contracts — Statutes — Parol Evidence.*—A contract made by a municipality and the abutting owners on its street, respecting an improvement of the street, does not require, for its validity, that it be entered in the minutes of the meeting of the duly constituted authorities, acting in behalf of the municipality, in the absence of statutory provision requiring it, and may be shown by parol evidence. *Charlotte v. Alexander*, 515.

15. *Municipal Corporations—Cities and Towns—Streets—Discretionary Powers—Statutes—Damages.*—Where the highway commissioners and the aldermen of a town are given by statute discretionary power to regrade and open the streets thereof when in their judgment required by the public interest, and damages are alleged in an action against the town, by an owner of land abutting upon a street by reason of the widening of the street by taking the lands of opposite owners and elevating the further side of the street, leaving the original street upon its former level, but affording reasonable access to the new part of the street and original access to the other streets of the town: *Held*, the plaintiff has shown no actionable damages, and a motion to nonsuit should be allowed. *Stiles v. Franklin*, 651.

16. *Municipal Corporations—Cities and Towns—Streets—Statutes—Method of Assessments—Pleadings—Demurrer.*—Where a public-local statute provides a valid method of assessing damages to owners of lands abutting upon a street widened or regraded, such owner should pursue the remedy prescribed, and a demurrer to a complaint which does not state this as a basis of a cause of action should be sustained. *Ibid.*

17. *Municipal Corporations—Sinking Fund—Commissioner—Salary—Interest.*—Where the authorities of a municipal corporation pass a resolution fixing the compensation of the commissioner of the sinking fund at $100 a year and 4 per cent interest, after he has served continuously for several terms, the charter of the city authorizing it, the fact that the resolution unlawfully attempted to charge the commissioner with interest on the fund which they claim he should have received does not affect the fact that the compensation was fixed by the resolution, at the stated rate; and it is erroneous to allow the commissioner the legal rate of interest. *Borden v. Goldsboro*, 661.

18. *Municipal Corporations—Cities and Towns—Negligence—Evidence—Trials—Nonsuit.*—Evidence that a city maintained a drainage 18 inches deep across its street in an unfrequented section, then being developed, without description as to its construction, and which was covered by a bridge a greater part of the distance, is not of itself sufficient showing of actionable negligence on the part of the city to sustain a verdict for damages for a personal injury sustained there. *Godfrey v. Elizabeth City*, 696.

19. *Municipal Corporations—Cities and Towns—Ordinances—Peddlers—Privilege Tax—Exceptions—Statutes—Farm Products—Meat—Taxation.*—The general law of 1915, with regard to selling by itinerant

MUNICIPAL CORPORATIONS—*Continued.*

merchants or peddlers, excepts those who sell or offer for sale "any articles of the farm or dairy," excludes meat butchered by a farmer from cattle he has raised on his own farm; and where a town ordinance makes it a misdemeanor for such vendors to sell meat within its limits without first obtaining a town privilege tax, except those who are exempt under the general law, a farmer selling meat upon the streets of the town butchered from cattle he had raised comes within the exception made in the ordinance. *S. v. Smith*, 772.

20. *Municipal Corporations—Cities and Towns—Ordinances—Peddlers—Privilege Tax—Exceptions—Burden of Proof—Taxation.*—Where there is evidence tending to show that the defendant had peddled meat upon the streets of a town, without a license, prohibited by ordinance, with certain exceptions, the burden is upon the defendant to show he comes within the exceptions, when this defense is relied upon. *Ibid.*

21. *Same—Trials—Evidence—Questions for Jury — Instructions.* — Where the defendant seeks to avoid the charge of violating a town ordinance in peddling meat upon the streets without paying the privilege tax upon the ground that the meat he sold was obtained from his own cattle he had raised upon his farm, and there is evidence that he bought and butchered cattle in the regular way, and peddled the meat, several times a week, cutting it up for customers and weighing it upon his wagon, the question of his good faith and the real character of the transaction, under proper instructions, is properly submitted to the jury. *Ibid.*

MUNICIPALITIES. See Constitutional Law, 2, 5; Public Officers, 4.

Municipalities—Counties — Bonds — Poor House — Necessaries—Constitutional Law.—The building of a county home is for a class of citizens without a place of residence, and beneficent provision for whom is recommended by our Constitution, Art. XI, sec. 7, "as one of the first duties of a civilized and Christian State"; therefore, providing for such a home being included in the idea of their support, a county may pledge its faith and credit and issue valid bonds for that purpose, as a necessary expense, without the approval of its voters. *Comrs. v. Spitzer*, 147.

MURDER. See Homicide, 1, 2, 4, 6, 7, 8.

NAMES. See Judgments, 5.

NECESSARIES. See Statutes, 2; Constitutional Law, 3; Municipalities, 1.

NECESSARY EXPENSES. See Municipal Corporations, 1.

NEGLECT OF COUNSEL. See Judgments, 15.

NEGLIGENCE. See Carriers of Goods, 1, 2, 4, 5, 8, 9; Master and Servant, 1, 3, 4, 6, 7, 8, 12, 17; Automobiles, 1; Public Officers, 1, 3; Municipal Corporations, 3, 4, 18; Evidence, 4; Judicial Sales, 1; Carriers of Passengers, 3, 7, 8; Railroads, 6, 8, 9, 10, 11.

1. *Negligence — Evidence — Opinion — Facts — Expert Evidence.*—Where there is evidence tending to show that the plaintiff, defendant's employee, was injured while engaged in the course of his employment by reason of an old and defective printing press, and he testified that the press was not such as was in general use at the time; that it was

NEGLIGENCE—*Continued.*

out of date, not equipped, old and worn: *Held*, competent as a statement of fact, and this applies to an expert witness who testifies with knowledge of such facts. *Hux v. Reflector Co.*, 97.

2. *Negligence—Assumption of Risks—Master and Servant.*—The doctrine of assumption of risk applies only to machinery in good condition, and not where an employee is injured by the negligence of his employer in not so keeping it. *Ibid.*

3. *Negligence—Master and Servant—Personal Injury — Declarations — Weight of Evidence—Physicians.*—In an action to recover damages for the negligent killing of plaintiff's intestate while engaged in the defendant's employment, declarations made by the intestate as to his physical condition with relation to the injury complained of, to the witness, though not a physician, are competent, the fact that the witness was not a physician going only to the weight to be given his testimony by the jury; the requisite being that such declarations must not be narrative in form, either as to a past condition or the cause of it. *Howard v. Wright*, 339.

4. *Negligence—Automobiles—Chauffeur—Management of Car—Master and Servant—Employer and Employee.*—Where a chauffeur is running an automobile under the charge and direction of another therein, and by its negligent operation injury is caused to a third person, the chauffeur will be deemed the servant of such other person and fix him with liability, whether actually employed by him or not, and without respect to the fact of the ownership of the car. *Williams v. Blue*, 452.

5. *Negligence—Instructions—Burden of Proof—Sanitariums—Intoxicating Liquors.*—In an action against the owner of a private sanitarium to recover damages for injuries alleged to have resulted from his negligence in not taking care of a patient received in a practically unconscious condition from the excessive use of alcohol, there was conflicting evidence as to whether the injury was received after the plaintiff had been discharged and while permitted to sleep in a lower room at his request until the next morning, or whether the plaintiff was in such condition at the time as to be unaware of what he was doing: *Held*, a charge to the jury imposing upon the defendant the duty to exercise ordinary care under the circumstances for the plaintiff's protection was proper, as also (in accordance with his special request) his liability for willful injury, if his phase of the evidence should be accepted by the jury, placing the burden of proof on plaintiff. *Young v. Gruner*, 622.

NEGLIGENT DEATH. See Master and Servant, 9.

NEGOTIABLE INSTRUMENTS. See Bills and Notes, 6, 8.

NEWLY DISCOVERED EVIDENCE. See Appeal and Error, 11.

NEW TRIAL. See Jurors, 3.

NONRESIDENTS. See Venue, 1.

NONSUIT. See Master and Servant, 1, 3, 17; Contracts, 3; Appeal and Error, 5; Automobiles, 1; Tenants in Common, 2; Malicious Prosecution, 2; Railroads, 2, 4, 9, 11; Carriers of Passengers, 4; Limitation of Actions, 4; Actions, 2; Contributory Negligence, 1; Instructions, 4; Municipal Corporations, 18; Evidence, 11; Arson, 1; Embezzlement, 2.

NOTES. See Insurance, 6.

NOTICE. See Bills and Notes, 4, 8; Deeds and Conveyances, 9, 10; Municipal Corporations, 4; Divorce, 1; Corporations, 5, 7; Insurance, 8, 13; Partnership, 4; Arrest and Bail, 2.

NUISANCE. See Municipal Corporations, 11.

OATH. See Register of Deeds, 3.

OBJECTIONS. See Appeal and Error, 6, 21; Evidence, 3.

OBJECTIONS AND EXCEPTIONS. See Jurors, 3; Appeal and Error, 15, 26, 41, 45, 47; Master and Servant, 10.

OBLIGORS. See Arrest and Bail, 1.

OFFENSES. See Intoxicating Liquors, 3.

OFFER. See Judgments, 16.

OFFICERS. See Public Officers, 1; Insurance, 18.

OFFICIALS. See Venue, 3.

OFFSETS. See Condemnation, 3; Corporations, 14.

OPINION. See Instructions, 1; Negligence, 1; Appeal and Error, 11, 43; Deeds and Conveyances, 22; Evidence, 7.

OPTIONS. See Contracts, 4; Trusts, 1.

ORDER, NOTIFY. See Carriers of Goods, 7.

ORDERS. See Master and Servant, 7; Judgments, 23; Appeal and Error, 42.

ORDINANCES. See Municipal Corporations, 9, 11, 19, 20; Constitutional Law, 7.

PAROL AGREEMENT. See Bills and Notes, 7.

PAROL EVIDENCE. See Statute of Frauds, 5.

PARTIES. See Carriers of Goods, 1; Drainage Districts, 1; Judgments, 6; Partnership, 2; Health, 5; Appeal and Error, 20; Corporations, 10.

1. *Parties—Contracts—Beneficial Interests—Actions.*—In an action to recover money due upon contract the defense is available that the defendant had paid, at the request and for the benefit of the plaintiff, certain moneys to another in a transaction to which the plaintiff was not a party. *Chandler v. Jones*, 427.
2. *Parties—Class Representation — Service — Publication — Judgments.*—Where parties are brought in by publication in proceedings to partition lands, for the purpose of excluding any interest they might claim, and are properly represented by those in the same class, the doctrine of "virtual representation" applies. *Ryder v. Oates*, 569.
3. *Parties—Mortgages—Executors and Administrators.*—Where suit of foreclosure is brought, with allegation that the mortgagee of the land is dead and that his personal representative has not been made a party, a demurrer for the want of necessary parties is properly sustained. Revisal, sec. 239 (4). Such representative, when only a

PARTIES—*Continued.*

proper party, may be brought in at the option of either party to the suit. *Geitner v. Jones*, 591.

PARTITION. See Judgments, 9; Tenants in Common, 4.

Partition—Unknown Claimants—Contingent Interests—Clerks of Court—Jurisdiction.—When adversary proceedings to partition land among tenants in common, alleging fee-simple title in some of the parties and joining others for the purpose of excluding such interest, contingent or otherwise, as they may claim, whether *in esse* or otherwise (Rev., sec. 410), and for the appointment of guardians for such interest, are brought before the clerk of the Superior Court, the Superior Court, on appeal, acquires jurisdiction and can retain the cause and hear and determine all matters in controversy. Revisal, sec. 614. *Ryder v. Oates*, 569.

PARTNERSHIP. See Bills and Notes, 2; Malicious Prosecution, 5; Banks and Banking, 2; Equity, 4.

1. *Partnership—Deeds and Conveyances—Frauds—Trusts and Trustees—Accounting.*—Where one partner has fraudulently obtained from another a deed to partnership lands, and equity has decreed a charge upon the lands to secure the consideration, instead of rescinding the contract, the plaintiff, individually, is not entitled to an accounting for the rents and profits, for such would be due the partnership. *Massey v. Alston*, 215.

2. *Same—Parties—Creditors.*—In this suit in equity, decreeing the consideration due by one partner a charge upon partnership lands, the rights of creditors, not made parties, are not considered. *Ibid.*

3. *Partnership—Services—Profits and Loss—Dissolution by Death—Contributing Partner—Impairment of Capital—Distribution of Assets.*—Where, under partnership agreement, one of the partners is to contribute the capital and the other his services in managing the business, and receive "his part" by equally dividing the profits after paying all necessary expenses, and the partnership has been dissolved by the death of the contributing partner, and it has been ascertained that the capital has been impaired, the agreement will not admit of the construction that the surviving partner should receive for his services, in addition to his share of the profits, an equal distribution of the remaining capital; and there being no profits for division, the surplus thereof, after paying the partnership debts, should be paid to the personal representative of the deceased partner. *Moseley v. Taylor*, 286.

4. *Partnership—Dissolution—Notice.*—Personal notice of dissolution of a partnership should be given to those who had theretofore sold it goods, and notice by newspaper publication to the public generally. Where a vendor ships goods to a partnership who had theretofore dealt with it, upon order in the partnership name, without knowledge of the dissolution or notice sent to that effect, each member of the partnership is liable therefor. Revisal, 2521, *et seq.*, as to limited partnerships, is inapplicable to the facts of this case. *Supply Co. v. Lyon*, 445.

5. *Same—Inquiry.*—Inquiry made of the cashier of a local bank as to the financial standing of a partnership, with the reply that in his opinion

PARTNERSHIP—*Continued.*

the order would be good if "O.K.'d" by a certain member of the firm, is not in itself sufficient notice of the dissolution of the partnership. *Ibid.*

6. *Partnership—Profits—Principal and Agent—Compensation.*—Where the sharing in the profits of a business arrangement is only a method employed in determining the compensation one is to receive for services rendered another, it falls within the exception of the rule that the test of whether a partnership exists is the sharing of profits by the parties. *Trust Co. v. Ins. Co.*, 558.

PAYMENT. See Deeds and Conveyances, 7; Insurance, 2, 11, 25; Limitation of Actions, 4; Corporations, 11.

PAYMENT IN ADVANCE. See Insurance, 17.

PEDDLERS. See Municipal Corporations, 19, 20.

PEDESTRIANS. See Railroads, 8.

PENALTIES. See Vendor and Purchaser, 4.

PERISHABLE GOODS. See Carriers of Goods, 2.

PERMITS. See Municipal Corporations, 6, 7, 8.

PERSONAL INQUIRY. See Negligence, 3.

PERSONALTY. See Wills, 12.

PETITION. See Appeal and Error, 39.

PETITIONER. See Contracts, 6.

PHYSICIANS. See Negligence, 3; Homicide, 3; Instructions, 7; Evidence, 12.

PLEADINGS. See Processioning, 1; Justices' Courts, 1; Tenants in Common, 1; Judgments, 10; Health, 3; Divorce, 2; Actions, 2; Removal of Causes, 1; Instructions, 4; Wills, 17; Appeal and Error, 25, 26; Municipal Corporations, 16; Issues, 1.

1. *Pleadings—Amendments—Allegations — Independent Cause — Original Cause—Courts—Automobiles.*—In an action to recover damages alleged to have been caused by the negligent running of defendant's automobile, stated in the original complaint as that of the defendant's driver and daughter, an amendment allowed by the court, setting out that the driver, the co-defendant, was at the time employed to instruct and teach the defendant's minor daughter, and that he was negligent and reckless in permitting the automobile to run into the plaintiff's buggy, does not constitute a new cause of action, but is practically the same as that originally stated, and its allowance is not reversible error. *Williams v. May*, 78.

2. *Pleadings—Allegations—Demurrer—Cause of Action.*—Where the allegations of a complaint to recover for the joint tort of several defendants are definite as to some and vague as to the others, but so interwoven that it appears that a cause of action is sufficiently stated as to all, a demurrer thereto will not be sustained for uncertainty of allegation. *Williams v. Blue*, 452.

PLEADINGS—*Continued.*

3. *Pleadings—Interpretation.*—Allegations of a complaint are construed liberally in the pleader's favor with a view to substantial justice between the parties, and where the question of jurisdiction between the Superior Court and that of a justice of the peace arises, depending upon the amount involved, and whether the action is *ex contractu* or *ex delicto*, the courts are disposed to construe the complaint in favor of the jurisdiction chosen. *Mitchem v. Pasour*, 487.

4. *Same—Tort—Superior Court—Jurisdiction.*—An action by the landlord against his tenant, alleging the tenancy, the nonpayment of rent, and a conversion of the crops raised on the land, successively joining in third parties claimed to have received the money, but as to whom the action was *nol prossed*, when brought in the Superior Court for an amount less than $200, will be regarded as an action sounding in tort, and the jurisdiction will be sustained. *Ibid.*

5. *Pleadings—Demurrer—Contract.*—A demurrer to the complaint admits the truth of the allegation therein sufficiently pleaded; and where it alleges an amount due by the defendant for cutting timber under a contract, for which the action was brought, a demurrer thereto will be denied. *Ollis v. Furniture Co.*, 542.

6. *Same—Arbitration.*—Where the complaint sets out a cause of action alleging a definite amount due under contract, a demurrer thereto on the ground that the contract providing for an arbitration as to the amount is bad, as the amount is not then in dispute; and if the defense is available it should be set up in the answer. *Ibid.*

7. *Pleadings—Demurrer—Judgment—Appeal and Error—Statutes.*—Upon overruling a demurrer to the complaint, the defendant should be permitted to answer over. Revisal, sec. 506. *Kearnes v. Gray*, 555.

PLEA IN BAR.

Plea in Bar—Accord and Satisfaction—Statutes—Issues—Court's Discretion.—Where, among other defenses to an action, the defendant pleads accord and satisfaction, Revisal 859, the discretionary power of the trial judge in submitting this issue to the jury before submitting the other issues upon the merits will not be reversed on appeal. *McAuley v. Sloan*, 80.

PLEDGE. See Constitutional Law, 21.

POLICE POWERS. See Health, 1; Municipal Corporations, 9; Judgments, 18; Constitutional Law, 19; Statutes, 11.

POLICY. See Insurance, 17.

POOR HOUSE. See Municipalities, 1.

POSSESSION. See Limitation of Actions, 2, 6; State's Lands, 4; Issues, 2.

POWER OF DISPOSITION. See Trusts and Trustees, 3.

POWERS. See Wills, 2, 8; Corporations, 16, 17, 19; Municipal Corporations, 15.

PREMEDITATION. See Homicide, 4, 6.

PREMIUM NOTES. See Insurance, 2, 3, 5; Judgments, 17.

PREMIUMS. See Insurance, 8, 10, 11, 17.

PRESUMPTIONS. See Deeds and Conveyances, 7; Appeal and Error, 13; Bills and Notes, 6; Municipal Corporations, 10; Mortgages, 9; Judgments, 19; Constitutional Law, 17; State's Lands, 3; Reference, 4; Courts, 3.

PRIMA FACIE CASE. See Malicious Prosecution, 3; Carriers of Passengers, 4.

PRINCIPAL AND AGENT. See Carriers of Goods, 1; Corporations, 1, 9; Contracts, 7; Principal and Surety, 1; Statute of Frauds, 4; Partnership, 6; Insurance, 18; Carriers of Passengers, 8; Embezzlement, 1.

1. *Principal and Agent—Deeds and Conveyances—Dual Agencies—Issues.* Where the evidence is conflicting as to whether the agent of the vendor of lands to whom the deed had been given for delivery to the vendee had only the authority to receive cash therefor, and not extend the time for payment, which he had done, and that the agent acted in collusion with the vendee, received a commission from him without the knowledge of the vendor, his principal, and on account of the confidence placed in him had induced the vendor to sell at a price much less than he could have obtained from others, and the evidence was in conformity with the pleadings: *Held*, if the agent had no authority to change the terms of the sale, the vendee could not recover by reason of his failure to perform the contract on his part, and it was reversible error for the trial judge to refuse the vendor's appropriate issues tendered in apt time, or other suitable ones on this and the other controverted matters. *Vinson v. Pugh*, 189.

2. *Principal and Agent—Dual Agent—Knowledge—Contracts—Fraud.*—Where the agent for a vendor for the sale of lands has accepted benefits from or is acting for the other party, unknown to his principal, and accordingly the contract of sale has been made, it is avoidable at the option of the principal as being against public policy, and to prevent fraud which may arise in such dual agencies, without the necessity of showing actual fraud in the transaction. *Ibid.*

3. *Principal and Agent—Commissions—Evidence—Trials—Questions for Jury.*—In this action to recover agent's commission under contract for the sale of timber, it is *Held*, that the evidence of agency, and that of the efforts of the alleged agent to sell the timber, were sufficient; as to the former, of the fact of agency, and as to the latter, that the agent's acts were the efficient cause of the sale, and that he performed his contract. *House v. Boyd*, 701.

PRINCIPAL AND SURETY. See Bills and Notes, 5; Equity, 8; Contracts, 18.

Principal and Surety—Banks and Banking—Agreement with Surety—Consideration—Principal and Agent—Evidence.—Where there is evidence tending to show that the cashier of a bank discounted a note signed by a surety, and received, at the time, a mortgage given by the maker to the surety to indemnify him, under promise by the cashier who attached the papers together to have the mortgage registered, but did not do so for several years, when, fearing the insolvency of the parties, he had the mortgage recorded, but not until other mortgages had been registered to the full value of the property: *Held*, sufficient to show that the cashier was acting for the bank, and not personally for him-

PRINCIPAL AND SURETY—*Continued.*

self, the consideration being the additional security for the note; and to sustain a verdict in behalf of the surety, the defendant in the action. The charge in this case is approved. *Elliott v. Smith*, 265.

PRIORITIES. See Judicial Sales, 2; Deeds and Conveyances, 19.

PRIVITY. See Indebitatus Assumpsit, 1.

PROBABLE CAUSE. See Injunction, 2; Malicious Prosecution, 2, 3, 4; Malice, 1.

PROBATE. See Judgments, 19, 21.

PROCESS. See Arrest and Bail, 3.

PROCESSIONING.

1. *Processioning—Title—Issue—Pleadings—Evidence.*—While in proceedings to procession land the title thereto is not directly involved, it may become incidentally one of the questions or issues in the case raised by the pleadings or the facts therein which must be decided before the main issue as to the location of the true dividing line can be determined. *Rhodes v. Ange*, 25.
2. *Same—Adverse Possession.*—In proceedings to procession land, where the defendant claims he has been in adverse possession up to the location of the line he claims, with supporting evidence, which the plaintiff disputes, an instruction is proper that the jury consider the possession of the respective parties, with respect to the disputed line, as evidence to determine its location; and if the defendant's adverse possession for twenty years or more up to that line was sufficient, it should be found in accordance with his contention. *Ibid.*
3. *Processioning—Surveyor—Conduct of Parties—Evidence.*—Testimony of the surveyors and the conduct of the parties as to the location of the disputed line between adjoining owners in proceedings to procession it does not necessarily establish it, but is only evidence thereof. *Ibid.*

PROFIT and LOSS. See Partnership, 3.

PROMISE. See Contracts, 1; Equity, 2.

PROOF OF DEATH. See Insurance, 14, 15.

PROSECUTORS. See Malicious Prosecution, 4.

PROXIMATE CAUSE. See Carriers of Goods, 8; Master and Servant, 5; Carriers of Passengers, 5; Railroads, 10.

PUBLICATION. See Parties, 2.

PUBLIC DUTIES. See Public Officers, 2.

PUBLIC OFFICERS.

1. *Public Officers—Highway Commissioners—Bridges—Negligence—Individual Liability—Statutes—Officers.*—Public officers in the performance of their official and governmental duties involving the exercise of judgment and discretion may not be held liable as individuals for breach of such duties unless they act corruptly and of malice. *Hipp v. Ferrall*, 167.

PUBLIC OFFICERS—*Continued.*

2. *Public Officers—Ministerial Duty—Public Duties—Individual Liability Statutes.*—Where public officials are charged with a plainly ministerial duty, they may not be held individually liable for a negligent breach thereof, when they are of a public nature and imposed entirely for the public benefit, unless the statute creating the office or imposing the duties makes provision for such liability. *Ibid.*

3. *Public Officers — Discretionary Duties — Highway Commissioners — Bridges—Negligence.*—Where it appears from the entire testimony that defendants, members of the highway commission of Lee County, had taken charge of the approach to a county-line bridge, if at all, not as mere administrative agents, but in pursuance of their public duties in administering the road laws of the county, imposed upon them for the public benefit, and, further, that the duties they had assumed in reference to the bridge, required the exercise of judgment and discretion both in reference to the kind of approach to be constructed (the engineer having advised a steel structure) and also as to whether there were funds available for the purpose, having proper regard to the bad condition of the roads in other parts of the county, there was no error to plaintiff's prejudice in submitting the issue of liability to the jury, and on such facts the court could not have sustained a motion to nonsuit. *Ibid.*

4. *Public Officers — Compensation — Quantum Meruit — Municipalities—Sinking Fund.*—Where a municipal corporation engages a commissioner of its sinking fund under the provisions of its charter, by which the incumbent was employed for a term of years continuously, his employment is that of a public officer, which precludes compensation based upon a *quantum meruit*, and he may not recover for his services in the absence of express statutory provision. *Borden v. Goldsboro*, 661.

PUBLIC POLICY. See Venue, 5.

PURCHASE. See Mortgages, 1.

PURCHASERS. See Judgments, 8; Judicial Sales, 1; Constitutional Law, 10.

QUALIFICATIONS. See Jurors, 4; Evidence, 13.

QUANTUM MERUIT. See Public Officers, 4.

QUESTIONS FOR JURY. See Accord and Satisfaction, 1; Justices' Courts, 2; Deeds and Conveyances, 3; Master and Servant, 8; Insurance, 7, 9, 14; Railroads, 11; Principal and Agent, 3; Arson, 1; Municipal Corporations, 21; Trials.

QUESTIONS OF LAW. See Master and Servant, 11; Register of Deeds, 2.

QUITCLAIM. See Wills, 11.

QUO WARRANTO. See Corporations, 17.

RAILROADS. See Injunction, 5; Carriers of Passengers, 3; Carriers of Goods, 9; Judgments, 18.

1. *Railroads—Fires—Defective Locomotives—Evidence.*—In an action to recover damages for the alleged negligent setting fire to the plaintiff's lumber and plant by sparks from the defendant railroad company's

RAILROADS—*Continued.*

defective locomotive while passing the place, evidence that another locomotive of the defendant was throwing sparks while passing there on the preceding day is incompetent. *Moore v. R. R.*, 311.

2. *Railroads—Fires—Defective Locomotives—Damages—Trials—Evidence —Nonsuit.*—Where the evidence in an action against a railroad company to recover damages alleged to have been caused by the negligent burning of plaintiff's lumber and plant by sparks from the defendant's engine, passing 70 feet away, tends only to show that there was a mild wind blowing from the tracks at the time, but without evidence of any defective condition of the engine; that the fire was discovered thirty minutes after the engine had passed, it is too conjectural to be submitted to the jury upon the issue of defendant's negligence; nor is the question affected by evidence that the only fire in the plant was in the boiler 200 feet from where the fire started, which operated the dry-kiln, on account of the likelihood of fires occurring in places of this character; and under the circumstances of this case a judgment as of nonsuit should be granted. *Ibid.*

3. *Railroads—Contracts—Judgments—Federal Courts—Corporation Commission—Courts—Equity—Rights of Public.*—While the Corporation Commission, which has no equity jurisdiction, and the equitable jurisdiction of the courts may, in proper instances, interfere with the enforcement of an unconscionable contract between railroad companies that would impair the utility of one of them to the public as a common carrier, the application of this principle does not arise in this case, owing to an arrangement which may prove satisfactory and under which the question may not again arise. *R. R. v. R. R.*, 413.

4. *Railroads—Street Railways—Fenders—Evidence—Nonsuit.*—Where in an action to recover damages against a street car company for the negligent killing of plaintiff's intestate there is evidence tending to show that the intestate was run over while down upon the track, and that the car was equipped with an old style fender, costing about $5, which was unavailable to save a pedestrian in this position, but that with later styles of practical fenders, with which the car could have been equipped, in general use a number of years, costing about $30, the life of the intestate could have been saved, at the speed of the car at the time, defendant's motion to nonsuit should not be granted. *Smith v. Electric R. R.*, 489.

5. *Railroads—Street Railways—Fenders—Statutes—Exceptions — Burden of Proof.*—The burden of proof is on a street railway company to show that the Corporation Commission, in its judgment, had found it unnecessary to enforce the provisions of Revisal, sec. 2616, requiring the use of "practical fenders" on their street cars, in an action to recover damages caused by its negligence in not using them. *Ibid.*

6. *Railroads—Street Railways—Statutes—Negligence Per Se.*—The "practical fenders" required for street cars by Revisal, sec. 3601, making the failure to use them a misdemeanor, are those which are efficient for the purpose of protecting human life, etc., or the most approved appliance in general use, and a violation of this statute is negligence *per se*. *Ibid.*

7. *Railroads—Street Railways—Fenders—Instructions.*—Where there is evidence tending to show that the plaintiff's intestate was killed by reason of the failure of defendant street car company to use "practical

RAILROADS—*Continued.*

fenders" on its car, an instruction to the jury to answer the issue of negligence "No" is erroneous. *Ibid.*

8. *Railroads—Street Railways—Pedestrians—Negligence.*—Pedestrians on the streets of the city have equal rights to the use of the streets with street car companies, and the motormen on the cars are held to a higher degree of care in looking out for their safety than engineers running the trains on the right of way of a railroad company; and failure of the motormen in this respect constitutes negligence. *Ibid.*

9. *Railroads—Street Railways—Negligence—Trials — Evidence — Nonsuit.* Where there is evidence that the plaintiff's intestate while down upon the track of a street railway in a city was run over and killed at a place where the view of the track was unobstructed for 200 feet, and the intestate could have been seen by the motorman in time to have avoided the injury, a nonsuit is improperly allowed. *Ibid.*

10. *Railroads—Street Railways—Fenders—Negligence—Proximate Cause.* Where a pedestrian, helpless and down upon a street car track in a city, has been run over and killed by defendant's street car, which would not have occurred with the use of a proper fender, the negligence of the defendant continues up to the time of the injury and is the proximate cause thereof. *Ibid.*

11. *Railroads—Depots—Bad Condition—Negligence — Trials — Evidence — Nonsuit—Questions for Jury.*—In an action against a railroad company to recover damages for the negligent killing of plaintiff's horse, there was evidence tending to show that the plaintiff had driven on defendant's premises to unload fertilizer and his horse stepped upon a nail in a plank covered by mud and water, owing to the bad condition of the place, immediately resulting in lockjaw, from which the horse died: *Held*, sufficient to take the case to the jury upon the issue of defendant's actionable negligence. *Ricks v. R. R.*, 696.

RATIFICATION. See Deeds and Conveyances, 15.

REBUTTER. See Deeds and Conveyances, 8.

RECEIVERS. See Corporations, 13, 18; Banks and Banking, 4, 5.

1. *Receivers—Corporations—Time to File Claims—Additional Time—Court's Discretion.*—It is within the discretion of the Superior Court judge to permit a creditor of a defunct corporation to file his claim with the receiver beyond the time theretofore generally allowed the creditors, so that he may share in the surplus of the assets, without disturbing the payments theretofore made. *Hardware Co. v. Holt*, 304.

2. *Receivers—Corporations—Claims — Contract — Termination — Electric Companies.*—Where an electric power supply company, under a contract with a manufacturing company, is to receive a stated monthly sum for an unfixed period, for the investment and maintenance, etc., of the local line transmitting the electricity, in addition to that charged for the power used, and has shut off the supply upon the insolvency of the corporation, such act amounts to a termination of the contract, and the electric company is not entitled to an allowance from the receiver for such maintenance charge, etc., thereafter. *Ibid.*

3. *Receivers—Corporation—Title—Appointment — Judgments.* — The title to the property of a corporation vests in the receiver at the time he has

RECEIVERS—*Continued.*

been duly appointed by the court, from which time the corporation is divested thereof, and a judgment against the corporation entered thereafter, but before the docketing of the order or the qualifying of the receiver thereunder can acquire no lien in favor of the judgment creditor. Revisal, sec. 1224. *Hardware Co. v. Holt*, 308.

4. *Receivers—Corporations—Interest.*—The appointment of a Federal receiver for an insolvent railroad company does not stop the running of interest for debts it had incurred to contractors and subcontractors in the building of the road, when there are sufficient funds to pay it without disturbing the equalization of payment among claimants of the same dignity. *Moore v. R. R.*, 726.

RECORD. See Appeal and Error, 8, 14, 21, 32.

RECORDER'S COURT.

Appeal—Recorder's Court—Justice's Court—Dismissal of Appeal—Judgment—Stay Bond—Costs—Statutes.—Where a defendant appeals a judgment rendered against him in a recorder's court, under a statute prescribing the same methods as from a court of a justice of the peace, and fails to have it docketed in the Superior Court at the next ensuing term, etc., the plaintiff may have the appeal docketed and dismissed upon motion, and the judgment in the lower court affirmed (Rev., sec. 608), and tax the defendant and his surety on his stay bond with the costs of appeal, according to the conditions thereof. Revisal, sec. 607. *Sneeden v. Darby*, 274.

REDEMPTION. See Judicial Sales, 2.

REFERENCE. See Appeal and Error, 7, 23, 24, 34.

1. *Reference—Exceptions—Issues—Trial by Jury.*—A party to a compulsory reference, who has duly excepted thereto, is not entitled to a jury trial by excepting specifically to the findings of fact, for he must also aptly tender the issues he desires to be answered by the jury, or he will be deemed to have waived the right. *Ziblin v. Long*, 235.
2. *Reference—Appeal and Error—Exceptions—Trial by Jury.*—Where exception to a reference is not taken or the rights of the party preserved, his demand for a trial by jury will not be granted. *Drug Co. v. Drug Co.*, 502.
3. *Reference—Independent Findings—Evidence—Appeal and Error.*—The referee's findings of fact, upon legal evidence, approved and accepted by the court, and the court's independent findings of fact, upon legal evidence, are not reviewable on appeal. *McGeorge v. Nicola*, 707.
4. *Reference—Exceptions Sustained—Evidence—Greater Weight—Appeal and Error—Presumptions.*—Where an action to recover lands, involving the location thereof under State's grants, is referred, and the judge sustains plaintiff's exceptions to the report, which states the facts on which they are based, it will be presumed that the judge found the statement of facts as true, by the greater weight of the evidence; and where there is supporting evidence, his action is not reviewable on appeal. *Ibid.*

REGISTER OF DEEDS. See Statutes, 4.

1. *Register of Deeds—Marriage License—Statutes—In Pari Materia—Reasonable Inquiry.*—Revisal, sec. 2090, imposing a penalty on the register

REGISTER OF DEEDS—*Continued.*

of deeds for issuing a license without reasonable inquiry for the marriage of persons to which there is lawful impediment, or where either is under the age of 18 years, and section 2088, requiring that written consent of the parent be filed with him, and should be construed together; and where the reasonable inquiry as to the age has been made by the register of deeds, he is not subject to the penalty, because he has not required the written consent of the parent provided for in section 2088. *Gray v. Lentz*, 346.

2. *Register of Deeds—Marriage License—Reasonable Inquiry—Questions of Law—Trials.*—The question of the reasonableness of the inquiry required by Revisal, secs. 2088 and 2090, to be made by the register of deeds before issuing a marriage license, is one of law where the facts are not disputed. *Ibid.*

3. *Same—Oath of Applicants—Unknown Applicant.*—Where it appears that a register of deeds issued a marriage license for a female under the age of 18, against the consent of her parents, living in another county, but accessible by telegraph and telephone, upon the application of two parties unknown to him, who proved to be of bad character, and of whose character he made no investigation, and it appears that one of them, claiming to have known the female all of her life, had refused to swear to her age upon oath, and returned with the other, who also claimed to have known her, and who stated she was 18 her last birthday, and produced an unsigned letter purporting to be the parents' consent, and upon both of them making oath as to the age given, the certificate was issued: *Held*, insufficient as to the question of "reasonable inquiry," and a charge of the trial court submitting the case to the jury is reversible error. *Ibid.*

REGISTRATION. See Deeds and Conveyances, 9, 10, 19; Statute of Frauds, 1; Equity, 7.

REHEAR. See Appeal and Error, 39.

REINSURANCE. See Insurance, 9.

RELATIONSHIP. See Jurors, 2.

RELEASE. See Bills and Notes, 3, 5; Arrest and Bail, 3.

RELIEF. See Venue, 7.

RELIGIOUS SOCIETIES. See Limitation of Actions, 5.

REMAINDERS. See Wills, 16.

REMANDING CASE. See Appeal and Error, 8; Homicide, 7.

REMOVAL OF CAUSES. See Courts, 5.

Removal of Causes—Federal Courts—Diversity of Citizenship—Pleadings—Judgments—Severable Controversy.—Where suit is brought against a resident and nonresident defendant, upon motion of the latter to remove it to the Federal court for diversity of citizenship the plaintiff is entitled to have his cause considered and dealt with as stated in his complaint, and ordinarily under conditions existent at or before the time the defendant is required to answer; and where the plaintiff has alleged a joint cause of action, and has not voluntarily discon-

REMOVAL OF CAUSES—*Continued.*

tinued his action against the resident defendant, but on defendant's appeal from a joint judgment the judgment is affirmed as to the resident defendant and a new trial granted to the nonresident, it does not work such a severance as to constitute a separable controversy within the meaning of the removal statutes, and a motion thereafter duly made to remove the cause will be denied. *Gurley v. Power Co.*, 447.

RENOUNCEMENT. See Trusts and Trustees, 3.

RENTS AND PROFITS. See Wills, 17.

RENUNCIATION. See Contracts, 2, 4.

REPEAL. See Statutes, 13.

REPRESENTATION. See Parties, 2.

REPRESENTATION OF OWNERSHIP. See Constitutional Law, 21.

REPUDIATION. See Wills, 3.

REQUISITIONS. See Appeal and Error, 32.

RESIDENCE. See Venue, 6.

RESOLUTIONS. See Corporations, 6.

RESTRAINT OF TRADE. See Vendor and Purchaser, 2.

RESULTING TRUSTS. See Liens, 1.

REVISAL. (See various headings of subjects for greater accuracy.)

SEC.

16 (1). As to whether administrator must sue municipality for wrongful death in county where letters were taken out, where change is made in county lines, *quære*. *Hannon v. Power Co.*, 520.

59. Case settled beyond time agreed upon by pledge without consent of appellee, may be dismissed under the rules. *McNeil v. R. R.*, 729.

235. The individual liability of stockholders is an asset available to creditors and depositors, and not included in an agreement among stockholders to relieve the bank of certain worthless papers after its assets are exhausted. *Hill v. Smathers*, 642.

239. Demurrer for want of necessary party is good in foreclosure suit of lands when mortgagee is dead, and his personal representative has not been made a party. *Geitner v. Jones*, 591.

265. Judgment that receiver collect other assets of bank before collecting from stockholders under their agreement to guarantee worthless paper, does not require the receiver to first collect upon unpaid subscriptions, when the assets are evidently insufficient. *Hill v. Smathers*, 642.

370. Laws of 1915 (Greg. Biennial, 1915), as to payment of costs, has no application. *Summers v. R. R.*, 398.

410. The Superior Court on appeal acquires jurisdiction to adjust all interests of tenants in common of lands. ***Ryder v. Oates*, 569.**

REVISAL—*Continued.*

SEC.

419. This section controls section 424 as to venue in county where land is situated. *Wofford v. Hampton*, 686.

420, 421, 420 (2). In change of county line venue of action against non-resident corporations is governed by its location at beginning of the action; section applies to action on official bonds; is inapplicable to administrator's actions. *Hannon v. Power Co.*, 520.

423. Administrator may sue a municipality for wrongful death in his own county of residence. *Hannon v. Power Co.*, 520.

424. This section is subject to section 419, and where interest is claimed in land venue is where land is situated. *Wofford v. Hampton*, 686.

424-5. Construed with section 420, and permitting administrator to sue municipality, for wrongful death, in his own county. *Hannon v. Power Co.*, 520.

467. Verified account of vendor in justice's court is not regarded as a written pleading. *Building Co. v. Hardware Co.*, 55.

481 (1). Plaintiff may not take voluntary nonsuit, as of right, in an action for lands, claiming defendant's deed void, which is denied, and defendant claims title. *McLean v. McDonald*, 429.

488. Subsequent pleadings to one verified, being written and verified, does not apply to courts of justices of the peace. *Building Co. v. Hardware Co.*, 55.

506. Defendant answers over on overruling his demurrer. *Kearns v. Gray*, 555.

535. Failure of judge to explain meaning of "wagering contract in futures"; *Held*, error. *Orvis v. Holt*, 231.

566-7. Mortgagee holding equitable title may make the mortgagee holding the naked legal title convey the lands. *Evans v. Brendle*, 149.

573-4. Judgment does not relate to beginning of term to affect vesting of title to corporate property in receiver from time of his appointment. *Hardware Co. v. Holt*, 308.

574. Reservation by deed of indefinite homestead in lands does not suspend statute of limitations, and grantor acquiring reversionary interest after expiration of judgment lien acquires title against it. *Kirkwood v. Peden*, 460.

591. This section must at least be substantially complied with in serving and settling case on appeal. *Jenkins v. Carson*, 725.

607-8. Appeal from recorder's court docketed and dismissed at appellant's cost. *Sneeden v. Darby*, 274.

614. Superior Court may retain jurisdiction to sell land, held in common, protect contingent interests and settle the controversy. *Ryder v. Oates*, 569.

629. Executions against property held in active trust not allowed. *Hardware Co. v. Lewis*, 290.

629 (3). Mortgagee purchasing under execution sale subject to his mortgage acquires equity of redemption. *Woodruff v. Trust Co.*, 546.

641. When sale is not judicial, but only under power in mortgage, the place of sale as stated controls. *Palmer v. Latham*, 60.

REVISAL—*Continued.*

SEC.

685. Reservation by deed of indefinite homestead in lands does not suspend statute of limitations, and when grantor after expiration of judgment lien acquires reversionary interest, his title is good against it. *Kirkwood v. Peden*, 460.

689a. The fact of proper indorsement of negotiable paper must be proved. *Midgette v. Basnight*, 18.

735-8, 751-2-3-4. Execution against the person will issue only after execution against the property and return *nulla bona* or *non est inventus;* obligors on bond will be released on production of debtor's person or his voluntary surrender thereof. *Pickelsimer v. Glazener*, 630.

859. Submitting issue of accord and satisfaction before submitting other issues is discretionary with trial judge, and small matter of cost will not affect payment as plea in bar. *McAuley v. Sloan*, 80.

877. Notice of motion for alimony in term after pleadings filed is not required, especially if husband is about to remove or conceal his property. *Jones v. Jones*, 279.

960-2. Husband depositing his money to his wife's credit with her knowledge to avoid creditors is contrary to our statute to prevent fraudulent gifts. *Moore v. Bank*, 180.

1041. Requiring wife to join in mortgage of household and kitchen furniture, with privy examination, is constitutional, and a piano may be included within its terms. *Thomas v. Sanderlin*, 329.

1042. Does not control place of sale stated in and made under power of mortgage. *Palmer v. Latham*, 60.

1224. Corporate property vests in the receiver from the time of his appointment. *Hardware Co. v. Holt*, 308.

1310 (1). Appeal by county commissioners from order to build fences and borrow money therefor abates upon passage of act authorizing a bond issue therefor with voters' approval. *Brinson v. Duplin County*, 137.

1566. Findings by trial judge only that plaintiff had made out a prima facie case of abandonment, in her action for partial divorce, is insufficient to sustain an award of alimony. *Easeley v. Easeley*, 530.

1566. Notice of motion of alimony in term after pleadings filed is not required, especially if husband is about to remove or conceal his property. *Jones v. Jones*, 279.

1578. A devise of lands for life, followed by a separate paragraph, to "bodily heirs" of devisee, is of a fee tail enlarged by statute into a fee. *Keziah v. Medlin*, 237.

1588. An active trust, under this section, to pay annual profits, is not considered executed under the statute of uses and subject to debts of *cestui que trust*. *Fowler v. Webster*, 442.

1589. Plaintiff has no right to voluntary nonsuit in action for land, claiming defendant's deed inoperative when defendant claims under his deed. *McLean v. McDonald*, 400.

1589. Contract signed by husband and wife to convey latter's land, without her privy examination, is a cloud on her title and subject to suit. *Satterwhite v. Gallagher*, 525.

1590. Superior Court may retain jurisdiction to sell land held in common, protect contingent interests, and settle the controversy. *Ryder v. Oates*, 569.

REVISAL—*Continued.*

SEC.

1626. Life tables of expectancy are not conclusive. *Odom v. Lumber Co.*, 135.

1629. *Failure of judge to explain meaning of "wagering contract in futures," Held*, error. *Orvis v. Holt*, 231.

1915. Unless otherwise specified, a premium not given for life insurance bears 6 per cent interest from its date. *Owens v. Ins. Co.*, 373.

1967-8. When sheriff is interested in the action, the court should designate another to summon talesmen. *Lupton v. Spencer*, 126.

2088-90. Where register of deeds has made "reasonable inquiry" before issuing marriage license, his failure to get written consent does not make him liable for penalty; statutes are remedial, and construed to prevent the mischief. Facts not disputed, question of law. *Gray v. Lentz*, 346.

2168. The fact of proper indorsement on negotiable paper must be proved. *Midgette v. Basnight*, 18.

2179. The fact of proper indorsement on negotiable paper must be proved. *Midgette v. Basnight*, 18.

2201-2208. Indorsee is prima facie a holder in due course, when such indorsement is admitted by maker, which is not overcome by denial in pleadings. *Steel Co. v. Ford*, 195.

2270. Promise to one joint maker of note that holder would carry it past maturity is not sufficient to release the other. *Roberson v. Spain*, 23.

2342. Joint makers of negotiable instruments deemed primarily liable, with burden on them to show matters in release. *Roberson v. Spain*, 23.

2513. Highest bidder at sale of lands under a decree acquires no rights until he moves for confirmation, and after confirmation he is the equitable owner; and confirmation will not be set aside except for mistake, fraud, or collusion. *Upchurch v. Upchurch*, 88.

2521. Creditor of a partnership continuing to sell without notice having been sent, and in ignorance, may hold the partnership liable. *Supply Co. v. Lyon*, 445.

2616. To avoid damages for negligence, a street car company must show the Corporation Commission found the use of "practical fenders" unnecessary. *Smith v. Electric R. R.*, 489.

2670-1. Trustees of a congregational church may convey its lands. *Gold v. Cozart*, 612.

2672. A congregational church may acquire land by adverse possession. *Gold v. Cozart*, 612.

2846. *Quia timet* notice required to release joint maker for indefinitely stated time given other on note. *Roberson v. Spain*, 23.

2866. Assessment upon land in drainage district not favored within ten years. *Drainage District v. Hoffstetler*, 523.

3057. Section constitutional; statute controls question of necessity as to distance; unrestrained use confers no right, and town cannot acquire vested right; action enjoined in name of secretary, Board of Health; town required to confer with State Board of Health. *Board of Health v. Comrs.*, 250.

3057. Directing examination of sputum by Laboratory of Hygiene does not affect principle of interpretation that appropriation to State Board of

REVISAL—*Continued.*

SEC.

Health for extension work, Laws of 1915, was not repealed by Laws of 1917. *Sanatorium v. State Treasurer*, 810.

3080. Widow's "right" when dissenting from will, is that of year's support with allowance for child, etc.; and her estate is her dower interest, both vesting by statute. *Drewry v. Bank*, 664.

3098. Assignment of year's provisions to widow may be increased. Revisal, 3103. *Mann v. Mann*, 20.

3103. Under this section, assignment of year's provisions to widow may be increased. Revisal, 3098. *Mann v. Mann*, 20.

3104-7. Findings of fact of the lower court fixing allowance for widow's year's support, upon evidence, will not be reviewed on appeal. The proceedings are statutory. *Drewry v. Bank*, 664.

3254. Motion in arrest of judgment denied if charge in indictment sufficient to sustain judgment. *S. v. Carpenter*, 767.

3265a. (Gregory's). On motion to nonsuit in criminal case, whole evidence considered on second motion. *S. v. Killian*, 792.

3269. On indictment for murder a conviction as accessory will be sustained. *S. v. Bryson*, 803.

3287-9-90. A sentence for twenty years as accessory to murder is less punishment than law requires, and prisoner may not complain that he had not been tried as accessory, or demand release upon the ground that he may not be put in jeopardy twice for same offense. *S. v. Bryson*, 803.

3434. This section is constitutional; but indictment is fatally defective if it fails to make written charge and state agreement to apply property to debt. *S. v. Mooney*, 798.

3632. Construed with chapter 80, section 6, Laws of 1907, does not confine judge to sentence for manslaughter on roads when, in his discretion, a sentence to State's Prison will secure the prisoner from escape. *S. v. Killian*, 792.

3673. Declarations of threats made by witness's father to another witness, incompetent in criminal case; and evidence as to footprints competent. *S. v. Martin*, 808.

3823-4. Failure of judge to explain meaning of "wagering contract in futures," *Held* error. *Orvis v. Holt*, 231.

4779a. Negligence of the insurer will not avail it to declare a policy of life insurance forfeited for nonpayment of premium. *Aiken v. Ins. Co.*, 400.

5326. The general election laws 1916, taken with this section and Constitution, Art. XIII, sec. 3, contemplates proposed amendments take effect subsequent to election. *Reade v. Durham*, 668.

RIGHT OF WAY. See Injunction, 5.

RITUALS. See Corporations, 2.

ROADS AND HIGHWAYS. See Constitutional Law, 9, 12.

Roads and Highways—General Statutes—Local Laws—Prospective Acts—Bonds—Constitutional Law.—Chapter 284, Laws 1917, requiring that the proposition for issuing bonds for public roads should first be

ROADS AND HIGHWAYS—*Continued.*

approved at an election by a majority vote, is prospective in its effect, and by section 62 does not purport to repeal or modify local laws "enacted for the purpose of constructing, altering, or improving the public roads of a county." As to the time of the effectiveness of the constitutional amendment of 1916, see *Reade v. Durham, ante,* 668. *Rankin v. Gaston County,* 683.

ROLL-CALLS. See Constitutional Law, 7, 8.

RULE IN SHELLEY'S CASE. See Wills, 4.

RULES. See Carriers of Passengers, 1.

RULES OF COURT. See Appeal and Error, 32, 35, 37, 47.

SAFE PLACE TO WORK. See Master and Servant, 4.

SAFETY PASS. See Carriers of Passengers, 6.

SALARIES. See Sheriffs, 1; Municipal Corporations, 17.

SALES. See Mortgages, 1, 2, 3, 5, 9; Judgments, 7; Equity, 5; Constitutional Law, 6; Tenants in Common, 5; Statute of Frauds, 4; Courts, 1.

1. *Judicial Sales—Confirmation—Court's Discretion—Statutes.*—The highest bidder at a sale of lands under decree of court is a preferred proposer, acquiring no independent rights in the property or suit until confirmation, which rests within the sound legal discretion of the court until he moves therefor, the statutory requirement that the sale be confirmed "if no exception thereto is filed within twenty days," being for the convenience of the parties in not requiring them, as before the enactment of the law, to give notice, etc., of the motion whereon the court may act and conclude them. Revisal, sec. 2513. *Upchurch v. Upchurch,* 88.

2. *Same—Advanced Bid—Amount.*—While it has been in accord with the practice in this State to confirm a judicial sale unless there has been an advanced bid from a responsible bidder, this is but to afford evidence as to the inadequacy of the price, which the court, in the exercise of its discretion to confirm or set aside the sale, may regard or disregard; and while a bid of 10 per cent will customarily be considered, so may, also, an advanced bid in a less sum, when the amount is large, a distinction also recognized by our statute, ch. 146, Laws 1915, as to sales under decree of foreclosure, etc., making 5 per cent sufficient when the bid is more than $500. *Ibid.*

3. *Judicial Sales—Confirmation—Fraud and Mistake—Motion in Cause—Statutes.*—After confirmation by the court of a judicial sale of lands, the purchaser is regarded as the equitable owner, and the sale, as it affects his interest, can only be set aside for "mistake, fraud, or collusion," established on petition regularly filed in the cause. Revisal, sec. 2513. *Ibid.*

4. *Judicial Sales—Courts—Private Sales.*—It is within the power of the court, having jurisdiction, to order the private sale of lands for the purpose of dividing the proceeds among tenants in common. *Ryder v. Oates,* 569.

SENTENCE. See Judgments, 23, 24; Courts, 4; Criminal Law, 6.

SEPARATE EXAMINATION. See Husband and Wife, 1; Equity, 7.

SEPARATE PROPERTY. See Husband and Wife, 3.

SERVICES. See Parties, 2; Indebitatus Assumpsit, 1; Appeal and Error, 31.

SET-OFFS. See Banks and Banking, 1; Deeds and Conveyances, 9.

SEWERAGE. See Municipal Corporations, 2; Statutes, 1; Health, 1, 5, 6.

SHAREHOLDERS. See Corporations, 5, 8, 9; Banks and Banking, 5.

SHARES. See Corporations, 5; Statute of Limitations, 1.

SHERIFFS. See Jurors, 1, 2; Statute of Frauds, 4; Contracts, 18.

Sheriffs—Successors—Taxes—Salaries—Tax Lists—Emoluments—Fees—Counties—Statutes.—While collecting the county taxes is made a part of the duties of a sheriff, it is a separate function, and exists after his term as such, for the purpose of collecting, from the tax lists in his hands, the taxes for the current year, in the absence of legislation to the contrary; and an act of the Legislature changing the pay of county officials from a salary to a fee basis, taking prospective effect from the expiration of the terms of the present incumbents except the clerk, for whom it is to be effective two years later, will be presumed to have a sensible and just intent, with knowledge of existing conditions; and where it does not direct the incumbent sheriff to deliver the tax lists to his successor, it will not be construed as discriminative in favor of the clerk, register of deeds, or like officers, and to deprive the incumbent sheriff of the emoluments of his term by requiring that he deliver the tax lists to his successor. *Mills v. Deaton*, 170 N. C., 388, cited and distinguished. *Comrs. v. Bain*, 377.

SHIPMENT. See Carriers of Goods, 1.

SINKING FUND. See Counties, 3; Public Officers, 4; Municipal Corporations, 17; Appeal and Error. 28.

SPECIAL REQUESTS. See Instructions, 3.

SPECIFIC PERFORMANCE. See Statute of Frauds, 1.

SPENDTHRIFT TRUSTS. See Trusts and Trustees, 1.

STATE BOARD OF HEALTH. See Health, 2, 6; Statutes, 16.

STATE SANATORIUM. See Statutes, 14.

STATE'S LANDS.

1. *State's Lands—Grants—Regularity.*—A grant is regular upon its face when the record discloses that it was duly entered and surveyed, and bonds for the purchase money filed as required by law, which was subsequently paid by the assignee of the surety of the purchaser and issued to the one under whom a party to the controversy claims title. *Waldo v. Wilson*, 689.

2. *Same—Same Entry.*—Where the parties to a controversy to recover lands claim under a senior and junior grant based upon the same entry, the latter may not claim that the land was not open to entry

STATE'S LANDS—*Continued.*

at the time; and the oldest grant will take priority unless it is successfully attacked, which cannot be done collaterally for irregularity or fraud. *Ibid.*

3. *State's Lands — Grants — Presumptions — Collateral Attack—Fraud—Trusts and Trustees.*—There is a presumption that a grant of State's lands, regular on its face, is valid, required by law, has been taken, and a senior grant may be attacked for fraud by an adverse claimant, that being a matter for the State, his remedy being to have the grantee declared a trustee for his benefit. *Ibid.*

4. *State's Lands—Limitation of Actions—Adverse Possession—Diminutive Extent—Color—Grants—Deeds and Conveyances.*—Occupation by an adjoining owner of a very small part of lands claimed by another, as a fiftieth part of an acre from a 640-acre tract, does not presume such adverse possession of the larger tract as will ripen title under color of a deed or grant, and the issue was, in this case, properly left to the jury under a charge of the court which was approved on appeal. *Ibid.*

STATION PLATFORMS. See Carriers of Passengers, 6.

STATIONS. See Carriers of Passengers, 1.

STATUTE OF FRAUDS. See Mortgages, 1; Contracts, 7; Corporations, 9.

1. *Statute of Frauds—Deeds and Conveyances—Escrow—Specific Performance—Damages—Registration—Equity.*—A good and sufficient deed executed in pursuance of a parol contract to convey lands, and placed in escrow, is a sufficient writing within the intent and meaning of the statute of frauds for the grantee to recover damages for a breach of contract to convey, especially when his grantor has conveyed the land to another who holds under a prior recorded deed. *Pope v. McPhail*, 238.

2. *Statute of Frauds — Municipal Corporations — Street Improvements—Promise—Direct Obligation — Consideration.*—Where a statute prohibits a municipality from assessing the lands of adjoining owners upon a street exceeding 20 per cent of their value for its improvement, and the requisite number of such owners appear before the proper authorities at their regular meeting and propose that the street be improved at a cost beyond the limit imposed, the same to be assessed against their lands, the spokesman promising to obtain a written waiver of their statutory right from the other owners and deliver them to the city, and in consequence the proposition is accepted and the improvement made: *Held*, the promise made by the spokesman created a direct obligation upon himself, founded upon the benefits to be received by him, and is not a promise to answer for the debt or default of another, falling within the meaning of the statute of frauds requiring a writing, etc. *Charlotte v. Alexander*, 515.

3. *Same—Benefits—Estoppel.*—Abutting property owners who have contracted with a municipality that the latter exceeded its statutory authority in assessing their lands beyond a certain per cent of their value for street improvements, and to give it a written waiver of such right, are estopped to deny the validity of the contract by accepting its benefits, and the "waivers," when obtained, are enforcible by the municipality. *Ibid.*

STATUTE OF FRAUDS—*Continued.*

4. *Statute of Frauds—Judicial Sales—Sheriffs—Principal and Agent.*—A sheriff at an execution sale of lands under a judgment, by public outcry by his auctioneer, acts as agent for all parties therein interested, including the purchaser, and a memorandum made by him on the execution at the time of the sale of the purchaser thereat, and the price, with description of the lands in the execution, is sufficient memorandum of the transaction within the meaning of the statute of frauds. *Woodruff v. Trust Co.*, 546.

5. *Statute of Frauds—Deeds and Conveyances—Letters—Inclosures—Parol Evidence.*—A letter written by the purchaser to the seller of lands, fully describing the lands and inclosing a deed sufficient in form and description, for him to execute and return, providing for deferred payments of the balance of the purchase price, is a sufficient writing within the meaning of the statute of frauds, permitting a recovery of such balance; and the fact that the deed had been inclosed in the letter may be proved by parol evidence, as a collateral matter to the written instrument. *McLendon v. Ebbs*, 603.

STATUTE OF LIMITATIONS.

Statute of Limitations—Corporations — Transfer of Shares — Contingent Interests—Conversion.—Where a contingent interest in shares of stock has vested by will in the remainderman after the death of the first beneficiary, and he brings his action against the corporation wrongfully transferring them, for the stock or its value within three years of the happening of the contingency, the action is not for a conversion, and the statute of limitations will not bar it. *Baker v. R. R.*, 365.

STATUTE OF USES. See Judgments, 11; Trusts and Trustees, 1.

STATUTES. See Municipal Corporations, 1, 2, 14, 15, 16, 19; Executors and Administrators, 1, 2; Bills and Notes, 4, 6; Mortgages, 3, 5, 7, 8; Injunction, 4; Plea in Bar, 1; Sales, 1, 3; Carriers of Goods, 7, 9; Drainage districts, 1; Jurors, 1; Actions, 1, 2; Constitutional Law, 2, 4, 5, 7, 9, 11, 13, 14, 15, 18, 19, 20, 21, 22; Trusts and Trustees, 1; Public Officers, 2; Evidence, 4, 11; Master and Servant, 9; Venue, 1, 2, 4, 5, 6; Instructions, 3; Estates, 1; Condemnation, 1; Health, 1, 3, 4, 5; Recorder's Court, 1; Divorce, 1; Judgments, 11, 23, 25; Register of Deeds, 1; Insurance, 8, 18; Sheriffs, 1; Equity, 6; Homestead, 3; Contracts, 9, 11; Railroads, 5, 6; Marriage and Divorce, 1; Pleadings, 7; Courts, 1, 5; Husband and Wife, 3; Corporations, 18, 19, 21; Limitation of Actions, 5; Counties, 1; Arrest and Bail, 2; Banks and Banking, 4; Commerce, 1; Appeal and Error 29, 33, 35, 42; Roads and Highways, 1; Intoxicating Liquors, 1, 2, 3; Indictment, 2; Criminal Law, 3, 4, 6, 7; Homicide, 7, 8.

1. *Statutes—Interpretation—Repealing Statutes—Electric Lights—Waterworks—Sewerage—Municipal Corporations — Cities and Towns.*—The provision in chapter 131, section 1, Laws 1915, permitting municipalities to issue bonds for necessary expenses without the approval of their voters, that the act shall not be construed to repeal or supersede any other statutes, refers to acts of only local application; and the act of 1911, ch. 86, sec. 1, subdivisions (a) and (b), requiring the approval by the voters of the proposition of acquiring and installing electric lights, water, and sewerage by a municipality, is inconsistent with the

STATUTES—*Continued.*

later act, which in this respect repeals the former one. *Swindell v. Belhaven*, 1.

2. *Statutes—Stock Law—Assessments — Necessaries — Fences — Constitutional Law.*—A statute which creates stock-law territory for certain townships of a county, and authorizes the county commissioners to make assessments for erection of fences on the township lines, without submitting the question of assessments to the approval of the voters, is void as to the assessment, Constitution, Art. VIII, Sec. 7, such not being for a necessary expense; and it is also unconstitutional upon a further ground, when it permits assessments to be made for the building of fences, etc., upon real and personal property not within the territory prescribed and receiving no benefit from the erection thereof. *Harper v. Comrs.*, 133 N. C., 106 cited and applied. *Archer v. Joyner*, 75.

3. *Statutes—Stock Law—Independent Provisions—Constitutional Law.*—Where there are distinct and valid provisions of a statute for creating stock-law territory in certain townships of a county, with unconstitutional provisions for assessments to be made for the erection of fences on its lines, the valid provisions may be enforced, the two portions of the law being separate and it appearing from a perusal of the statute that the Legislature intended the valid portion to be effective independently of the invalid part. *Ibid.*

4. *Statutes—Remedial—Register of Deeds—Marriage License.* — Revisal, secs. 2090 and 2088, requiring reasonable inquiry to be made by the register of deeds as to the age of the parties, etc., before issuing a marriage license to them, are remedial, and should be construed to prevent the mischief and advance the remedy intended. *Gray v. Lentz*, 346.

5. *Statutes—Widow's Year's Support—Equity.*—The proceedings to allot a year's support is statutory and without an element of equitable jurisdiction. Revisal, secs. 3104, 3107. *Drewry v. Bank*, 664.

6. *Statutes—Widow's Year's Support—Wills—Dissents — Equity.* — The "rights" and "estate" referred to in the statute, Revisal, sec. 3080, allowed to the widow dissenting from her husband's will, is the right to a year's support, together with a child's allowance, and her estate is her dower interest, and both rest by statute without equitable cognizance, except when equity may be invoked to enforce her legal rights. *Ibid.*

7. *Statutes—Widow's Year's Support—Jury—Trials.*—When the widow's right to a year's support is admitted, the amount is a question of law arising under the statute, and the statutory method must be pursued, which does not require a trial by a jury; and especially so when no objection thereto is duly taken or demand therefor aptly made. *Ibid.*

8. *Statutes — Widow's Year's Support — Minor Children — Allowance.*—Where a year's support is made for the widow and minor children it should be allowed to the widow, who is charged with the support of the children, and the increase of the allowance made in such instances is for that purpose. *Ibid.*

9. *Statutes—Widow's Year's Support—Allowance — Discretion — Abuse—Courts.*—Where the estate of the deceased husband is large, left in good condition, with annual income of $38,000, an allowance of a

STATUTES—*Continued.*

year's support to the widow of $12,500, who has a minor son, less than the value of the household furniture, is held not an abuse of the Superior Court's discretion which the Supreme Court will review. *Ibid.*

10. *Statutes—Interpretation—Intent—Language Used.*—Where a statute is clearly expressed, and is without doubtful meaning, an interpretation beyond the meaning of the expressions used therein is not permissible. *S. v. Carpenter*, 767.

11. *Statutes—Police Powers—Relative Rights.*—A citizen deriving title to real property from the State acquires it upon condition that he holds it subject to necessary or reasonable regulations in promotion of the public interest, the rights, duties, and advantages of each being reciprocal with those of adjoining owners of lands, and beneficial to all. *S. v. Perley*, 783.

12. *Statutes—Municipal Corporations — Watersheds — Timber Interests.*—One having logging interests upon lands is amenable to the provision of our statute requiring the removal of the tree-tops, etc., from the cutting-over of the land within 400 feet of a municipal watershed affording the means of a water supply to its inhabitants. *Ibid.*

13. *Statutes—Repeal—Implication.*—The repealing of a statute by a subsequent one by implication is not favored by interpretation, and where two laws on the same subject are both affirmative in terms, the latter will not be held to repeal the former unless and to the extent that the two are clearly repugnant, or unless the latter, covering the entire subject, gives clear indication that it was intended as a substitute for the former. *Sanatorium v. S. Treasurer*, 810.

14. *Same—State Sanatorium—Appropriations.*—A statute was enacted incorporating a department of the State Government for treatment of "persons afflicted with tuberculosis," appointing directors and making appropriation and apportioning the same for establishment and maintenance, and later, at a different session, a statute was enacted making appropriation for these stated purposes. At a still later session a statute was enacted abolishing or removing the old directorate, substituting the State Board of Health as such, *ex officio*, continued the corporation and created and made annual appropriations for a new feature for "extension work," distinct and separate from those theretofore existing. At a still later session a statute was enacted for a bond issue to provide for permanent improvements on the principal State institutions, apportioning a certain amount to the one in question, without repealing clause. *Held*, the appropriation for the "extension work" being distinct, and so recognized by the statute, was not repealed by implication by the last enactment, it being with reference only to the maintenance of the institution. *Ibid.*

15. *Same—Annual Appropriations—"Extension Work."*—Where in a general act appropriating money to State Institutions there appears in the same section three distinct appropriations, separately stated, to the State Sanatorium, two of which were embraced in former statutes, but adding a third for the dissemination of knowledge concerning tuberculosis, with specific annual appropriation, the placing of the appropriations in such act, ordinarily effective for the two intervening years from the date of the legislation, does not control the interpretation that the repeal of statutes by implication is not favored; and a

STATUTES—*Continued.*

later statute making appropriations for the first two items, and leaving out the third, will not be held to repeal the third, in the absence of a repealing clause, and especially when it appears that such would leave the institution without means to carry on this important work. *Ibid.*

16. *Same—Laboratory of Hygiene—State Board of Health.*—The principle upon which it is held in this case that appropriation of 1915 for "extension work" or disseminating knowledge throughout the State as to tuberculosis was not repealed by the laws of 1917 is not affected by the provisions of Revisal, sec. 3057, directing the examination for suspected sputum by the State Laboratory of Hygiene, or by the Laws of 1909, providing an assistant, such being an aid to the main purpose of the statute of 1915, and not coming within the appropriations to the State Board of Health, as a part of that department. *Ibid.*

STIPULATIONS. See Insurance, 2, 15.

STOCKHOLDERS. See Corporations, 6; Banks and Banking, 4.

STOCK LAW. See Statutes, 2, 3; *Injunction*, 4.

STREET IMPROVEMENTS. See Statute of Frauds, 3.

STREET RAILWAYS. See Railroads, 4, 5, 6, 7, 8, 9, 10.

STREETS. See Appeal and Error, 1; Cities and Towns, 1; Municipal Corporations, 3, 4, 15, 16.

SUBSCRIBERS. See Corporations, 14.

SUBSCRIPTION LISTS. See Corporations, 11.

SUBSCRIPTIONS. See Corporations, 13, 15.

SUITS. See Insurance, 24; Criminal Law, 7.

SUPERIOR COURT. See Justice's Courts, 2.

SUMMONS. See Drainage Districts, 1.

SURETIES. See Arrest and Bail, 2.

SURVEYOR. See Processioning, 3; Deeds and Conveyances, 21.

SURVIVORSHIP. See Wills, 10; Husband and Wife, 2, 4.

TAXATION. See Counties, 1, 3; Municipal Corporations, 19, 20.

TAXES. See Sheriffs, 1.

TAX LISTS. See Sheriffs, 1.

TELEGRAPHS.

Telegraphs — Commerce — Federal Control — Federal Decisions — Unrepeated Messages—Extra Charge.—The amendment by Congress passed in 1910 to the Federal Employers' Liability Act subjects interstate messages by telegraph to the provisions of that act, requiring that charges therefor shall be reasonable, classifying them into day, night, repeated, unrepeated messages, etc., and permitting different rates

TELEGRAPHS—*Continued.*

to be charged for the different classes of messages. *Held*, Congress having assumed entire control of interstate messages, the decisions of the Federal courts are controlling, and thereunder a stipulation on the message blank that no recovery can be had beyond the toll paid for the message, unless repeated upon the payment of an extra charge, is valid and enforcible, when suit is brought upon the contract, in the courts of this State. *Meadows v. Tel. Co.*, 240.

TENANTS IN COMMON. See Judgments, 9; Estates, 1.

1. *Tenants in Common — Issues — Pleadings — Sole Seisin.* — Where the pleadings raise the issue as to whether the plaintiff and defendants, in proceedings originally instituted to partition lands, are tenants in common, as heirs at law of a common ancestor, it is not sufficient to submit but one issue as to sole seisin claimed by defendants, for if answered in the negative it would not be determinative or support a judgment. *Lester v. Harward*, 83.

2. *Tenants in Common—Sole Seisin—Burden of Proof—Nonsuit—Trials.*— Where the defendants plead sole seisin in proceedings to partition lands, the burden of proof is with the plaintiff, which will devolve upon the defendant to establish adverse possession, when relied upon for title after a prima facie case of tenancy in common is made out, and a motion for judgment of nonsuit on such defense cannot be allowed. *Ibid.*

3. *Tenants in Common—Title—Adverse Possession—Limitation of Actions.* Where the plaintiff and defendants claim the land sought to be partitioned among them as tenants in common as heirs at law of the deceased owner, the latter as grandchildren, and it appears that one of the defendants had lived on the land with her father, who continuously occupied and exclusively used it as sole owner during her life, and thereafter it was so continuously used by the other defendants covering altogether a period of twenty years: *Held*, such adverse possession ripens the title to the lands in the defendants. *Dobbins v. Dobbins*, 141 N. C., 216, cited and applied. *Ibid.*

4. *Tenants in Common—Deeds and Conveyances—Partition—Equality in Value—Evidence.*—Tenants in common of land under a devise that the *locus in quo* be equally divided between them had the lands surveyed and executed mutual conveyances to the other, each deed purporting to convey the same number of acres, "more or less." One of them brought action thereafter against the other with allegation and evidence tending to show that his acreage was substantially less than stated in his deed, which he had made good by payment of damages to a purchaser, and sought to recover the amount of his loss therein. *Held*, a division of lands in common rests upon equality of value rather than acreage, and in the absence of allegation or evidence tending to show an inequality in the former, a recovery was properly denied. *Lee v. Montague*, 226.

5. *Tenants in Common—Outstanding Title—Mortgage of Ancestor—Foreclosure Sale.*—Where the ancestor has mortgaged his lands, and subject thereto they have descended to his heirs at law as tenants in common, and one of them has become the purchaser at the foreclosure sale, the title thus acquired is not regarded as outstanding, in the sense it may not be acquired by one tenant in common against the others,

TENANTS IN COMMON.—*Continued.*

but in that of the ancestor himself; and where the sale and conveyance thereunder are regular and valid, the purchaser's title will be upheld. *Troxler v. Gant*, 422.

6. *Tenants in Common—Limitation of Actions—Adverse Possession—Minority—Instructions—Appeal and Error.*—Where a tenant in common claims the lands by adverse possession without sufficient evidence as to the time thereof, and there is evidence of the minority of the other party for a part of the period claimed, it is reversible error for the judge to charge the jury that such possession for twenty years, etc., would ripen the claimant's title, and without reference to the evidence of the minority of the adverse party, when such is relevant to the inquiry. *Ibid.*

TENDER. See Insurance, 4, 5, 10; Judgments, 17; Accord and Satisfaction, 2.

TERMS. See Judgments, 1, 12, 15; Appeal and Error, 38.

TEXT BOOKS. See Evidence, 12.

THREATS. See Municipal Corporations, 7; Criminal Law, 8.

TIMBER. See Contracts, 4, 12; Deeds and Conveyances, 17, 18, 20.

TIMBER DEEDS. See Drainage Districts, 2.

TIMBER INTERESTS. See Statutes, 12.

TIME. See Judgments, 1; Bills and Notes, 4.

TITLE. See Processioning, 1; Tenants in Common, 3, 4; Judgments, 6, 9; Deeds and Conveyances, 7; Wills, 3, 11; Injunction, 5; Limitation of Actions, 2; Receivers, 3; Estates, 2; Issues, 2.

TORTS. See Corporations, 1; Pleadings, 4.

TRANSFER. See Corporations, 5.

TRANSFER OF CAUSES. See Courts, 5.

Trespass — Legal Right — Nominal Damages. — Nominal damages are awarded in recognition of a legal right where the right has been invaded and no actual damages are shown; and where trespass upon the right to cut timber standing upon lands has been shown in an action, nominal damages, at least, are recoverable, which carries the cost against the defendant. *Hutton v. Cook*, 496.

TRESPASSER. See Master and Servant, 2.

TRIAL BY JURY. See Reference, 1, 2; Courts, 7.

TRIALS. See Bills and Notes, 5, 9; Master and Servant, 1, 3, 8, 11, 17; Appeal and Error, 1, 4, 5, 10, 44; Cities and Towns, 1; Corporations, 3; Contracts, 3, 20; Accord and Satisfaction, 1; Justice's Court, 2; Carriers of Passengers, 2, 4; Deeds and Conveyances, 3; Evidence, 2, 3, 8; Tenants in Common, 2; Malicious Prosecution, 1, 2; Instructions, 3, 4; Railroads, 2, 9; Register of Deeds, 2; Municipal Corporations, 7, 18, 21; Insurance, 7, 14; Actions, 2; Contributory Negligence, 1; Statutes, 7; Railroads,

TRIALS—*Continued.*

11; Principal and Agent, 3; Limitation of Actions, 6; Arson, 1; Embezzlement, 2; Criminal Law, 5, 8.

Trials — Impartiality — Homicide — Witnesses. — Where the plea of insanity as a defense in the trial of a capital felony is made and relied on, objection to the fairness or impartiality of the trial, that the solicitor had subpoenaed and had not examined as a witness a specialist in mental diseases, cannot be sustained on appeal. *S. v. Terry*, 761.

TRUSTEES. See Limitation of Actions, 5.

TRUSTS. See Limitation of Actions, 1, Judgments, 7, 11; Corporations, 5.

Parol Trusts — Lands — Options — Deeds and Conveyances — Grantor.— Where the plaintiff has been put to trouble and expense in securing an option to himself on lands of nonresident under parol agreement that he and the defendant were to buy them jointly, which option he assigns to the defendant, who subsequently, and without his knowledge, exercises his right and takes title to himself, and thereafter repeatedly promises to conform to his agreement and convey the plaintiff his part, which he since refused to do: *Held*, an option does not transfer title to the lands, and the plaintiff is entitled to enforce the parol trust in his favor, the principle that a grantor of lands cannot enforce a parol trust therein in his favor (*Gaylord v. Gaylord*, 150 N. C., 222) not applying. *Allen v. Gooding*, 93.

TRUSTS AND TRUSTEES. See Evidence, 4; Equity, 3; Partnership, 1; State's Lands, 3.

1. *Trusts and Trustees—Spendthrift Trusts—Income—Statute of Uses—Statutes.*—A devise creating a spendthrift trust, under Revisal, sec. 1588, for the trustee to receive and pay the profits, annually, or oftener for the support and maintenance of the testator's named son, is not a passive trust either as to the principal or income, or one executed under the statute of uses, and is not subject, as to either, to the payment of the debts created by the *cestui que trust*, though he be a nonresident of the State. *Fowler v. Webster*, 442.

2. *Same—Creditors—Exemptions.*—The effect of the spendthrift trust, Revisal, sec. 1588, is not to create a personal property exemption in favor of a nonresident *cestui que trust* in the income from the trust estate. *Ibid.*

3. *Trusts and Trustees—Executors and Administrators—Power of Disposition—Consent of Executors—Renouncement—Judgment—Estoppel.*— A devise and bequest of real and personal property to the wife with the power of disposition given her with the consent of several executors named in the will, is one of personal confidence in each of the executors, requiring the consent of all for the exercise of the power; and where the executors have not qualified for death or renunciation, under the formalities of Revisal, sec. 10, those thus renouncing may not come in and qualify after a lapse of twenty years and give valid consent to the exercise of the power, especially when they are bound by a judgment in an action to sell the lands, wherein they had been made parties. *Ryder v. Oates*, 569.

UNDUE INFLUENCE. See Wills, 5, 6.

VALIDITY. See Insurance, 24; Constitutional Law, 13.

VENDOR AND PURCHASER.

1. *Vendor and Purchaser—Contracts—Parol Evidence — Fraud.*—Where a purchaser of machinery has signed a written order stating that it was not to be varied by parol representations of the seller's agent, and containing provision that it may be returned on certain conditions with which the purchaser has not complied, in the absence of evidence that the agent had procured the contract by fraud, it may not be shown as a defense in the seller's action on the contract that his agent had made representations, precluded by the contract, as to its pulling stumps, which were false. *Harvester Co. v. Carter*, 229.
2. *Vendor and Purchaser—Contracts—Restraint of Trade.*—A sale of business with agreement that the seller will not engage therein in the same locality for a certain number of years is not in restraint of trade if it affords a fair protection to the interests of the purchaser, and not so extensive as to interfere with that of the public; and a covenant in the sale of a barber business within a town, that the seller will not engage in such business within the town for two years, is valid and enforcible. *Bradshaw v. Milliken*, 432.
3. *Same—Liquidated Damages—Equity—Injunction.*—Where it is agreed in positive terms in a written contract of sale of a business that the seller will not engage therein for two years in the same town, specifying that he pay a reasonable sum as liquidated damages upon its breach, the specification of such damages is not construed as an implied permission to breach his covenant and pay the amount of the damages named, as the purchaser is left to his remedy at law for the recovery of his damages and his equitable remedy by injunction to restrain the seller from violating his covenant. *Ibid.*
4. *Same—Penalties.*—Where the seller of his business has made a valid covenant with the purchaser not to go into the same business in the same locality for a term of years, with further agreement to pay a certain sum as liquidated damages upon his breaching his covenant, it is the policy of the courts to construe such agreement as liquidated damages rather than a penalty, in the absence of evidence to show that the amount claimed is unjust or oppressive, or disproportionate to the loss actually sustained; and their payment being of the very substance of the agreement, they may be recovered by the purchaser. *Ibid.*
5. *Same—Appeal and Error—Damages.*—The trial court having erroneously dissolved an order restraining the seller of his business from breaching his covenant not to engage therein for a term of years, upon the ground that liquidated damages were agreed to be paid by the seller in that event, as an alternative of performance, it is *Held*, that the defendant should be enjoined, and that the plaintiff may recover any damages he can prove to the date when the injunction is served. *Ibid.*

VENIRE.

Venire—Another County—Court's Discretion — Appeal and Error — Jury. The refusal of a motion to summon a venire from another county for the trial of a capital felony is within the sound discretion of the trial judge, and not reviewable by the Supreme Court on appeal. *S. v. Terry*, 761.

VENUE. See Executors and Administrators, 3; Corporations, 21.

1. *Venue—Nonresidents—Municipal Corporations—Executors and Administrators—Domicile—Statutes.*—Where the plaintiff sues a nonresident corporation and a municipal corporation jointly for the wrongful death of his intestate in the county in which the intestate died domiciled, but at the time of commencing the action, by change made in the county line, the place of the domicile was in an adjoining county, the question of venue is ordinarily governed by the *locus* at the commencement of the action. Revisal, sec. 421. *Hannon v. Power Co.*, 520.
2. *Venue—Foreign Corporations—Executors and Administrators—Wrongful Death—Statutes.*—A foreign corporation may be sued by an administrator for the wrongful death of his intestate either in the county wherein the cause of action arose or that of the personal representative of the deceased. Revisal, sec. 423. *Ibid.*
3. *Venue—Municipal Corporations—Officials—Wrongful Death—Executors and Administrators.*—The requirement of Revisal, sec. 421, that action against a municipal officer be brought in the county of the municipality, applies to actions on official bonds, and not against municipal corporations except as falling under Revisal, sec. 420 (2), which is inapplicable to actions by an administrator to recover for the wrongful death of his intestate. *Ibid.*
4. *Venue—Statutes, General—Special — Exceptions — Municipal Corporations—Executors and Administrators.*—Revisal, sec. 420, providing, among other things, that an action against a public officer be brought in the county wherein the cause of action arose, subject to the power of the court to change the place of trial, Revisal, 425, is general in its terms, and Revisal, sec. 424, should be construed as an exception thereto, allowing an administrator to sue at his election in his own county for the wrongful death of his intestate. *Ibid.*
5. *Venue—Public Policy—Statutes—Conflicting Laws.*—As a general rule, when not prohibited by public policy expressed by statute, a resident party seeking the aid of our courts may select the forum; and this should prevail when the statutory provisions respecting the venue are conflicting. *Ibid.*
6. *Venue—Actions—Statutes—Residence of Parties—Lands.*—Revisal, sec. 424, providing that the venue of causes of action shall be where the plaintiffs or defendants or any of them reside, is general in its terms and subject to the provisions of Revisal, sec. 419, subsec. 1, specifying the venue for the recovery of real property or of an estate or interest therein, or for the determination in any form of such right or interest, etc., shall be in the county in which the subject of the action or some part thereof is situated. *Wofford v. Hampton*, 686.
7. *Same—Creditors' Bill — Principal Relief — Deeds and Conveyances—Fraud.*—Where the wife of a debtor is made party defendant in an action in the nature of a creditors' bill in order to set aside his deed to her for fraud and subject the land to the satisfaction of the demands of his creditors, the suit to establish the plaintiffs' claims will be considered as incident to the essential and controlling purpose of setting aside the deed, and the venue governed by Revisal, sec. 419, requiring that the suit be brought in the county wherein the land, etc., is situated. *Ibid.*

VERDICT. See Judgments, 17; Carriers of Goods, 10; Homicide, 6.

VERIFICATION. See Divorce, 2.

VERIFIED STATEMENTS. See Justice's Courts, 1.

VOLUNTEER. See Master and Servant, 7.

WAGERING. See Contracts, 8.

WAIVER. See Insurance, 12, 15; Deeds and Conveyances, 20; Evidence, 1; Judgments, 22.

WAREHOUSEMEN. See Carriers of Goods, 8.

WARRANTY. See Deeds and Conveyances, 8.

WATERSHEDS. See Constitutional Law, 19; Criminal Law, 3; Statutes, 12.

WATERWORKS. See Municipal Corporations, 2; Statutes, 1.

WILLS. See Deeds and Conveyances, 5; Evidence, 2; Equity, 1; Appeal and Error, 15; Statutes, 6.

1. *Wills—Interpretation—Intent.*—The object in construing a will is to give effect to the testator's intent as gathered from the language of the entire instrument, rejecting no words or language if a meaning can be given them, and, if possible, reconciling seeming repugnancies between its different provisions. *Satterwaite v. Wilkinson*, 38.

2. *Same—Estates—Contingent Limitations—Powers of Disposition—Deeds and Conveyances.*—A devise to the wife of testator's property, including lands, with power to dispose thereof for her maintenance and for the support of a named son, and for his education, but if his widow die before the son, the latter to be the "entire heir of the remaining property" upon certain conditions, then with contingent limitation over; and if the son live to be 21 years of age, etc., the property "is to be at his own disposal." After the death of the widow and upon the arrival of the son at the age of 21 and the fulfillment of the conditions, it is *Held*, construing the will to effectuate the intention of the testator as gathered from the whole thereof, the son took a defeasible fee, with general power of disposition, and his deed to the land conveyed a good fee-simple title to the purchaser. *Ibid.*

3. *Wills—Husband and Wife—Joint Wills—Repudiation by Survivor—Title.*—A husband and wife holding lands by entireties may make a valid will jointly, devising the lands to their children or to others; but upon the death of either of them the property will go to the survivor, who may repudiate the paper-writing as his or her will, as the case may be, nothing else appearing, and convey the title to a purchaser. *Ginn v. Edmundson*, 85.

4. *Wills—Devise—Loan—Estates for Life—Rule in Shelley's Case.*—The word "loan," used in connection with a testamentary disposition of lands for life, bears the same interpretation as the words "give" or "devise," unless a contrary intent appears and a "loan" to testator's son, S., of certain lands "to have during his life, at his death to his bodily heirs, and to his wife her lifetime or widowhood," is of the fee simple to S., subject to the life estate of his wife, or until she remarry; and the precedent life estate in her does not affect the operation of

WILLS—*Continued.*

the rule in *Shelley's case*, so far as the heirs are concerned. *Smith v. Smith*, 124.

5. *Wills—Devisavit Vel Non—Mental Capacity—Undue Influence—Beneficiaries—Declarations.*—Upon a trial of *devisavit vel non* of a will, naming two or more beneficiaries, wherein the issues, submitted without objection, and the contentions of the parties relate solely to its validity as a whole, declarations of one of the devisees in favor of the caveator, as to the mental capacity of the testator, or undue influence practiced upon him, would be prejudicial to the rights of the other beneficiary or beneficiaries, and incompetent. *McDonald v. McLendon*, 172.

6. *Wills—Undue Influence—Evidence—Instructions.*—*Held*, in this action of *devisavit vel non*, old age, bad health, and weakness of mind were circumstances to be considered by the jury upon the question of undue influence by the son of the testator, but practically afforded no evidence of fraud; and the charge of the court, construed as a whole, was not erroneous. *Ibid.*

7. *Wills—Codicils—Interpretation.*—A codicil to a will is a part thereof, expressing the testator's afterthought or amended intention, and should be construed with the will itself as one instrument. *Darden v. Matthews*, 186.

8. *Same—Estates—Powers of Sale.*—A devise of lands for life, with certain limitations, etc., by the will and a codicil thereto confers upon the first taker "full power and authority to sell and convey" the same and "to make title to the purchaser after my death." *Held*, the life estate is not enlarged by the codicil; but the life tenant is given authority to exercise the power to sell the lands, and upon his doing so he may convey the fee-simple title to the purchaser by a good and sufficient deed, but is only entitled to the value of his life estate out of the proceeds of sale. *Ibid.*

9. *Wills—Interpretation.*—A will should be interpreted from the perusal of the entire instrument, giving meaning, when possible, to the words or expressions therein used to ascertain and effectuate the testator's intent, having reference to those who are evidently the objects of his care, when the language of the will indicates them. *Bowden v. Lynch*, 203.

10. *Same—"Children"—Successive Survivorships — Termination.*—Where a will appears to have been written by one unfamiliar with technical language and the meaning of legal expressions, who used throughout the words "children," "heirs of the body," etc., indiscriminately and with reference to both real and personal property, and devises a part of his real property, after a life estate to his wife, to certain of his children, "and if any of my children before mentioned shall die without heirs lawfully begotten of their body them surviving, then the legacies herein given shall revert back to the survivor or survivors of my children and the lawfully begotten heirs of them surviving forever"; *Held*, the intent of the testator will be construed as a devise to his children and the grandchildren, coming within its terms, by successive survivorship, determined with reference to the death of the testator's children, and not that of his own death, his living and named children taking absolutely, subject only to be defeated in the event any of such children die without children. *Ibid.*

WILLS—*Continued.*

11. *Same—Deeds and Conveyances—Quitclaim—Title.*—Under a devise of lands to the testator's daughter, but shall she die without children the estate should revert to her sisters and living children, and the daughter has conveyed the land to another and since died without leaving living children, etc., a quitclaim deed to the land made by the contingent remaindermen to the same grantee, of all "right, title, and interest, estate, claim, and demand, both in law and equity, as well in possession as in expectancy," is sufficient to pass their title to the purchaser. *Beacon v. Amos,* 161 N. C., 367, etc., cited as controlling. *Ibid.*

12. *Wills—Personalty—Contingent Remainders.*—Personal property may be bequeathed upon successive contingent interests in the same manner lands may be transferred by deed or testamentary disposition. *Baker v. R. R.*, 365.

13. *Wills—Interpretation—Intent—Equality of Division.*—A testator owning and living on a 200-acre tract of land and owning a valuable city lot at the time of making his will, and who afterwards acquired a 7-acre tract of land, provided for his eight children by the first and second marriage as follows: To two of his sons, 40 acres he had marked off from the 200-acre tract, valued at $350 each; $350 to each of his three daughters from his personalty, which was found to take it all; for the remaining three sons, "the land to be divided . . . each tract valued at $350 apiece, the remainder equally divided among my eight children." The two sons to whom the designated and marked lands were devised took possession in the testator's lifetime. *Held,* the intent of the testator was an equality of division among his eight children, and the division intended among his three sons was of the remainder of his 200-acre home tract, leaving as the remainder to be equally divided the town lot and the 7-acre tract. *Cecil v. Cecil,* 410.

14. *Wills—Interpretation—Intent—Findings of Court.*—Extraneous findings of the court as to the valuation of the testator's property in getting at his viewpoint in interpreting his will is allowable in proper instances, but not controlling when remaining property is left for a further division. *Ibid.*

15. *Wills—Interpretation—Intent—Equality of Division.*—Where it appears from the will, construed as a whole, that the dominant intent of the testator is an equality of division of the estate among his children, this intent will prevail over minor considerations in conflict with it, and where the language, in case of doubtful meaning, will permit, the early vesting of estates is favored. *Hunt v. Jones,* 550.

16. *Same—Bodily Heirs — Children — Estates — Contingent Remainders—Deeds and Conveyances.*—Where from the entire will it appears that a testator intended an equal division of his estate among his children after the death of his wife, which has occurred, a devise of lands to two of his daughters "supposed to contain 535 acres, jointly, so long as they live together, and, if they should see fit to separate, then it is to be equally divided between them and their bodily heirs; and if either of them should die without bodily heirs, it is to go to the living one," etc., without residuary clause or disposition of the property if both of the daughters should die without bodily heirs: *Held,* the testator's intent was an equal division of the land between the daughters should they separate, and in the event of the death of either with-

WILLS—*Continued.*

out children, their share would go to the other; hence a conveyance by both of them will pass a good and entire title. *Ibid.*

17. *Wills—Annuities—Rents and Profits—Pleadings—Demurrer.*—Where in an action against an executor to recover the difference between the amount allowed by the will for plaintiff's support and the amount received, it is alleged that the plaintiff and her mother, during the latter's lifetime, under the terms of the will, were to receive a certain monthly amount, each, out of the rents and profits of the estate, and in the event of sickness or unforeseen circumstances the executor may allow more; and that the rents and profits had been exhausted in the mother's lifetime, the annuity was not a charge upon the corpus of the estate, and without allegation that the unforeseen circumstances had arisen or demand in this respect made upon the executor in the mother's lifetime, a demurrer should have been sustained. *Kearnes v. Gray*, 555.

18. *Wills—Undue Influence—Fraud.*—Upon a trial *devisavit vel non*, evidence upon an issue as to undue influence upon the testator must be of a fraudulent character to invalidate the will. *Worth v. Sugar Feed Co.*, 711.

WITNESSES. See Appeal and Error, 12, 14, 46; Evidence, 7, 14; Courts, 2; Trials, 1.

WRITTEN AGREEMENT. See Appeal and Error, 31.

WRONGFUL DEATH. See Evidence, 4; Venue, 2, 3.

YEAR'S SUPPORT. See Executors and Administrators, 1; Appeal and Error, 29; Statutes 5, 6, 7, 8, 9.