NORTH CAROLINA REPORTS

Vol. 174

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1917

ROBERT C. STRONG

REPORTER.

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1 " Eq.	"	54	"
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OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1917

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ASSOCIATE JUSTICES:

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GEORGE H. BROWN,
WILLIAM A. HOKE,
WILLIAM R. ALLEN.

ATTORNEY-GENERAL:

JAMES S. MANNING.

ASSISTANT ATTORNEY-GENERAL:

R. H. SYKES.

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ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

W. M. Bond	First	Chowan.
George W. Connor	Second	Wilson.
John H. Kerr	Third	Warren.
F. A. Daniels	Fourth	Wayne.
H. W. Whedbee	Fifth	Pitt.
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.

WESTERN DIVISION

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

SOLICITORS

EASTERN DIVISION

J. C. B. Ehringhaus	First	Pasquotank.
Richard G. Allsbrook	Second	Edgecombe.
Garland E. Midyette	Third	Northampton.
Walter D. Siler	Fourth	Chatham.
Charles L. Abernethy	Fifth	Carteret.
H. E. Shaw	Sixth	Lenoir.
H. E. Norris	Seventh	Wake.
H. L. Lyon	Eighth	Columbus.
S. B. McLean	Ninth	Robeson.
S. M. Gattis	Tenth	Orange.

WESTERN DIVISION

S. P. Graves	Eleventh	Surry.
John C. Bower	Twelfth	Davidson.
W. E. Brock	Thirteenth	Anson.
G. W. Wilson	Fourteenth	Gaston.
Hayden Clement	Fifteenth	Rowan.
R. L. Huffman	Sixteenth	Caldwell.
J. J. Hayes	Seventeenth	Wilkes.
Michael Schenck	Eighteenth	Henderson.
J. W. Swain	Nineteenth	Buncombe.
G. L. Jones	Twentieth	Macon.

LICENSED ATTORNEYS

FALL TERM, 1917

The following were granted license to practice law by the Supreme Court, August Term, 1917:

AKIN, HENRY DREWRY.....Murphy, Cherokee County.
ANDLETON, ALLAN WILLS.....Weldon, Halifax County.
BELL, DANIEL LONG.....Graham, Alamance County.
BOURNE, HENRY CLARK.....Tarboro, Edgecombe County.
BRINKLEY, WALTER FOIL.....Lexington, Davidson County.
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HARRIS, WILLIAM CHESTER.....Farmville, Pitt County.
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KELLEY, LASSIE.....Franklin, Macon County.
MCALISTER, DAVID JAMES.....Fayetteville, Cumberland County.
MCCORMICK, JOHN ROWLAND.....Washington, D. C.
NANCE, STELLA ELIZABETH PHELPS.....Winston-Salem, Forsyth County.
NEWCOMB, CHARLES BAILEY.....Wilmington, New Hanover County.
PARIS, ERNEST RALPH.....Lincolnton, Lincoln County.
PUHLMAN, RAYMOND THOMAS.....Charlotte, Mecklenburg County.
RAY, JAMES CLYDE.....Hillsboro, Orange County.
ROWE, JOSEPH VANCE.....Aurora, Beaufort County.
SHAPIRO, MOSES.....Winston-Salem, Forsyth County.
SHARP, THOMAS HARVEY.....Harmony, Iredell County.
SHEPARD, ALEXANDER HURLBUTT.....Wilmington, New Hanover County.
STANFORD, UBER LELAND.....Stoneville, Rockingham County.
STONE, MARCUS HERBERT.....Thomasville, Davidson County.
VAUGHN, ROBERT CANDLER.....Winston-Salem, Forsyth County.
WARREN, ERNEST ROBERT.....Gastonia, Gaston County.
WRIGHT, MARTIN LEROY.....Edenton, Chowan County.
YATES, GROVER CLEVELAND.....Chadbourn, Columbus County.
ZOLLICOFFER, ALLEN.....Weldon, Halifax County.

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 26
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, FALL 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

Fall Term, 1918—Judge Bond.

Camden—July 15(1); Nov. 4(1).
Gates—July 29(1); Dec. 9(1).
Washington—Aug. 5(1).
Currituck—Sept. 2(1).
Chowan—Sept. 9(1); Dec. 2(1).
Pasquotank—Sept. 16†(2); Nov. 11†(1).
Beaufort—Sept. 30†(2); Dec. 16†(1).
Hyde—Oct. 14(1).
Dare—Oct. 21(1).
Perquimans—Oct. 28(1).
Tyrrell—Nov. 25(1).

Second Judicial District

Fall Term, 1918—Judge Connor.

Nash—Aug. 26(1); Oct. 7(1); Nov. 25 (2).
Wilson—Sept. 2(1); Sept. 30(1); Oct. 28†(2); Dec. 16*(1).
Edgecombe—Sept. 9(1); Nov. 11*(2).
Martin—Sept. 16(2); Dec. 9(1).

Third Judicial District

Fall Term, 1918—Judge Kerr.

Bertie—July 1(1); Aug. 26(2); Nov. 11 (2).
Hertford—July 29(1); Oct. 14(2).
Northampton—Aug. 5‡(1); Oct. 28(2).
Halifax—Aug. 12(2); Nov. 25(2).
Warren—Sept. 16(2).
Vance—Sept. 30(2).

Fourth Judicial District

Fall Term, 1918—Judge Daniels.

Lee—July 15(2); Sept. 16†(1); Oct. 28† (2).
Chatham—Aug. 5†(1); Oct. 21(1).
Johnston—Aug. 12*(1); Sept. 23†(2); Dec. 9(2).
Wayne—Aug. 19(2); Oct. 7†(2); Nov. 25 (2).
Harnett—Sept. 2†(2); Nov. 11†(2).
Lee—Sept. 16†(1); Oct. 28†(2).

Fifth Judicial District

Fall Term, 1918—Judge Whedbee.

Pitt—Aug. 19†(1); Aug. 26(1); Sept. 16 (1); Nov. 4†(1); Nov. 11(1).
Craven—Sept. 2*(1); Sept. 30†(2); Nov. 18(2).
Carteret—Oct. 14(1).
Pamlico—Oct. 21(2).
Jones—Dec. 2(1).
Greene—Dec. 9(2).

Sixth Judicial District

Fall Term, 1918—Judge Allen.

Onslow—July 15†(1); Oct. 7(1); Dec. 2† (1).
Duplin—July 22*(1); Aug. 26†(3); Nov. 18†(2).
Sampson—Aug. 5(2); Sept. 16†(2); (B) Oct. 21(2).
Lenoir—Aug. 19*(1); Oct. 14(1); Nov. 4†(2); Dec. 9*(1).

Seventh Judicial District

Fall Term, 1918—Judge Calvert.

Wake—July 1†(2); July 15*(1); Sept. 9*(1); Sept. 16†(2); Oct. 21*(1); Oct. 28† (2); Nov. 25*(1); Dec. 2†(2)
Franklin—Aug. 26†(2); Oct. 14*(1); Nov. 11†(2).

Eighth Judicial District

Fall Term, 1918—Judge Stacy.

Brunswick—Aug. 19†(1); Oct. 7(1).
Columbus—Aug. 26(2); Nov.18†(2); Dec. 16*(1).
New Hanover—Sept. 9*(2); Oct. 21†(2); Nov. 11(1); Dec. 2†(2).
Pender—Sept. 23†(2); Nov. 4(1).

Ninth Judicial District

Fall Term, 1918—Judge Lyon.

Robeson—July 8*(1); Sept. 2†(2); Sept. 30†(2); Nov. 4*(1); Dec. 2†(2).
Bladen—Aug. 5*(1); Oct. 14†(1).
Hoke—Aug. 12(2); Nov. 25(1).
Cumberland—Aug. 26*(1); Sept. 16†(2); Oct. 21†(2); Nov. 18*(1).

Tenth Judicial District

Fall Term, 1918—Judge Devin.

Granville—July 22(1); Nov. 11(2).
Person—Aug. 12(1); Oct. 14(1).
Alamance — Aug. 19*(1); Sept. 9†(2); Nov. 25*(1).
Durham — Aug. 26* (1); Sept. 23† (2); Nov. 4(1); Dec. 9*(1).
Orange—Sept. 2(1); Dec. 2(1).

WESTERN DIVISION

Eleventh Judicial District

Fall Term, 1918—Judge Lane.

Ashe—July 8(2); Oct. 14(1).

Forsyth—July 22*(2); Sept. 9†(2); Sept. 30(2); Nov. 4†(2); Dec. 9*(1).

Rockingham—Aug. 5*(2); Nov. 18†(2).

Caswell—Aug. 19(1); Dec. 2(1).

Surry—Aug. 26(2); Oct. 21(2).

Alleghany—Sept. 23(1).

Twelfth Judicial District

Fall Term, 1918—Judge Shaw.

Davidson—July 29(2); Nov. 18†(2).

Guilford—Aug. 12†(2); Sept. 2†(2); Sept. 16*(1); Sept. 23†(1); Oct. 7†(2); Nov. 4†(2); Dec. 2†(1); Dec. 9*(1); Dec. 23*(1).

Stokes—Oct. 21*(1); Oct. 28†(1).

Thirteenth Judicial District

Fall Term, 1918—Judge Adams.

Richmond—July 1†(1); July 15*(1); Sept. 2†(1); Sept. 23*(1); Dec. 2†(1); Dec. 16†(1).

Stanly—July 8(1); Oct. 7†(1); Nov. 18(1).

Union—July 29(1); Aug. 19†(2); Oct. 14†(2).

Moore—Aug. 12*(1); Sept. 16†(1); Dec. 9†(1).

Anson—Sept. 9*(1); Sept. 30†(1); Nov. 11†(1).

Scotland—Oct. 28(1); Nov. 25(1).

Fourteenth Judicial District

Fall Term, 1918—Judge Harding.

Mecklenburg—July 8*(2); Aug. 26*(1); Sept. 2†(2); Sept. 30*(1); Oct. 7†(2); Oct. 28†(2); Nov. 11*(1); Nov. 18†(2).

Gaston—Aug. 12†(1); Aug. 19*(1); Sept. 16†(2); Oct. 21*(1); Dec. 2†(2).

Fifteenth Judicial District

Fall Term, 1918—Judge Long.

Montgomery—July 8(1); Sept. 23†(1); Sept. 30(1).

Randolph—July 15†(2); Sept. 2*(1); Dec. 2(2).

Iredell—July 29(2); Oct. 14(2).

Cabarrus—Aug. 12(2); Oct. 28(2).

Davie—Aug. 26(1); Nov. 11(1).

Rowan—Sept. 9(2); Oct. 7†(1); Nov. 18(1).

Sixteenth Judicial District

Fall Term, 1918—Judge Webb.

Lincoln—July 15(1); Oct. 14†(2).

Cleveland—July 22(2); Oct. 28(2).

Burke—Aug. 5(2); Sept. 30†(2); Dec. 2†(2).

Caldwell—Aug. 19(2); Nov. 11(2).

Polk—Sept. 16(2)

Seventeenth Judicial District

Fall Term, 1918—Judge Cline.

Avery—July 1†(1); Oct. 14(2).

Catawba—July 8(2); Oct. 28(2).

Mitchell—July 22†(2); Nov. 11(2).

Wilkes—Aug. 5(2); Sept. 30†(2).

Yadkin—Aug. 19(1); Nov. 25(1).

Watauga—Sept. 2(2).

Alexander—Sept. 16(2).

Eighteenth Judicial District

Fall Term, 1918—Judge Justice.

McDowell—July 8(2); Sept. 16(2).

Transylvania—July 22(2); Nov. 25(2).

Yancey—Aug. 12†(1); Oct. 28(2).

Rutherford—Aug. 19†(2); Oct. 14(2).

Henderson—Sept. 30*(2); Nov. 11†(2).

Nineteenth Judicial District

Fall Term, 1918—Judge Carter.

Buncombe—July 8(2); Aug. 5†(3); Sept. 2(3); Sept. 30†, '17(1); Oct. 7†, '18(4); Nov. 4(3); Nov. 25(3).

Madison—Aug. 26(1); Sept. 23(1); Oct. 21, '17(2); Oct. 28, '18(1); Nov. 25(1).

Twentieth Judicial District

Fall Term, 1918—Judge Ferguson.

Haywood—July 8(2); Sept. 16(2).

Swain—July 22(2); Oct. 21(2).

Cherokee—Aug. 5(2); Nov. 4(2).

Macon—Aug.19(2); Nov. 18(2).

Graham—Sept. 2(2); Dec. 2(2).

Clay—Sept. 30(1).

Jackson—Oct. 7(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. S. A. ASHE, 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.

S. A. ASHE, 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

FALL TERM, 1917

GEORGE GRAHAM v. NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 12 September, 1917.)

1. Carrier of Passengers — Infirm Passenger — Duty of Carrier—Negligence.

A carrier of passengers is not liable for an injury to a passenger leaving the car at his destination, caused solely by his physical infirmity, when the assistance of its employees in charge of the cars had not been requested upon opportunity thereto afforded, and in the exercise of proper care of the passengers they were in ignorance of the circumstances requiring their assistance.

2. Appeal and Error—Verdict Set Aside—Matters of Law.

Where the trial judge sets aside a verdict as a matter of law, and not within his discretion, an appeal will lie, and the verdict reinstated when he was in error in so acting.

CIVIL action tried before *Daniels, J.*, at February Term, 1917, of BEAUFORT, upon this issue:

Was plaintiff injured by negligence of defendant as alleged? Answer: "No."

His Honor set aside the verdict for error of law in charging jury and not in his discretion. Defendant excepted and appealed. Plaintiff also appealed.

Daniel & Warren for plaintiff.

Small, MacLean, Bragaw & Rodman for defendant.

(2) DEFENDANT'S APPEAL

BROWN, J. Plaintiff testified that he was a passenger for Wilmar on defendant's road; that the porter passed through car and called station; that he was crippled at time and started for door in company with another negro named Fulcher; as he reached second step, train was jerked violently and he was thrown on his head and a dent made in it, causing serious injury, confining him for three months.

Plaintiff offered other evidence tending to prove injury and damage. Defendant denied the injury and the negligence and offered evidence tending to prove that the conductor took the proper position between colored and white cars when train stopped at Wilmar, and was in a position to help any passenger needing assistance; that plaintiff did not ask for assistance, and that conductor did not see him fall. Defendant offered other evidence tending to corroborate this, and also testimony of a physician that he examined plaintiff ten days after the alleged injury and found no wound in his head or other evidence of injury, and that plaintiff was then in good physical condition.

The jury after taking the case returned and asked certain information. The following colloquy took place between the jury and the judge:

Q. The jury wants to ask a little information; whether the conductor and the porter—whether the law requires the conductor and porter to be at the exit of the coach when the passengers are getting off?

A. I don't know that that is so; the evidence here was that their place was between the colored coach and the white coach.

Q. What the jury wants to know is, whether the law requires them to be there?

A. Neither the porter or conductor is required to assist the passengers unless the passenger requests it, or unless in the position they occupy they could see, in the exercise of reasonable care, that they were in need of assistance.

Q. There is one other question; whether the porter is required to open the door and call the stations?

A. The law requires that an announcement shall be made; the testimony in this case was that the porter went through the car; I don't think there is any requirement as to the place they shall occupy.

Q. The conductor and porter were not required to have a regular station when the passengers were getting out of the train?

A. In this case the evidence was that they were at their usual

places where they stood, between the two cars; and so far as appears, they were in the places where they ought to have been.

In view of the evidence in this case we are of opinion that there is no substantial error in above instructions. It is well settled that when a passenger is sick, blind, or crippled and infirm, and his condition is apparent or made known to the carrier, it is bound to render the passenger necessary assistance in boarding or alighting from its cars, 4 R.C.L. 1235. It is also well settled that a carrier will not be liable for failure to assist when not asked and when ignorant of the need for assistance. *Ibid.*, *Southern Ry. v. Hobbs*, 63 L.R.A. 68; *Anderson v. R. R.*, 161 N.C. 462; *Clark v. Traction Co.*, 138 N.C. 82. (3)

The evidence of plaintiff is that the porter came through the car and called the station; that he did not ask for assistance or make known his condition to the porter or conductor, but undertook to get off the car in company with one Fulcher. Plaintiff had ample opportunity to notify the conductor when he took up his ticket, and also the porter when he passed through the car before reaching Wilmar.

In view of the evidence, we think the judge erred in setting aside the verdict as matter of law.

The verdict will be reinstated and judgment rendered for defendant.

Reversed.

PLAINTIFF'S APPEAL.

Plaintiff's assignments of error are all directed to the charge of the court.

It is assigned as error that the court charged that no duty rested on defendant to assist the plaintiff in getting off the train, but only to allow him a reasonable time to get off. The full instruction is as follows:

"The court charges you that there was no duty resting on defendant to assist plaintiff in getting off the train, but only to allow him a reasonable time to get off, unless he had requested, called attention to any infirmity which he might have had and requested assistance, or if in attempting to get off the defendant's conductor or porter could, in the exercise of reasonable care — such as they were required to bestow at the time passengers were alighting — could have observed that he was crippled and unable to help himself."

There can be no question that this is a correct statement of the law as universally declared by the courts and text-writers.

We have examined the other assignments of error, and think they are without merit and are covered by what is said in the opinion in defendant's appeal. The charge as a whole appears to be a fair and clear presentation of the case to the jury.

On plaintiff's appeal we find

No error.

Cited: White v. Chappell, 219 N.C. 664; *Hardy v. Ingram,* 257 N.C. 475.

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(4)

C. F. BROWN v. J. S. SCOFIELDS SONS COMPANY.

(Filed 12 September, 1917.)

1. Master and Servant—Safe Place to Work—Nonsuit—Evidence—Negligence—Proximate Cause—Trials.

When the evidence tends only to show that a coemployee of the plaintiff had a pair of pliers in his pocket a few minutes before it fell upon and injured the latter at work at the foot of an iron water tank 100 feet high, at the top of which the former was painting; that the master had not furnished the coemployee a safety belt, with nothing to show that such were in common use for this kind of work, it is held that the negligence, if any, was that of a fellow-servant upon which no recovery could be had; and that were such belts required, there was nothing to show that the omission to furnish one on this occasion was the proximate cause of the injury received, and defendant's motion to nonsuit was properly granted.

2. Master and Servant—Negligence—Safe Place to Work—Changing Conditions—Evidence.

Where the evidence tends only to show that plaintiff, at work near the bottom of an iron water tank, was struck and injured by a pair of pliers falling from a coemployee at work painting the tank near the top, the rule requiring the master to furnish the servant a safe place to work has no application, the situation being one of changing conditions and relative positions known as well to the servant as to the master, and with which the latter is not required to keep informed.

CIVIL action tried before *Daniels, J.,* at January Term, 1917, of PERQUIMANS, upon these issues:

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

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

3. Did the plaintiff assume the risks and dangers of injury in his employment? Answer: "No."

4. What damages, if any, is plaintiff entitled to recover of defendant? Answer: "$7,500."

From the judgment rendered defendant appealed.

Ward & Thompson, P. W. McMullan for plaintiff.
Rountree & Davis, Pruden & Pruden for defendant.

BROWN, J. The defendant introduced no evidence. The facts established by that introduced by plaintiff are few and simple.

The defendant, as subcontractor for MacCreary & Co., was engaged in erecting a large water tower and tank 100 feet in height at Hertford, N. C. Defendant's foreman, Stanly, was superintending the work. One Montgomery was directed to paint the tank, which had been finished. He put on a pair of overalls, took his paint brush, bucket of paint, and a pair of pliers and went upon the tank to paint it. There was a swinging seat from (5) the top of the tank on which Montgomery had to sit in order to do the painting, which seat could be moved up and down and horizontally. The evidence does not disclose what Montgomery was doing with the pliers, when they fell or why they fell, but it does disclose the fact that they had been in the possession of Montgomery, and one of the witnesses said that he saw them in the pockets of his overalls eight minutes before they fell.

There was evidence that Montgomery was also a riveter, and that he sometimes used the pliers for extending his reach by taking hold of the paint brush with them. There is no evidence that he was riveting any bolts; in fact, there were no bolts to rivet. The evidence is that the tank was completed, and that Montgomery was engaged in painting it. While Montgomery was painting the top of the tank, plaintiff, in obedience to Stanly's orders, was engaged in steadying a cable used in hoisting heavy material, and while at such work was standing near the posts supporting the tank and under where Montgomery was painting. The pliers fell and struck plaintiff on the head and seriously injured him.

The alleged grounds of negligence consist: (1) In the defendant's failure to furnish Montgomery with a safety belt for the purpose of holding the pliers to prevent them falling. (2) In failing to furnish plaintiff a reasonably safe place to do his work.

There is no evidence that safety belts, or other similar appliances, were in common use for such work as house or tank painting, or were ever supplied to painters by employers for such purpose. The evidence of plaintiff's witness Holbrook proves that Mont-

gomery was not engaged in riveting; that he could not rivet unless an assistant was on inside of tank, and that there was none, and, further, that there was no riveting to be done, as the tank was completed. He further states that safety belts were used by linemen engaged in work on wires.

There is no evidence that Stanly directed Montgomery to take the pliers with him, or that he knew that he did take them. There is evidence that Montgomery had the pliers in the pocket of his overalls, but there is no evidence that they fell out of his pocket, except that a witness saw them in Montgomery's pocket eight minutes before they fell. For aught that appears, Montgomery may have dropped them when taking them out of his pocket or in using them to lengthen his paint brush handle.

In any event, such negligence would be that of a fellow-servant, for which defendant would not be liable.

Assuming, for sake of argument, that it was defendant's duty to furnish a safety belt, there is no evidence that the failure to furnish it was the proximate cause of the injury. Mont-
(6) gomery may have had the belt buckled around his waist and yet have dropped the pliers while using them in connecting with his brush.

Upon the evidence, no one can account for the falling of the pliers. It was evidently one of those accidental and unavoidable mishaps that has not infrequently occurred in building houses, erecting tanks, and doing similar work, and which no reasonable diligence upon the part of the master could foresee and prevent.

It is contended that defendant failed to furnish plaintiff a safe place to do his work and negligently permitted plaintiff to do his assigned work in a place of obvious danger. While it is the duty of the master to use ordinary care to furnish reasonably safe instrumentalities with which his servants may perform their work, and a reasonably safe place in which they may render their service, this duty has its legal and rational limits.

The master is not required to stand by his servant and watch his every movement in order to protect him from injury. While the duty of construction and provision is his, the duty of operation and protecting himself from negligent use is the servant's.

The rule is correctly stated in *Bedford Co. v. Bough,* 14 L.R.A. (U.S.) 425, as follows:

"It is true that an employer is bound to exercise ordinary care to furnish an employee with a reasonably safe place to work, and to exercise ordinary care to keep it in that condition. The employer, however, is not liable to his employee for the negligence of his co-servant in respect to the details of the work, nor is he bound to

protect his employee against the mere transitory perils that the execution of the work occasions; nor is he liable merely because a fellow-servant negligently handles appliances in such a way as to occasion injury to an employee." *So. Ind. R. R. v. Harrell,* 161 Ind. 689-698, 700, and cases cited; *Tedford v. Los Angeles,* 54 L.R.A. 106.

In considering this subject the Supreme Court of the United States has said: "The obligation of a master to provide reasonably safe place and structures for his servants to work upon does not oblige him to keep a building, which they are employed in erecting, in a safe condition *at every minute of their work, so far as its safety depends on the performance of that work by them and their fellow-servants.*" *Armour v. Habor,* 111 U.S. 313.

Our own Court has substantially declared the same doctrine in numerous cases.

In *Mace v. Mineral Co.,* 169 N.C. 143, it is held that the rule holding the master to accountability in not furnishing his servant a safe place to work "does not apply where the servant, an experienced man necessarily, from the nature of the work required, in its various stages, to construct the place with reference (7) to his own safety, and his injury proximately results either from his own negligent act in failing to do so or in taking such reasonable and available precaution for his own safety as the dangerous character of his work required."

In that case, Mr. Justice Walker says:

"This Court has often held that 'an employer's duty to provide for his employees a reasonably safe place to work does not extend to ordinary conditions arising during the progress of the work when the employee doing his work in his own way can see the dangers and avoid them by the exercise of reasonable care.' *Simpson v. R. R.,* 154 N.C. 51. The rule was well stated in *Covington v. Furniture Co.,* 138 N.C. 374, as follows: 'The general rule of law is that when the danger is obvious and is of such a nature that it can be appreciated and understood by the servant as well as by the master or by any one else, and when the servant has as good an opportunity as the master or any one else of seeing what the danger is and is permitted to do his work in his own way and can avoid the danger by the exercise of reasonable care, the servant cannot recover against the master for the injuries received in consequence of the condition of things which constituted the danger. If the servant is injured it is from his own want of care.' *Warwick v. Ginning Co.,* 153 N.C. 262; *House v. R. R.,* 152 N.C. 397; *Hicks v. Mfg. Co.,* 138 N.C. 319."

In *Mining Co. v. Floyd,* 51 Ohio St. 542, the servant was killed

by a fall of a piece of slate from the roof of a mine. In discussing the duty of the master to furnish the servant a safe place to work, the Court says: "Here the place was not furnished as in any sense a permanent place of work, but was a place in which surrounding conditions were constantly changing, and instead of being a place furnished by the master for the employees, within the spirit of the decisions referred to, was a place the furnishing and preparation of which was in itself a part of the work which they were employed to perform." The distinction is shown in a number of cases. *Frazier v. Lumber Co.*, 45 Minn. 235; *McGinty v. Reservoir*, 155 Mass. 183; *Coal Co. v. Schelles*, 42 Ill. App. 619.

The place where plaintiff was standing when hurt was not a *"place"* within the legal significance of that term. It was a condition liable to change at any moment whenever the prosecution of the work required plaintiff to change his position. The defendant's foreman could not possibly be aware of such changing conditions unless he was personally present all the time and exercising that vigilance for plaintiff which the law required him to exercise for himself.

(8) The *"place"* itself was perfectly safe, but the actual situation from which the injury arose was a temporary and changing incident of the performance of the work, and was, in effect, the negligence of a fellow-servant, which could not possibly have been foreseen or provided against by the defendant.

It was plaintiff's duty to exercise due diligence to protect himself. He knew that his fellow-servant was working above him, and he had all the knowledge the foreman had. There is no evidence that plaintiff was bound to take his position immediately under Montgomery. As he did so, it was his duty to keep a lookout and protect himself, and not rely on the foreman. He had every opportunity to protect himself that the foreman would have had if he had been standing immediately by him.

If the drastic rule contended for by the plaintiff is held to be good law, it would be almost impossible to construct an ordinary house without constituting the owner or builder an insurer of his employees against those ordinary accidents that are incident to such work.

The motion to nonsuit is allowed.

Reversed.

Cited: Thomas v. Lawrence, 189 N.C. 527; *Richardson v. Cotton Mills,* 189 N.C. 654; *Fore v. Geary,* 191 N.C. 94; *Owenby v. Power Co.*, 194 N.C. 130; *King v. Printing Co.*, 203 N.C. 481; *Muldrow v. Weinstein,* 234 N.C. 592.

JERRY M. BUNCH v. FOREMAN BLADES LUMBER COMPANY.

(Filed 12 September, 1917.)

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

Evidence is sufficient upon the issue of actionable negligence which tends to show that the defendant employed the plaintiff, inexperienced in such work, to sweep and clean the shavings from his planing machines; that within the week, the plaintiff was injured by having his arm drawn through a dent or aperture of an old and defective hood, which could readily have been replaced or made safe, to an old and infrequently used planer, caused by a powerful suction to carry off the shavings, augumented by the swiftly revolving knives within the hood, and while removing from the hood an accumulation of shavings which stuck to and concealed the defect in the hood of which he was unaware.

2. Same—Inspection—Duty of Master—Notice.

It is evidence of gross negligence for an employer to permit a planing machine to remain out of order for years and subject his employees thereat to the danger of the exposed and rapidly revolving knives; and notice of the defects will be implied from their long continuance, which a performance of his duty to inspect would reasonably have revealed.

3. Master and Servant—Contributory Negligence—Trials—Instructions.

When the evidence is conflicting as to whether the defendant had furnished the plaintiff, his employee, a safe appliance to remove the shavings from a planer and had instructed him to use it, and that the injury complained of was caused by the failure of the plaintiff to obey this instruction, a charge to the jury is not open to the defendant's objection, that the plaintiff cannot recover should the jury find that the plaintiff violated this instruction, and such caused the injury complained of or contributed to it.

4. Guardian and Ward—Compromise—Consideration—Fraud.

A ward is not bound by a compromise of his general guardian of the former's claim for damages for a personal injury, unless made with the sanction of the court to which the guardian should account; and in no event when the compromise is due to the gross negligence of the guardian, or in bad faith, is manifestly unfair to the ward, and for a grossly inadequate consideration; and when such are found to be the facts, legal fraud will be inferred and the compromise will be set aside without a specific finding of actual fraud.

5. Guardian and Ward—Compromise Set Aside—Credit—Guardian's Liability.

Where a compromise made by a general guardian of his ward's claim for damages for a personal injury has been set aside by the court, the amount paid thereon will be allowed as a credit to the defendant in the action, and made a charge against the guardian and his bondsman.

CIVIL action tried before *Daniels, J.*, at January Term, 1917, of CURRITUCK, upon these issues: (9)

1. Was the plaintiff Jerry Bunch injured by the negligence of the defendant Lumber Company, as alleged? Answer: "Yes."

2. Did plaintiff Jerry Bunch by his own negligence contribute to his injury, as alleged in the answer? Answer: "No."

3. What damage is plaintiff Jerry Bunch entitled to recover? Answer: "$5,000."

4. Did Joseph H. Bunch, after qualifying as guardian for said Jerry M. Bunch, then a minor, make settlement and execute the release dated 9 September, 1912, and introduced as exhibit in this cause? Answer: "Yes."

5. Was said release obtained by the fraud and undue influence of defendants, as alleged? Answer: .....

6. Was the compromise and release executed by said Bunch, Sr., made in the exercise of ordinary attention and honest judgment? Answer: "No."

7. What was the consideration actually paid for said release to said guardian for the benefit of said Jerry Bunch? Answer: "$400."

8. Was said release obtained for a grossly inadequate consideration? Answer: "Yes."

9. When did plaintiff Jerry Bunch become 21 years of age? Answer: "18 July, 1916."

From the judgment rendered defendant appealed.

(10) *Ehringhaus & Small for plaintiff.*
Aydlett & Simpson for defendant.

BROWN, J. We will not undertake to discuss the sixty-one assignments of error presented in this record. In the main, they represent three propositions: Whether upon all the evidence there was any negligence; whether upon all the evidence plaintiff was guilty of contributory negligence; and whether the attempted settlement by guardian was conclusive.

The evidence of negligence is abundant. That of plaintiff tends to prove that he was an inexperienced hand, 21 years of age, employed in defendant's mill to clean up shavings and keep the shavings clear from the planing machines and to rake them over to a blow-pipe, where they were carried off by suction. If one of the men who was operating one of the machines went out temporarily he was to take his place at the machine. He was put to work in a large room where those and other machines were in operation.

Boards are carried into the machines on a roll-way. Above the plane of the roll-way is one set of planer knives revolving on an

axle, which planes or smoothes the upper surface of the board; passing through the machine and below the plane of the roll-way is another set of revolving knives which serves the same purpose for the lower surface of the board. These knives revolving at a great speed are protected by a cone-shaped galvanized hood both above and below, and the largest part of the shavings, which are thrown off by the action of the knives, are drawn through these hoods by a powerful suction into pipes leading from their apexes to other parts of the mill. The other shavings find their way out and cluster on the greasy, sticky machinery or fall on the floor about the machines, and were supposed to be raked to other suction pipes by plaintiff. If the hoods fit up close, flush with the surface of the roll-way, it is impossible to come in contact with the knives.

The evidence tends also to show that the particular machine at which plaintiff was hurt was a very old one, not constantly but occasionally used, and the hood, which could have been easily and cheaply replaced, was old and had been for some time worn out; that though the hoods on other machines had been removed and replaced by newer ones, *nothing had been done to this one for ten years;* that there was at the time of injury, and had been for some time prior thereto, a large hole or dent an inch or an inch and a half or two inches wide where the lower hood had slipped or shaken down, and which also was cracked and bent in; that this break was apparently an old one; that it frequently had become stopped or clogged up with shavings; that either the machine was not carefully inspected, or its broken condition repeatedly passed (11) over; that the gap had gotten so clogged with shavings at time plaintiff was hurt that it appeared to be an accumulation or knot of shavings stuck to the outside of the galvanized hood; that on the Saturday following the Monday he went to work, plaintiff noticed an accumulation of shavings sticking to the outside of the galvanized hood, the plaintiff being entirely ignorant of the defective condition of the hood and of the existence of the hole and dent which had become clogged by shavings; and pursuant to his instructions to keep the machines clear of shavings, and in the line of his duty, he attempted to brush off these shavings from the hood, when instantly the suction created by the rapidly revolving knives, supplemented by the suction of the machine designed to draw off the shavings, pulled his fingers, right hand and forearm into the hood through the dent and entirely destroyed the same up to near his elbow, causing the plaintiff great suffering and injury.

That the above stated facts, proven by plaintiff's testimony, taken to be true, constitute actionable negligence is too plain to be discussed.

The hood over the dangerous knives was a necessary protection to the workmen, and it was gross negligence to let it remain out of order for the length of time disclosed by the evidence. An employer of labor is held to the duty of inspecting dangerous power-driven machines used in his factory, and notice to him will be implied from long existing defects in such machines. *Cozzins v. Chair Co.*, 165 N.C. 364; *Kiger v. Scales Co.*, 162 N.C. 136; *Labbatt*, p. 2711 *et seq.*

Upon the issue of contributory negligence, the defendant contended that plaintiff was instructed specifically by the foreman to use a rake furnished him for the purpose of raking the shavings away from the machines, and that he was directed not to put his hands on the machine. The defendant contends that while he had been given a wooden rake to rake shavings, no particular instructions had been given him as to how or when to use it, and the rake was not suitable for use in scraping off the shavings from the machine, and that it was impossible to get the shavings out of the aperture in the hood with it.

The judge left this question to be determined by the jury, and his instructions are clear and all that defendant could reasonably ask. He substantially told the jury that if plaintiff violated the directions of the foreman, and that such dereliction of duty caused the injury or contributed to it, plaintiff could not recover.

The third proposition presented by defendant is the conclusiveness of the alleged settlement and release made and executed by the father of the plaintiff as his guardian. It is true that there is authority for the position that a general guardian has authority to compromise a claim on behalf of his ward, but even in these
(12) jurisdictions it is held that the ward is not bound by a compromise which is made in bad faith or which is unfair to him, and an order of court must be first obtained authorizing the compromise if required by statute. 21 Cyc. 74, n. 6; 5 R.C.C. (Compromise and Settlement), secs. 9 and 10.

We are not apprised of any statute of this State which authorizes or forbids a guardian to settle by compromise for an injury to his ward's person. The weight of authority forbids such a settlement without the sanction of the court or officer to whom the guardian must account. Rogers on Domestic Relations, sec. 859; 12 R.C.L. 1130; 22 Cyc. 663.

It has been held by this Court that receivers have no such power *(Temple by Williams*, 91 N.C. 82), but receivers are not vested with the authority of a general guardian. The right of a guardian to settle by compromise without legal sanction for a personal injury to his ward has never been passed upon, so far as

we are informed, by this Court. Assuming, however, that the guardian has such authority, the ward is not bound by the compromise when it is due to gross negligence, bad faith, is manifestly unfair to the ward, and made for a grossly inadequate consideration.

In a leading case *(Ordinary v. Dean,* 44 N.J.L. 64) the New Jersey Court, speaking of the power of a guardian, says:

"He stands in the same position as any other trustee, who may generally, acting in good faith, compound and release a debt due the trust estate; and such composition or release for a valuable consideration is *prima facie* valid and effective. If the compromise or release is made without justification or fraudulently or upon a grossly inadequate consideration, the guardian will be answerable for it in his accounts; and such compromise can be impeached upon the trial of the action in which it is presented as a defense by showing that it was not made in good faith but in fraud of his rights." See, also, *Nashville Lumber Co. v. Barfield,* 20 Ann. Cas. 968, where this New Jersey case and other authorities are discussed.

It is true the jury failed to answer the fifth issue relating to specific fraud, but they did find that the guardian failed to exercise *"ordinary attention and honest judgment,"* and that the consideration paid by defendant to the guardian was only $400, and that it is grossly inadequate. Such findings are tantamount to a finding of fraud and do in themselves constitute *legal* fraud and justified the court in declaring the release void. We think, however, that defendant is entitled to credit on the judgment for the $400 paid the guardian. For this sum the guardian and his bond are, of course, liable to plaintiff. Let such credit be entered.

Upon a review of the entire record, we find

No error.

Cited: Rector v. Logging Co., 179 N.C. 62; *Longer v. Rockingham,* 187 N.C. 212; *Keller v. Furniture Co.,* 199 N.C. 419; *Patrick v. Bryan,* 202 N.C. 71; *Wyatt v. Berry,* 205 N.C. 123; *In re Reynolds,* 206 N.C. 288; *Butler v. Winston,* 223 N.C. 425.

(13)

C. C. FINEMAN v. J. B. FAULKNER, ADMINISTRATOR.

(Filed 12 September, 1917.)

Vendor and Purchaser—Contracts—Public Policy—Immoral Use.

When the sale of goods is lawful in itself, the fact that they are used in an immoral place does not affect its validity when such use is not participated in by the vendor; and where a phonograph is sold to a woman of bad character, keeping an immoral place, known to the vendor, the mere fact of the vendor's knowledge thereof, will not prevent his recovering the purchase price or the enforcement of his vendor's lien thereon.

APPEAL by defendant from *Whedbee, J.*, at June Term, 1917, of EDGECOMBE.

This is an action against the administrator of Mamie Faulkner upon a note for the purchase of an Edison machine. The defense set up by the administrator is that the note was void because contrary to public policy. Counsel agreed upon the following statement of facts:

"That defendant's intestate was on 18 September, 1916, and several years prior thereto, a public prostitute, and was on said date carrying on her trade at her home in Princeville, across the river from the town of Tarboro; that plaintiff knew by general reputation at the time the paper-writing set forth in the complaint was executed that the defendant's intestate was a prostitute, and, knowing such, sold her the musical instrument referred to, delivered it and records to her home in Princeville, and had her execute the paper-writing referred to in section 1 of the complaint; that plaintiff had no interest in the business of defendant's intestate and in no way aided her in carrying it on, other than the mere sale of the musical instrument to her might be said to do so; that the sale to her was in the usual course of business and similar in terms and in every way to other sales made by him from time to time; that the plaintiff is a retail dealer of pianos and talking machines in the town of Tarboro, N. C.; that the machine in question was of the character in general use and had no slot attachment."

Donnell Gilliam (by brief) for plaintiff.
James M. Norfleet and A. W. MacNair for defendant.

CLARK, C.J. Mr. Gilliam, the counsel for the plaintiff, is absent in the army, but we think the principles covering this case are admirably summed up in the following quotation which, with a slight modification, is taken from his brief:

"When the selling of goods is in itself unlawful, the price cannot be recovered with the aid of the court. When the thing sold can only be used for an unlawful purpose, the price cannot be recovered. But when the sale of the goods is entirely lawful and the thing sold is, under ordinary circumstances, used for a perfectly lawful and legitimate purpose, the mere knowledge of the vendor (14) that the vendee is a person of bad character or engaged in an unlawful business will not prevent recovery by the vendor, provided he did not sell the article to aid in the unlawful business nor was an accessory to the unlawful use of the article by the vendee further than by selling the article which, so far as he was concerned, might be used in a perfectly lawful and proper manner."

It would be singular if the purchaser of an article of this kind, which is not ordinarily used for immoral purposes, can refuse payment or her administrator can be protected from payment, upon the ground that the purchaser was a person of bad character or engaged in an illegal occupation. It would be as reasonable to say that such persons are exempt from liability to pay for provisions or for clothing or anything else. This would be, indeed, encouragement to them, unless it should debar them from all such purposes, neither of which the law intends. Suppose a merchant or a grocer should sell provisions or clothing in the ordinary course of dealing to one whom he happens to know is engaged in illicit distilling or retailing intoxicating liquors, or in any other unlawful occupation, without aiding him in his unlawful purposes, can such illicit dealer plead his own illegal occupation to prevent payment for the articles thus bought?

In *S. v. Bevers,* 86 N.C. 595, it is said that to defeat the plaintiff's recovery, "It must appear that the very party who is seeking aid from the Court participated in the unlawful purpose. Indeed, it is said that the very test of the application of the principle is whether the plaintiff can establish his case otherwise than through the indebtedness of an illegal transaction *to which he was himself a party.*"

In this case it is agreed as a fact "That plaintiff had no interest in the business of defendant's intestate and in no way aided her in carrying it on, other than that the mere sale of the musical instrument to her might be said to do so; that the sale to her was in the legal course of business and similar in terms and in every other way to other sales made by him from time to time."

In *Armfield v. Tate,* 29 N.C. 258, it was held that "The circumstances that the vendor was informed before the completion of the contract that the vendee intended the place as a residence for his kept mistress does not vitiate the contract." The Court said that the

fact that the vendee intended to use the house for an immoral purpose did not destroy the contract, for the use to which he intended to put the property after he became the owner of it should not protect him from payment of the purchase money to the vendor who had no control over the subsequent use of the land. This case is stronger than that, for the seller here had no knowledge
(15) that the machine was to be used for immoral purposes, if it was so used.

The authorities drawing the line between cases in which the vendor participates in the illegal purpose, and that in which he does not, are admirably set out by Brown, J., *Electrova Co. v. Ins. Co.,* 156 N.C. 232, where the discussion is so full and clear that we can add nothing.

The defendant relies upon *Calvert v. Williams,* 64 N.C. 168, where a note given for a gambling debt was held void. This was because the statute so provided, for, unlike this case, the consideration was illegal. The same was true in *Gooch v. Faucett,* 122 N.C. 270, which denied recovery, for the same reason, upon a note given for a bet upon a horse race. In *Rowland v. B. and L. Asso.,* 115 N.C. 825, the Court refused to enforce a contract that was invalid under our usury statute. The same was true in *Martin v. McMillan,* 63 N.C. 486, where the plaintiff was not allowed to recover payment for mules sold the defendant for use by the Confederate government, which was a transaction invalid in itself, and in *Smitherman v. Sanders,* 64 N.C. 522, where it was sought to recover money borrowed to be used in equipping a company for the Confederate army.

Probably the latest case on the subject is *Loose v. Larsen* (Nev.), L.R.A., 1917B. 1166, in which it is held that the vendor "is not prevented from recovering the purchase price of liquors sold for resale to one having a license to deal in them by the fact that the resale will incidentally encourage the business of a house of ill-fame conducted by the buyer on the premises where the liquors are to be sold."

In the very full notes thereto it is said: "In harmony with the foregoing decision, that a vendor of goods who does not participate in the running of a house of ill-fame, or do anything in furtherance thereof, may recover the purchase price of the goods, though he knew that the vendee intended them to be kept and used in such a house, are *Music Co. v. Berry,* 85 Ark. 9; 122 Am. St. 17 (sale of a piano); *Belmont v. Furnishing Co.,* 94 Ark. 96; 140 Am. St. 112 (sale of furniture); *Schankel v. Moffat,* 53 Ill. App. 382 (sale of furniture); *Hubbard v. Moore,* 24 La. Ann. 591; 13 Am. Rep. 128 (sale of furniture); *Sampson v. Townsend,* 25 La. Ann. 78 (sale of

furniture); *Brewing Asso. v. Mason,* 44 Minn. 318; L.R.A. 508; 20 Am. St. 580 (sale of liquor); *Liquor Co. v. Shaw,* 38 Wash. 398; 3 Ann. Cas. 153 (sale of liquor)."

The defendant relies upon *Godwin v. Tel. Co.,* 136 N.C. 258, where the Court refused a *mandamus* to compel the telephone company to place an instrument in a house of ill-fame. This was almost necessarily for aid in an illegal business. Besides, the purchaser was not, as in this case, seeking to evade payment for a telephone which had been bought. The defendant also relies upon *Courtney v. Parker,* 173 N.C. 479, where the plaintiff sold (16) building material, which was a lawful business, but was denied recovery because he was doing business illegally, contrary to ch. 77, Laws 1913, and therefore the sale by him was illegal, and he could not ask the aid of the Court to recover under it. It does not affect the principle here that the balance due is secured by lien on the machine. The defendant, while refusing payment of the purchase money, did not even offer to return the machine.

In all the cases in which recovery has been denied, it will be found that either the consideration or the transaction was illegal or the vendor participated in the illegal purposes of the purchaser. The sale of an Edison talking machine was a legitimate transaction and for a valuable consideration. The seller had no control over the use to which it should be put, and did not sell to aid in any legal purpose, and cannot be held responsible therefor from the simple fact that he knew that the purchaser was carrying on an illegal business.

The judgment of the Court upon the facts agreed is

Affirmed.

Cited: Finance Co. v. Hendry, 189 N.C. 552.

JESSIE B. EVERETT v. M. W. BALLARD, ET ALS.

(Filed 12 September, 1917.)

Married Women—Separate Realty—Contracts—Breach—Damages—Constitutional Law—Statutes.

A married woman is liable in damages for the breach of her written contract to convey her separate realty, though made without the written consent of her husband. Const., Art. X, sec. 6; Laws of 1911, ch. 109.

ALLEN, J., concurs in result; BROWN, J., dissenting; WALKER, J., concurring in the dissenting opinion.

EVERETT *v.* BALLARD.

APPEAL by plaintiff from *Whedbee, J.*, at June Term, 1917, of MARTIN.

On 14 October, 1914, the defendant Nannie B. Roberson, wife of W. R. Roberson, contracted in writing, without written assent of her husband, with the plaintiff to sell him a tract of land, her separate property, at the price of $2,500. After the delivery of said contract the defendant Nannie B. Roberson, with the written assent of her husband, conveyed the land to the defendant M. W. Ballard. This action is brought against said Nannie B. Roberson to recover damages for the breach of said contract upon her part and against her husband and M. W. Ballard for conspiracy with her to damage the plaintiff by breaking said contract.

The judge below being of opinion that the failure of the
(17) husband of Nannie B. Roberson to give his written consent to the contract rendered it void and entered judgment of nonsuit. Appeal by plaintiff.

Dunning & Moore for plaintiff.
Harry W. Stubbs for defendants.

CLARK, C.J. The change in the property and contract rights of married women made by the Constitution of 1868 and the laws since is so complete that no aid can be had by reference to the decisions made before such changes, and their present status may be thus briefly summed up:

Property Rights.—The Constitution, Art. X, sec. 6, provides that all the property, real and personal, of any married woman acquired before or after marriage shall not be liable (as formerly) to the debts or control of the husband, but shall be "The sole and separate estate and property of such female . . . and may be devised and bequeathed and, with the written assent of her husband, conveyed by her as if she were unmarried."

It will thus be seen that a married woman has the absolute power to dispose of her property by will, and that she can convey it "with the written assent of her husband," which does not restrict her freedom in the disposition of her personal property, as conveyances apply only to realty.

The Constitution requires the privy examination of a wife only as to the conveyance of her husband's allotted homestead. Const., Art. X, sec. 8.

The statute which requires her privy examination as to the conveyances of her husband's property, so as to release her right of dower, is unquestionably a matter for the Legislature, which confers, and which can reduce or increase, or deprive her of dower at

will. Hence, from 1784 to 1868 (during which time the common-law right of dower was repealed), the wife was not required to join in conveyances by the husband of his realty. The only debatable question has been whether the Legislature can now require the privy examination of the wife in conveyances by her of her own realty, since the Constitution guarantees that she can convey "as if she were unmarried, with the written assent of her husband."

Contractual Rights.—Since the Constitution of 1868 there have been successive changes by sundry statutes and by decisions of the Court towards full freedom of contract by married women to correspond with the freedom of ownership bestowed by the Constitution. The complication of our decisions was admirably summed up in a table of several pages of fine print prepared by Professor Mordecai, which is set out in *Vann v. Edwards,* 128 (18) N.C. 431-434, inclusive. For this "codeless myriad of precedent" the Martin Act, Laws 1911, ch. 109, substituted a simple statute that, "subject only," the act says, to Rev. 2107 (which retains the former requirements as to contracts between husband and wife), *"Every married woman shall be authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried,"* with a further condition that *"conveyances* of her real estate shall not be valid without the written assent of her husband, as required by the Constitution, and a privy examination to execution of *the same* as now required."

There is in this statute no requirement of the written assent of the husband, nor of the privy examination of the wife, as to any *contract* unless between her and her husband.

The "Martin Act" emancipates a wife, absolutely as to all *contracts,* except with her husband, as to which there must be her privy examination and the approval of the contract by a justice of the peace.

The requirement of privy examination is exacted as to no other contract, but is required in conveyances by the wife still in addition to the "written assent of the husband," which alone is required by the Constitution.

This is the plain letter and intent of the statute, and was so held in *Warren v. Dail* (Hoke, J.), 170 N.C. 406, where damages were held recoverable against a married woman for breach of a contract to convey land, as the Court was unable to decree specific performance owing to the refusal of his written assent by the husband. That case, often cited since, is conclusive of the liability of the wife to damages for breach of this contract. To the same effect

are the decisions of other States on similar statutes. *Wolf v. Meyer,* 76 N.J.L. 574; *Davis v. Watson,* 89 Mo. App. 15, and many others.

One cannot make a conveyance of land except in writing, but it has never been held that on breach of an oral contract damages cannot be recovered under which the land can be sold, "because that would permit to be done indirectly what cannot be done directly." When the Legislature authorized a married woman "to contract and deal so as to affect her *real and personal* property in the same manner, and with the same effect, as if she were unmarried," it authorized contracts for breach of which they would be liable as fully as if they had remained unmarried. The act so states. The Legislature was of opinion, evidently, that a woman did not lose her intelligence and her capacity to contract when she married, and in making valid her *contracts* after that date it was intended that her property, "real *and* personal," should be liable for breach of the same; otherwise, instead of saying to "affect her real and personal property in the same manner and with the same effect as
(19) if she were unmarried," it would have said "to affect her personal property only."

The Constitution emancipated married women fully as to their property rights, save only the restriction (retained in very few States) of the husband's assent to conveyances. If it had intended to extend this restriction to "contracts" it would have said so. Certainly there was no restriction upon the power of the Legislature to declare married women as capable of making contracts as their single sisters or their brothers.

To what purpose should the Legislature enact that a married woman "can contract as if single" if she is not liable for breach of such contract? Who would accept such contract?

Reversed.

ALLEN, J., concurs in result.

BROWN, J., dissenting: I agree with the Court that the opinion of the majority in *Warren v. Dail,* 170 N.C. 406, is controlling in this case.

In my dissenting opinion in *Warren v. Dail* (concurred in by Justice Walker), I said: "If any legal question has ever been settled by repeated decisions of this Court, it is that the deed or contract of a married woman charging her real estate in this is a nullity unless her husband joins and her privy examination is taken," citing numerous cases.

It is admitted in this case that W. R. Roberson, the husband of Nannie R. Roberson, did not give his written assent to the contract

to convey her land to plaintiff. It is admitted that the contract cannot be specially enforced because executed by the wife alone. It is now proposed to recover damages against the wife for breach of her contract and to sell her separate estate to pay the judgment. If this is not "whipping the devil around the stump," I am at a loss to know what is.

I do not think the Martin Act permits, or that its author ever contemplated, that a married woman should be permitted to enter into a contract of any sort affecting her real estate without her husband's consent, by virtue of which she may be mulcted in damages and her property sold to satisfy the judgment.

My views are set out more fully and the authorities cited in the dissenting opinion in *Warren v. Dail,* and I am content simply to refer to that.

MR. JUSTICE WALKER concurs in this dissent.

Cited: Miles v. Walker, 179 N.C. 485; *Martin v. Bundy,* 212 N.C. 444; *Buford v. Mochy,* 224 N.C. 247.

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(20)

W. T. POTTER v. G. I. BONNER AND WIFE, BESSIE BONNER.

(Filed 12 September, 1917.)

1. **Deeds and Conveyances—Definite Description—General Statements.**

Where a description to a part of a lot in a conveyance of law is by sufficient and definite metes and bounds, with the statement that one-half thereof was intended to be conveyed, the definite description in case of variance will control the general statement, and the divisional line between that and a subsequent conveyance of the remaining portion of the lot will be established accordingly.

2. **Deeds and Conveyances—Descriptions—Grantor's Declarations—Parol Evidence—Statute of Frauds.**

Parol evidence may control the description given in a conveyance of lands when the parties, with the view of making the deed go upon the land, make a physical survey of the same, giving it a boundary which is actually run and marked, and the deed is thereupon made, intending to convey the land which they had surveyed, and the mere declaration of a grantor as to a divisional line, at variance with the given description, falls within the meaning of the statute of frauds, and is inadmissible.

ACTION to try the title to land, the whole controversy being dependent on the location of the dividing line between the lot of the plaintiffs and of the defendants.

Sallie Carr Thompson, wife of W. A. Thompson, in 1909 owned a lot in Aurora, N. C., lying on the east side of Fourth Street and north side of Middle Street. In the deed to Mrs. Thompson from F. C. Buck and wife the lot is described as "Beginning at the intersection of Fourth and Middle streets, and runs about east with the center of Middle Street 70 yards; thence about north and parallel with Fourth Street 65 yards; thence about parallel with Middle Street 70 yards; thence with center of Fourth Street 65 yards to the beginning."

By deed dated 12 July, 1909, Sallie Carr Thompson and W. A. Thompson conveyed to Bessie C. Bonner, *feme* defendant, that portion of said lot described as follows:

"A certain tract or parcel of land in the town of Aurora, Beaufort County and State of North Carolina, adjoining the lands of Nannie Dailey, F. C. Buck and others, and bounded as follows, viz.:

"On the east side of Fourth Street in the town of Aurora, beginning in the center of Fourth Street at a point 110 feet north of the intersection of Fourth and Middle streets, running about east and parallel with Middle Street 210 feet; thence about north and parallel with Fourth Street to the line of the lot belonging to the heirs of J. B. Bonner, deceased; thence about west with the Bonner line to the beginning, containing one-half acre, and being the same lot known as the F. C. Buck home place; and this deed is intended to convey the northern one-half of the said Buck lot, it (21) being Lot No. 1 as conveyed by F. C. Buck and wife to Sallie Carr Thompson by deed dated 23 October, 1906, and recorded in Book 141, page 323."

By deed dated 8 March, 1917, Sallie Carr Thompson conveyed to W. T. Potter, plaintiff, that portion of the Buck lot lying south of the portion conveyed to Bessie C. Bonner, *feme* defendant, the description calling for the line of the defendant.

The defendants admit that the dividing line is as plaintiffs claim, if the following description in the deed to them controls:

"Beginning in the center of Fourth Street at a point 110 feet north of the intersection of Fourth and Middle streets, running about east and parallel with Middle Street 210 feet; thence about north and parallel with Fourth Street to the line of the lot belonging to the heirs of J. B. Bonner, deceased; thence about west with the Bonner line to the beginning," but they contend that the above description is enlarged by the subsequent language, and that if they own the northern half of the Buck lot the dividing line is as they contend.

The defendants further contend that at the time the deed to

them was executed there was an actual location of the line as they contend it to be, and that this controls the calls in the deed.

The only evidence for the defendants bearing on the last contention is that of the defendant G. I. Bonner, who testified that he acted for his wife, Bessie Bonner, in procuring the deed executed to her; that the deed was drawn by W. A. Thompson, husband of Sallie Carr Thompson, and was delivered in the office of said Thompson; that they did not go out on the land; that there was a wire fence on the land when the deed was made, running with the line claimed by the defendants, and that Thompson said to him when the deed was delivered, "That is your line up to that fence; that is half of the Buck lot."

There is no allegation of fraud or mistake in the pleadings, nor is an estoppel pleaded.

The jury returned a verdict establishing the line as contended for by the plaintiffs, and the defendants appealed from the judgment rendered thereon.

Small, MacLean, Bragaw & Rodman for plaintiff.
Ward & Grimes for defendant.

ALLEN, J. The first position of the defendants cannot be sustained because of the well-established rule that when there is a particular and a general description in a deed, the particular description controls. *Carter v. White,* 101 N.C. 30; *Cox v. McGowan,* 116 N.C. 135; *Midgett v. Twiford,* 120 N.C. 4; *L. Co. v. McGowan,* 168 N.C. 87.

The principle was applied in the *Carter* case to a deed containing a description by metes and bounds, and also (22) "known as Walker's Island"; in the *Cox* case to a deed containing the description "being the part of the Burton McGowan land conveyed by him to James H. McGowan," following a particular description, and *Dana v. Middlesex Bank,* 10 Dana 250, is cited and approved, in which the book and page where the deed referred to was registered was given; and in the *Midgett* case, which is approved in *L. Co. v. McGowan,* to a deed giving a particular description, followed by the words "or the one-fourth part of all the land that my father, Edward Mann, died seized and possessed of."

It was held in these cases (and many others could be cited to the same effect) that the particular description controlled, and that it could not be enlarged to include other lands by the general description.

The second contention of the defendants is also untenable.

The rule prevails with us, as contended by the defendants, that the description of land in a deed may be enlarged or limited by evidence of a cotemporaneous survey, but the rule has always been applied with caution, because, in legal effect, it permits the transfer of title to land by parol, in violation of the statute of frauds, and it may frequently result in wrong and injustice. It not infrequently happens that parties having in contemplation the execution of a deed go upon the land and make an actual survey and locate and mark the boundaries to be included in the deed, and afterwards conclude to shorten or lengthen a line, or to make some other change in the description, and the deed is executed accordingly, and if parol evidence of an actual survey is permitted to control the description in the deed, it, in such cases, would thwart the intent of the parties instead of carrying it into effect. The Courts have therefore been careful to define with particularity the circumstances under which such evidence may be received, and have only permitted it to control the description in the deed "when parties, with the view of making the deed, go upon the land and make a physical survey of the same, giving it a boundary which is actually run and marked, and the deed is thereupon made, intending to convey the land which they have surveyed." *Clarke v. Aldridge,* 162 N.C. 330, and cases cited.

These requirements are not only for the purpose of having the line definitely marked, but also to give publicity to the acts of the parties, and is analogous to the livery of seizin of the common law, where the lord, without writing, in order to invest the tenant with title, went upon the land and in the presence of witnesses delivered a tuft of grass or a twig from the land and declared the tenant to be in possession of the land granted to him.

(23) In this case none of these evidences were present. The parties did not go upon the land; they did not survey it; they did not mark the boundaries, and the defendants must rely upon a simple declaration of one of the grantors made at the time of the execution of the deed without any allegation of a fraudulent intent.

We are therefore of opinion his Honor could have instructed the jury on the facts not in controversy to answer the issue in favor of the plaintiffs, and this view renders it unnecessary to consider the exceptions taken by the defendants in the course of the trial.

No error.

BROWN, J., did not sit.

Cited: *Watford v. Pierce,* 188 N.C. 433; *Wearn v. R. R.,* 191 N.C. 583; *Realty Corp. v. Fisher,* 216 N.C. 200; *Bailey v. Hayman,* 218 N.C. 177; *Lewis v. Furr,* 228 N.C. 93; *Hudson v. Underwood,* 229 N.C. 275; *Lee v. McDonald,* 230 N.C. 521; *Whiteheart v. Grubbs,* 232 N.C. 242; *Franklin v. Faulkner,* 248 N.C. 660.

ALVERTA JONES v. ABRAM BRINKLEY.

(Filed 12 September, 1917.)

1. Slander—Moral Turpitude—Statutes—Felonies—Misdemeanors.

Actionable slander does not depend upon whether the defamatory matter would have subjected the plaintiff, if true, to a conviction of a felony, or a misdemeanor if the offense be infamous, Revisal, secs. 3291, 3293, or of petty larceny, the amount being under $20, for it is sufficient if it would subject the party to an indictment for a crime involving moral turpitude, as, in this case, for the larceny of a gallon of ice cream at a church festival, in charge of the plaintiff, of the value of one dollar.

2. Same—Inferior Courts—Recorders' Courts—Constitutional Law.

While the constitutionality of a recorder's court given jurisdiction of the offense of petty larceny, *i.e.*, of goods not less than $20, is upheld, Art. IV, sec. 12, not requiring a trial by jury or indictment by grand jury when appeal is given, Const., Art. I, sec. 3, the test of actionable slander upon acquittal does not depend upon the question of jurisdiction, but upon whether the offense charged involved moral turpitude.

3. Slander—Mental Suffering—Humiliation—Damages.

A consequent humiliation of plaintiff's feelings may be the grounds for special damages in an action for slander, as where the plaintiff, a woman, was falsely charged with larceny of a gallon of ice cream at a church festival under her charge, which prevented her going to church or elsewhere.

4. Slander—Defenses—Truth of Charge—Evidence.

The defense in an action for slander charging the plaintiff with larceny is in establishing the truth of the accusation.

APPEAL by plaintiff from *Daniels, J.,* at Spring Term, 1917, of GATES.

B. L. Banks and Ward & Grimes for plaintiff.
A. P. Godwin and Ehringhaus & Small for defendant.

CLARK, C.J. This is an action for slander. It was alleged and in evidence that the defendant, in the presence of divers (24)

persons and at different times and places, used words to the effect that the plaintiff had stolen a gallon of ice cream. It was admitted that the ice cream was worth about one dollar. The plaintiff testified that such statement deeply humiliated her, and prevented her from wishing to go to church or anywhere else.

The court granted the defendant's motion to nonsuit upon the ground that "genuine humiliation of feelings is not an element of independent damages itself, and therefore there was no special damage shown"; (2) that "under the act of 1913, the larceny charged, being of less than $20, is not punishable in the penitentiary, and therefore not a felony, and it is not slander to charge one of an offense which is merely a misdemeanor."

It would be a very singular condition of the law if to charge one of stealing $19.99 is not slander, but to charge a theft of $20 would be. Such is not the case. To constitute slander, it is not necessary that the offense charged should be a felony. "At common law, and until the act of 1891, conspiracy, and even such grave crimes as perjury and forgery, were misdemeanors." *S. v. Mallett,* 125 N.C. 723. And it was always libel or slander to charge falsely that one was guilty of perjury. 25 Cyc. 305, or forgery, *ib.* 292. The act of 1891, ch. 205, now Rev. 3291, providing that "crimes punishable by death or imprisonment in the State's Prison are felonies and all other crimes are misdemeanors," was for the purpose of settling the line between felonies and misdemeanors; but this did not prevent misdemeanors including cases where the offense was infamous, for Rev. 3293, specially provides for imprisonment in the county jail or State's Prison on conviction of misdemeanor "if the offense be infamous." The line between felonies and misdemeanors has never been whether the offense is an infamous one or not. The line between them is now made by our statute to depend upon whether the offense is punishable by imprisonment in the penitentiary or capitally, in which case the offense is a felony; otherwise it is a misdemeanor.

It is true it has been said rather loosely, that an action for slander lies for "words falsely spoken which impute to the plaintiff the commission of a criminal offense involving moral turpitude, and which would subject him, if the charge be true, to an infamous punishment." We have already seen that under our statutes misdemeanors for an infamous offense may be punished by imprisonment.

Besides, the definition is not correct. The general rule is, "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude *or* subject him to an infamous punishment, then the words will be in themselves ac-

tionable." 25 Cyc. 270, 272. To charge one with larceny is (25) to charge him with an offense involving moral turpitude.

Nor can we attach any importance to the defense set up, that the charge of petty larceny, *i. e.*, of goods less than $20, having been made petty larceny cannot be an infamous offense because, under the statute, the recorder's court had jurisdiction of this offense. The jurisdiction of the recorder's court is bestowed by the Legislature under the authority of the Constitution, Art. IV, sec. 12, which provides that "The General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed by this Constitution or which may be established by law in such manner as may be deemed best."

It has been held that the jurisdiction given the recorders' courts is not in violation of the right of trial by jury guaranteed by Const., Art. I, sec. 3, because that section provides that the Legislature may dispense with jury trials "for petty misdemeanors, with the right of appeal," and that for the same reason an indictment by a grand jury is not necessary. This Court has repeatedly upheld the validity of such courts. *S. v. Shine,* 149 N.C. 480; *S. v. Doster,* 157 N.C. 634; *S. v. Dunlap,* 159 N.C. 491, and in other cases.

The test whether an action lies for slander is not whether the offense is triable in the Superior Court or the recorder's court or in a magistrate's court. It does not depend upon the offense being a felony or a misdemeanor. If the offense charged involves moral turpitude, which is defined to be "An act of baseness, vileness or depravity in the private and social duties that a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man" (25 Cyc. 272), then such charge, if false, is ground for an action of slander if orally made, and for an indictment or action for libel if made in writing or printed. To charge a woman falsely of a want of chastity is slanderous and libelous, though such matter is not a felony in her.

The only case in our Court which properly considered seems to be in conflict with this is *McKee v. Wilson,* 87 N.C. 300, which holds that to "constitute oral slander, the words must impute to the plaintiff the commission of an infamous offense" (which a charge of theft is), but that case went on to say "A misdemeanor, punishable only by fine or imprisonment, is not infamous." This latter, if ever a correct statement of law, is corrected by Rev. 3293, which provides for the punishment of misdemeanors, "if the offense be infamous, by imprisonment in the county jail or by a fine." The test is not the nature of the punishment, but the nature of the offense

(26) charged. A charge of larceny is actionable *per se,* and "there is no distinction between grand and petty larceny in this respect." 25 Cyc. 297.

It was also argued to us that one could not be guilty of slander or libel unless he falsely charged another with an offense for which he would lose his *"libernam legem."* Counsel did not agree among themselves as to the meaning of this survival from a former stage of civilization. "To lose one's free law (called the villainous judgment) was to become discredited or disabled as a juror and witness, to forfeit goods and chattels and lands for life, to have these lands wasted, houses razed, trees rooted up, and one's body committed to prison." Black's Law Dictionary, quoting Hawk P.C. 61, c. lxxii, § 9; 3 Inst. 321. Such punishments have long since disappeared from our more humane law, and to require that to constitute slander or libel the offense charged must be one that would subject the party charged to such punishment would be simply to abolish such actions.

Nor do we agree that humiliation of the kind inflicted upon the plaintiff by the charge of theft and its resultant consequences is not special damage. In *Young v. Tel. Co.,* 107 N.C. 384, 385, it is said: "Damages for injury to the feelings, such as mental anguish or humiliation, are given, though there may be no physical injury in many cases . . . The plaintiff is entitled to recover, in addition to nominal damages, compensation for the actual damages done him, and mental anguish is actual damage . . . It is very truthfully and appropriately remarked by a learned author that 'the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter. Indeed, the sufferings of each frequently, if not usually, act reciprocally on the other.' 3 Suth. Dam., 260. And Cicero (who certainly may be quoted as an authority among lawyers) says in his Eleventh Philippic against Anthony, *'Nam quo major vis est animi quam corporis, hoc sunt graviora ea quae concipiuntur animo quam illa quae corpore.'* For, as the power of the mind is greater than that of the body, in the same way the sufferings of the mind are more severe than the pains of the body." This has been repeatedly approved. See Ann. Ed.

In *Osborn v. Leach,* 135 N.C. 628, it was held, "Actual damages include pecuniary loss, physical pain, mental suffering, and injury to reputation." Also, Hoke, J., in *Ammons v. R. R.,* 140 N.C. 200, citing Bleckley, C.J.

What humiliation more intense and poignant can be inflicted than a charge of theft, which was made against this plaintiff, and would any one on hearing such charge consider whether the amount

of the larceny charged would subject the person to a trial in the Superior Court or the recorder's court, or whether it was a felony or a misdemeanor? Would this make any difference (27) in the humiliation of the plaintiff or in the injury to her reputation? Indeed, under some circumstances, a petty larceny might be more infamous than one of a larger amount. In this case the plaintiff, in charge of a church festival, was charged with stealing ice cream, which, among her associates and acquaintances, if true, would have condemned her to an isolation greater than that which might result from the theft of large sums under other circumstances.

The protection of a defendant in such cases as this is not in such defenses as are herein set up, but by proof of the truth of the charge. Even this in former times would not have been a defense, but in a juster age we have deemed this a just protection, and have so provided by statute. Rev. 3267. For the enactment of this act allowing the truth of the charge to be a defense, we are indebted to the splendid defense by Lord Erskine in the *Stockdale* case and the efforts in the English Parliament of Charles James Fox. To the verdict of the jury on such defense, the defendant must look, if he has not maliciously and falsely slandered the plaintiff.

The judgment of nonsuit is

Reversed.

Cited: Payne v. Thomas, 176 N.C. 402; *Cotton v. Fisheries Prod. Co.,* 177 N.C. 59; *Paul v. Auction Co.,* 181 N.C. 5; *Deese v. Collins,* 191 N.C. 750; *Castelloe v. Phelps,* 198 N.C. 456; *Oates v. Trust Co.,* 205 N.C. 16; *Albertson v. Albertson,* 207 N.C. 551; *Flake v. News Co.,* 212 N.C. 787; *Roth v. News Co.,* 217 N.C. 22; *Gillis v. Tea Co.,* 223 N.C. 472; *S. v. Surles,* 230 N.C. 279.

J. A. ROGERSON v. A. B. HONTZ, TRADING AS SOUTHERN ROLLER, STAVE AND HANDLE COMPANY.

(Filed 12 September, 1917.)

Master and Servant—Negligence—Ordinary Tools—Defects—Inspection Trials—Evidence—Nonsuit.

The rule relieving an employer from liability for a personal injury caused by a defective implement of an ordinary kind to be used in an ordinary way, furnished by him to his employee for the work required of him, has no application when he knew, or should have known, of the

defects by reasonable inspection, and that its use threatened substantial injury; and where an employer furnished an inexperienced employee a defective cant hook, under his protest, to unload heavy logs from a flat car, and the employee was injured shortly thereafter by reason of the breaking of the implement which he had been instructed to use, a judgment of nonsuit is improperly granted, and the issue of defendant's actionable negligence is for the determination of the jury.

BROWN, J., concurring.

CIVIL action tried before his Honor, *M. H. Justice, judge,* and a jury, at June Special Term, 1917, of the Superior Court of PASQUOTANK.

The action was to recover damages for physical injuries received by plaintiff, an employee of defendant, while engaged in loading logs onto cars and by reason of alleged negligence of defend-
(28) ant in not supplying plaintiff with a cant hook fit and proper for the purpose.

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

E. L. Sawyer and J. B. Leigh for plaintiff.
Meekins & McMullan for defendant.

HOKE, J. The testimony introduced by plaintiff tending to support his claim is set forth in the record as follows:

"Plaintiff testified that he thought Evans knew more about the cant hook than he did and went to work with it because Evans said it was all right. Plaintiff had been working there a week or two and had worked very little with cant hooks and did not know much about them. About half an hour after he began work unloading logs, where Evans had directed him to work, that in rolling a log from the flat car the handle of the cant hook broke and threw him off the flat car about five or six feet, and he fell backward, head first, and hit his shoulder on the end of a log and sustained serious and painful injury; that he was confined to his home several days on account of the injury; that it was very painful, and that he has not been able to do any heavy work since; that if he worked with the injured side during the day it pained him so he could not sleep at night, and that this condition continues to the present time.

"Percy Davis, witness for plaintiff, testified: That plaintiff and he went to foreman Evans for orders, and that foreman put them to work unloading logs from flat car; that said foreman handed each of them a cant hook, and that plaintiff said the cant hooks were not worth a cuss, and that Evans said go on, the cant hooks

would hold more than he could pull; that he saw no other cant hooks on the premises other than the two he and plaintiff had; that in a short time after they began to roll logs off the car the handle of plaintiff's cant hook broke and he fell backwards off the flat car, and the back of his shoulder hit the end of a log; that he fell some five or six feet; that he laid on ground some five minutes before he got up. When he went off he was holding his arm, and his actions indicated that he was suffering great pain."

Considering this evidence as correctly portraying the facts of the occurrence, and we are required so to consider it on a judgment of this character, we are of opinion that the order of nonsuit is erroneous, and the cause must be referred to the jury.

In the recent case of *Wright v. Thompson,* 171 N.C. 88, while recognizing the position that the rule requiring an employer of labor, in the exercise of reasonable care, to provide his employees with a safe place to work and furnish him tools safe and suitable for the purpose, was not "so insistent in the case of ordinary (29) every-day tools and ordinary every-day conditions requiring no special care, preparation or provision," the Court held that an employer was not relieved of all obligation and responsibility in reference to such tools, and further, that when there was negligence in supplying tools of that character or keeping them in order, and the defect was of a kind that reasonably imported menace of substantial physical injury, and the same was known to the employer, or if it should have been ascertained by him under the rules of inspection applicable to such cases, and having due regard to the nature of the defect and the use to which it was being put and all the attendant circumstances, liability might attach.

In the case referred to, the employee, engaged in holding a steel drift-pin while another struck it with a sledge hammer, had his eye put out by a chip of steel flying from the head of the pin. The end was burred, or frayed, and its condition had been called to the attention of the boss, or vice-principal, and had been in that threatening condition for near three months. To use such a pin in that way was likely to bring about just the injury that occurred, and though the tool was a simple one, a drift-pin 15 inches long, tapering from seven-eighths to a half inch, a judgment of nonsuit was reversed and the cause referred to the jury. The ruling, we think, is grounded in right reason and was made as the correct deduction from numerous decisions of our Court in which the question had been considered and passed upon. *Mincey v. R. R.,* 161 N.C. 467-471; *Young v. Fiber Co.,* 159 N.C. 375; *Reid v. Rees,* 155 N.C. 230; *Mercer v. R. R.,* 154 N.C. 399; *Cotton v. R. R.,* 149 N.C. 227.

On the facts as now presented, the evidence tends to show that

this cant hook was an implement suitable to the work and which the employer should supply; that while simple in itself, it was designed, by leverage, to give the workman more power; that he was engaged in loading and unloading heavy logs from cars, rough work and where he was frequently liable to be in position that, if the hook slipped its hold or the handle broke, severe injuries were not improbable, and, applying the principles of the cases referred to and others of like import, the issue must be referred to the jury on the question whether the tool was defective; was such defect known to the employer, and was it of a kind which threatened substantial injury in its use.

The case of *Morris v. R. R.*, 171 N.C. 533, to which we were referred by counsel, is not in conflict with our present decision. In that case a nonsuit was sustained on facts tending to show that claimant received a severe sprain in the back because a hammer with which he was driving spikes into cross-ties had slipped from the head of the spike as the blow was struck. There was also
(30) evidence that the hammer had been slick and the employer had promised a new one. The decision was made to rest on the position that, in work of that kind, the mere fact that a hammer had become slick did not import menace of physical injury, and the occurrence should be fairly regarded as an accident.

Speaking to the two cases of *Wright* and *Morris*, the Chief Justice tersely points out the distinction as follows: "In *Wright's* case we set aside the nonsuit because it was shown that the drift-pin furnished the plaintiff had been broken off and had remained so at least thirty days, and that the plaintiff had notified the foreman of its defective condition. Injury might reasonably have been expected from such cause. That was certainly a very different case from the present. Here the tool was a hammer, and it could not be anticipated that on striking the spike to drive it into the cross-tie the hammer would slip, nor that by its going two inches further the plaintiff's back would be sprained," and held that the *Morris* case came within the principle as illustrated and applied in *House v. R. R.*, 152 N.C. 398; *Brookshire v. Elec. Co.*, 152 N.C. 669; *Dunn v. R. R.*, 151 N.C. 313, and that class of decisions.

There is error, and this will be certified that the proper issues be submitted to the jury.

Error.

BROWN, J., concurring: It would seem that under the decisions of this Court cant hooks should be classified among the minor tools in ordinary and every-day use, the regular inspection of which is not required of the master, and for defects in which he is generally

exempt from responsibility. But it appears in the evidence that this particular cant hook, the breaking of which caused the injury, was to be used in at best a rather dangerous business, the unloading of large logs from a car, an operation in which the safety of the laborer is to a considerable extent dependent upon the strength of the utensil.

The plaintiff knew this, and of course the foreman knew it. When given the cant hook by the foreman, the plaintiff protested that it was defective and unfit for rolling logs off the car. The foreman assured him that it was strong and would hold more than he could pull. The plaintiff relied upon such assurance, and was injured in consequence.

For these reasons, I think the Court erred in sustaining the motion to nonsuit.

Cited: *Thompson v. Oil Co.*, 177 N.C. 282; *Winborne v. Cooperage Co.*, 178 N.C. 90; *Hensley v. Lumber Co.*, 180 N.C. 576; *Gaither v. Clement*, 183 N.C. 454; *McKinney v. Adams*, 184 N.C. 564; *Nowell v. Basnight*, 185 N.C. 148; *Bryant v. Furniture Co.*, 186 N.C. 443; *Bradford v. English*, 190 N.C. 745; *Fowler v. Conduit Co.*, 192 N.C. 17; *McCord v. Harrison-Wright Co.*, 198 N.C. 745; *Cole v. R. R.*, 199 N.C. 393.

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(31)

WILLIE EVANS, BY GIDEON PENDLETON, GUARDIAN, v. DARE LUMBER COMPANY.

(Filed 12 September, 1917.)

1. Master and Servant — Contracts—Independent Contractor—Employment at Will—Hiring Employees.

One who is employed by the owner of a lumber manufacturing plant to cut laths from lumber furnished by the owner with machinery at his mills, at so much per thousand, the employment terminable at the will of the owner, is not an independent contractor within the meaning of the principle that the owner is not liable for the negligence of his independent contractor causing injury to the latter's employees, and the fact that the contractor hired and discharged the employee is not controlling.

2. Master and Servant — Negligence — Statutes—Child Labor—Employment.

It is negligence on the part of the owner of a lumber manufacturing plant to allow a boy ten years of age to work in his power-driven mill,

at a dangerous place, where the live rollers to carry the lumber to the various machines were left unboxed and exposed, causing the injury complained of, which occurred while the boy was engaged at his work with the knowledge of his superintendent, who made no objection.

3. Master and Servant—Independent Contractor—Contracts—Negligence—Dangerous Instrumentalities.

The master's nonliability for the acts of an independent contractor does not obtain when the work engaged in is inherently dangerous, and the injury complained of was caused by the negligence of the master himself in respect to conditions under his control.

4. Negligence — Child Labor—Manufacturing Plants—Statutes—Master and Servant—Contributory Negligence.

The provisions of our statutes, Rev., sec. 1981(a), forbidding employment of children under 12 years of age at any factory, etc., and Rev., sec. 3366, amended in 1907, making it a misdemeanor for such factory to knowingly and willfully employ a child under that age, include within their provisions the working of children under the forbidden age at such places with the actual or special knowledge of the owner or his superintendent; making it negligence *per se* when such child is injured, with the presumption that it was not guilty of contributory negligence.

5. Contracts—Independent Contractor—Trials—Evidence—Questions for Jury.

When the evidence is conflicting, the question of independent contractor is one for the jury.

APPEAL by plaintiff from *Justice, J.*, at Special June Term, 1917, of PASQUOTANK.

This is an action for personal injuries. The plaintiff, who is suing by his guardian, was 10 years old at the time his arm was caught and torn off, when attempting to straighten a board on the "live rollers," while working in the defendant's mill, as ordered to do. These live rollers were used for conveying lumber from place to place in the mill, and were fitted with rapidly revolving
(32) rollers and dangerous cog wheels, which were not boxed and totally unprotected.

There was evidence "that most live rollers are boxed in, and that the live rollers in the defendant's mill were boxed in clean down to the lower end of the slasher, but that part which came down where the defendant was working was not boxed in; that they box them in because they are dangerous." This child had been hired to work by one Tony Spruill, who had charge of the defendant's lath room. The defendant was operating a large saw and planing mill, one of the departments of which was known as the lath room. The floor of this room was about four feet lower than the floor of the big mill, but it was under the same roof, with no partition, and there were several dangerous machines, *i. e.*, the button saw, the

lath saw, and the cut-off saw. The live rollers at which the plaintiff was hurt were located in the big mill near the lath room.

Tony Spruill, who hired the plaintiff, was operating this lath room, making laths for the defendant at so much per thousand under a contract with the general manager of the mill. The lath room and all the machinery in it belonged to the defendant. Spruill made the laths out of slab wood sent down by the defendant from the big mill under directions of the defendant's foreman. The laths, after being sawed and bundled were delivered to other employees of the defendant and sold for defendant's profit. Under his contract with defendant's manager, Spruill was to pay his helpers out of the 60 cents per thousand which he received. He used as helpers two men and five boys, three of the latter, one of them the plaintiff, being about 10 years old. At the time of his injury, 19 October, 1911, the plaintiff was throwing wood from the big mill into the lath room under orders from Spruill. He took the wood in the big mill to the live rollers, and, when standing about twelve or fourteen feet from them, the plaintiff was told to straighten out a board on the live rollers, in order to throw the wood over. The plaintiff had to go close to the live rollers, as the wood was piled against them. He was caught in them, lifted clear of the floor, and hung there until his arm was pulled off. He could not have been caught by the live rollers if they had been boxed in, as is usually done. The wood had thus been piled in the big mill under permission from one of defendant's foreman. The man who ordered the plaintiff to straighten the board was in the big mill, as was the plaintiff, at the time he lost his arm.

The defendant's manager had seen the plaintiff there at work, and nothing was said to him or to Spruill by any superintendent of defendant's company, nor was there any objection to his working there. After he was injured one of the defendant's superintendents said to Spruill, speaking of another of these boys (33) about plaintiff's age, that he was too small to be working there.

At the close of the evidence for the plaintiff, the judge allowed the defendant's motion for a nonsuit.

E. L. Sawyer and Meekins & McMullan for plaintiff.
Aydlett & Simpson and Ehringhaus & Small for defendant.

CLARK, C.J. It is six years since this boy's arm was torn off, and we have just reached the nonsuit stage in this action.

There was negligence on the part of the defendant in allowing this boy 10 years of age to work in the factory; in allowing him to

work in a dangerous place, and in allowing the live rollers to be operated without being boxed. The defendant's superintendents saw the boy there and made no objection to his working.

The only defense the defendant attempted to set up was that Tony Spruill, who hired the boy and paid him, was an independent contractor. In *Wiswall v. Brinson,* 32 N.C. 554, Pearson, C.J., in holding that the owner of a house, who contracted with another to remove it (the contractor employing his own hands and being paid by the job), is liable for the negligence of the contractor, whereby a third person was injured, said that the rule excepting an employer from liability for the acts of those who work under his employment is restricted to those who exercise an independent calling.

In this case the employer had power to terminate Spruill's employment at any time. This gave the defendant potential control over him, and is conclusive that Spruill was not an independent contractor for whose negligence the defendant was not responsible. It is said in 14 R.C.L. 72, that it is idle and vain to assert that an employee is an independent contractor because he has the sole right to hire and discharge his help when his own employer has the unquestioned right to terminate the contractor's employment at will.

Neither does the doctrine of the master's nonliability for the acts of an independent contractor apply to protect the masters when the injury is caused by such inherent danger in the work, as in this case, which called upon the master to observe the duty of absolute control, and most especially when the machinery which Spruill was operating was dangerous and by the negligence of the defendant was unprotected by boxing. *Young v. Lumber Co.,* 147 N.C. 26.

The defendant owed the employees of Spruill, even if he had not been subject to discharge at the will of the defendant, the same duty to furnish a safe place to work and safe machinery that it owed to its other employees. *Houghton v. Pilkington,* 28 Ann. Cas.
(34) 792; *Pugmire v. R. R.,* 14 Anno. Cas. 384; *Aga v. Harbach,* 4 Ann. Cas. 441, and *Paducah Box Co. v. Parker,* 143 Ky. 607.

This question of it being negligence *per se* to work children of tender years in factories first came before this Court in *Ward v. Odell,* 126 N.C. 946, where a boy 12 years of age lost his eye, and in *Fitzgerald v. Furniture Co.,* 131 N.C. 636, where a boy 9 years old had his hand injured in a factory. In both cases it was held by a divided Court (the writer announcing the opinion of the majority) that the defendant was guilty of actionable negligence, though there was at that time no statute against child labor. In the latter case a table of ages fixed in other States under which children could not be exposed to such labor and dangers was set out. Since then this

State has enacted Revisal 1981(a), which forbids the employment of any child under 12 years of age in any factory or manufacturing establishment within the State.

Revisal 3362 (passed in 1903 and amended in 1907), provides that if, after 1 January, 1908, "Any mill owner, superintendent, or other person, acting in behalf of a factory or manufacturing establishment, shall knowingly and willfully employ any child under 12 years of age to work in any factory or manufacturing establishment . . . he shall be guilty of a misdemeanor."

It is not only the purpose of these statutes to protect immature children against physical depreciation, but against dangers from working around machinery to which they would be liable by reason of their curiosity and indiscretion. The language of the statute contemplates not only those cases in which there is direct employment of such children by the owner of a factory or manufacturing establishment, but all cases in which a child under the forbidden age is worked there with the actual or special knowledge of the owner or of the superintendents in charge of the work.

In this case the lath room was a part of the big mill. Spruill, the immediate employer of the child, had no fixed term of contract, but was subject to discharge at any moment, and, therefore, was working under the control of the defendant; and besides, the child was injured in the big mill itself and in obeying instructions, which required him to remove wood stacked up in the big mill, by order of the defendant's superintendent, and in such dangerous proximity to the live rollers that the removal of the wood caused him to fall into the live rollers, which were unguarded by any boxing, whereby the child sustained this terrible injury and pain of having his arm torn off.

In *Partelle v. Coal Co.*, Ann. Cas. 1913E 338, the Supreme Court of Illinois, construing the child labor statute of that State, said: "It is contended that this act can only apply when the relation of master and servant actually exists. We cannot agree with this contention. Section 1 of the Child Labor act of 1903 (35) reads, in part: 'No child under the age of 14 years shall be employed, permitted, or suffered, to work at any gainful occupation in any manufacturing establishment, factory, or workshop.' The object of this statute was to prevent absolutely the employment of children under the age of 14 years in the occupations mentioned therein, and a construction should be given which will effectuate that purpose, if it can be done consistently with the wording of the statute. Those who are liable under it are bound, at their peril, to see that children are not employed contrary to its provisions. To put the construction on this statute contended for by

counsel for appellant would leave the words 'permitted or suffered to work' practically without meaning. It is the child's working that is forbidden by the statute, and not his hiring; and while the statute does not require employers to police their premises in order to prevent chance violations of the act, they owe the duty of reasonable care to see that boys under the forbidden age are not permitted or suffered to work there contrary to the statute."

Since the passage of our act, Congress, in pursuance of a humane desire to protect childhood from overwork and the dangers of employment in factories, has used its control over interstate commerce to raise the ages under which employment of children is allowable by forbidding interstate shipments of goods from any factory in which children under the forbidden age are worked. It has been held that the violation of our statute is negligence *per se (Leathers v. Tobacco Co.,* 144 N.C. 333; *Starnes v. Mfg. Co.,* 147 N.C. 556), and there is a presumption that the child is incapable of contributory negligence.

In *McGowan v. Mfg. Co.,* 167 N.C. 192, where a child under 12 years of age was injured in the lapper room of the defendant's mill, it was held that the defendant was liable though the child was not on the pay roll of the mill, but had been merely permitted to work there.

Upon the evidence, the defendant could not defend upon the ground that Spruill was an independent contractor, and that it was released from liability when the child was worked in the defendant's mill, whose officers could have seen, and did see, that he was under the prescribed age and when the defendant had furnished the dangerous machinery which, by reason of its unboxed condition, caused the injury. But if there had been an absence of these circumstances, the evidence would have left it a mixed issue of fact and law whether Spruill was an independent contractor, and in any view it would have been an error to direct a nonsuit.

Reversed.

Cited: Smith v. Coach Lines, 191 N.C. 591; *Corp. Comm. v. Trust Co.,* 193 N.C. 700; *Diamond v. Service Stores,* 211 N.C. 633; *Rothrock v. Roberson,* 214 N.C. 28; *Lassiter v. Cline,* 222 N.C. 274; *Hwy. Comm. v. Transportation Corp.,* 226 N.C. 376; *Cooper v. Publishing Co.,* 258 N.C. 589.

(36)

LAKE DRAINAGE COMMISSIONERS v. S. H. SPENCER ET ALS.

(Filed 12 September, 1917.)

1. Process—Summons—Sheriff's Returns—Presumptions—False Returns—Evidence—Statutes.

The sheriff's return showing service of summons on defendant in an action, in this case proceedings to establish a drainage district, is taken as *prima facie* correct, and may not be successfully attacked by motion in the cause, except by clear and unequivocal evidence, requiring the testimony of more than one person to overturn the official return of the officer, Revisal, sec. 1529.

2. Process—Summons—False Returns—Penalty—Damages—Actions.

For making an incorrect or false return of service of summons, the sheriff is liable to an action by the injured party for the penalty of $500 and for damages.

3. Process — Summons—Sheriff's Returns—False Returns—Declarations—Evidence.

Declarations of a party defendant that a summons in an action had not been served on him, contrary to the sheriff's returns, is incompetent as hearsay evidence and insufficient to overturn the endorsement of service made by the sheriff, and especially is such evidence incompetent when it is in the negative form.

APPEAL by plaintiffs from *Daniels, J.*, at May Term, 1917, of HYDE.

Thomas S. Long, H. C. Carter, Jr., and Small, MacLean, Bragaw & Rodman for defendants.

Spencer & Spencer and Ward & Grimes for plaintiffs.

CLARK, C.J. The plaintiffs' drainage district was duly established by proceedings regular on their face. It appeared from the return of the sheriff upon the summons in said cause that it had been duly served upon Mrs. S. H. Spencer, the mother of the defendants. The defendants, however, contended that, notwithstanding the return of the sheriff, said summons had not in fact been served upon her.

On the trial of this cause the sheriff testified, in corroboration of his return to the writ, that he did in fact duly serve the summons on Mrs. Spencer. Her children, who were defendants, were allowed to testify that they never heard their mother say anything to anybody about the summons having been served upon her. This was error in any aspect. In the first place, if the witnesses had testified affirmatively that Mrs. Spencer had said that the summons had not

been served upon her, it would have been incompetent as hearsay. It is all the more incompetent in this negative form, that they had heard her say nothing about it, which proves nothing; and if it proved anything, would tend to show that she had been served.

(37) Even if the ancestor of the defendants had been alive, her testimony alone would not have been sufficient to rebut the presumption arising from the return of the sheriff that he had duly served the summons upon her. *Burlingham v. Canady,* 156 N.C. 179. Revisal 1529, provides that the return of the sheriff, that the summons has been executed, "shall be deemed sufficient evidence of the service thereof." The presumption is that the officer's return states the truth. *Strayhorn v. Blalock,* 92 N.C. 292; *Isley v. Boon,* 113 N.C. 249; *Miller v. Powers,* 117 N.C. 218; *Chadbourn v. Johnston,* 119 N.C. 282. It is *prima facie* correct. *Williamson v. Cocke,* 124 N.C. 585.

Revisal 2817, provides that the sheriff is liable for a penalty of $100 for failure to serve process when delivered to him in the prescribed time before the return day, and to a penalty of $500 and an action for damages if he make a false return of process. The recitals in the sheriff's return are *prima facie* true *(Simpson v. Hiatt,* 35 N.C. 470), and cannot be collaterally impeached. *Edwards v. Tipton,* 77 N.C. 222.

In *Hunter v. Kirk,* 11 N.C. 277, it is said that the sheriff is "A sworn officer, and his return cannot be contradicted by a single affidavit." This was cited with approval in *Mason v. Miles,* 63 N.C. 564. To same effect, *S. v. Vick,* 25 N.C. 491. Both these cases were cited as authority in *Miller v. Powers,* 117 N.C. 220, and *Burlingham v. Canady,* 156 N.C. 179.

At common law, the rule was, as it is still in many of our States, that, as between parties and privies, the return of an officer is conclusive as to service of process, and can be controverted only in an action against the officer for a false return, unless there is contradiction by other matter in the record itself, or unless it is shown that the false return was procured by the plaintiff in the action, or resulted from the mistake of the officer. 32 Cyc. 514, 515.

In *Tillman v. Davis,* 28 Ga. 497; 73 Am. Dec. 786, Lumpkin, J., said: "I have investigated carefully in Brooke & Viner's Abridgements, and traced the question to its fountain-head, and find it well settled that by the common law no averments will lie against the sheriff's return." This is held in many of our States, as set out in the notes to 32 Cyc. 514, 515.

In other States a more liberal rule permits the return to be impeached by affidavit or otherwise in a direct proceeding brought for that purpose, such as an action to set aside the return, or to vacate

a judgment by default based thereon, but the proof necessary to overthrow the return *"must be clear and unequivocal,"* 32 Cyc. 516, 517, and the notes thereto.

While this is one of the States in which the return on the process is not conclusive, even between the parties and privies to the action, still, under Revisal 1529, and the authorities above cited, such return is *prima facie* correct, and cannot be set aside unless the evidence is "clear and unequivocal." 32 Cyc. 517. It (38) would work the greatest mischief if after a judgment is taken it could be set aside upon the slippery memory of the defendant, perhaps years thereafter, that he had not been served. This would shake too many titles that rest upon the integrity of judgments and the faith of purchasers and others relying thereon. The return of the sheriff is by a disinterested person acting on oath in his official capacity and made at the time.

The defendant in such case has his remedy by an action against the officer for the penalty of $500 for false return, and also by an action for damages. The defendant, who contends that he has not been duly served, may also proceed by a motion in the cause. *Banks v. Lane,* 170 N.C. 14; *S. c.,* 171 N.C. 505. But his evidence must be more than testimony by one person, which would not be sufficient to overturn the official return of the sheriff, which has a *prima facie* presumption of correctness properly attached thereto.

In no case, as we have already said, would hearsay testimony of the declaration of a defendant, that he had not been served, be competent, and still less competent would be testimony that the defendant had not been heard to make any statement in regard to the matter, with a view of raising a presumption therefrom that said defendant had not been served. The fact that the defendant had made no statement in regard to the matter, if evidence at all, would tend to prove that she had been served, as returned by the sheriff. In this case the sheriff went upon the stand and testified that his return was correct.

There was no sufficient evidence to go to the jury that the summons had in fact not been served. The burden was upon the defendants who allege this, and the court should have charged, as prayed by plaintiffs, that they should answer the first issue (as to whether the summons was served upon the defendants' mother) "Yes."

Error.

Cited: Caviness v. Hunt, 180 N.C. 384; *Long v. Rockingham,* 187 N.C. 209; *Trust Co. v. Nowell,* 195 N.C. 450; *Penley v. Rader,* 208 N.C. 704; *Dunn v. Wilson,* 210 N.C. 494; *Adams v. Cleve,* 218 N.C. 304; *Harrington v. Rice,* 245 N.C. 642.

(39)

CALLIE KING v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 12 September, 1917.)

Master and Servant — Negligence — Ordinary Tools—Defects—Duty of Master—Employer and Employee.

When plaintiff has been employed as fireman for the defendant's stationary engine, with duty to keep the fire going, shake the grate, etc., to which latter a rod or bar was attached on which was an iron "spigot," or peg, which worked through a slot on a detached bar of iron 3 feet long, used as a handle for the purpose of shaking the grate beneath the boiler; and there is evidence that this spigot had been broken off or bent so that the regular handle or bar would not fit; that the plaintiff's boss furnished him and required him to do this work with an iron bar taken from the engine 3½ feet long, weighing 10 or 15 pounds, with a slot too large for the spigot, giving it play, making its use dangerous for the purpose, and the plaintiff was injured in consequence of its slipping from the spigot, and that the boss had previously been warned of the danger in its use, and had failed in his promise to make it safe: *Held*, the principle that the employer is not held responsible for defects of ordinary tools to be used in the ordinary way has no application, and the evidence presents the issue of actionable negligence for the determination of the jury. See *Rogerson v. Hontz*, *ante* 27.

CIVIL action to recover for physical injuries caused by alleged negligence on the part of defendant, tried before his Honor *H. W. Whedbee, J.*, and a jury, at June Term, 1917, of EDGECOMBE.

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

J. W. Keel and W. O. Howard for plaintiff.
John L. Bridgers for defendant.

HOKE, J. In *Rodgerson v. Hontz*, at the present term, the Court has held, in approving the decision of *Wright v. Thompson*, 171 N.C. 88, and other cases, that where an employee was injured by reason of defective tools supplied him, the employer was not necessarily relieved of all responsibility merely because the tools were of simple structure, but in case there was negligent default in the respects suggested on the part of the employer, and the defect was of a kind importing menace of substantial injury, having due regard to the nature of the work and the manner of doing it; and it was further shown that the employer knew of such defect, or should have found it out under the duty of inspection ordinarily incumbent upon him, in such cases, that under certain conditions liability might attach.

In the present case, there was evidence on the part of plaintiff

tending to show that in February, 1913, plaintiff was an employee of defendant as fireman of a stationary engine in the shops of defendant at Rocky Mount, N. C., his duties being to (40) keep his fires going and his grate clean—"to shake the grate." To do this, there was a rod or bar attached to the grate under the boiler, and on this was an iron "spigot," or peg, about 11 inches long, the size of two fingers. There was also a detached bar of iron about 3 feet long with a slot in it, designed to fit over the spigot and make a handle by which the fireman moved the grate back and forth when it needed cleaning; that this spigot had been in part broken off and bent, so that the regular bar would not fit over it at all, and on the evening in question and at one or two other times, plaintiff's boss had gotten a bar from an engine, which was 3½ feet long, weighing 10 or 15 pounds, and directed plaintiff to clean the grate with that; that the slot in this engine bar was too large for the spigot, or peg, giving it some play or slack as it was being used, and it was dangerous to operate; that witness had told the boss that there was danger in the conditions presented and some one was going to get hurt, and the boss had promised to have it fixed; that at the time of the occurrence, as plaintiff was pulling the bar with great force in the effort to clean the grate, that owing to this slack or misfit on the slot, it slipped off the end, striking the plaintiff in the stomach, causing serious and painful injuries; that he was in the hospital two months, hernia developed as a result, and witness still suffered and was incapacitated for heavy labor.

Another witness, Mr. Braswell, boss of plaintiff, testified, among other things, that ordinarily the regular iron bar or handle fitted tight over the spigot, or peg, but this last had been broken or bent for several days so it could not be used, and so they got one off an engine; that this last was too large for the spigot and witness had seen it slip off several times before, and one of the firemen had gotten his knee hurt by it; that witness had reported the condition to the shop boss and he had promised to have it fixed.

While ordinary work of this character might not import such danger or threat of injury as to permit an inference of actionable negligence on the part of an employer, we think that the size and weight of the bar and grate in this instance and the defect complained of, together with the positive evidence of danger in operating the grate under conditions described, present a case requiring that the question of responsibility be submitted to the jury on appropriate issue, and to that end the order of nonsuit be set aside.

Error.

Cited: *Thompson v. Oil Co.*, 177 N.C. 282; *Winborne v. Cooperage Co.*, 178 N.C. 90; *Hensley v. Lumber Co.*, 180 N.C. 576; *McKinney v. Adams*, 184 N.C. 564; *Nowell v. Basnight*, 185 N.C. 148; *Bryant v. Furniture Co.*, 186 N.C. 443; *McCord v. Harrison-Wright Co.*, 198 N.C. 745; *Cole v. R. R.*, 199 N.C. 393; *Lee v. Roberson*, 220 N.C. 62.

(41)

FIRST NATIONAL BANK OF ELIZABETH CITY, N. C., v. ROBERT BROCKETT.

(Filed 12 September, 1917.)

1. Evidence—Lost Papers—Pleadings—Admissions.

Where a check has been given credit at a bank to the payee, and the maker is sued by the bank for the amount thereof, it is reversible error for the court to enter a judgment of nonsuit against the plaintiff upon the ground there was no evidence of the loss of the check, where the execution of the check, the amount, on what bank drawn, and to whom payable, have been admitted by the answer.

2. Evidence—Lost Papers—Parol Evidence.

Evidence that a check sued on had been received by its payee, sent to the plaintiff bank, and by it to another bank with a letter of transmittal, and by the proper employer of latter bank that it had not been received, is sufficient evidence of the loss of the check in the mail to admit parol evidence concerning it.

CIVIL action tried before *Justice, J.*, at the June Special Term, 1917, of PASQUOTANK.

This is an action instituted by the First National Bank of Elizabeth City against Robert Brockett, of High Point, N. C., to recover the sum of $1,335.70, being the amount of a check drawn by Robert Brockett on 21 August, 1915, and paid to C. Syer & Co., of Norfolk, Va., and deposited with the plaintiff on the account of C. Syer & Co., after being endorsed by C. Syer & Co. The evidence tends to prove that Brockett received credit for the full sum and C. Syer & Co. received credit for the full $1,335.70 from the plaintiff bank. The defendant admits drawing the check and owing C. Syer & Co., and that he has never paid it, and has refused to pay it.

The check was not produced at the trial, and at the conclusion of the evidence his Honor entered judgment of nonsuit on the ground that there was no evidence of the loss of the check, and the plaintiff excepted and appealed.

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

ALLEN, J. The principle requiring the loss of a paper to be established before evidence of its contents is admitted has no application to this case, because the defendant admits in his answer the execution of the check, the amount, on what bank drawn, and to whom payable, and the nonproduction of the paper was only material after verdict in determining the action of the court with reference to indemnity. There was, however, evidence of loss of the check.

C. C. Hayes, a member of the firm of C. Syer & Co., testified that he received the check from the defendant and (42) sent it to the plaintiff. E. V. Griffin, who was employed in the plaintiff bank, testified that the check was sent out to the Bank of Commerce at High Point in a letter he wrote; and H. A. Willis, cashier of the Bank of Commerce, testified, in substance, that the Bank of Commerce did not receive the check. This, if true, raises a fair presumption that the check was lost in the mail.

It is true, contradictory statements were made by some of these witnesses on cross-examination, but, as said in *Shell v. Roseman,* 155 N.C. 94, and approved in *Christman v. Hilliard,* 167 N.C. 5, this affected the credibility of the witness only, and did not justify withdrawing the evidence from the jury.

The judgment of nonsuit must be set aside.

Reversed.

Cited: Smith v. Coach Line, 191 N.C. 591; *Collett v. R. R.,* 198 N.C. 762; *Lee v. Bank,* 202 N.C. 638.

RUCKER & SHEELY CO v. DR. H. S. WILLEY AND THE KRAMER REALTY COMPANY.

(Filed 12 September, 1917.)

1. Negligence — Landlord and Tenant — Damages — Joint Cause—Proximate Cause.

Where under the terms of his lease the landlord has assumed the responsibility of making repairs of the leased premises with diligence and has charge thereof, through his employee or janitors, and has rented an office over a store therein, with a defective or choked drain pipe, to a dentist, which he had for years failed to inspect; in an action by the

lessee of the store against him and the lessee of the office, evidence that the dentist had provided an insufficient outlet for the water flowing from his cuspidor, and that he had permitted the overflow from the cuspidor to continue all night, and from this and the choked condition of the drain the water overflowed and went through the floor and injured plaintiff's stock of goods, is sufficient to sustain a verdict against both defendants jointly, the negligence of each, if established, being the proximate cause of the injury.

2. Same—Evidence—Instructions—Trials.

Where there is evidence of negligence on the part of a landlord in failing to properly repair a drain pipe in the office of his tenant, and of negligence on the part of the tenant, a dentist, in failing to make proper connection therewith for the waste water flowing from his cuspidor, and that he negligently permitted the water to continue to flow all night and damage was caused to the plaintiff's goods, the lessee of the store beneath, in an action by the lessee of the store against the landlord and his codefendant, the dentist, a charge is proper, that if the codefendant installed a system for the waste that was unsafe, which a reasonably prudent man would not have done and which was the proximate cause of the injury, the jury should render a verdict against him.

APPEAL by both defendants from *Justice, J.*, at June Spe-
(43) cial Term, 1917, of PASQUOTANK.

The plaintiff (which is a large dry goods concern), as tenant of defendant Kramer Realty Company, occupied one of the storerooms on the ground floor of the large three-story building in Elizabeth City, known as the Kramer Building, and belonging to said company. The defendant H. S. Willey, who is a practicing dentist, also occupied as tenant two of the offices of the second floor of said building, directly over the rear portion of plaintiff's store. The building was equipped with water and sewer pipes, and as a part of the lease contract, water and sewerage were furnished to the various tenants by the lessor company.

In December, 1915, the plaintiff found, upon opening the store one morning, that during the night the floor of the store had been flooded and the stock injured by water, which was then falling in large quantities from the ceiling just under Dr. Willey's office. The evidence tended to show that 500 to 600 gallons had come through, and that it would have taken from eight to nine hours for it to leak through. The floor in Dr. Willey's office was found saturated with water. There was no sign of any water having leaked from any other portion of the second floor. Dr. Willey had for the operation of his dental apparatus an arrangement different from the other tenants, in that he had some extra plumbing to carry the water into and away from the fountain cuspidor on his dental chair, which extra plumbing was put in and paid for by him, with the consent and approval of the Kramer Realty Company. This fountain cus-

pidor was not connected with the main water and sewerage pipes in the building by an iron pipe, but rubber hose was used, and it was so constructed that the water would run into and out of it continuously if the waste pipe was clear.

The plaintiff brought this action against both defendants, and from the verdict and judgment both the defendants appealed.

Ward & Thompson for plaintiff.

J. B. Leigh and Aydlett & Simpson for Kramer Realty Company.

Ehringhaus & Small for Dr. Willey.

CLARK, C.J. As to the Kramer Realty Company, the rule applicable may be thus stated: "The occupant, and not the owner or landlord, is ordinarily liable to third persons for injuries caused by failure to keep the premises in repair. But this liability, however, is extended to the landlord where he contracts to repair, as in this case, or lets the premises in a ruinous condition, or (44) where he authorizes a wrong." 1 Jaggard Torts, 223, approved in *Knight v. Foster,* 163 N.C. 329.

The contract in this case provided: "If during the term, the demised premises shall be damaged by fire or causes other than the act, default or neglect of the tenant, they shall be repaired by the lessor with all reasonable diligence."

It is true that Dr. Willey had no written lease, because of the fact that he objected to the length of time required, but his offices were rented to him with the same privileges as the other tenants and he was subject to the same penalties. Besides, as between the landlord and the plaintiff, the obligation to repair was not released by any neglect of Dr. Willey. There being evidence tending to show that this overflow of water was caused by the stoppage of the water pipes or other defect in the water system above plaintiff's store, the jury were warranted in finding that the goods of the plaintiff were injured by the negligence of the Kramer Realty Company.

The contract of said company with the tenants provided that it should have the right at all times to enter the premises to make such repairs and alterations as were necessary. It had twice made such repairs for Dr. Willey's office. It had a janitor in charge of the building and its manager had a key to Dr. Willey's room and the other rooms in the buildings to supervise them generally, and there was also evidence that the additional plumbing arrangements in Dr. Willey's office were installed before he moved in, with the permission and supervision of the Kramer Realty Company, under stipulation in the lease that all repairs should be done with its ap-

proval and should be the property of the lessor at the termination of the lease. There was further evidence that the water in the building was under the control of the Kramer Company, which had a cut-off on the outside of the building over which the tenants had no control, and that the waste pipes had been there for seven years without being inspected, and the uncontradicted evidence of the plumber was that there was a stoppage somewhere beyond the cuspidor of Dr. Willey, and that the sewerage pipe between Dr. Willey's room and the toilet room to carry off the water was clogged up.

As a part of the agreement between the plaintiff and the Kramer Realty Company was that the latter was to furnish water to the building. The Kramer Realty Company was in control of the water and impliedly agreed to protect its tenants from damages arising from negligence in oversight and control or want of repair of the water system. The landlord is liable to the tenants for damages arising from defect of plumbing when it is controlled by the landlord and he has agreed in the lease to keep the building in repair.

(45) The jury also found that the plaintiff's goods were injured by the negligence of Dr. Willey, and there was evidence to justify this in the fact that he allowed the water to run through his cuspidor all night, when he did not need it for use and when no one was present to cut it off in case of stoppage in the pipe below. The Kramer Realty Company was also negligent in its lack of proper oversight through its janitor and manager in not ascertaining that the cuspidor was allowed to run under such circumstances, and that there was such defect in the hose from the cuspidor or in the pipe which, if repaired, would have prevented the destruction of plaintiff's goods.

We think that the court did not err in charging "that if Dr. Willey left the water running that night, or that he installed a system of waste through the rubber hose that was unsafe, such as a reasonably prudent man would not have installed, and that this was the proximate cause of the injury, the jury should find the first issue that the plaintiff was injured by the negligence of the defendant Dr. H. S. Willey."

There was no evidence that the pipe burst from freezing or other cause, without negligence on the part of defendants, but there was evidence that the overflow of the pipes, which resulted in damage to the plaintiff's goods, was caused by a stoppage in the pipes or defect therein. If so, this stoppage was negligence on the part of the Kramer Realty Company and in Dr. Willey in permitting the continuous flow of water at night, which justified the jury in finding that the combination was the proximate cause of the injury to

the plaintiff's goods. If such flow had been in the day it could have been discovered in time to prevent damage.

There was evidence both that the hose from Dr. Willey's cuspidor to the connection with the pipe was defective, and that the running of the water all night caused the overflow, which would not have occurred if he had cut off the water running through his cuspidor when he left his office that afternoon.

The stoppage in the pipe would not have caused the overflow if the water from the cuspidor had not been running, and this running of the water, negligent as it was, would not have caused the overflow if there had been no stoppage in the pipe or proper supervision by Kramer Company's janitor. There was, therefore, evidence which justified the jury in finding that the proximate cause of the damage to the plaintiff's goods was the negligence of Dr. Willey and the Kramer Realty Company jointly.

The motion to nonsuit was properly refused as to both defendants. We need not discuss the other assignments of error.

No error.

Cited: Fields v. Ogburn, 178 N.C. 409; *Markham v. Improvement Co.,* 201 N.C. 122; *Childress v. Lawrence,* 220 N.C. 197.

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(46)

C. C. LEARY AND WIFE, v. CAMDEN RUN DRAINAGE COMMISSIONERS.

(Filed 12 September, 1917.)

Drainage Districts—Negligence—Waters—Diversion of Flow—Damages.

The judgment awarding damages to the plaintiff, not residing in a drainage district or party to the proceedings to establish it, for the diversion of the waters by improper ditches, etc., to the injury to his lands, is sustained under the former opinion of the Court, 172 N.C. 25.

APPEAL by defendants from *Bond, J.,* as Special May Term, 1917, of CURRITUCK.

Aydlett & Simpson and Ehringhaus & Small for plaintiffs.
Ward & Thompson for defendants.

CLARK, C.J. This case was before us at last term, *Leary v. Drainage Comrs.,* 172 N.C. 25, and was fully considered.

On this trial, the evidence showed, as before, that the defendants, through their superintendent, had cut drainage canals whereby large quantities of water were gathered together from some 25,000 acres of land, including a large part of the Fountain tract in the Dismal Swamp and an area known as the Lake lands; that these waters were diverted from their natural flow into the main canal of the defendants' district; were brought through it to a point immediately opposite plaintiffs' lands, and then turned loose; that that canal was cut across one side of a wide area known as the Morgan Swamp, into which plaintiffs' lands had theretofore drained and over which the water would have spread out; that the canal was so negligently cut and the embankments so negligently constructed that the plaintiffs' lands were left abutting upon a jug-shaped swamp area, into which the diverted water was turned, being penned up between the plaintiffs' high land and the canal bank and thus was forced back onto the ditches of the plaintiffs, ponding upon and injuring their lands. It also appeared that the canal was negligently and abruptly stopped at point "400" on the map, just opposite the plaintiffs' lands, and its mouth was left filled with debris, so that water stagnated and overflowed the banks of the canal as above stated. There being no other way for it to go off, the water backed into the plaintiffs' ditches, stopping the flow of water therein from his lands.

The judgment in the proceedings creating the drainage district adopted another and an apparently adequate system of drainage. But its superintendent changed the plans and made the outlet of the main canal five feet narrower and shortened its length a mile and a half. There was evidence tending to show that the expense
(47) thus saved was used in draining the Fountain tract, in which the superintendent was personally interested.

The plaintiffs' lands were entirely out of the drainage district and they were not parties to the proceedings establishing it.

The case has been tried in accordance with the opinion in the case when here before and it is not necessary to repeat what was then said.

Upon careful review of the exceptions taken, we find

No error.

BOARD OF EDUCATION OF BEAUFORT COUNTY v. BOARD OF COMMISSIONERS OF BEAUFORT COUNTY.

(Filed 12 September, 1917.)

Constitutional Law—Amendments 1916—School Districts—Special Statutes—Statutes—Corporations.

The amendment of 1916 to Article VIII, section 1, of the Constitution withdraws from the Legislature the power to create a corporation, or to extend, alter, or amend its charter by special act, and does not affect an act of the Legislature, passed since it went into effect, authorizing a school district theretofore formed under the provisions of Revisal, sec. 4115, to issue bonds for school purposes with the consent of its voters. As to whether corporations of this character come within the meaning of the amendment as *quasi*-municipal corporations, *quære?*

CIVIL action tried before *Kerr, J.*, the Fall Term, 1917, of BEAUFORT.

This is a controversy, submitted without action, to ascertain whether an act authorizing the Small Graded School District to issue bonds for the purpose of building a schoolhouse, and ratified by the General Assembly of 1917, on 30 January, 1917, is in contravention of the Constitution, Art. VIII, sec. 1.

His Honor held that the act was not in violation of the Constitution, and the defendant appealed.

The Small Graded School District is a special-tax district organized under section 4115 of the Revisal of 1905 and acts amendatory thereof.

Small, MacLean, Bragaw & Rodman for plaintiff.
Lindsay C. Warren for defendant.

ALLEN, J. The statute which the defendant assails was ratified 30 January, 1917, twenty days after the amendments of 1916 to the Constitution became operative.

It confers authority to hold an election in the Small Graded School District, which had theretofore been estab- (48) lished under the general law (Rev., sec. 4115), on the question of issuing bonds for the purpose of building a schoolhouse and furnishing it with suitable equipment and to issue bonds pursuant to the will of the people expressed at the election.

An election has been held in accordance with law, and the result declared in favor of the proposition, but the defendant refuses to issue the bonds as directed to do by the statutes upon the ground that the statute is unconstitutional, in that it is in conflict with Article VIII, section 1, of the Constitution, which, as amended, reads as follows:

"No corporation shall be created, nor shall its charter be extended, altered, or amended by special act, except corporations for charitable, educational, penal, or reformatory purposes that are to be and remain under the patronage and control of the State; but the General Assembly shall provide by general laws for the chartering and organization of all corporations and for amending, extending, and for forfeiture of all charters, except those above permitted by special act. All such general laws and special acts may be altered from time to time or repealed; and the General Assembly may at any time by special act repeal the charter of any corporation."

It is true, as the defendant contends, that special school-tax districts are referred to in several decisions as *quasi*-municipal corporations; but if it is conceded that this is their legal status, and that municipal corporations are among those covered by section 1 of Article VIII of the Constitution, although this article is entitled "Corporations other than Municipal," the question remains for decision whether the statute comes within the prohibitions of the section.

Power is withdrawn from the General Assembly by the section in two instances only: (1) No corporation shall be created by special act; (2) no charter shall be extended, altered, or amended by special act — thereby confining the limitation on legislative action to creating corporations and to extending, altering, and amending the charters of corporations already in existence.

The statute in question does neither. The school district had been formed before the enactment of the statute and was not created by it, and it has no charter to be extended, altered, or amended.

Affirmed.

Cited: Watts v. Turnpike Co., 181 N.C. 135; *Webb v. Port Comm.*, 205 N.C. 673.

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(49)

DEMPSEY GRAY v. GERGE W. CARTWRIGHT.

(Filed 12 September, 1917.)

1. Malicious Prosecution—Malice—Evidence—Damages—Trials.

Where the evidence is sufficient for the recovery of punitive damages in an action of malicious prosecution, testimony of the defendant that he believed the charge in the indictment to be true at the time is properly admitted on the question of the absence of malice and in diminution of the damages recoverable.

2. Appeal and Error—Malicious Prosecution—Punitive Damages—Objections and Exceptions—Acquiescence—Issues.

Where, with the consent and acquiescence of the plaintiff in an action for malicious prosecution, the issue of punitive damages has been submitted to the jury, it is not open to his objection that defendant was permitted to testify, in diminution of the damages, that he believed the charge in the indictment to be true at the time.

3. Malicious Prosecution — Punitive Damages—Actual Malice—Evidence —Trials.

In order to recover exemplary or punitive damages in an action for malicious prosecution, the plaintiff must show actual malice on the part of the defendant in prosecuting the criminal action against him, importing an evil intent or wish or design to vex, annoy, or injure him.

4. Appeal and Error—Objections and Exceptions—Briefs—Rules of Court.

Exceptions not set up in the appellant's brief, or in support of which no reason or argument is therein stated or authority cited, will be taken as abandoned in the Supreme Court under Rule 4. 164 N.C. 551.

5. Malicious Prosecution — Larceny—Other Thefts—Evidence—Criminal Intent—Trials.

In an action to recover damages for malicious prosecution of a criminal action for the larceny of a cow, evidence is competent to show that the defendant in the criminal action and the plaintiff in the civil one had taken at other times cattle to his premises, under similar circumstances, when relevant to his criminal intent in the matter under consideration in the present action. *S. v. Murphy*, 84 N.C. 742; *S. v. Walton*, 114 N.C. 783, cited and approved.

CIVIL action tried before *Daniels, J.*, at the February Term, 1917, of PASQUOTANK.

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

WALKER, J. Action for malicious prosecution. Defendant had prosecuted the plaintiff before a justice of the peace for stealing his cow, valued at $30; and the justice having, after hearing the evidence, adjudged that there was no probable cause for the accusation, and that the defendant in that case was not guilty, dismissed the proceeding and taxed the prosecutor with the (50) costs. This suit was thereupon brought by the plaintiff, and resulted in a verdict and judgment for the defendant, the jury, upon issues submitted by the court, having found that there was probable cause.

At the trial of this case the defendant was asked the question, whether, at the time he made the charge of larceny against the defendant, he believed it to be true, and that plaintiff had stolen his

cow, to which he was permitted to answer, after objection by the plaintiff, that he did believe it to be true. Plaintiff excepted.

There is some conflict in the authorities whether such a question is competent when the suit is brought solely for actual or compensatory damages, but we need not consider this view of the matter, as we find upon an examination of the charge of the court that the question of punitive damages was fully submitted to the jury, with the plaintiff's consent or acquiescence, and when this is done, all the authorities are quite agreed that such a question is clearly competent. The general rule is thus stated in 25 Cyc., at page 420: "Defendant may show in mitigation of damages that the libel or slander was published under an honest conviction of its truth arising from probable grounds of suspicion known to him at the time of publication, or that he otherwise acted in good faith and without malice. But it has been held that absence of malice mitigates exemplary, and not compensatory, damages, and hence in a jurisdiction where compensatory damages alone can be recovered, absence of malice is immaterial and cannot be shown." And again, at page 584: "Where absence of malice on the part of defendant becomes material to the issue, any competent evidence legitimately tending to show that he made the publication in good faith under belief in its truth is admissible. So the fact that an alleged newspaper libel was published in the absence of the owner and against his orders is held admissible on the question of intent."

It was held in *People v. Stark,* 59 Hun. (N.Y.) 51; 12 N.Y. Suppl. 688 (affirmed in 136 N.Y. 538), and in *Com. v. Sconton,* 25 Pa.Co.Ct. 138, that defendant in an action of this kind may testify that he made the charge in good faith, upon the honest belief that it was true, which is the very question we are now considering. See, also, *S. v. Clyne,* 53 Kan. 8.

The principle is said to be based upon common sense and to be fully justified by the reason that, where actual malice, as distinguished from legal malice, is necessary to a recovery of damages, it is competent to show defendant's good faith and an honest belief in the truth of his accusation, as it tends to rebut the actual malice and to show that the charge was induced, not by ill-will toward the party accused, nor by a reckless disregard of his rights. The
(51) distinction between legal and actual malice, with reference to the recovery of punitive damages, was well stated by Hoke, J., in *Stanford v. Grocery Co.,* 143 N.C. at page 427, 428, where he said: "It is also correct doctrine, as stated in the charge, that on a verdict for the plaintiff in malicious prosecution, punitive or exemplary damages may be awarded by the jury. *Kelly v. Traction Co.,* 132 N.C. 368. This right to punitive damages does not at-

tach, however, as a conclusion of law, because the jury have found the issue of malice in such action against a defendant. The right under certain circumstances to recover damages of this character is well established with us; but, as said in *Holmes v. R. R.*, 94 N.C. 318, such damages are not to be allowed 'unless there is an element of fraud, malice, gross negligence, insult or other cause of aggravation in the act which causes the injury.' And again, in the concurring opinion in *Ammons v. R. R.*, 140 N.C. 200, it is said: 'Such damages are not allowed as a matter of course, but only when there are some features of aggravation, as when the wrong is done willfully or under circumstances of oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights.' Attention is also called to this concurring opinion as to what may be properly included in compensatory damages." And discussing further this question, it was said later in the opinion, at page 428: "The term 'malice' here, in reference to the question of damages, unlike its meaning in the issue fixing responsibility, means actual malice in the sense of personal ill-will, and the jury should be instructed that if they find the issue fixing responsibility in favor of the plaintiff, they shall award him compensatory damages; and if they further find that the wrongful act was done from actual malice, in the sense of personal ill-will, or under circumstances of insult, rudeness or oppression, or in a manner which showed a reckless and wanton disregard of the plaintiff's rights, they may, in addition to compensatory, award punitive damages. *Holmes v. R. R., supra; Ammons v. R. R., supra,* concurring opinion; *Bowden v. Bailes,* 101 N.C. 612; *Kelly v. Traction Co., supra;* 1 Joyce Damages, sec. 442, citing numerous authorities; 19 A. and E. 704."

We understand that in order to establish the cause of action, it is sufficient to show merely the absence of probable cause as evidence of it, but if the plaintiff wishes to add punitive damages to his recovery, he must show actual malice, which imports an evil intent or wish, or design to vex, annoy or injure him. *People v. Stark, supra,* where the point is carefully considered and the authorities cited. When actual malice must be shown ,it is held that evidence tending to show its non-existence is competent.

We have discussed this question in order merely to show what appears to be the state of the decisions upon it, and not (52) with a view of expressing any decided opinion as to their merit or the conclusions reached by the Courts in them, for we hold that this exception, not being discussed in the brief of the plaintiff's counsel, is not, strictly speaking, before us, under Rule 34 of this Court, providing that "Exceptions to the record not set out in appellant's

brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." 164 N.C., p. 551.

On the cross-examination of the plaintiff, who testified in his own behalf, he was asked many questions for the purpose of proving that he had committed similar offenses in regard to his neighbors' cattle, and especially that he had stolen this defendant's "bull yearling" of the Jersey blood. There appears to have been no objection to this part of the evidence, but later on the defendant was permitted to show that the plaintiff had committed like offenses in the same neighborhood. Plaintiff objected to this testimony upon the ground, as appears in his brief, that it was collateral, and defendant was bound by the plaintiff's answers in respect thereto, and besides, that it was an attempt to establish one crime by proof of the commission of another one, though of like nature. This evidence was competent to show the intent with which the defendant "took and carried away" the cow in question. Larceny involves three elements, viz.: the taking, the carrying away, or asportation, and the felonious or dishonest intent. The plaintiff did not ask the court to restrict the evidence to the intent, but objected generally. It was competent to show that other similar offenses had been committed at or about the same time as the one mentioned in the complaint, and under the circumstances appearing in this case, for the purpose of proving the plaintiff's intent to take the cow. There was more direct evidence of his felonious purpose, but this did not exclude that to which objection is now taken, as defendant could add to his proof in this respect.

"The general rule is that, on a prosecution for a particular crime, evidence which, in any manner, shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial, even though it be a crime of the same sort, is irrelevant and inadmissible, but to this rule there are several exceptions." 12 Cyc. 405. And again, at pages 408, 409 and 410, after discussing other exceptions to this general rule, it is said: "Evidence of other crimes similar to that charged is relevant and admissible when it shows or tends to show a particular criminal intent which is necessary to constitute the crime charged. Any fact which proves, or tends to prove, the particular intent is competent, and cannot be excluded because it incidentally proves an independent
(53) crime. Where the question is whether a certain act was intentional or accidental, evidence to show that the accused intentionally committed similar acts before is relevant to show the intent. So, also, where malice is an element in the crime charged, as in murder, assault with intent to kill, arson, malicious mischief, and the like, evidence of another similar act by the accused is ad-

mitted to show malice. Evidence to show the motive prompting the commission of the crime is relevant and admissible notwithstanding it also shows the commission by the accused of another crime of a similar or dissimilar character. Thus it may be shown that the crime charged was committed for the purpose of concealing another crime or to prevent the accused from being convicted of another crime. But evidence of another crime which has no connection with that for which the accused is on trial, and which therefore is not relevant to prove motive, cannot be introduced under the guise of proving motive." Other notable exceptions are stated, but are all based upon the same evident reason. But there is direct authority for the principle in cases decided by this Court. We quote the headnote in *S. v. Murphy,* 84 N.C. 742: "Evidence of a 'collateral offense' of the same character and connected with that charged in an indictment, and tending to prove the *guilty knowledge* of the defendant, when that is an essential element of the crime, is admissible; therefore, on the trial of an indictment for the larceny of a hog, where the prosecutor testified that he identified the property as his in an enclosure of the defendant and demanded its delivery to him, it was held competent for the State to prove by the testimony of another witness that, at the same time and place and in presence of prosecutor and defendant, such witness said that the other hog therein was his, and he then and there claimed and demanded it of defendant."

The Court says, in an opinion by Justice Ashe, who always wrote clearly, accurately, and vigorously, and reviews the English and American cases at length, that "Where the question of identity or intent is involved, or where it is necessary to show a guilty knowledge on the part of the prisoner, evidence may be received of other criminal acts than those charged in the indictment," citing and affirming *Yarborough v. State,* 41 Ala. 405; *Thorp v. State,* 15 Ala. 749.

The Court also cites and approves *Rex v. Davis,* 6 Car. and P. 117, where it was held, as to an indictment for receiving stolen goods, that, for the purpose of showing guilty knowledge of the defendant, evidence that other goods not belong to him were found at the same time on the premises of the defendant, which had been taken under similar circumstances, was competent, this Court saying that evidence of independent offenses is an exception to the general rule, excluding proof of other offenses when it is necessary to prove the *quo animo* or the *scientus.*

The case of *S. v. Murphy* is much like this case in many of its features, and is substantially like it in respect to the (54) facts. To the same effect is *S. v. Walton,* 114 N.C. 783,

where Justice McRae said, quoting from and approving *S. v. Murphy, supra:* "It is a fundamental principle of law that evidence of one offense cannot be given against a defendant to prove that he was guilty of another. We have been unable to find any exception to this well-established rule, except in those cases where evidence of independent offenses has been admitted to explain or illustrate the facts upon which certain indictments are founded, as where, in the investigation of an offense, it becomes necessary to prove the *quo animo,* the intent, design or guilty knowledge. In such cases it has been held admissible to prove other offenses of like character." A recent decision of the same general tenor is *S. v. Knotts et als.,* 168 N.C. 189, and numerous other and like cases could be cited from this and other jurisdictions.

This rule as to evidence of other transactions has been applied to civil cases where it was necessary to prove the intent with which an act was committed, as, for example, in questions of fraud. *Brink v. Block,* 77 N.C. 59, approved in *Gilmer v. Hanks,* 84 N.C. 317; *Coble v. Huffines,* 133 N.C. 422; *S. v. Weaver,* 104 N.C. 758; *Robertson v. Halton,* 156 N.C. 215, and especially *Eddleman v. Lentz,* 158 N.C. 74; *Ins. Co. v. Knight,* 160 N.C. 592.

The jury manifestly did not agree with the justice of the peace, as they believed, and so found, that the defendant had probably stolen the cow, and may perhaps have included the "Jersey bull yearling," while the justice decided that there was no probable cause of guilt. There was ample evidence to support the jury's finding, and the case is otherwise without any error in law.

While we have reached this conclusion in the case and based it upon the reasons assigned, there are other grounds stated in the defendant's brief, with great force and clearness, which lend additional weight to those selected by us as sufficient to dispose of this appeal favorably to him. These relate to the competency of the evidence as to other transactions of the plaintiff, admitted by the court to show the felonious intent of plaintiff in taking the cow and to contradict material parts of plaintiff's testimony, and also to the particular charge of the court respecting this evidence, to which the plaintiff objected. It is especially stressed in the defendant's brief that the evidence was competent to show what the defendant really knew at the time he made the accusation against the plaintiff, as tending to show good faith and probable cause and the absence of malice.

The trial of the case was conducted in accordance with the law applicable thereto.

No error.

Cited: *S. v. Simons,* 178 N.C. 682; *S. v. Stancill,* 178 N.C. 687; *S. v. Mitchner,* 178 N.C. 701; *S. v. Beam,* 179 N.C. 769; *S. v. Beam,* 184 N.C. 738; *In re Will of Beard,* 202 N.C. 662; *S. v. Lea,* 203 N.C. 25; *S. v. Bittings,* 206 N.C. 801; *S. v. Wilson,* 217 N.C. 127; *S. v. Bentley,* 223 N.C. 566; *Dillingham v. Kligerman,* 235 N.C. 299.

(55)

EDGECOMBE COUNTY AND R. B. HYATT, SHERIFF, v. A. T. WALSTON, TRUSTEE, ET ALS.

(Filed 19 September, 1917.)

1. Taxation—Funds—Custodia Legis—Statutes—Constitutional Law.

The taxation of funds in *custodia legis* is regulated by the Legislature, subject to constitutional provisions.

2. Taxation—Funds—Clerks of Courts.

The clerk of the court is both a "receiver" and "accounting officer" of funds paid into his hands in the course of litigation, within the meaning of the statute, and thereunder should properly list such funds for taxation on May first of each year, when no adjudication as to the rightful owners has been made.

3. Same—Claimants—Title—Judgment.

Where the proceeds of the sale of the property of an insolvent corporation have been paid into the office of the clerk of the Superior Court awaiting adjudication as to its distribution among first and second mortgagees, bondholders and others claiming a superior lien, the duty of the clerk to list the fund for taxation on May first, as the statute requires, is not affected by the fact that some of the bondholders have listed their bonds for taxation which others claim to be exempt, for they can acquire no title to or control over the funds or a part thereof until the matter has been determined.

CIVIL action tried before *Whedbee, J.,* at April Term, 1917, of EDGECOMBE.

By consent, the court found the facts as set out in the answer to be true, and that those not found in the answer, but set forth in the complaint, are also true.

The purpose of the action is to determine whether certain moneys listed for taxation by the clerk of the Superior Court, 1 May, 1915, are liable to taxation. His Honor rendered judgment against plaintiffs, dismissing the action. Plaintiffs appealed.

Alsbrook & Phillips for plaintiff.
G. M. T. Fountain & Son for defendant.

BROWN, J. From the pleadings we gather that these are the admitted facts:

The property of the Tarboro Cotton Factory, a corporation, was sold by decree of the Superior Court by the receivers under foreclosure of a second mortgage for $60,000, subject to a first mortgage for $100,000. The property subject to said first lien was sold for $29,000, the sale confirmed, and the money paid to the receivers who made the sale. By interlocutory decree, this money was paid to the clerk of Superior Court (after deducting certain allow-
(56) ances) to await the subsequent determination of the court as to the rights of the various creditors, the fund being insufficient to pay them all in full. Under the decree of June Term, 1914, the receivers paid to the clerk $18,700.

No further decree having been made in the cause since June, 1914, the clerk of the Superior Court duly listed said fund for taxation on 1 May, 1915.

Subsequently, at June Term, 1915, a decree was entered in the cause directing the clerk to pay over to the codefendants Staton, Cobb, and Zoeller (who own all the second mortgage notes) all of said fund except $2,275 retained to await the disposition of certain contested claims supposed to have priority over the second mortgage.

It is contended that the money on deposit with the clerk was not taxable on 1 May, 1915. It is true that at common law, property in *custodia legis* was not subject to taxation (Cyc. 797), but the subject of taxation is one now regulated exclusively by statute, subject to constitutional provisions, and the law-making power has the right to tax property in the custody of the courts and judicial officers as well as any other property.

The statutes of this State require that taxes shall be listed as of 1 May, each year, and every person owning property is required to list all the real and personal property, money, credits, etc., in his possession or under his control on the first day of May, either as owner or holder thereof, or as parent, guardian, trustee, executor, executrix, administrator, administratrix, receiver, accounting officer, partner, agent, factor, or otherwise.

The clerk was both receiver and accounting officer as to this fund, and it was plainly his duty to list it for taxation as it was in his hands and no decree for distribution had been entered on 1 May. By use of the words "or otherwise," the statute is made broad enough

to cover all funds in the hands of the clerk of the Superior Court or any other public official or fiduciary.

For a further defense, it is averred in the answer "that the money was due to the parties named in the exhibit hereto attached, marked 'A,' by bonds secured under the trust deed recorded in Book 146, at page 68, and was by those who are liable therefor duly listed as solvent credits. That a large number of the creditors secured in said mortgage were not liable for taxes on said funds, for that they were themselves indebted to others in a larger amount than others were indebted to them. That the said clerk was holding the fund under the order of court, awaiting the decision of this court as to who was entitled to said fund."

It is manifest that the facts stated are too meager and indefinite to base any judgment upon. It is not stated what creditors listed their second mortgage notes, or what valuation was placed upon them. It does not appear that the entire second mort- (57) gage notes were listed at valuations at all equaling the sum in the hands of the clerk, nor what amount of taxes have actually been paid on said notes. But if the facts were fully and sufficiently stated, they would constitute no defense to plaintiff's claim.

On 1 May, 1915, no decree had been made disposing of the fund, or any part of it. The rights of the claimants to it had not been adjudicated, and no one of them had acquired a title to any specific part of it. At that time there were other claimants seeking to subject part of this fund to their demands whose claims were supposed to have priority. These claims had not been passed upon by the court, and what dividend would be paid on the second mortgage notes was uncertain and unascertained. Until the June decree, defendants acquired no title to or control over the fund and had no right to list any part of it for taxation on 1 May. That was plainly the duty of the clerk.

Before the foreclosure of the mortgage the factory property was taxable separate and distinct from the notes. The corporation paid the taxes on the property, and the owners of the notes were chargeable with the taxes upon them. The same rule prevailed as to the proceeds of sale up to the final decree in June, 1915. The second mortgage notes, after the foreclosure, may have been worth but little, if anything. The owners were not required to list them at more than their actual cash value, deducting their indebtedness. If they were worthless in consequence of such foreclosure and the insolvency of the corporation, they were not required to list them at all. If they listed them at a substantial value when they were worthless, it was their own folly. The clerk had no knowledge of what defendants claim to have done, and even if he had he could not be

governed by their actions. It was his duty to obey the statute, which he did.

Upon the facts agreed let judgment be entered for plaintiffs.

Reversed.

Cited: *Carstarphen v. Plymouth,* 186 N.C. 93.

NORFOLK BUILDING SUPPLIES CORPORATION v. J. W. JONES, HOSPITAL COMPANY, ET AL.

(Filed 19 September, 1917.)

1. Mechanics' Liens—Materials—Notice—Statutes—Waiver.

An itemized statement made to the owner for materials furnished the contractor for the building, and used therein, in the form of an account with the contractor, giving the dates, kind of materials, and the prices, etc., with items: "25 September, 1914, to furnishing hardware, as per contract; 14 August, 1914, $270; 30 September, sash, doors, weights and cords, as per contract; 18 July, 1914, $1,225," etc., is a sufficient notice to establish the statutory lien; and were it otherwise, the owner waives any objection by accepting it and paying money to the claimant accordingly.

2. Mechanics' Liens — Materials—Notice—Amount Due Contractor—Pro Rata.

One who has furnished material to the contractor, which has been used in the building, is entitled to his *pro rata* part of whatever sum the owner owes the contractor on his contract at the time of notice given him.

CIVIL action tried before *Justice, J.,* at the June Special (58) Term, 1917, of PASQUOTANK.

This is an action to enforce a claim and lien for material furnished by the plaintiff and used in the construction of a building for the defendant Hospital Company by the defendant Jones, contractor.

There was evidence tending to prove that the Hospital Company contracted with Jones for the erection of its hospital building, and that the total price to be paid for the same, after allowing credits and adding extras, was $18,712.88; that at the request of Jones, plaintiff furnished $1,858.15 worth of materials, all of which were used in the building, and that C. C. Benton was architect in charge of the work for the Hospital Company.

Jones testified that he (Benton) was representing the Hospital Company. My recollection is that it is stated in the specifications

that the contractor shall furnish to the architect statements of material furnished before he shall receive voucher for monthly payments. Benton was the architect who was in charge of the building the whole time I was there. I did furnish Benton with itemized statement. He required me to furnish statements each and every month, which he verified before he issued voucher. I would give him the statement, and he would go to the building and go over the bill and verify it by seeing for himself whether the goods mentioned in my bill were there. I furnished Benton, for the company, itemized statements that I got from Norfolk Building Supplies Company. I don't remember what date it was that each payment became due, but a day before that date would come I would prepare a statement of the amounts of pay-rolls and materials used and on the ground, and I would make them in duplicate and turn that over to Mr. Benton when he came on the ground. I made it in duplicate. He would take this duplicate and go over and count for himself and verify and would see if the amount of material used on the ground as I had stipulated. Before I could get my money I had to make this statement, and he would verify it, and when he had verified it and found it all right he would then issue me a voucher. He got his money only after furnishing statement and getting voucher from architect. Those were made in duplicate and given to Mr. Benton. Mr. Benton was my boss, and was in charge of that (59) building, representing the builders. I gave to the architect in an itemized statement anything that was furnished by the Norfolk Building Supplies, and after October, 1915, provided I collected it. In other words, if I got a voucher for it, I gave it.

Mr. Page also testified that on 18 January, 1915, he rendered statement, Exhibit 3, to Dr. McMullan, for the plaintiff, showing balance due, as follows:

STATEMENT (EXHIBIT 3).

SOLD TO MR. J. W. JONES,
ELIZABETH CITY HOSPITAL,
ELIZABETH CITY, N. C.

1914.		
Sept. 12.	15 bags Keen's cement @ $1.50	$ 22.50
15.	2 bags red motor color, 200 lbs., @ 15¢	3.00
16.	90 lin. feet ¾-inch rubber weather strip, @ 3½¢	3.15
25.	To furnishing hardware, as per contract, August 14, 1914	270.00
30.	Sash, doors, weights and cord, as per contract, July 18, 1914	1,225.00

Oct.	12.	1 bag red motor color, 100 lbs.	1.50
Nov.	7.	2 sash 1-5x5-2-1¾ 10 lts. 2 wide glass D. S. No. 1 W. P. B. R.	
	30.	To furnishing and installing tile, as per contract, March 30, 1914	325.00
		Cr.	$1,858.15
Oct.	8.	By cash	1,000.00
			$ 858.15

The defendant Jones also testified to a settlement with Dr. McMullan, representing the Hospital Company, on 18 January, 1915, as follows:

"Before I could get the money for my work I was required to give the architect a statement, and when he was satisfied as to the amount that was due me, he would issue a voucher. I had a final settlement with Dr. McMullan about the matter. The night that Dr. McMullan and I had the final settlement, of course, we went over the accounts to see what was due me. We agreed on everything, except when we were about to finish we found a variation. I think the variation was $477.58. Dr. McMullan told me that the difference represented a check that had been drawn by a man I had as foreman. I had not authorized the payment of those checks. I
(60) don't know that those checks that my foreman, A. G. Page, drew went to pay the laborers on that building. The checks drawn by Mr. Page every month were not in my settlement and agreed by me as proper payment; I didn't know anything about them until Dr. McMullan and I had a settlement. We had monthly settlements. I did not know in each month. We had an agreement about how Mr. Page and the men working on the building were to be paid. I agreed to pay it at the time of the settlement with Dr. McMullan because I had nothing else to agree to. I never brought any suit for it. I never claimed that this was unauthorized, and never brought suit because I was advised that if I took a step that would be legal, that I would have to prosecute a bank and they, in turn, would have to take it up with Page, and if I did win I would be loser, on account of attorneys' fees and expense money. I was advised that in order to get $400 I would have to pay more than that for attorneys' fees."

There was also evidence that after this settlement the Hospital Company paid to the several claimants, including the plaintiffs, their *pro rata* share of said sum of $1,000, the amount agreed on in the settlement. There was also in evidence that the Hospital Company had in hand, due to the contractor, $501.98 on 29 September, 1915.

At the conclusion of the evidence his Honor entered judgment of nonsuit upon the ground (1) that there was no evidence that the plaintiff had furnished itemized statements to the Hospital Company, or its agent; (2) that if such statement was furnished, there was no evidence of any amounts due the contractor at that time except said sum of $1,000, which was distributed according to law.

The plaintiff excepted and appealed.

Ehringhaus & Small for plaintiff.
Ward & Thompson for Hospital Company.

ALLEN, J. The statement of 18 January, 1915, is a sufficient compliance with the statute. But if it was not, the Hospital Company waived any objection to it when it accepted the statement and paid money to the plaintiff on it. There is also evidence that thereafter the Hospital Company owed the contractor $501.98, which, if true, entitled the plaintiff to its *pro rata* part thereof. There was therefore error in the ruling of his Honor.

We have not considered the legal effect of the statements made by the contractor to the owner from time to time because we fail to find evidence of any amount due when they were made.

Reversed.

Cited: Construction Co. v. Journal, 198 N.C. 277.

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(61)

J. A. CREECH v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 19 September, 1917.)

1. Carriers of Passengers—Ejecting Passengers—Connecting Lines—Principal and Agent.

A railroad agent selling a passenger a ticket to his destination, receiving the price therefor, acts as the agent of each of the connecting lines over which the ticket is sold; and where the conductor on one of them assumes to have the ticket corrected at a station on his line, and the destination is erroneously changed by him or the ticket agent there, they act as agents for the remaining lines of travel, making such connecting roads liable in damages for an ejection of the passenger caused by their error.

2. Carriers of Passengers—Ejection of Passengers—Contracts—Rights of Passengers.

Upon the wrongful ejection of a passenger from a train, who has paid his fare to his destination, he may stand upon his rights under his contract of carriage, and it is not required that he pay any additional price for being transported the intervening distance.

3. Carriers of Passengers — Ejection of Passengers—Damages—Mental Anguish—Notice.

Where the conductor on a passenger train has wrongfully ejected a passenger before reaching his destination, and was informed at the time by the passenger that such would prevent his getting to the corpse of his father before burial, the railroad company is liable for the consequent mental anguish thereby caused.

APPEAL by defendant from *Cox, J.*, at February Term, 1917, of JOHNSTON.

This is an action by a passenger for wrongful ejection from defendant's train. The plaintiff, who lived with his father near Selma, N. C., was attending school at Dayton, Va., when he received a telegram that his father was dead. He borrowed money to buy his ticket home, and at Harrisonburg, Va., on Baltimore and Ohio Railroad, the nearest depot, he bought a through ticket to Selma, N. C. At Staunton, Va., he changed to train of Chesapeake and Ohio Railroad for Richmond. The conductor on that train told him that his ticket was not good. Plaintiff explained to him that his father was dead, and he was trying to get home to the funeral. The conductor told him that he would have the agent at Charlottesville to fix it. At Charlottesville the conductor went into the ticket office with the ticket and afterwards gave the ticket back to the plaintiff, who went on to Richmond, where he again changed cars and boarded the defendant's train for Selma. When the defendant's conductor came around he told plaintiff that he was on the wrong train; that Thelma was on the Seaboard Railroad line. The plaintiff told him that he had bought the ticket at Harrisonburg, Va., to Selma, N. C.,
(62) on the defendant's line; that his father was dead, and he would not like to be delayed, and asked the conductor to wire back to Harrisonburg and ascertain that he bought the ticket there for Selma, offering to pay for the telegram; that he would pay the fare to Selma, but he had only 50 cents in his pocket, and had borrowed the money to buy the ticket he had. The conductor thereupon put him off at 9 o'clock at night a mile and a half from Richmond, to which place he had to walk back. The fare he paid at Harrisonburg was $7.95, which was the price of the ticket from Harrisonburg, Va., to Selma, N. C., and more than the cost of the ticket from Harrisonburg to Thelma, of which place the plaintiff said he

had never heard before. His father was buried before the plaintiff reached home.

The defendant moved for a nonsuit, which was denied. Verdict and judgment for plaintiff. Defendant appealed.

Wellons & Wellons and Manning & Kitchin for plaintiff.
Abell & Ward for defendant.

CLARK, C.J. The only question presented by the appeal is the refusal to nonsuit. When the railroad company, through its agent at Harrisonburg, sold the plaintiff a through ticket to Selma, N. C., he was acting as agent for the defendant road as to its part of the line, and its part of the money received was received by him on behalf of the defendant company. The ticket on its face stated that the issuing company acted as the agent only of the other companies. It does not appear, and it is not claimed, that there was any error in that ticket. When the agent at Charlottesville, at the instance of the conductor, changed the ticket, so that *"Thelma"* was written in lieu of *"Selma,"* he was acting as agent for the two companies over whose lines the plaintiff had still to travel to reach Selma. The error thus made by the agent at Charlottesville was made by him, acting for the defendant company. For such mistake the defendant company was liable. The evidence does not show how the change was made from Selma to *Thelma*. It may be that the conductor or the Charlottesville agent lisped. That, however, is merely a surmise. It does appear, however, from the unquestioned evidence that the plaintiff had a ticket from Harrisonburg to Selma; that it was changed by the agent at Charlottesville, at the instance of the conductor, and that in the mistake then made the plaintiff had no part, for he was not present with the conductor in the ticket office when the change was made and took the ticket which was handed to him.

The mistake was the mistake of the agent of the defendant and it is liable for damages in putting the plaintiff off. In *Norman v. R. R.*, 161 N.C. 330, the Court said: "Where a passenger asks and pays for a certain ticket and the station agent by mistakes gives him a different one that does not entitle him to the passage desired, the conductor has no right to expel him, and the (63) company is liable to damages if he is expelled. The passenger has a right to rely upon the agent to give him the right ticket." The Court goes on to say that though the conductor may be exonerated from blame personally in following his orders, the company is liable, for the expulsion was caused in such case by the error of the agent who sold the ticket. In the present case it would seem that the

conductor was not entirely free from blame, because the plaintiff offered to pay for the telegram to the agent at Harrisonburg to ascertain the facts.

In *Hallman v. R. R.*, 169 N.C. 130, the plaintiff exchanged mileage for a ticket from Hickory to Winston, by Barber's Junction, upon the assurance of the agent that the train would there make connection for Winston, and if not, he could go by Salisbury and Greensboro to Winston on the same ticket. He missed the connection and offered to let mileage be pulled from his book for the difference in the two routes. This was refused. He declined to pay the extra fare in money and was ejected. This Court sustained the recovery of damages on the ground that the company is liable for damages for the expulsion of a passenger caused by the mistake of the agent, although the conductor was obeying a rule of the company. The defendant's liability was based upon the fact that the agent issuing the ticket misled the plaintiff.

In *Sawyer v. R. R.*, 171 N.C. 13, the plaintiff had bought a ticket from Norfolk, Va., to New Bern, N. C. It was necessary for him to change cars at Chocowinity. The conductor on the train from Norfolk took up the plaintiff's ticket and failed to return it to him, but gave him the usual conductor's check. At Chocowinity he took the train for New Bern. The new conductor demanded his ticket and refused to recognize his check. The plaintiff was ejected. The Court sustained the recovery, and said it was negligence in the first conductor in not returning the ticket when he knew the passenger was to change at Chocowinity, and there was negligence also on the part of the other conductor, who could have satisfied himself by inquiring of two men who had come in on the same train from Norfolk with the plaintiff. The plaintiff did not have money to pay his way. But the Court further said that as the plaintiff was rightfully on the train, it was not incumbent upon him to pay a second time and to be at the expense of counsel fees and court costs to recover back the excess; that it would be as fair to require the carrier to take the passenger to his destination and sue him to recover the fare which he should have paid, adding: "But neither is required to do this. Each party can stand upon its rights, if he so chooses. This has been often held. *Harvey v. R. R.*, 153 N.C. 575, and cases there cited."

There are numerous cases which hold that under circum-
(64) stances of this kind the conductor should listen to reasonable explanation and use proper means to ascertain whether the passenger's statements are correct, for notwithstanding the conductor may be obeying a rule of the company, it will be liable for the wrongful ejection of a passenger. 5 A. and E. 602.

There are a few contrary decisions in some of the other States, but the weight of authority is in accordance with the rule laid down by this Court. The cases on both sides are collected in the notes to *Melody v. R. R.*, 24 Ann. Cas. 730.

No error.

CARRIE D. HOWELL ET ALS. v. CHARLES B. MEHEGAN ET ALS.

(Filed 19 September, 1917.)

1. Wills—Death of Devisee—Lapsed Legacies—Statutes.

A devise to a brother who dies before the testator does not come within the provision of Revisal, sec. 3144, as to "a child or other issue of the testator," and lapses by reason of his prior death to that of the testator.

2. Same—Residuary Clause—Contrary Intent.

A lapsed devise of lands will not fall within the residuary clause of a will, under the statute, Revisal, sec. 3142, where a contrary intent appears from the construction of a will itself; and where the testator has specifically devised his lands, making ample provision for his widow, and gives her, in the residuary clause, "all other property not herein specified," the use of the word "property," with the expression "not herein specified," shows the testator's intent that a lapsed devise of the realty should not fall within the residuary clause, but will go to the testator's next of kin instead of those of the widow or her devisees under her will.

CIVIL action tried before *Whedbee, J.*, at the June Term, 1917, of EDGECOMBE.

This is an action to determine the title to land.

Francis L. Bond was formerly the owner of the land in controversy. He died leaving a last will and testament, the parts material to this controversy being as follows:

"To my brother, John M. Bond, the residue of lot No. 102, beginning at a point on Granville Street 115 feet 4 inches from the corner of Granville and Trade streets; thence running along the line of the part thereof devised to Mary Dawson and parallel with Trade Street a distance of 153 feet to Thomas Newton's line, thence along Thomas Newton's line parallel with Granville Street a distance of 38 feet 6 inches to the line of Robert C. Brown's line; thence along said Robert C. Brown's line to Granville Street a distance of 153 feet; thence along Granville Street a distance of 38 feet 6 inches to the beginning.

"After the death of my wife, Martha E. Bond, I give and bequeath to my nephew, James Mehegan, the old family (65)

Bible, to be kept throughout his generation, also the portraits of my father, stepmother and cousin, Elizabeth Lawrence. All other property of any kind not specified herein I give to my wife, Martha E. Bond."

Francis L. Bond left no children or grandchildren surviving him.

John M. Bond, the devisee in said item of the will, died intestate prior to the death of the testator Francis L. Bond, leaving surviving him several children, who are defendants in this action.

Martha E. Bond mentioned in said item has died since the testator, leaving a last will and testament devising her property to the plaintiffs in this action.

The heirs of Francis L. Bond, the testator, are also defendants.

The plaintiffs contend that John M. Bond having died before the testator, the devise to him lapsed and passed to Martha E. Bond as residuary devisee, and then to the plaintiffs by her will.

The defendants, the children of John M. Bond, contend that the devise did not lapse; that their father was the owner of said land in fee under the will, and that they are the owners of it by inheritance from their father.

The defendants, the heirs at law of Francis L. Bond, contend that the devise did lapse, but that it did not fall into the residuary clause because of the language contained therein "not specified herein." They further contend that upon an inspection of the whole will it appears that it was not the intention of the testator that said land should pass to Martha E. Bond, and that if either contention is true, Francis L. Bond died intestate as to the land devised to John M. Bond, and that they are the owners as the heirs of said Francis L. Bond.

His Honor held with the plaintiffs and rendered judgment accordingly, and the defendants appealed.

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

James M. Norfleet, A. W. MacNair, and John J. Wicker for defendants.

ALLEN, J. The devise to John M. Bond lapsed by reason of his death prior to the death of the testator, and he does not come within the exception to the rule provided for in section 3144 of the Revisal because he was not "a child or other issue of the testator." The heirs of John M. Bond, have, therefore, no title to the land in controversy.

Did the land devised to him pass to Martha E. Bond as residuary devisee, or did Francis L. Bond die intestate as to this land?

This presents the question at issue between the plaintiffs and the defendants, who are heirs of Francis L. Bond. (66)

The statute (Rev., sec. 3142) provides that, "Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

This establishes the rule that void and lapsed devises pass under a general residuary clause unless a contrary intention appears from the will, but, as said in *Sorrey v. Bright,* 21 N.C. 116, "The rule itself is not founded upon the actual intention of the testator to include everything, for often—nay, generally—there is probably a contrary intention, as every man must be supposed to consider each particular disposition of his will valid and to expect it to take effect. But the rule is an inference from the presumed general intention not to die intestate as to anything when there is a gift of the general residue. Doubtless it may be restricted by the special wording of the will. If the residue given is partial, that is, of a particular fund, the rule has no application. So, where it is clear from the residuary clause itself or other parts of the will that the testator had in fact a contrary intention, namely, that the residue should not be general, and that things given away, or which the will professed to give away, should not fall into the residue."

Is there evidence in the will of a contrary intent? We think so, and that it is conclusive when the language of the residuary clause is considered in connection with the whole will. We might rest our judgment on the use of the word "property" in the residuary clause under *Holton v. Jones,* 133 N.C. 400, in which the language used was "all such property that is not itemized and bequeathed or devised herein," and the Court said, "It is clear that in using the word 'property,' he intended to refer to personal property, because he had expressly itemized and devised the land," but there is also authoritative decision on the words "not specified herein."

In *Fiemster v. Tucker,* 58 N.C. 72, the language in the residuary clause was "all the property left to the use of my wife that is not herein otherwise directed," and the Court said in reference to a void bequest, which it was contended passed under the residuary clause, "It is clear, too, as we think, that the residue given by the seventeenth clause is also a special one, and cannot have the effect to dispose of these slaves. The clause directs that all the property left to the use of the testator's wife that is not 'otherwise directed' be

sold by the executors at the wife's death, marriage or removal out of the county, on a credit of twelve months, and the proceeds
(67) divided," etc. And in *Lea v. Brown,* 56 N.C. 150, the Court says, while discussing the same question, "By the fifth item he gives the *'remainder of my slaves not herein specifically bequeathed'* to certain legatees, among whom he directs they shall be divided so as not to separate families, and *'in no event to sell them for a division';* and in providing a subdivision, he again repeats, 'in this division there must be no sale,' etc. This is not a general residuary clause, and the mind rejects at once the suggestion that it was intended to include in it the slaves in controversy. They are as clearly excluded from it as if the testator had specifically excepted them by name."

The case of *Hughes v. Allen,* 31 Ga. 382, is a leading authority in which the testator bequeathed certain slaves, and the bequest was held to be void. The residuary clause gave "all other property belonging to me and *not heretofore specified,*" and it was held that the subject-matter of the void bequest did not pass under the residuary clause, since the language "not heretofore specified" evinced a clear intent on the part of the testator to exclude from the operation of the residuary clause the property, inasmuch as it had been theretofore "specified."

The Court, after stating the general rule as to the scope and inclusiveness of residuary clauses, declares the exception as follows:

"A testator may by the terms of his bequest so narrow the title of the residuary legatees as to exclude them from lapsed and void bequests. We apprehend this principle to be incontrovertible. (Citing numerous authorities.) We have searched carefully for any decision, cited by counsel or in the libraries, that meets this case, and we have been unable to find one. In many of the wills, whose residuary clauses I have copied, they might seem to be the same upon casual inspection, *but the difference is fundamental.* A testator might say 'all the rest of my property not heretofore disposed of,' etc., and a void bequest would pass under it. And why? Because an ineffectual disposition is no disposition. But the term 'not heretofore specified' is a term of *identification,* and applied as well to a lapsed or void legacy as to a valid one. And that is this case."

It is not necessary to discuss in detail the authorities relied on by the appellee. They establish the principle, which is not controverted, that no contrary intent appearing, a void or lapsed legacy or devise passes under a general residuary clause, but in none of them was language present, such as is in the will before us, which, in our opinion, shows a contrary intent. A consideration of the whole

will confirms the conclusion we have reached, that the devise to John M. Bond did not pass under the residuary clause.

In the first item of the will the testator gives to his wife, Martha E. Bond, in fee, his residence lot and two other lots in Tarboro. In the second item he gives to his wife his household and kitchen furniture, certain articles of personal property, and all his money, notes, and accounts. In the third item he gives and (68) devises to his said wife all the residue of his property and estate during the term of her life, subject only to the payment of taxes and two small sums annually, during her life, to two persons named in the item. In the fourth and fifth items he directs his executors to rent out the property devised and bequeathed to his wife during her life, after her death, and to use the proceeds in the payment of certain specified amounts and certain expenses. In the sixth item, "after the payment of all these expenses," he devises one of the lots given to his wife for life to the Ancient York Masons. In the seventh item, "after the payment of all said expenses," he gives and devises to his nephew and nieces and his brother all of the remainder of the land devised to his wife during her life, specifically describing the lot given to each, and in this item we find the devise to John M. Bond.

It therefore appears from the will that the testator made ample provision for his wife, and that John M. Bond was not to take until after her death and after the payment of certain expenses to be derived from the rental of the land after she died, and if so, it could not have been in the mind of the testator to give to his wife, by words importing a gift to a living person, land which John M. Bond could not take prior to her death.

We are therefore of opinion that his Honor was in error in holding that the plaintiffs, as heirs and devisees of Martha E. Bond, are the owners of the land in controversy, and we hold that Francis L. Bond died intestate as to the land devised to John M. Bond, and that it now belongs to the defendants, who are his heirs.

Reversed.

LOUIS W. MIZELL v. THE DENNIS SIMMONS LUMBER COMPANY.

(Filed 19 September, 1917.)

Options—Death of Optionor—Deeds and Conveyances—Statutes—Executors and Administrators.

Where the optionor under contract to convey land or timber thereon dies within the time granted for the optionee to exercise his right to purchase thereunder and before he has done so, the title descends to the heirs at law or the devisee of the optionor; and where the optionee, after the death of the optionor and within the time prescribed, desires to exercise his right to purchase, he must make the proper offer to comply with the conditions of his option to the heirs at law of the optionor, or his devisee in case of a will, and a deed made by the administrator, or executor, without power delegated by the will does not fall within the provisions of Revisal, sec. 83, the statute contemplating conveyances of a bilateral nature, where both parties are bound to its performance by its terms.

CIVIL action tried before *Whedbee, J.*, at March Term, (69) 1917, of MARTIN.

A jury trial being waived, the court found the following facts:

1. That on 21 and 13 November and December, 1912, respectively, Jesse Mizell, the then owner of the land in controversy, and his wife, Winnie Mizell, in consideration of one dollar each, as therein specified, for the paper-writings hereinafter referred to, executed and delivered to the defendant company two options, thereby giving to said company the right and privilege of purchasing, within the period of ninety days, certain timbers and other easements on said land, for a period of ten years from the dates thereof, by paying the amounts of money therein mentioned.

2. That on said afore-mentioned dates said options were duly acknowledged and proven by said grantors before a notary public.

3. That thereafter and within the period of ninety days, said Jesse Mizell died, leaving a last will and testament, which has been duly admitted to probate, the defendant company not having theretofore elected to purchase under said options.

4. That after the death of said Jesse Mizell and within the period of ninety days, said options were duly admitted to registration.

5. That thereafter and within the period of ninety days, said Winnie Mizell duly qualified as administratrix, C. T. A., upon the estate of her said husband; and upon the payment of said purchase money, executed and delivered to the defendant company a deed conveying the timber and other privileges set out and described in the aforesaid options.

6. That the last will and testament of the said Jesse Mizell contained no power or authority for said conveyance.

7. That under and by virtue of one item of said will, the plaintiff became the devisee in fee simple of one of the tracts of land described in the said options, and upon which a goodly portion of the timber was situate.

8. That plaintiff, claiming to be the owner of the timber on the tract devised to him, by virtue of the fact that there was no authority under said will for said conveyance and the said company had failed to exercise its rights thereunder prior to the death of said Jesse Mizell, has obtained a restraining order, thereby preventing said defendant company from cutting and removing the timber in accordance with the provisions of said deed.

9. That defendant insists said deed was legally and properly executed under and by virtue of the provisions contained in section 83 of the Revisal.

Upon these findings the court adjudged that plaintiff was not entitled to an injunction to the final hearing to prevent the cutting of the timber, and dissolved the restraining order. Plaintiff appealed.

Daniel & Warren for plaintiff. (70)
Wheeler Martin and Harry W. Stubbs for defendant.

BROWN, J. At common law, when a vendor of land contracted for a valuable consideration to sell it and entered into a bond to execute title and died before doing so, his heirs at law, or his devisee of the land, were the proper persons upon whom the vendee must call for a conveyance. In a suit in equity to compel such conveyance, the heirs or devisee were necessary parties.

To expedite and simplify the completion of such contracts, the following statute was enacted: "That when any deceased person shall have *bona fide* sold any lands and shall have given a bond or other written contract to the purchaser to convey the same, and the bond or other written contract hath been duly proved and registered in the county where the lands are situated . . . his executor, administrator or collector may execute a deed to the purchaser conveying such estate as shall be specified in the bond or other written contract; and such deed shall convey the title as fully as if it had been executed by the deceased obligor: *Provided,* that no deed shall be made but upon payment of the price, if this be the condition of the bond or other written contract." Rev., sec. 83.

According to the findings of fact, the defendant had never closed the contract by exercising the option and buying the land during

the testator's lifetime. Had this been done, then we think, under the terms of the statute, the administrator would have had the undoubted right to receive the purchase money and execute the deed. But in our opinion, an option is not such a contract as is contemplated by the statute, for that evidently refers to a contract binding on both parties to it at the death of the owner of the land. An open option is not such contract, but merely a right acquired by contract to accept or reject a present offer within a limited or reasonable time.

As said by Mr. Justice Conner in *Trogden v. Williams,* 144 N.C. 199: "There is a marked and well-defined distinction between a contract in which both parties are bound to sell and convey land, postponing the delivery of the deed and payment of the purchase money until some fixed day, even when made dependent upon some condition, and a mere promise on the part of the promisor to permit the promisee to elect at the end of a fixed day whether he will at that time enter into a contract of purchase. The relative rights and obligations are entirely different and are governed by different principles."

Therefore, it is held that a power under a will given to executors to sell land and enter into a mutual contract to sell with the purchaser does not confer upon the executors the power to give
(71) an option to purchase the land. *Trogden v. Williams, supra.*

In *Winders v. Kenan,* 161 N.C. 633, Mr. Justice Allen very clearly points out the difference between an option and the usual closed contract to sell land in these words: "It (an option) is a contract to give another the right to buy and not a contract to sell; and it is because of the fact that the other party is not compelled to buy that it is spoken of as an option."

In case of the option not being exercised during the life of the owner, the land descends to his heirs; and if the option is unexpired and based upon a valuable consideration, the holder of the option must make the demand upon the heirs or devisee and tender the option price to them and not to the administrator or executor, who has no right to receive it.

This question is practically settled by this Court in *Timber Co. v. Wells,* 171 N.C. 264, where Mr. Justice Hoke says: "The cases on the subject are to the effect, further, that a stipulation of the kind now presented, providing for an extension of the time within which the timber must be cut, is in the nature of an option, and it is held by the great weight of authority that contracts of this character do not of themselves create any interest in the property, but only amount to an offer to create or convey such an interest when the conditions are performed, and working a forfeiture when not

strictly complied with. *Waterman v. Banks,* 144 U.S. 394; *Hacher v. Weston,* 197 Mass. 143; *Gaston v. School District,* 94 Mich. 502; *Newton v. Newton,* 11 R.I. 390; *Bostwick v. Hess,* 80 Ill. 138.

"Our own decisions are in general approval of these principles. *Ward v. Albertson,* 165 N.C. 218; *Winders v. Kenan,* 161 N.C. 628; *Bateman v. Lumber Co.,* 154 N.C. 248; *Hornthal v. Howcott,* 154 N.C. 228; and from this it follows that where the time first provided in one of these timber deeds and paid for has passed, and it becomes necessary for the grantee to hold by reason of the performance of the stipulation for an extension, that the estate or interest arises at the time the conditions are complied with, and, in the absence of any provision in his deed to the contrary, the price paid belongs to him who then has the title and from whose ownership the interest is then created. The option or privilege obtained, to the extent of the right conferred, is a contract attendant upon the title, and, as stated, unless otherwise specified in the deed conveying the title, the price for the interest arising on proper performance of the conditions will inure to the owner. It is from his estate that the interest passes, and he must receive the purchase price."

The same point is presented in *Timber Co. v. Bryan,* 171 N.C. 266, where the same learned Judge said: "In accordance with our decisions in the case of *Lumber Co. v. Wells,* we must hold that the right to this fund is in the heirs. The title having descended to them, it is from their estate that the interest arises and (72) they are entitled to receive the purchase price." And again: "This provision in the deed for an extension of the time was an option, an offer to confer the right which matured only at the time the conditions were complied with. The property was then owned by the heirs, and the price to be paid for the interest then arising out of their ownership must, in our opinion, inure to them."

We think that it necessarily follows from these decisions that when Jesse Mizell died, the defendant should have notified the plaintiff, the devisee of the optioned land, of its acceptance of the option and should have tendered the purchase money to him and demanded a deed.

Plaintiff is entitled to an injunction and to a final judgment upon the facts stated.

Reversed.

Cited: Morton v. Lumber Co., 178 N.C. 166; *Lumber Co. v. Valentine,* 179 N.C. 425; *Carpenter v. Carpenter,* 213 N.C. 40; *Trust Co. v. Frazelle,* 226 N.C. 728; *Scott v. Jordan,* 235 N.C. 248.

FRANK K. BORDEN ET ALS. V. CAROLINA POWER AND LIGHT COMPANY.

(Filed 19 September, 1917.)

1. Appeal and Error—Objections and Exceptions—Briefs.

Exceptions not mentioned in the appellant's brief are deemed abandoned. Rule 34.

2. Appeal and Error—Objections and Exceptions—Unanswered Questions.

Reversible error cannot be presented on appeal by exceptions to unanswered questions not showing the nature or character of the evidence sought to be elicited from the witness.

3. Appeal and Error—Improper Argument—Corrections—Objections and Exceptions—Assignments of Error.

Exceptions should be made at the time to improper statements made by counsel to the jury in the argument before them not supported by evidence; and where objection is thus made and the judge corrects them, the error is cured.

4. Water and Watercourses—Ponding Water—Measure of Damages.

The measure of damages to the owner of lands for wrongfully ponding water upon them are the damages present, past, and prospective, being the difference between the value of the lands before and after the act causing the injury complained of, and taking into consideration evidence of the uses to which it might have been applied and those for which it was adopted or used.

5. Same—Ditching—Trials—Instructions—Conflict—Harmless Error.

One who has been damaged by the wrongful ponding of water upon his lands is not required to lessen the damages thereby caused by cutting drainage ditches thereon; and where the court has instructed the jury correctly thereon, but adds that the plaintiff is ousted of the right to recover damages for loss or depreciation because of failure to so ditch the land, unless such ditching was useless by reason of the water backing on it, the conflict, if any, in the instruction was not to defendant's prejudice.

APPEAL by defendant from *Stacy, J.*, at January Special
(73) Term, 1917, of LEE.

Williams & Williams and H. A. London & Son for plaintiffs.
R. H. Hayes and Seawell & Milliken for defendant.

CLARK, C.J. This is an action to recover damages by reason of the defendant's dam at Buckhorn backing water upon the plaintiff's land. The plaintiffs contend that their lands have been thus damaged, while the defendant contends that whatever damage, if any, the plaintiffs sustained was not due to defendant's dam, but to natural causes and the negligence of the plaintiffs.

The plaintiffs' land lies upon Cape Fear River six or seven miles above defendant's dam. It has been subject to overflow from time immemorial. It is admitted that the greatest overflow which has occurred in the memory of men now living was in the memorable freshet of August, 1908, when the defendant's dam was broken; and the plaintiffs contend that when it was rebuilt after said freshet, it had been raised and caused the water in the river to rise several feet higher than before, causing backwater to overflow and sob the lands of the plaintiffs. This was a disputed issue of fact, upon which there was a great deal of evidence, and the jury have found in favor of the plaintiffs.

Exceptions 1 and 4 are not mentioned in defendant's brief, and are therefore abandoned. Rule 34 of this Court.

Exceptions 2 and 3, to the admission of testimony, cannot be sustained for the reason, if for no other, that there was no answer made to either question, and, so far as the record shows, the evidence to which the defendant objected did not get to the jury.

Exception 5 is because, during the argument of plaintiffs' counsel, he made a statement of a matter of fact as to which there was no evidence, but the counsel for the defendant interrupted, calling to the court's attention that there was no evidence on the point. Thereupon the judge at once stated to the jury that there was no evidence to that effect, when counsel for the plaintiff said that he was not arguing that there was evidence, for there was none, but only that there might have been such an occurrence. There was nothing further said or done, and no exception was taken. The assignment of error in the case on appeal cannot cure the failure to except at the time. *Harrison v. Dill,* 169 N.C. 544; *S. v. Tyson,* 133 N.C. 699; *S. v. Davenport,* 156 N.C. 611. Besides, the statement of plaintiffs' counsel of matter not in evidence was (74) promptly corrected by the judge.

Exceptions 6, 7, 8, and 10 are to parts of the judge's charge which are, in effect, substantially the same as to the charge made by the judge in Power Corp. against this defendant, 168 N.C. 219, which the Court held did not require discussion.

Exception 6 was because the court charged the jury: "If you find from the greater weight of the evidence that the plaintiffs' property was wrongfully damaged by the ponding of water by the defendants' dam, the measure of the damages is the difference in the value of the same before and after the injury complained of."

Exception 7 is because the court charged the jury: "The proper inquiry is, What was its market value before the alleged injury? in view of any uses to which it might have been applied and the uses to which it was adapted and the uses for which it was used, and

you should then say, after making that inquiry, what its present value is, and the difference will be your answer to the fourth issue."

Exception 8 is because the judge charged: "If the jury shall find from the greater weight of the evidence that the plaintiffs' property has been damaged by the ponding of the water by the defendant's dam, the measure of damages is the difference in the value of the same before and after the injury complained of."

Exception 10 is because the court charged: "On the fourth issue, gentlemen, the court instructs you that if the plaintiffs are entitled to recover, they can recover permanent damages to their lands, past, present, and prospective, caused by the wrongful ponding back of the water upon their lands or damaging their lands, and the measure of damages would be the difference between the value of said lands before such wrongful ponding of water and the value thereof after such ponding."

These instructions were correct. *Brown v. Power Co.*, 140 N.C. 342-345; *R. R. v. Mfg. Co.*, 169 N.C. 156. If there has been a general enhancement in the value of lands due to extrinsic causes, it is the plaintiffs, not the defendant, who can complain of these instructions.

Exception 9 is because the court charged the jury: "If you find from the greater weight of the evidence, the burden being upon the plaintiff, that the water in Cape Fear River was wrongfully ponded back, upon, or in any way damaged the plaintiffs' lands, the court instructs you that the plaintiffs were not under any legal duty to drain such lands to avert or mitigate damages thereto."

This charge is correct. *Roberts v. Baldwin,* 155 N.C. 281; *Waters v. Kear,* 168 N.C. 246; *Barcliff v. R. R., ib.,* 270; *Cardwell v. R. R.,* 171 N.C. 367.

(75) In the latter case the Court said that the defendant could not rely upon the defense that the plaintiff should have reduced his damages by cutting drainage ditches, for the injured proprietor is not required to incur such expense in order to avoid damages when the defendant has wrongfully diverted the surface water from its natural flow to his damage. In this case the court went farther than the defendant was entitled to by immediately adding that the jury "should not award the plaintiffs any damages in this case for the loss or depreciation in their property by reason of their failure to ditch their land, unless their failure to properly ditch it was rendered useless or unnecessary by reason of the water backing on it from Cape Fear River as the result of the raising of the dam by the defendant." And further, that "This defendant is not to be taxed with any loss by reason of the plaintiffs' failure to properly cultivate his lands, but only for backing

water upon it; and if the plaintiffs failed to ditch their land when it could have been done, then this defendant is not to be charged with their neglect or failure." If there is any conflict in these instructions, the defendant cannot complain, because in neither instruction was there any error of which the defendant could complain.

We cannot pass without notice that this action, began in 1909, has just reached this Court. Such delay of justice should not occur.

No error.

Cited: *S. v. Harris,* 181 N.C. 613; *Currie v. Malloy,* 185 N.C. 209; *York v. York,* 212 N.C. 701.

TOWN OF TARBORO ET AL. v. WALSTON, TRUSTEE, ET AL.

(Filed 19 September, 1917.)

For digest, see *Hyatt v. Walston, Trustee, ante* 55.

CIVIL action tried before *Whedbee, J.,* at April Term, 1917, of EDGECOMBE.

Plaintiff appealed.

Alsbrook & Phillips and Don Gilliam for plaintiff.
G. M. T. Fountain & Son for defendants.

BROWN, J. The same facts are found in this case as in *Edgecombe County and R. B. Hyatt, Sheriff, v. Walston, Trustee, et als., ante* 55, and the same questions of law are presented.

Upon the authority of that case, judgment will be entered for plaintiff.

Reversed.

(76)

E. J. GODWIN ET ALS. v. B. H. JERNIGAN.

(Filed 19 September, 1917.)

1. Reference—Exceptions—Trial by Jury—Issues—Waiver.

A party who has excepted to a compulsory reference and to the report of the referee must also file the issues upon which he demands a trial by jury; and when he does so after the report has been filed and received, without leave of court, it is too late to preserve the right to a jury.

2. Actions—Misjoinder—Pleadings—Demurrer Ore Tenus.

Objections to the misjoinder of parties or of causes of action must be taken by answer or demurrer in the trial court, or the objection is waived. Rev. 478.

APPEAL by defendant from *Stacy, J.,* at February Special Term, 1917, of HARNETT.

Clifford & Townsend for plaintiffs.
R. L. Godwin and E. F. Young for defendant.

CLARK, C.J. This cause was tried in the recorder's court of Dunn. On appeal, there was a compulsory reference. On the filing of the referee's report, 8 November, 1915, exceptions were filed by the defendant thereto, but no issues were formulated to secure a jury trial, as required under our practice. *Driller Co. v. Worth,* 117 N.C. 515; *Ogden v. Land Co.,* 146 N.C. 443. On 16 June, 1916, the defendant filed the issues, but without leave of court. This was too late.

Upon the hearing of the exceptions to the referee's report at February Term, 1917, the defendant demurred *ore tenus,* and for the first time, upon the ground that there was misjoinder of parties and a misjoinder of causes of action. This objection was not interposed in the recorder's court nor in the Superior Court, either by answer or demurrer. Revisal 478, provides: "If no such objection (for misjoinder or other objection appearing upon the face of the complaint) be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action." The demurrer *ore tenus* therefore also came too late. *Cooper v. Express Co.,* 165 N.C. 538; *Kochs v. Jackson,* 156 N.C. 326; *Hocutt v. R. R.,* 124 N.C. 214; *Mining Co. v. Smelting Co.,* 99 N.C. 462, and citations in Pell's Revisal to section 478.

The exceptions to the referee's report were to the findings of fact, and the action of the judge in overruling such exceptions is not reviewable when, as here, there is evidence. Pell's Revisal 525, and citations.

Affirmed.

Cited: Sheffield v. Alexander, 194 N.C. 745.

(77)

LUTHER B. TUTHILL v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 19 September, 1917.)

1. Carriers of Goods—Act of God—Sole Cause—Damages—Negligence—Contributing Cause.

Where goods in the carrier's warehouse are destroyed solely by the destruction of the warehouse by reason of a windstorm of such unusual violence and proportions as amount to "an act of God," without evidence of any negligence on the part of the carrier as a contributing cause, an instruction is proper that, if the jury believe the evidence, no liability will attach to the carrier by reason of the destruction of the goods.

2. Appeal and Error—Verdict Set Aside—Matter of Law.

Where the trial judge has set aside a verdict of the jury as a matter of law, upon the ground that he should have given an instruction aptly requested, his action in so doing is appealable.

CIVIL action tried before *Daniels, J.,* and a jury, at February Term, 1917, of BEAUFORT.

The action was to recover damages for loss of plaintiff's goods shipped over defendant's road and held by company as common carrier in its warehouse at Washington, N. C., where they were destroyed, the warehouse being also wrecked, in the wind and rainstorm in that vicinity 3 September, 1913.

The jury having rendered a verdict for plaintiff, his Honor, on motion, set the same aside as a matter of law, being of opinion that he should have charged the jury, as requested, that if the jury believed the evidence, no liability would attach by reason of the destruction of the goods. Plaintiff having duly excepted, appealed.

Ward & Grimes for plaintiff.

Small, MacLean, Bragaw & Rodman for defendant.

HOKE, J. In *Harris v. R. R.*, 173 N.C. 110, a recovery was sustained for loss of goods at this same time and place. In that case both sides offered testimony, and the court was of opinion that there were facts in evidence permitting the inference that the negligence of the company had concurred in causing the loss, a fact that may import liability, though an act of God may also be a contributory cause. *Ferebee v. R. R.*, 163 N.C. 351.

In the present case, the defendant, admitting that the goods were lost while held by the company as common carriers in its warehouse at Washington, N. C., offered evidence tending to show that both goods and warehouse were destroyed and lost by reason of a wind and rainstorm of such unusual violence and proportions that it amounted to "an act of God" within the meaning of the principle which may relieve carriers of liability in such cases that the
(78) loss was due solely to such act of God, and that the negligence of the defendant in no way contributed. We find nothing to controvert this testimony in the present record, and if these facts are accepted by the jury, we concur in his Honor's view that no liability should attach, and that he did right in setting the verdict aside. Having done this as a matter of law, our decisions hold that the order is appealable. *Shives v. Cotton Mills*, 151 N.C. 290; *Oil Co. v. Grocery Co.*, 136 N.C. 354; Revisal 1905, sec. 554.

This will be certified that a new trial be had of the issues. The appellant will be taxed with the costs of this appeal.

Affirmed.

Cited: *Lawrence v. Power Co.*, 190 N.C. 670.

MARY VANDYKE v. ÆTNA LIFE INSURANCE COMPANY ET ALS.

(Filed 19 September, 1917.)

1. Interpleader—Demurrer—Resisting Action—Costs.

Where a party claiming to be merely a stakeholder is sued, he may cause other necessary parties to come in and escape the payment of cost by preserving strict neutrality; but where he takes sides and defends the action by demurring to the complaint, and other necessary parties are made, including minors, by their guardians, who are interested in the distribution of the funds, he is liable, in case the demurrer is overruled, for all the costs of the trial, including those incurred in appointing guardians *ad litem* for the infant parties. Revisal, sec. 1264.

2. Appeal and Error—Costs.

An appeal will lie from a judgment retaxing the cost of an action when the question is not who shall pay the cost when the principal matter has been settled by compromise or otherwise, but what are the costs, or how much is due from the party taxed with it, or whether one or more items have been erroneously inserted in the bill.

APPEAL by defendant Insurance Company from *O. H. Allen, J.*, at June Term, 1917, of VANCE.

T. T. Hicks for plaintiff.
J. H. Bridgers for defendant.

WALKER, J. This is a motion in the Superior Court to retax the costs. The case was tried upon a demurrer, which was overruled, and judgment entered against the defendant for the amount of the policy of insurance, upon which this action was brought, and the costs, from which the defendant appealed to this Court, where the judgment of the lower court was affirmed. Defendant contends that it is not liable for any costs except that which accrued after the judgment, and especially is it not liable for costs of ap- (79) pointing a guardian *ad litem* for the infants, who were claimants of the policy fund.

Neither position is tenable, but both are founded on a misapprehension of the facts and of the law relating to the taxation of costs. The defendant had contested plaintiff's right to recover, and alleged that the fund belonged to the other parties, some of whom at least were minors without general guardian. The infants were necessary parties, as they were interested in the action, even according to the defendant's own contention, and their presence in the suit as parties was more of a protection to the defendant than to the plaintiff. It was necessary to appoint a guardian *ad litem* for them in order to bring them into the case, and it was plainly a distinct advantage to the defendant that they were duly made parties, so that the judgment would bind all claimants, and thus protect the company against being subjected to a second payment. The Court virtually held, in the former appeal at the last term, that they were necessary parties, and that it was no concern of this defendant that there may be a controversy hereafter between the rival claimants, and we adhere to this view.

It is directed by the statute that "Costs shall be allowed to plaintiff upon a recovery . . . in actions of which a justice of the peace has no jurisdiction, unless otherwise provided by law. Revisal, sec. 1264, sub-sec. 3; *Yates v. Yates*, 170 N.C. 533, and *Williams v. Hughes*, 139 N.C. 17, where it is said: "The matter of costs

is regulated solely by the statute, and the correctness of plaintiff's contention depends, therefore, upon what is its true construction, and must be determined by its meaning. By section 525 of The Code, costs are allowed, of course, to the plaintiff, upon a recovery, in cases of which a justice of the peace has no jurisdiction. This action was of that character, it being one brought for the purpose of subjecting land to the payment of intestate's debts. By section 526, costs are allowed, of course, to the defendant, unless the plaintiff be entitled to recover them. These are the general provisions of the statute relating to the taxation of costs." The plaintiff, therefore, was properly taxed with the costs of the suit, including the items he now contests, unless his case falls within some exception, and this it does not do. Instead of asking that all of the rival claimants be made parties for the purpose of interpleading, and that he be allowed to pay the money into court and be discharged from liability, he chose to litigate the matter and withhold the money. The demurrer was overruled, and defendant was accordingly cast in the suit and adjudged to pay the costs for its false clamor.

We do not see how the ruling of Judge O. H. Allen could be wrong. It was clearly right. There was no interpleader, and could not be, as this defendant did not surrender the fund by de-
(80) positing it in court, but kept it; nor was it without interest and neutral in the controversy, as it leaned toward the side of one of the contesting claimants.

"A simple bill of interpleader cannot be sustained by a person who has lent his aid to further the interest of either of the claimants. Where the party seeking to file a bill of interpleader has so committed himself to one of the claimants of the subject-matter that he does not stand in a position of absolute impartiality between them, he is not entitled to relief by way of interpleader. . . . The object of a bill of interpleader is to protect a claimant standing in the situation of an innocent stakeholder, and when a recovery against him by one claimant of the fund might not protect him against a recovery by another claimant." 23 Cyc. 7 and 8.

It is true that he is under no duty to decide as to the contentions of rival claimants, from whom he is entitled to be protected, and may in good faith bring them and the fund into the court and compel them to interplead. *Pennsylvania R. Co. v. Stevenson,* 63 N.J. Eq. 634.

"A bill of interpleader will not lie where the plaintiff claims an interest in the subject-matter himself. Thus, if an action is brought against an auctioneer for a deposit, he cannot maintain a bill of interpleader if he insists upon retaining either his own commission or the duty. So, also, where an interpleader bill alleged that the

interest on a sum secured by a policy is not due from the company by whom the bill was filed, it was held not sustainable. . . . It is essential to an interpleader that the party seeking relief should have incurred no independent liability to either party, and should have acknowledged the title of neither." Bispham's Equity (6 ed.), secs. 421 and 422.

The complainant in a bill of interpleader is not called on to decide disputed questions of fact, nor to resolve doubtful points of law, under penalty of a dismissal of his bill. Having stated his danger, his indifference as between the several claimants, and his willingness to pay, he has done all that he is required to do. *Byers v. Sansom-Thayer Commission Co.,* 111 Ill. App. 575.

Where the subject-matter is money or other property conveniently capable of manual delivery, the bill, perhaps, should ordinarily contain an offer to bring it into court. 23 Cyc. 23; *Parker v. Barker,* 42 N.H. 8; *Bassett v. Leslie,* 123 N.Y. 396; *Freyhan v. Berry,* 49 La. Ann. 305; *A. N. Inst. v. Anderson,* 71 Md. 128; *Look v. McCahill,* 106 Mich. 108; *Blue v. Watson,* 59 Miss. 619; *Supreme Council, etc., v. Dailey,* 61 N.J. Eq. 145. It was held that an offer to deposit the money in court is not always a condition precedent to an order for an interpleader, as added interest to the date of payment may supply its place. *Barnes v. Bamberger,* 196 Pa. St. 123. And further, that a deposit of the thing, the title to which is in controversy may, in other cases, be dispensed with un- (81) der some circumstances. *Beebe v. Mead,* 101 N.Y. App. Div. 500 (92 N.Y. Suppl. 51); *Am. Press Asso. v. Brantingham,* 57 N.Y. App. Div. 399 (68 N.Y. Suppl. 285); *Van Zandt v. Van Zandt,* 7 N.Y. Suppl. 706.

We have considered the questions raised, as the defendant had the right to appeal from the denial of his motion to retax, it being reviewable here, the question being not who shall pay the costs where the principal matter has been settled by compromise or otherwise, but what is the costs, or how much is due from the party taxed with it, or whether one or more items have been erroneously inserted in the bill of costs. *S. v. Byrd,* 93 N.C. 624; *Elliott v. Tyson,* 117 N.C. 114; *Morristown Mills Co. v. Lytle,* 118 N.C. 837; *S. v. Horne,* 119 N.C. 853.

The rule as to appeals from a decision on a mere question of costs was thus stated in *Elliott v. Tyson, supra:* "As a general rule, this Court will not hear an appeal when the only matter to be decided is the disposition of the costs. *Russell v. Campbell,* 112 N.C. 404, and cases there cited; *Futrell v. Deanes,* 116 N.C. 38. This is especially so when the subject-matter in dispute has been settled or destroyed and the only matter left to be passed upon is the ad-

judication of the costs by the court below. Clark's Code (2 ed.) 560. There are exceptions, among them the liability of a prosecutor for costs in a criminal action *(S. v. Byrd,* 93 N.C. 624), and where the very question at issue is the liability to a particular item of costs, as a tax fee, or the like. And of course there is a further exception when the court in which the action was begun did not have jurisdiction. In that case the adjudication of the costs is illegal and reviewable equally with any other judgment." And in *S. v. Horne, supra:* "While this Court will not entertain an appeal to determine who shall pay the costs of an action in which the subject-matter has been disposed of, yet where the question is whether a particular item is properly chargeable as costs, or, taking the case below as rightly decided, whether the costs are properly adjudged, the case is reviewable on appeal."

There is no real merit in the exceptions, as we think the correctness of Judge Allen's ruling cannot well be doubted.

Affirmed.

Cited: Waldo v. Wilson, 177 N.C. 462; *Cochran v. Rowe,* 225 N.C. 646.

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(82)

JONES-PHILLIPS COMPANY v. D. B. MCCORMICK ET ALS.

(Filed 19 September, 1917.)

Liens, Agricultural—Form—Statutes—Interpretation—Contracts.

Our statute, Revisal, sec. 2055, requires no particular form for the written instrument creating a valid agricultural lien but that it be substantially according to that therein prescribed; and our courts in construing it will look to the substance rather than the form and regard the entire writing with the view of ascertaining and effectuating the intention of the parties; and an instrument expressing itself to be an agricultural lien and given in consideration of money or goods to be advanced for the purpose of making crops on certain land for the current year, with certain other property pledged as additional security, is sufficient without further designation, it appearing that the parties intended it to be one. The rules for interpreting contracts discussed and applied by WALKER, J.

CIVIL action tried before *Cox, J.,* at March Term, 1917, of LEE.

This action was brought by plaintiff against D. B. McCormick and the copartnership of Griffin & Saunders to recover the possession

of two bales of cotton, one buggy, and other personal property, which he claimed under an agricultural lien and a chattel mortgage executed by D. B. McCormick to him 15 April, 1914, which mortgage is in proper form, but subsequent in date and time of registration to a mortgage and agricultural lien executed by D. B. McCormick to the defendants Griffin & Saunders, which was dated 26 January, 1914. If Griffin & Saunders' lien, or mortgage, is sufficient in form to vest the title to the property in them, subject to the trust declared therein, they are entitled to recover, as it is of prior date and registration. The plaintiff contends that it is not, and therefore that his mortgage takes precedence of it. The language of the mortgage of McCormick to Griffin & Saunders is as follows:

"I, D. B. McCormick, of the county of Lee and in the State of North Carolina, am indebted to Griffin & Saunders, of Lee County, in said State, in the sum of one hundred and ten and 30-100 dollars, for which they hold my note to be due on 1 October, A.D. 1914, and to secure the payment of the same I do hereby convey to Griffin & Saunders an agricultural lien upon all of the crops of corn, cotton, fodder, peas, shucks, cotton seed, sugar cane, and all other farm products which I may raise or cause to be raised during the year 1914 on the lands of Dandy Thomas in Jonesboro Township, adjoining the lands of Charles Godfrey, Arch Dalrymple, and Rufus Cox and others and any other lands which I may cultivate during the year 1914; also, I convey to them these articles of personal property, to wit: One brown and black horse mule, about 12 years old, known as the Bob Cox mule, one got of Griffin & Saunders, twenty bushels of corn, nearly (all) of which is white, all of which is free from any encumbrances." (83)

We omit the words of the trust and power of sale contained in the mortgage, as there is no contention that it is not correct in form.

The defendants' mortgage, omitting the words of the trust and power of sale, is as follows:

"I, D. B. McCormick, of the county of Lee, in the State of North Carolina, am indebted to Jones-Phillips Company, a corporation under the laws of North Carolina, in the sum of $58.75 for advances to be made for agricultural purposes, for which it holds my note to be due 15 October, A.D. 1914; and to secure the payment of the same, I do hereby convey to it these articles of personal property, to wit: All the crops of every description to be raised or caused to be raised by me in the year A.D. 1914 on the lands of Dandy Thomas and any other lands, and it is agreed that this shall take precedence to all other liens; also one buggy, all of which is free from any encumbrances."

Hoyle & Hoyle for plaintiff, appellee.
L. H. Gibbons for defendants, appellants.

WALKER, J., after stating the case: By comparing the two instruments, it will appear that the difference between them is that defendants' mortgage "conveys to Griffin & Saunders an agricultural lien upon all crops of corn, cotton, fodder," and the other articles, while in plaintiff's mortgage is conveyed substantially the same articles to it, without the use of the words "agricultural lien," etc., but in our opinion there is no essential difference between the two papers, and the defendants' conveys the articles in question with as much certainty and as effectually in law as does the plaintiff's. The lower court thought otherwise, and, having rendered judgment in favor of the plaintiff, the defendants appealed.

The law does not regard the form of things so much as the substance, and it attaches little or no weight to the particular language used in a written instrument, provided that which is employed by the parties expresses their intention with sufficient clearness. Our statute on this subject requires no special form for such instruments. It provides in Revisal, sec. 2055, as follows: "For the purpose of creating a valid agricultural lien under the preceding sections for supplies to be advanced and also to constitute a valid chattel mortgage as additional security thereto, and to secure a preëxisting debt, the following, *or a substantial similar form,* shall be deemed sufficient, and for those purposes legally effective." Then follows the form which may be used. But whether this statute had been enacted or not, the common law, which remains with us
(84) as an entirety, except where it has been amended from time to time to adjust it to ever-changing conditions of society, paid little respect to the form of words by which parties expressed themselves, so that the meaning was disclosed, except in some instances where the use of technical words were required. This is one of the leading rules which has come down to us among the vast number of those wise and beneficent principles of the common law which have survived to this time and are likely to be perpetual.

It is not difficult by reading the defendants' instrument to reach a satisfactory conclusion as to what the parties meant, and we are required by the settled canon of construction so to interpret it as to ascertain and effectuate the intention of the parties. Their meaning, it is true, must be expressed in the instrument, but it is proper to seek for a rational purpose in the language and provisions of the deed and to construe it consistently with reason and common sense. If there is any doubt entertained as to the real intention, we should reject that interpretation which plainly leads to injustice and adopt

that one which conforms more to the presumed meaning, because it does not produce unusual and unjust results. All this is subject, however, to the inflexible rule that the intention must be gathered from the entire instrument "after looking," as the phrase it, "at the four corners of it." *Gudger v. White,* 141 N.C. 507, 513.

Chief Justice Ruffin, as far back as nearly a century ago, said, in *Kea v. Robeson,* 40 N.C. 378: "Courts are always desirous of giving effect to instruments according to the intention of the parties, as far as the law will allow. It is so just and reasonable that it should be so that it has long grown into a maxim that favorable constructions are to be put on deeds: *Benigne faciendae sunt interpretationes chartarum, ut res magis valeat quam pereat.* Hence, words, when it can be seen that the parties have so used them, may be received in a sense different from that which is proper to them; and the different parts of the instrument may be transposed in order to carry out the intent. Yet instruments are not unfrequently brought under adjudication which are so repugnant or uncertain that they cannot be upheld. The degree of uncertainty which shall vitiate a deed, it is admitted, must be such that the meaning cannot be ascertained who, for example, are the contracting parties, or what thing is the subject of the contract. An effort is to be made to give some meaning to the deed, if possible." The latin maxim he quotes, when either literally or broadly translated, means that a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties.

Mr. Broom, in his admirable treatise on the maxims of the law, thus refers to those now being considered: "The two rules of most general application in construing a written instrument are:
First, that it shall, if possible, be so interpreted *ut res magis* (85)
valeat quam pereat, and secondly, that such a meaning shall
be given to it as may carry out and effectuate to the fullest extent the intention of the parties. These maxims are, indeed, in some cases restricted by the operation of technical rules, which, for the sake of uniformity, ascribe definite meanings to particular expressions; and in other cases they receive certain qualifications when applied to particular instruments, such qualifications being imposed for wise and beneficial purposes; notwithstanding, however, these exceptions and qualifications, the above maxims are undoubtedly the most important and comprehensive which can be applied in determining the true construction of written instruments. It is then laid down repeatedly by the old reporters and legal writers, that in construing a deed, every part of it must be made, if possible, to take effect, and every word must be made to operate in some shape or

other. The construction, likewise, must be such as will preserve rather than destroy, it must be reasonable and agreeable to common understanding; it must also be favorable and as near the minds and apparent intents of the parties as the rules of law will admit; and, as observed by Lord Hale, the Judges ought to be curious and subtle to invent reasons and means to make acts effectual according to the just intent of the parties; they will not, therefore, cavil about the propriety of words when the intent of the parties appears, but will rather apply the words to fulfill the intent than destroy the intent by reason of the insufficiency of the words."

Chief Justice Taylor said, in *Campbell v. McArthur,* 9 N.C. 38; "Words shall always operate according to the intention of the parties if by law they may, and if they cannot operate in one form, they shall operate in that which by law shall effectuate the intention. This is the more just and rational mode of expounding a deed, for if the intention cannot be ascertained, the rigorous rule is resorted to from the necessity of taking the deed most strongly against the grantor."

In 9 Cyc., at page 577 *et seq.,* will be found a series of expressions upon this question which is well worth consideration: The law furnishes certain rules for the construction of written contracts for the purpose of ascertaining from the language the manner and extent to which the parties intended to be bound; and those rules should be applied with consistency and uniformity; and it is not proper for a court to vary, change, or withhold their application. The first and main rule of construction is that the intent of the parties as expressed in the words they have used must govern. Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. If the words used clearly show the intention there is no need for applying any technical rules of construction, for where there is no doubt there is no room for construction.

(86) When construing a written contract, the words used are to be taken in the ordinary and popular sense, unless from the context it appears to have been the intention of the parties that they should be understood in a different sense. Language must be interpreted in the sense in which the promisor knew, or had reason to know, that the promisee understood it. The intention is to be collected, not from detached parts of the instrument, but from the whole of it. And all parts of the writing, and every word in it will, if possible, be given effect. Where it is clear that a word has been used inadvertently, and it is clearly inconsistent with and repugnant to the meaning of the parties, it will be rejected altogether. Where two clauses are inconsistent and conflicting, they must be

construed so as to give effect to the intention of the parties as collected from the whole instrument. If one clause be at variance with another, the one contributing most essentially to the contract will be entitled to more consideration than that which contributes less. The Court will restrict the meaning of general words by more specific and particular descriptions of the subject-matter to which they are to apply. The contract must be read according to the intent of the parties in spite of clerical errors and omissions which, if followed, would change the intention. The grammatical construction of a contract will not be followed if a different construction will give effect to the intention of the parties as shown by the whole instrument and accomplish the object for which the contract was executed. Where a particular word or words, or the contract as a whole, is susceptible of two meanings, one of which will uphold the contract or render it valid, and the other of which will destroy it or render it invalid, the former will be adopted so as to uphold the contract. The words of a contract will be given a reasonable construction, where that is possible, rather than an unreasonable one, and the Court will likewise endeavor to give a construction most equitable to the parties, and which will not give one of them an unfair or unreasonable advantage over the other. Thus, where the meaning is doubtful, the construction will be avoided which will entail a forfeiture. To determine the intention of the parties if the meaning is not clear, it is necessary that regard shall be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view. It is a well-settled rule of construction that words will be construed most strongly against the party who used them, the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the Court will adopt a construction by which they would mean another thing more to his advantage.

Some of the cases heretofore decided by this Court with reference to this rule in addition to *Kea v. Robeson, supra,* (87) are *Triplett v. Williams,* 149 N.C. 394; *Beacon v. Amos,* 161 N.C. 357; *Ipock v. Gaskins, ibid.,* 674; *Jones v. Whichard,* 163 N.C. 241; *Quelch v. Futch,* 172 N.C. 316, and the recent case of *Revis v. Murphy,* 172 N.C. 579.

With this review of the principle of construction and the authorities sustaining it, our way to a correct decision is not beset with any grave difficulties. No one can successfully prove upon the facts in this case that the intention was not to create an agricultural

lien, as well as a mortgage, by the instrument under construction. It would be vain to attempt such a thing.

The next question is, Does the language of the parties evince, as well as effectuate, their purpose? We think it unmistakably does so. It is quite as definite in its terms, as to the nature of the debt to be secured, as that in the plaintiff's lien and as to all the other prerequisites of a valid "agricultural lien," and is really more so, as it expressly recites that it is given as such an instrument, that is, a lien to secure advances of money and supplies made, or about to be made, to assist the lienor in the cultivation of his land, which the use of words "agricultural lien" implies, as there could not be one except for such a purpose.

The case of *Rawlings v. Hunt,* 90 N.C. 270, seems to be a direct authority sustaining defendants' contention. There Justice Merrimon said, at pages 273, 274, and it is well to reproduce it here: "We think the deed might be treated as creating an 'agricultural lien' on the crops to secure the advancement of $29.90. It has all the necessary requisites for that purpose, but it goes further in this case; it has all the esesntial elements of, and it creates, a mortgage on the crops as well as the horse. No particular formula of words is essential to create a mortgage of personal property. Any words that express the purpose to create a lien and give the mortgagee power over and control of the property, with power of sale, or to have it sold to pay the mortgage debts, are sufficient. As we have seen in this case, the mortgagor used apt words of conveyance as to personal property, and provided in terms that the plaintiff should have the right to take possession of the property, including the crops, and sell the same to pay his debt. It is not true, as contended, that an instrument intended as an 'agricultural lien' must effectuate that purpose and none other, or be treated as necessarily inoperative for all purposes. A written instrument, whether deed or otherwise, to create such a lien must indeed conform to the statutory requirements, else it cannot operate to create such lien; but if the instrument will bear such a construction as will effectuate the purpose of the parties, it must be so construed and treated. As, for example, if it would not operate to create the 'agricultural lien,' but has all the requisites of a mortgage of personal property, it
(88) would be so treated and upheld. If a written instrument, as a deed, fails to effectuate one purpose specified in it, yet if it will effectuate another purpose plainly agreed upon in it, it must be upheld for the latter purpose. We can see no reason why it should not be, and in such case every reason why it should be, as completely as if provided for in a separate instrument. Nor can we see any good reason why the same instrument may not be so framed

as to operate in one part of it as a mortgage and in another as an 'agricultural lien.' "

This view is supported, we think, by most of the other cases cited by the plaintiff. But if the instrument operates as a chattel mortgage, it is quite sufficient to defeat plaintiff's recovery. It makes no difference what it is called by the parties, except as showing the intention, for the material question is, What is its real nature in law? We conclude that, by its words, it may operate both as an "agricultural lien" and a chattel mortgage. *Townsend v. McKinnon,* 98 N.C. 103. The amount is fixed certainly, and it sufficiently appears, and is also admitted, what the instrument was given for, and, therefore, what it was intended to be. If by its words it can operate as an agricultural lien, the consideration being advancements for making the current crop, the lien is good, as held in *Hahn v. Heath,* 127 N.C. 27; *Odom v. Clark,* 146 N.C. 551; *Loftin v. Hines,* 107 N.C. 360, and *Townsend v. McKinnon, supra.*

The case last cited is much in point. It was admitted at the trial that both instruments were given for money or property advanced to the lienee for making the crop of 1914, the year in which they were executed. Our conclusion is that the learned judge erred in entering judgment for the plaintiff, as, upon the admitted facts, he should have rendered a judgment for the defendants, and it is accordingly directed that this be done.

Reversed.

Cited: Ely v. Norman, 175 N.C. 296; *Ferguson v. Fibre Co.,* 182 N.C. 736; *Armstrong v. Service Stores,* 203 N.C. 500.

W. L. COHOON AND A. E. COHOON v. WILEY UPTON AND WIFE.

(Filed 19 September, 1917.)

1. Wills—Devises—"Loan."

The use of the word "lend" in a devise of land will pass the property to which it applies in the same manner as the use of the word "give" or "devise," unless a contrary intent is manifested by the terms of the instrument.

2. Same—Heirs of the Body—Statutes—Rule in Shelley's Case.

Under a devise or "loan" of lands to S. and E. "their natural lives, and give to their begotten heirs of their body," etc.: *Held,* the words "heirs of the body" are equivalent to the words "heirs general" (Revisal, sec. 1548), no contrary intention appearing in the other expressions used

in the will, and the specifically named beneficiaries take a fee-simple estate under the rule in *Shelley's* case. The history and interpretation of this rule discussed, and its reason applied, by HOKE, J.

CLARK, C.J., concerning with opinion.

CIVIL action heard on demurrer to complaint before *Kerr,* (89) *J.,* at July Term, 1917, of CAMDEN.

The complaint alleged that plaintiffs were holders, by proper conveyances, of the estate of Alfred Evans and Rhoda Sawyer, who held the land under the last will and testament of William G. Sawyer, deceased, in terms as follows: "I lend to my sister, Rhoda Sawyer, and my nephew, Alfred Evans, all of my entire estate, both real and personal, after paying my just and honest debts, their natural lives and give to their begotten heirs of their body," etc.

That William G. Sawyer having died, defendants are wrongfully asserting ownership of said land on the ground that the said will only passed to said devisees a life estate in the same.

Defendants demurred and assigned for cause, that, under the terms of said will, Alfred Evans and Rhoda Sawyer only took a life estate, and that defendants' assertion of title was not wrongful.

The court entered judgment sustaining the demurrer, and plaintiffs excepted and appealed.

Meekins & McMullan for plaintiff.
Ehringhaus & Small for defendant.

HOKE, J. The rule in *Shelley's* case is fully recognized in this State as a rule of property, and in many well-considered decisions, recent and of older date, the statement of the rule appearing in the cases and standard text-writers has been approved and applied to facts directly presenting the question to the Court. *Smith v. Smith,* 173 N.C. 124, (91 S.E. 721); *Revis v. Murphy,* 172 N.C. 579; *Robertson v. Moore,* 168 N.C. 389; *Nichols v. Gladden,* 117 N.C. 497; *Starnes v. Hill,* 112 N.C. 1; *Leathers v. Gray,* 101 N.C. 162.

In some of the later cases, the rule is given from 1 Coke 104, 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 a word of purchase."

And from Preston on Estates, approved by Chancellor Kent as a full, accurate statement of the rule: "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 (90) quality to his heirs or the heirs of his body as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."

It was established rather arbitrarily as a rule of property under the feudal system for the reason, chiefly, that to construe the word "heirs" in such case as a word of purchase would often have the effect to deprive the feudal lord of certain fees and perquisites accruing to him in case of lands descended, and, as said in the recent case of *Ford v. McBrayer,* 171 N.C. 421, operating not infrequently to defeat the purpose of the grantor or testator as expressed in the instrument, the rule has been abolished by statute in many States of the Union; and in those where it is still allowed to prevail, the tendency is to restrict its application, confining it to those cases where the word "heirs" is used in its technical sense to denote the whole line of heirs to take in succession according to our canons of descent. Accordingly, in many cases in this jurisdiction, the application of the rule has been denied where, from the context or from perusal of the entire instrument, it appeared that the word was used in a more restricted sense, or that it was merely a *descriptio personarum,* designating certain individuals of a class as owners. *Ford v. McBrayer,* 171 N.C. 421; *Jones v. Whichard,* 163 N.C. 241; *Puckett v. Morgan,* 158 N.C. 344; *May v. Lewis,* 132 N.C. 115; *Ward v. Jones,* 40 N.C. 400.

In *Jones v. Whichard* and *Puckett v. Morgan, supra,* the word "heirs" or "heirs of the body" were employed to designate the ultimate takers, but by reason of certain qualifying words in the context it was construed to mean bodily issue in the sense of children and grandchildren, the general position, as a rule of interpretation, being stated in *Jones v. Whichard* as follows: "For the application of the rule in *Shelley's* case to a conveyance to one for life and the heirs of his body, it must appear that the words 'heirs of the body' were used in their technical sense, carrying the estate to such heirs as an entire class to take in succession, with the effect to convey 'the same estate to the persons, whether they take by descent or purchase,' and when it appears from the perusal of the entire instrument that the words were not intended in their ordinary acceptation as words of inheritance, but simply as *descriptio personarum,* designating certain individuals of the class, or that the estate is thereby conveyed to 'any other person in any other manner or qual-

ity than the canons of descent provided,' the rule does not apply and the interest of the first taker is an estate for life."

Giving full recognition, however, to the restrictive tendency of these decisions, we find nothing in the provisions of the present will to prevent the operation of the principal rule. In numbers of cases we have held that the "word 'lend' in a will will be taken to
(91) pass the property to which it applies in the same manner as give or devise, unless it is manifest that the testator otherwise intended." *Smith v. Smith,* 173 N.C. 124; *Robeson v. Moore,* 168 N.C. 388; *Sessoms v. Sessoms,* 144 N.C. 121-124.

Under our decisions and by express provision of the statute, the words "heirs of their bodies" are equivalent to the words "heirs general." *Revis v. Murphy, supra;* Revisal, sec. 1548. And there is nothing in the context or general terms of the will that in any way restricts, or tends to restrict, the meaning of the word "heirs" from their usual significance as words of general inheritance.

We are of opinion, therefore, that the rule in *Shelley's* case must be held to apply, and the demurrer of defendants should be overruled.

Reversed.

CLARK, C.J., concurring: The "Rule in *Shelley's* case" has come before this Court so often that it may not be amiss to say something of the origin and reason for the rule.

The decision was brought about by litigation over a settlement made by Sir William Shelley, a judge of the common pleas, as to an estate which he had purchased at the dissolution of Sion Monastery. Though Judge Shelley died in 1549, the case did not come up for hearing till Easter Term, 1581, and after long argument was decided by an assembly of all the judges presided over by Lord Chancellor Bromley. The rule, therefore, has not come down to us like so much of the "common law" (which is simply judge-made law) with an origin dating back to some obscure and unknown judge whose opinion was repeated by successive judges because some other judge had said the same thing before.

The Reformation in England was caused as much, if not more, by economic reasons than by conflict of religious convictions. It was largely a revolt against the concentration of so great a part of the lands of the realm in the hands of the Church in priories and monasteries. When Henry VIII. procured the dissolution of all these foundations, instead of dividing the lands thus taken back among the people, which would have been an unheard of thing in those days, or even selling them for the benefit of the crown, he divided the most of them among his courtiers. It was either by such dona-

tion or by purchase from one who was a donee of the king that this estate came into Judge Shelley's hands.

The object of the rule, the law writers state, was to secure the feudal owners of lands against the loss of wardships and other "rake offs" upon which the feudal lords lived at a time when land was the principal wealth and the foundation of dignity and influence. The rule is a highly technical one, for it contradicts the plain expression of the intent of the grantor or devisor, and could only have been laid down under the pressure of some such (92) motive from a powerful class. It has led to much litigation, but the feudal lords needed such protection against the loss of those feudal incidents which would have been ousted if the heir of the grantee or devisee had taken as purchaser and not as successor. The rule was first reported 1 Coke Reports 93B.

In 1660, at the restoration of the monarchy, one of the conditions exacted for the return of Charles II. was the abolition of all feudal tenures (with a slight exception), and with it the reason of the rule ceased; but having been once laid down, it was continued in England, like so many other outworn things, and was brought over to this country.

The rule at this time serves an excellent but an entirely different purpose in this State, in that it prevents the tying up of real estate by making possible its transfer one generation earlier, and also subjecting it to the payment of the debts of the first taker. It is doubtless for this reason that the rule has never been repealed in North Carolina.

The best work, and probably the only one that has treated the rule with any clearness, is "Contingent Remainders and Executory Devises," by Fearne, the possessor of a wonderfully analytic mind, who treated the whole subject with marvelous clearness. It was written to combat a decision by the great Lord Mansfield in *Perrin v. Blake,* and had the effect of reversing that decision.

Cited: Crisp v. Biggs, 176 N.C. 2; *Byrd v. Byrd,* 176 N.C. 114; *Nobles v. Nobles,* 177 N.C. 245; *Wallace v. Wallace,* 181 N.C. 161; *Hampton v. Griggs,* 184 N.C. 19; *Walker v. Butner,* 187 N.C. 537; *Benton v. Baucom,* 192 N.C. 632; *Welch v. Gibson,* 193 N.C. 686; *Jackson v. Powell,* 225 N.C. 600.

R. L. NORRIS v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 26 September, 1917.)

1. Commerce—Telegraphs—Congressional Acts—Federal Decisions—Constitutional Law.

It is the duty of this Court to follow the decisions of the Supreme Court of the United States, upon questions involved in interstate commerce, where Congress has assumed control of the matter relating thereto, and involved in the litigation. Const., Art. I, secs. 3 and 4.

2. Commerce—Telegraphs—Congressional Acts—Mental Anguish—Negligence—Contracts.

The contract entered into by the sender of a telegram with the company includes both the transmission and delivery of the message; and Congress having assumed the entire control of the field with relation to interstate messages by telegraph and telephone companies (act of Congress, 18 June, 1910), the decisions of the Supreme Court of the United States respecting such messages are controlling in the courts of this State; and thereunder a recovery of damages for mental anguish alone, where there was no injury to the person, property, health, or reputation of the plaintiff cannot be had, whether the negligence occurred in this State or elsewhere along the route of the transmission of the message.

CIVIL action tried before *Daniels, J.*, at the April Term, (93) 1917, of CHOWAN.

This action was brought to recover damages of defendant for negligently failing to deliver a telegraphic message, which was filed with the defendant at Sebrill, Va., on 27 August, 1916, to be transmitted by it to the plaintiff at Edenton, N. C., announcing the death of his mother and the day of her funeral. Defendant negligently failed to deliver the message, and by reason thereof the defendant was prevented from attending his mother's funeral. The jury returned the following verdict:

1. Did the defendant, after the receipt of the message at Edenton, N. C., negligently fail to deliver the same with reasonable promptness, as alleged in the complaint? (No answer.)

2. If so, did the acts and omission constituting negligence occur in the State of North Carolina? (No answer.)

3. If the message had been delivered in a reasonable time, could and would the plaintiff have gone to and attended the funeral of his mother, as alleged? (No answer.)

4. What damage, if any, has the plaintiff sustained on account of mental anguish caused by the negligence of the defendant? Answer: "Nothing."

The court has instructed the jury that they need not answer the other three issues as to negligence, and so forth. Judgment was entered upon the verdict in favor of the defendant, that the plain-

tiff take nothing by his action, and that he be taxed with the costs. The prayer of the complaint was confined to damages for the mental anguish resulting from defendant's negligence. Plaintiff appealed.

Ehringhaus & Small and H. R. Leary for plaintiff.
Pruden & Pruden and S. Brown Shepherd for defendant.

WALKER, J., after stating the case: This case is governed by our decision at the last term in *Meadows v. W. U. Tel. Co.* There we held that by the Act of 18 June, 1910, Congress has taken possession of the entire field of commerce with respect to telegraphs and telephones of an interstate character and of messages transmitted from one State to another through the medium of the electric telegraph. The plaintiff was consequently denied a recovery because the case was governed by the Federal law. The plaintiff's message was an unrepeated one, and while this Court has held in numerous cases that the stipulation written on the message as to repeated and unrepeated messages, and other like stipulations, were void, the highest Federal Court, in *Primrose v. W. U. Tel. Co.,* 154 U.S. 1, had decided that the telegraph company has the right to classify its messages, and the stipulation in regard to repeated messages was reasonable and valid. We simply followed that case and held as plaintiff's message was unrepeated, and therefore as there (94) had been no compliance with this material part of the contract with the company, he could not recover under the *Primrose* case. The error in that message was a change in the language of the original message, which materially altered its terms.

In the present case the plaintiff demands that he recover damages for mental anguish alone. The Supreme Court of the United States, in *So. Exp. Co. v. Byers,* 240 U.S. 612, decided that mental suffering alone did not warrant a recovery of damages when there was no injury to person, property, health, or reputation. We quote from the opinion of the Court delivered by Justice McReynolds: "The action is based upon a claim for mental suffering only; nothing else was set up, and the proof discloses no other injury for which compensation had not been made. In such circumstances as those presented here, the long recognized common-law rule permitted no recovery; the decisions to this effect 'rest upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health, or reputation.' Cooley on Torts (3 Ed.), p. 94. The lower Federal Courts, almost without exception, have adhered to this doctrine, and in so doing we think they were clearly right upon principle and also in accord with the great weight of authority."

While in intrastate cases, our decisions to the contrary will stand unaffected by the *Byers* case, unless they are reversed by this Court, we are bound to follow the highest Federal Court, because it is our duty to do so by the terms of our Constitution (Art. I, secs. 3 and 4), the Federal law, when applicable, being the supreme law of the land. We, therefore, in construing a Federal law, follow the decisions of the highest Court in that jurisdiction, and do this, although we may radically differ with that Court in its reasoning and conclusion. It follows our decisions in the construction of our Constitution and statutes, and has said that it will do so "however absurd and illogical" those decisions are in their opinion; and we apply the same rule conversely, not meaning to use any harsh or discourteous language in doing so, for we entertain great respect for the highest tribunal in our land, and will restrain ourselves within bounds of strict propriety and courtesy in referring to it or any other Court.

Following the Federal rule, we must hold, that as this is an interstate message, the plaintiff is not entitled to recover damages for mental anguish resulting from the defendant's negligence in not delivering the message in question.

It was argued that as the negligence occurred in this State, the case is governed by *Penn v. Tel. Co.*, 159 N.C. 309, but this is a fallacy, and grows out of a misconception as to the effect of
(95) the amendment of 18 June, 1910, by which the Congress assumed control over telegraphs and telephones engaged in interstate business. As said in *Gardner v. W. U. Tel. Co.*, 231 Fed. Rep. (C. C. of Appeals) 405: "Congress has taken possession of the field of interstate commerce by telegraph, and it results that the power of the State to legislate with reference thereto has been suspended." We cite several cases in *Meadows v. Tel. Co., supra,* which decided as to the effect of the amendment by Congress of the Commerce Act, when it placed telegraph and telephone companies engaged in interstate business under its control, and showed that the Courts generally had held, as will appear in those cases and many others cited in defendant's brief, that the control of the State was thus suspended; their statutes and decisions were displaced or superseded thereby, and the rights and liabilities, under the law, of such companies must therefore be determined by the Federal rule. *Durre v. Tel. Co.*, 161 N.W. Rep. 755; *W. U. Tel. Co. v. Brown,* 234 U.S. 542.

The contract in this case was to "transmit and deliver," and the interstate transaction, therefore, included both transmission and delivery. The interstate dealing between the parties was not closed until the message had been delivered to the sendee, and, therefore, it makes no difference that the negligence occurred in this State, as

it is the same principle that controlled in respect to the delivery of goods by a carrier. It was held in the "original package" cases that the carriage was not complete until the consignee had received the goods from the carrier. It would be incongruous to regulate the transmission and let go the delivery, having two sets of laws to govern one indivisible transaction.

As plaintiff claims damages for mental anguish alone, we concur with the learned judge (Hon. F. A. Daniels) that he is not entitled to recover.

No error.

Cited: Johnson v. Tel. Co., 175 N.C. 589; *Hardie v. Telegraph Co.,* 190 N.C. 47; *S. v. Davis,* 253 N.C. 95; *Transportation Co. v. Brotherhood,* 257 N.C. 26.

J. C. DUKE v. TOWN OF BELHAVEN.

(Filed 26 September, 1917.)

Municipal Corporations — Cities and Towns — Negligence — Defects in Streets—Contributory Negligence—Trials—Evidence.

Upon evidence tending to show, and *per contra,* that the plaintiff's injury was caused by the defendant town leaving for months a ditch across its street 18 inches deep and about the same width, into which his horse, hitched to a buggy, fell or stumbled when being driven about 7 miles an hour, after dark; that the place was unlighted, he could not see the ditch, or reasonably know of its existence: *Held,* sufficient upon the issue of defendant's actionable negligence, and the evidence of plaintiff's previous knowledge of the ditch some months before, and his belief that it had since been fixed, under the circumstances, was also properly submitted to the jury upon the issue of contributory negligence.

CIVIL action tried before *Daniels, J.,* and a jury, at April Term, 1917, of BEAUFORT. (96)

The action was to recover damages caused by alleged negligence of defendant growing out of the bad condition of its streets. On denial of liability and plea of contributory negligence, the jury rendered the following verdict:

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

2. Was plaintiff's injury, if any, caused by his own negligence contributory thereto? Answer: "No."

3. What damages, if any, is plaintiff entitled to recover? Answer: "$1,000."

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

Ward & Grimes for plaintiff.
Tooly & McMullan for defendant.

HOKE, J. We have carefully examined the record, and find no reason for disturbing the results of the trial. The evidence on the part of plaintiff tended to show that on 27 December, 1913, between 7 and 8 o'clock, good dark and no light near the place, he was driving in a top buggy along Railroad Street, in the town of Belhaven, about the point this street entered into Pantego Street, a much frequented street of the town, when his horse blundered into an open ditch, or "chasm," across the street 18 inches deep and about the same width, and as he jumped forward, he wheeled into Pantego Street, turned the buggy over, throwing plaintiff out and causing him serious and painful injuries from which he still suffers; that he was a deputy sheriff and engaged in the performance of his duty on the night in question and was driving along about 7 miles an hour, the usual gait of the horse; that it was too dark for him to note the ground ahead, and he did not know or have any reason to believe any such obstruction was on the street; that some months before, just after the September storm, he had noticed that people were driving around towards the edge of the street, but he supposed that whatever damage had been done by the storm had been repaired by the town authorities. The evidence was also that the buggy and harness were badly damaged at the time.

There was testimony on the part of defendant that there was no such ditch and chasm across the street as claimed by plaintiff; that there was a depression there, but so slight that the street au-
(97) thorities did not consider it in any way dangerous, and had therefore repaired other places which had been more badly damaged by the September storm.

This conflict of testimony on the material question in the case was submitted to the jury under a clear and correct charge by his Honor, and they have decided the issue against the defendant.

On the second issue there was very little, if any, evidence tending to show contributory negligence. True, the plaintiff testified that several months before, just after the September storm, he noticed people were driving towards the edge of the street as if to avoid an obstruction, but that witness lived at Pantego town, miles away, had not seen the street since, and supposed and had every reason to

suppose that in that length of time the authorities would have repaired any serious damage to the street. On this question the case was tried out under the principles approved in a recent decision of this Court in *Darden v. Plymouth,* 166 N.C. 492, and the distinction pointed out in the opinion between that case and *Ovens v. City of Charlotte,* 159 N.C. 332, and other cases chiefly relied on by defendant obtained equally here.

On the record, we are of opinion that the cause has been correctly and fairly tried, and the judgment in plaintiff's favor is affirmed.

No error.

Cited: Willis v. New Bern, 191 N.C. 511; *Hunt v. High Point,* 226 N.C. 77.

MAGGIE D. BATEMAN v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 26 September, 1917.)

Commerce — Telegraphs—Routing—Another State—Interstate Commerce —Supreme Court Decisions.

A message received by a telegraph company engaged in interstate and intrastate business at one point in this State for transmission to and delivery at another point therein and routed in good faith through another State is an interstate message controlled by Congress (Act of 18 June, 1910), and under the decisions of the Supreme Court of the United States, damages for mental anguish alone arising from negligence on the defendant's part may not be recovered. The question of defendant's good faith in the routing in this case was submitted to the jury and decided in favor of the defendant. *Norris v. Tel. Co., ante* 92.

CIVIL action tried before *Daniels, J.,* at the January Term, 1917, of WASHINGTON.

Gaylord & Gaylord and J. C. Coggins for plaintiff.

Albert T. Benedict and Small, MacLean, Bragaw & Rodman for defendant.

WALKER, J. This action was brought to recover damages for mental anguish alleged to have been caused by the (98) negligence of the defendant in failing to properly transmit and deliver to the plaintiff a telegraphic message filed with the defendant at Durant's Neck, N. C., by her brother, George Simpson, and addressed to her at Plymouth, N. C., in the following words:

"Father died last night. Will bury Sunday, 3 p. m." As delivered to her, the message read: "Walter died last night. Will bury Sunday, 3 p. m." The defendant transmitted the message by way of Norfolk, Va., instead of directly to Plymouth, N. C., and the defendant contends, for that reason, that the sending of the message was a transaction in interstate commerce, and therefore the case should be governed by the Federal law, which denies a recovery for mental anguish. *Express Co. v. Byers,* 240 U.S. 612.

The plaintiff, on the contrary, argues that it is not interstate, but intrastate commerce, the initial and terminal points of the transmission being in this State. If the defendant's contention is the right one, and the case must be considered and decided according to the Federal rule, then plaintiff is not entitled to recover, as it would present the same question we decided at the last term against the plaintiff's right of recovery in *Meadows v. Tel. Co.,* 91 S.E. 1009, and *Norris v. Tel. Co.,* at this term. It would be superfluous to restate the reasons upon which the decisions in those cases were based, and we content ourselves with merely referring to them, as this case is, as to the question now being considered, substantially identical with them in respect to its nature, and is precisely like the *Meadows* case, as the alleged negligence there was an error in the message as delivered. The only question left for consideration, therefore, is whether the transaction in this case was interstate commerce. We are of opinion that it was, and especially so if, in sending the message via Norfolk, Va., the defendant did so in good faith, and not for the purpose merely of evading the law. On the face of the transaction, and without any suggestion and finding of a fraudulent purpose to circumvent the law and acquire the protection of the Federal principal and to rid itself of the contrary rule of the State Court, it is an interstate, and not a intrastate, transaction.

The authorities to this effect are very numerous and consistent. *Shelby Ice and Fuel Co. v. Ry. Co.,* 147 N.C. 66. In that case we followed *Hanley v. R. R.,* 187 U.S. 617, which finally determined the question in favor of the view, that although the two points are in the same State, yet if in the transportation by a carrier any part of the route is in another State, it is interstate commerce. The Court said by Justice Holmes, quoting and adopting the rule stated by Justice Fields, on the circuit, in *P. C. Steamship Co. v. R. R. Comrs.,* 9 Sawyer 253 (18 Fed. Rep. 10), and also citing *Lord v. Goodall,* 102 U.S. 541: "To bring the transportation within
(99) the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State." With reference to these words, Justice Holmes said: "We are of opinion that the

language which we have quoted from Mr. Justice Fields is correct." Other cases cited by that Court are *State ex rel R. R. Warehouse Co. v. Chicago, etc., R. R. Co.*, 40 Minn. 263 (3 L.R.A. 238); *Sternberger v. Cape Fear, etc., Ry. Co.*, 29 S.C. 510 (2 L.R.A. 105; 7 S.E. Rep. 836), and *M. P. Protective Asso. v. Delaware, etc., R. R. Co.*, 7 Interstate Com. Rep. 92, 160, 161.

The Court criticized certain cases in conflict with the views expressed in the *Hanley* case, and virtually overruled them, as to this question, for it states that they were based upon a misconception of the real question and the true decision thereon in *L. V. R. R. Co. v. Pennsylvania*, 145 U.S. 192, and adds: "We are of opinion that they carry their conclusions too far." Among those cases is *State ex rel R. R. Comrs. v. W. U. Tel. Co.*, 113 N.C. 213. At any rate, the result in the *Hanley* case was to hold that if any part of the route was in another State than that where the shipment or the message started, it was interstate commerce, and the liability of the carrier or telegraph company must be determined according to the Federal law. This doctrine is supported by a large number of cases, which are cited in defendant's brief. This rule applies to telegraph companies engaged in interstate business, they being instruments of commerce protected by the Federal law. *W. U. Tel. Co. v. James*, 162 U.S. 650; *Same v. Pendleton*, 122 U.S. 347; *Same v. Brown*, 244 U.S. 542.

In *W. U. Tel. Co. v. Bolling*, (Va.), S.E. 154, the Court said upon this question: "Inasmuch, however, as under the express provisions of the act to regulate commerce, telegraph and telephone companies are common carriers, these decided cases are conclusive of the question here involved. Since the case of *Hanley v. Kansas City, etc., R. R. Co.*, 187 U.S. 617 (47 L. Ed.) 333, there has been no dissent from the proposition that although the point of shipment and the point of delivery are in the same State, if during the course of transportation the property passes without the boundaries of the State, such a shipment is interstate commerce. . . . Upon principle, we cannot conceive how any different doctrine can be applied to telegraph messages which, in the course of their transmission, pass without the State into any other State or the district of Columbia," citing many cases.

His Honor, Judge Daniels, who presided at the trial, submitted the question of the defendant's good faith in selecting the route via Norfolk, Va., to the jury, as follows: "If the jury believe the evidence, and find therefrom that the message was transmitted in the usual, customary and necessary route from Hertford, N. C., to Norfolk, Va., and relayed and transmitted from Norfolk, Va., to Plymouth, N. C., then the message would be an interstate (100)

message, and as such, interstate commerce, and the liability of the defendant is such only as is fixed and determined by the Federal law applicable thereto; . . . and mental anguish alone in such a case as this is not recognized by the Federal law as an element of damage for which a recovery can be had, . . . therefore, upon such finding, you will answer the third issue 'Nothing.'"

This charge, read in connection with the verdict, or the answer to the third issue, excludes the idea of bad faith on the part of the defendant, and goes further, for it establishes the fact that instead of there being any attempt to evade the law, the route selected by the defendant was "the usual, customary and necessary one."

Our conclusion, therefore, is that there was no error in the trial of the case.

No error.

Cited: Speight v. Tel. Co., 178 N.C. 150; *Watson v. Tel. Co.*, 178 N.C. 472; *Hardie v. Telegraph Co.*, 190 N.C. 47.

WILLIAM S. BAKER ET ALS. v. SALLIE JENKINS EDGE, ET ALS.

(Filed 26 September, 1917.)

1. Wills—Codicils—Interpretation.

A codicil should be construed with the will, as an addition, explanation, or alteration thereof, in reference to some specified particular, the law not favoring a revocation by implication, but that the other parts of the will shall stand unless a different intent be gathered by construing the will and codicil as a whole.

2. Same — Lapsed Devises—Estates—Contingent Limitations—Residuary Legatees—Next of Kin.

A devise of certain lands with specific bequests to named grandsons of the testator, John and Jesse, in case of either dying without issue, the estate and personalty to go to the other; and in the event of the death of both without issue, then to their "next of kin in equal degree," etc., with codicil revoking only the devise of the lands to John, and instead, giving him another tract of land since acquired. After the death of both John and Jesse without issue: *Held*, the codicil revoking only the devise of the land to John, did not impliedly revoke, and was not intended to revoke, the limitation over to "the next of kin" of Jesse's undivided portion, and the contingency having happened, John's undivided part became lapsed, and came within the residuary clause freed from the limitations, while Jesse's such portion went to the "next of kin" upon the happening of the contingency, as directed by the will.

3. Same—Limitation of Actions.

Where lands are devised with limitation over upon the death of the two devisees, without issue, and by codicil the portion of one has fallen within the residuary clause of the will, and that of the other has gone to the "next of kin" upon the happening of the contingency, the statute of limitations begins to run against the residuary legatees by adverse possession under color at any time since the death of the testator, and against the next of kin only from the happening of the contingency.

CIVIL action tried before *Whedbee, J.*, at the April Term, 1917, of EDGECOMBE. (101)

This is an action to recover a tract of land known as the Ruffin tract, on the following facts:

Moses Baker, late of Edgecombe County, North Carolina, died in said county and State, leaving a last will and testament, which is duly recorded in the office of the clerk of the Superior Court of Edgecombe in Will Book G, page 146 *et seq.*, the pertinent paragraphs of which read as follows:

Item 12. 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 Wilmington and R. R. R. 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 survivor; and if both should die leaving no issue, then I give, devise, 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.

Item 13: I authorize, direct, and empower my executor to sell all the balance or residue of my property of every description, real, personal, and mixed, and in making sale of same, I give to my executor full discretion to sell publicly or privately, for cash or on time, as he may deem advisable.

Item 14: As to the money which shall come to the hands of my executor from sales of property, debts due me, and all other sources, I provide as follows, to wit: They shall be applied, first, to the payment of my just debts, funeral expenses, and such as shall be necessary for the settlement of my estate; secondly, to the satisfaction of the legacy of $200 to my wife; and as to the residue of the said moneys, I give and bequeath them as follows, viz.: One-fourth part to my son William S. Baker, one-fourth part to my grandsons John Baker and Jesse Baker, with the same provisos and

exceptions as are made in item 12; one-fourth part to the said William S. Baker, as trustee, for the sole and separate use of the said Polly Pitt during her natural life, and after her death for the benefit of her children and grandchildren, with the exception of Leah Armstrong and Thomas Pitt, as provided in item 5, the said Baker to have power to invest the same in property or bank stock, or to loan it out at his discretion; and the other fourth to George W. Walker and Vesta Walker, on the same terms and conditions, with the same provisos, and to such other persons as are contained and set forth in item 9.

I hereby nominate, constitute, and appoint my son Wil-
(102) liam S. Baker executor of this my last will and testament.

Codicil: I hereby revoke and annul the devise or bequest of an undivided one-half of the "Ruffin tract of land" unto my grandson John Baker contained in item 12 of said will, and in lieu thereof I give and devise unto the said John Baker the tract of land which I have purchased since making of the said will from Dawson and Bytha Brown, adjoining the lands of Mrs. Whitehead and Mrs. Cohoon and the heirs of W. G. Baker, and containing 137 acres, more or less. If the said John shall die without issue, it is my will and desire in that event the said land shall go to his brother Jesse Baker.

The will is dated 28 August, 1854; the codicil, 4 November, 1855, and same was probated August Term, 1857.

John and Jesse died without issue—Jesse dying in 1864, John in 1913. Jesse died testate, and in his will attempted to devise the lands in controversy to his brother John Baker. In 1865, John executed a deed, conveying the lands in controversy to the defendant's ancestors, and the defendants have been in possession ever since. The plaintiffs are John and Jesse's next of kin within the terms of item 12. The title to said Ruffin tract is out of the State.

His Honor, being of opinion that the plaintiffs were not entitled to recover, allowed, at the conclusion of all the evidence, the defendants' motion for judgment as of nonsuit, and plaintiffs appealed.

Henry Staton and G. M. T. Fountain & Son for plaintiff.
F. S. Spruill and Allsbrook & Phillips for defendants.

ALLEN, J. The question presented is the effect of the codicil on the will. Does it strike the name of John Baker from the 12th item of the will, and does it destroy the ulterior limitation to the next of kin, in the event of the death of both John and Jesse Baker leaving no issue?

The researches of counsel and of the Court furnish no precedent to guide us, and we are left to ascertain the intent of the testator under general rules of construction established by the wisdom and experience of our predecessors, but not always leaving the mind free from doubt, since in the last analysis, construction is an effort to find the mind of the testator as expressed in the will, and the standard is the mind of the Court, and generally they are unlike, differently trained, and reach conclusions by a course of reasoning having no similarity.

The codicil before us does not purport to revoke the will. It only revokes and annuls the devise or bequest of an undivided one-half of the Ruffin tract to his grandson, John Baker, leaving John in the 12th item of the will as one-half owner of the negro Ben and as the sole owner of two shares of Wilmington and (103) R. R. R. stock.

It is well settled that there may be a partial revocation of a will *(Barfield v. Carr,* 169 N.C. 575), and that a codicil "imparts not a revocation, but an addition, or explanation, or alteration of a prior will in reference to some particular, and assumes that in all other particulars the will is to be in full force and effect." *Boyd v. Latham,* 44 N.C. 367.

The codicil and the will are "the final disposition reading by the light of both instruments together as a corrected whole" *(In re Venable's Will,* 127 N.C. 347, quoting from Shouler), and the will and codicil must be considered together as a whole. *Albright v. Albright,* 172 N.C. 353.

The Courts are also averse to the revocation of a will by implication, and, as said in *Hallyburton v. Carson,* 86 N.C. 294, " 'If the codicil is expressed to allow the will in one particular, the presumption is,' says a recent author, 'that it confirms and republishes the rest of the will.' O'Hara on Wills, p. 6. 'It is an established rule not to disturb the dispositions of the will further than is absolutely necessary to give effect to the codicil.' 1 Jar. Wills, 343, note.

"Thus a change of devisees to whom land is given, subject to a rent charge, will not revoke the rent charge, but the substituted devisee will take the land *cum onere. Becket v. Hardin,* 4 M. & S. 1. The object in all cases is to arrive at the intent of the testator and give effect to both instruments when they can operate in harmony."

Applying these principles, and keeping in mind that the codicil does not revoke item 12, nor all the bequests and devises to John in that item, that it only purports to revoke the devise to John of an undivided half of the Ruffin tract, and that John's name must still remain in the item in order that he may retain his interest in the negro and the railroad stock, the limitation over, on the death of

John and Jesse leaving no issue, must stand; and as this event has taken place, the next of kin have an interest in the land in controversy.

It does not follow, however, that this interest extends to the whole of the Ruffin tract. The testator gives to Jesse Baker in item 12 only an undivided half of the Ruffin tract, and he has manifested no purpose in the codicil to increase this interest, when it would have been easy to do so if this had been his intent. John and Jesse were grandsons of the testator, equally the objects of his bounty, and the purpose is clear to treat them alike. He gave an undivided half of the Ruffin tract to each, and in the codicil he gave John the Brown track in lieu of an undivided half of the Ruffin tract. Is it reasonable, under these conditions, to conclude that the testator, controlled by the purpose to treat both grandsons impartially and to give each an equal share in his estate,
(104) could have intended to give Jesse the whole of the Ruffin tract, which was, in his opinion, worth twice as much as the Brown tract given to John? We think not.

This undivided interest does not go to the next of kin. It is property not specifically disposed of under the will, and passes under the residuary clause *(Faison v. Middleton,* 171 N.C. 173, and cases cited), freed of the limitations in item 12, and as to those claiming under the residuary clause, the adverse possession of the defendants and those whom they claim under color since 1865 is a complete bar as to this one-half interest.

The principle that the revocation of the particular estate by a codicil revokes the remainder or limitation does not apply unless the codicil discloses a testamentary intent to revoke the limitation, and generally the limitation will be accelerated by the revocation of the particular estate rather than defeated. *In re Whiteforn* (2 Ch., 121), 5 Anno. Cas. 789, and note.

We are, therefore, of opinion the next of kin take an undivided one-half interest in the Ruffin tract under the limitation in item 12 of the will, and as their rights did not accrue until the death of John in 1913, the defendants have not acquired title as to that part by adverse possession, and that the defendants are the owners of the other one-half of said Ruffin tract.

The defendants will pay the costs of the appeal.

Reversed.

Cited: In re Love, 186 N.C. 100; *Woody v. Cates,* 213 N.C. 794; *Cannon v. Cannon,* 225 N.C. 622; *In re Will of Goodman,* 229 N.C. 446; *Armstrong v. Armstrong,* 235 N.C. 735; *Yount v. Yount,* 258 N.C. 243.

ELLA MORGAN v. TOWN OF TARBORO AND JOE ERVIN.

(Filed 26 September, 1917.)

1. Municipal Corporations—Cities and Towns—Negligence—Principal and Agent—Committees—Ordinance.

Where the aldermen of a town, to prepare for a festival occasion, have appointed a committee consisting of the mayor and manager, to act with others, which committee, without further authority, permits a third person to erect a stand of seats in a public park for the convenience of spectators, without obstructing the streets, suggesting a certain charge per seat; and there is an ordinance of the town prohibiting such use, the town, not participating in the profits or having supervision of the seats, is not responsible to a spectator who was injured by the falling of the stand from faulty construction or overcrowding.

2. Municipal Corporations—Cities and Towns—Public Occasions—Parks—Seats—Nuisance—Negligence.

The permission of a town to erect stands of seats in its public park, without obstructing the streets, for the convenience of those attending a gala occasion, does not partake of the character of an authorized nuisance, and falls within the principle that where a town licenses a person to commit within its limits an act not unlawful in itself or inherently dangerous, and an injury is occasioned merely in consequence of the manner in which the act is performed, the municipality is not liable.

CIVIL action tried before *Whedbee, J.*, at April Term, 1917, of EDGECOMBE. (105)

At the conclusion of the evidence the court sustained a motion to nonsuit as to the town of Tarboro, to which plaintiff excepted and appealed. Plaintiff submitted thereupon to a voluntary nonsuit as to Joe Ervin.

Allsbrook & Phillips for plaintiff.
D. M. Gilliam for defendant.

BROWN, J. The town of Tarboro owns a "Town Common," or park conveyed to it in 1760 by Joseph Howell, lying on the east and west side of Main Street. In August, 1915, the Colored Firemen's Tournament was held in Tarboro, and in order to provide seats for the spectators along the line of march, Joe Ervin erected a grandstand on said town common, open to the public at 10 cents admission. This stand was crowded with spectators, plaintiff being one of them. In consequence of the negligent construction of the stand, or from overcrowding, it fell and injured plaintiff.

We think the nonsuit was properly allowed.

1. There is no evidence in the record that the stand was erected by authority of the board of commissioners of the town. On 14 June, 1915, the board passed the following resolution:

"On motion of Commissioner J. D. Jenkins, the manager and mayor were appointed a committee with power to act as to an appropriation; also to assist Mr. McCabe and Simmons in getting contributions from the different business men in the town."

This is the only reference to the matter in the minutes of the board of commissioners, and the only authority delegated by the board. Later, Mr. Jacocks, the town manager, together with Paul McCabe, with whom the committee appointed by the board was to serve, gave the defendant Joe Ervin permission to erect in the aforesaid town common, parallel with Main Street, a grandstand for the accommodation of those who should attend the tournament, which was to be held on the Main Street of said town. The committee, or some of them, told Erwin where to erect the grandstand and advised him that he should not charge more than 10 cents admission. The town was to receive no part of the proceeds.

(106) It must be noted that the public street was not obstructed in any way. The grandstand was erected on the common and solely for the accommodation of spectators that they might more comfortably view the tournament. The town authorities did not authorize its erection and received no part of the proceeds of admission. On the contrary, an ordinance of the town was in force at the time forbidding the use of the common for shows, exhibitions, or entertainments of any kind.

2. But admitting that the town did authorize Ervin to erect the stand for the convenience of spectators on such gala occasion, under the evidence in this record, it would not be liable.

The principle of law is well settled that if the act which the municipality licenses a person to commit within its limits is not unlawful in itself or inherently dangerous, so as to become a public nuisance, and an injury is occasioned merely on consequence of the manner in which the act is performed, then the municipality is not liable. 5 Thompson on Negligence, 5805, and cases cited.

The erection of temporary seats along the city streets on public occasions is not unusual. It is allowed for the convenience of the public, and does not in the least partake of the character of a nuisance.

The plaintiff having submitted to a voluntary nonsuit as to defendant Ervin, the action was properly dismissed.

Affirmed.

S. D. EVERETT, EXECUTOR, v. MOLLIE GRIFFIN.

(Filed 26 September, 1917.)

1. Wills—Directions—Sale of Lands—Equity—Conversion—Personalty.

A direction by will to sell lands, the proceeds to be "divided between all my children, the heirs of such of my children as may not be living at my death to receive such child's portion," is an equitable conversion of the devise into personal property, under the doctrine that equity regards that as done which ought to be done, and the proceeds of the sale pass to the beneficiaries as such.

2. Same—Distribution.

When no contrary intent appears from the will, and the testator uses the word "heirs" in connection with the distribution of his personal property, it refers to those who take as such under the statute as distributees thereof.

3. Same—Heirs—Widow—Statutes.

A devise of lands to be sold and the proceeds to be distributed among designated children of the testator, as personalty, under the equitable doctrine of conversion, "the heirs of such of my children as may not be living at my death to receive such child's portion": *Held*, the widow of a deceased son of the testator is regarded as an "heir" under our statute, and in the event of no child of the marriage, etc., she is entitled to one-half of the property her husband would have taken. Rev., sec. 132, subsec. 3.

CIVIL action tried before *Whedbee, J.*, at the February Term, 1917, of NASH. (107)

This is an action by an executor for the construction of a will and for advice as to the distribution of the proceeds of the sale of a tract of land.

On 26 May, 1915, David Everett, at the time domiciled in Nash County, in this State, died seized and possessed of a considerable estate, consisting of both real and personal property, having theretofore, to wit, on 11 July, 1914, made and published his last will and testament; and in his said will the testator above named, having first made provision for his wife, who survived him, and having therein made other specific bequests to certain of his children and grandchildren, in the fifth item thereof, made disposition of certain of his lands as follows:

"Fifth. I direct that my executor hereinafter named advertise for thirty days, and sell at public sale, and make deed thereto to the purchaser at said sale, that portion of my home place, excepted from items '2 and 3' of this will, lying on both sides of the county road and east of a path running north and south, which said path or road leads from the county road in an almost straight line to the back of my home place plantation, said path to be extended or

surveyed across my entire home place plantation in the general northerly and southerly direction in which it now runs.

"And I further direct that the proceeds thereof after sale shall be equally divided between all my children, the heirs of such of my children as may not be living at my death to receive such child's portion."

The said testator left surviving a widow, Matilda Everett, and four children, to wit: S. D. Everett, Mollie Griffin, Ida Batts, and J. A. Everett, all of whom are now living and before the court.

The said testator was the father of five other children, whose demise preceded his, to wit: Dora Everett, born in 1871, died in 1872; Debbie Hunter, wife of E. A. Hunter, born in 1869, died in 1905; Lena Dawes, wife of W. R. Dawes, born in 1874, died in 1910; W. A. Everett, born in 1884, died in 1912; and Frank Everett, born in 1879, died 23 April, 1915.

The said Debbie Hunter left surviving a husband, E. A. Hunter, and three children, to wit: Alma Hunter, Mabel Hunter, and Lillian Hunter, all of whom are now living and before the court.

The said Lena Dawes left surviving a husband, W. R. Dawes, whose demise was prior to that of the testator, and five children, to wit: John Dawes, Russell Dawes, Edna Dawes, George Dawes,
(108) and Sallie Dawes. All of said children are now living and before the court.

The said W. A. Everett left surviving a widow (now Jennie G. Gasser, wife of Paul Gasser) and one child, to wit, William A. Everett, all of whom are now living and before the court.

The said Frank Everett left surviving a widow, Matilda Gilliam Everett, the appellant, but no child.

The land has been sold and the proceeds of sale are ready for distribution.

The appellant, Matilda Gilliam Everett, is the widow of Frank Everett, who died before the testator, leaving no child, and she claims that the proceeds of sale are personal property; that the word "heirs" in the fifth item of the will means distributees, and that she is entitled to one-half of the share of Frank under the statute of distributions, and as there were nine children, one-eighteenth of the whole, if Dora Everett, who died before the testator, leaving no child, is considered, or one-sixteenth of the whole if she is not considered. The children and grandchildren contend that the word "heirs" means issue or children. His Honor held with the children and grandchildren and entered judgment accordingly, from which Matilda Everett appealed.

E. B. Grantham for appellant.
L. V. Bassett and M. V. Barnhill for appellees.

ALLEN, J., after stating the case: "The direction to sell land operates as an equitable conversion, and the property or proceeds thereof pass to the beneficiary as personalty." *Lee v. Baird,* 132 N.C. 755.

All of the text-books and the decided cases support this principle, which rests upon the doctrine that equity regards that as done which ought to be done. 3 Pom. Eq. Jur., sec. 1159; Bispham's Eq., sec. 307; 2 Underhill on Wills, 957; *McCabe v. Spruill,* 16 N.C. 189; *Elliott v. Loftin,* 160 N.C. 361.

We must then deal with the proceeds of sale as personal property, and keeping in mind that "when language is used having a clearly defined legal significance, there is no reason for construction to ascertain the intent; it must be given its legal meaning and effect." *Campbell v. Cronly,* 150 N.C. 469. Let us see what is meant by the words "heirs of such of my children as may not be living at my death," and whether the word "heirs" used in connection with the disposition of personalty has a clearly defined legal signification.

The word is ordinarily used to describe one upon whom the law casts the inheritance upon the death of the person last seized, and it has been frequently construed to mean issue or children, when this appears to have been the intent of the testator, but when used in connection with the disposition of personalty, and no (109) contrary intent appears, the authorities in this State and elsewhere hold that it refers to those who take under the statute, distributing the personal estates of deceased persons.

The Court says, in *Croom v. Herring,* 11 N.C. 398: "Exclude the idea of blood, and it is matter of surprise how it could be doubted that the widow is not included in the word 'heir,' when applied to personal property. Her claims to the succession are precisely the same with the next of kin; both unknown to the common law, and both given by the same statute."

In *Freeman v. Knight,* 37 N.C. 75: "The ninth clause of the will is in these words: 'It is also my will that Big Sam and Isaac should be sold and the proceeds equally divided between my legal heirs.' Who are the persons thus designated? Is the wife one? Are the children of a deceased child included in the description? And if they be, do *they* take as designated persons *per capita,* or the share of the parent whom they represent? These inquiries would open a wide field for speculation, in which great ingenuity and learning have been exerted and expended, but that we feel ourselves bound to

follow out the construction which in a very similar case was sanctioned by our predecessors in *Croom v. Herring,* 11 N.C. 393. It was there determined that when a testator makes an immediate gift of personal property to 'his heirs,' he means a gift to those whom the law has appointed to succeed to the personal estate of dead men, who have made no appointment themselves.' If so, it includes the widow, and it includes the children of a *deceased child.*"

In *Corbett v. Corbett,* 54 N.C. 117, "The word 'heirs' is not appropriate to the disposition of personal property; and when used in reference to it, means those who take by law or under the statute of distribution." In *Brothers v. Cartwright,* 55 N.C. 116, in which land was directed to be sold and the proceeds distributed, "The land directed to be sold by the second clause became personal estate at the death of the testator's widow, when the sale was to be made. *Croom v. Herring,* 11 N.C. 393; Adams Eq. 136. The division of the proceeds was then to take place, and it must be among those of his children who were then living and the heirs of those who had died, either before the testator or after his death and before the death of his widow. By *heirs,* as applied to a bequest of personal estate, it is settled that those are to take who are entitled according to the provisions of the statute of distributions. *Croom v. Herring, ubi supra; Freeman v. Knight,* 37 N.C. 72"; and in *Lee v. Baird,* 132 N.C. 765, in which the executor was directed to sell certain lots and divide the proceeds among all the heirs of the testator, "The direc-
(110) tion to sell operates as an equitable conversion, and the property or proceeds thereof pass to the beneficiaries as personalty. *Mills v. Harris,* 104 N.C. 626; *Benbow v. Moore,* 114 N.C. 263. Therefore, the word 'heirs' must be understood and construed to describe those persons who would take as distributees."

In 40 Cyc. 1464, the author says: "The word 'heirs' in a will, when applied to real estate, primarily means persons so related to one by blood that they would take the estate in case of intestacy; and when applied to personalty, primarily means next of kin or those persons who would take under the statute of distribution in case of intestacy, and this rule applies where the will directs realty to be sold and the proceeds paid to his heirs."

And in 2 Underhill on Wills, sec. 619, the rule is thus stated: *"The word 'heirs,' in gifts of personal property, means next of kin.* In the case of a gift of personal property made either to the heirs of the testator or to the heirs of another person, the question may arise whether the word 'heirs' is employed as meaning those to whom land descends, which is its ordinary sense, or whether it is used to indicate those only who take the personal property in intestacy. Where personal property *alone* is bequeathed to the heirs, either of

the testator or of another person, and the will itself does not show that the testator has employed the word in its technical sense, it may be presumed that the testator has used it to indicate the next of kin, according to the statute, who succeed to the personal property in case of intestacy." See, also, 4 Words and Phrases 3253, where many decided cases are cited in support of the proposition that the word "heirs" when used in connection with the disposition of personal property means those who take under the statute of distributions.

There is nothing in this will to show a contrary intent, and we must give to the word its accepted meaning. It follows, therefore, that the appellant is entitled to share in the proceeds of sale as a distributee of her husband, and as Dora, one of the children, died before the testator, leaving no child and not having married, and as at the death of the testator there were four children alive and the representatives of four who were dead, including Frank, she is entitled to one-sixteenth of the proceeds, or one-half of one-eighth, the share of Frank, under the statute of distributions (Rev., sec. 132, subsec. 3), which gives to the widow one-half of the personalty when there is no child nor legal representative of a deceased child.

Reversed.

Cited: Grantham v. Jinnette, 177 N.C. 240; *Yelverton v. Yelverton,* 192 N.C. 620; *Coppedge v. Coppedge,* 234 N.C. 176.

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(111)

D. M. SMITH v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 26 September, 1917.)

Carriers of Goods—Commerce—Damages—Notice to Carrier—Burden of Proof—Evidence—Instructions—Appeal and Error.

In an action against the carrier for damages for failure to deliver an interstate shipment of goods, the burden is on the plaintiff to show that the required notice was given within the four months, at the point of origin or of delivery, after a reasonable time for delivery had elapsed; and upon failure of evidence thereof the plaintiff cannot recover.

APPEAL from justice's court, tried before *Cox, J.,* at January Term, 1917, of CHATHAM, upon these issues:

1. Was the shipment of freight described in the pleadings delivered to the plaintiff? Answer: "No."

2. Was claim for loss of shipment filed with the defendant at a point of destination or at point of origin within four months after a reasonable time for delivery has elapsed? Answer: "Yes."

3. In what sum is defendant indebted to plaintiff? Answer: "$15.51."

From the judgment rendered, defendant appealed.

No counsel for plaintiff.
Murray Allen for defendant.

BROWN, J. Plaintiff sues to recover for loss of goods shipped in interstate commerce. The defendant denied loss of goods and pleaded specifically that plaintiff had failed to comply with the contract of shipment by filing a written claim for loss within four months.

The court charged the jury: "If you find that such claim was not filed in writing at the point of origin or at the point of delivery within four months, after a reasonable time for delivery had elapsed, you will answer that issue 'No.'" Defendant duly excepted.

It is contended that the burden of proof is on the plaintiff on the second issue, and that there is no evidence to support the charge.

The exception is well taken. Before he can recover, the burden is on plaintiff to show not only that the claim was *in writing,* but that it was filed with defendant's agent at the point of delivery or of origin within four months after a reasonable time for delivery has elapsed. The point is expressly decided in *Culbreth v. R. R.,* 169 N.C. 724.

There is no evidence in the record justifying the charge. His Honor should have instructed the jury to find the issue against plaintiff.

(112) It is erroneous, and ground for exception, for the trial judge to give an instruction to a jury without evidence to support it. *Stewart v. Carpet Co.,* 138 N.C. 36.

As no motion to nonsuit appears in the record, there will be another trial.

New trial.

Cited: Eagles v. R. R., 184 N.C. 70; *Dorsey v. Corbett,* 190 N.C. 786.

STATE EX REL. JOHN T. COLE, S. W. BROWN, AND W. V. MASSENGILL v. J. W. SANDERS, W. W. STEWART, AND JOHN R. MASSENGILL.

(Filed 26 September, 1917.)

Public Officers—Qualifications Recommendatory—Statutes—Courts.

The provision in a statute that township highway commissioners shall be selected for their fitness, and not for political faith, and to remove the position from partisan politics, one each of the two members to be elected shall, "so far as feasible and practicable, come from each of the two leading political parties of the township," is too indefinite and uncertain to affix a qualification to the position, being recommendatory only to the voters, whose action is not reviewable by the courts.

CIVIL action tried before *Cox, J.*, at the April Term, 1917, of JOHNSTON.

This is an action in the nature of a *quo warranto,* instituted by the plaintiffs, the relators, to recover possession of the offices of the Township Highway Commissioners of Ingrams Township in Johnston County.

His Honor rendered judgment in favor of the plaintiff, and the defendants appealed.

S. S. Holt and James D. Parker for plaintiffs.
F. Hunter Creech and Abell & Ward for defendants.

BROWN, J. The facts are that the relators were elected highway commissioners by the following votes: John T. Cole, 321 votes; W. B. Massengill, 321 votes; S. W. Brown, 318 votes. The defendant John W. Sanders received 192 votes; W. W. Stewart, 197 votes; and John R. Massengill, 196 votes.

The plaintiff duly qualified and demanded possession of the offices of the defendants John W. Sanders and G. K. Massengill, who were members of the old board of highway commissioners of said township, the books, records, and all other property of the highway commission. The defendants refused to surrender, and the plaintiffs brought this action for possession of the offices.

The defendants do not deny the above allegations, but allege that the plaintiffs are not entitled to recover because the Public-Local Laws of 1913, chap. 441, sec. 7, provides:

"That a township highway commission for each and every township in the county of Johnston is hereby created and (113) incorporated, which township highway commission shall consist of three members, one of which shall be chairman and another clerk; said township highway commission shall be *selected for their fitness and not their political faith,* provided that at each and every

election by popular vote of any township highway commission, and in order to remove the same, as far as possible, from partisan politics, *one each of the two members* of the several township highway commissions to be elected under this act shall, so far as feasible and practicable, *come from each of the two leading political parties of such township.*"

The defendants allege that all three of the plaintiffs are Republicans, and that it was "possible and practicable" to have elected a competent person of a different political faith in compliance with the provisions of said statute.

We are of opinion that the plaintiffs are entitled to recover possession of the offices, as adjudged by his Honor below. We think the words of the act declaring, in substance, that, "so far as feasible and practicable," two members shall be selected from each of the two leading political parties, are merely recommendatory to the voters. They are entirely too indefinite and uncertain to have the effect of affixing a qualification to the position of highway commission. The feasibility and practicability of electing persons of different political parties is a matter for the voters to pass on, and their judgment is final and not reviewable by the Courts.

The judgment of the Superior Court is

Affirmed.

CLARK, C.J., concurring: At an election regularly held 7 November, 1916, for three highway commissioners in Ingrams Township, Johnston County, the plaintiffs received the following vote: John T. Cole, 321 votes; W. B. Massengill, 321 votes; and S. W. Brown, 318 votes, while the defendants received: John W. Sanders, 192 votes; W. W. Stewart, 197 votes; and John R. Massengill, 196 votes. The plaintiffs duly subscribed to the oath of office and were sworn in as township highway commissioners. Immediately thereafter, on 4 December, 1916, they demanded of the defendants John W. Sanders and G. K. Massengill, who were members of the old board of highway commissioners for said township, the books, records, and all other property of said highway commission, which the defendants refused to surrender, and this action of *quo warranto* was brought for the possession of said offices.

The defendants do not deny above allegations, but allege that the plaintiffs are not entitled to recover because Public-Local Laws

1913, chap. 441, sec. 7, provides: "A township highway com-
(114) mission for each and every township in the county of Johnston is hereby created and incorporated, which township highway commission shall consist of three members, one of which shall

be chairman and another clerk; said township highway commission shall be selected for their fitness, and not for political faith, provided that at each and every election by popular vote of any township highway commission, and in order to remove the same, as far as possible from partisan politics, one each of the two members of the several township highway commissions to be elected under this act shall, so far as feasible and practicable, come from each of the two leading political parties of such township." A third member was, by the same section, to be chosen by each township after the first election.

The defendants allege that all three of the plaintiffs are Republicans, and that it was "possible and practicable" to have elected a competent man of a different political faith, in compliance with the provisions of said statute. The court, there being no disputed facts, properly rendered judgment in favor of the plaintiffs.

If the constitutional qualifications apply to this position, this case is governed by *S. v. Bateman,* 162 N.C. 591, in which it is said: "The Constitution of this State, Article VI, prescribes who shall be 'voters,' and section 7 of that article provides: *'Every* voter in North Carolina, except as in this article disqualified, shall be eligible to office.' The Legislature is, therefore, forbidden by the organic instrument to disqualify any voter, not disqualified by that article, from holding any office. The General Assembly cannot render any 'voter' ineligible for office by exacting any additional qualifications, as by prescribing, in this instance, that the candidate shall be a 'licensed attorney at law,' any more than it could prescribe that he should own a specified quantity of property, or should be of a certain age, or race, or religious belief, or possess any other qualification not required to make him a voter."

The provision in the Constitution, Art. VI, sec. 7, that *"Every voter* in North Carolina, except as in this article disqualified, shall be eligible to office," was especially intended to prevent any action by the Legislature disqualifying any voter from holding office on account of race or color. The disqualifications in that article provided are set out in section 8 thereof, and disqualify only atheists and those convicted of treason, felony, or of any penitentiary offense, or of corruption or malpractice in office, unless restored to the rights of citizenship. The Legislature is disabled, therefore, to disqualify any other "voter" from holding office. The Constitution, Art. XIV, sec. 2, prescribes as a penalty to be imposed by a sentence of court, disqualification to hold office upon any one who shall take part in or be accessory to duelling; and the same article, section 7, prohibits any person from holding two offices or places of trust or

profit. However commendable the object of the Legislature
(115) was in attempting to provide for a nonpartisan board of township highway commissioners, the provision of the Constitution is so explicit that the judge properly refused to hold either of the plaintiffs so disqualified, it being admitted that all three had received a majority of the votes cast. It is difficult to see which one of the three he could have held disqualified; and if he had held one of them disqualified, still two were admittedly legal officers, and being a majority of the board, they were entitled to a *mandamus* to be inducted into office, and they could then fill the vacancy as to the third man as provided in the act, for upon no theory could any one of the defeated candidates be held elected on account of the disqualification of his competitor, if it had existed *(S. v. Bateman, supra,* where the proposition is fully discussed), and there would be merely a failure to elect the third commissioner.

It is very apparent that if the Legislature can prescribe that a part of the commission must belong to the opposite political party; if it can take into consideration as qualification, or disqualification, the political or religious or other views of candidates, it can prescribe that all the members of the commission or candidates for any office, even members of the Legislature, shall be of the same party, or of the same race, or of the same church affiliations as the majority of the General Assembly. It is true that this is very improbable action, but it was because that it was deemed probable that some future Legislature might prescribe race or color as a qualification for office that this enactment was put in the Constitution with a view of preventing any disqualification of any voter "other than those in that article disqualified."

In accordance with these views is the ruling in *Attorney-General v. Detroit,* 58 Mich. 213; 55 Am. Rep. 675, and many other cases. "Where, however, no constitutional prohibition intervenes, the Legislature may fix the qualifications for office, and may also add to them at pleasure." Mechem on Office, secs. 97, 465; *Commonwealth v. Plaisted,* 148 Mass. 386, 387; *Rogers v. Buffalo,* 123 N.Y. 173.

We have very proper provisions requiring, in the appointment of election boards for canvassing returns, that at least one member shall be of an opposite political party from the other two. This is to insure fairness in the returns, and is a highly important provision for the correct ascertainment of the popular will at the ballot box. These appointees, however, are not officers within the meaning of this provision of the Constitution.

There is ample authority, however, for the proposition that the qualifications prescribed for office in a constitution apply only to offices created therein or authorized by it, as was the case in *S. v. Bateman, supra,* who was elected judge of a recorder's court which the Legislature was authorized to create by the amendment of 1876, Art. IV, sec. 12. In *Scown v. Czarnecki,* 264 Ill. 312, (116) it is held in a full discussion, with ample citation of authority, that the constitutional requirements apply only "to elections provided for by that instrument. The qualifications of voters at such elections are fixed by the Constitution, and the Legislature cannot change them. Other elections, however, provided for only by statute and not by the Constitution are wholly within the control of the Legislature."

The distinction between offices of constitutional origin and those created by statute, as to their control by the Legislature, has been repeatedly recognized, and the rule has been often announced that an office created by legislative action is wholly within the control of the Legislature which can declare, the manner of filling it, how, when, and by whom the incumbent shall be elected or appointed, and to change from time to time the mode of election or appointment. *People v. Morgan,* 90 Ill. 558, and numerous other cases cited in *Scown v. Czarnecki,* 264 Ill. 312.

In *S. v. Dillon,* 32 Fla. 545; *Buckner v. Gordon,* 81 Ky. 665; *Hanna v. Young,* 84 Md. 179; *Plummer v. Yost,* 144 Ill. 68, and many other cases, it is held that "constitutional provisions prescribing the qualifications of electors do not apply to any election for municipal offices not provided for by the Constitution, but created by legislative enactment."

This is made absolutely so in our State by the amendment to the Constitution (now section 14, Article VII), which places suffrage in the counties and towns absolutely in the discretion of the General Assembly. Under this amendment, the Legislature in a very large number of counties, during a long series of years, made the magistrates, and not the people at large, electors for county officers, and provided for the appointment of aldermen by the Governor or by other constituencies than the people. *Harriss v. Wright,* 121 N.C. 172. To this day, in many counties, the justices are not elected by the "voters," but by the Legislature. Laws 1917, chap. 10.

As the board of highway commissioners of this township was created, not by the Constitution, but by the General Assembly, it had the power to prescribe by what constituency they should be elected, whether by the magistrates, or by the landowners, or by the county commissioners, or otherwise; and hence the General Assembly had the right to prescribe qualifications for these positions at

pleasure. Mechem on Office, sec. 97; *Comm. v. Plaisted,* 148 Mass. 386; *Rogers v. Buffalo,* 123 N.Y. 173. Therefore, speaking for myself, while admitting that there can be no disqualifications for office added by the Legislature as to offices created by the Constitution (which was not done in this act), it seems to me that, as to positions created by the General Assembly having the authority to create the office, it can prescribe its term and salary and tenure, and change or abolish these at will; and that hence the act in question is valid in requiring that one of the highway commission (117) shall be of the opposite political party to the others. But there is no method provided for enforcing the disqualifications, and in the absence of such legislation, the judge was compelled to require the defendants to surrender the office to the newly elected board, of whom two at least, being a quorum, are duly elected and legally entitled. No one of the defendants was elected or has any color of title.

In this there is no question raised as to the right of the Legislature to authorize other than State voters to hold office. It is simply a question whether it has a right to disqualify any who are voters at that election from eligibility to these positions for which they received a majority of the votes.

It was well said by Chief Justice Marshall in *U. S. v. Maurice,* 2 Brock 96: "Although an office is an employment, every employment is not an office." Mechem on Offices, sec. 2 and notes; Throop on Officers, sec. 3 and notes. Our State Constitution clearly distinguishes between "offices" (referred to in the Constitution, Art. VI, sec. 7, to which "every voter" is eligible, unless disqualified in the following section 8 of that article) and "places of trust or profit," which are therefore not offices (Const., Art. XIV, sec. 7), for these places of trust or profit the Legislature is not disabled from prescribing or adding other qualifications. For this reason, also, I am personally of opinion that the Legislature was authorized to prescribe such qualifications as it saw fit for this board created by itself; and on that ground, also, am of opinion that the act is valid, but that the judge below could not do otherwise than induct the two admitted legal commissioners into office and oust the defendants, leaving to the newly elected board, of whom a legal quorum was present, to manage the affairs of the commission. In the absence of a legislative provision prescribing the method of procedure, when one of those receiving the highest vote is not of an opposite political party to the other two, the Courts must wait till the Legislature shall prescribe such method.

Can it seriously be held that to the voters of this township was really submitted the question whether there was any Democrat

whom it was "feasible and practicable to elect"? They did not in fact pass upon any such question. The majority of voters in the township were Republicans, and they elected three Republicans because they preferred them, and they were doubtless advised by counsel that, under the Constitution and the ruling of this Court in *S. v. Bateman*, 162 N.C. 591, *"Every voter* was eligible" unless he were an atheist, a convict, or had been removed from office for corruption, and for that reason, and not because they voted that no Democrat in the township was competent, did the electorate choose the plaintiffs at the ballot box.

The judgment of the court below in any view must be affirmed.

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(118)

N. B. ADAMS ET ALS. v. ROBERT BEASLEY.

(Filed 26 September, 1917.)

Pleadings—Admissions—Judgments—Evidence—Burden of Proof—Trials.

Where the owner of lands has contracted to convey them, and received a payment on the purchase price, and rendered his performance of his contract impossible by conveying the lands to another; and in the purchaser's action to recover the amount so paid, the payment and amount is admitted by the pleadings; and also therein, that the seller had paid the purchaser a stated smaller amount: *Held*, the doctrine that the burden of proof rests upon each of the parties to sustain their respective allegations, does not extend to admissions, and upon failure of each to introduce evidence, a judgment for the difference in the two amounts is properly rendered for the plaintiff.

CIVIL action tried before *Stacy, J.*, at the February Term, 1917, of HARNETT.

This is an action to recover $350 and for damages.

The plaintiffs allege in their complaint that the defendant entered into a contract to convey to them certain real estate at a special price, and allege, further, the payment of $350 on the purchase price, and also that thereafter the defendant conveyed the land in question to a third party, thereby making it impossible for the defendant to comply with his contract. The defendant admits the execution of the contract to convey the land, the receipt by him of the $350 on the purchase price, and the conveyance by him thereafter of the land in question to a third party. The defendant then sets up in his answer matters in defense and alleges a counterclaim. The plaintiff filed a reply, denying the material allegations

of the answer. It was also admitted that the defendant paid the plaintiff $50.

When the action came on for trial the plaintiffs contended that the burden of proof was on the defendant and declined to introduce any evidence, and the defendant contended that the burden of proof was on the plaintiffs and introduced no evidence. His Honor rendered judgment upon the pleadings in favor of the plaintiff for $300, and the defendant excepted and appealed.

Clifford & Townsend for plaintiffs.
R. L. Godwin for defendant.

ALLEN, J. The burden was on the plaintiff to prove the allegations of his complaint not admitted by the answer and on the defendant to establish his defense and his counter-claim, but neither party was required to offer evidence of facts admitted in the pleadings. It follows, therefore, as the matters alleged by the defendant as a defense and counter-claim were denied by the reply,
(119) that the defendant was not entitled to recover upon his counter-claim or to diminish the amount of the recovery by the plaintiff without furnishing evidence in support of his allegation; and as the plaintiffs introduced no evidence, they could only recover on the facts admitted, which are that the defendant agreed in writing to convey a certain tract of land to the plaintiff at a specified price; that the defendant had received $350 as a part of the purchase price; that thereafter the defendant conveyed the land to a third party and made it impossible for him to comply with his contract, and that he had paid to the plaintiffs $50 on the amount received from them, leaving a balance due of $300, for which his Honor rendered judgment in favor of the plaintiff.

It requires no citation of authority to sustain the position, that when one receives money upon a contract and then voluntarily makes it impossible for him to perform the contract, that he must at least return the money he has received. *Sprinkle v. Wellborn,* 140 N.C. 163.

The course taken by his Honor in rendering judgment upon the admissions made is in accordance with the ruling in *Parker v. Bledsoe,* 87 N.C. 221, which is approved in *Curran v. Kershner,* 117 N.C. 264.

In the *Parker* case the action was to recover on a note for $1,244.72. The answer set up certain defenses which required a reference, but it admitted $499.20 to be due, and it was held proper

to render judgment for the latter amount and order a reference as to those matters in controversy.

Affirmed.

Cited: Sewing Machine Co. v. Burger, 181 N.C. 253; *Little v. Rhyne,* 211 N.C. 433; *Aiken v. Andrews,* 233 N.C. 305; *Wells v. Clayton,* 236 N.C. 106.

J. H. MITCHELL v. ELIZABETH RIVER LUMBER COMPANY ET ALS.

(Filed 26 September, 1917.)

1. Partnership—Railroads—Contracts—Timber—Independent Contractor —Fires.

Where a party owning a timber contract, with the right to operate a railroad thereon, enters into a contract with another to furnish the railroad track and equipment, and with yet another to do the cutting and hauling of the timber, the liability for negligence of the latter in causing damages by fire to the plaintiff's land is not confined solely to him, notwithstanding a clause in the tripartite agreement that he was to do this work as an independent contractor, it appearing therein that each was to be compensated out of the profits, and the liability of each is that arising under a partnership.

2. Railroads—Lessor and Lessee—Negligence—Fires.

Where the owner of a railroad on the lands of another under a timber contract agrees that yet another should cut the timber and haul the same over the railroad, and have control over its operation, fixing the compensation of each out of the profits, the arrangement amounts to a lease of the railroad property, making the lessor responsible in damages caused by lessee's negligence in setting fire to the plaintiff's lands.

APPEAL by defendants from *Allen, J.,* at April Term, 1917, of HERTFORD. (120)

Winborne & Winborne and W. W. Rogers for plaintiff.

D. C. Brown, G. E. Midyette & Burgwyn for defendant Lumber Company.

D. C. Barnes and G. E. Midyette & Burgwyn for defendant Bradshaw.

CLARK, C.J. This is an action for the negligent burning of plaintiff's woods. The defendant company owned the lease of the plaintiff's timber on the Willoughby tract under a timber contract

and a right of way across it to remove the timber therefrom as well as timber from other tracts. On said right of way the defendant Bradshaw had laid down the iron and furnished an engine and was operating a lumber road to his mill plant. On 4 February, 1914, there was a tripartite contract entered into between the Lumber Company and one T. W. Davis and the defendant Bradshaw, the purport of which was that the Lumber Company put in its timber contract and right of way; the defendant Bradshaw put in the engine, railroad track, and sawmill, which he was operating, and Davis was to cut the timber, haul it and saw it up into lumber, and load it on the cars at Ahoskie for shipment to Norfolk, for which service the Lumber Company was to pay him $8.50 per thousand feet, out of which sum it was to deduct, however, $1.50 per thousand feet to pay the party of the second part for the use of the sawmill, engine and railroad track, called "mill equipment." It was stipulated in the contract that said T. W. Davis was to be an independent contractor, and that neither the Lumber Company nor Bradshaw was to be "responsible to any person for any damage, injury, or loss occasioned to, or sustained by, such persons on account of, or in connection with, the work to be done by the party of the second part," the said Davis.

We are of opinion that the contract on its face shows a partnership by which each of the three parties put into business what is above recited. It seems that Davis was irresponsible, and he is not sued in this action. The object seems to have been by this means to prevent all liability on the part of the owner of the timber and the owner of the sawmill, railroad engine and track for negligence or otherwise, and to let that fall upon Davis by the device of calling him an "independent contractor."

The court charged the jury that "If the operator of said railroad negligently permitted the right of way to become foul with combustible matter, and the leaves, straw, etc., on the right of way caught fire from coals falling from the ash pan of said en-
(121) gine or caught from sparks of the engine, and the fire burned over and damaged plaintiff's land, the defendant Lumber Company would be liable for said damage, notwithstanding Davis was an independent contractor operating the road." To this the defendant Lumber Company excepted.

The court also charged the jury: "If you find from the evidence that the defendant Bradshaw furnished or rented to T. W. Davis his railroad on plaintiff's land and material to build or extend said railroad to other lands in order to remove the timber over the plaintiff's land to the A. C. L. R. R. under the contract between the Elizabeth River Lumber Company, Bradshaw and Davis negli-

gently kept a foul right of the track with combustible matter thereon, with no spark arrester on the engine, and live coals were allowed to fall out of the defendant's firebox or ash pan on the railroad track and put out fire, which burned over the plaintiff's land to his injury, then Bradshaw would be equally liable to plaintiff with the defendant Lumber Company for damage, if any done him by the fire." To this the defendant Bradshaw excepted.

In neither of these instructions do we find any error. "The lessor of a railroad is liable for the negligence of the lessee in the operation of the road." *Harden v. R. R.*, 129 N.C. 354; *Logan v. R. R.*, 116 N.C. 944, and many other cases.

In the present instance the Lumber Company owned the timber and the right of way. It did not convey away either, and the defendant Bradshaw laid down the track and furnished the engine and cars and was operating the road on the Lumber Company's right of way and the sawmill. They were practically, therefore, a partnership operating said railroad to get out the Lumber Company's timber to market. The operation of the railroad and mill plant by Davis, who seems to have been irresponsible, cannot have the effect to relieve the other two defendants from liability from negligence either as to employees or the owner of the land whose woods were set fire to by the negligence in the operation of the engine. If this could be done it would be a very simple device to put some nominal or irresponsible party in the control of the railroad and mill plant and thereby exempt the owners of the same from all liability.

The other exceptions require no discussion.

No error.

HOKE, J., concurring in result.

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(122)

W. A. CHAVIS v. A. M. BROWN ET AL., EXECUTORS.

(Filed 26 September, 1917.)

1. Appeal and Error—Supreme Court—Compromise Judgment.

A judgment final, by the consent of the attorneys of record with the sanction of their clients, may be entered in the Supreme Court on the appeal of the case.

2. Same—Jurisdiction—Superior Court—Trial by Jury.

Where a compromise judgment has been entered in the Supreme Court by the consent of the attorneys of record, and certified down, the Su-

perior Court is without jurisdiction to change or modify this judgment, upon the ground that the necessary consent of the client had not in fact been obtained, the remedy being by motion in the cause in the Supreme Court, supported by affidavits; and a trial by jury is not allowed as a matter of right, but when allowed is to be only regarded in an advisory character in ascertaining the facts at issue.

3. Judgments—Compromise—Impeachment—Burden of Proof.

A compromise judgment is presumed to have been rightfully entered until the contrary is made to appear, with the burden upon the one assailing its validity.

4. Appeal and Error—Supreme Court—Compromise Judgment—Presumptions—Rebuttal—Evidence.

Where it appears that the attorneys of record, reputable and upright practitioners, have agreed to a compromise judgment, entered in the Supreme Court on appeal, and this judgment is sought to be impeached for the lack of their authority to have so acted, an affidavit to this effect made by the client, the plaintiff in the action, and an affidavit of another witness as to a conversation between the party and one of his attorneys tending to corroborate it, is not held sufficient to overcome the presumption of the validity of the judgment, taken in connection with the affidavits of the attorneys that they had been so authorized, and stating that, upon a new trial if granted upon the errors assigned, they could not get another verdict.

MOTION to set aside judgment made in the Superior Court, HERTFORD County, and hear before his Honor, *O. H. Allen, Judge,* at February Term, 1917.

On the hearing it appeared that theretofore, to wit, at Fall Term, 1915, plaintiff had recovered judgment against defendants in the sum of $3,029.94; that defendants appealed to Supreme Court. After argument in this Court, and pending the term, counsel for plaintiff and defendant compromised the matter involved for $2,000, and judgment was thereupon entered here in form as follows:

"In the cause of W. A. Chavis v. C. G. Parker and A. M. Brown, executors of C. W. Parker. All matters in controversy have been and are hereby compromised and settled on terms that the defendants are to pay plaintiff Chavis $2,000 and also to pay all (123) costs of the case, both in the Superior and Supreme Courts.

"To this settlement both parties agree, and same is to be in full compromise and payment of the judgment heretofore entered therein.

"WINBORNE & WINBORNE,
"Attorneys for Defendant,
"JOHN E. VANN,
"Attorney for Plaintiff."

"Upon the foregoing, it is adjudged that the defendants C. G. Parker and A. M. Brown and surety L. J. Lawrence do pay the costs of this Court, to wit, the sum of $14.05."

This judgment having been certified down, plaintiff moved to disallow compromise because entered without any authority from him, and on affidavits in support and denial of the position, tendered an issue for determination of the question by a jury.

His Honor, being of opinion that the court was without jurisdiction to consider and pass upon plaintiff's motions, so entered his judgment, and plaintiff excepted and appealed.

On the hearing of this appeal, parties desired that if the court below was without jurisdiction on the question presented, that the same should be considered and determined as on motion in this Court to set the judgment aside, both sides consenting to such course.

R. C. Bridger, Manning & Kitchin, and W. R. Johnson for plaintiff.

Winborne & Winborne for defendants.

HOKE, J. It is settled with us, both by statute and approved precedent, that this Court on appeal may enter final judgment if it sees proper to do so on perusal of the record. *Griffin v. R. R.,* 150 N.C. 312; *Industrial Siding Cases,* 140 N.C. 239; *R. R. Connection Case,* 137 N.C. 1; Revisal, sec. 1542.

In recognition and pursuance of this principle, the judgment entered here, embodying the compromise, was a judgment final by consent, modifying the judgment formerly entered, and certified to the court below for the purposes of enforcement.

This being, in our opinion, the correct estimate of the proceedings here on the former appeal, we concur in his Honor's view that the Superior Court was without jurisdiction to change or modify the judgment of this Court by reason of facts and conditions existent and occurring here at the time the judgment was entered and directly appertaining thereto. *Dobson v. Simonton,* 100 N.C. 56; *Murrill v. Murrill,* 90 N.C. 120; *Durant v. Essex Co.,* 101 U.S. 555; 13 Vol. Pl. & Pr. 850; 15 Vol. Pl. & Pr. 228.

This is true of Courts of coördinate jurisdiction, and *a fortiorari* it must hold in reference to final judgments of an (124) Appellate Court. And this being in effect an application to set aside a judgment because this Court was imposed upon by a compromise alleged to be entirely without authority, a motion in the cause supported by affidavits is the proper procedure and a jury trial is not allowed as a matter of right. *Cox v. Boyden,* 167

N.C. 320; *Massie v. Hainey,* 165 N.C. 174; *Bank v. McEwen,* 160 N.C. 414; *Roberts v. Pratt,* 152 N.C. 731.

Doubtless, the Superior Court, on motion before it, could refer such an issue to a jury, and this Court could certify an issue down to be so determined, but the verdict in either case would be of an advisory character and considered only as an aid to the court in making correct ascertainment of the facts in issue.

Coming, then, to the principal question, plaintiff's motion to set aside the present judgment, our decisions hold that an attorney has no right to compromise his client's case without authority to do so. *Bank v. McEwen,* 160 N.C. 414-423; *Morris v. Grier,* 76 N.C. 410; *Moye v. Cogdell,* 69 N.C. 93. But while this position is very generally recognized (Freeman on Judgments, 4th Ed., sec. 463), when a compromise has been made and formally embodied in a court judgment, it is presumed to have been rightfully entered until the contrary is made to appear, and one who undertakes to assail such a judgment has the burden of making good his impeaching averments to the satisfaction of the court. *Gardiner v. May,* 172 N.C. 192.

Considering the record in that aspect, we are of opinion that plaintiff has failed to make out his case. True, he makes affidavit that the compromise was made without any authority from him, and another witness testifies, or makes affidavit, that he at one time overheard a conversation between plaintiff and one of the attorneys which tends in part to corroborate plaintiff. On the other hand, four reputable attorneys, having record as honorable practitioners and upright men, make oath that, acting as counsel in the case, they had grave doubt as to the question presented on the original appeal in the cause, and being satisfied that if a new trial was granted for the errors assigned they would never be able to secure another verdict, they entered into consultation with their client, advised the compromise, and were authorized by him to make it. On this record, we do not hesitate to hold that plaintiff has failed to sustain his allegations as required by law, and the judgment heretofore entered is

Affirmed.

Cited: Davis v. Storage Co., 186 N.C. 683; *Deitz v. Boloch,* 209 N.C. 206; *Morgan v. Hood, Comr.,* 211 N.C. 93; *Harrington v. Buchanan,* 224 N.C. 127; *King v. King,* 225 N.C. 641; *Howard v. Boyce,* 254 N.C. 263; *Collins v. Simms,* 257-8 N. C. 12.

(125)

FESTUS WEST v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 26 September, 1917.)

1. Railroads—Master and Servant—Public Crossings—Flagman—Interstate Trains—Commerce.

The plaintiff was employed by the defendant railroad company to warn with flags by day, and with a lantern by night, pedestrians of approaching trains at a public crossing in a town, and by signaling to the engineer of an approaching train, and to coöperate with him in the movement of the train before making the crossing, so as to prevent injury to the persons on the train and the people using the crossing. There was conflicting evidence, and the plaintiff, having thus coöperated with the conductor on an interstate train, was injured by the defendant's negligence when he had crossed the platform on this train and was on the lowest step of the car for the performance of his duty on the other side, with reference to a second track there. Upon the trial in the State Court under the Federal Employers' Liability Act, the evidence is sufficient upon the question of employment in interstate commerce, and to sustain a verdict in plaintiff's favor thereunder, or under our own statute of like effect. Laws of 1913, chap. 6.

2. Evidence — Corroboration — Changed Conditions — Admissions—Railroads.

Evidence in corroboration of plaintiff's testimony, in his action to recover damages for a personal injury, involving the alleged negligent condition of the defendant railroad company's track at the time, that since the injury the condition of the track had been changed, is competent, when it appears that it was confined to within proper limits and was not permitted to be considered in the light of an implied admission of negligence.

CIVIL action tried before *Stacy, J.*, at the February Term, 1917, of HARNETT.

Action for injuries caused by negligence.

The evidence tends to show that on 23 December, 1914, the plaintiff was employed by the defendant as street crossing flagman at Broad Street, in the town of Dunn, which runs east and west and intersects the main line of defendant's railway, running north and south, at right angles. At the crossing, the defendant has two main line tracks and one warehouse or pass track; the duties of plaintiff were to warn persons traveling Broad Street of the approach of trains about to cross said street; this was done by means of a flag which the plaintiff carried in his hand by day and of a lantern by night; plaintiff's instructions were, and it was his custom upon the approach of a train, to stand on the side of the track upon which the engineer sat in his cab. On 23 December, 1914, upon the approach of train No. 89 from the north, it being an interstate passen-

ger train, plaintiff was standing on the west side of the track and gave persons traveling Broad Street warning of the coming of the train; as soon as the train stopped, being then on the crossing, the plaintiff handed his flag to Will Taylor, who was standing on
(126) the west side of the track, and himself went upon the platform of the standing train, the evidence being conflicting as to whether he went in the train to assist or to see a passenger, or, as he himself testified, made his way as rapidly as possible over the platform, which was crowded with people, to the other side of the train, which was a part of his duty, plaintiff stating, as a witness, that he was going across the platform for the purpose of clearing the second main line track on the east side of said train of all persons who might be standing upon said track, although there was no train approaching upon said second track in so far as he could see.

The plaintiff's evidence tends to show that he had made his way across the platform and had descended the steps on the east side of the train, and had reached the lowest step, occupying then his proper position, when, as he was in the act of stepping on the ground; the train started suddenly and with a jerk throwing plaintiff off. The bottom step struck his back, rolled him under the train, one of his legs being cut off by the wheels of the train. He received other minor injuries.

The evidence on the part of the defendant tended to show that plaintiff had gone into the train; that he came out after the train had started, and attempted to get off, running for some time while holding to the grabiron, and falling under the train. The plaintiff's evidence further tended to show that the east main line track had recently been laid. The ground was uneven between the cross-ties when he was hurt, but that the same had been remedied since the accident by elevating the track across Broad Street some nine inches or more. There was evidence tending to show that all the time the plaintiff was in the discharge of his duties as flagman, when he was on the ground and when he crossed over the steps and platform in his attempt to reach the east side of the track, and that he was assisting or helping the engineer to move his train safely at the time he was injured.

Under the evidence and charge of the court, the jury rendered the following verdict:

1. Was the 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 injuries, as alleged in the answer? Answer: "No."

3. Was the defendant engaged in interstate commerce, and

was the plaintiff employed by the defendant in interstate commerce, at the time of the plaintiff's injury? Answer: "Yes."

4. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: "$7,500."

Judgment was entered thereon, and defendant appealed.

E. F. Young and R. L. Godwin for plaintiff. (127)
Rose & Rose and Clifford & Townsend for defendant.

WALKER, J., after stating the case: It was admitted that the train from which the plaintiff fell had come from the State of Virginia into this State, and therefore was being used in interstate commerce. The principal question discussed before us was whether the plaintiff, at the time he was injured, was employed in interstate commerce, as he alleged in his complaint, there being evidence to support the allegation, which tended to prove that he was a flagman at Broad Street crossing, in the city of Dunn, and his duties were to flag trains approaching from either direction, so that they might proceed safely to and beyond the crossing, and also that pedestrians could be properly warned that a train was coming to the crossing, so that they might protect themselves. He was required to stand on the side of the train where the engineer sat in his cab, so that he could coöperate with him in the movement of the train through Dunn, and thereby prevent any injury to the persons on the train and the people using the crossing; and it was while he was performing his usual duties, and after he had flagged the engineer on the west side of the track, that he passed over the platform of the car to the other side to further perform his duty. While doing so, he was thrown from the lowest step of the platform on the east side by a sudden and violent jerk of the train, and his injuries were the result of the fall.

The case was tried under the Federal Employers' Liability Act of Congress. We cannot perceive why the plaintiff was not employed in interstate commerce at the time he was hurt, as he was directly connected, by the nature of the duties assigned to him, with the movement of the train from which he fell, and was, of course, on the train when the accident occurred. It seems to us that these facts, not seriously disputed, in this phase of the case, bring it squarely within the operation of the Federal law. The very question we have here was virtually passed upon by us in the recent cases of *Sears v. A. C. L. R. R. Co.*, 169 N.C. 447; *Raines v. So. Ry. Co., ibid.*, 189.

In the *Sears* case, we said that "the first question may well be disposed of by a bare reference to the evidence. . . . The engine which was to carry the train to Florence, S. C., had steam up, and

R. C. Garland, the engineman, was in the cab, and moved the train under signals from the plaintiff. This would seem to properly characterize this train as one engaged in interstate commerce; and while the plaintiff was employed on a local shifting engine, any injury to him through the negligence of the defendant while he was engaged in cutting out the 'bad order car' from this train is regarded in law as one received while he was 'employed in such commerce.' "

We referred to *Pedersen v. D. L. and W. R. R. Co.,* 229 U.S. (128) 146, where the Court held that the plaintiff, who was injured by the negligence of the defendant in that case while he was carrying bolts to the workmen on a bridge, which was part of the defendant's railway, and was being repaired in some of its parts, was employed in interstate commerce. Defendant was an interstate carrier, its line extending through several States. It was held that upon these facts the defendant was engaged in interstate commerce, and that plaintiff, who was run down and injured by an intrastate train while carrying the bolts was employed in interstate commerce at the time of his injury.

The Court said in the *Pedersen* case: "The statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is, Is the work in question a part of the interstate commerce in which the carrier is engaged? . . . Of course, we are not here concerned with the construction of tracks, bridges, engines or cars, which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such. True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."

But the *Raines* case, *supra,* decided by us and reported in 169 N.C. 189, is precisely in point. It was the case of a flagman who was giving signals to the engineer of an interstate train, and while doing so was struck by the train and killed. The case was tried under the Federal Act, and, with reference to this feature of the case, we said: "The intestate at the time of his injury was employed in interstate commerce, and the case was, therefore, properly tried under the Federal Employers' Liability Act." This is decisive of the present case.

Other tests by which to determine whether a plaintiff was, at the time of his injury, employed in interstate com- (129) merce are stated in the following authorities, from which we make several extracts:

"The question for decision is, Was Shanks at the time of the injury employed in interstate commerce within the meaning of the Employers' Liability Act? What his employment was on other occasions is immaterial, for, as before indicated, the act refers to the service being rendered when the injury was suffered. Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see *Swift & Co. v. United States,* 196 U.S. 375, 398; 49 L. Ed. 518, 525; 25 Sup. Ct. Rep. 276), and that the true test of employment in such commerce in the sense intended is, Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?" The Court then gives several illustrations, and among them this one: "Where a fireman is walking ahead of and piloting through several switches a locomotive which is to be attached to an interstate train and to assist in moving the same up a grade," citing *N. and W. R. R. Co. v. Earnest,* 229 U.S. 114, which is almost identical in its facts with our case.

"But other employees of common carriers by railroad are not within the purview of the Federal Employers' Liability Act unless they are actually engaged in interstate transportation; that is, in transporting passengers or freight from one State to another, or in such work that is so closely related to interstate transportation as would be in a practical sense a part of it. The interstate status of an employee in each case must depend largely upon its own particular facts." *Minn. and St. Paul R. R. Co. v. Winters,* 13 N.C.C.A. 1135.

The case of *Graber v. D. S. and A. R. R. Co.,* 159 Wis. 414, is a valuable one on this question. We quote a part of the syllabus:

"1. Where the facts are undisputed, the question whether a particular service or engagement therein is of interstate character is one of law; but when material facts bearing on that question are in dispute, they may properly be determined by the jury, leaving to the court the legal conclusion to be drawn therefrom.

"2. A railway employee while actually performing a service essential to or so closely connected with the business of interstate commerce as to be substantially a part of it, though not necessarily exclusive of all *intrastate* features, is employed in *interstate* commerce within the meaning of the Federal Employers' Liability Act.

"3. If the particular service in progress at the time of
(130) the injury, in any substantial part, is within the interstate field, then the Federal law rules the case if either party so elects; but this is a right which may be waived, expressly or impliedly."

The judge in our case submitted the disputed questions of fact to the jury as to the nature of plaintiff's employment at the time of his injury, and the jury decided adversely to the defendant.

There are other decisions of the highest Federal Court which strongly support our view, but it is unnecessary even to cite them, as those already considered are quite sufficient to show that the question has been finally settled by them upon substantially similar facts. The plaintiff coöperated with the engineer in protecting the train and facilitating its movement through Dunn. He performed substantially and to a certain extent, though not exactly in the same way, the task of the flagman on the train, whose duty it is to safeguard it from other trains which are approaching it, in order to prevent collision. But if plaintiff could not recover under the Federal Act, because not employed in interstate commerce at the time of the injury, we think he had the right to do so under our State law, as we decided in *Sears v. R. R. Co., supra.* His complaint is broad enough in its allegations to include a case under the State act (Laws of 1913, chap. 6), and there is ample evidence to substantiate it. But he is not put to such a necessity, as we are of the opinion that, by allegation and proof, he has clearly made out his case in the other aspect of it.

Whether he went upon the train to see a man, or for the performance of his duty, was a question of fact which the jury has decided against the defendant. There was no tangible evidence of contributory negligence and no plea of "assumption of risks." The jury found all issues against the defendant. The case is a plain and simple one. We cannot interfere with the jury in finding facts upon evidence sufficient to warrant their verdict. The presiding judge submitted the case to the jury in his charge with singular clearness

and impartiality. There was nothing omitted that should not have been omitted, and nothing expressed which should not have been said, but all of it, after a most searching and critical examination, is considered by us to be entirely free from any error in law or fact. The jury have simply decided against the defendant the crucial questions or upon those which alone defendant could have hoped for favorable responses.

The question of evidence raised by the defendant, which is, that the court admitted incompetent evidence as to the condition of the track and road-bed at the time of the injury, and its reparation since that time, is founded upon a misapprehension of the true nature of that evidence. It was not admitted as an implied admission of negligence on the part of the defendant, but as tending to corroborate the plaintiff, as a witness in his own behalf, as to their condition at the time of the accident, and the instructions to (131) the jury clearly show that the evidence was let in solely for such purpose. In that view, it was competent, as we have held. *Tise v. Thomasville,* 151 N.C. 281; *Pearson v. Clay Co.,* 162 N.C. 225; *Boggs v. Mining Co., ibid.,* 393; *Shaw v. Public-Service Corp.,* 168 N.C. 611.

The other exceptions are unimportant, or formal, and require no special discussion.

The case was correctly tried, and we therefore affirm the judgment.

No error.

Cited: Holt v. Mfg. Co., 177 N.C. 178; *Beck v. Tanning Co.,* 179 N.C. 126.

MOLLIE SUE MARTIN ET AL. v. OLIVE BELLE VINSON ET AL.

(Filed 26 September, 1917.)

1. Wills—Devises—Locus in Quo—Identity.

The testator devised to his son C. a known and designated 100-acre tract of land. C. died intestate, leaving him surviving two daughters and a son, R. The appellants claim an interest in the *locus in quo* through their mother, a daughter of C. and a sister of R. The lands in controversy were devised by R. to the children of F. and as "the tract of land on which their mother lived at the time of her death and came by my father": *Held,* the devise of R. being of the tract of land, and not of his interest therein, is not sufficient evidence in itself to identify the land as

that devised to his father C. and in which the appellants claim an interest as the heirs at law of their mother, the sister of R.

2. Descents—Heirs at Law—Evidence—Identification.

Where the appellants claim the *locus in quo* through their mother, M., as an heir at law of her father, C., testimony of the daughters of M. that she had told them that her father was C., and that her brother R. and her sisters were the children of C. is held sufficient under the circumstances of this case to establish their relationship.

3. Appeal and Error—Exceptions—Briefs.

Exceptions not discussed in the brief on appeal are deemed abandoned.

CIVIL action tried before *O. H. Allen, J.*, at Spring Term, 1917, of HERTFORD.

This was a proceeding, brought under section 1590 of the Revisal, to sell certain lands in Hertford County devised under item 6 of the codicil thereto of the will of R. D. Bridger.

The appellants claim that under the will of Josiah Bridger the first tract of land devised in item 6 of the will of R. D. Bridger was devised by said Josiah Bridger to his son, Carter Bridger; that Carter Bridger died intestate and left three children: R. D. Bridger, Martha Rebecca (Moore), and Charlotte Ann (Matthews); that Martha Rebecca Moore (*née* Bridger) was the mother of appellants; that she died 16 May, 1893, in the State of Illinois, having removed from North Carolina when a child about 13 years
(132) of age. The depositions of Mrs. Gaddis and Mrs. Phelps, both daughters of Mrs. Moore, were taken and offered in evidence. Both of these witnesses testify that their mother was Martha Rebecca Moore; that she told them her father was Carter Bridger; that she was born in Hertford County, and that R. D. Bridger was her brother, and she had a sister, Charlotte Ann, who married ..... Matthews.

His Honor sustained the objection of plaintiffs to certain questions and answers in the deposition, and charged the jury to answer the issue submitted "No." That issue was as follows: "Have the heirs of Rebecca Moore any interest in the land described in the complaint in this cause?"

The defendants excepted to the rulings of his Honor on the question of evidence, and also to his instruction to the jury.

Josiah Bridger, who was the father of Carter Bridger and the grandfather of R. D. Bridger, died about 1831, leaving a will in which he devised a tract of land as follows:

Item 5. "I give and bequeath to my son Carter one feather bed and furniture and one hundred acres of land, more or less, known by the name of the Old Place, adjoining John Jones and Colonel Wynns."

Item 10. "If my son Carter in like manner should die without heir lawfully begotten of his body, I wish the land before given to my said son Carter to descend to my two sons, William and James, share and share alike."

Carter Bridger died about 1838, leaving R. D. Bridger as one of his heirs at law, the appellants also claiming to be heirs at law of Carter Bridger and Josiah Bridger.

R. D. Bridger died about 1905, leaving a will in which he devised the land in controversy to the children of Sarah Jane Futrell, the land being described in said devise as "the tract of land on which their mother lived at her death and came by my father."

The appellants offered no evidence identifying the land described in the sixth item of the will of R. D. Bridger as the same land described in the fifth item of the will of Josiah Bridger, other than that contained in the devises themselves.

There was a verdict and judgment in favor of the plaintiff, and the petitioners claiming to be heirs of Martha Rebecca Moore excepted and appealed.

Winborne & Winborne for plaintiffs.
R. C. Bridger and Manning & Kitchin for defendants.

ALLEN, J. The exceptions to the exclusion of certain parts of the depositions offered by the appellants are not discussed in the brief, and are therefore deemed abandoned. This leaves two questions for decision under the peremptory instruction of (133) his Honor:

(1) Did the appellants offer evidence tending to prove that they are the heirs at law of Josiah Bridger and of Carter Bridger?

(2) Is there evidence that the land described in the devise in the will of R. D. Bridger is the same land that was devised by Josiah Bridger to his son Carter?

If there was evidence of these two facts, then there was error in the instruction of his Honor directing the jury to answer the issue "No"; and if there is a failure of proof as to both, the appellants have shown no interest in the land in controversy.

Upon the first question, the depositions offered in evidence by the appellants furnished evidence of the relationship, and if accepted by the jury, would justify a finding that the appellants are heirs. We do not think, however, that there is any evidence identifying the land in the will of R. D. Bridger as the same land devised by Josiah Bridger to his son Carter, father of R. D. Bridger.

The appellants rely upon the expression in the will of R. D. Bridger, "and came by my father." If the expression had been

"came by my father by inheritance," or "came by my father, being the land devised to him by Josiah Bridger," there might have been evidence of identification; but the fact that he received the land from his father in the absence of other proof, and taken in connection with the fact that R. D. Bridger does not undertake to devise his interest in the land, but the land itself, furnishes no evidence upon the disputed questions. In other words, if the appellants are heirs, and it is the same land and Carter Bridger died intestate without having executed a conveyance for the land, then they would be entitled to one-third of the land, and R. D. Bridger would have been the owner of a one-third interest. On the other hand, if the land is the same, and Carter Bridger executed a conveyance to R. D. Bridger, he would have been entitled to the whole; and when R. D. Bridger devises the land and not his interest therein, it is equivalent to a declaration on his part that he owns the entire land, and not an interest therein; and when he describes it "as the land that came by my father," it means, in the absence of explanation, that he was entitled to the whole of the land from his father.

Again, the land devised in the sixth item of the will of R. D. Bridger may have passed to the testator from his father, Carter Bridger, without being the same land devised by Josiah Bridger to Carter. It may have been acquired by Carter by purchase or by inheritance from some other person, and not under the devise of Josiah. We are more inclined to adopt this conclusion, rather than permit land titles to rest upon mere speculation, as the
(134) records were open to appellants and they could have easily shown how R. D. Bridger acquired title.

As said in *Byrd v. Express Co.*, 139 N.C. 273, and approved in *Finch v. Michael,* 167 N.C. 325, "There must be legal evidence of the fact in issue, and not merely such as raises a suspicion or conjecture in regard to it. The plaintiff must do more than show the possible liability of the defendant for the injury."

We therefore conclude there was no error in the instruction given to the jury.

No error.

J. B. RUFFIN v. J. R. GARRETT AND C. C. HOGGARD.

(Filed 26 September, 1917.)

Public Roads—Township Commissioners—Negligence—Personal Liability —Pleadings—Demurrer.

Personal liability will not attach to supervisors of the public roads of a township for an injury received from their failure to keep the roads in proper repair, etc., in the absence of allegations and proof that the acts complained of were either corrupt or malicious; and a demurrer to a complaint in such action which fails to make these necessary allegations is good.

CIVIL action tried before *Allen, J.*, at Spring Term, 1917, of HERTFORD.

Demurrer to the complaint was made *ore tenus* upon the ground that no cause of action is stated, and was sustained and action dismissed. Plaintiff appealed.

W. R. Johnson and R. C. Bridger for plaintiff.
Winborne & Winborne for defendants.

BROWN, J. The complaint alleges that defendants are supervisors of the public roads in Ahoskie Township, Hertford County; that it was their duty to keep in proper repair and in a reasonably safe condition the roads and bridges of said township; that defendants negligently failed to do so; that in consequence of such negligence plaintiff's automobile was badly damaged in crossing an unsafe bridge in bad condition.

The ground of the demurrer is that the complaint fails to allege that the negligence of defendants was either corrupt or malicious. The demurrer was properly sustained.

This subject is fully discussed and the authorities reviewed by Justice Hoke in the recent case of *Hipp v. Ferrall*, 91 S.E. 831, and further discussion is unnecessary.

Affirmed.

Cited: Spruill v. Davenport, 178 N.C. 366; *Wilkins v. Burton*, 220 N.C. 15.

(135)

A. M. SHRAGO v. L. D. GULLEY.

(Filed 26 September, 1917.)

1. Deeds and Conveyances — Surface Lines — Overhanging Buildings — Ouster—Remedy.

A call in a conveyance of a city lot to "a point on a line of the northern edge of" a brick store, the other lines called for being upon the surface of the ground, is to a point on the surface of the ground; and where the walls of the building appreciably incline upward over the lot conveyed, in this case four inches at the top, so as to prevent the use of the lot for an intended building, the encroachment amounts to an ouster, giving the owner a right of action.

2. Same—Demurrer—Ascertainment of Facts.

The specific rights in this case of the owner whose land has been encroached upon by an appreciably overhanging wall of an adjoining brick building, on appeal from a judgment sustaining a demurrer to the complaint, will await the determination of the facts in the lower court.

3. Pleadings—Relief—Facts Alleged.

Under our system of pleadings, the relief demanded in the complaint does not necessarily control the remedy, but it will be ascertained and granted upon the facts alleged and proved.

APPEAL by plaintiff from *Cox, J.*, at May Term, 1917, of WAYNE.

D. H. Bland and J. L. Barham for plaintiff.
Dickinson & Land for defendant.

CLARK, C.J. The court sustained a demurrer *ore tenus* to the complaint for that it did not set out a cause of action. The defendant conveyed to the plaintiff a certain lot in Goldsboro, described in the deed as follows: *"Beginning at the northeastern corner of the brick store* owned by L. D. Gulley on John Street, between Walnut and Mulberry, in the city of Goldsboro, and running thence with said John Street about 36½ feet to the line of the lot owned by Neuse Lodge, No. 6, of the Independent Order of Odd Fellows; thence westerly with said line 209 feet to a stake; thence southerly and parallel with John Street about 36½ feet to *a point on a line with the northern edge of the said brick store* owned by the said L. D. Gulley; thence easterly a straight line 209 feet to the beginning on John Street."

This lot is in the heart of the business district of Goldsboro, and is valuable for business purposes. The complaint alleges that the defendant knew the purpose for which the plaintiff purchased the lot, and that it was necessary for him to use every available inch in

width. Plaintiff further alleges that when he started to erect his three-story building, at a cost of $20,000 (of which he had arranged to borrow $10,000), he discovered that the northern wall of defendant's brick store (the southern boundary of this lot) (136) was not a perpendicular wall, but leaned over on his lot about four inches at the top; that had he known this fact he would not have purchased the lot of the defendant, and that he has been prevented thereby from erecting the building for which he had plans prepared.

In 1 R.C.L., pp. 377-380, in speaking of "Encroachments," it is said: "No person has any right to erect buildings or other structures on his own land so that any part thereof, however small, will extend beyond his boundaries, either above or below the surface, and thus encroach on the adjoining premises; yet the erection of a house so as to overhang the adjoining land will not give the owner of the land encroached on the legal title to the part so overhanging. It would be a violation of his right for which the law would afford an adequate remedy, but would not give him an ownership or right to the possession thereof." He adds, however, that such encroachment is not an ouster of possession which by the lapse of time would bar the remedy of the owner of the land overhung by an adjoining wall. It depends upon circumstances, whether the owner of the property encroached upon is entitled to a removal of the encroachment or an ejectment or damages or an injunction. But in any event he has a cause of action. There are numerous cases in the notes. In this action against his grantor, the grantee asks for removal of the encroachment and for damages.

In 1 Corp. Juris. 1207, the same subject of "Encroachments" is very fully treated, with copious citation of authorities. It is there said, "The maintenance of an encroachment is a continuing trespass or nuisance," and the different phases call for appropriate remedy; what would be a suitable remedy on one state of facts would not be so in another. The subject is also treated 3 Devlin Deeds, sec. 1522. There are cases in which the Court held that the overhanging of one's premises by the wall of an adjacent proprietor one-fourth or one-half an inch would not be deemed a cause of action. But in this case the allegation is that the wall overhangs four inches, which would certainly be a material injury to the plaintiff, which must be taken as true upon a demurrer.

In *Sherman v. Williams,* 113 Mass. 481; *S. c.,* 18 Am. Reports, it was held that the proprietor of a building owns to a line marked by a plummet dropped from the eaves of the house when the house is the boundary called for. In the present case there are no eaves, and the simple question is, What is the remedy of the plaintiff

where the wall of the defendant's building leans four inches out of plumb over upon plaintiff's land? At the surface of the ground the defendant's wall is the line called for by the deed, but the wall is not perpendicular.

This is undoubtedly an "encroachment" for which the plaintiff has a cause of action. Cases of this kind are not very usual, in this State at least, and it might be interesting to discuss the rem-
(137) edies applicable to the different states of circumstances, whether the remedy is by the recovery of damages or removal of the nuisance or by injunction, or otherwise; but such matters will arise upon the ascertainment of the facts upon issues before a jury.

Whatever modification in the law that one owns his land perpendicularly *usque ad coelum* may be forced by the use of the air by flying machines, it will not affect this case. The calls in the deed are evidently the line on the surface of the ground, and the call to "a point on a line with the northern edge of the said brick store owned by the said L. D. Gulley" is a point on the surface of the ground, and the further call, "then easterly a straight line 209 feet to the beginning on John Street," is for a line marked on the ground. It does not contemplate any derogation of the principle that the purchaser takes from such line perpendicularly in the air and in the ground. If the facts are as alleged in the complaint, the plaintiff can recover damages on the warranty in his deed, or it may be he can have rescission and return of the purchase money.

The plaintiff is not restricted under our system to the relief demanded in his complaint, but is entitled to any relief which the facts alleged and proven entitle him to receive. Pell's Revisal 467 (3), and cases there cited; *Bradburn v. Roberts,* 148 N.C. 214; *Baber v. Hanie,* 163 N.C. 588. The judgment sustaining in the demurrer is

Reversed.

Cited: Jones v. R. R., 193 N.C. 595; *Mortgage Co. v. Long,* 205 N.C. 535; *Lamb v. Staples,* 234 N.C. 168.

GILIKIN & EDWARDS v. NORFOLK SOUTHERN RAILROAD COMPANY AND NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY.

(Filed 26 September, 1917.)

1. **Carriers of Goods—Damages—Notice—Connecting Lines—Commerce.**

Sufficient notice of damages to the initial carrier of an interstate shipment of goods is sufficient notice to the connecting carrier in the line of carriage.

2. **Appeal and Error—Pleadings—Amendments—Court's Discretion.**

It is discretionary with the trial court, in an action for damages to a shipment of goods by interstate carriage, to permit an amendment alleging that written notice had been given within the four months.

3. **Carriers of Goods—Connecting Lines—Negligence—Commerce.**

Under the Carmack Amendment, a connecting carrier in an interstate shipment is liable for damages for its negligence therein, and may be sued alone at plaintiff's option; and while the initial carrier may also be held liable, a direction of the court exculpating the latter from damages does not necessarily relieve the former from liability.

4. **Carriers of Goods — Negligence — "Act of God"—Trials—Evidence—Questions for Jury.**

Where the evidence is conflicting as to whether damage was caused to a shipment of perishable goods by the negligent delay of a connecting carrier, or by a storm, "an act of God," or whether the shipment would otherwise have reached its destination in time to have avoided the injury, the issue is properly left to the determination of the jury.

APPEAL by New York and Norfolk Railroad Company from *Stacy, J.*, at March Term, 1917, of CARTERET. (138)

D. L. Ward for plaintiffs.

Moore & Dunn and George R. Allen for defendant N. Y., P. and N. R. R. Co.

CLARK, C.J. This is an action for damages for delay in two shipments of Irish potatoes and other vegetables from Beaufort, N. C., to New York. It is admitted in the pleadings that the Norfolk Southern Railroad delivered said shipments on schedule time to the New York, Philadelphia and Norfolk Railroad Company, but there was a delay of about two days at Port Norfolk after delivery to the other defendant, which alleged and offered evidence that this was due to a storm of great and unusual violence. The produce was delayed and did not reach New York till two days over schedule time, when the potatoes had suffered injury and the other vegetables were a total loss. The evidence of reasonable time from Beaufort to New York was five days, the defendants' schedule time for

through freight. The notice to the initial carrier was sufficient notice of the claim under the statute. *Aydlett v. R. R.*, 172 N.C. 47. The court permitted an amendment to the complaint to allege that written notice was served on 16 June, 1915, being within the four months. This was a matter in the discretion of the court. The consignee sold the potatoes at a loss and sent proceeds to the plaintiff, less commission, and refused the other vegetables because they had become worthless by delay in delivery.

The question whether the delay was caused by circumstances beyond the control of the defendants, usually styled "act of God," or was caused by the negligence of the carrier, was submitted to the jury, who found for the plaintiffs. The evidence was uncontradicted that the goods were delivered on schedule time by the Norfolk Southern to the other defendant. The court thereupon directed the jury to return a verdict exculpating the Norfolk Southern. Neither the plaintiffs nor the other defendant excepted to this. It is true that under the "Carmack Amendment" the plaintiff might have held the Norfolk Southern, but the plaintiff does not except. The other defendant could be sued at option of the plaintiff. *Aydlett v. R. R., supra.*

There was evidence that both shipments could have been
(139) delivered in time but for the negligent delay of the N. Y., P. & N. R. R. Company. It offered evidence to the contrary, and especially insisted that the evidence showed that if the second shipment had been received in New York in regular course, it would have gotten there on Saturday and the Fruit and Producers' Association would not have unloaded it. There was evidence for the plaintiff that if these goods had been delivered on regular schedule time they would have gotten there on Friday at least, and could have been unloaded, and that the first shipment had been delayed two days at Port Norfolk at the identical time that other barges went on to Cape Charles en route to make connections by rail for New York.

This phase of the case was entirely an issue of fact, and the jury, under careful and proper instructions from the court, have found for the plaintiff as to both shipments.

No error.

Cited: Paper Box Co. v. R. R., 177 N.C. 352.

W. R. DIXON v. DISTRICT GRAND LODGE OF ODD FELLOWS ET AL.

(Filed 26 September, 1917.)

1. Principal and Agent—Evidence—Fraternal Orders—Scope of Agency —Fences.

The defendant, a fraternal order, owned a farm enclosed with the same fence as that of plaintiff, without a division fence, which had remained so for a number of years. The farm of defendant was managed by a board of nonresident trustees, except one, who acted as managing agent thereof. *Held*, evidence of an agreement made by the defendant's managing agent that defendant was to maintain the fences around its part of the property and plaintiff was to do likewise as to the fence on his own land is competent to bind the defendant thereto, the same being within the ostensible scope of the authority of defendant's agent, without the necessity of a specific resolution to that effect passed by the defendant fraternal order.

2. Contracts—Fences—Stray Cattle—Crops—Measure of Damages—Duty to Decrease.

Where the plaintiff and defendant have entered into an agreement to surround their adjoining farms with one fence, without a divisional one, each to keep up the fence on his own land, and the plaintiff's crop has been damaged by stray hogs and cattle coming through defendant's part of the fence left in negligent condition, the measure of damages is the reasonable value of the crops destroyed; and the principle has no application that it is the duty of one sustaining damages through the negligent act of another to do what he reasonably can do to decrease them, or, in this instance, go upon defendant's land and repair the fence.

APPEAL by defendants from *Stacy, J.*, at April Term, 1917, of CRAVEN. (140)

D. L. Ward for plaintiff.
Owen H. Guion for defendants.

CLARK, C.J. The plaintiff and defendants owned adjoining tracts of land. The jury find the facts in accordance with plaintiff's evidence, as follows: By agreement between them, which had been in force for several years, there was to be no division fence, but the defendants were to keep up the outside fence on their side and the plaintiff was to do the same on his side, so that the two tracts of land were under a ring fence. Indeed, before the plaintiff and the defendants went into possession, the whole farm was enclosed by one fence, and the plaintiff and defendants, to save expense, agreed that no dividing fence should be built.

The plaintiff kept up his part of the fence, but the defendants neglected to keep up the outside fence on their side, and let it go down for a long distance, whereby they permitted cattle and hogs to get into plaintiff's field and destroy his crop.

Exceptions 1, 2, 3, and 4 as to the evidence of the contract cannot be sustained. The farm was managed by a board of trustees who were nonresident, except one (Lawrence), who had charge of the farm. He was general agent and acting in the apparent scope of his business. Besides, the agreement had existed since 1912 and the board of managers were presumably fixed with knowledge of the arrangement by reason of the fact that there was no division fence. The letter written by Lawrence giving instructions as to the fence was on the paper of the Grand Lodge, of which Lawrence was a high official. He admits his signature to be genuine, and is corroborated by the testimony of the plaintiff that Lawrence had authority to act, and in fact did act, as general agent in charge of the property. It could hardly be expected that an agreement of this kind should be made by a resolution of the Grand Lodge. It was a matter of adjustment between its agent in charge of the farm and the plaintiff as a neighbor.

The motion to nonsuit was properly denied. The court properly charged that the damages, if the jury found that damages were sustained by the negligence of the defendants, were the reasonable value of the crops destroyed. *Hawk v. Lumber Co.*, 149 N.C. 10. The defendants insist that the measure of damages should have been the cost of repairing the fence and such damages to the crop as accrued before the plaintiff had knowledge of the condition of the fence. But the fence that was out of repair was on the defend-

ants' outside line and the plaintiff could not cross the defend-
(141) ants' line to make such repairs without being a trespasser.

The plaintiff's fence was in good condition according to the contract.

The rule which requires a party injured by the wrongful act of another to do what he reasonably can to decrease the damages cannot be extended to a case like this. The plaintiff was not required to go upon defendants' land and put up defendants' fence for a mile or more to keep out the cattle. This would have been protecting the defendants' land at the plaintiff's expense. If the plaintiff's fence around his own crop had been thrown down by cattle, then the proposition that he was entitled against their owner only to the damage sustained on that occasion, and the cost of repairing his fence, would be reasonable. He should not let his fence stay down merely to enhance his damages. But here it is not the plaintiff's fence that was down, nor on the plaintiff's land, but the defendants' fence on their own land. The two cases are not analogous.

The other exceptions require no discussion.

No error.

(142)

COMMISSIONERS OF JOHNSTON COUNTY v. B. S. LACY, STATE TREASURER.

(Filed 26 September, 1917.)

1. Constitutional Law—Statutes—Roads and Highways—Bonds—Counties—Townships—State Aid.

Chapter 6, Laws of 1917, is designed to enable the State to lend its aid to road building and maintenance in counties, townships, and road districts, applying therefor in accordance with the terms of the act, the State to issue its 4 per cent bonds upon receiving a bond from the county at 5 per cent interest, intending to take care of the State's bond with interest in a designated period of years; and provides that the county bond may be put in suit to recover any deficiency, with penalty attached, section 19 establishing a limit on the amount the county may borrow; section 11 requiring the bond to obligate the county for its payment; section 20 extending its terms so as to include townships and road districts, requiring bond to be executed by the county commissioners, wherein the township and road district is situate, making it their duty to levy and the sheriff to collect the special tax: *Held*, the bond contemplated to be given to the State is that of the county and not that of the township or road district.

2. Same—Taxation Without Benefit—Equal Protection—Faith and Credit.

Section 20 of chapter 6 of the Laws of 1917, extending the provisions of the act to townships and road districts, requiring that the bond of the county be given the State upon which the latter is to issue its forty-one year 4 per cent bonds and turn over the proceeds under the scheme set forth to the township, etc., to the establishment and maintenance of the public roads of the particular township, etc., is one entirely within the township government as to the control and expenditure of the fund, without reference either to State or county benefit, and is unconstitutional as the taxing of other districts, etc., within the county, without their consent, for the exclusive benefit of one of them, and is in derogation of Article I, section 17, forbidding that any person be disseized of his freehold liberties and privileges, or in any manner deprived of his property, etc., "but by the law of the land," and of Article VII, section 7, prohibiting a municipality to contract a debt or pledge its credits, except for a necessary expense thereof unless with the approval of its qualified voters.

3. Same—"Necessaries"—Benefit.

While the building of public roads has been held a necessary expense within the meaning of Article VII, section 7 of our Constitution, the application of the principle may not be extended to instances where a statute requires the county to issue its bonds for road purposes to obtain aid for a township or local taxing district therein, upon the approval of the voters of the particular district alone, and without benefit to the others.

4. Roads and Highways—Statutes—Counties—Townships—Bonds—State Aid—Adequate Security.

Section 20, chapter 6, Laws of 1917, cannot be construed so as to require the county commissioners, as agents for the township, to give the

township bond to the State upon which the latter shall issue its 4 per cent bond to aid the township in the construction, etc., of its public roads, for apart from the express language, the statute contemplates more adequate security than a township bond would afford, the size and boundaries of the townships being under the statutory control of the commissioners and subject to be changed by them. Rev., sec. 1318, subsec. 7.

5. Constitutional Law—Statutes—Interpretation.

The principle that when two constructions of a statute are permissible, the courts, in favor of upholding legislation, should adopt that which is in accordance with the organic law, does not apply when such would force a departure from the plain and natural significance of the words employed in the statute, and which the meaning and purpose of the law clearly tend to confirm and support.

6. Same—Test.

The test of the constitutionality of a statute is whether the statute authorizes an unconstitutional act, and not whether the act in a particular instance would be done with a beneficial effect.

7. Constitutional Law — Unconstitutional in Part — Courts—Appeal and Error.

Where a portion of a legislative act is alone presented on appeal and found to be unconstitutional, the Court may not properly consider the effect thereof upon other portions of the act, as to the constitutionality of such other portions, when not necessary to the decision.

WALKER, J., concurring in the result; CLARK, C.J., dissenting.

CIVIL action heard on case agreed before his Honor, *W. A. Devin, J.*, at June Term, 1917, of WAKE.

From the facts as presented, it appears that O'Neal Town-
(143) ship in Johnston County, having decided by popular vote to apply to the State for a loan of $40,000 to establish and maintain a system of public roads in said township, pursuant to the provisions of chapter 6, Laws 1917, entitled "An act to encourage road building in North Carolina by State aid," and the result having been duly certified to the Board of Commissioners of said county, that body passed a resolution to levy a special tax in said township at the approaching August meeting in 1917 to meet the obligations imposed by the statute, duly applied for said loan and prepared and tendered to defendant, the State Treasurer, the bond of the county in the sum of $40,000, promising to repay said loan and interest thereon at 5 per cent for forty-one years, payable semiannually, and to be computed at said rate on each installment of said loan from the date same should be advanced. Said bond contained provision, also, "that in default of prompt payment of said interest as it accrues, the said county of Johnston promises to pay the penalties prescribed by section 12, said chapter 6, and to ob-

serve and be bound by other provisions of the act." Accompanying the offer of the bond was a request from the Board of Commissioners that the Treasurer presently advance on said loan an installment of $15,000, etc. The same facts are applicable in case of Selma Township in said county, except the amount voted and total loan applied for was $50,000.

The defendant, the State Treasurer, declined to accept the bond and advance the money, contending:

"1. That the act was invalid.

"2. That the bond tendered was not in proper form.

"3. That the proposed tax levy was invalid," etc.

The court being of opinion with the plaintiff, so entered its judgment and directed that the State Treasurer pay the commissioners the amounts asked for in accordance with the provisions of the law.

Defendant thereupon excepted and appealed.

F. H. Brooks for plaintiff.

Attorney-General and Assistant Attorney-General R. H. Sykes for defendant.

HOKE, J. Chapter 6, Laws 1917, is a statute designed to enable the State to lend its aid to road building and maintenance in the counties, townships and road districts properly applying therefor under its provisions. In general terms, the scheme and purpose is that the State shall procure the money by issuing its coupon bonds, payable forty-one years from date, bearing interest at 4 per cent, and advance the money so obtained to localities applying for the same on receiving the bond of the respective counties promising to pay interest on the amount loaned at 5 per cent for said period of forty-one years, this 1 per cent difference in the (144) amount of interest to constitute a road fund to be invested by the State Treasurer, the purpose and estimate being that, if continuously and favorably invested for that period, there should be realized an amount sufficient to relieve both the State, counties and townships from ultimate liability. The loans are to be advanced by the State Treasurer in amounts as required, not to exceed the sum of $400,000 semiannually; and this is to continue for the period of forty-one years, involving, if carried out to its full intent and meaning, the incurring of a State indebtedness approximating $32,000,000. Provision is also made that if at any time there is any default in payment of the 5 per cent interest, as stipulated, the bond shall be put in suit for the amounts due and penalties attached; and if at

the end of forty-one years the Treasurer has not been enabled to realize the full amount then due according to the scheme of loans and investment, the respective counties shall make good the deficit in proportion to the amount of the proceeds which such counties may have received.

After thus providing for obtaining the money in case of counties, the statute (in section 19) establishes a limit on the amount a county may borrow, the same not to exceed, in connection with other county indebtedness, 6 per cent of the assessed valuation of the property in the county; and in section 20 it is enacted as follows:

"Townships and road districts created by special act of the General Assembly may avail themselves of the benefits of this act upon compliance with the requirements herein set out: *Provided,* that the bond or undertaking filed with the State Treasurer shall be executed by the board or boards of county commissioners of the county or counties in which such township or road district is situated. It shall be the duty of such commissioners to levy and the duty of the sheriff to collect such special taxes and make payment thereof in the manner and under the penalty set out in section eighteen of this act."

The application for a loan in this case, being in behalf of two of the townships of Johnston County, comes more directly within the meaning of this section 20; and considering the same in reference to the terms employed and the other provisions of the statute and the general meaning and purpose of the law, it is clear, we think, that, whether the loan be applied for by county, township, or road district, the bond that is tendered shall be that of the county. No other than a county bond is anywhere mentioned in the statute, and in section 11 the statute itself says "said bond shall obligate said county to pay to the State Treasurer the 5 per cent interest per annum on the amount thus loaned," and when the provisions of the statute were extended to townships and road districts and the provision formally required that the "bond tendered should be
(145) executed by the Board of County Commissioners," it plainly meant the bond that had been previously referred to and which the Board of County Commissioners would naturally give—the bond of their county. This is evidently the interpretation put upon it by the advocates of the measure as well as the actors in the present suit, for in this transaction (said to be brought as a test case), though the election and application are by two of its townships, the bonds are obligations of Johnston County. To hold otherwise would not only be a departure from the plain meaning of the language used, but would leave the proviso without substantial sig-

nificance. And there is too controlling reason for such a requirement. A perusal of the statute will disclose that, while the bonds of the State are to be positive obligations so far as the creditor or holder is concerned, it was clearly contemplated that the State should be ultimately reimbursed for its outlay, and to this end proper security should be furnished. A county bond in all probability would do this, whereas the bond of a township or road district, without regard to its size or ability to pay and on which no limit in its indebtedness had been placed by the statute, except that it could only have its proportionate part in case the aggregate amount applied for should exceed semiannual loan of $400,000, might and often would fall far short of affording adequate security. It was for this reason no doubt that the proviso was inserted, and both its language and the facts and circumstances show that the framers of the statute intended that in all cases a county bond should be required. This being the correct and, to our minds, the only permissible construction of this section 20, we are of opinion that the Legislature is without power to require a county to give its binding obligation to pay the interest on a loan at 5 per cent for forty-one years on the application and vote of a township or road district for the construction and maintenance of the roads of the township or district.

On the facts here presented, an obligation of this kind imports a liability to taxation, and in case of a subordinate municipal corporation, it means that payment can be coerced, and that all the taxable values therein may be made available on the claim. As said in *People v. Township Salem,* 20 Mich. 452: "The exercise by a municipal corporation of the power to pledge its credit is an incipient step in the exercise of the power of taxation, and unless the object to be promoted be such as may be provided for by taxation, the power to make the pledge does not exist, and the Legislature cannot confer it." And a decision in this Court at the last term in *Bennett v. Commissioners of Rockingham* is in full recognition of the principle. True, both the levy and apportionment of taxation is very largely in the legislative discretion, and, when the power exists, it is very rarely if ever that courts are allowed to interfere. It is true, also, that a State or county may, as a rule, lend its (146) aid or expend its money in the building and maintenance of public roads anywhere within its borders when it is being done for the public benefit or as a part of a State or county system, but in this instance the improvement is entirely localized. The roads of the differing townships or districts are set apart and a scheme is entered upon by which they can be planned, constructed, and improved entirely under township governance and without reference

either to State or county benefit; and when this occurs, the principle is presented that it is not within the legislative power to tax one community or local taxing district for the exclusive benefit of another—a principle which has been directly approved in several recent decisions of this Court and is one very generally accepted. *Keith v. Lockhart,* 171 N.C. 451; *Faison v. Comrs.,* 171 N.C. 411; *Harper v. Comrs.,* 133 N.C. 106; *Commissioners Prince George v. Commissioners Laurel,* 70 Md. 443; *Lumber Co. v. Township of Springfield,* 92 Mich. 277; *People of Salem, supra,* citing *Lexington v. McQuillan's Heirs,* 39 Ky. 513; Cooley on Taxation (3d Ed.) 420; Judson on Taxation, sec. 254; 37 Cyc. 749.

In the citation to Cooley on Taxation, speaking to the question, the author says: "The taxing district through which the tax is to be apportioned must be the district which is to be benefited by its collection and expenditure. The district for the apportionment of the State tax is the State, for a county tax the county, and so on. Subordinate districts may be created for convenience, but the principle is general, and in all subordinate districts the rule must be the same."

In 37 Cyc., *supra,* the principle is stated as follows: "The constitutional requirement of uniformity of taxation forbids the imposition of a tax on one municipality or part of the State for the purpose of benefiting or raising money for another."

It is a fundamental principle in the law of taxation that taxes may only be levied for public purposes and for the benefit of the public on whom they are imposed, and to lay these burdens upon one district for benefits appertaining solely to another is in clear violation of established principles of right and contrary to the express provisions of our Constitution, Art. I, sec. 17, which forbids that any person shall be disseized of his freehold liberties and privileges or in any manner deprived of his life, liberty or property but by the law of the land."

On the facts presented by this record, the position is further emphasized and conclusively determined in this jurisdiction by reason of another constitutional provision, Article VII, section 7, which provides that no county, city, town or other municipal corporation shall contract a 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 ma-
(147) jority of the qualified voters therein." True, we have held in several well-considered decisions, that debts incurred and moneys expended for the building and maintenance of public roads are a necessary expense within the meaning of this section, but neither the decisions nor the principle on which they rest will sanc-

tion or approve the position that the road system of a township or road district under its local control and constituted for its special benefit is a necessary county expense, or that a vote of such township or district made for such purpose can establish a county obligation importing liability to taxation on the entire county and to which the voters of the county have not given their consent and are nowhere permitted and required to give it. On the contrary, it appears from a bare perusal of the relevant facts that such a localized road system can in no sense be considered a necessary county expense, and a statute, or that portion of it certainly which undertakes to establish a county liability for its construction and upkeep is in clear violation of this wholesome constitutional provision and must be declared invalid.

Recognizing the conclusive force of this position, it is contended for the applicants that the objectionable proviso in section 20 shall be so construed as to require only the execution of the township bond, and that the county commissioners, for the purpose, shall be held to act only as the representatives or agents of the townships and road districts for which the loan is made, and we are referred to various decisions of the Court where the commissioners have so acted, among others, *Edwards v. Comrs.*, 170 N.C. 448; *McCracken v. R. R.*, 168 N.C. 62; *Jones v. Comrs.*, 107 N.C. 248.

To give the statute such an interpretation, as we have endeavored to show, would be contrary to the natural import of the language and to add to the proviso in question words that it does not now contain, and, on the reason of the thing, we deem it well to note again that it is clear from a perusal of the entire statute that the State is to be ultimately reimbursed for this outlay, and to that end adequate security is to be furnished for the loans. A county whose boundaries are known and tax-paying ability recognized and established would very likely do this, whereas a township bond where size and boundaries are now entirely under control of the commissioners (Revisal, chap. 23, sec. 1318, sub sec. 7) might, and no doubt frequently would, prove totally insufficient.

In view of these conditions, the only protection the State could prudently rely on was to require, as it has done, that, for township and district loans, a county bond shall be given, and the authorities cited tend rather to confirm than to antagonize this construction of the law, for in every one we have examined the statute construed, as plaintiffs contend, contained the provision in express terms that, in giving the bond, it should be the "obligation of the township," or that "the commissioners should act only as agents (148) of the township," terms that do not appear in the statute before us.

The principle is further urged upon our attention that, when two constructions of a statute are permissible, the Courts in favor of upholding legislation should adopt that which is in accord with the organic law; but such principle does not justify a departure from the plain and natural significance of the words employed and which the meaning and purpose of the law clearly tend to confirm and support. As said in 6 Ruling Case Law, sec. 77: "There are, however, limitations to the application of these principles, and Courts are not at liberty, in order to sustain a statute, to give it a forced construction which does not appear in the language enacted by the Legislature."

We are not inadvertent to the fact that thus far a tax only on the township applying for the loan is contemplated by the county commissioners, but, as we have seen, the bond to be given fixes an obligation on the county for the entire sum, and the statute provides that if there be default in paying the 5 per cent interest for thirty days the entire amount due and all penalties shall "at once become due and payable" and enforced by action. And, as we have said in former decisions: "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 benevolent manner, for when a statute is being squared to the 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 validity."

Applying these principles, and for the reasons stated, we are of opinion that section 20 of this statute is unconstitutional and void, and that the application for these present loans, which are entirely dependent upon it, were properly refused by the State Treasurer.

What effect the invalidity of this section may have upon the remaining provisions of the statute, and whether the general principles which forbid that, on the facts of this record, the cost for building and upkeep of a local road system for a township or road district be fixed upon a county will operate to prevent a State from incurring a large bonded indebtedness in aid of road building in the different counties are questions of gravest import which we do not now determine. They are not presented in the record and we do not consider it proper to decide them by anticipation. Speaking to this course, the Supreme Court of the United States in *Baker v. Grice,* 169 U.S. 284, says: "It is a matter of common occurrence—indeed, it is almost the undeviating rule of the Courts, both State and Federal—not to decide constitutional questions until the necessity for such decision arises in the record before the Court. This Court has followed this practice from the foundation of the Govern-

ment." And in *Wellman v. R. R.*, 143 U.S. 339: "Such an (149) exercise of the power is the ultimate and supreme function of Courts. It is legitimate only in the last resort and as a necessity in the determination of real earnest and vital controversy between individuals." And in *Liverpool, etc., Steamship Co. v. Commissioners Em.*, 113 U.S. 33: "It (the Court) has no jurisdiction to pronounce any statute, either of State or of the United States, void because irreconcilable with the Constitution, except as it is called on to adjudge the legal rights of litigants in actual controversies." In accord with these precedents and in full recognition of their fitness, we purposely refrain from determining the questions suggested, and confine our decision to the controversy actually presented in the record and dependent, as stated, on the validity of section 20 of the statute.

The suggestion that the State extends its aid in offering educational advantages to the people throughout its territory, and that it is at times made effective in certain designated localities, to our minds, is not apposite to the question decided in this appeal and not helpful to its proper solution. That is recognized and dealt with as a State-wide system under the control of general State officers, made imperative by special constitutional provision; and while aid is at times extended to certain localities where need is pressing, and through the agency of local officials, they are acting, as stated, in promotion of the general system and are in fact and truth performing official duties to that end.

There is error, and this will be certified to the court below that the action be dismissed.

Reversed.

WALKER, J., concurring in result: I cannot agree that section 20, chapter 6, of the Public Laws of 1917, requires that where the people of a township or road district vote in favor of a loan for road construction and maintenance that the bond shall be issued and tendered by the county as its independent obligation, and that it thereby becomes liable to the State thereon and must look to the township or road district which applied for the loan for reimbursement in case of any loss by it. It appears to me to have been intended that the bond should be issued by the county in behalf of the township or road district to be benefited, as has been done in similar cases mentioned in the dissenting opinion of the Chief Justice, and others might be added to them. This is the usual and customary method adopted in such cases and the method held by the majority to be that which was contemplated by the Legislature is not the usual one, but I believe the solitary instances in which

the county has been made to assume solely and independently the obligation of a township or road district where the entire benefit would accrue to the latter. It is contrary to the spirit, if not (150) the letter, of our Constitution, and also is in violation of every principle of justice and equity, that one should reap the whole benefit and another be made to pay for it. The statute should be very clear, therefore, before we adopt such a construction of it and bring about such a result. I agree with the majority that such a law would be unconstitutional and invalid, and we should follow the rule of interpretation that even where the language is of doubtful meaning, we may call, in aid of a proper construction, the fact that the statute will be void if a certain meaning is given to it, while it will be valid if it receives another construction. Of course, we cannot force a construction for the purpose of sustaining its validity by avoiding any conflict of its provisions with those of the Constitution, but in this case I do not think we are driven to any such necessity, as the language of the statute will well warrant the construction that the obligation of the county will extend no further than the assumption of the debt or liability of the township, for and in its behalf only, and not as a separate obligation of its own. But if the bond to be issued, where a township or district applies for the loan, is that of the beneficiary alone, and not of the county, which acts merely as an agent in its behalf, it seems to me that even in such a case the bond may be void upon grounds not necessary to be now stated, nor until so grave and serious a question is directly and squarely presented and necessary to be decided. I do not say that a statute cannot be so framed as to avoid the constitutional difficulty, but I will decline to express an opinion upon the subject until a concrete case is presented which requires me to do so. It is sufficient for the present to say, that as the majority are of the opinion, and have so decided, that the bond to be issued and exchanged for a State bond of like amount, at a lower rate of interest, is that of the county, and as that decision must stand until it is changed, and must be taken as correct unless reversed, my view is that, in this aspect of the case, the statute, at least so far as it affects this particular suit, is invalid, being in direct conflict with the Constitution.

It is a principle which has been deeply rooted in our jurisprudence that no man's property shall be taken from him and devoted to private purposes or uses except upon fair and just compensation. The great opinion of Chief Justice Ruffin, in *Raleigh and Gaston R. R. Co. v. Davis,* 19 N.C. 451, established this proposition long ago beyond any question, and it never has been doubted since, but frequently affirmed in so many, perhaps, as a hundred

cases. We have recently said, in *Lloyd v. Venable,* 168 N.C., at p. 535, citing *S. v. Hanie,* 169 N.C. 277: "The right to a just compensation for property taken by the sovereign or by any corporation possessing a part of the sovereign power, springs from our sense of natural justice," and "is a principle so salutary to the citizen and concerns so nearly the character of the State" that this (151) Court, in *R. R. v. Davis,* 19 N.C., at p. 460, declared it to be "an essential restriction upon the exercise of the power of eminent domain, even though no express provision may be found in our Constitution authorizing it, or requiring it to be made, when property is so taken for a public purpose; and we have adhered to this rule ever since." And Chief Justice Ruffin said in *R. R. v. Davis, supra,* at pp. 455 and 456: "The right of the public to private property, to the extent that the use of it is needful and advantageous to the public, must, we think, be universally acknowledged. Writers upon the laws of nature and nations treat it as a right inherent in society. . . . When the use is in truth a public one, when it is of a nature calculated to promote the general welfare or is necessary to the common convenience, and the public is in fact to have the enjoyment of the property or of an easement in it, it cannot be denied that the power to have things before appropriate to individuals again dedicated to the service of the State is a power useful and necessary to every body politic. Theoretical writers have derived it from the original and full property, in its highest sense, existing in the community or sovereignty of the State before any division among individuals, and they deem the right of resumption for common use to be tacitly reserved by implied agreement. Thus derived, the power has the sanction of compact, which probably furnishes the motive for tracing it to this source as constituting a sanction founded in morals and nature. But practically, it is immaterial whether the right be supposed to have been impliedly reserved because it ought not to be granted, or because it is a portion of the national sovereignty which is inalienable by the Government, or whether the right is created by the public necessity, which at the time calls for its exercise; its existence in every State is indispensable and incontestible." He then gives different examples of the exercise of this power, in this way: "A familiar instance of the exercise of the power is the levying of revenue, by taking from the citizen, from time to time, such portions of his property as may be requisite to conduct the government instituted by the nation. Another instance essentially of the same character is that of devoting private property to public use as a highway. A nation could not exist without these powers, and they involve, also, the welfare of each citizen individually. An associated people cannot be con-

ceived without avenues of intercommunication, and, therefore, the public must have the right to make them without or against the consent of individuals." He then further argues in favor of compensation as an inherent or a sacred right to be implied from several provisions of our Constitution, as follows: "The principle is, however, so salutary to the citizen and concerns so nearly the character of the State that it may well be urged that it must be
(152) consecrated by its adoption in some part of the free Constitution of this State. We should be reluctant to pronounce judicially our inability to find it in that instrument. If it be not incorporated therein, the omission must be attributed to the belief of the founders of the Government that the Legislature would never perpetuate so flagrant an act of gross oppression, or that it would not be tolerated by the people, but be redressed by the next representatives chosen."

The clause of the Constitution that "no freeman shall be disseized of his freehold or deprived of his life, liberty, or property but by the law of the land" seems to have impressed him with the belief that it was intended in general terms, is is true, to protect the citizen from the taking of his property, either directly, by the exercise of the power of eminent domain, or indirectly, by the exercise of the power of taxation, without just compensation, for he also says that the "clause in question is restrictive of the right of the public to the use of private property and impliedly forbids it, without compensation," though not so obviously as other considerations.

"Under the guaranty of this article, it had been held, and in our opinion properly held, that private property is protected from the arbitrary power of transferring it from one person to another" is another clear and emphatic declaration in favor of the citizen and the enjoyment of his property without fear of having to surrender it, or any part of it, and receiving no just equivalent for the loss he thereby sustains. I could not cite a stronger or more conclusive authority to show that it is a well-recognized principle in our jurisprudence that no citizen can be made to give up what he has for another's exclusive benefit, and not even for the most important public purposes, without receiving a just compensation for it. But the question has been absolutely and forever settled by more recent decisions of this Court. *Harper v. Comrs.*, 133 N.C. 106; *Faison v. Comrs.*, 171 N.C. 411; *Keith v. Lockhart*, 171 N.C. 451; and the cases in the other jurisdictions, and the textwriters, support this position very strongly and almost, if not quite, unanimously.

The *Harper* case is sufficiently illustrative of the rule, and has been affirmed in numerous cases. There it is said, quoting two of the headnotes which accurately report the principle: "2. The Pub-

lic Laws of 1903, chap. 554, if regarded as an act authorizing the imposition of special assessments, is invalid because it authorizes assessments on the real estate of the entire county, including the real estate of the township withdrawn from the benefits of the stock law and which would receive no benefits from the fences erected by the commissioners. 4. The Code, sec. 2824, providing that for the purpose of building stock-law fences the county commissioners may levy a special assessment on all taxable real estate 'within the county, township, or district which may (153) adopt the stock law,' does not authorize the imposition of an assessment on the real estate of a township withdrawn from the benefit of the stock law by express legislative enactment for the purpose of raising money to replace the money withdrawn from the general fund to pay the expenses of fences erected by the commissioners."

This righteous principle has been approved by every authority known of, because it is the one that contains the essence of honesty and fairness and the very germ of the moral law, and especially that of the Golden Rule. If we adopt any other principle it would lead to intolerable wrong and gross oppression. All the Judges now on this bench concurred in this principle of justice, as stated in that case, the Chief Justice and the writer of this opinion in the case itself and all that it decided, and the other members of the Court in subsequent cases by citing that decision and approving it without a dissenting or doubting word.

I believe in a strict adherence to those principles which are, or should be, the basis of all laws, without exception, whether they come to us from the body of the common law or the statutes enacted to adjust that great system of jurisprudence to present condition, or to supplement it by such new provisions as will round it out so that it may be adapted to modern requirements. Any man having a just conception of the rights of his neighbor, using that word in its broadest sense, must accept this doctrine as applicable to any phase of human life, for our laws are founded upon the Decalogue; not that every case can be exactly decided according to what is there enjoined, but we can never safely depart from this short but great declaration of *moral* principles without founding the law upon the sand, instead of upon the eternal rock of justice and equity. Do not exact from your neighbor what you would most unwillingly give up to him. It is, therefore, manifestly right that our law should have declared that nothing shall be taken from the citizen, whether in the form of seizure directly for public uses or indirectly by way of taxation, unless he is fairly paid for it, and that is the reason why every man is so deeply jealous of his property rights, for he

rebels against an act of injustice. It is an innate principle and easily finds its expression in every constitution and generally in every statute where any invasion of the citizen's property is attempted. The Legislature never attempts, except in rare instances, to take from him that for which it does not pay, or for which it does not provide for payment. It cannot resist the united voice of man in a cry for justice and fair play.

So I say that the Legislature had no power to declare that the people of the county of Johnston, in this case, should be made to pay for that for which they do not receive, and cannot receive, any benefit. A contrary doctrine would lead to the gravest wrong
(154) and imposition and would put a weapon in the hands of the Legislature by which to crush and even destroy the citizen. We know that the Legislature would not consciously or advisedly use it, but that is not the question, which is one of conceding the existence of the power itself. Our system of government was built upon no such foundation. It was intended to stand forever (and we all confidently hope it will), and not to fall by its own iniquities and the weight of its own wrongs against the people. It is just because I firmly believe, and have a confident hope, in the perpetuity of our institutions that I give expression to these views, so essential to make that belief and that hope assured facts.

Referring once again to the authorities, my clear belief is that the very recent decision of this Court (*Faison v. Comrs.*, 171 N.C. 411; S.E. Rep. 481), which was approved by all of us, is decisive of this case. It presented the very question we have here to consider, and none of us *then* doubted, but all *unreservedly* agreed, that taxation of the many for the *sole* benefit of the few was not only unjust, but unconstitutional, and wholly in conflict with our sense of fairness and right. This has been the constant and unchanging view of this Court whenever the question has been presented to us for decision, and I hope it always will be, for whenever we reverse this wholesome doctrine it will open the gates to a flood of intolerably harsh legislation. The constitutional principle of uniformity, as all the authorities say, forbids the taxation of the many for the sole benefit of the few, or the taxation of the few for the sole benefit of the many. In whatever form this odious system appears, it is wrong, unjust and burdensome, and opposed to every just principle of law and of the Constitution. It must cease, or we can never redeem the promise which, by our compact, we adopted with the sanction of the people; they were assured that this shall be a government founded upon the right, and not one of injustice and oppression. Freedom and security of the weak against the strong and mighty can never exist under any other principle of government.

It appears to me that there is absolutely no analogy between the aid of this State to one township and that to its great *public* highways, such as the North Carolina Railroad, the Wilmington and Weldon Railroad, and the other great arteries of commerce within our borders extending across our entire domain and permeating nearly every section by their lateral branches. These are surely and essentially public highways of the first class, beneficial to the general public, and the very foundation of our hopes for the enlargement and development of our industries of all kinds. They affect the general public in a very material way, and their beneficial effect in promoting the general convenience and welfare and in contributing to the general prosperity cannot reasonably be doubted. It was on this ground that the subscription of the State to (155) their stock was upheld by this Court. But here we have the whole county paying for the construction of a neighborhood road within the confines of a single township and saddling its obligations to pay for this local benefit upon the other sections of the county which derive no benefit from it.

I would not utter one single word against road building in this State. Nothing contributes to the convenience, comfort, and prosperity of the people more than good roads, and if I entertained any doubt as to the validity of any statute providing for them it would quickly be resolved in their favor. In many respects they are of greater benefit to the State and her people than even railroads are, but we must not surrender a great principle of right and justice to a single cause, however deserving it may be, lest the concession once yielded and established may be recorded as a precedent, and thereby many evils may creep into the State. Better to do right all the time and tread upon the beaten way. It is safe and sound doctrine and has averted many misfortunes to those who would pursue the other course. A precedent, as Disraeli once so wisely said, embalms a principle, the product of wisdom and experience, and we do well when we follow it, at least so long as it is right. We must pursue this sane policy even against attack from every side, for it must be remembered that sometimes it is much easier to be critical than to be correct. *Jones v. Comrs.*, 137 N.C. 579, has no application to this case. There the Legislature merely required the county to pay its own legitimate debt. The other cases relied on by plaintiffs are no more in point.

My conclusion is, that if it was intended by this statute that the county should issue its own bond for the debt, the proper obligation of the township, which this Court now decides to be the case, the Legislature had no power under the Constitution to require it of the county, and that in this respect the legislation is void and of no

effect. What the Legislature may do within its rightful power and how far it may go without exceeding it are questions not now before us. I believe that my conclusion is sustained not only by the cases decided by this Court which I have cited, but also by many decisions in other jurisdictions and the text-writers, which it is not necessary to collate, as our own cases are quite sufficient as authorities.

There is more difficulty in dealing with the larger question involved in the defense—that the entire statute is invalid—and I forbear to discuss it, as I cannot foreshadow in what particular form it will be presented, if it ever comes before us, nor upon what special facts. It is much too big a question to be anticipated by me alone, and as the majority have deemed it wise to pretermit any reference to it, I will follow their example and also be silent, (156) though I am not sure that in a certain phase of the case we would not be justified in giving expression to our opinion in regard to it; but, as I have said, it is better perhaps to wait until we are required to decide it before doing so, owing to its great importance and the far-reaching consequences of such a decision one way or another. This induces me to withhold my opinion.

We all will hail with gladness the day when a great system of highways will penetrate every section of the State, reaching to every city, town and hamlet, or easily accessible therefrom, producing a larger measure of social and commercial intercourse among our people, and thereby bringing them into closer communion, with a better and ever-increasing understanding of each other and of their common interests, resulting at last in a united endeavor to coördinate their efforts in behalf of the general welfare and prosperity, so that every citizen may ultimately and fully enjoy the blessings of our free institutions under our Constitution and laws. This will all come to us, we hope, some time, and we should strive without ceasing to hasten the day of its coming. But we should not begin this great work of internal improvement except in accordance with the Constitution and the sanction of the law. It may be that this act in other respects has such a sanction, and if not, the voters will soon have, if they see fit to take advantage of it, an opportunity to declare their supreme will concerning it.

CLARK, C.J., dissenting: The public policy of the State is vested in the discretion of the Legislature, except when the law-making body is expressly restricted by some provision of the State or Federal Constitution.

The public policy of the State as regards education and public

roads is a matter of the closest interest to the public, for upon their development depends the progress and the prosperity of our people.

Up to within less than one hundred years, the public policy of our State left education solely in the hands of the parents, with the result that the great body of the people were uneducated, and the State suffered accordingly. When the system of public schools was inaugurated there was strong opposition by those who claimed that such system was Socialistic and compelled the well-to-do to pay for the education of the children of the poor. This argument, now antiquated and entirely discredited, was effective for many decades in halting the system within the narrowest possible limits. It is only in the last few years, and after a systematic education of public sentiment by broad progressive leaders, that a more adequate system of public education has set the State on the high road of progress.

Under our system of public roads, copied from the English common law, they were worked by the conscription of (157) labor, hence mostly by the landless, who had no wheels to roll over the roads, while those whose lands were benefited by the roads were largely exempt from working them, either by being residents of the towns or very often above the conscript age. This system, known as *corvees* in France, was one of the potent causes of the great Revolution in that country. It was not only a thoroughly unjust system, but a most ineffective one, for the laborers feeling the injustice of being forced to work roads in which they had no personal interest, the roads in England and France and in this country were a clog upon travel and transportation. The "Mud Tax" was largely in excess of any benefit accruing to landowners and the property interests from their nonpayment of taxes for road building. *S. v. Covington,* 125 N.C. 644.

When public sentiment was awakened to the injustice and inefficiency of this system, gradually we began to authorize counties and townships to work their roads by taxation, or partly by taxation, as they saw fit, and this was held to be a matter entirely for the Legislature. *S. v. Sharp,* 125 N.C. 631-635.

The State has aided also in the building of a State Highway, and received some assistance in this measure from the United States Government, the intention being to build such highway from Beaufort to Ducktown, with lateral branches to be built gradually by the State, counties, or townships.

It being seen at once that this system would take a long time for development, there was finally proposed for public consideration this measure by which the most remote counties and most remote townships, even the poorest and those which have always re-

ceived less benefit from State aid in any way, should have the same opportunity to construct efficient highways as the counties and townships near the large towns and in the wealthier sections. This measure, which was adopted as chapter 6 by the Legislature of 1917, has been for many years thoroughly discussed and considered by the people of the entire State, and has recommended itself by its affording equal opportunities to every section of the State, however remote. This bill, after thorough discussion before the people, was presented to the Legislature of 1911, passed in the House by an overwhelming vote, but was defeated by a small majority in the Senate. After the fullest discussion for another two years and a thorough debate in the Legislature in 1913 it passed the House by a unanimous vote and was again defeated in the Senate by a very narrow margin. It was again fully discussed for four years before the people, and in the General Assembly of 1917 it passed the House with only two dissenting votes and the Senate with only one dissent.

A measure of such wide public interest, setting forth a
(158) State policy of prime importance to every section, having thus been discussed for years, having three times received an almost unanimous vote in the House and defeated by close margins twice in the Senate, and having been passed at the last session with only one dissent in that body, must be taken as expressing the will of a self-governing people and the almost unanimous opinion of the law-making department of the government that its enactment was within their constitutional powers. It should not, therefore, be set aside unless its unconstitutionality is clear "beyond all reasonable doubt," as the U. S. Supreme Court held is essential before the Court can assume to hold any act unconstitutional. *Ogden v. Sanders,* 12 Wheaton 213, and hundreds of other cases cited in 6 R.C.L. in notes to sections 81-86 and 98-116.

In *Atkin v. Kansas,* 191 U.S. 223, it is said (Harlan, J.): "The public interests imperatively demand that legislative enactments should be recognized and enforced by the Courts as embodying the will of the people, unless they are *plainly and palpably, beyond all question,* in violation of the fundamental law of the Constitution." It can hardly be said that a measure which has been so long discussed, and which has received the approval of the people of this State, evinced by the votes of their representatives for three sessions of the General Assembly, and which is deemed constitutional by a minority of this Court, is unconstitutional "beyond question" and "beyond a reasonable doubt." In fact, there is no line to be found in our Constitution which authorizes the Court to hold an act of the Legislature unconstitutional any more than there is any au-

thority in the Legislature to hold a decision of the Court unconstitutional. Neither department has supremacy over the other. The intention of the Constitution was that the Legislature should obey the Constitution; and if it did not, the authority to review its action is not given to the Courts, but rests with the people in the election of a new Legislature. In a majority of the States they have made this more expedious by the adoption of the initiative and referendum, which requires, upon a proper petition, any statute to be submitted to the people immediately for approval or disapproval.

A measure of such wide and general importance is entitled to be considered before it is condemned. It does not appropriate, as has been suggested, $32,000,000. It is true that the plan provided for issuing State bonds at 4 per cent and receiving in exchange from each county receiving a loan from the State for itself, or its townships, a bond bearing 5 per cent interest is based on the calculation that the difference of 1 per cent properly handled will pay off the whole indebtedness at the end of forty-one years without costing the State or counties anything on the principal. But this does not require that the act shall be in force forty-one years or shall cease after that date. It provides that "not more than $400,- (159) 000 shall be issued each six months." The next Legislature, or any succeeding Legislature, can repeal the act, leaving outstanding only the bonds that have been issued up to that date; and the act does not necessarily stop at the end of forty-one years, but can continue indefinitely if it proves satisfactory to the people of the State. It proposes to create a State-wide system of modern public roads without costing the State a cent and costing the counties 5 per cent interest and no principal to repay.

The county issues no bonds to go on the market, but merely gives to the State its certificate of indebtedness for the amount loaned to the county for itself, or for one or more of its townships, if the people have so voted for building good roads, and the county is to collect from the whole county, if the county has voted for the loan, or from the township or townships which have voted from such loans from the State, 5 per cent on the loan annually and pay this over to the State, exactly according to the same plan by which for years the State has loaned money to the township or other local boards to build schoolhouses, for which loan the county has collected out of the township or locality and remitted the money to the State Board of Education.

The passage of this bill has been petitioned for by Farmers' Unions, Chambers of Commerce, Good Roads Associations and many others, for years. If it operates as its friends, and the Legislature contemplate, the people will be benefited by the immediate

spending therein of the money loaned to the counties and townships. The dwellers in the rural districts will be relieved from the bad roads which are now the heaviest incubus upon agriculture in the State. The farmers will be relieved of the isolation which is the greatest drawback to rural life. The State will achieve a State-wide system of modern public roads extending, without exception, to every township and county as they successively adopt the measure; the townships and counties will have the good roads they desire, in a short time, by the payment of 5 per cent annual interest on the money borrowed for forty-one years, a moderate rental for the roads; and at the end of that time there will be no principal to pay either by the State, county or township, as the investment of the differences between the 5 per cent paid by the counties and townships and the 4 per cent paid by the State on its bonds will, in a sinking fund, amount to enough to pay off the State bonds, which will then return to the counties their bonds to be canceled.

The Secretary of State has already issued license to 50,000 automobiles in the State. With the successful operation of this bill the number will soon be doubled, and besides, motors will be used by farmers, instead of wagons, to carry their farm products to the towns or the nearest railroad station. It is a safe calculation (160) that if this carefully considered action of the General Assembly is not set aside by this Court the increase in farm values and in farm products will in each township or county adopting this system far overpay the 5 per cent annual interest, which is all that they will be called upon to pay.

The same system has been successfully operated by Great Britain to remove the age-long grievance in Ireland of great feudal estates and absentee landlordism. Being able to sell her bonds bearing 2 per cent interest, England thus raised a large sum with which it bought up the vast landed estates in Ireland, which it took over by purchase or condemnation, and cutting them up into small holdings, sold them to the former tenants at the same price per acre, adding a sum in money to each to furnish the farm, taking from the tenants their notes bearing 5 per cent interest. The difference between the 2 per cent and the 5 per cent in the course of a few years at compound interest paid off the purchase money for the lands and the money loaned, and the Government canceled the notes, giving the tenants fee-simple deeds, and all this not costing the taxpayers a penny and costing the tenants less than the rent would have been. The proposition here adopted by our Legislature proposes to abolish the age-long grievance of bad roads and isolation without costing the State a dollar and at an expense to the counties and townships of 5 per cent interest on the cost for forty-one years. The bonds for

the principal, both those given by the State and those given by the counties, are then to be canceled out of the sinking fund.

We already have a statute by which the State loans out of the Treasury annually a certain sum of money, aggregating now over $600,000, at the rate of 5 per cent interest, for the purpose of building schoolhouses. These loans are made on long time, with annual installments, and have assisted in building hundreds of schoolhouses in North Carolina, and the State has never lost a dollar in its numerous transactions with the local school boards. The county boards of education sign a bond in the name of the county to whose local or township board the money is loaned, and the indebtedness thus becomes a county responsibility in precisely the same manner that is proposed in regard to loans to townships for good roads in this bill.

This "Road Law" now before the Court applies to good roads exactly the same proposition. The State proposes, in effect, to lend for the benefit of any township or county that will vote to tax itself for the purpose of building roads, thereby evincing their progressiveness and public spirit, certain sums of money, receiving therefor bonds (just as from local school boards) bearing 5 per cent interest, but not to exceed in the aggregate $400,000 each six months, and the State is to raise the sum thus loaned by the sale of its own 4 per cent bonds. This latter is a detail which does not concern the counties and townships voting to build the roads. (161) As to them, it is simply a loan of money by the State (just as to the local school board), and the State will raise the money by the sale of its bonds, which it has a right to do, for the statute was passed for a necessary purpose, with three readings in each house with the yeas and nays recorded on the Journal, as required by Const., Art. II, sec. 14. The Constitution, Art. V, sec. 4, authorizes this appropriation since the State bonds have been at par. The State does not, by this act, "give or lend the credit of the State in aid of any person, association or corporation."

The counties and townships are simply agencies of the State government. The Legislature can create, change, or abolish counties at will. It has abolished fourteen counties, and it abolished two others which it subsequently recreated, and has increased the number of counties to one hundred. It created the townships in 1868, and since then, under a general statute, has authorized the county commissioners to make others; and the Legislature also has created several townships, so that at present there are 1,055 townships in the State. Therefore, in putting money in the hands of the counties and townships to build roads, the State is merely putting its money in the hands of its own agents.

In *Atkins v. Kansas,* 191 U.S. 220, it is said: "Such corporations are the creatures, mere political subdivisions, of this State for the purpose of exercising a part of its powers . . . They are in every essential sense only auxiliaries of the State for the purposes of local government. They may be created or, having been created, their powers may be restricted or enlarged, or altogether withdrawn, at the will of the Legislature," citing many cases; among others, quoting from *Williams v. Eggleston,* 170 U.S. 310, as follows: "A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the State for conducting the affairs of government; and, as such, it is subject to the control of the Legislature." The Court further said, quoting from *Clinton v. R. R.,* 24 Iowa 475, with approval: "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the Legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control." The Court added that the Legislature could, if it saw fit, abolish any and all of the municipal corporations of the State in one act, saying: "We know of no limitation on this right, so far as the coprorations themselves are concerned. They are, so to phrase it, the mere tenants at will of the Legislature. The Legislature, therefore, when it advances money for a township to build public roads at the request of the people of the township, as evinced by a vote of its people (which is not necessary to its validity, *Kinston v. Trust Co.,* 169 N.C. 207, for it is a necessary expense. (162) *Hargrave v. Comrs.,* 168 N.C. 626) can place the money in the hands of the county to be used for such township, requiring the county, as one of its agents, to execute a certificate of indebtedness for the amount loaned to its sub-agent (the township) by the State, and require the county through its officers to collect the tax annually from such township to pay the 5 per cent to the State. This process of loaning the money to the township or other local board and requiring the county to give its note to the State for such sum and to collect and transmit the taxes from the township or locality has been in force since 1903, and has been approved by this Court, Brown, J., in *Casey v. Dare,* 168 N.C. 285.

It has long been the policy of the State to give its aid to any local betterment which it has seen fit. It has never been doubted that the Legislature could create, at the cost of the entire State, a local public road, or a canal, of benefit to a restricted area, or a railroad whose benefits were more or less local, or establish any other local enterprise for the public benefit, in its judgment. Long ago the State thus authorized and aided the Clubfoot and Harlowe Canal—of almost purely local benefit, the Hyde County Canal, the Dismal

Swamp Canal; also constructed the Quaker Road in Jones County, the Pender County Highway, the Hickory Nut Gap Road and other local public roads. It has also built at the State's expense, in part, the railroad from Weldon to Wilmington, passing through six counties (now eight), of small interest to the remainder of the one hundred counties of the State, which has become, however, of more general importance by reason of the subsequent connections. It also largely built the Raleigh and Gaston Railroad, passing through five counties; the Wilmington, Charlotte and Rutherfordton Railroad; the North Carolina Railroad; the Western; the Western North Carolina Railroad, and several others. All these enterprises were more or less of local benefit and of almost infinitesimal benefit to large sections in other parts of the State.

These canals, public roads, and railroads were built by virtue of the sovereignty of the State and were paid for in cash out of the State Treasury, the money being raised by taxation or by the sale of State bonds, as the Legislature deemed best. It has never been doubted that the State could build a highway in any one of our hundred counties, or in any one of the 1,055 townships, and pay for it out of the State Treasury. Whether the money in the Treasury was raised by taxation or by the sale of State bonds, whether it was donated, or a loan, or an investment by the State, rested with the General Assembly. Frequently the State has issued its own bonds and received in exchange the bonds of the company or of the city or county contributing to build the road. This was done in building the Raleigh and Augusta Railroad, the Taylorsville Railroad (sometimes known as the "June-bug" Railroad) and other (163) railroads and turnpikes. All these matters were in the judgment of the self-governing people of this State, as expressed by the action of the law-making body—our General Assembly.

The road law now before the Court is a carefully devised measure to give every township and every county that is willing to vote a tax upon itself the same benefit that every school district has obtained by voting an additional tax; but inasmuch as for building roads a larger sum is needed in the first instance, with only a small annual appropriation for interest, and the credit of the townships and counties might not be sufficient to float their bonds at par at a low rate of interest, the State offers to loan the money for the amount each township or county votes at 5 per cent, and proposes to raise the money for that purpose by selling its own bonds at 4 per cent, with the calculation that the 1 per cent difference in interest, properly invested for forty-one years, will result in returning the entire sum thus loaned to the State Treasury, the State in the meantime being benefited by the construction of a

State-wide system of public roads in every township and in every county in the State. To avoid a scramble as to what townships and counties shall be first benefited, it is left to them to make the move, and thus select themselves. The result will be that the most progressive and wide-awake townships and counties, those who most feel the need of the good roads system, will be the first to profit by this beneficent movement. It will not be left, as in the past, for those communities which have the most influence in the Legislature to obtain priority in the State aid thus afforded. Successively each county and township will come in, in the order they themselves create, making a completed State-wide road system.

It is suggested that, not denying that the measure is valid and without passing upon that question which is of vast importance to the State at large and of the deepest interest to the public welfare, the Court (leaving that question undecided) can hold against those claiming aid in these two cases upon the ground that these plaintiffs, in both cases, are claiming under a township election, and that the Legislature could not authorize a county to give its bond to the State for a road improvement in a township.

Section 20 of the act before us provides: "Townships and road districts created by special act of the General Assembly may avail themselves of the benefits of this act *upon compliance with the requirements herewith set out: Provided,* that the bond or undertaking filed with the State Treasurer shall be executed by the board or boards of county commissioners of the county or counties in which such township or road district is situated. It shall be the duty of such commissioners to levy and the duty of the sheriff to collect *such special taxes* and make payment thereof *in the manner* (164) and under the penalty set out in section 18 of this act." It is apparent that under this section it was intended that the counties in which these townships lay were to give their bonds as agents for the township, as has been done in very many instances where townships have voted appropriations for railroads or other public or *quasi*-public purposes, as in *Jones v. Comrs.,* 107 N.C. 248 (Person County); *McCracken v. R. R.,* 168 N.C. 62 (Alamance), and in numerous other cases.

The last lines of this section prescribe, after providing that "the bond or undertaking filed with the State Treasurer shall be executed by the board or boards of county commissioners of the county or counties in which such township or road district is situated" (evidently including cases in which a road district might lie in two or more counties), adds: "It shall be the duty of such commissioners to levy and the duty of the sheriff to collect *such special taxes* and make payment thereof in the manner and under the penalty set

out in section 18 of this act." This places beyond question the intention of the Legislature that the county commissioners are to collect the taxes out of the township or road district to remit to the State Treasury, and that where the road district is in two or more counties the commissioners of each county shall collect from that part of the district in their respective counties. As it is provided that no county, township, or road district shall receive a loan amounting to more than 6 per cent of the assessed value of the property when added to the other bonded indebtedness thereof, there is no danger of the county not collecting 5 per cent annually on that amount from any township or road district.

An exactly analogous provision has long been in force as to building stock-law fences (Rev. 1685), which provides that the county commissioners may levy a special assessment on all taxable real estate "within the county, township, or district which may adopt the stock law." This act has been often held constitutional and that it does not violate the provision as to uniformity, and "Does not authorize the imposition of an assessment on real estate outside of the district." *Harper v. Comrs.*, 133 N.C. 110.

It would seem clear that the language of section 20 of this act contemplates that the certificate of indebtedness given by the county commissioners for money loaned by the State to build roads in a township or road district is to be signed by the commissioners as agents for such township or road district, from which it is expressly provided that they shall collect such taxes and remit to the State Treasurer. However, a matter of this importance should not go off on such a technicality. Taking it that the act requires the county commissioners to sign the certificate and make the entire county responsible, as there is the further provision that the county commissioners shall collect such taxes from the township or (165) road district, as in the case of the stock law for townships or districts, there is nothing inequitable. But even if the county commissioners did not exercise such power, there is nothing in the Constitution which forbids the Legislature to require the county certificate of indebtedness, since the county commissioners have it in their power to collect from the localities. *Edwards v. Comrs.*, 170 N.C. 448, by Hoke, J. The county of its own motion can appropriate money to build roads in any one township in the county at its discretion. *Patterson v. Comrs.* (Brown, J.), 170 N.C. 503; *Edwards v. Comrs., supra.* A township whose roads are thus worked by the county can be required to levy a tax for the same, even without a vote, as roads are a public necessity. If so, when the State loans money to be used for building roads in a township, there is no reason the State shall not look to the county, if the Legislature so

orders, to reimburse the State, as the county can collect the taxes from the township to reimburse itself. Both county and township are agencies of the State government, and this is not a matter forbidden by the Constitution, but purely a method of administration expressed through the Legislature by the people of the State. A case exactly in point is *Moss v. Tazewell County,* 112 Va. 878.

If the United States Government can, as it does, make appropriations out of the funds of the whole Union to make an improvement in a river, a creek, or a harbor; or the State can, as it does, appropriate from the Treasury out of the money of the whole State to build a local public road or a canal for a district or township, certainly the Legislature can require a county (if it had so chosen) to become responsible for a loan to build a road in one of its townships, especially when section 20 prescribes that the amount to repay it shall be collected by the township officials out of the property of that township.

The system of counties issuing bonds to work the roads in their townships and collecting out of each township the interest and principal as they fall due has often been followed, and a State-wide act to that purport was enacted, Laws 1913, chap. 122, recognized and amended. Laws 1917, chap. 207. If the present act is unconstitutional, the act of 1913, chap. 122, and all the bonds issued under that and similar acts are rendered invalid, which will be a public calamity.

In the matter of loans by the State to aid in building schoolhouses, it is provided that such loans to any locality shall be evidenced by the note of the county board, and that the county board shall deduct the amount of the annual payment from the district or township receiving the loan. Rev. 4053-4056. This system has worked well for the last fourteen years, and its legality has never been questioned.

In *Jones v. Comrs.,* 137 N.C. 598 (Hoke, J.), the Court held that the Legislature could pass an act to require a county to issue bonds for indebtedness incurred for necessary expenses. (166) Roads are a necessary expense, and when a township has thus voted to incur indebtedness for that purpose, and the State has agreed to loan the money, there is no reason why the Legislature should not take the obligation of the county (if that is what section 20 of this act means), leaving the county to collect, through its own officers, the annual interest from the township, in the meantime executing its own bond to the State for the amount thus loaned to the county for the benefit of that township. This case (*Jones v. Comrs.,* 137 N.C. 598) reversed a former decision on rehearing, and was therefore fully considered.

In *Jones v. Comrs.*, 143 N.C. 60, it was held that where certain townships, by extra taxation, procured the building through their territory of a railroad, "the Legislature has the power to direct the county commissioners to expend exclusively in those townships the county taxes derived from such railroad property in such townships, and that there is no constitutional requirement that the tax rate shall be the same everywhere; it varies in the different counties, and may vary in different townships, parts of townships, districts, towns and cities in the same county, for they are all legislative creations, mere governmental agencies, subject to be changed, abolished or divided and controlled, at the will of the General Assembly, especially at the control of the Legislature since the amendment (section 14) to article VII."

The uniformity of taxation required by the Constitution means a uniform rate for the same object. It does not mean that there shall be the same rate of taxation throughout the State or throughout a county, or even throughout a township, for there are objects of taxation in some townships, districts, and counties for which tax is not laid in others. *Jones v. Comrs.*, 143 N.C. 60.

The will of the people has been fully gathered and clearly expressed in the passage of this act. It is a matter that closely affects the right of the people to govern themselves. It touches the interest of every section of the State. Heretofore, State appropriations for canals, for public roads and highways, and in the building of railroads have largely been procured in the interest of the influential and wealthier sections of the State. This act gives to the people of any township or county, however remote or poor it may be, the same opportunity to vote taxation upon themselves for the benefit of procuring public roads as is given to wealthier and more influential sections. It gives to the farmers and residents of remote townships and counties the same benefit of using the State credit in exchange for their own as is given to the larger counties and cities; it gives to the denizens of the mountain coves the same opportunity of obtaining good roads that is vouchsafed to the owners of rich river bottoms and of valuable suburban lands near the cities.
It is a case of "equal opportunity to all, without favor to (167) any."

The cases quoted that one community should not be made to pay the debt of another has no application. The township is a part of the county. Besides, the county of Johnston does not propose to pay the tax for building the roads in Selma Township. The Johnston County commissioners could take the county money for that purpose. They are judges of what roads shall be worked with the county money. *Supervisors v. Comrs.* (Pitt County), 169 N.C. 548.

The Legislature could, as it does, loan money to Johnston County (which is simply a State agency) to be used, in this instance, exclusively in building roads for Selma Township, if that township votes taxes to pay interest on the loan, and the General Assembly can require the county of Johnston, as such State agency, to execute its bond to the State for this money, since, through its county officers, Johnston County will collect the money out of the property of Selma Township. The county and the township are alike State agents, and if the Legislature sees fit to adopt this method, it is within the discretion of the law-making body.

The judge below (Devin) has properly, in my judgment, sustained, both in letter and spirit, the enactment by the General Assembly of this most just, beneficent, and progressive measure, which was adopted only after the fullest consideration by the people of the State and their representatives.

Cited: Comrs. v. Boring, 175 N.C. 107; *Mills v. Comrs.,* 175 N.C. 218; *Hill v. Lenoir Co.,* 176 N.C. 583; *Martin Co. v. Trust Co.,* 178 N.C. 32; *Parker v. Comrs.,* 178 N.C. 96; *Comrs. v. Trust Co.,* 178 N.C. 173; *Riddle v. Cumberland,* 180 N.C. 329; *Proctor v. Comrs.,* 181 N.C. 59; *Robinson v. Comrs.,* 181 N.C. 592; *Lacy v. Bank,* 183 N.C. 381; *Comrs. v. Comrs.,* 184 N.C. 467; *Jones v. Bd. of Ed.,* 185 N.C. 309; *Duffy v. Greensboro,* 186 N.C. 473; *Slayton v. Comrs.,* 186 N.C. 695; *Person v. Doughton,* 186 N.C. 725; *Chemical Co. v. Turner,* 190 N.C. 473; *Ellis v. Greene,* 191 N.C. 756; *Wood v. Braswell,* 192 N.C. 589; *Hinton v. State Treas.,* 193 N.C. 500; *Briggs v. Raleigh,* 195 N.C. 224; *Greene County v. R. R.,* 197 N.C. 423; *Reeves v. Buncombe County,* 204 N.C. 47; *John v. Allen,* 207 N.C. 521; *Thomason v. Harnett County,* 209 N.C. 667; *Fletcher v. Comrs. of Buncombe,* 218 N.C. 12; *Nash v. Tarboro,* 227 N.C. 285; *Cab Co. v. Charlotte,* 234 N.C. 576; *Wilson v. High Point,* 238 N.C. 20; *Greensboro v. Smith,* 241 N.C. 366; *Ins. Co. v. Johnson, Comr.,* 257 N.C. 373.

CORA HALL AND LILLIE SPELLMAN, BY HER NEXT FRIEND, *v.* JOSHUA FLEMING.

(Filed 3 October, 1917.)

1. Descents—Slaves—Statutes.

In order for a child of a deceased slave to inherit the real estate of his father under chapter 30, Rule 13 of Descendents of the Revisal, the paternity of the child must be shown, and that of the parents of the claimant, prior to January, 1868, lived together as man and wife and with exclusive association.

2. Same—Customs.

The inquiry as to whether slaves who have intermarried have continued to live together exclusively as man and wife, so as to transmit the inheritance of real property to their children as recognized by Rule 13 of Descent, Rev., sec. 1556, involves the consideration of the customs existing at the time, permitting, in certain instances, marriage with others, when one of the parties has been sold and moved to a distant locality; and upon evidence tending to show that a claimant to real property owned by the father has been born of the first marriage, and that so far as conditions and customs permitted, the slave and his wife continued to live together as man and wife, it is reversible error for the trial judge to nonsuit the plaintiff upon the ground that the parent had remarried prior to 1868 in accordance with the custom then existing.

3. Same—Paternity—Evidence.

When an inheritance is claimed by the son of a slave marriage prior to 1868, from the father, the declarations and conduct of the father, since deceased and made *ante litem motam*, are competent upon the question of paternity, if such facts tend naturally to establish the relationship as claimed.

SUIT for sale of land for partition, transferred to Civil Issue Docket and tried before his Honor, *M. H. Justice, J.,* (168) and a jury, at June Special Term, 1917, of PASQUOTANK.

It appeared that the property described in the petition belonged to Joshua Fleming, deceased, who was a slave before the termination of the Civil War. Plaintiff, Cora Hall, claimed that she was a daughter of Joshua Fleming, born to him before January 1, 1868, by an alleged wife, Judith Carey, and that she was entitled, as heir, to a portion of her deceased father's property, under Rule 13 of our Statute of Descents, Revisal, chap. 30. Defendant, Joshua Fleming, Jr., was one of eight children of said Joshua, Sr., by his wife, Elizabeth Norcum, all admitted to be heirs at law, and whose interests in the property were held by defendant, Joshua, Jr., except that of Lillie Blanch Spellman, an infant child of a deceased daughter, who sues by her next friend.

Plaintiff, Cora Hall, and this grandchild instituted these proceedings, alleging that they were tenants, in common with defend-

ant, of the land in question. Defendant, admitting that he was tenant in common with Lillie Spellman, the grandchild, denied that Cora Hall had any interest in the property.

On the trial, there was evidence on the part of plaintiff tending to show that Joshua Fleming, deceased, and Judith Carey were slaves before the war; that Joshua lived at Bolling Hall, owned by Colonel Bolling, and Judith at Judge Leak's, a few miles off; that they were married in the year 1854 and lived together as man and wife for two or more years, till Joshua was sold and moved to Edenton, N. C., and that while they lived together as man and wife, Cora, one of plaintiffs, was born; that they were married by a minister of the gospel; that Joshua Fleming called Cora his daughter, and Judith Carey was later married again in Virginia.

At the close of the testimony, on motion, there was judgment of nonsuit, and plaintiff, Cora Hall, excepted and appealed, assigning for error said order of nonsuit, and also the exclusion of certain evidence offered by plaintiff, his Honor's ruling thereon having been duly excepted to, as follows:

"Exception 1. Florence Bright, admitted to be one of
(169) the children by his wife, Elizabeth, was asked: 'Did you ever hear your father say anything about any other marriage?' She would have testified that she heard her father say that he was married before the war, in Virginia, to Judith Carey, and was living with her as his wife and had one child, Cora Hall; that he was a slave at the time and was sold and removed to North Carolina.

"Exception 2. 'Do you know anything about your father claiming Cora Hall as his daughter?' The plaintiff would have proved by the answer to this question that the witness heard her father say on more than one occasion that Cora Hall was his child by his first wife.

"Exception 3. 'When she came to visit you, how was she received by your father, Rev. J. A. Fleming?' The witness' answer to this would have been that Cora Hall visited Joshua A. Fleming in 1886 in Elizabeth City and at other times; that he treated her as his child, calling her daughter, and told his children that she was his daughter by his first wife.

"Exception 4. Primus Williams, a witness for the plaintiff, was asked: 'Did he (J. A. Fleming) claim her (Judith Carey) as his wife, exclusively?' He would have answered, 'Yes.'

"Exception 8. The plaintiff, Cora Hall, was asked: 'When he introduced those people to you and your mother, what did he say?' The plaintiff would have proved by the answer to this that he took

his son-in-law and several friends to the home of her mother and introduced them to her as his first wife.

"Exception 10. John Gregory, a witness for the plaintiff, was asked: 'Did you ever hear Joshua A. Fleming say what relation Cora Hall was to him?' Plaintiff would have proved by this witness that Joshua A. Fleming stated to him that Cora Hall was his daughter by his first wife."

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

HOKE, J. Our statute of Descents, Revisal, chap. 30; Rule 13, provides "That the children of colored parents, born at any time before the first day of January, 1868, of persons living together as man and wife, are hereby declared legitimate children of such parents, or of either one of them, with all the rights of heirs at law and next of kin with respect to the estate or estates of any such parents or either one of them," etc.

There was evidence admitted tending to bring the case of this claimant, Cora Hall, directly within the provisions of the statute, and, on the record, we are of opinion that the order of nonsuit should be set aside.

True, as contended by defendant, the Court has held in several decisions that, in order to the operation of the statute, the paternity of the child must be shown, and that the living together by the parties as man and wife must have been an exclusive (170) association. *Spaugh v. Hartman,* 150 N.C. 454; *Branch v. Walker,* 102 N.C. 35. But these decisions and the statute itself must be interpreted and construed in reference to the terms employed and the facts and conditions presented and which they were intended to regulate and control.

We know that, while persons in slavery were allowed to go through the forms of marriage and to live in that association, it was not regarded as a full and perfect marriage, but, under the system, was subject to the paramount rights of ownership; and when a slave who had so married was sold or removed by his owner to a distant locality, involving a physical separation, the parties were allowed to marry again, and it was usual and customary for them to do so. In holding, therefore, that this association must be exclusive, it was not at all intended that it should be enduring or in strict personal fidelity while it continued. *Croom v. Whitehead, post* 306. If it was exclusive during the period covered by the association, a child born during such association would come within the meaning and purpose of the law. We know, further, that not infrequently

the slaves of different owners were allowed to enter on these marriages, and when they did so, it was customary for the man to visit and associate with his wife at stated periods, and when this custom was followed, it should properly be considered "a living together as man and wife," as contemplated by the statute; and, as heretofore stated, there was testimony received tending to show that such a marriage took place between Joshua Fleming, deceased, and a former wife, Judith, mother of Cora Hall; that they lived together as husband and wife, and the claimant was born to them during such association; and if these facts are accepted by the jury, it would establish her right to inherit her portion of her father's property.

Again, it is the accepted principle that, in questions of pedigree and race ancestry, the declarations of deceased relatives made *ante litem motam* may be received in evidence, and that such testimony is not always restricted to the expressed declarations of the parties, either oral or written, but under certain circumstances, may be extended to include treatment and conduct of parties towards each other, where such facts are relevant and tend naturally to establish the relationship as claimed. *Ewell v. Ewell* ,163 N.C. 233; *Rollins v. Wicker,* 154 N.C. 559; *Walker v. Walker,* 151 N.C. 164; *Gilliland v. Board of Education,* 141 N.C. 482; *Moffitt v. Witherspoon,* 32 N.C. 185; Jones on Evidence (2d Ed.), sec. 312. Under these decisions, and the principle they uphold, we think the evidence offered should have been received, and, for the errors indicated, the judgment of nonsuit as to Cora Hall must be set aside and her cause referred to the decision of the jury.

Reversed.

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(171)

B. F. WALLACE v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 3 October, 1917.)

1. Carriers of Passengers—Intermediate Point—Leaving Train—Contract of Carriage—Negligence.

One who has purchased his ticket to his destination on a passenger train does not relieve the railroad of its duty to him as such passenger by getting off the train during its stop at an intermediate station, without notice to its employees or objection from them, to see some person there on business.

2. Carriers of Passengers—Evidence—Single Witness—Negligence—Declarations—Appeal and Error.

Where there is evidence of negligence on the part of a railroad company in injuring a passenger while boarding a train at its station, and his attending physician has testified in defendant's behalf as to statements he made to him as to how the injury occurred, which, if true, would exclude his recovery, an instruction that, should the jury find the facts to be as testified to by this witness, to answer the issue as to defendant's negligence, "No," is properly refused, as such would be the singling out the testimony of one witness from that of others, relating to the facts at issue, and referring to evidence not directly testified to by him; and especially so, when there is evidence that the plaintiff was then in such pain that he did not understand the meaning of his words.

3. Instructions — Negligence—Declarations—Verdict Directing—Trials—Contributory Negligence.

A prayer for instruction that the jury should answer the issue as to defendant's negligence in the negative if they found certain declarations made by plaintiff to be true, is improper, when the declarations are not inconsistent with plaintiff's evidence, which is sufficient to support an affirmative finding, and when the evidence referred to in the requested prayer properly relates to the issue as to contributory negligence.

4. Appeal and Error—Carriers of Passengers—Moving Train—Contributory Negligence—Instructions—Harmless Error.

An instruction given in this case, that if plaintiff attempted to board a moving train and received the injury complained of, he cannot recover, is not open to defendant's exception, or one of which he can complain, as boarding a moving train does not always amount to such contributory negligence as will bar a recovery.

CIVIL action, tried before *Daniels, J.*, at February Term, 1917, of BEAUFORT.

This is an action to recover damages for personal injury, caused, as the plaintiff alleges, by the negligence of the defendant, in that, while getting on the train at Pinetown as a passenger, the defendant negligently caused its train to move suddenly and with a violent jerk, which caused him to fall and to be seriously injured.

The defendant denies negligence, and contends that the plaintiff was not a passenger at the time of his injury, and that he was injured by his own contributory negligence, in that he was trying to get on a moving train. (172)

All of the evidence tends to prove that the plaintiff became a passenger of the defendant at Washington, N. C., and that his destination was Mizell; that he left the train temporarily at Pinetown, an intermediate station, at which the train stopped two or three minutes, for the purpose of meeting some one on business, and that he was injured when returning to the train.

The evidence of the plaintiff tends to prove that the train was

not in motion when he stepped on the train; that there was ice on the step, and that while on the steps, entering the train, there was a violent, unusual movement of the train, which caused his injury.

The evidence of the defendant tends to prove that there was no violent movement of the train, and only such as was usual and necessary, and that the train was in motion when the plaintiff attempted to return to it.

Dr. Hunter, a witness for the defendant, testified to a conversation with the plaintiff on the morning of his injury, while in the hospital, as follows:

"He told me that morning how it happened. He said he went to Washington that afternoon, and was going back on the night train to Mizell to meet a man named Cherry, and that when he got to Pinetown he got off the day coach and walked back and crossed over the rear of the day coach to the woods side—that is, the side opposite the depot—and that then he walked back towards the Pullman cars, looking for his man, and then turned around and walked back a way, and by that time the car was moving, and he grasped the handle of the steps of the car of the front coach and missed his hand-hold, and his body swung between the two coaches. He said that the steps of the car that was coming hit him in the right side. He grasped the rail of the passenger coach and missed the steps with his feet, and that the steps of the oncoming car struck him on the right side, and that he fell under the cars, and that he realized he only had a second to get out, and that he put his right foot on the rail and pushed himself out and got clear, all except the foot that was on the rail, and that the wheel of the car ran over him. He said that when he started to get on the train he was on the opposite side from the station. I don't think any one on the station side could have seen him unless they were looking especially for him. He said that the car was moving, was the reason he missed it. I am a friend of Mr. Wallace. I have treated him for delirium tremens. He said he grabbed the handrail and that the steps immediately behind struck his side. It was a year or more before this happened that I treated him for delirium tremens. I don't know how long he had been drinking liquor. He was not drinking the night this happened."

Preceding the testimony of Dr. Hunter, plaintiff testi-
(173) fied: "I couldn't say for certain whether I told Dr. Hunter how I got hurt or not. I don't remember whether I did or not. I don't remember whether I told him that the train was in motion and that I caught hold of one of the hand-rails and that the Pullman step struck me. I couldn't say whether I made that statement or not. A man in the fix I was in would be liable to tell any-

thing. He wouldn't be liable to tell a story if he knew what he was doing at the time. If I knew what I was saying, what I told Dr. Hunter was the truth, because I had no object in telling him anything but the truth."

Following the testimony of Dr. Hunter, plaintiff was recalled, and said: "I don't remember that he talked to me at all." Plaintiff also testified, on his direct examination, that when the train started up at Pinetown, "I was starting up the step and looked around to see if I saw Cherry coming, when they snatched the train. It was a hard snatch—hard enough that it pulled my left hand loose and I swung around and hit the side of the car and went under. The steps were sleety—I saw them. When the train snatched, I swung around and hit the side of the car, and that wrung my hand loose and I fell to the ground, and my foot was cut off while I was down there."

The defendant requested the court to charge the jury as follows:

1. The court charges you that if you find from the evidence that plaintiff dismounted from the train, left the station and went on the opposite side of the track from where it took on and put off passengers, and that the defendant was not notified of the intention of the plaintiff to leave the train for a temporary purpose, that then the contract of carriage between the plaintiff and defendant would have terminated, and that the defendant would not owe any duty to the plaintiff, except not to injure him, knowingly; and it will be your duty, on all of the evidence, if you should find these facts to be true, to answer the first issue "No."

2. The court charges you that if you should find the true facts with reference to this injury to be as testified to by Dr. Hunter and as disclosed by his statement which was introduced in evidence, that there would be no negligence on the part of the defendant, and you should answer the first issue "No."

3. The court charges you that if you find, from all of the evidence, that plaintiff attempted to board the train after it had started up, and missed his foothold or handhold, that you should answer the second issue "Yes."

The court refused to give the first instruction, and did not give the others, except as they appear in the charge, and the defendant excepted.

There was no motion for judgment of nonsuit, and no request for peremptory instruction.

The jury returned the following verdict:

1. Was the plaintiff injured by the negligence of the de- (174) fendant as alleged? Answer: Yes.

2. Did plaintiff contribute to his injury by his own negligence, as alleged by defendant? Answer: No.

3. What damages, if any, is plaintiff entitled to recover? Answer: $2,900.

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

Ward & Grimes for plaintiff.
Small, McLean, Bragaw & Rodman for defendant.

ALLEN, J., after stating the case: There is authority for the position presented by the defendant in the first prayer for instruction (*S. v. Grand Trunk Ry. Co.*, 58 Me. 176; *De Kay v. R. R.*, 41 Minn. 178); but the better rule, and one supported by the weight of authority, is that a passenger does not lose his rights as such by leaving the train temporarily at an intermediate station for a lawful purpose. 10 C.J. 624; 4 R.C.L. 1040; *R. R. v. Satler*, 64 Neb. 636; *Dodge v. R. R.*, 148 Mass. 207; *Parsons v. R. R.*, 113 N.Y. 355; *R. R. v. Coggins*, 32 C.C.A. 1, and other authorities in the note to the citation to *Corpus Juris* and Ruling Case Law.

The author in *Corpus Juris* states the principle as follows: "The relation ordinarily terminates when a passenger chooses to abandon his journey at a point before reaching the place to which he is entitled to ride. But a temporary departure from the train for any good or reasonable cause, without an intention to abandon transportation, does not terminate the relation. As a general rule, a passenger does not lose his character as such by merely temporarily alighting at an intermediate station, with the express or implied consent of the carrier, for any reasonable and usual purpose, such as the procuring of refreshment, the sending or receiving of telegrams, or for the purpose of exercising by walking up and down the platform, or even from motives of curiosity."

And the Court said, in the Nebraska case, "In this country of long journeys by railway trains there can be no impropriety in a passenger claiming the right, which may be said to be established by long custom, to leave his car at an intermediate point on his journey, where a stop of any considerable time is made, to send a message, to obtain exercise and relief by walking up and down the platform, or to gratify his curiosity, provided he does not interfere with the employees of the company or run counter to any established rule brought to his notice. In the exercise of this privilege he does not lose his character of passenger, and the common-law (175) duties of the carrier are still to be exercised in his behalf, and injuries received on account of a failure on the part of a carrier to observe all its duties toward him required by the rules of the common law must be responded to in an action for dam-

ages." In the Massachusetts case: "To determine the rights of the parties in every case, the question to be answered is, What shall they be deemed to have contemplated by their contract? The passenger, without losing his rights while he is in those places to which the carrier's care should extend, may do whatever is naturally and ordinarily incidental to his passage. If there are telegraph offices at stations along the railroad, and the carrier furnishes in its cars blanks upon which to write telegraphic messages, and stops its train at stations long enough to enable passengers conveniently to send such messages, a purchaser of a ticket over the railroad has a right to suppose that his contract permits him to leave his car at a station for the purpose of sending a telegraphic message, and he has the rights of a passenger while alighting from the train for that purpose, and while getting upon it to resume his journey. So of one who leaves a train to obtain refreshments, where it is reasonable and proper for him so to do, and is consistent with the safe continuance of his journey in a usual way. Where one engages transportation for himself by a conveyance which stops from time to time along his route, it may well be implied, in the absence of anything to the contrary, that he has permission to alight for his own convenience at any regular stopping place for passengers, so long as he properly regards all the carrier's rules and regulations, and provided that his doing so does not interfere with the carrier in the performance of his duties." In the New York case: "We do not think that a passenger on a railroad train loses his character as such by alighting from the cars at a regular station, from motives of either business or curiosity, although he has not yet arrived at the terminus of his journey." And in the case from the Circuit Court of Appeals: "But we think the weight of authority, reason, and custom all require us to hold that where a passenger, without objection by the company or its agents, alights at an intermediate station, which is a station for the discharge and reception of passengers, for any reasonable and usual purpose, like that of refreshments, of the sending or receipt of telegrams, or of exercise by walking up and down the platforms, or the like, he does not cease to be a passenger, and is justified in the belief that the company is exercising due care for his safety."

These authorities, and the reasoning on which they are based, are satisfactory to us, and justify the refusal to give the first prayer for instruction.

There are several objections to the second prayer. In the first place, Dr. Hunter knew nothing of the facts and did not testify to them, his evidence being confined to a conversation with the plaintiff; but if we give a broader interpretation to the pray- (176)

er, it is objectionable as singling out the evidence of one witness and directing the attention of the jury to that instead of to all the evidence bearing upon the issue.

The answer to the second issue, taken in connection with the charge, also shows that the jury accepted the theory of the plaintiff that the conversation with Dr. Hunter was while he was in such pain that he did not know what he was saying.

Again, the statement made by Dr. Hunter is not necessarily inconsistent with the evidence of the plaintiff at the trial, that there was a violent movement of the train; and if the two could stand together, the evidence of Dr. Hunter was material on the second issue of contributory negligence, and not on the first issue, to which the prayer was directed.

This is evidently the view taken by his Honor, as he charged the jury: "Now, if this evidence satisfies you, by its greater weight, that the plaintiff got off the train at Pinetown, holding a ticket for a point beyond Pinetown, got on the opposite side of the train from the station and waited until after the train had started to pull out, and that he then attempted to catch the train while it was in motion, then the plaintiff would be guilty of contributory negligence, and it would be your duty to answer the second issue 'Yes.'"

This was perhaps too favorable to the defendant, as it is not contributory negligence in all cases to get on a train while in motion, but of this the defendant cannot complain, and this excerpt from the charge also shows that the third prayer was given.

No error.

Cited: *Bane v. R. R.*, 176 N.C. 249; *Wharton v. Ins. Co.*, 178 N.C. 138; *Clark v. Bland,* 181 N.C. 116; *Wilson v. Bus Lines,* 217 N.C. 587; *White v. Chappell,* 219 N.C. 659.

E. R. JOHNSON v. W. H. BRAY.

(Filed 3 October, 1917.)

Mortgages, Chattel—Assignee of Mortgage—Claim and Delivery—Right of Possession.

The assignee of a chattel mortgage may maintain proceedings in claim and delivery for the possession of the mortgaged property or for its value, etc., in his own name and right, after the note secured by the mortgage is overdue and remains unpaid.

JOHNSON *v.* BRAY.

CIVIL action, in the nature of claim and delivery, to recover possession of certain personal property described in a mortgage from defendant to one Hampton, and assigned to plaintiff, tried at May (Special) Term, 1917, *Bond, J.*, in CURRITUCK Superior Court.

At the time of commencing the action the debt was past due. These issues were submitted: (177)

1. What balance, if anything, is due by defendant Bray to plaintiff Johnson on note referred to in complaint? Answer: $153.10, with interest from 2 November, 1915.

2. Is the property seized in this action liable as security for said sum due plaintiff by defendant? Answer: Yes.

It being admitted that the property seized under claim and delivery and replevied by defendant cannot be restored, and that the value of same at the time of seizure and replevy was the $155, the court rendered judgment against defendant and B. N. Bray, surety on bond, for its value.

Defendants appealed.

A. M. Simmons and Ehringhaus & Small for plaintiff.
Ward & Thompson for defendant.

BROWN, J. The principal contention of defendant is that plaintiff cannot recover in an action for the possession of the mortgaged property because he is not the mortgagee, but only an assignee of the debt secured by the mortgage. The contention cannot be maintained.

It is expressly decided in *Satterthwaite v. Ellis*, 129 N.C. 67, that the assignee of a chattel mortgage is entitled to the possession of the property before the mortgage becomes due. If so, the assignee is certainly entitled to such posesssion after the debt falls due. 11 Corp. Juris, 671, sec. 432; 5 R.C.L. 473; 64 L.R.A. 618, and notes.

The other assignments of error are without merit and need not be discussed.

No error.

J. L. AND W. R. BRYAN v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

(Filed 3 October, 1917.)

1. Carriers of Goods—Commerce—Bills of Lading—Live Stock—Written Notice—Waiver.

It is necessary to give the written notice of a claim for damages to an interstate shipment car-load of live stock to the proper carrier before the animals are removed at destination and commingled with others, in order to recover such damages, the stipulation in the bill of lading to that effect having been declared reasonable and valid by the Supreme Court of the United States, the decision of which, as to interstate carriage, being controlling upon the State courts; and a verbal notice to a clerk in the carrier's office is insufficient, and his acquiescence cannot be regarded as a waiver by the company.

2. Same—Federal Statutes—Carmack Amendment—Interstate Commerce Commission.

In order to obtain uniformity of carriage contracts for interstate commerce, the Carmack Amendment to the Interstate Commerce Act requires the carrier to issue a bill of lading upon terms fixed by the Interstate Commerce Commission; and while a parol contract of shipment is upheld as binding, the uniform contract yet fixes its terms.

3. Carriers of Goods—Commerce—Uniform Bills of Lading—Parol Contracts.

In an action against the carrier for damages to an interstate shipment of live stock, the carrier is obligated by law to furnish a proper car; and a parol agreement to this effect adds nothing to the carrier's duty in this regard.

4. Same—Issues.

A negative answer to an issue as to whether a damaged interstate shipment of live stock was made under the uniform bill of lading should be disregarded; and an alleged special parol contract of shipment, under which it is claimed that the written notice as to the damage was not required, should not be considered.

5. Carriers of Goods—Federal Statutes—Bills of Lading—Live Stock—Damages—Written Notice—Cummins Amendment.

The Cummins Amendment, approved March, 1915, restricting the right of the carrier to make certain stipulations in the bills of lading of interstate shipments, is not retroactive in effect, and has no application to a case wherein the shipment was made and the cause of action accrued theretofore.

ACTION tried before *Allen, J.*, at November Term, 1916, (178) of WILSON, upon these issues:

1. Did the defendant, the Louisville and Nashville Railroad Company, agree with the plaintiff that it would furnish a car of sufficient size and strength to carry 26 head of horses and mules from East St. Louis, in the State of Illinois, to Wilson, in the

State of North Carolina, safely and so that said horses and mules would not be crowded therein? Answer: Yes.

2. Did the defendant, the Louisville and Nashville Railroad Company, furnish to the plaintiff at East St. Louis, in the State of Illinois, a car within which to ship 26 head of horses and mules to Wilson, N. C., safely and so that said horses and mules would not be crowded therein? Answer: No.

3. Were the horses and mules of the plaintiff damaged and injured by reason of the defendant's, the Louisville and Nashville Railroad Company's, failure to comply with its contract in furnishing a car, as it contracted to do? Answer: Yes.

4. Did the plaintiffs give notice in writing of their claim for loss and injury to the animals to the agent of the Louisville and Nashville Railroad Company or to the agent of the Atlantic Coast Line Railroad Company before said animals were re- (179) moved from the place of destination and before said animals were mingled with other animals? Answer: No.

5. Did the plaintiffs give verbal notice to the defendant, the Atlantic Coast Line Railroad Company, of their claim, before said animals were mingled with other animals? Answer: Yes.

6. Were the agents of the plaintiffs guilty of contributory negligence in loading the 26 animals in a 38-foot car, as alleged in the answer of the Louisville and Nashville Railroad Company? Answer: No.

7. Did the plaintiffs enter into the shippers' contract with the defendant, the Louisville and Nashville Railroad Company, as alleged by the defendant? Answer: No.

8. What damages, if any, has the plaintiff sustained by reason of the defendant, the Louisville and Nashville Railroad Company, violating its contract with the plaintiff? Answer: $1,000 and interest from 23 October, 1912.

From the judgment rendered, the defendant, the Louisville and Nashville Railroad Company, appealed.

H. G. Connor, Jr., and Robert W. Winston for plaintiff.
Murray Allen for defendant.

BROWN, J. There are a large number of assignments of error, but we will consider only those directed to the stipulation in the bill of lading relating to notice, viz.: "As a condition precedent to the shipper's right to recover any damages for loss or injury to said animals, he will give notice in writing of his claim thereof to the agent of the railroad company or other carrier from whom he received said animals, before said animals are removed from the

place of destination above mentioned, or from the place of delivery of the same to said shipper, and before said animals are mingled with other animals."

The jury have found that no *written* notice was served, but that verbal notice was given to the Atlantic Coast Line, the delivering carrier. There is evidence that verbal notice was given to a clerk in the Coast Line's office at Wilson. That the stipulation is reasonable and valid is settled by State and Federal authority. *Schloss v. R. R.*, 171 N.C. 350.

We are of opinion that the verbal notice to the clerk in the Coast Line office is not a compliance with the contract. It is stipulated that the notice shall be in *writing.* There are very obvious reasons why written notice should afford more protection to the carrier than mere verbal notice to some clerk in the office who may overlook it.

Our decisions have been to the contrary, but the Supreme
(180) Court of the United States has recently decided, in *St. Louis, I. M. & S. R. Co. v. Starbird,* 37 S.C. Rep. 462 (April 30, 1917), that "A stipulation in a through bill of lading for an interstate shipment of peaches that the carrier issuing the bill of lading shall not be held liable for damages unless a claim for damage is reported by the consignee, in *writing,* to the terminal carrier within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery, is valid and not unreasonable."

It is useless to quote fore from the opinion. The whole tenor of it in writing as an essential part of the contract, and that unless complied indicates that the court regarded the stipulation that the notice must be with, a recovery cannot be had.

This decision is binding upon us. To the same effect is a decision of the Supreme Court of Massachusetts, *Metz v. R. R.,* 116 N.E. 475, where Rugg, C.J., says:

"The doctrine of waiver is not applicable to any subject where the public policy has been authoritatively declared to be contrary to waiver rights. Laws founded upon consideration of public policy cannot be evaded by the device of waiver. The absolute defense is allowed in such instances, not for the sake of the defendant, but because it is the established principle of the law."

If it is essential that the notice be in writing, then verbal notice to some clerk in the office cannot be regarded as a compliance with the contract, nor a waiver of the stipulation. But it is contended that the plaintiffs are not suing upon the bill of lading given him by the defendant, but upon an oral and distinct agreement made by defendant's agent to furnish them with a car of sufficient size

and strength to carry 26 head of horses and mules from East St. Louis to Wilson.

The complaint of plaintiffs, after stating the terms of the contract, etc., declares: "And the said Louisville and Nashville Railroad Company issued to these plaintiffs its bill of lading, or contract of carriage, the original of which has been delivered to the defendant, the Atlantic Coast Line Railroad Company, but a copy of the same will be produced upon the trial of this action, if demanded."

There was but one contract, and that was to transport safely the 26 animals to Wilson. Under the terms of the bill of lading, as well as in performing its legal duty as a common carrier, the defendant was bound to furnish such car without any separate agreement to that effect. A special agreement to furnish a car sufficient in size and strength to transport the animals added nothing whatever to the obligation assumed by defendant. That was its plain duty, under the law, without any such agreement.

The finding of the jury that plaintiffs did not enter into the shipping contract was evidently in response to an erron- (181) eous charge of the court. No such issue should have been submitted. Plaintiffs allege that they entered into it, and in their complaint offer to produce it on the trial. It was produced and introduced in evidence. Such finding is merely surplusage and can have no effect.

But the true ground upon which the written bill of lading must be held to control the rights of the parties is founded on the Carmack Amendment to the Interstate Commerce Act. That amendment requires the carrier to issue a bill of lading, the terms of which are fixed by the Interstate Commerce Commission, whereby such contracts are made uniform through the United States. The defendant has no authority to enter into any other contract.

In the *Starbird* case, *supra,* the United States Supreme Court says: "Since the passage of the Carmack Amendment, the State court must be held to have known that interstate shipments were covered by a uniform Federal rule which required the issuance of a bill of lading, and that bill of lading contained the entire contract upon which the responsibilities of the parties rested. This is the result, not only of our own holdings, but is universally held in the State courts."

The Supreme Court of New Jersey, in *Thread Co. v. R. R.,* 95 Atlantic 1002, speaking of this amendment, says: "The Carmack Amendment, which is part of section 20 of the Interstate Commerce Act, as amended by the Hepburn Act, June 29, 1906 (34 Stat. at L. 584, chap. 359), quoted in *Southern Express Co. v. Croninger,* 226

U.S. 491, requires the issue by carriers of a bill of lading. Under the act and the regulations made by the Interstate Commerce Commission pursuant thereto, defendant was required to submit and publish with its tariffs a uniform bill of lading."

How far the Cummins Amendment, approved 4 March, 1915, restricting the right of a carrier to make certain stipulations in the bill of lading, may affect this particular stipulation requiring written notice of damage, is not presented in this record. That amendment to the interstate commerce statutes is not retroactive, and can therefore have no effect upon the disposition of this case, as the shipment was made and cause of action accrued in October, 1912. *Starbird* case, 468; *N. Pac. Ry. v. Wall,* 241 U.S. 87. In the latter case it is said: "The act of March 4, 1915 (chap. 176, 38 Stat. 1196), altering the terms of the Carmack Amendment, is without present bearing, because passed long after the shipment was made."

This Court takes the same view of the Cummins Amendment in *Horse Exchange v. R. R.,* 171 N.C. 65, where the substance of the statute is given.

(182) We are not unmindful of our own decisions in *Davis v. R. R.,* 172 N.C. 208, and *Smith v. R. R.,* 162 N.C. 143, in which it is held that it is not essential to a contract of shipment that the carrier issue a bill of lading. We still hold to the principle laid down in those cases to this extent, if a carrier receives goods for shipment in interstate commerce, and fails to issue the bill of lading prescribed by the Federal law, the carrier is nevertheless liable for the value of the goods and damage thereto to the same extent as if it had issued the bill of lading. The carrier could not be permitted to take advantage of its own negligence in failing to issue it.

But the contract of shipment would be just what is prescribed by Federal law, notwithstanding any oral agreement at variance with the bill of lading, for common carriers engaged in interstate commerce are prohibited from changing that contract or entering into any other, the object being to make all such contracts uniform throughout the United States.

Upon the pleadings and all the evidence, the court should have sustained the motion to nonsuit.

Let the judgment be entered accordingly.

Reversed.

Cited: Mann v. Transportation Co., 176 N.C. 108; *Aman v. R. R.,* 179 N.C. 313; *Dixon v. Davis,* 184 N.C. 210; *Rogers v. R. R.,* 186 N.C. 88; *Newman v. R. R.,* 188 N.C. 345; *Schroader v. Express Agency,* 237 N.C. 459.

N. M. McLAUGHLIN AND ELM CITY LUMBER COMPANY v. RALEIGH, CHARLOTTE AND SOUTHERN AND NORFOLK AND SOUTHERN RAILWAY COMPANIES.

(Filed 3 October, 1917.)

1. Actions, Joint — Withdrawal of Plaintiff — Courts — Amendments — Mistake—Statutes.

Where A. contracts with B. for the sale of lumber manufactured by him under a contract vesting the title in B. when it had been manufactured and placed on the dry-kiln trucks, and the lumber thus placed has been destroyed by fire, upon which they bring a joint action for the recovery of the damages alleged to have been caused by the defendant's negligence, upon its developing on the trial that the destroyed lumber belonged exclusively to B., according to the contract, it is not error for the trial judge to permit A. to withdraw as plaintiff and to continue the suit and amend his complaint in respect to the mistake made in the construction of the contract. Rev., sec. 507.

2. Actions, Joint—Withdrawal of Plaintiff—Courts—Defendant's Liability —Test.

The concern of the defendant, when the court permits one of two plaintiffs suing jointly for damages alleged from defendant's negligence to withdraw from the suit, is whether he will be protected from another suit growing out of the same transaction by the same parties; and when he is protected in this respect it is not error to his prejudice that the court permitted one of the plaintiffs to withdraw from the action.

3. Limitation of Actions—Actions, Joint—Withdrawal of Party—Negligence—Pleadings—Amendments.

Where damages are sought by joint plaintiffs upon the alleged negligence of the defendant, the cause of action is such negligence; and where one of them is permitted to withdraw and the other to amend, owing to a mistaken construction of a contract as to the joint ownership of the property damaged, the amendment referring to the same alleged negligent act does not create a new cause of action, but, being upon the same cause, relates back to the issuance of the summons, and when that was done in time the statute of limitations will not have run against it.

4. Judgments—Estoppel—Parties—Privies—Subject-matter.

Where the plaintiff in a former action for damages unites with another and brings a joint action to recover damages to different property alleged to have been caused by the same negligent act, the judgment in the former action may not successfully sustain the plea of *res judicata* as to the additional plaintiff in the second action, as he was not a party or privy thereto, and the subject-matters of the two actions are different.

5. Same—Bailment.

Where one of two joint plaintiffs in an action to recover damages is properly permitted to withdraw, owing to a mistake as to his joint ownership, the fact that he may have been the bailee of the other at the time of defendant's negligent act does not affect the cause of action of the continuing plaintiff.

APPEAL from *Stacy, J.*, at January Term, 1917, of HAR-
(183) NETT.

This is an action instituted by N. McLaughlin and the Elm City Lumber Company, as plaintiffs, to recover damages for the negligent burning of certain lumber.

The fire complained of, which occurred 11 November, 1912, destroyed the saw- and planing-mills of the plaintiff, N. McLaughlin, and the greater part of the lumber in the yard thereof.

The plaintiff, N. McLaughlin, brought an action to the September Term, 1913, of Harnett County Superior Court against the defendant for the recovery of damages on account of the burning of his saw- and planing mills, which action resulted in a judgment in favor of McLaughlin against the defendant for the recovery of $2,000, which sum, with the costs, was paid by the defendant.

The present action, instituted by N. McLaughlin *and* the Elm City Lumber Company against the defendant for the recovery of damages on account of the destruction, by the same fire, of lumber alleged to belong to the two plaintiffs *jointly*, was commenced by summons, dated 3 December, 1914.

Complaint was filed at January Term, 1914.

It alleges "That on 11 November, 1912, the plaintiffs were owners of a large amount of lumber; the plaintiff, N. McLaughlin, to the amount and value of $4,971.12, and the plaintiff, Elm
(184) City Lumber Company, to the amount and value of $3,194.71, located on the lands." The material allegations of this complaint are denied by the defendants, and *res adjudicata* pleaded.

During the trial the plaintiff, N. McLaughlin, on 21 January, withdrew as a party, and, over objection and exception by defendant, the court permitted the plaintiff, Elm City Lumber Company, to file an amended complaint on said day.

In the amended complaint the Elm City Lumber Company claims to be the sole owner of the lumber destroyed by fire, and alleges its value to be in excess of $22,000 instead of $8,165.83, as alleged by the two plaintiffs jointly, and demands judgment for $8,165.83, the amount originally demanded by both plaintiffs.

The defendant, in its answer to the amended complaint, denied the material allegations thereof, and pleaded joint ownership of the property destroyed, by McLaughlin and the Elm City Lumber Company, and further pleaded *res adjudicata* and the statute of limitations.

The contract between McLaughlin and the Lumber Company was introduced in evidence.

There was a verdict and judgment in favor of the plaintiff lumber company, and the defendant appealed, contending:

1. That judgment of nonsuit ought to have been entered at the conclusion of the evidence, because it appeared that the Elm City Lumber Company was not the sole owner of the lumber, and that McLaughlin had an interest therein.

2. That the court had no power to allow the amendment to the complaint, contending that it introduced a new cause of action.

3. That the judgment in the former action between McLaughlin and the defendant operated as an estoppel upon the plaintiff lumber company.

4. That if the court had power to allow the amendment, that it did not relate to the commencement of the action, and that the cause of action was barred by the statute of limitations.

E. F. Young and R. L. Godwin for plaintiffs.

D. H. McLean & Son, Clifford & Townsend, and Robinson & Lyon for defendant.

ALLEN, J. The lumber which was destroyed by fire had been manufactured and placed on the dry-kiln trucks, and the contract between McLaughlin and the Elm City Lumber Company provides unconditionally that when in this condition the lumber becomes the property of the lumber company.

There is also incorporated in the contract an absolute bill of sale of the lumber from McLaughlin to the lumber com- (185) pany, and the provision as to change of prices, dependent upon fluctuations in the market, affected the amount due from the lumber company to McLaughlin, and not the title to the lumber.

The lumber company was therefore the sole owner of the lumber, and it was proper to permit McLaughlin, who had no title, to withdraw as a party plaintiff, and this was within the power of the court. *Campbell v. Power Co.*, 166 N.C. 488.

It was also permissible to allow an amendment to the complaint by alleging that the lumber company was the sole owner of the lumber, and this did not change the original cause of action and introduce a new cause of action.

The allegation in the original complaint that McLaughlin and the lumber company were the owners of the lumber was made under a mistaken construction of the contract, and the Revisal, sec. 507, provides that the judge or court may amend any pleading "by correcting a mistake in the name of a party, or a mistake in any other respect."

In *Ely v. Early*, 94 N.C. 1, a complaint was filed alleging the ownership of land, and an amendment was allowed alleging a mis-

take in a deed in the chain of title, and it was held that the amendment related to the summons.

In *Jarrett v. Gibbs,* 107 N.C. 303, a complaint was filed in the name of two plaintiffs alleging that they were the owners of certain cross-ties. The name of one of the plaintiffs was stricken out at the trial, and it was held in the Supreme Court that the judge could allow the remaining plaintiff to file an amended complaint alleging sole ownership of the cross-ties.

The only difference between this last case and the one before us is, that in the first the question was as to the ownership of cross-ties, while in this it is as to the ownership of lumber.

In *King v. Dudley,* 113 N.C. 169, the plaintiff alleged the ownership of all of a crop as lessee of certain receivers, and an amendment was approved, alleging sole ownership of a part.

In *Morton v. Water Company,* 168 N.C. 583, the plaintiff was allowed to amend by including property not in the original complaint, and by increasing his allegation of damage from $2,000 to $4,000.

These authorities and others also hold that the cause of action is the wrong done—here, the burning of the lumber—and that the chief concern of the defendant as to parties is to have those before the court who will protect it against a second demand for the same cause.

Instructive cases on the question are *Simpson v. L. Co.,* 133 N.C. 95, an action to recover damages for negligent burning, in which Walker, J., says, "The cause of action was the negligent
(186) burning and the damage resulting therefrom"; and *Lassiter v. R. R.,* 136 N.C. 90, in which Clark, C.J., draws the distinction between the cause of action, which is the wrongful act for which damages may be recovered, the object of an action, which is the relief demanded, and the right of action, which must be in the plaintiff.

It also follows, if the amendment is germane to the original cause of action, deals with the same transaction, and does not introduce a new cause of action, it relates back to the commencement of the action, and prevents the running of the statute of limitations from that time. *Pickett v. R. R.,* 153 N.C. 149, and *Lefler v. Lane,* 170 N.C. 183.

In the *Pickett* case the plaintiffs sued to recover damages for injury to crops by overflow of water, and an amendment was allowed, alleging permanent injury to the land, and increasing the demand from $2,000 to $4,000. The defendants answered, and among other things pleaded the statute of limitations. The Court held aganist the plea, upon the ground that the amendment related to

the commencement of the action, and among other things said: "We do not think the amendment added a new cause of action, but related only to the *quantum* of damages. The cause of action was the injury to the land, and the consequent damages."

And in the *Lefler* case, Hoke, J., says: "Under the statute regulating our present system of procedure (Revisal 1905, sec. 507, *et seq.*), and numerous decisions construing the same, the power of amendment has been very broadly conferred, and may and ordinarily should be exercised in 'furtherance of justice,' unless the effect is to add a new cause of action or change the subject-matter thereof; and our cases on the subject hold that where the amendment is germane to the original action, involving substantially the same transaction and presenting no real departure from the demand as originally stated, it shall, when allowed, have reference by relation to the original institution of the suit."

We are therefore of opinion it was within the power of the court to allow the amendment, and as it relates to the commencement of the action, this disposes of the plea of the statute of limitations, this action having been commenced within three years from the time of the injury complained of.

Nor can the plea of *res adjudicata* avail the defendant, for the reason that the plaintiff in this action, the lumber company, was not a party to the former action, nor in privity with any party thereto, and the subject-matter of the two actions is different.

The fact that McLaughlin, the plaintiff in the former action, may have been a bailee of the property, does not affect the question.

"It seems to be the accepted doctrine at present that if any permanent injury be done to the chattel, such an injury as will depreciate its value when it returns to the bailor's hands, he may maintain a special action on the case against a third (187) person for injury done by him to the reversionary interest, and this seems to be, both by reason and authority, the rule, whether the bailment has expired or not, and whether an action might or might not be maintained by the bailee against such person for trover, trespass, or replevin, to control the immediate possession." 3 Ruling Case Law 141.

This disposes of all of the questions discussed in the brief.

No error.

Cited: Capps v. R. R., 183 N.C. 187; *Goins v. Sargent,* 196 N.C. 481; *Discount Corp. v. Butler,* 200 N.C. 713; *Clevenger v. Grover,* 212 N.C. 17; *Nassaney v. Culler,* 224 N.C. 327; *Webb v. Eggleston,* 228 N.C. 580.

JOHN ATKINS v. J. W. MADRY.

(Filed 3 October, 1917.)

1. Master and Servant—Employer and Employee—Safe Place to Work—Defects—Trials—Evidence—Questions for Jury.

It is the duty of the master to provide his servant a safe place to work in the performance of his duties; and where there is evidence tending to show that an inexperienced employee was directed by his employer to remove the tin from the roof of a closely sheathed shed, which fell with and injured him by reason of the fact that only the tin attached to the adjoining building held the shed and kept it from falling over, of which fact the employer was unaware and could not reasonably have seen, and the shed fell without his knowing why: *Held*, it is sufficient upon the issue of defendant's actionable negligence.

2. Master and Servant—Employer and Employee—Safe Place to Work—Assurance of Master—Assumption of Risks.

Where the place furnished by the master on which the servant is required to work in the course of his employment has a hidden defect therein of which the servant was unaware and which he could not have reasonably ascertained, and which caused an injury, the subject of his action for damages; and the employer instructed the employee to do this particular work, assuring him, upon his inquiry, of the safety of the place and of the work to be done thereon: *Held*, the direction thus given, with the assurance of the master of its safety, relieved the employee of assuming the risk in doing the work, there being nothing in the appearance of the place which would have caused a man of reasonable prudence to have refused to do the work thereon.

3. Master and Servant—Employer and Employee—Safe Place to Work—Evidence—Opinion—Trials—Questions for Jury.

Where damages in an action are sought for the failure of the master to provide a safe place for his employee to work, testimony of witnesses that the place was a safe one is incompetent, that being a question for the court and jury upon conflicting evidence.

ACTION to recover damages for personal injuries, tried before *Allen, J.*, at March Term, 1917, of HALIFAX.

(188) *A. Paul Kitchin and A. W. Dunn for plaintiff.*
Stuart Smith and W. E. Daniel for defendant.

WALKER, J. Plaintiff and other hands were employed by the defendant in August, 1916, to remove some tin from the roof of a shelter, or large lumber shed, at Tillery, N. C., and was instructed by his employer to go upon the top of the shelter and do the work. Plaintiff had no experience in such matters, nor did he know anything about the construction of the shelter, nor was there anything on the roof of it to notify him of any weakness in any part of it, or

of any danger in performing the task assigned to him by the plaintiff. There was evidence which tended to show that plaintiff did know, or could by the exercise of ordinary care have known, that the shelter was supported by the tin which was nailed to an adjoining house, there being no braces under the shed to stay or support it. When the tin was ripped from the house, there being nothing left to hold up the shed, it collapsed and injured the plaintiff in the manner described. The defendant contends that removing the tin was a simple process, requiring no former experience and no particular skill, nor was the work of such a dangerous nature as to require the master to instruct his inexperienced servant as to how to do it. His counsel, therefore, insist that the case falls naturally and easily within the rule laid down in the following cases: *Rumbly v. R. R. Co.,* 153 N.C. 457; *Martin v. Mfg. Co.,* 128 N.C. 264; *Dunn v. R. R. Co.,* 151 N.C. 313; *Brookshire v. Electric Co.,* 152 N.C. 669; *Simpson v. R. R. Co.,* 154 N.C. 51; *Mercer v. R. R. Co.,* 154 N.C. 399; *House v. R. R. Co.,* 152 N.C. 397; *Bunn v. R. R. Co.,* 169 N.C. 651. They especially rely on two of the above cases—*House v. R. R. Co.* and *Simpson v. R. R. Co.*—and quote the following passages from them: In *House's* case it was said: "As stated in *Hicks v. Mfg. Co.,* 138 N.C. 319-325, and other cases of like import, the principle more usually obtains in case of machinery more or less complicated, and more especially when driven by mechanical power, and does not, as a rule, apply to the use of ordinary every-day tools nor to ordinary every-day conditions, requiring no special care, preparation or provision, where the defects are readily observable and where there was no good reason to suppose that the injury complained of would result. The reason for the distinction will ordinarily be found to rest on the fact that the element of proximate cause is lacking; defined in some of the decisions as 'the doing or omitting to do an act which a person of ordinary prudence could foresee would naturally or probably produce the injury.' *Brewster v. Elizabeth City,* 137 N.C. 392."

The Court said, in *Simpson's* case, after stating the general rule as to complicated machinery: "If there was any negligence it could better be imputed to the plaintiff in taking his position on the car between two piles of cross-ties, if it was a dangerous one, than to any one else. The hands did the work assigned to (189) them in their own way, and without any special instruction as to the manner of doing it, and there was nothing to indicate that it was of such character as to be inherently dangerous or likely to result in injury to any one, if carefully done. There was nothing in its nature which called for anything more than ordinary skill or even any experience in a work of like kind. The plaintiff required

no instruction as to the proper method of doing so simple a piece of work. That degree of care which every man of reasonable prudence exercises in the ordinary affairs of life would have been a sufficient safeguard against injury." To the same general effect is *Covington v. Furniture Co.*, 138 N.C. 374, and the other cases cited above. But we think that the principle upon which those decisions rest does not apply here, where the facts are essentially different, as some of the evidence we recite will show. It must be borne in mind that there was a defect in this structure, of which the employee had no knowledge, and which he could not have ascertained except by a careful examination. In the position he stood on the top of the shelter, with solid sheeting underneath, he could not see the defect, which was practically hidden from him. It is true, he says that he asked his employer if there was any danger, but we see that he was assured by him that there was not—at least as far as he knew. Plaintiff testified: "Mr. Madry did not give any instructions as to how to take the tin off. He said get it off the quickest way. He was not on the shelter when it fell. I was hurt—hurt my back. I could not see that the shelter was about to fall. The shelter was sheeted solid—tin over top of it. Could not see through it. After we got the tin off, it was solid sheeted. Boards put close together, nails holding boards to tin. I don't know what caused the shelter to fall, unless it was taking the tin off. I did not knock loose or take out any brace. I do not know why the shelter fell at the time it did. Three colored men up there with me. I was not Mr. Madry's foreman. Did anything that came to hand; hauled brick, wood, fired the boiler, put brick in the kiln. Never had moved any tin from the top of a building before. Tin was thrown off the building as it was taken up. Saw nothing to indicate that the shelter was about to fall when I removed the tin. The shelter was solid. I did not see anything. From where I was, I could not have seen what was holding the planks up. Fell from the shelter to the ground. Did not have time to get off after the shelter began to fall. Had no notice that it might fall." And again: "The shed was open underneath. I did not go there to examine the shelter. Mr. Madry said it was safe. I did not have time to examine the shelter. The shelter was open. Don't know what it was resting on. Made no examination whatever. I went under the front to see a sick mule. After I went under it I did not make any examination of it. I knew that I was going on top
(190) to rip off tin. I did not see any danger. I could have seen underneath if I had gone under there, and could have seen exactly what was holding it together." We have quoted what we consider to be the material parts of plaintiff's testimony, to show that the facts of this case, and those of the cases we have cited, are

not governed by the same principle. In none of those cases was the servant told that the structure was safe before he entered upon his work, and they were of such a kind that the servant could detect any danger in the progress of the work, as could his master.

In *Rumbly v. R. R. Co., supra,* which resembles this case in its general features more than any other, there was nothing which amounted virtually to an assurance from the master that the building was safely constructed and in the usual way, or that "the work was safe," and when the workmen had knocked off the rafters the condition of the joist, on which he was standing, and from which he fell, was exposed to his view, or he at least had a fair opportunity to examine and know its condition with reference to safety or danger, and this is what the principle of those cases like *Rumbly v. R. R. Co.* means: that the employee, as he goes on with his work, must beware of revealed dangers, and look out for them, which he can easily do by proper care and caution. If he must stand on a joist to do his work, he can test its strength, if he will, before using it. But in this case the plaintiff was told by his employer that the place where he was working, and the work itself, was safe. He had a doubt about it, and inquired of his employer, so that he could quit if it was dangerous, or have his doubt removed. There is one other view which distinguishes this case from the others. Here the workmen had expressed a doubt as to their safety, and plaintiff then made his inquiry of his employer. Under these circumstances, was it not the plain duty of the defendant to inform himself of the safety or danger of the shed? Was it not clearly the duty of the master to make the inspection when his attention had been especially called to it, and not leave his servants exposed to a possible danger? If he had not examined the building, and did not know whether or not they were in danger, he should not have answered the question as he did, and have thrown them off their guard, and let them go on with the work, relying upon his assurance of safety. Besides, he was overseeing and directing the particular work that was being done, and gave the order which caused them to cut away the supporting tin, when the plaintiff could not see the danger in doing so. He did not leave the work to them with instructions to perform it according to their own judgment and to take care of themselves. The work in the *House* and *Simpson* cases was very simple, and any one could have done it in perfect safety by the exercise of ordinary skill, care and prudence. The character of the work was fully exposed to view. In those cases the danger of the work was before them, so that the employee could see and under- (191) stand it; while here, the danger was hidden, and was not, and could not be disclosed in the ordinary progress of the work. The

plaintiff suddenly fell to the ground without knowing what had occurred to cause his fall. The authorities, we think, are in harmony with these views, as will appear from the following: An employee's assumption of risk may be abrogated by a distinct order that he use a dangerous appliance, accompanied by an implied assurance that it is safe. *Cherokee Brick Co. v. Hampton,* 84 S.E. 328. An employee, injured in executing a direct order of his employer, will not be held to have assumed the risk of obeying it, unless the danger was so great that a reasonably prudent man would not have obeyed the order. *United States Leather Co. v. Showalter,* 113 Va. 479. Where the employer's foreman assures the employee, upon his making complaint, that he is in a safe place to work, and commands him to proceed with the work, the responsibility for resulting injuries is on the employer, and ordinarily the law reads into an employment contract an agreement by the servant to assume the known risks of the employment so far as he comprehends them; but this implication may be abrogated by an express or implied agreement to the contrary if the servant complains and the master assures him there is no danger. *Massee & Felton Lumber Co. v. Ivey,* 12 Ga. App. 583. A master is liable for injuries to a servant in the execution of an express direction, where the servant was ignorant of the incident danger.*McClary v. Knight,* 73 W. Va. 385. "A servant has the right to rely upon the representations and assurances of the master, or his vice-principal, as to the absence of, or precaution against, danger, unless the danger is obvious and imminent." 26 Cyc. 1185. "Where a servant knows of defects in machinery, appliances, or place of work, but is, by words, acts, or conduct of his master, lulled into a sense of security, and continues in the service, and is injured by reason of such defects, he may nevertheless recover, unless the danger is well known to him, or is so plain and obvious that a prudent, careful man would refuse to run the risk. A person assumes the risk of injury from dangers and defects which are so patent and obvious that he either knew, or in the exercise of ordinary care should have known of their existence. On the other hand, a servant is under no primary obligation to investigate for latent defects and test the fitness and safety of the place, fixtures, or appliances provided him by the master. He has a right to rely upon the obligation resting upon the master to exercise reasonable care to see that they are fit and safe; and although the circumstances may be such that a servant is chargeable with knowledge of such defects as are patent and obvious, and of such defects as in the exercise of ordinary care he ought to have knowledge of, he is

not to be deemed as having notice or as assuming the risks (192) of such defects and insufficiencies as can be aseertained only

by investigation and inspection for the purpose of ascertaining that there is no danger." *Ibid.*, pp. 1213-1216. We have held repeatedly that a servant is not barred of recovery, under the doctrine of assumption of risks, unless he knew and appreciated the danger, or the danger was so obvious and imminent that no reasonable and ordinarily prudent man would continue to work in its presence. The duty of the master, in the exercise of ordinary care, to furnish a reasonably safe place for his servant to do his work, is primary and absolute. If he has a better opportunity to know of defects than his servant, and they are unknown to the latter, their obligation to exercise care, diligence and prudence is not exactly the same, and should not be. With respect to machinery and appliances, it was said, in *Pressly v. Yarn Mills,* 138 N.C. 417: "The principle which holds the employee to an equality of obligation and responsibility in the respect suggested is unsound and unjust, and has been rejected in the more recent and better considered cases." Beach on Cont. Neg., sec. 372; *Lloyd v. Hanes, supra; Patterson v. Pittsburgh,* 76 Pa. St. 389; *Kane v. R. R.,* 128 U.S. 91; *Smith v. Baker,* Appeal Cases (1891) 325. The Court held, in *Yarborough v. Geer,* 171 N.C. 335: "The rule that the servant assumes the risks incident to the nature of a dangerous employment has no application to injuries directly resulting from the negligence of the master, in failing in his duty to furnish him a safe place to work, or that of another to whom the master had delegated this duty." This rule was fully considered, in its various phases, at the last term, in *Howard v. Wright,* and the authorities reviewed. In *Howard's* case the plaintiff was working on a platform, when a plank broke and he fell to the ground and was injured. In our case the plaintiff was not remedying the defect in the shed, but merely stripping the tin from it, and he did not know of the particular danger incident to its faulty construction; and, besides, he was assured of its safety and ordered to "get the tin off the quickest way," being told at the same time that there was no danger, or that "it was safe," to use the exact words of Madry. The case, therefore, in its legal aspect, is substantially like those just cited above. The plaintiff was in no fault, as he testified that he did not see the defect or know that the shed was about to fall, and give his reason for not knowing, and he did not find out what was the cause of the fall until after the accident. There was conflicting evidence, but the jury have settled it in favor of the plaintiff. The charge of the learned judge was a very correct one, and gave the defendant at least the benefit of every principle of law to which he was fairly entitled, and, if anything, was more favorable to him than to the plaintiff. He required the latter to show that he was not aware of the defect in the shed, and of the danger, and

could not have acquired knowledge of it by the exercise of
(193) ordinary care, in order to recover. This did not give the plaintiff the full benefit of his master's assurance of safety, but the defendant obviously cannot object to this omission, as he received a benefit from it, and there is nothing else in the charge available to the defendant in asking for a reversal.

The objections to evidence are untenable. The question as to what the other men on the shed had said in regard to the danger had been sufficiently answered by the plaintiff, for he said: "I called Mr. Madry to the edge, but he did not come to see whether it was safe or not, and the other men there said they thought it was dangerous." It was then that Madry assured him that the work was safe, and the same may be said about the three colored men being on the building. The other exceptions have no merit. The defendant could have prevented the injury by the exercise of proper care, and it was not for the witness to say whether or not he exercised proper care, as the question was one for the court and the jury to decided upon the facts. If defendant had not given the promise of safety, without inspecting the shed, the plaintiff would not have proceeded with his work. If defendant did not know whether or not the shed was safe for his workmen, or had no knowledge of its condition, then his assurance of safety and his order to his servants were little short of reckless. The testimony of the plaintiff may not be true, and the verdict may be wrong on the facts, but we can afford the defendant no remedy, even if this be so. The judge below only has the power to do so.

No error.

Cited: Holt v. Mfg. Co., 177 N.C. 177; *Thompson v. Oil Co.*, 177 N.C. 282; *Davis v. Shipbuilding Co.*, 180 N.C. 76; *Hill v. R. R.*, 180 N.C. 492; *Fowler v. Conduit Co.*, 192 N.C. 17; *Overton v. Mfg. Co.*, 196 N.C. 672.

J. L. THOMPSON COMPANY v. E. R. COATS, A. V. COATS ET ALS.

(Filed 3 October, 1917.)

1. Husband and Wife—Separate Property—Executory Contracts.

Prior to the ratifications of the Martin Act, on March 6, 1911, a married woman could not bind her separate property by her executory contract, except in limited respects, without the written consent of her husband; nor could personal judgment be rendered against her thereon.

2. Same—Principal and Agent—Evidence—Landlord and Tenant.

The law does not imply an agency of the husband to act as such in behalf of his wife; and where the evidence in an action against her to recover for supplies furnished the tenants on her lands tends only to show that they were furnished to her husband as such tenant, and others, without direct benefit to herself; that she independently managed her own affairs and did not live on good terms with her husband, but apart from him, owing to his dissolute habits; that the supplies had been charged directly to the tenants, who farmed for a certain part of the crops raised by them; that she had never authorized her husband to act as her agent, and that no demand for payment for the supplies had been made on her before the institution of the action: *Held*, no agency has been shown authorizing him to act for her, and recovery will be denied.

CIVIL action, tried at February Term, 1917, of HARNETT Superior Court, before *Stacy, J.*, upon these issues: (194)

1. Did the plaintiff, during the year 1911, sell and deliver to the defendant E. R. Coats goods, merchandise, supplies, fertilizer, etc., including a part of 1909 and 1910 account to the amount of $1,275.94? Answer: Yes.

2. Did the defendant E. R. Coats accept and use said goods, merchandise, and fertilizer upon the lands of his wife, A. V. Coats, with her knowledge, consent and procurements? Answer: Yes.

3. If so, did the use of said goods, merchandise, and fertilizer improve said lands? Answer: Yes.

4. Did the defendant A. V. Coats accept and use the benefits of said goods and improvements with notice thereof? Answer: Yes.

5. Was the defendant E. R. Coats, as the husband of the defendant A. V. Coats, acting as the agent of his wife at the time of the sale and delivery of said goods, merchandise and fertilizer, as alleged in the complaint? Answer: Yes.

6. Did the plaintiff have knowledge of said agency and act upon the same in good faith in selling and delivering said goods? Answer: Yes.

7. Has the defendant A. V. Coats ratified the contract and purchase of said goods, fertilizer, etc.? Answer: Yes.

8. Was the defendant E. R. Coats insolvent during the years 1909, 1910, and 1911? Answer: Yes.

9. Did the defendant A. V. Coats cultivate and use for the benefit of herself and family a large amount of real estate during the years 1909, 1910, and 1911? Answer: Yes.

Other issues were submitted relating to the validity of certain deeds executed by Mrs. A. V. Coats to her children, which it is unnecessary to set out.

From the judgment rendered, the defendants appealed.

J. F. Wilson and R. L. Godwin for plaintiff.
J. W. Wilson, C. L. Guy, and E. F. Young for defendants.

BROWN, J. The purpose of this action is to charge the defendant, Mrs. A. V. Coats, with goods, merchandise, and fertilizer purchased from plaintiffs by her husband (now deceased) during the years 1909, 1910, and 1911, upon the ground that the husband purchased them as her agent, by her authority and for her benefit, and that she ratified the purchase.

The complaint also alleges that defendant, Mrs. Coats, (195) executed certain deeds to the other defendants, her children, subsequently to 1911, conveying certain lands for the purpose of defeating the collection of plaintiff's debt. The complaint demands that the deeds be set aside and that plaintiff's debt be declared a lien upon the lands, and that they be sold to pay the judgment.

Prior to the ratification of the Martin Act, on 6 March, 1911, the power of a married woman to enter into an executory contract was greatly restricted. The only way in which her separate property could be subjected to the discharge of her debts, even with the written assent of her husband, was by a specific charge or by showing a beneficial consideration peculiar to herself. In such cases her separate estate might be charged with her obligations, not upon the theory that she had contracted a debt, but that under certain circumstances her obligation constituted a charge which courts of equity would enforce. If the wife had no separate estate that a decree could charge, then there was no legal remedy, for no personal judgment could be rendered against her.

Where the object of the action was to charge her separate real estate, as in this case, it could only be done by showing a written instrument sufficient in form and duly executed by husband and wife, with privy examination of the latter. Furthermore, the *feme covert* was prohibited by the statute from entering into *any executory* contract whatever without the written assent of her husband, except where the consideration is for her necessary personal expenses, for support of her family, or to pay an ante-nuptial debt. In such cases she could charge her estate without the consent of her husband.

This subject has been so fully discussed in numerous well-considered opinions of this Court that it is useless to do more than refer to a few of the leading cases: *Flaum v. Wallace,* 103 N.C. 297; *Farthing v. Shields,* 106 N.C. 295; *Harvey v. Johnson,* 133 N.C. 352; *Vann v. Edwards,* 135 N.C. 661; *Ball v. Paquin,* 140 N.C. 86; *Bank v. Benbow,* 150 N.C. 784.

There is no evidence of any written assent upon the part of the husband of Mrs. Coats, and no evidence that she contracted this debt for her *necessary personal* expenses or for the support of her family.

Therefore, it is manifest that prior to the Martin Act plaintiff could not recover, and as that act is not retroactive, neither the separate real or personal estate of Mrs. Coats can be charged for the alleged indebtedness contracted prior to its ratification.

The statement of account (Exhibit A) is not attached to the record, and we cannot tell how much of the supplies of 1911 was received after the ratification of the Martin Act, but the evidence shows the contract to furnish them, made by plaintiff and the husband, was in February and prior thereto. (196)

But, assuming they were purchased after such ratification, upon the evidence, we are of the opinion that plaintiff has failed to show any liability upon the part of Mrs. Coast.

The evidence shows that she was the owner of considerable real estate, consisting of farms and a store and other property. She resided in Dunn and only a short distance from plaintiff's place of business. Her farms were rented out to tenants for a certain number of bales of cotton of 500 pounds each. Mrs. Coats testifies that she was not to furnish anything. There is nothing to contradict her statement.

The plaintiff's evidence shows that the supplies were furnished to the tenants, who were the father and brother of E. R. Coats, and one McKethan. Plaintiff's witness, Parker, testified: "The agreement was that Mr. Coats came down there and asked Mr. Thompson if he would furnish these supplies to the tenants, and he said he would, and after that was done I waited on these tenants. E. R. Coats paid what was paid on the account. No part of the balance ever been paid. As the goods were sent, I gave each tenant a bill." The witness further testified that the account was charged in the name of E. R. Coats, and not to Mrs. Coats, and that the goods were delivered at the request of E. R. Coats to the tenants. A very large part of the account appears to have been for fertilizer delivered in January and February, 1911, to the father and brother of E. R. Coats and to McKethan.

It appears in plaintiff's evidence that Mrs. Coats bought two carloads of fertilizer from plaintiff in 1911, and that she gave note and mortgage to plaintiff for $500, due 1 November, 1911, and that she paid it.

It further appears in evidence that Mrs. Coats, although living very near plaintiff's place of business, was never notified of the transaction between plaintiff and her husband, and that no demand

was ever made on her until suit commenced, and that she had no personal knowledge of such transactions.

Mrs. Coats testified: "That she was the wife of E. R. Coats; that she did not authorize her late husband or any one else to buy any goods or supplies upon her credit from J. L. Thompson Company at any time; that there was nothing bought from the plaintiff during 1909, 1910, and 1911 by her husband nor any of her tenants with her knowledge or consent; that she did not know of any fertilizer having been bought from the plaintiff during said years and used on any of her land; that during said year she rented her land to C. R. Coats; that she did the renting and he paid the rents to her; that E. R. Coats was not her agent for any purpose; that E.
(197) R. Coats died in June, 1916, and that she attended to her own business, and that she and her husband had not been living on good terms for twelve or fifteen years; that during this period he had left home occasionally and lived separate and apart from her."

Witness Lee testified that Coats was a drinking man and that he and his wife had trouble and lived separate in 1911.

Upon such evidence as this record presents, we think it would be a variance with the principles of the law of agency to hold that the husband was the agent of his wife and authorized to bind her and her property to the payment of the plaintiff's debt.

The mere relationship of husband and wife is not evidence of authority of the husband to act as the agent or lease the property of the wife. He has no power to bind her by a contract simply because of the marital relation, and no presumption arises from it. *Realty Co. v. Bumbrough*, 172 N.C. 741.

If any such presumption arose from such relation, it would in this case be rebutted by the fact that during 1911 Coats and his wife lived separate and apart, a condition brought about by his dissipated habits, and which existed when this debt was contracted.

All the evidence shows that Mrs. Coats is a woman of independent means, and supports her family; that she contracted only one debt with plaintiff in 1911, and secured it by mortgage, which she paid. She knew nothing of her husband's transactions with plaintiff to secure supplies for his father and brother and McKethan, and she made no contract to furnish such supplies. None of the goods were used for her own household or personal expenses.

The plaintiff never notified her until suit was brought that he had any account against her, or made any demand on her. The goods were never charged to her, but always to her husband. The only debt she contracted with plaintiff in 1911 was secured by a mortgage and promptly paid.

We think the precedents in this Court are decidedly against holding the wife liable upon the evidence in this case.

In *Branch v. Ward,* 114 N.C. 149, it is held that "Only positive and unequivocal assent of the wife to a disposition by her husband of crops raised on her land, and not mere silence, will estop her from asserting her title to the same."

In *Wells v. Betts,* 112 N.C. 283, the Court holds: "Where a husband without the authority, joinder or knowledge of his wife, mortgaged the crops on her lands for supplies, which were expended in making the crops, and the mortgagee had notice of the wife's ownership, and there was no evidence of any representations made by the wife by which the mortgagee was misled, the mortgagee acquired no rights to such crops as against the wife." Notwithstanding, "Acquiescence by wife for several years previous in the management and control by her husband of her lands, and the disposition by him of the crops grown thereon, does not, of (198) itself, authorize the husband as her agent to mortgage the crops to one having notice of her ownership."

In the opinion Chief Justice Shepherd well says: "It is better that the law should require her (the wife's) positive and unequivocal assent than to destroy the domestic tranquillity by forcing her at the peril of forfeiting her rights to exercise a constant and irritating surveillance over the conduct and the management and cultivation of her lands or their joint support. No inconvenience can result from such a ruling, as it is quite easy for a party making advances to require that she be joined as a party to the mortgage." See, also, *Rawlings v. Neal,* 122 N.C. 175; *Evans v. Cullen,* 122 N.C. 55; *Bray v. Carter,* 115 N.C. 16.

Bazemore v. Mountain, 121 N.C. 60, differs essentially from this case. The evidence tending to prove the agency of the husband was not sent up and is not stated in the opinion or in the report of the case. The case was decided by this Court upon the following statement in the case on appeal, viz.: "That the defendant, W. E. Mountain, was the agent of the *feme* defendant, and as such agent he contracted with the plaintiff to furnish the supplies sued for in this action. And his Honor says, in making up the case on appeal, that there was evidence tending to prove all these facts."

In the case at bar all the evidence is sent up and comes before us for review, and upon that evidence we are of opinion that the motion to nonsuit must be sustained and action dismissed.

Let the judgment be entered accordingly.

Reversed.

Cited: Guano Co. v. Colwell, 177 N.C. 220; *Pitt v. Speight,* 222 N.C. 588.

BURROUGHS ADDING MACHINE COMPANY v. L. G. MORROW & CO.

(Filed 3 October, 1917.)

Partnership—Dissolution—New Agreement—Profits—Individual Liability.

Where a partnership, A. & B., has been dissolved by the mutual consent of the parties, who thereupon enter into another written agreement, assuming some of the contracts of the former partnership, and changing its name to A. & Co., giving the management to A. and providing specifically that B. shall receive "his *pro rata* share of the net profits" of the business, the new arrangement having been signed by both of them, but is in many respects ambiguous or unintelligible: *Held*, by the clear provision of the contract, a partnership has been created, making B. liable for the debts incurred in the business, there being nothing to show the profits were looked to only as a method of compensating B. for services rendered.

BROWN, J., dissenting.

APPEAL by George E. Moore from *Stacy, J.*, at March (199) Term, 1917, of PITT.

Outlaw & Darden for plaintiff.
Albion Dunn and Skinner & Cooper for appellant.

CLARK, J. This action is to recover $175, purchase price of an adding machine, the contract to purchase being signed by "L. G. Morrow & Co., by L. G. Morrow, Manager." L. G. Morrow and G. E. Moore were partners in the firm of Morrow & Moore, which was dissolved 12 June, 1914. Thereafter, on 20 June, 1914, L. G. Morrow and G. E. Moore entered into articles of agreement, reciting that L. G. Morrow and G. E. Moore had dissolved their partnership, and without repudiating that dissolution in any way, and agreeing that the firm of L. G. Morrow & Co. should be liable for certain contracts therein specified, which had been made between the firm of Morrow & Moore and certain parties named, and annulling a former contract by which L. G. Morrow was to deliver a deed for certain property to G. E. Moore upon a consideration of $1,500, and leaving that matter optional with said Morrow and certain other agreements in regard to the business of the former firm of Morrow & Moore, the following provision is added: "It is hereby agreed by the said G. E. Moore that he shall continue in said business during the year 1914, and that he will be and remain vigilant and active in securing in good faith all business possible for the L. G. Morrow Co." There is a further provision that "the firm business of L. G. Morrow & Co." shall be managed by L. G. Morrow, and that no one connected with or interested in said firm and business shall have

authority to make any contract without the permission of L. G. Morrow, manager." There is also a further provision that "no one interested in the firm of L. G. Morrow & Co. shall have authority to purchase tobacco without the permission of L. G. Morrow, manager; that the sales shall be managed by L. G. Morrow, and that no one connected with the firm of L. G. Morrow & Co. shall in any way interfere with sales of tobacco," and that "All parties interested in or connected with the firm of L. G. Morrow & Co. agree that all checks drawn by L. G. Morrow & Co. shall be countersigned by L. G. Morrow & Co." There is also this provision: "The said G. E. Moore shall be entitled to his *pro rata* share of the net proceeds of said tobacco business during the year 1914."

On 3 August, 1914, L. G. Morrow & Co. bought of plaintiff an adding machine at the price of $175. This proceeding was begun before a magistrate to recover the above sum, against L. G. Morrow and George E. Moore, alleging partnership. George E. Moore defended upon the ground that he was not a partner.

The judge, on the trial in the Superior Court, recited the terms of the contract, and charged that the instrument re- (200) ferred to "made Moore a partner in the tobacco business for the year 1914, because, under the agreement, he was to take a part of the profits, and that would render him liable for the debt." Moore excepted to this instruction and, the jury having found against him, appealed.

The contract is a very confused and complicated instrument. Moore's counsel very frankly says in his brief: "We must confess that the contract is clouded in doubt, and it is indeed hard to say exactly what is does mean, or what function it was intended that it should perform. It is flooded with inconsistencies, and ambiguities are abundant. In fact, after reading the contract, we know of no language that will so well describe it as the language of Mr. Greenleaf, as follows: 'The instrument is valuable, not only for its intrinsic complication, which is insuperable, but also for its lamentable ambiguity of phrase and confusion of terminology' "; but there is no ambiguity in the agreement that Moore "is to remain in the business during 1914, and shall receive his share of net proceeds."

The firm of Morrow & Moore was dissolved, and subsequently on 20 June, 1914, the agreement between Morrow & Moore was executed. This contract specifies that Moore was to share in the profits for the year 1914. There are several references in this contract that Morrow alone of those interested in the business was to sign checks and have control over the business as manager. And there is no evidence tending to show that any one had any interest in the business besides L. G. Morrow, except G. E. Moore, and as

to him there is this agreement: "In case and provided the said repayment is made, as provided in this the fifth article of these agreements, then the said G. E. Moore shall be entitled to his *pro rata* share of the net proceeds of said tobacco business during the year 1914." Why was Moore a party to the above agreement unless he was a partner in the new firm. In *Cossack v. Burgwyn,* 112 N.C. 305, the Court held that one who shares in the profits of a business, either from capital invested or for services rendered, becomes a partner and liable as such. The Court held that one who loans money to an individual or firm and takes security for the same, and besides the security, a profit from the business is received by him, becomes a partner in the business and liable for its debts.

In *Webb v. Hicks,* 123 N.C. 244, the Court held, citing *Jones v. Call,* 93 N.C. 170; *Kootz v. Tuvian,* 118 N.C. 393: "When the facts are undisputed, what constitutes a partnership is a question of law, and the usual, not the universal, test is participation in the profits and losses of the business. In *Norfleet v. Ins. Co.,* 160 N.C. 327, it is held that the obligation of the partner is joint and several.

(201) The agreement here is in writing, and the facts are not disputed, and the judge did not err in telling the jury that as the defendant Moore was to share in the profits, he was liable for the debt which was incurred in carrying on the business. It would be otherwise if it were shown that the share in the profits was merely a method of fixing the amount of the salary.

Exception was taken to the verification of the account, but it was verified and proven in the manner required by Revisal 1625. *Nall v. Kelly,* 169 N.C. 718. This made out a *prima facie* case for the goods sold. *Lipensky v. Revell,* 167 N.C. 508. The issue was in proper form.

We find

No error.

BROWN, J., dissents.

Cited: Oakley v. Morrow, 176 N.C. 135; *Bolch v. Schuford,* 195 N.C. 661; *Martin v. Bush,* 199 N.C. 100; *Guano v. Ball,* 201 N.C. 537; *Eggleston v. Eggleston,* 228 N.C. 674.

JOHNSON & STROUD v. RHODE ISLAND INSURANCE COMPANY.

(Filed 3 October, 1917.)

1. Insurance — Contracts—Policies—Cancellation—Mutual Consent—Express Stipulation.

While ordinarily it requires the consent of both parties to an existing contract to cancel it before breach of its conditions, this principle is not controlling when contrary to the express provisions that a party thereto may cancel the same without the consent of the other party; and where the insured, under a tornado policy of insurance of standard form, had, within the provisions of the policy, demanded its cancellation of the insurer's agent, the policy is void thereafter, and a recovery for a subsequent loss under the policy may not be had.

2. Same—Adjustment of Premium.

Where the insured has, within the terms of his contract, canceled a policy of tornado insurance, and the question arises as to whether the insurer has retained, on the short-term plan, a greater amount than necessary to extend the insurance beyond the time of the loss claimed, the question is only one for adjustment between the insurer and insured as to the amount of money due the latter, and cannot have the effect of continuing the policy in force beyond the time of its cancellation.

3. Insurance—Contracts—Policies—Cancellation—Physical Acts.

Where the insured has demanded the cancellation of the policy of tornado insurance by right, under its provisions, upon which the policy should be void, the fact that the policy was not physically surrendered and canceled cannot have the effect of continuing the policy in force.

CIVIL action to recover on two tornado insurance policies of standard form, Nos. 2105 and 2106, aggregating $4,000, tried before his Honor, *W. P. Stacy, J.*, and a jury, at April Term, 1917, of PITT.

At a former trial, there was recovery by plaintiff, and, on appeal, a new trial was awarded for an erroneous reception (202) of evidence. See *Johnson v. Ins. Co.*, 172 N.C. 143. This opinion having been certified down, defendant admitting that it had issued the policies in question, and that the amount of damages done by the storm was as claimed by plaintiff, $1,496.80, resisted recovery chiefly on the ground that at the time of the alleged storm, 3 September, 1913, said policies were no longer in force, having been canceled at plaintiff's request.

On issue submitted, jury rendered their verdict that said policies had been canceled as claimed by defendant.

Judgment on the verdict, and plaintiffs excepted and appealed.

Harding & Pierce and J. L. Horton for plaintiff.
Albion Dunn for defendant.

HOKE, J., after stating the case: There was evidence on the part of defendants tending to show that on 25 August, 1913, preceding the storm on 3d September, plaintiff had requested of defendant's agent that he cancel the policies, and again on 29th August that he demanded that this be done, and further that this was so entered on the company's books either on the 29th or entered on slips on that day and duly posted on the day following.

The evidence of plaintiff tended to show that no direct or positive request to cnacel was made, but that plaintiff and defendant's agent had some conversation on the subject, and the matter was left open for plaintiffs to hand in the policies, which he did not have present at the time. On this feature of the case, his Honor, among other things, charged the jury as follows:

"Upon that point I am asked to instruct you, and I do, as follows: The defendant contends that the policies in suit were ordered canceled by the plaintiff Stroud. There is a provision in the policy reading as follows: 'This policy may also be canceled on the request of the insured, in which event the company shall be entitled to the customary short-rate premium for the time expired.'

"I charge you, gentlemen of the jury, that all that is required for the cancellation of the policy and the immediate termination of the insurance is a request from the insured to the insurer, and as soon as received, the cancellation takes effect at once. The assent of the insured is not required. That while it takes two to make a contract, in the cancellation of policies, one of the parties to the contract may end it, if the contract itself so provides.

"I charge you further that a request upon the part of the insured to the insurer's agent to cancel the policy operates as a cancellation upon the instant that such request is made (even if the (203) insurer absolutely refuses to permit it to be done)."

This position is directly approved in *Mfg. Co. v. Ins. Co.*, 161 N.C. 88, as to policies issued in standard form, or containing this or equivalent stipulation for cancellation on request of the insured. Without such provision, the ordinary rule is that in contracts of insurance, as in other cases, there can only be a cancellation by agreement on the mutual assent of the parties (*Waters v. Annuity Co.*, 144 N.C. 663), but the question in the present case is controlled by the express stipulation that the action of the insured making direct request shall suffice. And if this request was made, there would be no significance in the fact that after the loss occurred, the company, in making a remittance for the unearned premium, retained an amount sufficient, at the annual rate, to have carried the policy beyond the date of such loss.

The company insists that the amount is strictly correct, as the

rate is higher for the shorter period, the policy having been in fact canceled or abrogated pursuant to the contract stipulation. Even if the amount retained by the company was too much, this would only be a matter of adjustment between them as the sum actually due and would have no effect on the continued existence of the policy.

Nor is there merit in the suggestion that the policies themselves were not in fact surrendered or actually canceled, as a direct request to cancel by the insured to the company or its proper agent is held sufficient to abrogate the contract. *Mfg. Co. v. Ins. Co., supra.*

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

No error.

R. R. RANDOLPH v. ERNEST McGOWANS.

(Filed 3 October, 1917.)

Claim and Delivery—Replevy Bond—Failure to Return Property—Damages—Statutes—Common Law.

In the event of adverse judgment against a defendant under replevy bond in claim and delivery, upon the terms or conditions thereof required by statute, he is not relieved from liability for the damages in failing to return the property, by reason of its having been destroyed, while in his possession, by causes beyond his control, or solely by the act of God, etc., for the statute changes the common-law rule both as to liability on the bond required of the plaintiff and defendant in such proceedings.

CIVIL action tried before *Stacy, J.*, at March Term, 1917, of PITT, upon these issues:

1. Was the plaintiff the owner and entitled to the immediate possession of the cow described in the complaint at (204) the institution of this suit? Answer: "Yes."

2. What was the value of said cow at the time of the sheriff's seizure? Answer: "$25."

3. Was the cow's death occasioned by the negligence of the defendant? Answer: "No."

The defendant moved for judgment upon the issues that he go without day and recover costs. The court rendered judgment that plaintiff "be declared to have been the owner of the cow described in the complaint at the institution of this suit, and it being made

to appear to the court that during the pendency of this action that the said cow has died and cannot be returned to the plaintiff, it is now ordered and adjudged that the plaintiffs recover of the defendant and the surety on his bond, to-wit, C. H. Mills, the penalty of the bond, to be discharged on the payment of the sum of $25, with interest thereon from the.....day of February, 1915, and the costs of the action, to be taxed by the clerk."

Defendant appealed.

Albion Dunn for plaintiff.
Skinner & Cooper for defendant.

BROWN, J. This is a civil action, instituted to recover possession of a cow. Plaintiff, at commencement of the action, took out the ancillary proceeding of claim and delivery. Defendant replevied when the cow was seized by the sheriff, and took the cow back into his possession. In order to do so, he was required to give the bond required by the statute, the condition of which is as follows:

"That if the said property be returned to the defendant, it shall be delivered to the plaintiff with damages for its deterioration and detention; if such delivery cannot for any cause be had, that the plaintiff shall be paid such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon, as damages for such taking and detention."

The appeal presents the question, Is the defendant liable for the value of the cow at the date he replevied, although the animal died from natural causes before the action was tried? We think the court below properly held that he is.

The former action of replevin in this State is regulated by statute. It is a civil action to recover personal property. The plaintiff has the right and usually does avail himself of the ancillary proceeding of claim and delivery, in which the plaintiff is required to give a bond before he can take the property, and in which the defendant has the right to have the property returned to him
(205) to await the termination of the action. The defendant is then required to give bond, the condition of which is above quoted.

This subject has been discussed in a number of cases, and decided in different ways, but the overwhelming weight of authority is to the effect that the plaintiff in possession of the property under a replevied bond, or the defendant in possession under a forthcoming bond, is liable under all conditions for the return of the property, if the action is decided against him. The fact that a return cannot be had of the property is caused by the act of God, or

other unavoidable causes beyond his control, is of no avail to relieve him from his obligation.

A defendant in possession of property under a forthcoming bond is not a bailee in any sense, but he is claiming the property as its owner. If his claim is decided adversely to him, his possession has been wrongful *ab initio,* and in violation of the rights of the true owner. Therefore, the best considered authorities hold that he cannot escape liability for failure to return the property as conditioned in his bond by showing that the failure comes from circumstances beyond his control. This was the doctrine of the common law.

"So, if the defendant claims the property or says that he did not take it, if in the meantime the beasts die or are sold, so that he cannot have a return, he may recover all in damages, if it be found for him." Hale's Notes, Fitzherbert, Nat. Brev. 69.

The failure upon the part of the defendant to establish his title makes him a wrong-doer, and, being such, he is not permitted to set up the destruction of the property while wrongfully withheld from the plaintiff as a discharge of his obligation to return the goods or pay their value and damages. Shinn Replevin, sec. 812; 24 A. and E. Enc. Law, 536; Wells Replevin, sec. 455; 6 Bacon's Abridgement 67; *George v. Hewlett,* 35 Am. State Reports, 626; *Suppinger v. Grauz,* 137 Ill. 216; *Hinkson v. Morrison,* 47 Iowa 167; *Scott v. Hughes,* 9 Mont. 104; *Blaker v. Sands,* 29 Kan. 551; *DeThomas v. Wetherby,* 61 Cal. 92.

In this case the Court says: "A plaintiff, not being the owner of goods, who takes them out of possession of the real owner, holds them in his own wrong and at his own risk. He is depriving the real owner of the possession, and has also deprived him of the means of disposing of the property pending the litigation; and when at the end of perhaps a protracted litigation, it is determined that the plaintiff in the replevin suit had no right to the possession of the goods, and judgment is rendered against him for the return of the property or its value, he cannot, on principle or authority, be excused from satisfying said judgment under a plea that the property has been lost in his hands even by the act of God."

This subject is very fully discussed in a very learned opinion by Lurton, Circuit Judge, in *Lumber Co. v. Blanks,* (206) 69 L.R.A. 283, and in the notes to that case, where all the authorities are collected and commented upon by the learned annotator, who states the rule to be as we have stated it, in all the courts of this country, with a few exceptions.

This Court decided, in 1791, in *Skipper v. Hargrove,* 1 N.C. 27, "That in detinue the plaintiff shall have judgment, though the slave for which the action was brought has died since the judg-

ment." This case, however, it is claimed, is overruled by *Bethea v. McLennon,* 23 N.C. 527.

In the latter case Judge Gaston says: "The termination of the plaintiff's interests in the goods, which in law necessarily follows when the goods cease to be, not having been caused by his own act, may change the nature of the plaintiff's action, so far as it demands a restitution of the goods themselves, but it does not impair his claim for damages because of the unlawful detention thereof." We would infer from this quotation that while the court could not render judgment for the property in specie, it could render judgment in the same action for its value; but however that may be, the statutory proceeding of claim and delivery, ancillary to the civil action, has superseded the old common-law forms of action, and the condition of the bond is that the property shall be paid for, *if for any reason* it cannot be returned. There seems to be no exception. This is strictly in line with the English courts, as well as the great majority of our own. See, also, Sedgwick on Damages, sec. 536-A, where the subject is discussed.

A New York case is cited and relied upon by the defendant—*Burk v. Graham,* 106 App. Div. 108—which would seem to support his position. We think, however, that the New York statute differs from ours; and as the matter is one of statutory regulation, we base our decision upon the language of our statute, which makes the party giving the bond and taking the property, and remaining in possession of it, practically an insurer.

No error.

Cited: Rogers v. Booker, 184 N.C. 186; *Motor Co. v. Sands,* 186 N.C. 734; *Garner v. Quakenbush,* 188 N.C. 184; *Trust Co. v. Hayes,* 191 N.C. 544; *Crump v. Love,* 193 N.C. 466; *McCormick v. Crotts,* 198 N.C. 667; *Credit Corp. v. Saunders,* 235 N.C. 371.

THOMAS G. BASNIGHT v. AMERICAN MANUFACTURING COMPANY AND SOUTHWESTERN SURETY INSURANCE COMPANY.

(Filed 3 October, 1917.)

Public Policy—Contracts—Statutes—Principal and Surety—Estoppel.

A bond guaranteeing the performance of a "trade expansion contract" which is contrary to our statute against lotteries and gift enterprises (Rev. 3726) and the public policy of our State (*Mfg. Co. v. Benjamin*

Sons, 172 N.C. 53), is as unenforcible against the surety thereon as the contract upon which it is founded; and the defendant surety, in an action on the bond, cannot be estopped, in pleading his defense, upon the ground that by reason of the endorsement of the surety the plaintiff was induced to part with his money.

CIVIL action, tried before *Stacy, J.*, and a jury, at March Term, 1917, of PITT. (207)

Service of process having been obtained as to defendant, the surety company, the issue of liability was determined only as to said surety.

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

Skinner & Cooper and S. J. Everett for plaintiff.
F. G. James & Son for defendant.

HOKE, J. There was allegation, with evidence on the part of plaintiff tending to show that in 1912 the plaintiff, owning a pharmacy business in Greenville, N. C., entered into a contract with the American Manufacturing Company, whereby the latter, in consideration of the sum of $1,800, three-fourths of which had been paid, agreed to procure an increase in plaintiff's business of $20,000 within twelve months from date, or to pay plaintiff 9 per cent on any sum that said increase should fall short of the stipulated amount; that this increase was to be brought about by means of an extensive advertising scheme, owned and copyrighted by the company, which was passed to plaintiff, accompanied with a book of instructions giving full directions as to how to make the same effective, and embracing a voting contest and the offer of an automobile and other prizes in the effort to stimulate plaintiff's trade and patronage.

To secure proper performance of the contract on its part, the company entered into a bond in the sum of $1,800, which bond, attached to the contract, was guaranteed by the endorsement of the defendant, the American Surety Company.

The plaintiff has duly performed all the dependent stipulations of the agreement on his part, but defendant failed to obtain the increase of business, the deficit amounting to something like $15,000.

The action is instituted on the bond to recover the 9 per cent of this amount, service of process being obtained only on the surety company.

We do not make more extended reference to this plan, sold to plaintiff and not inaptly termed a "trade expansion scheme," for the reason that it cannot be distinguished in any essential particular

from one of a very similar kind presented for our consideration in the recent case of *Brevard Mfg. Co. v. Benjamin,* 172 N.C. 53, and which was there held to be in violation of our statute against lotteries and gift enterprises (Rev., sec. 3726) and contrary to our public policy, to which this statute gives expression.

Plaintiff does not seriously argue that the present con-
(208) tract, in its terms and meanings, is not within the application of the decision referred to, but contends that the principle should not be allowed to prevail in this instance because the suit, being against the surety only, and it appearing that plaintiff, having been induced to part with his money by reason of the endorsement of the surety, the latter should be estopped from maintaining this defense; but such a position cannot for a moment be allowed. The bond signed by the present defendant, guaranteeing due performance of the contract, and attached to and made a part of it, is in direct aid of the illegal agreement, and recovery on it can no more be upheld than on the contract itself. This position of a contract by estoppel or recoveries by reason of such a principle, and more usually presented in contracts by corporations and their agents, is sometimes sustained when the impeaching facts have reference to the capacity of the parties to make the contract; but, so far as we are aware, the position is never allowed to prevail when the agreement itself is essentially vicious or contrary to public policy or express provisions of the statute law. In such case the doctrine of estoppel is not recognized, and no recovery can be had in the courts, either against principal or surety. *Brown v. Bank,* 137 Ind. 655; *McCanna & Frazer v. Citizens Trust Co.,* 76 Fed. 420; *County of Keith v. Power Co.,* 64 Neb. 35; Bigelow on Estoppel (6th Ed.), p. 497; Brant on Suretyship, sec. 19; Bead on Contracts, sec. 1499.

In *Brown's* case, *supra,* it was held, among other things: "That a person who has derived benefit from a contract that is void, as against public policy, is not estopped thereby to defend against such a contract when it is sought to be enforced against him."

And in Brant on Suretyship (3d Ed.), sec. 19: "It is essential to the contract of suretyship that there be a contract or obligation on the part of the principal to which the contract of suretyship is collateral. If there is no principal contract, or if the principal contract is void as against public policy, etc., there can be no contract of suretyship."

We find no error in the record to plaintiff's prejudice, and the judgment of nonsuit is

Affirmed.

Cited: Tomberlin v. Bachtel, 211 N.C. 268.

(209)

J. H. KORNEGAY, ADMR. OF HARRIET SUSAN HILL, DECEASED, v. ROBERT CUNNINGHAM *ET ALS.*

(Filed 3 October, 1917.)

Wills — Devises—Estates—Defeasible Fee—Heirs—Children—Contingent Limitations—Rule in Shelley's Case.

Where a testator, by separate devises, gives to each of his three daughters, who are his only heirs at law, a certain tract of his land, with provision in each item, "to her and the lawful heirs of her body in fee simple forever, and if she should die without a lawful heir of her body, then the property to go to the other surviving heirs": *Held*, by the expression, "lawful heirs of her body," in the connection used, the testator intended "child" of his daughters, and they took a fee simple title to the designated lands, subject to be defeated upon their dying without child; and where all of them have died without child, at different times, the successive survivor or survivors took a fee simple title in the land of their predeceased sister or sisters, and so on to the last, at whose death the title derived through her sisters descended to her heirs at law; but as to the devise made directly to her, she could not take a fee simple under the will, and this part descended to the heirs of the testator, as intended by him, the Rule in *Shelley's* case not applying.

CIVIL action, tried before *Stacy, J.*, at March Term, 1917, of GREENE.

This is a proceeding instituted by the administrator of Harriet Susan Hill against her heirs and the heirs of Hymbric Hill to sell land for assets to pay the debts of said Harriet Susan Hill.

The land in controversy formerly belonged to Hymbric Hill, who died, leaving surviving him three children, Harriet Susan Hill, Huldah Ann Hill, and Sarah John Hill, as his only heirs at law.

He left a will in which he devised the land to Harriet Susan Hill, in item 2; another tract of land to Huldah Ann Hill, in item 3, and another tract of land to Sarah John Hill, in item 4.

The limitations as to all of these devises to the daughters are substantially alike, and one is quoted as illustrative of all.

"Item 2. I give and devise to my beloved daughter, Huldah Susan, 52 acres of land, bounded as follows (description omitted, as it is not material), to have and to hold to her and the lawful heirs of her body, in fee simple forever; and if she should die without a lawful heir of her body, then said property is to go to the other surviving heirs."

Sarah John Hill died before her sisters, Huldah Ann and Harriet Susan Hill, without ever having had a child.

Huldah Ann Hill died before her sister Harriet Susan Hill, without ever having had a child.

Harriet Susan Hill, the last surviving daughter, died in May, 1915, without ever having had a child.

His Honor held that Harriet Susan Hill died seized in fee (210) of all of the lands described in items 2, 3, and 4 of said will, and entered judgment accordingly, and the defendants appealed.

J. Paul Frizzelle for plaintiff.

Loftin, Dawson & Manning, G. V. Cowper, and R. A. Whitaker for defendants.

ALLEN, J. The language in the devise, "and if she should die without a lawful heir of her body," in the connection in which it is used, means children, under any decisions of this Court. *Smith v. Lumber Co.,* 155 N.C. 389; *Bizzell v. Loan Assn.,* 172 N.C. 159; *Allbright v. Allbright,* 172 N.C. 352, and the cases cited in these opinions.

It is also equally well settled that under the provisions of the will, the daughters took a fee simple estate, subject to be defeated upon dying without leaving a child. *Whitfield v. Garris,* 134 N.C. 24; *Ford v. McBrayer,* 171 N.C. 420.

If so, under the plain language of the will, upon the death of Sarah John, leaving no child surviving her, the tract of land devised in item 4 passed in fee simple to the two surviving daughters, Huldah Ann and Harriet Susan, who were the only heirs of Hymbric Hill, the testator, and of Sarah John, the deceased daughter, and upon the death of Huldah Ann the land devised to her in item 3 and her interest in the land devised to Sarah John passed in like manner and for the same reason to the last surviving daughter of the plaintiff.

There is nothing in the will to support the contention of the appellants, heirs of Hymbric Hill, that upon the death of the two, Sarah John and Huldah Ann, the land devised to them passed to the surviving daughter, Harriet Susan, with the defeasible quality annexed to the title, and on the contrary the will says that upon the death of one leaving no children "the property is to go to the other surviving heirs," which, in the absence of qualifying words, means to them absolutely.

The appellants further contend that in any event they are entitled to the land devised to Harriet Susan, and here the case depends on the meaning of the words, "to the other surviving heirs."

Do they mean the surviving heirs of the testator or the surviving heirs of the devisee?

Under either construction, the whole of the property would pass

under the will, so that no light is thrown on the question by the presumption against intestacy.

It appears, however, from the will, that it was the intention of the testator that his daughter should not have an absolute estate in fee if she died leaving no children, and this intention would be defeated if we held that "surviving heirs" meant "her surviving heirs."

If we adopted this construction, contended for by the appellees, the devise would be to his daughter in fee if she left (211) children, and if she left no children, then to her heirs; and under the latter contingency she would hold in fee under the Rule in *Shelley's* Case, which operates "Where the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same instrument an estate is limited, either mediately or immediately, to his heirs in fee or in fee tail, the heirs are words of limitation of the estate and not of purchase." *Ford v. McBrayer,* 171 N.C. 420.

This would be to impute to the testator the employment of many meaningless words, the imposition of limitations upon the devises to his daughters having no legal effect, and would be contrary to the intent expressed in the will, that the daughters were not to have a fee if they left no children.

We are therefore of opinion that Harriet Susan died seized in fee of the land devised in items 3 and 4 of the will, and that the heirs of Hymbric Hill are the owners of the land devised in item 2 as his surviving heirs.

The appellee will pay the costs of the appeal.

Modified and affirmed.

Cited: Williams v. Sasser, 191 N.C. 456; *Daniel v. Bass,* 193 N.C. 299.

TAFT AND VANDYKE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 3 October, 1917.)

Railroads—Commerce—Bills of Lading—Stipulations—Written Notice—Federal Decisions—State Courts.

A stipulation in an interstate bill of lading for a shipment of furniture, requiring that a claim for loss or damage must be made in writing to the carrier at the point of delivery or at the point of origin, within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has

elapsed, is held reasonable and valid, following the decision of the highest Federal Court, which is controlling, in such instances, in the State courts; and when such notice has not been given within the time stated, damages for injury to the shipment will be denied in the courts of the State; and a notation by checking on the freight receipt, made by the agent of the delivering carrier and given to the consignee, is not a compliance with the stipulation stated.

ACTION for damages, tried before *Harding, J.*, at May Term, 1917, of PITT.

Plaintiff appealed.

S. J. Everett for plaintiff.
Skinner & Cooper for defendant.

WALKER, J. This suit was brought to recover damages (212) for injury to furniture shipped over defendant's line in interstate commerce, the amount claimed being $62.89. The court held, and so adjudged, that plaintiff was not entitled to recover, as he failed to comply with the following stipulation of the bill of lading: "Claims for loss, damage or delay must be made, in writing, to the carrier at the point of delivery or at the point of origin, within four months after the delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable." It appears that the goods arrived at Greenville, N. C., on different days in 1914, and the agent saw their condition and noted it on the receipt for the freight charges, which was evidently done to enable the plaintiff to file his claim according to the requirements of the contract between the shipper and the defendant, but the plaintiff did not file any written claim until 10 October, 1914. We have held in several cases that the mere knowledge of the carrier's agent, at the place of delivery, as to the condition of the goods would be sufficient notice and takes the place of a written claim. *Rabon v. R. R.*, 149 N.C. 59; *Kime v. R. R.*, 153 N.C. 398; 156 N.C. 451; 160 N.C. 457; *Duval v. R. R.*, 167 N.C. 24; *Horse Exchange v. R. R.*, 171 N.C. 65; *Baldwin v. R. R.*, 170 N.C. 12; *Mewborn v. R. R., ib.*, 205; *Reynolds v. Express Co.*, 172 N.C. 487. It is said by the Court, in *Mewborn v. R. R., supra*, that this principle, by which actual knowledge acquired by the delivering carrier's agent of the injury to goods, and the extent of the damages, will be a sufficient notice or claim of loss, notwithstanding the provisions in the bill of lading, that the claim shall be in writing, will be adhered to by this Court, in the absence of a contrary decision of the highest Federal Court. At the October Term, 1916, the

United States Supreme Court decided that such a stipulation in a bill of lading is reasonable and valid, and must be complied with by the shipper, and if he does not comply with it he cannot recover damages *(St. Louis, etc., B. Co. v. Starbird,* 37 S.C. Reported 462 [30 April, 1917]), and that actual knowledge of the agent of the carrier as to the condition of the goods is not equivalent to such claim of loss. Referring to this case, we said, at this term, in *Bryan v. L. & N. R. Co.:* "We are of opinion that the verbal notice to the clerk in the Coast Line office is not a compliance with the contract. It is stipulated that the notice shall be in *writing.* There are very obvious reasons why written notice should afford more protection to the carrier than mere verbal notice to some clerk in the office, who may overlook it. Our decisions have been to the contrary, but the Supreme Court of the United States has recently decided, in *St. Louis, I., M. & S. R. Co. v. Starbird,* 37 S.C. Rep. 462 (30 April, 1917), that "A stipulation in a through bill of lading for an interstate shipment of peaches that the carrier issuing the (213) bill of lading shall not be held liable for damages unless a claim for damage is reported by the consignee in *writing* to the terminal carrier within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery, is valid and not unreasonable."

It is useless to quote more from the opinion. The whole tenor of it indicates that the court regarded the stipulation that the notice must be in writing as an essential part of the contract, and that unless complied with, a recovery cannot be had. As the Court also said in that case, it is not difficult for the consignee to comply with a requirement of this kind, and give notice in writing to the agent of the delivering carrier. Such notice puts in permanent form the evidence of an intention to claim damages, and will serve to call the attention of the carrier to the condition of the freight, and enable it to make such investigation as the facts of the case require while there is opportunity so to do. The Court said, in *Southern Express Co. v. Caldwell,* 21 Wall. (88 U.S.), 264, that a stipulation of this kind is valid. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence and of capacity, which the strictest rules of the common law ever required. And it is intrinsically just. The Court held that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy; and, further, that an agreement that in case of failure by the carrier to deliver

goods, he shall not be liable unless a claim shall be made by the bailor, or by the consignee, with a specified period, if that period be a reasonable one, is not against the policy of the law, and is valid. It purported to relieve the defendants from no part of the obligations of a common carrier. They were bound to the same diligence, fidelity and care as they would have been required to exercise if no such agreement had been made. All that the stipulation required was that the shipper, in case the package was lost or damaged, should assert his claim in season to enable the defendants to ascertain the facts; in other words, that he should assert it within ninety days. *Queen of the Pacific,* 180 U.S. 49 (45 L. Ed. 429). And this Court decided the same way in *Lytle v. Telegraph Co.,* 165 N.C. 504, and, further, that the stipulation as to a written claim for loss was not complied with by a verbal statement to the agent of the company that the particular message had been delayed and the company would have to pay for it.

In this case there was no written notice of loss given, nor (214) even any verbal or written statement by the consignee that he intended to claim any damages, until long after the four months had expired, although he had ample time to file such a notice or claim of loss. The receipt for freight charges was handed to the consignee by the agent, and he has it now, but the notation thereon was no compliance with the stipulation in the bill of lading. It may be added that the consignee himself took our view of the matter as to this stipulation, and was conscious that a written claim of loss was required of him, because he did file such a claim, but entirely too late to be of any service to him. The carrier would be at a great disadvantage if he had to rely upon mere knowledge of his agent, or a verbal notice to him, say the Federal courts, for it would result in great confusion and uncertainty as to the nature of claims, and prevent their orderly and intelligent consideration. In many cases the special facts would be involved in doubt if carriers had to rely upon the memory of their agents as to claims for losses.

It follows that there was no error in the ruling of the court.

No error.

Cited: Mann v. Transportation Co., 176 N.C. 108; *St. Sing v. Express Co.,* 183 N.C. 407; *Thigpen v. R. R.,* 184 N. C. 35.

C. B. WEST v. C. O'H. LAUGHINGHOUSE, J. W. HIGGS ET ALS.

(Filed 3 October, 1917.)

1. Mechanics' Liens—Building Contracts—Abandonment—Damages.

Where a contractor abandons his contract for the erection of a building in his own wrong as to the remaining executory features thereof, he cannot maintain an action for its breach, it being required that he allege and prove a performance of his own antecedent obligations.

2. Same—Breach—Waiver—Architect.

Where a nonresident architect, in full charge of the erection of a building, whose duty it was to visit the building for the purpose of supervision, whenever he deemed it necessary, within a few days after an acknowledged and material departure from the contract by the contractors, notified the contractor that the building would not be accepted unless the breach were remedied, which the contractor refused to do, the mere fact that the breach was with the knowledge of the local representative of the architect, who made no protest, will not be considered as a waiver of the terms of the contract.

3. Same—Penalty—Additional Costs.

Where the contractor for the erection of the building abandons it in his own wrong, thereby causing an additional expense to the owner, arising from extra services required of his architect, and a delay has occurred in the completion of the building, for which a stipulated sum per day was agreed to be allowed the owner, this sum so allowed, on the facts of the present case, is to be regarded as in the nature of a penalty, and the legal rate on the capital invested was properly allowed the owner, together with the amount due the architect for the extra services thus required of him.

4. Reference — Consent—Agreements—Mechanics' Liens—Creditors' Bill — Parties—Contracts—Amounts Due—Pro Rata Distribution—Statutes.

Where, in an action by the contractor against the owner of the building to recover an amount alleged to be due him, the matter is referred, with the consent of the parties, containing a provision that any amount due by or in the hands of the defendant shall be applied to the debts incurred in the construction and completion of the building, arising out of labor, services or material that went into such construction, etc.: *Held*, the claimants enumerated, by presenting and filing their claims with the referee, made themselves parties, as in a creditor's bill, and thereafter could acquire no preference by filing their claims with the owner (Rev., secs. 2019, 2020, 2021, 2022, 2023), and are bound by the agreement making the amount ascertained to be due into a trust fund for *pro rata* distribution.

5. Same — Priority—Payment—Confirmation—Final Judgment—Owner's Risk.

Where it is agreed in a consent reference that the amount ascertained to be due a contractor for the building shall be distributed *pro rata* among the laborers, material men, etc., the report of the referee is subject to modification before its confirmation, and before final judgment to

be set aside for good cause shown; and the owner paying out the funds in preference to some of the creditors contrary to the terms of the agreement, does so at his own proper risk.

6. Reference — Consent Order—Agreement—Mechanics' Lien—Contracts —Penalty—Damages—Liens.

Where, under a consent reference, binding upon the parties, it has been agreed that the amount due from the owner under the building contract, to the contractor, shall constitute a fund to be divided between claimants, who furnished material, and laborers on the building, etc., and there is provision for damages to the owner for delay in the completion thereof, by the express terms of the agreement to refer, the owner is entitled to his damages before the distribution of the funds, and the claimants may not successfully contend that this damage was a personal charge against the contractor, and that it should not be allowed in preference to their claims.

CIVIL action, heard on exceptions to report of referee, be-
(215) fore *Stacy, J.*, at March Term, 1917, of PITT.

The principal action was instituted by plaintiff, a contractor, who claimed that, having entered into a contract with the owners to build an office building at a contract price of $40,328.80, he did the work on time, to a stated period, when defendants wrongfully refused to pay him an installment due, and he was forced to abandon the work, and he sued for certain labor done and material furnished, and for profits to accrue on performance, etc.

Defendant denied that any amount was due for work,
(216) etc., done under the contract; alleged, further, that plaintiff had voluntarily abandoned the contract in his own wrong, having refused to remove certain woodwork, when directed by the architect, placed in the building before the plastering had dried, contrary to the express provisions and stipulations of the contract; that he thereupon voluntarily quit the work, as stated, and defendants, the owners, were compelled to finish the building themselves, and set up, by way of counterclaim, damages for delay and increased expense. The contract, among other things, contained stipulation for damages for such delay at the rate of $25 per day.

At September Term, 1915, the cause was referred to G. V. Cowper, Esq., the order of reference, among other things, providing that by consent any amount found due from the owners under the contract should be applied in discharge of all debts and liabilities for labor, services or material that went into the construction of the building, etc., before any recovery may be adjudged in favor of plaintiff, personally, and to that end the referee shall report all such debts, claims and demands as shall appear to be justly and properly due therefor at the time of the hearing, etc.

The referee, after hearing evidence and argument, made his re-

port to February Term, 1916, sustaining the positions of the defendant, and finding, in effect, that plaintiff had voluntarily and wrongfully abandoned the contract; that nothing was due him personally for work and labor, and allowing defendant, by way of counterclaim, $600, increased pay to architect, and $1,061.96 for delay of 158 days in completion of building incident to defendant's default.

This damage for delay was allowed, not at $25 per day, but on the basis of the interest on the value of the building, as contemplated and provided for in the contract.

The court sustained in full the report of the referee, adopting the same as the judgment of the court, and plaintiff, having duly excepted, appealed.

There was appeal also by certain material men who had been allowed to formally intervene for the purpose, and who excepted to report of referee in not allowing them a proper *pro rata* in the sum of $4,829.31, balance due on account after completion of building.

Julius Brown and J. C. Lanier for intervenors.
Harding & Pierce and Ward & Grimes for plaintiffs.
S. J. Everett, Harry Skinner, and F. S. Spruill for appellees.

PLAINTIFF'S APPEAL. (217)

HOKE, J. At the time plaintiff abandoned the contract, there was nothing due him by reason of labor performed or materials furnished, and the referee having found further that the abandonment was in plaintiff's own wrong as to the executory features of the agreement, the recognized position in the law of ordinary contracts should prevail—that one party to a contract cannot maintain an action for its breach without averring and proving a performance of his own antecedent obligations *(Ducker v. Cochrane,* 92 N.C. 597), a position approved in *McCurry v. Purgason,* 170 N.C. 468; *Supply Co. v. Roofing Co.,* 160 N.C. 445; *Wildes v. Nelson,* 154 N.C. 590; *Corinthian Lodge v. Smith,* 147 N.C. 244; *Tussey v. Owen,* 139 N.C. 457, and many other cases.

Plaintiff does not controvert this as a correct legal proposition, but contends that, although he placed this inside furnishing work in the building before the plastering had dried, and refused to take it out when directed to do so by the architect, contrary to an express provision of the contract, he was justified in his refusal because one G. S. Holland, who stayed at the building, representing the architect, saw him putting this wood trimming in, and made no

protest. Undoubtedly, a stipulation of this kind might be waived by the owners or by an agent having proper authority in the matter, but the facts, as declared by the referee, do not in our opinion show any such acquiescence or waiver as to justify a departure from this provision of the contract. It appears that the architect resided in Rocky Mount and came to Greenville only when he considered his presence necessary to a proper supervision of the work; and while Holland, his representative on the ground, did see the contractor placing the inside woodwork in breach of the agreement, the finding of the referee on this point is: "That soon after plaintiff began to place the finished woodwork and trimmings in the building, as heretofore set forth, and soon after Holland and the owners became aware of it, J. C. Stout, the architect, came to Greenville in person, and after he had seen the building, and especially the situation in reference to the plastering and finishing, he notified the contractor that this work would not be accepted under the contract," etc.

Plaintiff having admitted he acted here in violation of the contract stipulation, the burden is on him to justify his conduct and the facts disclosed in this finding of the referee, as stated, fails to establish either acquiescence or waiver.

On the damages, the referee, favoring the defendant, held that the $25 per day, stipulated for by the contract in case of delay in completing the building, was in the nature of a penalty, and awarded damages for this period, estimated by the interest on the capital invested, a course approved in several cases with us on the (218) subject. *Furniture Co. v. Express Co.,* 148 N.C. 87; *Rocky Mount Mills v. R. R.,* 119 N.C. 693; *Foard v. R. R.,* 53 N.C. 235. And the $600 allowed for the architect was by reason of extra services rendered necessary by plaintiff's breach of the contract and directly incident to it.

On careful consideration of the record, and the very full and intelligent report of the referee filed in the cause, we find no error which gives the plaintiff any just ground of complaint, and as to him the judgment is

AFFIRMED.

APPEAL BY CERTAIN MATERIAL MEN, CLAIMANTS, AND DESIGNATED IN THE RECORD AS INTERVENORS.

HOKE, J. This suit was instituted by the plaintiff against the owners of the property on 24 November, 1914, summons being served on the 25th, and at September Term cause was referred to E. V. Cowper, Esq., of the Kinston bar, and in the order of reference there was inserted by consent of the parties a provision that any amount

found to be due by or in the hands of the defendants under the contract shall be applied to the payment and discharge of all the debts and liabilities properly incurred in the construction and completion of the building, arising out of labor, services or material that went into such construction, etc.

On the hearing, a large number of such claims were presented and filed before the referee and embodied and set forth in section 12 of the report. The referee then classified certain of those claims in sections 14 and 15, section 14 showing an itemized statement, aggregating $3,021.44 for material used in and upon the building, and which had not been filed with the owners; and section 15 showing an itemized statement for material, etc., aggregating $4,426.77, which had, *in this proceeding,* been filed with the said owners; and the referee thereupon holds as one of the conclusions of law that those claims which had been filed with the owner should be paid in full out of the amount found due from the owners, and the balance, $402.38, shall be shared *pro rata* among the claimants in section 14.

To this conclusion the claimants in section 14, styled intervenors, having obtained leave of court for the purpose, filed an exception, contending that all of these material men should share equally in the amount to be apportioned. The ruling of the referee was, no doubt, based upon a construction of sections 2019, 2020, 2021, 2022, 2023 of Revisal, giving to subcontractors furnishing material a valid claim on any amount due from the owner, and also a lien on the building to that amount, if required, when they shall have given notice and filed an itemized statement of their claims with the owner.

The meaning and proper applications of these sections have been before the Court in several recent cases—*Foundry* (219) *Co. v. Aluminum Co.,* 172 N.C. 704; *Brick Co. v. Pulley, et al.,* 168 N.C. 371; *Mfg. Co. v. Andrews,* 165 N.C. 285—and a perusal of these cases, and of the statute referred to, will disclose that such subcontractor may, by filing an itemized statement, acquire a claim against any balance then due from the owner, or which may be earned under the contract, and a lien therefor on the building, not exceeding that amount. And in the *Foundry v. Mfg. Co.* case, more particularly, it is held that this amount is to be considered as a trust fund, to be divided equally among those claimants who have complied with the statute by filing a proper notice. This interpretation is emphasized by the language of section 2023, to the effect that in such a case "it shall be the duty of the owner to distribute the amount *pro rata* among the several claimants, as shown by the itemized statement which has been furnished him."

While this view might sustain the conclusion of the referee on this question if the matter was an adjustment *inter partes,* and possibly if the claimants had filed their itemized statements with the owners before suit brought, the position cannot obtain in the present instance by reason of the terms and effect of the order of reference, and by which it was agreed that all claims for material should share in any amount due from the owners to the contractors. Under that order and the provision agreed upon, these claimants all appeared and presented their claims, and the amount due under the contract, by their consent, to be considered and dealt with as a trust fund in which the designated material men were to share equally. After that time no one creditor or claimant could obtain advantage over another by filing his claim with the owner. The action as to them had taken on the nature of a creditor's bill for the proper distribution of a common fund and was no longer subject to a preference by action *inter partes.* In such suit, unless a claim is contested, in which case it is customary to file special pleadings in reference to it, that the issues may be the more intelligently determined, no formal order is necessary to make these claimants parties. They became such by presenting and filing their claims with the referee, and were thereby bound by the terms and significance of the order of reference, which clearly contemplates and requires an equal distribution of the fund. These positions are in accord with the recognized principles applicable to general creditors' bills, and are sustained by decisions of this Court dealing with the subject. *Fisher v. Bank,* 132 N.C. 771; *Bank v. Bank,* 127 N.C. 432; *Pipe Co. v. Woltman,* 114 N.C. 178; *Hancock Bros. v. Wooten,* 107 N.C. 9; *Warden v. McKimmon,* 94 N.C. 378; 6 Pomeroy's Eq., secs. 894-895.

(220) It is urged, on behalf of the owners, that a *pro rata* distribution should not now be ordered, because they have paid some of these claimants in (section 15) in full, and, after the report of the referee awarding such payments, had remained on file for some time unexcepted to.

It is well understood that the report of a referee is subject to modification on proper application at any time before it is confirmed, and after that and before final judgment, the order of confirmation may be set aside for good cause shown.

These exceptions entered, filed by leave of court and before confirmation, are in accord with regular order and procedure, and the defendants paying with full notice of this and before confirmation must be held to have paid at their peril. 34 Cyc., pp. 870 and 871. A position all the stronger here as they had agreed to an order of reference requiring the amount due from them should be shared

equally by material-men, and these claims for material had been duly filed with the referee in the cause.

It is insisted further for intervenors that the amount of $1,061.96 allowed the owners as damages for delay is a personal claim against the contractor plaintiff and should not be considered a proper deduction from the balance to be shared by claimants. Whatever may be the merits of such a position, we think it is not open to appellants on this record and by reason of the stipulation in the order of reference that the "amount due from defendants under the contract" shall constitute the fund to be divided. The contract, in express terms, provides for damages for this delay, and the appellants are concluded by this clause of the order.

There is error, and this will be certified that the judgment be so modified as to allow the claimants in sections 14 and 15 of the report to share equally in the balance due as found by the referee.

Error.

BROWN, J., did not sit.

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(221)

H. C. SIMMONS ET ALS. v. JOHN L. ROPER LUMBER COMPANY.

(Filed 3 October, 1917.)

1. Negligence — Fires — Causal Connection—Evidence—Railroads—Logging—Roads.

Evidence tending to show that defendant, in cutting and removing timber from lands under a timber conveyance, operated a steam train on tramroads through the lands, on the right of way of which straw and other combustible matter had been left by them; that a fire occurred thereon near a locomotive which was fired up and stood at one of these places; that the defendants' employees were seen trying to put out the fire which was spreading from the direction of the locomotive, on both sides thereof, is sufficient upon the issue of defendant's actionable negligence, the causal connection between the fire and its supposed origin, creating a reasonable inference from which the jury may find the issue against, especially when the evidence tended to show that the only fires on the land were those used by the defendant's employees in the operation of the locomotive.

2. Same—Presumptions—Res Ipsa Loquitur.

Where the evidence tends to show that a fire was set out by defendant's locomotive, standing on its tramroad with an inflammable right of way, which spread to plaintiff's land and damaged it, and defendant's em-

ployees were the only ones present when the fire originated, the burden is on the defendant to go forward with its proof, if he would show the absence of negligence, which, under the circumstances, is presumed, at least, *prima facie*, the matter being peculiarly within its own knowledge and the engine under its control; and the doctrine of *res ipsa loquitur* applies.

3. Contracts — Independent Contractor—Negligence—Liability—Dangerous Work.

The doctrine of independent contractor, relieving his principal from liability for the negligence of such contractor, does not apply when the latter assumes control and management in the prosecution of the work, or where the work to be done is inherently dangerous, as in cutting and hauling from the land, with steam locomotive power, the timber thereon, under the conveyance of such timber, giving the right to operate logging roads on the land for that purpose.

4. Pleadings—Proof—Variance—Statutes.

In the case of a variance between the allegations of the complaint and the proof upon the trial, the defendant must pursue the remedy prescribed in Revisal, sections 515 and 516, or the variance, under our liberal practice of construction, will be deemed immaterial, under the former section. The allegations of the complaint in this case are held sufficient.

CIVIL action for damages, tried before *Lyon, J.*, and a jury, at April Term, 1917, of ONSLOW.

This action was brought to recover damages for burning plaintiffs' woods, which they contend was caused by the defendant's negligence. The court, in the charge, states concisely the principal facts upon which the plaintiffs claim the right to recover. It is alleged by plaintiffs "that about 1 May, 1914, while the defendant Roper Lumber Company was in possession of certain land, and cutting the timber, building tramroads for the purpose of getting the timber out, hauling logs to load, that they negligently and carelessly permitted fire to escape from their engines, and thereby destroy a large quantity of timber that was not covered by the deed made by them to the Blades Lumber Company; that there were two fires several days apart, and there was no one else in the woods at the time, except those who were employed by the Roper Lumber
(222) Company, and that one of the fires originated from the right of way that they had weeded out for the purpose of putting down cross-ties and iron, and that no one else was there when the fire started; that the fire originated from or near that place, and that defendant's servants negligently and carelessly permitted the fire to get out, and that after the fire got out, that they, through their carelessness and negligence, did not stop it, and did not get a sufficient force for that purpose; that the fire was originated near

where they were at work, in a pile of logs that had been hauled there, and that some of the parties working for the Roper Lumber Company were at work near-by, and the fire spread out on the south side of the road and did great damage."

The principal exception of the defendant is that there was no evidence of negligence. We will, therefore, make such excerpts from the testimony as will show what the proof was upon which the plaintiffs relied, though will not state all of it consecutively, but only connectedly, as to that part of it which is material:

R. W. Craft testified: "Defendant's train ran on the only right of way he knows of in the woods in question."

A. D. Wood testified: "I know about the fire that started on and burned over that land . . . I passed there and saw the fire on one of the rights of way. I was 60 or 70 yards from the fire, I think. I had seen the right of way before I saw the fire on it. I think the hands had finished it. It came from the Pender line of the Roper Lumber Company. They had been making the right of way and it was just cleaned off. I saw that the logs and trees were cut and that it was weeded to secure the fire. The right of way was in condition to burn. I don't recollect how long it had been since it rained, but it was very dry; it was ordinary grass and straw on the ground. I heard some knocking going on around there. I went the next day where I had seen this and found fresh timber cut there. I know that afterwards the Roper Lumber Company hauled the logs. Some of the grass on the track was dead and some was alive. It had not burned much at that time. It was straw and wire-grass, pine straw; it was dry. The wind was blowing in a northerly direction that morning. I saw Mr. Hub Jones, and he was working for the Roper Lumber Company and was looking after the fire when I found him. I did not see any one else. The fire came from towards the train. It was burning in a few feet of the train. There was a train operating on the tram. I think the loader was on that line. I went near enough to see that they were trying to stop the fire. The loader was operated by a steam engine."

J. S. Raynor testified: "There was a lot of pine tops, which were dry and trashy. The ground where the fire spread was right smart trashy and dry bush. The best I can remember, the engine was not far from the fire at the time I first noticed the fire (223) break out."

There was a verdict for $600 in favor of the plaintiffs. Judgment was entered thereon, and defendant appealed, after reserving its exceptions.

Duffy & Day and G. V. Cowper for plaintiffs.
Frank Thompson and L. I. Moore for defendant.

WALKER, J., after stating the case: The first question is, whether there was sufficient evidence, in law, to support the verdict, or, in other words, was there any evidence that the defendant, by its servants, negligently burned the timber on plaintiff's land?

After a most careful review of the testimony, we think that the case was properly submitted to the jury upon the question of negligence, and that the evidence was sufficient to support the verdict. It was said in *Deppe v. R. R. Co.*, 152 N.C. 79, 81: "The defendant contends that no witness testified that he saw sparks emitted by the engine, or that he saw the sparks from the defendant's engine ignite the plaintiff's lumber kiln. In considering this contention, it must be remembered that this fire occurred in the daytime—in the brilliancy of a summer sun, rendering sparks emitted by an engine incapable of being seen by the human eye. That no one saw the sparks ignite the burned property was the fact in *McMillan v. R. R.*, 126 N.C. 725, and *Williams v. R. R.*, 140 N.C. 623, in which latter case this Court comments upon a similar contention: "No one testified that he saw the sparks fall from the engine upon the right of way. It is rarely that this can be shown by eye-witnesses, for it would be put out by the observer. But here the fire was seen on the right of way; it burned 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 defendant's engine passed. How long before that the fire began no one knew, but there was no fire before the engine passed. The other witnesses first saw the fire after a longer interval, and there was evidence that the fire burned both ways. These were matters for the jury. . . . In considering the *origin* of the fire, it is immaterial whether the fire caught on or off the right of way."

If this is a correct statement of the law as applicable to the *Deppe* case, it must be so in the present one, when we consider it with reference to the facts appearing in this record, which are much stronger, as tending to show negligence on the part of the defendant, than those in the other case.

It was said by Pearson, J., in *Bottoms v. Kent*, 48 N.C.
(224) 154, quoted with approval in *Cheek v. Lumber Co.*, 134 N.C. 225, 228: "As a condition precedent to the admissibility of evidence, the law requires an open and *visible* connection between the principal and the evidentiary facts. This does not mean a neces-

sary connection which would exclude all presumptive evidence, but such as is *reasonable* and not latent or conjectural."

It seems to us that the case of *Ashford v. Pittman,* 160 N.C., at p. 47, is on all-fours with this case, in all essential respects. Justice Brown there stated: "No evidence is offered which tends in the least to explain or throw any light upon the cause of the fire, unless it caught from the fire around the pot, built within 30 feet of the stables. It is true that the evidence does not prove conclusively that the stables caught from the fire, built so near them, but we think the evidence is of such circumstantial character that it should be submitted to the jury, to be determined whether the building the fire around the pot caused the burning of the stables. Circumstantial evidence has frequently been allowed to determine matters of much greater consequence, both criminal and civil. There are a number of cases in our reports where the evidence of circumstances has been allowed to go to the jury as bearing upon the origin of a fire," citing *McMillan v. R. R.,* 126 N.C. 726; *Aycock v. R. R.,* 89 N.C. 327; *Simpson v. Lumber Co.,* 133 N.C. 101. In the *McMillan* case, when the point was suggested that there was no eye-witness who testified to the origin of the fire, but the plaintiff relied only upon circumstances as to how the fire originated, the Court remarked that, while it was true the evidence was entirely circumstantial, it frequently happened in cases of gravity and of the greatest importance, both criminal and civil, that this kind of evidence is resorted to for proving or disproving the existence of an essential fact; and, it is added, that in the case then under consideration, the undisputed facts were that there was a railroad track and right of way where the defendant's engine was and had been, and immediately afterwards the fire was ignited, which spread to the plaintiff's lands and damaged them, the land contiguous to the track being covered with combustible material—that is, covered with dead broom-straw. The Court held the facts sufficient to go to the jury. The *Simpson* case is to the same effect. There the sparks were not actually seen by any one. It appeared in that case that the train had passed on the defendant's track, and shortly thereafter a fire was discovered not far from the plaintiff's house and near the track. That case is also very much like ours, the difference, if any, being that in this case there were fires on both sides of the track, while in the *Simpson* case the fire was confined only to one side. The mere fact that in the *Simpson* case the train was moving makes little or no difference, because an engine standing still can emit sparks as well as one that is moving. The *Aycock* case (225) is like the *Simpson* case in its material facts.

The cause of the fire is not required to be shown by direct and

positive proof, or by the testimony of an eye-witness. It may, as we have seen, be inferred from circumstances, and there are many facts like this one, which cannot be established in any other way. It is true that there must be a causal connection between the fire and its supposed origin, but this may be shown by reasonable inference from the admitted or known facts, for otherwise presumptive evidence would be excluded. We have held, proof as to the emission of sparks from locomotives or stationary engines to be sufficient for the purpose of showing that a fire was started by them, where no one saw the sparks dropping on the place which was burned, and for the reason that the surrounding circumstances tended to prove that they were the cause of the fire, by reasonable presumption or inference. We have cited several such cases, and it would be useless to mention others. This is rather a typical case of that class, and the facts tend to show the true cause of the fire with more certainty than in many of them where the owner of the engine was held liable for a negligent burning. There were fires on both sides of the tramroad. One of the witnesses stated that "the fire came from towards the tram and was burning within a few feet of the train which was operating on the tram. The loader, I think, was on the line, which was operated by a steam engine. I was near enough to see that they were trying to stop the fire." He also testified that the right of way was covered, at places, with dry grass and pine straw, logs and other inflammable material, and that the first fire seen by him was "in the region near the southwest swamp and on the right of way." This evidence is not merely conjectural or speculative, but is such as warranted the jury in forming a reasonably safe conclusion that the fire was set out by the engines; there being, in addition to all this proof, the fact that there was nothing else there to cause the fire. *McMillan v. R. R.*, 126 N.C. 725; *Williams v. R. R., supra.*

The next question is, Was there any negligence on the part of the defendant? "The decided weight of authority and of reason is in favor of holding that the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it used all reasonable precautions." *Deppe's* case, *supra.* An able writer on the law of negligence says: "The plain proposition applicable here, as in other cases, is that where an injury to 'A.,' or the property of 'A.,' proceeds from the premises of 'B.,' under such circumstances that injuries do not ordinarily happen where care is used to prevent them, the mere fact of the injury so proceeding is *prima facie* evidence of negligence to charge 'B.' in conformity with the rule *that the* (226) *thing itself speaks.*" Thompson on Negligence, Vol. 1, sec.

732, p. 671. This principle, as stated by Mr. Thompson, has frequently found its way into our decisions, and has been applied by us with exceptional uniformity. *Aycock v. R. R.,* 89 N.C. 329; *Williams v. R. R., supra; Cox v. R. R.,* 149 N.C. 118; *Knott v. R. R.,* 142 N.C. 238; *Kornegay v. R. R.,* 154 N.C. 392; *Currie v. R. R.,* 156 N.C. 419. In the *Aycock* case, Chief Justice Smith said: "It is but just that the owner should be allowed to say, 'You have burned my property, and if you were not in default, show it and escape liability," citing note to *R. R. v. Schurtz,* 2 Am. and Eng. R. R. Cases 271. And the same was thus substantially said by Justice Burwell, in *Haynes v. Gas Co.,* 114 N.C. 203, 208, citing and quoting from *Aycock's* case, *supra,* and *Moore v. Parker,* 91 N.C. 275, to this effect: "A *prima facie* case of negligence being thus made out against the defendant, he must produce proof of care on his part, or of some extraordinary accident that rendered care useless, in order to rebut the presumption. Guided by the principle announced in these cases, we come to the conclusion that this plaintiff should have been allowed to say to this defendant, 'The wire you put in the street killed my son while passing along the highway, as he had a right to do. If you are not in default, show it and escape responsibility.' Numerous authorities might be cited to sustain our conclusion upon this point, the cases being strictly analogous to this one. But we content ourselves with a reference to Ray on Negligence of Imposed Duties, p. 145; Wood's R. R. Law 1079; Whitaker's Smith Negligence 423. The last-mentioned author says (p. 422): 'If the accident is connected with the defendant, the question whether the phrase, "res ipsa loquitur," applies or not becomes a simple question of common sense.' It seems to us that there is nothing in the relation of the deceased to the defendant or in any of the circumstances attending the incident of his death to prevent the rigid application here of the rule announced by Judge Gaston in *Ellis v. R. R.,* 24 N.C. 138, and reaffirmed, as stated above, in *Aycock v. R. R., supra.*" And in *Haynes'* case, Justice Burwell gave the following reason for the rule, though, that Chief Justice Smith, from whose opinion he quoted, had personally preferred the one which placed the burden upon the plaintiff: "In *Aycock v. R. R.,* 89 N.C. 321, where a plaintiff sought to recover damages for the burning of his property, fire having been communicated to it by sparks from an engine on the defendant's road, Chief Justice Smith, discussing 'the question as to the party upon whom rests the burden of proof of the presence or absence of negligence where only the injury is shown, in case of fire from emitted sparks,' declares that this Court will 'abide by the rule so long understood and acted on in this State, not alone because of its intrinsic merit, but because it

is so much easier for those who do the damage to show the ex-
(227) culpating circumstances, if such exist, than it is for the plaintiff to produce proof of positive negligence,' and he adds that 'the servants of the company must know and be able to explain the transaction, while the complaining party may not.'" Justice Allen states the rule concisely in *Currie v. R. R., supra,* as follows: "The first issue establishes the fact that the defendant destroyed the property of the plaintiff by fire, and from this fact alone the presumption arises that the defendant was negligent," citing several of our decisions. The jury, in response to the first issue in the *Currie* case, merely found that the property was burned by sparks from the defendant's engine, and the burden was then shifted to the defendant to disprove negligence, or to show that the engine was properly constructed and carefully operated, so as to prevent the emission of sparks. This renders useless further discussion of this matter.

The contention that Jones and Raynor were independent contractors, having charge and direction of defendant's operation at the place of the fire, the jury have settled against the defendant, upon sufficient evidence and a correct instruction from the court, which was that if the jury found from the evidence that Jones and Raynor were at the time under the control and management of the defendant in doing the work assigned to them, they were not independent contractors; but that if the defendant had no control over the manner in which they performed the work, but simply paid them for their services, being interested only in the result of their labor, they would be independent contractors. This was sufficient, especially in view of what was said by the witness J. S. Raynor, that "Mr. Whitehurst (defendant's vice-principal) told me what to do in the woods. . . . He would tell me what logs to haul and how to put them, and I had to put them where he said. I hauled them in any direction that I wanted to. . . . Mr. Whitehurst was over me. He was walking boss. He told me where to work, and how to work, and where to put the logs, and so forth. . . . There was no one else there, except those working for the defendant." This was evidence that Raynor was not an independent contractor. There was other evidence of the true relation between defendant and Jones and Raynor. *Thomas v. R. R.,* 153 N.C. 351; *Beal v. Fiber Co.,* 154 N.C. 147; *Denny v. Burlington,* 155 N.C. 33; *Embler v. Lumber Co.,* 167 N.C. 457; *Dunlap v. R. R.,* 167 N.C. 669. But the doctrine does not apply at all if the work which the master directs to be done is inherently dangerous, as held in *Davis v. Summerfield,* 133 N.C. 325; *Thomas v. R. R., supra; Watson v. R. R.,* 164 N.C. 176; *Denny v. Burlington, supra,* and *Embler v. Lumber Co., supra,* in which the Court said: "An independent contractor is said to be one who, exer-

cising an independent employment, contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer, except as to the result of the work, and who has the right to employ and direct the action of the (228) workmen, independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what the laborers shall do as it progresses. 1 Bouvier's Law Dict., p. 1011; *Casement v. Brown,* 148 U.S. 615 (37 L. Ed. 582). The rule, however, is subject to this qualification: 'Where an obstruction or defect which occasions an injury results directly from the acts which an independent contractor agreed and was authorized to do, the person who employs the contractor and authorizes him to do these acts is liable to the injured party; but where the obstruction or defect caused or created is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable, and in such case the contractor will be liable for his own negligent acts.' . . . An employer, of course, cannot authorize a dangerous piece of work to be done, or work, the doing of which according to the contract of employment will necessarily or probably be dangerous and injurious to others, for this would be to participate in the commission of the tort, or to authorize the doing of it. The employer is, therefore, liable if injury results from work done as he has authorized it to be done," citing the following cases: *Robbins v. Chicago,* 4 Wall. (U.S.) 657, 679 (18 L. Ed. 527); *Water Co. v. Ware,* 16 Wall. 566, 576 (21 L. Ed. 485); *Ph., etc., R. Co. v. Ph., etc., Steam Towboat Co.,* 23 How. (U.S.) 209 (16 L. Ed. 433); *Chicago v. Robbins,* 2 Black (U.S.) 418 (17 L. Ed. 298).

The defendant's next position is, that there was a variance between the allegations and the proof; but we think the complaint is sufficiently broad in its allegations, when considered under the liberal construction to which it is entitled by our Code, to include a cause of action such as corresponds with the evidence, especially section 5, which is more general in its allegations. Besides, if there was any lack of correspondence between the allegations and the proof, Revisal, secs. 515 and 516, provides how a party may take advantage of it; and when the procedure there presented is not followed, the variance is deemed immaterial, under section 515.

We have carefully examined the questions raised by defendant's exceptions to evidence, and we find nothing that should induce us to reverse this judgment. We do not agree with defendant as to the nature of the questions, and the influence of the answers to them, upon the jury. In no view, we think, were they of sufficient importance to substantially affect the result.

The case was ably and forcefully argued by Mr. Moore for the defendant, but we have been unable to discover any fatal error, after carefully weighing the facts appearing in the record and the learned argument of counsel. We conclude that the case has (229) been correctly tried. It was submitted to the jury under a clear-cut charge from Judge Lyon, which was certainly not unfavorable to the defendant. We therefore affirm the judgment.

No error.

Cited: Muse v. Motor Co., 175 N.C. 470; *Royal v. Dodd,* 177 N.C. 212; *Matthis v. Johnson,* 180 N.C. 133; *Stone Co. v. Texas Co.,* 180 N.C. 559; *Newton v. Texas Co.,* 180 N.C. 566; *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; *Teague v. R. R.,* 212 N.C. 34; *Whichard v. Lipe,* 221 N.C. 57; *Hayes v. Elon College,* 224 N.C. 15; *Spivey v. Newman,* 232 N.C. 284.

J. M. WILLIAMS v. JOHN L. ROPER LUMBER COMPANY ET AL.

(Filed 3 October, 1917.)

1. Deeds and Conveyances — Timber — Contracts—Extension—Option—Condition Precedent—Time the Essence.

A contract conveying timber on lands entered into on 18 January, 1906, with provision for cutting and removing it in ten years, but that the purchaser could extend the period a reasonable time, not exceeding ten years, upon paying, on 1 January of each of the successive years thereafter, a certain sum of money: *Held,* the renewal payment contemplated was of the essence of the contract, and a condition precedent to the exercise of the option, requiring performance in advance of the termination of the right to cut and remove the timber.

2. Injunction, Perpetual—Deeds and Conveyances—Timber—Contracts—Options.

Where the facts are not in dispute, and it therefrom appears that a grantee of timber continues to cut and remove the same after his right thereto has ceased, the restraining order should be made perpetual.

APPEAL from *Lyon, J.,* at chambers, 29 May, 1917, from DUPLIN.

Gavin & Wallace and H. A. Grady for plaintiff.
L. I. Moore and L. A. Beasley for defendants.

CLARK, C.J. On 18 January, 1906, J. M. Williams executed to defendants' grantor a timber deed containing the following clause: "The party of the first part grants unto the party of the second part the full term of ten years from this date in which to cut and remove the timber hereinbefore described, and if not removed in that time, then the party of the second part, his heirs and assigns, shall have such additional time as they may desire, not exceeding ten years, by paying annually, on the first day of January of each year, to said J. M. Williams, interest at 6 per cent on the purchase price hereinbefore set out."

In December, 1915, the defendant paid to the plaintiff $72, which extended the time for one year from 18 January, 1916. The defendant, however, did not pay the $72 required on 1 January, 1917, in order to renew the contract from 18 January, 1917, to 18 January, 1918, and did not tender it until some time in March, 1917, when the plaintiff refused to accept the same, (230) upon the ground that the tender was not made on or before 1 January, 1917, and the option had therefore elapsed.

The ten years expired on 18 January, 1916, and thereupon all right and interest of the grantee and his assignee to cut the timber determined and ceased unless the grantee had exercised its option on or before 1 January, 1916, to renew for a year "by paying" the sum required, which the defendant did. At the end of that twelve months, *i. e.*, on 18 January, 1917, all right of the defendants then ceased and determined, because it had not on 1 January, 1917, again exercised its option "by paying" the sum required for renewal.

The terms of the option require, as a condition precedent, the payment of this interest on first January just before the termination of the stipulated time. The language is, "*By* paying annually on first day of January of each year." The grantor had the right to require this as a condition precedent, and to fix the date on first January of each year, *i. e.*, eighteen days before the expiration of the time. This was to give the grantor opportunity to look around for another purchaser, or arrange to cut the timber, and time was of the essence of the contract. It was not contemplated certainly that the purchaser should go on and cut the timber for a year more, lacking eighteen days only, and if no payment was then forthcoming, the grantee would only lose eighteen days of his term.

The original contract for ten years required payment in advance for the whole ten years. It was in line with this that the defendant was required to pay for each year's renewal in advance. The owner of the timber was selling for cash, and required cash in

advance for each yearly renewal. He was not intending to credit the purchaser and thus buy a lawsuit.

It is contended that when the purchaser bought the timber for ten years he also bought the right to renew for another ten years. The fallacy of this is transparent. The purchaser bought for cash the right to cut the timber for ten years, and the *option* to renew, not the renewal, upon payment of the sum named, on 1 January each year before the time expired.

It has always been held that timber deeds of this character convey an estate of absolute ownership, defeasible as to all timber not cut and removed within the stipulated time. *Timber Co. v. Wells,* 172 N.C. 262; *Winders v. Kenan,* 161 N.C. 628; *Bateman v. Lumber Co.,* 154 N.C. 248.

The cases hold that a stipulation providing for an extension of time, such as in this case, is an option and does not create any interest in the property, but is merely an agreement to convey when the condition prescribed is performed, and when this is not (231) done the interest of the purchaser has ceased and determined.

The option cannot extend the contract unless the option is complied with by compliance with its terms, as in this case, "by paying" $72 on 1 January preceding the termination of the existing contract to procure another year's right to cut. *Timber Co. v. Wells,* 171 N.C. 262; *Ward v. Albertson,* 165 N.C. 218; *Waterman v. Banks,* 140 U.S. 394. This is not the case of a forfeiture, for the term of the purchaser expired by limitation unless renewed by compliance with the terms of the option. The term was not extended, because the defendant failed to comply with the terms of the option upon which the purchaser would acquire the right to an extension. At the end of the term his right ceased and he had nothing to forfeit. By not complying with his option, he simply did not acquire any further right to cut. The courts will not hold the grantor bound for a year lacking eighteen days when the grantee has not bound himself at all by accepting the option. *Rountree v. Cohn-Bock Co.,* 158 N.C. 153; *Bateman v. Lumber Co.,* 154 N.C. 248.

This case differs from *Bangert v. Lumber Co.,* 169 N.C. 628, and *Taylor v. Munger, ib.,* 727, relied on by defendants. In the first of those cases the grantee notified the grantor before the expiration of the original term that he would take the full extension period, and tendered the full sum therefor. In the last-named case the contract specified that the payment was to be made at the office of the grantees in New Bern, and the grantor did not apply at said office for payment, and it was admitted that the grantees were able, ready and willing to pay if the grantor had applied at the office, according to the contract, for payment.

The matter is one of considerable importance, owing to the number of these contracts outstanding in this State, and we have therefore stated the law applicable at more length than otherwise would have been necessary, in view of the clear intent of the parties that at the expiration of the term all interest of the grantees therein should cease unless the option to renew was accepted "by paying" the sum specified, which was clearly a condition precedent, and the date named was of the essence of the contract.

The injunction should not have been dissolved. There are no facts in dispute. Upon the terms of the contract, the option not having been accepted by making payment as required on first January, 1917, the injunction should be made perpetual. The plaintiff is entitled to have his damages assessed for all timber cut since the expiration of his term, 18 January, 1917.

Reversed.

Cited: Dill v. Lumber Co., 186 N.C. 296; *Austin v. Brown*, 191 N.C. 627.

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J. B. AND F. B. ROBINSON v. W. J. JOHNSON.

(Filed 3 October, 1917.)

1. Reference—Exception—Waiver.

Where a party to an action excepts to a compulsory reference, he must specifically except in apt time to each of the findings of the referee, and demand a trial by jury thereon, when he desires such trial, and submit issues upon which he demands the trial by jury, or he will be deemed to have waived such right.

2. Same—Confirmation Order—Appeal and Error.

Exceptions taken alone to the rulings of the trial judge upon exceptions to the referee's report, without exception aptly and properly taken to the referee's findings, will not be considered on appeal.

3. Equity — Suits — Mortgages—Time to Redeem—Evidence—Purchase Price.

Where a mortgagor has given two mortgages on the same land, to the same person, the second mortgage embracing an additional tract, and sues to redeem, and to enjoin the sale under the second mortgage, alleging, also, payment in full, and the court has judicially determined that he still owes a certain balance to the mortgagee: *Held*, the mortgagor, having the right to redeem, upon payment of the ascertained balance and costs, is not prejudiced by the failure of the court to have considered the amount bid at the foreclosure sale, if such has been done.

ROBINSON *v.* JOHNSON.

CIVIL action, heard by *Devin, J.*, upon the report of referee, at October Term, 1916, of SAMPSON.

The action was brought to redeem two mortgages made by the plaintiffs, John B. Robinson and Fletcher B. Robinson, to the defendant, W. J. Johnson, the first mortgage dated 20 April, 1907, securing a debt of $1,227.95, due by four several notes, of equal amounts, and the second for $1,491.39, both mortgages describing 215 acres of land, and the second mortgage an additional tract of 200 acres. Defendant sold the 215 acres, the sawmill and fixtures, under the second mortgage, and bought them for himself at his own sale, but through another party, who acted for him. Plaintiffs alleged that the defendant took possession of said lands and cut cross-ties and timber therefrom worth $1,060, and committed waste thereon, so that the lands, by defendant's bad husbandry and the damage done to the land in other ways, was permanently injured and depreciated in value to plaintiff's damage $1,000, and that the rental value of the land is $200 per annum. They further allege that upon a fair accounting between the parties, it will be found that the debts secured by the mortgages not only have been fully paid, but the defendant is indebted to them. They ask for an injunction against a sale, under the second mortgage, of the 200-acre tract of land, which has been advertised for sale by the defendant, for an accounting, and the cancellation of the mortgages which have been satisfied in the manner above stated.

The case was referred by the court, without the consent
(233) of the plaintiffs, who objected to the reference, and demanded a jury trial. The referee reported that a balance of $163.98, subject to a credit of a less amount, was due to the plaintiffs. No exceptions were filed by the plaintiffs, nor did they demand a jury trial. Defendants filed exceptions, but plaintiff did not tender any issue upon them. The judge passed upon the defendant's exceptions and found that the plaintiffs owed the defendant $452.01, with interest from 1 January, 1915, and the plaintiff, F. B. Robinson, owed the defendant $60, with interest from 1 January, 1912, and judgment was entered accordingly. Plaintiffs reserved their exceptions, and appealed.

Grady & Graham and Kerr & Herring for plaintiffs.
Henry E. Faison, John G. Shaw, and I. C. Wright for defendant.

WALKER, J., after stating the case: Plaintiffs have clearly waived their constitutional right to the trial of the issues in the case by a jury, as they failed to except to the referee's report, and did not tender any issues at all, not even on the defendant's excep-

tions. This was really tantamount to an agreement on their part that the judge should pass upon the defendant's exceptions without a jury. Numerous cases support the view that there was a clear waiver of trial by jury. It was held in *Driller Co. v. Worth,* 117 N.C. 515:

"1. A party cannot be deprived of the right to a trial by jury, except by his own consent.

"2. The right to a jury trial may be waived by failure of a party to appear, or by the written agreement of himself or his attorney, or by oral consent entered on the minutes of the court, or by submission to a reference.

"3. Where an action is once referred by agreement, the order of reference cannot be annulled, except by the consent of all parties.

"4. Failure to object to an order of reference at the time it is made is a waiver of the right to a trial by jury.

"5. Although a party has his objection to a compulsory reference entered in apt time, he may waive his right to a trial by jury by failing to assert it definitely and specifically in each exception to the referee's report.

"6. Where there was a compulsory reference objected to by defendants, and the referee filed fourteen findings of fact, some of which related to questions not in issue under the pleadings, and defendants filed exceptions to the findings, a demand at the end of their exceptions for a jury trial on all the issues raised thereby was too general to entitle them to such a trial."

And it was held in a subsequent appeal in the same case (118 N.C. 746) that "although, in case of a compulsory ref- (234) erence, a party may in apt time reserve his constitutional right to a trial by jury at every stage of the proceeding, yet he may waive it by failing to set forth in his exceptions to the referee's report a specific demand for the trial of the precise issue of fact raised by the pleadings and passed upon by the referee in the finding to which exception was taken." These cases have frequently been approved and affirmed. *Ogden v. Land Co.,* 146 N.C. 443; *Simpson v. Scronce,* 152 N.C. 594; *Mirror Co. v. Casualty Co.,* 153 N.C. 373, where the cases are collected; and the recent case of *Alley v. Rogers,* 170 N.C. 538, where the Court says: "It has been frequently held that although a party duly enters his objection to a compulsory reference, he may waive it by failing to assert such right definitely and specifically in each exception to the referee's report, and by failing to file the proper issues. *Driller Co. v. Worth,* 117 N.C. 515, and cases in annotated edition; *Keerl v. Hays,* 166 N.C. 553."

The plaintiffs filed certain exceptions to the rulings of the judge upon defendant's exceptions to the report of the referee, but they, or the most of them, are really addressed to the findings of fact by

the judge, and we have often held that we will not review such findings, when based upon evidence. *Cotton Mills v. Cotton Mills,* 115 N.C. 475; *Harris v. Smith,* 144 N.C. 439; *Frey v. Lumber Co., ib.,* 759; *Williamson v. Bitting,* 159 N.C. 321; *McCullers v. Cheatham,* 163 N.C. 61; *French v. Richardson,* 167 N.C. 41.

The facts as to the sale of the land and other property of the defendants, and the amount bid for them, are not material now, as the judge has found what amount is due on the mortgage debt, and the plaintiffs can redeem by paying it and the costs. They are not prejudiced by a failure to consider the amount which was bid for this property at the sales, if there has been any such failure.

The remaining exceptions, which we have fully examined in connection with the findings of fact, are without merit, even if they are sufficiently presented and discussed in the defendant's brief. The learned judge who presided at the hearing of the exceptions appears to have given the case careful study, and to have reached the right conclusion.

Affirmed.

Cited: Baker v. Edwards, 176 N.C. 231; *Jenkins v. Parker,* 192 N.C. 189; *Booker v. Highlands,* 198 N.C. 285; *Cotton Mills v. Maslin,* 200 N.C. 329; *Corbett v. R. R.,* 205 N.C. 87; *Wilson v. Allsbrook,* 205 N.C. 598; *Anderson v. McRae,* 211 N.C. 199; *Gurganus v. McLawhorn,* 212 N.C. 410; *Brown v. Clement Co.,* 217 N.C. 53; *Bartlett v. Hopkins,* 235 N.C. 167.

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J. B. WINDERS v. JOHN F. SOUTHERLAND ET ALS.

(Filed 3 October, 1917.)

1. Actions—Deeds and Conveyances—Warranties—Parties—Predecessors in Title—Statutes.

A grantee of lands against whom a recovery has been had for a part thereof may sue his grantee for damages upon the covenants and warranty in his deed, and the successive warrantors in his chain of title separately or in the same action, the subject-matter being the same, our Code system not favoring a multiplicity of suits.

2. Parties, Unnecessary—Motions to Strike Out—Demurrer.

Where one who is not a necessary party has been made a defendant to an action upon a warranty in a deed, his remedy is on motion to strike out his name, and not by demurrer; and a joint demurrer by two defendants, with a good cause of action stated as to one, is bad.

WINDERS *v.* SOUTHERLAND.

APPEAL by defendants from *Lyon, J.*, at March Term, 1917, of DUPLIN.

Gavin & Wallace and R. D. Johnson for plaintiff.
Stevens & Beasley and W. S. O'B. Robinson for defendants.

CLARK, C.J. In 1907 the plaintiff received a deed for a tract of land from the defendants, Southerland and Hobbs, with warranty of title, of seisin and freedom from encumbrance. In 1905 John R. Smith conveyed this land to Southerland, with the same warranties. A portion of said land having been recovered against the plaintiff by action, he brought this action against all the above-named defendants. The defendants demurred, upon the ground that it was a misjoinder of action and of parties to unite all the defendants in one action, and to join in the same action upon their covenants of warranty Southerland and Hobbs, the plaintiff's grantors, and John R. Smith and wife upon his warranty in the deed to Southerland, because they were independent and separate transactions.

Winders could sue Smith upon the covenants in Smith's deed to Southerland, since he held a deed for the same property, with the same warranties from Smith's grantee. *Markland v. Crump,* 18 N.C. 94; *Wiggins v. Pender,* 132 N.C. 638. The demurrer was properly overruled. At the most, there would have been merely unnecessary parties, and for this a demurrer will not lie. Such party has his remedy by motion to strike out his name. *Sullivan v. Fields,* 118 N.C. 358; *Worth v. Trust Co.,* 152 N.C. 242. Moreover, where two defendants join in a demurrer, and the complaint states a good cause of action as to one of them, the demurrer must be overruled. *Caho v. R. R.,* 147 N.C. 20.

However, we think it was no error to join these defendants in the same action. While Hobbs and Southerland could (236) not sue Smith until they had sustained a loss, the plaintiff, on his being ousted, could sue Smith or any other warrantor in the chain of title. He had the same cause of action against Southerland and Hobbs, his immediate grantors. The Code system does not favor multiplicity of suits. The cause of action here is for the loss sustained by the plaintiff of part of this tract of land, and the object of the action is to recover damages of the parties to whom he had a right to look for indemnity by reason of the warranties. The tract of land in the deed from Smith to Southerland and from Southerland and Hobbs to the plaintiff, was the same. Their joinder was entirely proper, and if it had not been, as already said, the remedy was by a motion to strike out the name of an unnecessary party. But as the plaintiff had a right to sue them all, in separate actions,

and the cause of action was the same, it was entirely proper to join them in the same action.

Affirmed.

Cited: Tucker v. Eatough, 186 N.C. 507; *Bank v. Gahagan,* 210 N.C. 465; *Moore County v. Burns,* 224 N.C. 701; *Fleming v. Light Co.,* 229 N.C. 405; *Davis v. Radford,* 233 N.C. 287; *Hayes v. Wilmington,* 239 N.C. 244; *Hayes v. Wilmington,* 243 N.C. 534; *Paul v. Dixon,* 249 N.C. 624.

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AMERICAN POTATO COMPANY v. JEANNETTE BROTHERS COMPANY.

(Filed 10 October, 1917.)

1. Vendor and Purchaser — Contracts — Parol Evidence—Lost Letters—Fraud and Mistake—Equity—Reformation of Instruments.

The contents of a lost letter of the purchaser specifying the quality of the goods contemplated to be purchased, and referred to in a subsequent letter of the seller connecting it with the transaction in a material respect, may be shown by parol in defense of an action against the purchaser for damages in failing to accept the goods under a written contract of purchase executed in pursuance of the correspondence, upon allegation that the contract was executed by mistake or fraud, and that the goods were not of the quality or kind of those agreed upon.

2. Same—Damages.

In an action to recover damages of the purchaser of goods for refusing to accept them, wherein it is claimed that the goods offered were not of the quality of those purchased, and asking a reformation of the written contract for mistake or fraud, evidence as to the quality of the goods refused is competent, at least, upon the issue of plaintiff's damages.

3. Evidence—Pleadings—Compromise.

Where evidence of an offer of compromise has been introduced in an action to recover damages against a purchaser of goods for refusing to accept them under the terms of his written contract, it is competent for the defendant to show that it was not an admission of his liability for any portion of the sum claimed by the plaintiff; and where some of the evidence is competent and some incompetent, an exception to it as a whole, without specifications, will not be sustained.

4. Evidence—Pleadings.

Where certain sections of the complaint are introduced in evidence, it is competent to introduce the corresponding and relevant sections of the answer; and where only fragmentary parts of sections of a pleading are

introduced, the adversary party may introduce the other and explanatory parts thereof.

5. Same—Contracts—Reformation of Instruments.

Where damages are alleged in an action against a purchaser of goods for refusal to accept them under the contract of purchase, who pleads that the contract should be reformed to show that goods of a certain quality were purchased, evidence as to the inferior quality of the goods offered is competent, this question being embraced within the scope of the pleadings.

6. Appeal and Error—Issues.

Exception to the form of the issues submitted to the jury will not be sustained when they arise under the pleadings, embrace all essential questions in controversy, are sufficient to sustain the judgment, and each party has had an opportunity to present his contentions fairly and fully.

7. Vendor and Purchaser—Contracts, Breach—Ready to Comply—Trials —Questions for Jury—Burden of Proof.

Where the purchaser is sued for damages for failure to accept the goods under the terms of his contract, the question of whether the seller was ready, able and willing to perform his part thereof is one for the jury, with the burden on the plaintiff.

8. Appeal and Error — Instructions — Special Requests—Objections and Exceptions.

The proper procedure to raise an exception that the charge to the jury was not sufficiently full or pertinent is by requested instruction, aptly tendered and refused.

9. Contracts—Reformation of Instruments—Parol Evidence—Vendor and Purchaser—Fraud or Mistake—Correspondence—Burden of Proof.

While the terms of a written contract may not ordinarily be varied by parol, the principle does not obtain when the writing is sought to be reformed in equity for mistake or fraud in its material part; and in this action for damages for the alleged failure of the purchaser to accept the goods from the vendor, the plaintiff, letters in the correspondence between the parties tending to show that the contract as written and signed by them failed to truly state the quality of the goods purchased; that the contract was drawn by the vendor, and the purchaser signed at his request, with the other parol evidence in the case, is held sufficient, upon the issue of mutual mistake or fraud, for the reformation of the contract in this respect, the burden being upon the defendant to establish the facts by clear, strong and convincing proof.

CIVIL action, tried before *Daniels, J.*, and a jury, at January Term, 1917, of PASQUOTANK.

The action was brought to recover $469.40 as damages for refusing to receive a certain lot of potatoes which, it is alleged, the defendants contracted to buy. The case was here before, and is reported in 172 N.C., at p. 1. The defendants, who failed in the former appeal, have amended their original answer and asked (238)

for a reformation of the contract, dated 25 October 1912, which provided that plaintiffs should ship under it, and deliver to the defendants at Elizabeth City, 800 sacks of Cobblers and 200 sacks of White Bliss potatoes, at prices named, they "to be of the best quality shipped from Aroostook County, State of Maine, by the plaintiffs," while defendants allege that plaintiffs contracted to sell and ship to them "one hundred bags of seed potatoes of the same quality and kind which the defendants had purchased through Mr. Corey the year before." Defendants further allege: "That said order of the defendants was sent to plaintiffs in a letter on or about 22 October, 1912, and the receipts of the order was acknowledged by the plaintiff in a letter dated 25 October, 1912; that these two letters contained the true contract between the parties, and that it was clearly understood and agreed between the parties that the potatoes so bought by the defendants and sold by the plaintiffs should be the same kind and quality that the defendants had bought from Mr. Corey the year before, but through mutual mistake, or the mistake of these defendants, induced by the fraud of the plaintiffs, who sent the paper, 'Exhibit A,' to the defendants in a letter acknowledging receipt of this order, and accepting it, and represented that 'Exhibit A' covered the contract which had been made between the parties, these defendants signed the said 'Exhibit A'; that these defendants signed the said exhibit through mistake, fully believing that the language in said contract that the potatoes should be the best quality shipped from Aroostook County by the first party covered and was intended to guarantee to them the quality of potatoes they had obtained from Mr. Chorey the year before, and that the plaintiffs wrongfully, unlawfully and fraudulently misled the defendants into this belief, and wrongfully, unlawfully and fraudulently induced the said defendants to sign the 'Exhibit A' under the mistake and belief that they were buying the same quality and kind of potatoes they had purchased the year before from Mr. Corey, who was conducting this correspondence for the plaintiffs, and these defendants would not have signed the said 'Exhibit A' but for this mistaken belief." Defendants then ask for judgment that the contract be corrected accordingly, so that it will express the true agreement as they have alleged it. The jury returned the following verdict:

1. Was it agreed between the plaintiff and defendant at the time of the sale of the potatoes in question that said potatoes should be just as good as those purchased by defendant through D. W. Corey the previous year? Answer: Yes.

2. If so, was said provision omitted from the written contract, Exhibit A, by the mutual mistake of the parties or the mistake of defendants, induced by the fraud of the plaintiff? Answer: Yes.

3. Was the plaintiff ready, able and willing to comply with its contract, as alleged? Answer: No. (239)

4. Did the defendants wrongfully refuse to take the potatoes and pay for the same? Answer: No.

5. What damage, if any, is the plaintiff entitled to recover? Answer: Nothing.

Judgment was entered on the verdict, and the plaintiffs appealed.

G. J. Spence and Aydlett & Simpson for plaintiff.
Ehringhaus & Small for defendants.

WALKER, J. There are numerous errors assigned by the plaintiffs, nearly all of them relating to the issues, evidence and the charge. We will consider them *seriatim* and in the order they are presented.

1. The first exception refers to the contents of the letter dated 22 October, 1912, which had been lost, and we do not see why the evidence was not competent to prove what was in it, and especially as the letter of 25 October, 1912, was an answer to it, and indicated what was its contents. The object in proving the contents of the letter dated 22 October was to show that defendants had ordered potatoes of the kind and quality described in their amended answer —that is, the kind which were of the same quality as those which had been ordered by them from the plaintiffs, through Mr. Corey, the year before. It bears directly upon the main issue, concerning the mistake in the contract. The original writing is always the best evidence of its contents, and its production is required by the law, if the paper can be had, but when it is lost or the adverse party fails to produce it when notified to do so, parol evidence of its contents then becomes competent, as it is the best that is obtainable.

McKelvey on Evidence (2d Ed.), pp. 429, 430, and 431, secs. 273 and 274. It may be said, in this connection, that the sixth exception was properly overruled, as the letter, known as Exhibit D, was in itself evidence as to the contents of the lost letter, or at least is intimately connected with it in a material respect and throws light upon the issues. It also forms a part of the general correspondence between the parties.

2. The next six exceptions are untenable, as the evidence was relevant to the question of damages, whether the contract was or was not reformed. It was clearly admissible for the purpose of showing the condition and quality of the potatoes which were delivered to the defendants; and as to the twelfth exception, or that part of it referring to the offer of compromise, it was competent to show

why the offer was made, and that it was not an admission of liability for any portion of the sum claimed by the plaintiffs. If this was not true, it was harmless, as the offer was not accepted. The exception is further objectionable in form, as it does not specify (240) the particular part of the evidence which is incompetent, there being more than one subject embraced by it. If the exception was addressed to that part which relates to the compromise, and this seems to be the case, we have already dealt with it. It is stated in the thirteenth exception that the court admitted the evidence as to the compromise in answer to plaintiffs' testimony. It also appears by the letter of 18 February, 1913, that plaintiff also offered to settle on a basis that caused it a loss of about $160. The court properly admitted sections 5 and 6 of the answer, as plaintiffs had used in evidence the corresponding sections of the complaint and only fragmentary parts of sections 5 and 7 of the answer. Defendants were entitled to the whole, as the other parts of the two sections of the answer were explanatory of the parts introduced by the plaintiffs.

3. The next eight exceptions, including the twenty-second, relate to the value of the potatoes and their condition, and more especially to the difference in quality from those sold to defendants and other customers in 1912. The question of damages is included within the scope of the pleadings, as well as that of reformation of the contract. It also may be said that this evidence, or a large part of it, was corroborative of the defendants' testimony.

4. The court is not required to adopt any particular form of issues, so that those submitted embrace all essential questions in controversy, and each party has an opportunity to present fairly and fully his contentions, both as to fact and law. We said, in *Clark v. Guano Co.*, 144 N.C. 64: "The court below need not submit issues in any particular form. If they are framed in such a way as to present the material questions in dispute, and so as to enable each of the parties to have the full benefit of his contention before the jury, and a fair chance to develop his case, and if, when answered, the issues are sufficient to determine the rights of the parties and to support the judgment, the requirement of the statute is fully met," citing *Hatcher v. Dabbs*, 133 N.C. 239; *Falkner v. Pilcher*, 137 N.C. 449; *Jackson v. Telegraph Co.*, 139 N.C. 347. To the same effect is *Cunningham v. R. R., ib.*, 427; *Wilson v. Cotton Mills*, 140 N.C. 53. In the very recent case of *Power Co. v. Power Co.*, 171 N.C., at p. 258, we said: "Issues are sufficient when they submit to the jury proper inquiries as to all the essential matters or the determinative facts of the controversy. *Zollicoffer v. Zollicoffer*, 168 N.C. 326;

Hatcher v. Dabbs, 133 N.C. 239. The form of the issues is of little or no consequence if those which are submitted to the jury afford each party a fair chance to present his contention in the case, so far as it is pertinent to the controversy. *Carr v. Alexander,* 169 N.C. 665. Issues should be framed upon the pleadings and not upon the evidence. *Goins v. Indian Training School,* 169 N.C. 736."

We have paused to consider this matter again, as there seems to be some misunderstanding in regard to it, the (241) same exception appearing in many appeals to this Court. Of course, issues must be so framed as, when answered by the jury, they will form the basis of a judgment settling the controversy. If they are defective in this respect, so that judgment cannot be rendered upon them, it is ground for reversal, but if otherwise it is not, as the cases cited above will show. In this case the issues accepted by the court, and to which the jury have responded, cover the whole ground, and afforded the plaintiff a fair opportunity to present his case fully and without any hindrance or prejudice, and the court properly rejected the issues tendered by the plaintiffs, as the others were those made by the pleadings and were coextensive with the controversy.

5. The other exceptions, not considering those which are merely formal, were taken to the charge of the court. After reading it carefully, we do not see how instructions could more distinctly and clearly, and with greater fullness, have presented the case to the jury in all of its phases. It surely stated correctly the law bearing upon the issues, as it "arose upon the evidence," and an intelligent jury could not have misunderstood it. Whether the plaintiffs were ready, able and willing to comply with the true contract was an issue of fact, proper only for the jury, there being evidence, as we think, to support the finding on the third issue, and strong evidence, too. The burden as to this issue was properly laid upon the plaintiffs.

6. There were no prayers for instructions, and no motion to nonsuit. If the plaintiffs wanted fuller or more pertinent instructions, they should have requested them. *Simmons v. Davenport,* 140 N.C. 407, and other cases cited under it in Lyon's Digest, p. 33. But we will assume, as suggested in plaintiff's brief, that a motion to nonsuit was made and refused, which would raise the question whether there was any evidence of mistake in the contract, as alleged in the answer and mentioned in the first two issues. We are of opinion that there was. It is of no consequence in deciding this question that the instrument was read by the parties. *Penfield v. Village of New Rochelle,* 45 N. Y. Suppl. 460 (aff. in 160 N.Y. 697); *Bush v. Hicks,* 60 N.Y. 697; *Bush v. Hicks,* 60 N.Y. 298; 34 Cyc. 99; *West v. Suda,* 69 Conn. 60. It is said in the *Penfield* case that

the fact, if it be a fact, that the parties, or either of them, read the deed proposed to be corrected, does not affect the right to have it reformed if they mistakenly believed that it expressed the terms of the actual contract between them, or corresponded therewith. The mistake must be common to both parties to the transaction, or induced by the fraud of one and the mistake of the other *(Wilson v. Land Co.,* 77 N.C. 445), and may occur either in the formal statement of their agreement in the instrument, or in some matter causing the agreement to be made, or to which it is to be applied. (242) Kerr F. & M., p. 416; Leake on Contracts, p. 172. If both parties were mistaken, equity will adjust the form of expression to the true agreement, or if one of the parties has, by misrepresentation or other wrongful conduct, misled the other, and especially when it was done for the purpose of obtaining the contract, his act may amount to fraud, and equity will aid the injured party in rectifying the mistake. Kerr on F. & M., pp. 412 and 413, as to the evidence sufficient to show the mistake: "By the general rule of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made or during the time it was in a state of preparation, so as to add or subtract from or in any manner to vary or qualify the written contract. A court of equity, however, admits such evidence, whether the purpose of the suit be to rectify or rescind an agreement."

In *Wendt v. Diemer,* 9 Kansas App. 481, it is said: "In the trial of such cases, where one of the principal questions is to determine what were the actual terms of the contract as agreed upon by the parties, it is not error for the court to permit one of the parties in giving his evidence to tell all that was said at the time the contract was made between the parties, and also to state incidentally what was said by a third party who assisted in making the contract, although his interest therein, if any, does not appear." Kerr on F. & M., 415 and 416. And in 34 Cyc. 980, 981, and notes, where it is said, in regard to the proof of a material mistake in a deed or contract: "The general rules of evidence govern as to competency, materiality, relevancy, and such other qualifications as make facts admissible in proof. Anything which shows the intention or actual contract of the parties is material, and any evidence which goes to show the real intention of the parties is admissible, whether it be by way of conduct or documentary in nature. . . . Evidence must not be too remote, however, but in support of the issue. It should also be contemporaneous with or anterior to the instrument intended to be reformed. . . . It is competent to prove the mistake by ad-

missions of the parties, original instructions, and the testimony of the attorneys connected with the execution of the instrument." It is also stated there that the great mass of authorities have adopted what is considered to be the general rule, that parol evidence is admissible to show mistake or fraud. *Ib.*, p. 982. While negotiations leading up to the execution of the contract are merged in it at law, they are competent in equity to show what was the real agreement, for the purpose of correcting the instrument and doing justice. *Robinson v. Willoughby,* 65 N.C. 520; *Ins. Co. v. Boyle,* 21 Ohio St. 119; *Place v. Johnson,* 20 Minn. 219, and especially *Jones v. Warren,* 134 N.C. 390. The Court held in *Arthur v. McLure,* (243) 166 N.C. 140 and 143:

"1. Equity will reform a written instrument when such is necessary to make it express the intention of the contracting parties, which by reason of mutual mistake or the mistake of the draftsman it fails to do if no intervening or superior equities of third persons have arisen by reason of the mistake, this not coming within the rule that parol evidence will not be received to vary the terms of a written contract.

"2. It is required that the proof of the mistake be clear, strong and convincing, where a written contract is sought to be reformed, the burden of proof being on the party seeking the equitable relief, and the question as to whether the proof meets this requirement is one for the jury, and not for the court, to decide.

"3. The doctrine is elementary that parol evidence is not, in general, admissible between the parties to vary a written instrument, but it is equally well settled that mistake, fraud, surprise, and accident furnish exceptions to the general principal, and parol evidence, in any case brought within one of the exceptions, is admitted to vary the writing so far as to make it accord with the true intention and agreement of the parties. These exceptions rest upon the highest motives of policy and expediency, or otherwise an injured party would generally be without remedy."

So it was held in *Knapp v. White,* 23 Conn. 529, that letters written by the parties during negotiations for the purpose of making the contract are competent in equity to show that it was, and that it was mistakenly written, where reformation of it is sought by the complainant. And in *Morrison v. Jones,* 31 Mont. 154, a concurrently executed instrument tending to show the true character of a deed, as intended to be a mortgage. In *Van Tuey v. W. F. Ins. Co.,* 55 N.Y. 657, the Court, in an action to reform a policy, admitted parol evidence to show that it was to conform to the policies of a certain other company, and also admitted a policy of that company, in order to correct the policy in suit, so that it would agree

with it. Referring to the *quantum* of proof, it has been said: "What constitutes such clear, satisfactory and sufficient evidence as to make the case go one way or the other, depends upon the character of testimony, the coherency of the entire case, *and the force of documents,* circumstances and facts introduced. 34 Cyc., pp. 984, 985, 986."

If we examine the proof before us in the light of these authorities, there can be no doubt that there was sufficient evidence for the jury to pass upon. Of course, we refer the question of the *quantum* of proof to the jury, after they are instructed that it must be clear, strong and convincing. *Lehew v. Hewett,* 138 N.C. 6; *King v. Hobbs,* 139 N.C. 171; *White v. Carroll,* 147 N.C. 334; *Gray v. Jen-*
(244) *kins,* 151 N.C. 82. It was said in *Sills v. Ford,* 171 N.C., at p. 736: "There was sufficient proof of the mistake for the consideration of the jury *(King v. Hobbs,* 139 N.C. 171), whether it was clear, strong and convincing being a question for the jury." *Lehew v. Hewett, supra.*

The letter of 25 October, 1912, from the plaintiffs to the defendants, refers to the letter of the 22d of the same month as having been received, and then states: "We have booked *your order* for 1,000 sacks seed potatoes." It further says: "I remember well the stock you got last year. It was grown on the College Seed Farm. We had 25 acres on same farm this year, and grew 2,995 barrels. . . . I know what you want, and we have it. . . . We can spare you any part of 2,000 more Cobblers, just as good as you had last year, if unsold, when we hear from you. . . . We enclose contract for 1,000 sacks. Please execute and return copy to us." (Italics ours.) The proof shows the contents of the lost letter of 22 October, 1912, and that it ordered seed potatoes of the kind described in defendants' amended answer. This order, as the letter of 25 October shows, was accepted, or "booked." The contract was signed and returned by defendants in their letter of 3 November, 1912, and the receipt of it is acknowledged in plaintiffs' letter of 7 November, 1912, which stated: "Yours 3d, enclosing contract for 1,000 sacks of potatoes, signed. Note you can use more, but my price is too high. My price is not too high for what you want. . . . I can spare you 500 to 700 more good ones if unsold, when I hear from you, at the same price. . . . I shipped you potatoes last year when I could have taken $1 a sack more. We have booked your order and can carry them ourselves." In addition to the letters, there was much oral evidence as to the terms of the defendant's offer to buy seed potatoes made in the lost letter of 22 October, 1912, which would be clear, strong and convincing to us if we had to pass upon its weight and sufficiency, and the letters impart to it a well-nigh conclusive force.

The defendants, even if they read the contract, might naturally have been misled by its language. "The best potatoes shipped from Aroostook County" might also have been of the same kind and quality as those that the defendants had bought from Mr. Corey the year before, and the mistake as to the meaning would be one of fact and not one of law. It is perfectly evident that plaintiff either intended the defendants to so understand the contract, or if they did not, there is evidence in the papers, as well as outside, that they intended to mislead them and commit a deception which is equivalent to a fraud. Plaintiff's selection of either horn of this dilemma will not affect the result. We believe that the contract could be reformed upon the documentary evidence alone, if we were sitting as chancellors, and not merely dealing with the verdict of a jury. The letter of 22 October, 1913, was clear in its terms, as shown by the witnesses, and distinctly ordered potatoes of the kind bought (245) by defendants in 1912, and the letter of 25 October, 1913, in which the contract was enclosed, promised to sell to defendants any part of a lot of 2,000 sacks "just as good as you had last year." Unless the plaintiff intended to deceive the defendants, this letter meant that the enclosed contract complied with the terms of the promise made in the letter enclosing it, and was, therefore, calculated to impress defendants with the belief, when they signed the contract, that it corresponded with the promise. There are other considerations and circumstances which justify our conclusion that Judge Daniels committed no error at the trial.

No error.

Cited: Boone v. Lee, 175 N.C. 384; *Alexander v. Cedar Works,* 177 N.C. 149; *Futch v. R. R.,* 178 N.C. 284; *Bank v. Pack,* 178 N.C. 390; *Buchanan v. Furnace Co.,* 178 N.C. 655; *Brown v. Hillsboro,* 184 N.C. 375; *McLawhorn v. Coppage,* 188 N.C. 457; *Sams v. Cochran,* 188 N.C. 734; *Crawford v. Willoughby,* 192 N.C. 271; *Murphy v. Power Co.,* 196 N.C. 494; *Bank v. Bank,* 197 N.C. 532; *Waters v. Waters,* 199 N.C. 668; *Furr v. Trull,* 205 N.C. 419; *Ins. Co., v. Edgerton,* 206 N.C. 408; *Oliver v. Hecht,* 207 N.C. 485; *Boushar v. Willis,* 210 N.C. 55; *Ollis v. Bd. of Ed.,* 210 N.C. 493; *Henley v. Holt,* 214 N.C. 387; *Farmers Fed., Inc. v. Morris,* 223 N.C. 469; *Whiteman v. Transportation Co.,* 231 N.C. 705; *Turnage v. McLawhon,* 232 N.C. 516; *Lawrence v. Heavner,* 232 N.C. 560; *S. v. Smith,* 237 N.C. 20; *O'Briant v. O'Briant,* 239 N.C. 103; *Darroch v. Johnson,* 250 N.C. 313; *Rudd v. Stewart,* 255 N.C. 94; *Baker v. Construction Corp.,* 255 N.C. 308.

(246)

JOHN B. WOOD v. L. L. STATON ET AL.

(Filed 10 October, 1917.)

1. Statutes — In Pari Materia — Corporations—Dissolution—Reorganization—Judicial Sales—Purchasers.

Chapter 147, Laws 1913, authorizing a decree of dissolution of corporations, with certain exceptions, upon petition of minority stockholders owning as much as one-fifth of the capital stock, when dividends had not been paid as therein specified, and upon proper notice to shareholders and creditors, for their winding up and the distribution of their assets, should be construed with the provisions of the various sections of the Revisal, entitled "Reorganization," being sections 1238, 1239, 1240, 1241; and when thus construed, the purchaser at the sale under a decree of the court, duly entered, acquires the right to reorganize, in accordance with the terms imposed by the sections referred to, and carry on the business as a new corporation, acquiring the franchise of the old corporation as an asset included in his purchase.

2. Corporations — Judicial Sales—Purchaser—Property—Encumbrance—Franchise—Reorganizations.

In section 1238, Rev., providing for a sale of the property and franchise of a corporation and reorganization of same, in all cases where there shall be a sale under a judgment or decree of court, or under execution to satisfy a mortgage debt or other encumbrance thereon, the word "encumbrance" is not restricted, as in cases of real estate alone, to claims having specific lien on the property, but is extended to include any and all claims importing a liability to sale as a whole under judicial decree. When, therefore, in a suit by minority stockholders, a judicial sale of the entire plant, franchise, etc., is ordered, the purchaser acquires the right to reorganize under the same, on compliance with the requirements of the law.

3. Same—Stockholders—Assets—Judgments—Decrees.

When the property, including the franchise, of a corporation is sold under judicial sale, conferring on the purchaser the right to reorganize, etc., the old stockholders have a right to share in the assets, if there is a surplus; but the decree itself shuts off all their rights as such stockholders in the new corporation, and a decree which in express terms requires them to surrender their shares and have them canceled is without significance on the rights of the parties.

4. Corporations—Judicial Sales—Reorganization—Statutes—Name—Seal—Capitalization.

Where the purchasers of the entire property of a defunct corporation under the decree of court have in other respects complied with the requirements of the statute as to reorganization, the fact that they have assumed to continue operations without changing the seal, or determine upon a different amount of capitalization, does not necessarily affect the fact of proper reorganization, there being no statutory requirement that they change them. Rev., secs. 1239, 1240.

5. Corporations de jure — Stockholders — Individual Liability—Corporations de facto—Actions—State.

Where the purchasers of the property and effects of a corporation at judicial sale under a decree stating, in part, that the sale was to be made as "a going concern," reorganize within the requirements of the statutes (Rev., secs. 1238, 1239, 1240, 1241), except that it failed to file the certificate with the Secretary of State within one month from its reorganization (section 1240) as to whether the corporation was one *de jure*, the purchasers having acted in good faith, *Quære?* But, under the circumstances of this case, it became at least a corporation *de facto*, and the individuals cannot be held to personal liability for debts contracted in the name of the corporation, except to the extent the charter or act of incorporation provides.

6. Corporations—De jure—De facto.

A corporation *de jure* is said to exist when persons holding a charter have made substantial compliance with the provisions of the same, looking to its proper organization, while a corporation *de facto* is one where the parties having a charter or law authorizing it have in good faith made a colorable compliance with such requirements, and have proceeded in the exercise of the corporate powers or a part of them.

7. Same—Shareholder's Liability—Actions.

So far as the State is concerned, the ultimate distinction between a corporation *de jure* and a corporation *de facto* is, that the former, having made substantial compliance with the charter requirements looking to the proper organization, can successfully resist the suit instituted by the State or its officers for the direct purpose of annulling the charter, while the latter cannot; but as to private persons holding claims against them, the individual corporators, in either case, are not personally liable for debts, except and to the extent the charter and law applicable may so provide.

CIVIL action, heard on case agreed, before *Whedbee, J.*, at April Term, 1917, of EDGECOMBE.

It appears that plaintiff company sold to the Tarboro Cotton Factory, to be used in operating the mill, a bill of coal to the amount of $400. The cotton mill having become insolvent, and plaintiff's debt remaining unpaid, he instituted this action, seeking to hold individual defendants personally liable for the debt. (247)

The principal facts relevant to the questions presented, and his Honor's judgment thereon, are as follows:

1. That the Tarboro Cotton Factory was a duly incorporated and organized corporation under the laws of North Carolina prior to December, 1913.

2. That on said date L. E. Norfleet and others, minority stockholders of the said corporation, instituted an action against said corporation in the Superior Court of said county, alleging insolvency and praying the appointment of a receiver and the dissolution of said corporation, and the several judgments and reports of

sale therein material to the matter in controversy in this action are made a part of this agreed fact.

3. That under and by virtue of the judgment in said cause, the franchise and property and capital stock of the corporation was sold as directed by said judgment by the commissioners, and bought by Henry Staton under the conditions set forth in the deed to L. L. Staton, E. V. Zoeller, and Job Cobb, recorded in Book 172, page 375, as will appear from said judgments and deeds; and the said Staton thereafter conveyed the same to said L. L. Staton, E. V. Zoeller, and Job Cobb, as will appear from the following deeds: C. A. Johnson and H. B. Foxall, commissioners, to Henry Staton, recorded in Book 172, page 363, of the Edgecombe registry; Henry Staton to L. L. Staton, E. V. Zoeller, and Job Cobb, recorded in Book 172, page 375, of the said Edgecombe registry; and the said deeds are hereby made a part of this agreed fact; that no conveyance was made by said Staton, Zoeller, and Cobb to said Tarboro Cotton Factory or any other person.

4. That thereafter the said L. L. Staton, E. V. Zoeller, and Job Cobb met and the proceedings entered on the minute book of the Tarboro Cotton Factory as of date of 1914 were had, and the said minutes are made a part of this finding of fact.

5. That thereafter the said L. L. Staton, E. V. Zoeller, and Job Cobb operated said property as the Tarboro Cotton Factory, and contracted the bill of plaintiff in the name of Tarboro Cotton Factory, and plaintiff accepted notes of the Tarboro Cotton Factory in the payment of the same.

Upon the foregoing facts the court is of opinion that the said Tarboro Cotton Factory was sold as a going concern, subject to $100,000 deed of trust, and that the said L. L. Staton, E. V. Zoeller, and Job Cobb are not personally liable for the claims of plaintiff.

It is therefore ordered that the said L. L. Staton, E. V. Zoeller, and Job Cobb go without day and recover their costs.

(248) It is further ordered that the plaintiff recover of the Tarboro Cotton Factory the sum of $400, with interest from 18 June, 1915, subject to any amount that may have been collected of the defendant, Tarboro Cotton Factory, on account of execution heretofore issued on the judgment of the recorder, and costs.

H. W. WHEDBEE,
Judge Presiding.

From this judgment the individual defendants, having duly excepted, appealed.

James Norfleet, W. O. Howard, and A. W. MacNair for plaintiff.
G. M. T. Fountain & Son for defendants.

HOKE, J. From a perusal of the records and deeds, together with the entries on the minute book, referred to in the second, third, and fourth paragraphs of his Honor's judgment, it appears that, proceeding under chapter 147, Public Laws 1913, a minority of the stockholders of the Tarboro Cotton Mills, for lack of dividends paid or earned for six and three years, respectively, have obtained a decree directing a sale by court commissioners of all the property and franchises of the Tarboro Cotton Mill, subject to an existent mortgage of $100,000, for the purpose of winding up its affairs and distributing its assets.

The decree, reciting that it would be to the interest of all the stockholders, minority and other, that the stock as well as the property and corporate franchise be sold as a "going concern," directed that all stockholders be required to file their stock, endorsed in blank, with the clerk within sixty days, to be delivered to the purchaser under the sale, and on confirmation of the same, and that every stockholder who failed to deliver should be foreclosed of all right, title and interest in the stock, and new stock should be issued instead thereof to the purchaser, etc.; that pursuant to such decree, the property, "real and personal, of said corporation, together with its franchises, rights and appurtenances," was sold on 26 June, 1914, by the commissioners, and bid in by Henry Staton at $29,000; and the sale, being duly confirmed and price paid, was on 30 June, 1914, conveyed to him, free and clear of any and all claims whatsoever, except said prior mortgage of $100,000, and he in return reciting that he had acted in the matter for L. L. Staton, E. V. Zoeller, and Job Cobb, the three individual defendants, conveyed to them, their heirs, executors, administrators and assigns, "all the property described in his said conveyance, and all rights, title and interests therein acquired by him as purchaser at said sale, either by deed or under and by virtue of said decree," etc.; that within thirty days from said decree and sale and conveyance, to-wit, on 6 July, 1914, the purchasers met and proceedings were had, as follows, the same being entered on the minute book of the corporation as "minutes (249) of the meeting of the board of directors of the Tarboro Cotton Factory, held at the office of the company on 6 July, 1914":

"Present: L. L. Staton, E. V. Zoeller, and Job Cobb, who remained throughout the meeting. L. L. Staton was elected chairman and E. V. Zoeller secretary *pro tem.*

"The secretary read the court decrees and conveyances, and reported the 115.8 shares of stock delivered to Henry Staton, attorney, by the clerk of the court, had been delivered to him. Copies of the decrees and conveyances were ordered filed with the minutes.

"The vacancy caused by the resignation of T. E. Marshall as

secretary was filled by the election of E. V. Zoeller as secretary of the company, salary to be determined later.

"Upon resolutions unanimously carried, it was ordered that the president, L. L. Staton, and the secretary, E. V. Zoeller, issue to E. V. Zoeller 527.6 shares of stock, and to Dr. L. L. Staton 527.7 shares of stock, and to Job Cobb 527.6 shares of stock; the said parties having agreed that their interests as purchasers of the property were in proportion of one-third each, that being the liability of each as between themselves on the endorsements of notes of the factory outstanding.

"Upon resolutions unanimously carried, it was agreed that Henry Staton be paid in stock 61.6 shares for services rendered and expenses incurred in assistance to the purchasers and the company, and a certificate for 61.6 shares was ordered issued to him. This is not to affect in any wise any claim he might have against the company for loans, and it being understood also as between the endorsers of the Mutual Alliance Trust Company's note he should be protected against liability.

"The purchase of the company by others having divested H. L. Staton and H. C. Bridgers of stock ownership in the company, their directorship therein was declared terminated, and Henry Staton elected to fill one of the vacancies so made.

"The certificates of stock directed in the foregoing to be issued were issued and delivered to the respective parties.

"The president reported that the cloth of No. 2 mill was being started up.

"Above minutes read and approved before adjournment.

"E. V. ZOELLER, *Secretary.*"

And thereafter, as stated in the fifth paragraph of the judgment, the owners and holders of said stock continued to operate "said property as the Tarboro Cotton Factory, and contracted the bill of plaintiff in the name of the Tarboro Cotton Factory, and plaintiff accepted notes of the Tarboro Cotton Factory in payment of the same."

Upon these facts and findings, we concur in the opinion
(250) of his Honor that no individual liability should attach by reason of plaintiff's claim.

Chapter 147, Laws 1913, under which this decree and sale were had, provides that, except in case of corporations for religious, charitable, fraternal, or educational purposes, and except public-service and banking corporations, whenever stockholders owning as much as one-fifth or more of capital stock of a corporation shall apply to the court by petition and allege and show that for six years preceding no dividend has been paid, or for three years no dividend as

much as 4 per cent has been earned, the court shall enter a decree for dissolution of the corporation, a winding up of its affairs and distribution of its assets, provision being also made looking to proper notice to shareholders and persons having claims against the company or its property. Standing alone, this statute might be considered as confining the court, in such a proceeding, to a decree strictly of dissolution, involving a destruction of the corporate franchise, but when construed as it should be *(Keith v. Lockhart,* 171 N.C. 457), in connection with other provisions of our statute law on the subject, notably Revisal, chap. 21, secs. 1238, 1239, 1240, 1241, the court had ample power, in our opinion, to enter a decree for a sale of the franchise with the corporate property, transferring the same to the purchasers and conferring upon them the right to reorganize and carry on the business as a new corporation. *Coal and Ice Co. v. R. R.,* 144 N.C. 732. These sections referred to comprise a distinct subdivision of the chapter on corporations, entitled "Reorganization" (section 1238), providing that whenever the property and franchise of a corporation shall be sold under a judgment or decree of court, etc., or under execution, to satisfy a mortgage debt or other incumbrance thereon, such sale shall vest in the purchaser all the right, title, interest and property of the parties to the action in which such judgment or decree was made to said property or franchise so sold, subject to all the conditions, limitations and restrictions of such corporation and such purchaser and his associates, not less than three in number, shall thereupon become a new corporation, by such name as such persons shall select, who shall be the stockholders in the ratio of the purchase money by them contributed, and shall be entitled to all the rights and franchises, and be subject to all the conditions, limitations and penalties of such corporation when property and franchises shall have been sold," etc.

Section 1239 provides that the purchasers shall meet within thirty days for the purpose of reorganizing.

Section 1240. That the persons shall adopt a corporate name and seal, determine the amount of capital stock, and have power and authority to issue certificates on such shares and amounts as they see fit.

Section 1241. Among other things, that within one month after organization, it is the duty of the new corporation to (251) file a certificate with the Secretary of State, giving the date of organization, the name, amount of capital stock, with name of president and directors, which shall be recorded, and this shall be the charter and evidence of the corporate existence of the new corporation, etc.

This section contains also a proviso that nothing in the chapter

shall divest or impair the lien of any prior mortgage or encumbrance, thus justifying that portion of the present decree that sold, subject to the first mortgage of $100,000. It was the evident design and purpose, as it is the express meaning of these sections, not only to provide a successor to an insolvent corporation that might renew and carry on its business when desired, but that the franchise shall constitute an asset enhancing the value of the property to be distributed, and it is clear that the word "encumbrance" in the statute was not used in the restricted sense of an encumbrance on realty alone—that is, an estate or interest in property, or a burden thereon, tending to diminish its value, usually in the form of a lien, but embracing the property of the corporation, both real and personal, including its franchise. The term, as used in the statute, should be properly extended to any and every claim which imports a liability to sale as a whole by judicial decree. And this proceeding, which contemplated and authorized a disposition of the entire property, including the franchise, and a distribution of the proceeds among creditors and claimants, who were notified to appear, and among the stockholders, should there be a surplus, comes within the words and meaning of the statute, and justifies and upholds the sale and conveyance of the franchise conferring on the purchasers the right of corporate existence.

The portion of the decree which undertakes to eliminate the interest of the old stockholders by surrender and cancellation of their shares had no direct effect on the right of the parties. These old holders had a right, of course, to share in the assets if there was a surplus, and that is allowed them by the decree, but so far as the new corporation is concerned, the judicial sale under the statute effectually destroyed or annulled their holdings, and the case stands, as stated, as upon a sale of the corporation franchise and property as a whole, designated in the recital only as a "going concern."

Holding then the property and franchise with the right to organize thereunder, the question recurs on the conduct of the parties and its proper significance after their purchase. By reference to the minutes, it will appear that, within the thirty days as required by the statute, they met and apportioned the stock among three defendants, except 61 shares allotted to Henry Staton for his services.

They elected a president and secretary. By clear inference,
(252) they affirmed the old directorate, except H. L. Staton and H. C. Bridgers, whose office was declared terminated, and H. L. Staton elected to fill one of the vacancies; and thereafter they continued to operate the factory as before, and in such operation contracted present debt in the corporate name. True, they did not adopt a new seal and name—that is, a different name—nor deter-

mine anew on the amount—that is, on a different amount of capital stock; nor have they as yet filed their certificate with the Secretary of State, as contemplated and directed by section 1241. As to the name, the language of the statute is, "shall become a new corporation, by such name as they (the purchasers) shall select; nor is there express requirement in sections 1239 and 1240 that there shall be a different name and seal. This is usually desirable, but there seems to be nothing to prevent the purchasers from adopting the old seal and name if they see proper, nor from determining on the old number of shares; and as to filing the certificate, this is not made in such cases a condition precedent to corporate existence. Where parties have no charter and are proceeding to form one, section 1140 provides that corporate existence shall commence at the time of "filing the certificate with the Secretary of State"; but here the purchasers already had a charter by reason of their purchase; and the statute applicable (section 1240) provides that they shall, within one month from *its organization,* file the certificate containing certain statements with the Secretary of State, a copy of which, duly certified, shall be recorded in the office of the Superior Court clerk of the principal place of business, which shall be its charter and *evidence of its corporate existence.*

These omissions, if they were such, were no doubt due to the fact that in its recital the decree stated that it was to the interest of all parties that the corporation be sold as a going concern, and the purchasers may have thought—erroneously thought—that they were restricted to the provisions of the old charter in the respects suggested, but they were evidently acting in good faith about it, and on a proper consideration of these proceedings, we are by no means confident that these parties did not become a corporation *de jure*—that is, with a charter or law authorizing it. They have complied substantially with the charter requirements looking to a completed organization; and very certain we are that, as to this claimant, they became at least a corporation *de facto*—that is, having a charter and law which authorized it. They have made, in good faith, an attempt at organization with a colorable compliance with the charter requirements, followed by user of the corporate powers, or some of them.

So far as the State is concerned, the final distinction between the two is that one can successfully resist a suit by the State or sovereign which created it, brought directly to test the rightfulness of its existence, and the other cannot; but as to individuals (253) who have dealt with it as a corporation, as in this instance, there is no essential difference, and actors or owners of both are alike protected from individual liability for debts except to the extent

that the charter or act of incorporation provides. *College v. Riddle,* 165 N.C. 211; *Commissioners v. McDaniel,* 52 N.C. 107; *Burke v. Elliott,* 26 N.C. 355-359; *Tar River Nav. Co. v. Neal,* 10 N.C. 520; *Union Water Co. v. Keen,* 52 N.J. Eq. 111; *Board of Ed. v. Berry,* 62 W. Va. 433; *Finnigan v. Noerenburg,* 52 Minn. 239; *Mining Co. v. Woodbury,* 14 Cal. 424; *Judah v. The Amer. Live Stock Assn.,* 4 Ind. 333; 2 Cook on Corporations (7th Ed.), sec. 637; Clark on Corporations, chap. 3, p. 86; 10 Cyc. 252; 8 Amer. and Eng. Enc. (2d Ed.), pp. 248-249.

In *College v. Riddle, supra,* the Court approved the definition of a corporation *de facto* given in 10 Cyc., to-wit: "That there must be a statute under which it might organize, a *bona fide* attempt to organize pursuant to the statute, and an actual user of corporate powers incident to such organization." Upholding a conveyance of property by such a corporation, the opinion said, further: "And as such, and in reference to third persons, it could take and hold property and exercise all the powers of a corporation *de jure,*" citing *Ferguson v. Noerenburg,* 52 Minn. 239; *Investment Co. v. Davis,* 7 Ind. Ter. 152; *Marshall v. Keech,* 227 Ill. 35; 1 Clark and Marshall on Corporations, sec. 81. And, further, its powers to act could only be drawn in question by the State on suit regularly entered."

In *Board of Education v. Berry* it was held, among other things: "If there has been a *bona fide* effort to comply with the law to effectuate an incorporation, and the persons affected thereby have acquiesced therein, and have exercised the functions pertaining to the corporation, it becomes a *de facto* corporation, whose corporate existence cannot be litigated in actions between private individuals nor between private individuals and the assumed corporation. And, again, if a corporation *de facto* exists, it may exercise the powers assumed, and the question of its having a right to exercise them will be deemed one that can be raised only by the State."

If it be conceded, therefore, that in this instance there has not been substantial compliance with the law as to organization, constituting a corporation *de jure,* we are of opinion, on this record, that these purchasers, holding a charter which gave them the authority, have met all the requirements as to a corporation *de facto,* and have been properly protected from individual liability.

We have purposely refrained from resting our opinion on the position of incorporation by estoppel, which was also suggested for defendants. That doctrine is recognized in proper instances, (254) but it usually arises in cases where one having received value from an assumed corporation and under obligations for it, is seeking to resist recovery on the ground solely that the alleged corporation had no existence. It is an equitable doctrine, resting in

part on the ground of value having passed, and under circumstances which render it unjust that the suggested defense be upheld. It is very rarely, if ever, allowed where the claimant, having extended credit or value towards the alleged corporation, is seeking to recover his debt. In such case no estoppel arises from the mere fact that a creditor or claimant has dealt with defendant as a corporation; and unless there is one, either *de jure* or *de facto,* the members can, ordinarily, be held liable as partners. See *Bain v. Clinton Loan Assn.,* 112 N.C. 248; *Hanstein v. Johnson,* 112 N.C. 253; Clark on Corporations, pp. 99 and 103.

We find no error in the record, and the judgment of the court is Affirmed.

HOKE, J. For the reasons stated in the above opinion of *Fuel Co. v. Staton et al.,* and on exactly similar facts, a judgment denying individual liability is affirmed.

Judgment affirmed.

Cited: Bank v. Cotton Factory, 179 N.C. 204; *Britt v. Howell,* 210 N.C. 476; *Starbuck v. Havelock,* 252 N.C. 180.

A. W. DUNN, ADMR., v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 10 October, 1917.)

1. Carriers of Passengers — Railroads—Negligence—Depots—Evidence—Trials.

Upon evidence tending to show that the plaintiff's intestate was a passenger on defendant's train arriving at his destination after dark; that this train, unlike other passenger trains, stopped for its passengers to get off on a level with several other tracks between buildings on each side, and that plaintiff, to reach his hotel, had to go around the coaches on his train, and that the engine thereof, having detached itself from this train, ran upon and killed plaintiff's intestate after he had gone around the coaches and was upon a parallel track; that the engine was backing in excess of the speed ordinance of the town, without signal or warning or a proper lookout to warn the intestate, and that the place where the injury occurred was insufficiently lighted: *Held,* sufficient upon the issue of defendant's actionable negligence.

2. Railroads—Carriers of Passengers—Ordinances—Speed Limits—Negligence—Nonsuit—Trials.

The running of a train within a town at a speed in excess of that allowed by law is negligence *per se,* and not merely evidence thereof; and

where the intestate of plaintiff has been killed by the train while violating such ordinance, a judgment of nonsuit depending upon the absence of defendant's negligence alone, will be denied.

3. Carriers of Passengers — Railroads — Negligence — Warnings—"Look and Listen"—Trespassers—Instructions.

Where the evidence tends to show that plaintiff's intestate was run upon and killed by a locomotive on defendant's parallel track, while leaving the train in the usual way, upon which he had been a passenger, a charge of the court which imposes upon him an equal duty to look and listen before entering upon the track as that of the defendant to give proper signals and warnings, etc., is erroneous as to the plaintiff, but one of which the defendant cannot complain, as greater care is required of it than that of a trespasser or licensee. And the charge in this case is held to be further objectionable, as it eliminated from the consideration of the jury the evidence that the intestate was deaf, and the further circumstances tending to show that by defendant's negligence he would not have perceived the danger had he previously looked and listened.

4. Negligence—Proximate Cause.

Proximate cause does not relate merely to time and space, but is defined to be the natural and continuous sequence of events, unbroken by any new and independent cause, producing the event, and without which it would not have occurred.

5. Same—Evidence—Instructions.

Evidence tending to show that defendant's locomotive ran upon and killed plaintiff's intestate while it was exceeding the speed permitted by the town ordinance, and that otherwise the intestate would have reached a place of safety beyond the track, is sufficient upon the question of proximate cause, and under the circumstances of this case: *Held*, the charge of the court did not prejudice defendant in this regard.

CIVIL action, tried before *O. H. Allen, J.*, at June Term, (255) 1917, of HALIFAX.

This is an action to recover damages for the killing of the intestate of the plaintiff, caused, as the plaintiff alleges, by the negligence of the defendant, in that he was run over by a train of the defendant which was backing in the night-time without a light or an employee on the rear of the car; that no bell was ringing, and that the train was running in excess of four miles an hour, in violation of an ordinance of Weldon.

The defendant denies negligence, and pleads contributory negligence of the plaintiff's intestate.

The evidence of the plaintiff tends to prove:

On the night of the first of February, 1916, A. L. Artz, of Somerville, Mass., an inspector of the Lumber Mutual Fire Insurance Company, came to Weldon, N. C., to inspect a loss in a lumber plant; that he came on the train of the defendant company which should have arrived at 8:25 p.m., but actually did not reach Weldon

until about 8:40 p.m.; that the night was dark and rainy; that this train, designated as No. 72, upon reaching its destination at Weldon does not run on the elevated tracks of the At- (256) lantic Coast Line to the union station and discharge its passengers under shelter, who then by stairway reach the street line, but just south of the town it switches from the main line to the tracks of a lower level and runs to the place where the old shed used to be, between First and Second Streets of the said town, and on the same grade with the streets; that at the place where the train stops and discharges its passengers the defendant maintains six tracks, and on each side of said tracks there are two-story buildings, and the line of the buildings are only a short distance from the outer track on each side; that there are no lights at night about or near said tracks, except from the windows of the buildings and a street light above the crossing at First Street; that the main street of the town, Washington Avenue, strikes these tracks diagonally on their east side, just north of the building of the Weldon Bank and Trust Company, which is a building of triangular shape; that the Western Union telegraph office is on the west side of said tracks; that First Street is just north of the Western Union Telegraph Company's office and the bank building, and separates these points from the union station of the railroad companies; that passengers alighting from this train do so in an open yard, covered by these railroad tracks, where there are neither platform nor lights, except as above stated, and on the night in question, about the station and on the streets the mud was about ankle deep; that to reach First Street to go to the hotel a passenger had to proceed north and go around the office of the Western Union Telegraph Company, and to reach the main or business street of the town a passenger had to proceed north and go around the Weldon Bank and Trust Company building; that if he alighted on the west side of the train, to get into the main street he would be compelled to go around the front of the train, and if he alighted on the east side of the train, to go to the hotel he would be compelled to do the same thing; that on the night of the alleged injury Mr. Artz left the train on its west side, and desiring to go to the main street, was coming from somewhere about the second track directly to the point about the bank building; that the place was much frequented by the public; that when the train stops, the engine is detached and proceeds along the track on which it came, until a switch is reached, when it changes to the next track and runs back alongside the cars which it brought in, and which had remained where the train first stopped; that the switch is seven rails length, or 210 feet, from where his engine first stopped; that just as Mr. Artz was crossing in front of

the end of the train, this engine backed over him and so injured him that he died in a few hours; that the train was backing; that there was no light on the advancing end of the locomotive, nor was the bell ringing, and that the engine was running more than
(257) four miles an hour, in violation of an ordinance of the town.

The evidence of the defendant tends to prove that there was an arc light within 50 or 60 feet of the place where the intestate of the plaintiff was killed, and that one could easily see the approaching train; that there was a light and an employee of the defendant on the rear of the approaching train, and that the bell was ringing; that the train was not running in excess of four miles an hour; that the employee on the rear of the train called to the intestate of the plaintiff when he saw him approaching the track, and when he saw that he did not stop he gave the wash-out signal, and that the train was then stopped within three or four feet.

There was a motion for judgment of nonsuit, which was overruled, and the defendant excepted.

His Honor charged the jury, among other things, as follows:

"If the jury should find from the evidence that the plaintiff was walking on the railroad track, and the defendant was backing its engine along the track, in the night-time, in the direction of the plaintiff, and that there was no light at the time on the back part of the engine, and no agent there to keep a lookout along the track, or if, being there, he failed to exercise reasonable care in looking ahead along the track for any person on or near the track, and that no bell was ringing; and if the jury should find that the engine so moving ran against and upon the intestate and killed him; and if the jury should find that if the bell had been ringing and there had been a proper lookout on the engine, the intestate would have had proper notice of the approaching train in time and would have escaped the train, or if there had been a person stationed on the engine, and was exercising reasonable care in looking along the track, he would have observed the intestate in time to avoid striking him, then the jury should answer the first issue 'Yes,' and the second issue 'No.'

"That is all bearing upon the question as to whether the bell was ringing, and whether there was any one stationed to keep a lookout; in other words, whether they were using these proper precautions to prevent injury to persons who might be crossing. It was as much the duty of the deceased, Mr. Artz, to look and listen for approaching trains at the crossing as it was the duty of the railroad to give its signals; and so, if by reasonable care in looking and listening, the deceased could have seen or heard the approaching engine and have avoided the accident or injury, it was his duty to

have done so; and if he was run over and killed because of the failure to look and listen, the defendant company would not be liable, and in that event you would answer the second issue 'Yes,' that is, on the question of contributory negligence — (258) the negligence of the deceased.

"(That is given subject to this further charge that if the jury should find that the engine was being run at a greater rate of speed than four miles an hour, this would be a violation of the ordinance of the town, and is negligence *per se;* and if the jury should find that this was the proximate cause of the injury—that is to say, that if the jury should find that it was running at a greater rate of speed, and that that was the proximate cause of the injury—then you should answer the first issue 'Yes' and the second issue 'No.' ")

To so much of the foregoing instructions as appears in parentheses the defendant excepted.

The jury returned the following verdict:

1. Was the intestate of the plaintiff injured and killed by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the intestate of the plaintiff by his own negligence contribute to his injury, as alleged in the complaint? Answer: No.

3. Notwithstanding the negligence of the intestate of the plaintiff, could the defendant by the exercise of ordinary care have avoided the injury?

4. What amount of damages, if any, is the plaintiff entitled to recover? Answer: $15,000.

His Honor reduced the damages to $12,000, and rendered judgment for that amount, and the defendant appealed.

Walter E. Daniel and George C. Green for plaintiff.

F. S. Spruill, R. C. Dunn, W. A. Townes, and Carl H. Davis for defendant.

ALLEN, J. The evidence for the plaintiff, which has been accepted, establishes the negligence of the defendant as the proximate cause of the death of the plaintiff's intestate. *Purnell v. R. R.,* 122 N.C. 832; *Ray v. R. R.,* 141 N.C. 84; *Hill v. R. R.,* 166 N.C. 596.

The question has been recently discussed in a number of cases.

The Court says, in *Ray v. R. R.:* "It was a negligent act to back a train onto a railroad yard where persons, passengers and others were accustomed to stand or move about, either as of right or in the discharge of some duty, or by permission of the company, evidenced by established usage, without warning of any kind and without having some one in a position to observe the condition of

the track and signal the engineer or caution others in case of impending peril." And in *Hill v. R. R.*, quoting from *Lloyd v. R. R.*, 118 N.C. 1010: "It was negligence on the part of the defendant to run its engine, after night, rear in front, without such a light, (259) for two reasons—first, because by its aid the intestate might possibly have been seen in time to stop the train and avert the accident; and, secondly, because every person who used the track as a footway, under the implied license of the defendant, had reasonable ground to expect that such care would be exercised and to feel secure in acting upon that supposition."

It is also settled in this State that the violation of an ordinance or statute is negligence, and not mere evidence of negligence. *Ledbetter v. English,* 166 N.C. 125; *McNeill v. R. R.,* 167 N.C. 396.

The judgment of nonsuit could not, therefore, be granted except on the ground of contributory negligence, in that the intestate of the plaintiff entered on the track without looking and listening, and this could not be declared as matter of law, as will appear in the discussion of the charge relating to the second issue.

The only debatable question raised by the appeal is as to the charge on contributory negligence.

The first part of this charge was too favorable to the defendant, because it deals with the intestate as a stranger on the premises by permission, and not as a passenger leaving the premises of the defendant after alighting from its train.

In *Warner v. R. R.*, 168 U.S. 339, the Court said: "The duty owing by a railroad company to a passenger actually or constructively in its care is of such a character that the rules of law regulating the conduct of a traveler upon the highway when about to cross, and the trespasser who ventures upon the tracks of a railroad company, are not a proper criterion by which to determine whether or not a passenger who sustains injury in going upon the tracks of the railroad was guilty of contributory negligence. A railroad company owes to one standing towards it in the relation of a passenger a different and higher degree of care from that which is due to mere trespassers or strangers, and it is conversely equally true that the passenger, under given conditions, had a right to rely upon the exercise by the road of care; and the question of whether or not he is negligent, under all circumstances, must be determined on due consideration of the obligations of both the company and the passengers."

The cases bearing on the question are collected in the note to *Besecker v. R. R.*, 14 Anno. Cases 24, from which we quote the following: "The duty of a railroad to a passenger is of such a character that the rules of law regulating the conduct of a traveler upon

the highway when about to cross railroad tracks and of a trespasser who ventures upon such tracks are not proper *criteria* by which to determine whether a passenger who sustains injury in going upon the tracks for the purpose of passing between a train and a station in the manner designated by the railroad company is (260) guilty of contributory negligence.

"The failure of a passenger to look or listen, under such circumstances, may or may not be negligence, according to the peculiar facts of the case. *Chesapeake, etc., R. Co. v. King,* 99 Fed. 251; 40 C.C.A. 432; 49 L.R.A. 102. But the mere fact of crossing a track upon the implied invitation of the company, for the purpose of boarding or leaving a train, without looking or listening, is not necessarily contributory negligence as a matter of law."

The charge was also objectionable on the part of the plaintiff, because it ignored the evidence tending to prove that the intestate of the plaintiff was deaf; that there was neither man nor light on the rear of the train; that the electric light did not aid him; that it was dark where he was, and that if he had looked and listened he would not have seen nor heard anything that would have afforded him protection.

The Court says, in *Russell v. R. R.,* 118 N.C. 1109: "Where the plaintiff exposes himself to danger, if he is induced to incur the risk because of the failure to sound the whistle or ring the bell at the usual place, the omission to listen and look is deemed excusable, or not culpable, because he is misled by the conduct of the company. *Alexander v. R. R.,* 112 N.C. 734."

Did the modification of this charge by the part excepted to deprive the defendant of its defense of contributory negligence, and was it prejudicial to the defendant?

When the two paragraphs of the charge are considered together, they amount to an instruction that, although the defendant did not look and listen before entering on the track, yet, if the defendant was running its train in excess of four miles an hour, in violation of the ordinance, and this was the proximate cause of his death, the jury should answer the second issue "No."

This charge cannot be properly interpreted without determining the meaning of proximate cause and incorporating it into the charge.

Proximity of time and space is no part of the definition, and it "must be understood to be that which, in natural and continuous sequence, unbroken by any new or independent cause, produces that event, and without which such event would not have occurred." Sherman and Redfield on Negligence, sec. 26; *Hardy v. R. R.,* 160 N.C. 119; *Ward v. R. R.,* 161 N.C. 184.

The charge, therefore, considered in the light of the accepted definition of proximate cause, is equivalent to saying to the jury that, although the plaintiff did not look and listen before entering upon the track, yet, if the defendant was running its train in excess of four miles an hour, in violation of the ordinance, and that if the defendant had not been running its train at that speed, that
(261) the plaintiff's intestate would not have been killed, that then the plaintiff would not be guilty of negligence, which was the proximate cause of his death; and if the jury so found, they should answer the issue "No," and as thus understood, there was no error in the charge.

Was there evidence supporting such a finding by the jury?

One witness for the plaintiff, who was shown to be an expert, testified that upon certain findings by the jury, of which there was evidence, that the train was running from six to eight miles an hour. The engineer of the defendant testified that the train was running about four miles an hour, and that when he received the wash-out signal, which was before the plaintiff was struck, that he stopped the train within three or four feet.

There was also evidence that the body of the plaintiff was dragged, after it was struck, 15 feet.

This furnishes some evidence that the train was running in excess of the speed limit, and if so, the jury might well have found that if it had been running at four miles an hour, that the plaintiff's intestate would have passed over the track, a distance of 3 or 4 feet, before the train reached him, and would therefore have escaped injury, and that the rate of speed was the cause, without which the injury would not have happened.

We are therefore of opinion that there was no error in the charge.

No error.

HOKE, J., concurs in result.

Cited: Goodrich v. Matthews, 177 N.C. 199; *Parker v. R. R.,* 181 N.C. 102; *Albritton v. Hill,* 190 N.C. 430; *Campbell v. Laundry,* 190 N.C. 654.

KADER ASKEW v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 10 October, 1917.)

Commerce—Telegraphs—Negligence—Mental Anguish—United States Supreme Court—State Courts.

The decisions of the Supreme Court of the United States holding that mental anguish alone is not a legal ground for the recovery of damages in an action against a telegraph company for its negligence in transmitting an interstate message is controlling upon the courts of this state as to interstate messages; and the contract being for the delivery as well as for the transmission of the message, the fact that the negligence occurred in the delivery in this State can make no difference.

CIVIL action, tried before *O. H. Allen, J.*, at April Term, 1917, of HERTFORD.

Judgment for defendant, and plaintiff appealed.

Roswell C. Bridger, W. R. Johnson, and E. T. Snipes for (262) *plaintiff.*

Pruden & Pruden, Gilliam & Davenport, A. T. Benedict, and Tillett & Guthrie for defendant.

WALKER, J. This action was brought to recover damages for mental anguish, alleged to have been caused by the negligent delay of the defendant in delivering a telegram which was sent by Ernest Askew, who lived in New York, to the plaintiff, who lived in this State, announcing that the latter's son, Johnnie Askew, was then dying. It was, therefore, an interstate telegram. As appears in the record, the plaintiff sought to recover damages for mental anguish only, and the case, therefore, is governed by the recent decisions in *Norris v. Telegraph Co.* and *Bateman v. Telegraph Co.*, both decided at this term. We held in those cases, following the general principle, as to interstate telegrams, stated in *Meadows v. Telegraph Co.*, at the last term, that the Federal law is applicable in such cases, and for that reason, that damages cannot be recovered for mental anguish alone, unaccompanied by any physical or other sufficient legal injury. Where the telegraphic message is intrastate in character, our decisions will control. Besides, this was an unrepeated message, and *Meadows v. Telegraph Co., supra,* therefore, specially applies.

The other matter, relating to the reasonableness of the company's rule as to the delivery of messages beyond its prescribed limits, is much too important to be considered and decided until it is necessary to do so. The question, under the Federal law, as to what is a reasonable rate in the case of public-service corporations engaged

in interstate business, is generally one for the Interstate Commerce Commission to decide, at least in the first instance, but if it were otherwise the writer of this opinion, speaking solely for himself, does not see why the regulation of the defendant in respect to the forwarding of a message beyond its free-delivery limits, upon payment of a fair compensation for the extra service, is not a reasonable one, and valid in law. We have held that defendant has the right to establish such limits, if they are reasonable, and to be paid for any service done in delivering a message at a place situated beyond them.

It is suggested that the negligence alleged in this case was committed in this State, and for that reason, under *Penn's* case, 159 N.C. 309, the plaintiff is entitled to recover damages; but we decided otherwise in *Norris'* case, at this term, as the contract imposed upon the company the duty to "transmit and deliver," and, therefore, that "delivery" is a part of the interstate transaction and equally subject to Federal law, as is transmission. It was held in *Kirby v. W. U. Telegraph Co.*, 77 S.C. (58 S.E. 10), that (263) the word "deliver," as applied to a telegram, means "transmit and deliver," as a delivery could not be made without transmission, and so the latter is not effective without delivery.

No damages other than those for mental anguish, caused by delay in delivering this interstate message, being claimed, the judgment of the court was correct.

No error.

Cited: Johnson v. Tel. Co., 175 N.C. 589; *Hardie v. Telegraph Co.*, 190 N.C. 47; *S. v. Robbins*, 253 N.C. 49.

T. P. CHERRY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 10 October, 1917.)

1. Railroads—Employer and Employee—Master and Servant—Commerce—Repairing Track—Federal Act.

An employee injured by defendant's negligence while engaged in replacing cross-ties in a spur track of a railroad used in interstate commerce, the spur leading to a warehouse from which such shipments were received for transportation, and at the time a train of this character awaited the use of the spur, is held to be engaged in interstate commerce at the time of the injury, within the meaning of the Federal statute, and may maintain his action thereunder.

CHERRY *v.* R. R.

2. Master and Servant—Employer and Employee—Railroads—Negligence —Evidence—Trials—Assumption of Risks.

Where there is evidence that a railroad company has furnished its employee insufficient help to replace the cross-ties under its rails with heavy ones, and upon complaint its roadmaster had ordered the employee to do the work, saying he (the employee) could himself employ proper help, which the conditions and circumstances rendered impossible for him to do: *Held*, sufficient to sustain a finding in the negative upon the issue as to assumption of risks, and to sustain a finding upon the issue as to defendant's actionable negligence.

CIVIL action, tried before *Stacy, J.*, at April Term, 1917, of PITT, upon these issues:

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

2. Was the plaintiff employed by the defendant in interstate commerce, and engaged in such commerce at the time of his injury? Answer: Yes.

3. Did the plaintiff voluntarily assume risk of injury, as alleged in the answer? Answer: No.

4. What damage, if any, is plaintiff entitled to recover? Answer: $700.

From the judgment rendered, defendant appealed.

Albion Dunn for plaintiff. (264)
Skinner & Cooper for defendant.

BROWN, J. The evidence tends to prove that the plaintiff was employed as section master on defendant's road; that among other tracks in plaintiff's charge was a spur track in the town of Greenville, leading to a tobacco company's warehouse. Plaintiff was ordered by the roadmaster, a superior officer, to make repairs upon said spur track before the arrival of a freight train which was then in the block. The spur track was used by defendant in both its interstate and intrastate business. Cars were frequently loaded on the spur track at the American Tobacco Company's warehouse for transportation to other States.

The plaintiff's evidence tends to prove that he, together with one Stancill, a boy 15 years of age, commenced to make the repairs as directed. These repairs consisted in taking out rotten ties and replacing them with large switch ties, weighing something like 400 pounds each. Plaintiff testifies that he had been furnished with no help except the Stancill boy; that he had complained to the roadmaster that Stancill was not sufficient; that the roadmaster ordered him to go ahead and do the best he could; that the road-

master could not make men work, but for the plaintiff to get them if he could.

The plaintiff says that he could not get any men then, and gave as a reason for it the pay allowed by the defendant and the time and method of payment. It is contended and, we think, supported by the evidence, that the work was required to be done immediately, and that the plaintiff acted in obedience to the orders of the road-master.

The plaintiff testifies that he lifted one of the ties and was carrying it to the spur track, where it was to be immediately used, when in some way he stumbled and fell, owing to the weight of the tie, which fell on him and seriously injured him. Plaintiff testified that ordinarily it required two and sometimes four full-grown men to handle such ties as were being used on this occasion. There is evidence to the effect that if the boy, Stancill, had attempted to carry the ties in connection with the plaintiff, it would have hindered the plaintiff, as the plaintiff was so much taller.

It is contended that the plaintiff was not engaged in interstate commerce, and that therefore this action cannot be maintained. It must be admitted that, tested by the decisions of the Supreme Court of the United States on this question, the matter is left in some doubt, but there is one case so much like this that we feel obliged to follow it and apply it here.

The facts in the case at bar are, that the plaintiff was carrying cross-ties to repair a track used by the defendant in its interstate commerce, and then immediately to be used by a waiting train. In the case of *Peterson v. R. R.*, 229 U.S. 146, the plaintiff was (265) injured while carrying bolts to repair a bridge upon the track of the railroad company which was engaged in interstate commerce. In that case it was held that the case was properly triable under the Employer's Liability Act, as plaintiff was engaged in interstate commerce when injured. In that case the Court says:

"Tracks and bridges are as indispensable to interstate commerce by railroads as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair."

In *Montgomery v. Southern Pacific Co.*, 47 L.R.A. (N.S.) 13, it is held, substantially, that all employees who participate in the maintenance or operation of the instrumentality for the general use of the road, thereby enhancing the utility of such commerce, are necessarily engaged in the work of interstate commerce, within the meaning of the act.

In *Zikos v. Oregon R. R. Co.*, 179 Fed. 893, the Court says, in

holding that the employees engaged in working on a track over which both interstate and intrastate commerce is carried, was himself engaged in interstate commerce: "The track of the railroad company engaged in both interstate and intrastate commerce is, while essential to the latter, indispensable to the former. It is equally important that it be kept in repair. . . . To hold that the workman engaged in repairs upon the track of such a carrier is not furthering interstate commerce would be to deny the power to control an indispensable instrument for commercial intercourse between the States."

In *Lanphere v. Oregon Ry.*, 47 L.R.A. (N.S.) 38, this matter is fully discussed and numerous authorities collected in the notes, which, we think, fully sustain the contention that the plaintiff, at the time of the injury sustained, was engaged in an act relating to interstate commerce. *West v. R. R.*, this term.

We think the motion to nonsuit was properly overruled. The plaintiff's evidence tends to prove that the defendant had furnished him insufficient help; that the roadmaster had ordered him to repair the track immediately, so that a waiting train could use it; that he could not get any help, and that which he had was inefficient, and that the regulations of the defendant company in regard to pay was such as prevented the hiring of help that he needed, even if he had had the time to have gotten it.

In any view of this evidence, we do not think that the plaintiff assumed the risk of injury on his own account.

This case is very much like *Pigford v. R. R.*, 160 N.C. 97. In that case the plaintiff was instructed by his superior officer to load a gondola with iron rails. The plaintiff asked for more help, stating that he did not have help enough. He was told to "do the best you can," and while loading the rails with insufficient (266) help, plaintiff was hurt, and the Court sustains the finding of the jury that the plaintiff had not assumed the risk of his employment.

The subject is very fully discussed in that case, and we content ourselves by referring to it.

We have examined the other assignments of error, and think that they are without merit.

No error.

Cited: Hines v. R. R., 185 N.C. 74; *Barrett v. R. R.*, 192 N.C. 730; *Clinard v. Electric Co.*, 192 N.C. 739; *Jarvis v. Cotton Mills*, 194 N.C. 688; *Jackson v. Construction Co.*, 197 N.C. 782; *Loftin v. R. R.*, 212 N.C. 597.

WORTHINGTON & FRIZELLE v. TITUS JOLLY.

(Filed 10 October, 1917.)

1. Vendor and Purchaser—Statutes—Verified Account—Evidence—Prima Facie Case—Partnership.

The statutory statement of an account of goods sold and delivered, received as *prima facie* evidence in a court of a justice of the peace, is sufficient if verified by a partner in plaintiff's firm and in conformity with the statute.

2. Vendor and Purchaser—Statutes—Verified Account—Evidence—Prima Facie Case—Statute of Frauds—Debt of Another.

The itemized and verified account allowed by the statute in actions begun in the court of a justice of the peace affords *prima facie* evidence of the sale and delivery of the goods; and upon trial on appeal in the Superior Court, in which the defendant claims he is not liable under the statute of frauds, upon the ground that he is sought to be bound by his parol promise to be charged with the debt of another, it is reversible error to submit to the jury the verified account whereon was written the name of the defendant as "responsible."

3. Appeal and Error—Evidence—Verified Account—Statute of Frauds—Debt of Another.

In an action to recover for goods sold and delivered, where there is conflicting evidence upon the fact as to whether the defendant was sought to be charged upon his parol promise to pay for the debts of another, it is reversible error for the judge to fail in his charge to explain the statute of frauds and its effect upon the controversy, and make the answer to the issue solely depend upon whether the parol promise had been given. *Peel v. Powell*, 156 N.C. 533, cited and applied.

CIVIL action, tried before *Harding, J.*, at May Term, 1917, of PITT.

From the judgment rendered, defendant appealed.

F. G. James & Son for plaintiff.
Skinner & Cooper for defendant.

BROWN, J. This action is brought to recover $82.02 for (267) goods alleged to have been sold and delivered to one Summerell, at request of defendant. The plaintiff put in evidence a verified account, under the statute, which was objected to by defendant.

The person who verified it was Worthington, a member of the firm. We do not think it comes within the objection stated in *Nall v. Kelly*, 169 N.C. 717, but rather that it is supported by that case, so far as its regularity is concerned.

But we think the judge should have confined the account strictly to *prima facie* evidence of the delivery of the goods to Summerell.

At the beginning of the account is written, "Titus Jolly responsible." The account is not competent evidence of Jolly's responsibility, and those words should be stricken out and not permitted to go to the jury. They are well calculated to influence and possibly mislead the jury in their verdict.

In respect to the charge of the court, we think the assignments of error are well laid. The learned judge below did not explain to the jury the statute of frauds and what effect it has upon the controversy. The liability of defendant appears to have been made to depend upon whether he agreed to pay for all goods furnished Summerell. Defendant may have so agreed, and then not be liable, as such alleged agreement was not in writing. In order to hold the defendant upon a verbal promise, it must be found that he was an original promissor and was not a mere surety—in fact, that he purchased the goods practically on his own account and directed their delivery to Summerell.

The law is well stated in *Peel v. Powell,* 156 N.C. 553, as follows: "The obligation of a promissor to answer for the 'debt, default, or miscarriage of another' is original and binding if made at the time or before the debt is created, when the credit is given solely to the promissor, or to both."

The evidence upon this phase of the case is conflicting, and the court should have stated the evidence and contentions of both parties and let the jury determine whether it was the intention of both plaintiff and defendant that the latter should become the responsible debtor upon whose verbal request the goods were delivered, or did he promise solely as surety for Summerell. In the latter event there must be written evidence of the promise.

New trial.

Cited: Darden v. Baker, 193 N.C. 389; *Endicott-Johnson Corp. v. Schochet,* 198 N.C. 770.

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(268)

CARL RICE, BY HIS NEXT FRIEND, v. THE NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 10 October, 1917.)

Evidence—Negligence—Sickness—Causal Connection—Burden of Proof—Trials—Mosquitoes—Malaria—Hookworm—Nonsuit.

Where damages are sought for sickness alleged to have been caused from mosquitoes bred from the standing water on the plaintiff's land,

whereon he resided, as a result of defendant's negligence in permitting its drain pipe to have become clogged, the burden of proof is on the plaintiff to show that his sickness was the result and proximate cause of the negligence alleged; and upon evidence tending only to show that malaria was prevalent in this locality long before the alleged act of negligence; that the kind of mosquitoes required to transmit malaria was bred in the surrounding sea water; that plaintiff had hookworms, which would produce malaria and the same general appearance, for which he had been prescribed, but did not take the treatment, and that his attending physician did not make the only test that was regarded sure to ascertain whether the malaria was caused by mosquito bites, is held insufficient, upon defendant's motion, to nonsuit, something more than mere conjecture being required to take the case to the jury.

CIVIL action, tried before *Stacy, J.*, at June Term, 1917, of CARTERET, upon these issues:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.
2. What damages, if any, is the plaintiff entitled to recover? Answer: $950.
3. Is the plaintiff's cause of action, or any part thereof, barred by the statute of limitations? Answer: No.
4. Is the plaintiff estopped to maintain this action by the judgment rendered at the June Term, 1914, of this court, in the case of *W. J. Rice v. Norfolk Southern Railway Company?* Answer: No.

From the judgment rendered, defendant appealed.

Abernethy & Davis and C. R. Wheatley for plaintiff.
J. F. Duncan and Moore & Dunn for defendant.

BROWN, J. The plaintiff alleges that he is a minor, 18 years of age, and resided with his father, who is now dead, upon a certain lot belonging to his father, situated in the town of Beaufort. Plaintiff avers that defendant constructed its roadbed in such a negligent manner in 1906 that water was ponded on said lot; that to relieve this condition defendant caused a drain pipe to be laid to carry the water off, in 1910, which it allowed to become stopped up, so that water again ponded upon the lot; that in consequence thereof plaintiff in August, 1911, was made ill for five weeks with malaria, as the direct cause of mosquito bites.

The defendant avers that W. J. Rice, the plaintiff's father, (269) recovered judgment for this alleged injury to his premises, and in that action also recovered for the illness of his children, including plaintiff.

Defendant further contends that the evidence is not sufficient to establish negligence of defendant as the proximate cause of plain-

tiff's injury. Defendant sets up other defenses, which we need not refer to.

It appears that W. J. Rice recovered damages against defendant for this alleged injury to his premises, and that in the action was embraced a claim for injury to the health of his children. The case is reported in 167 N.C. 2, where the facts are stated.

It is needless to consider the effect of such recovery upon the rights of the plaintiff, as we agree with defendant that the evidence is insufficient to establish a direct causal connection between the alleged negligence and plaintiff's illness in 1911. It may be difficult to establish such connection in a case like this, but, nevertheless, the burden is on plaintiff to do so, for negligence becomes actionable only when it is shown to be the proximate cause of an injury.

The plaintiff claims that his illness was caused by malaria, communicated by mosquitoes, bred by the water so ponded on the lot.

We will first consider the evidence as to malaria. Dr. Davis, of Beaufort, who attended plaintiff in 1911, testifies that he examined plaintiff only once, and then diagnosed the case as malaria, and treated plaintiff for it, but that he made no microscopic examination of the blood, and that such examination is the only reliable way of detecting presence of malaria.

Dr. Maxwell testified that he examined plaintiff, but not thoroughly, last October; found his condition anæmic; could not say what brought it about; that malaria produces anæmia, and that hookworm will produce same results and appearance.

The undisputed evidence is that plaintiff had hookworm in 1911, and that he was examined by Dr. Strosnider, a hookworm expert, who prescribed for plaintiff in March, 1912, but plaintiff admits that he failed to take the treatment. All the medical testimony is to the effect that hookworm in the system will produce practically the same results as malaria. The Rockefeller hookworm expert who examined plaintiff in 1912 testified that, as plaintiff did not take the treatment, he has had hookworm disease ever since.

Thus we see that it is pure speculation and guesswork as to whether plaintiff's condition was the result of malaria or hookworm. His attending physician is not certain it was malaria, and admits that he did not make the only recognized positive test. All the medical experts agree that hookworm produces the same outward appearance as malaria, and affects the internal organs in similar manner. All the evidence shows plaintiff was impregnated with hookworm, and that he refused to take the prescribed treat- (270) ment for it.

We will now consider the evidence as to the mosquitoes. It is

testified to by all the experts examined on the trial, and it appears to be an established theory, that malaria can only be injected into the human system by the female of the anopheles species of mosquito. Malaria is not born in the mosquito, but it has to bite a human being who has it, and by its sting it may transmit it. It is a conveyor and not an originator of the disease.

It is in evidence by Dr. Davis, plaintiff's witness, that no particular locality in Beaufort is free from malaria, and that mosquitoes can breed in salt water; that there are mosquitoes of three varieties in Beaufort; that the culex and the anopheles are the most common.

The evidence shows that witness Hendricks lived on the lot prior to 1876; that the lot was frequently under water then; that the lot was a sunken place, being the lowest point in the block, and adjoining lots naturally drained on it. The evidence shows that there were plenty of mosquitoes around this lot before the railroad was built, and that there were chills and fevers about Beaufort in 1911. One witness testifies that he has lived in Beaufort many years, and that there have been chills and fevers in that town ever since he has lived there.

There is nothing to contradict the evidence that anopheles mosquitoes were generally prevalent in all that section at the time plaintiff became ill. Thus we see that the plaintiff's illness was more likely to have been caused by hookworm than by malaria, and if by the latter, it is mere speculation as to where the female anepholee was bred that transmitted it.

Referring to the character of evidence essential to establish a fact necessary to be proven, Mr. Justice Walker says, in *Byrd v. Ex. Co.*, 139 N.C. 275: "The burden was, therefore, upon the plaintiff to show that defendant's alleged negligence proximately caused his intestate's death, and the proof should have been of such a character as reasonably to warrant the inference of the fact required to be established, and not merely sufficient to raise a surmise or conjecture as to the existence of the essential fact."

In *S. v. Vinson*, 63 N.C. 335, this Court thus states the rule: "We may say with certainty that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury." And in *Brown v. Kinsey*, 81 N.C. 245, it is said: "The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue, or furnish more than ma-

terial for a mere conjecture, the court will not leave the is- (271) sue to be passed on by the jury."

Reviewing the entire evidence, we think that there is not sufficient probative force in it to justify a rational conclusion that plaintiff's illness was the proximate result of any alleged negligence upon the part of the defendant. To hold otherwise would be to give mere conjecture the probative force and effect of legal evidence.

The motion to nonsuit is allowed. Let judgment be entered accordingly.

Reversed.

Cited: Godfrey v. Power Co., 190 N.C. 29; *Elliott v. Power Co.*, 190 N.C. 66; *Burnett v. Williams*, 196 N.C. 621; *King v. R. R.*, 200 N.C. 400; *Carter v. Realty Co.*, 223 N.C. 192.

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

(Filed 10 October, 1917.)

1. Appeal and Error—New Trials—Motions—Newly Discovered Evidence—Superior Courts—Jurisdiction—Statutes.

By the act of 1887, a case appealed from remains in the Superior Court, and though a motion for a new trial may be made in the Supreme Court while the appeal is pending, it nevertheless may be made in the Superior Court at the next term after affirmation of its action and before final judgment entered therein in pursuance of the certificate.

2. Courts—Jurisdiction—Superior Courts—Motions—New Trial—Court's Discretion—Appeal and Error.

A motion properly made in the Superior Court for a new trial for newly discovered evidence is addressed to the sound discretion of that court, and is not reviewable on appeal unless this discretion has been abused.

CIVIL action, tried before *Stacy, J.*, at June Term, 1917, of CARTERET.

This was a motion for a new trial, upon the ground of newly discovered evidence.

This action was tried before his Honor, C. C. Lyon, Judge, and a jury, at October Term, 1916, of Carteret Superior Court. There was a verdict in favor of the plaintiff upon the issues submitted, and judgment rendered by his Honor, Judge Lyon, at said term, and appeal was taken from said judgment to the Supreme Court of North Carolina, and the opinion therein was filed 7 March, 1917,

and certified to the Superior Court of Carteret County on the first Monday in April, 1917, but no judgment was entered in accordance with the opinion of the Supreme Court, as the next term of Carteret Superior Court was the June Term, 1917, at which term the motion for a new trial was made.

A petition to rehear was filed in the Supreme Court, and in connection therewith a motion was made for a new trial upon the ground of newly discovered evidence.

The petition was denied and the motion was not con-
(272) sidered, because the certificate of the Supreme Court had been certified to the Superior Court.

Affidavits were filed by both parties on the hearing of the motion in the Superior Court, and after consideration thereof his Honor allowed the motion and ordered a new trial, and the plaintiff excepted and appealed, upon the ground that his Honor had no power to grant the motion.

Moore & Dunn for plaintiff.

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

ALLEN, J. Affidavits were filed by the defendant before his Honor, which justified him in granting the motion for a new trial, if he had authority in law to do so, and the decisions in this State sustain his authority.

The first case raising this question, after the changes in procedure following the adoption of the Constitution of 1868, was *Bledsoe v. Nixon*, 69 N.C. 81, in which it was held that an appeal took the whole case to the Supreme Court, and that when an appeal was taken the Superior Court could not entertain the motion.

This continued to be the law until the act of 1887 was passed, and since then it has been settled that the case remains in the Superior Court, and that while a motion for a new trial for newly discovered evidence may be considered in the Supreme Court while the appeal is pending therein, upon the judgment and opinion of the Supreme Court being certified to the Superior Court, the motion may be heard in the Superior Court at the next term. *Black v. Black*, 111 N.C. 303; *Banking Co. v. Morehead*, 126 N.C. 282; *Smith v. Moore*, 150 N.C. 159.

The conditions existing in the *Black* case were identical with those before us, and the Court says: "We are called upon in this case to construe the effect of the act of 1887 upon motions for new trials for newly discovered evidence in actions which have been

tried in the Superior Court, judgment rendered therein, taken by appeal to the Supreme Court, and the judgment affirmed and certified down, as in the present case, and by force of the statute the Superior Court is required to direct the execution thereof to proceed. Shall the practice settled in *Bledsoe v. Nixon, supra,* continue, or shall the motion now be made in the court where the judgment stands?"

There is no case pending nor judgment rendered in this Court, except the order affirming the judgment below and imposing the costs of appeal. To the Superior Court alone can the application be made, for it alone retains jurisdiction of the action. Motions for new trials for newly discovered evidence have been (273) entertained in this Court pending the appeal, since the passage of the act of 1887 *(Brown v. Mitchell,* 102 N.C. 347), but our attention has been called to none, after a final disposition of the appeal by affirmance of the judgment. And the matter has been settled by the case last cited.

1. We conclude that the proper practice is, that, pending appeals, such motions should be made in this Court, and when the final judgment has been rendered in this Court a petition to rehear should be filed for the purpose of making the motion here.

2. But when the judgment of the Superior Court has been affirmed and the opinion certified down, and the matter finally disposed of in this Court, the motion (or action in the nature of a bill of review, as was resorted to in *Matthews v. Joyce,* 85 N.C. 258) should be made or begun in the Superior Court, where the judgment was rendered.

This was affirmed in the *Banking Company* case and dealt with as a decision and not a *dictum,* the Court saying: "In *Black v. Black,* 111 N.C. 300, it was decided that, after a final decree in the Supreme Court, a motion for a new trial upon newly discovered evidence could be made, and that it should be made in the Superior Court. If a new trial could be ordered by the Superior Court after a final decision in the Supreme Court, surely such a motion as the one made in this case ought to have been granted, if the judge in his discretion thought it proper to grant it"; and in the *Smith* case, in which it is said that the practice since the statute of 1887 is laid down in *Black v. Black,* and that "when the opinion has been certified down, such motion must be made in the Superior Court."

The case of *Turner v. Davis,* 132 N.C. 188, is not in conflict with these decisions. It was decided upon the ground that the motion must be heard in the Superior Court at the next term after the opinion of the Supreme Court was certified down, and could not be continued to be heard at another term by another judge, and, as

pointed out in *Smith v. Moore,* it rests on the peculiar facts of the case.

The cases relied on by the appellant to the effect that after final judgment in the Superior Court the judge cannot order a new trial at a subsequent term, have no application, for the reason that the appeal does not bring the case here since the act of 1887, and it remains alive in the Superior Court until the next term after the opinion is certified down, when judgment should be entered according to the certificate.

As said in *Lancaster v. Bland,* 168 N.C. 377, "When judgment has been affirmed or reversed on appeal, it is a live case till, on receipt of the certificate, judgment has been entered below in conformity therewith, unless final judgment is entered here. (274) *Smith v. Moore,* 150 N.C. 158."

Black v. Black, 111 N.C. 300, and *Banking Co. v. Morehead,* 126 N.C. 279, were live cases, in which proper motions could be made, because, though the certificate had been sent down, judgment had not been entered in accordance therewith in the court below.

We therefore conclude that there was no error in entertaining the motion; and if the Superior Court had jurisdiction, it was a matter addressed to the discretion of the presiding judge, with which we cannot interfere unless there has been an abuse of the discretion, which we do not find to exist.

Affirmed.

Cited: S. v. Hartsfield, 188 N.C. 358; *Manuel v. R. R.,* 188 N.C. 560; *Tabor v. Burnett,* 188 N.C. 833; *Fountain v. Rocky Mount,* 190 N.C. 852; *Smith v. Fields,* 193 N.C. 841; *Moore v. Tidwell,* 193 N.C. 856; *Godfrey v. Coach Co.,* 201 N.C. 266; *S. v. Casey,* 201 N.C. 625; *S. v. Lea,* 203 N.C. 36; *S. v. Lea,* 203 N.C. 320; *Robertson v. Power Co.,* 205 N.C. 112; *S. v. Edwards,* 205 N.C. 662; *Goodson v. Lehmon,* 225 N.C. 518.

W. L. SUTTON AND WIFE v. C. G. CRADDOCK AND WIFE ET ALS.

(Filed 10 October, 1917.)

1. Appeal and Error—Judicial Sales—Increased Bids—Proposed Bidder.

As to whether one who has made an unaccepted offer to raise the price bid on lands at a judicial sale 10 per cent has acquired such an intent as would entitle him to appeal from the order of confirmation, *Quære?*

2. Judicial Sales—Courts—Private Sales—Increased Bids—Confirmation —Court's Discretion.

In an action to sell land affected with a contingent interest, under section 1590 of the Revisal, the court, acting within its equity powers, may order a private sale, where the interest of the parties will thereby be best promoted; and whether the sale made under the decree be public or private, the question of confirmation is vested in the sound legal discretion of the presiding judge; and while it is customary to refuse confirmation and order a resale in case of a responsible and increased bid, as much as 10 per cent, this course is not always obligatory, chapter 146, Laws 1915, not applying to judicial sales of this character.

3. Same—Improvements—Benefit of Parties—Appeal and Error.

Where all the parties at interest in lands affected with a contingent interest unite in requesting the court to confirm a sale privately made under a decree, and it is found as a fact by the trial judge that such would best subserve the interest of all parties, and that the purchaser had entered into possession, and by his personal effort and the expenditure of money increased the value of the land equal to or more than the amount of an increased bid made by a proposed purchaser, on appeal it is held that the action of the trial judge in confirming the sale was proper.

CIVIL action to sell land affected with a contingent interest, under section 1590, Revisal, heard on pleadings, record, and facts in evidence, before *Lyon, J.*, at June Term, 1917, of LENOIR.

On the hearing it appeared that the real estate in question formerly belonged to W. C. Fields, deceased, who devised the same in his last will and testament to his daughter, Annie Fields Sutton, for her natural life, and after her death, if she shall (275) have married and have children or child by such marriage, then to such child or children, and if she does not marry, then to her brothers and sisters who may survive her, to them, their heirs and assigns. That said Annie Fields Sutton has been married for six or seven years, without having had any child, and the parties in interest, to-wit, *feme* plaintiff and defendants, her brother and sisters, the children and devisees of W. C. Fields, desiring to sell the property, which is going to waste for want of proper care, bargained the same to one L. C. Mosely at the price of $21,000 and instituted the present action, as stated, to make sale and conveyance of said land pursuant to said bargain.

The court, on hearing the testimony, makes extended findings of fact relative to the proposed disposition of the property, among others, that at the time of bargain made and suit instituted, the price offered was an adequate one, and that "the interest of all parties required and would be materially enhanced by a sale of the land to L. C. Mosely at the price of $21,000, with interest thereon from 1 January, 1917, being amount and terms of the offer."

It further appeared that during the term the decree was entered, one W. T. Hines filed a written stipulation, whereby he agreed to raise the bid 10 per cent, and later in the term he increased his offer to $25,000; that before suit instituted, said Hines, who was negotiating with the parties for the purchase of the land, had withdrawn an offer of $19,000 which he had made for the land, saying that he didn't care to buy at that price. Thereupon the owners made the bargain with L. C. Mosely, as stated, at $21,000. That soon after making the trade, said Mosely, at the instance of the owners, had entered into possession of the property and expended, in money and material and improving said land, as much as $2,000, and had given almost his entire time to the purpose, and had thereby greatly enhanced its value, and that neither he nor his bargainors had any notice it was Hines' purpose to make an increased bid till it was offered in court, pending the proceedings. In this connection his Honor finds that the price offered by Mosely, when considered in reference to a reasonable compensation to him for his time and effort in improving the home, and the sum of $2,000 in money and material actually expended, is a more desirable bid than that of said Hines.

There was a decree of sale to Mosely at $21,000, retaining the proceeds to be invested pursuant to law, and the proposed purchaser, W. T. Hines, appealed.

Loftin, Dawson & Manning and McLean, Varser & McLean for Mosely.

Dickinson & Land for appellant.

HOKE, J. It seems that in an action of this character the (276) appellant, W. T. Hines, by reason of his unaccepted offer to purchase, has no such interest in the subject-matter of this litigation and has acquired no such status in this suit as to give him the right to question the proceedings by appeal or otherwise. In Battle's Revisal, sec. 585, the right of appeal in civil actions generally is conferred on "any party aggrieved," and we find no decision that would recognize this proposed purchaser as coming within the terms or meaning of the statute. *Upchurch v. Upchurch,* 173 N.C. 88; *Faison v. Hardy,* 118 N.C. 142; *Green v. Harrison,* 59 N.C. 253; *In re Switzer,* 201 Mo. 66, with extended note by the editor; 2 R.C.L., title Appeal and Error, sec. 33.

But if the right of appeal be conceded, it is clear, we think, that on the facts presented in the record the sale to L. C. Mosely has been properly confirmed.

It is fully established with us that in an action under this

statute, and in proper instances under its general power, and when the interest of the parties will thereby be best promoted, a court of equity may make a disposition of property by private sale. *Thompson v. Rospigliosi,* 162 N.C. 145, and authorities cited; and where a sale is made under its decree, public or private, the question of confirmation is vested in the sound legal discretion of the presiding judge; and while it is generally customary to refuse confirmation and order a resale in case of responsible and increased bid, as much as 10 per cent, this course is not always obligatory.

Speaking to the question in the recent case of *Upchurch v. Upchurch, supra,* the Court said: "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 interest of all the parties whose rights are being dealt with in the suit," citing *Thompson v. Rospigliosi, supra; Uzzle v. Weil,* 151 N.C. 131; *Wood, Admr., v. Parker,* 63 N.C. 379. How far and in what cases these principles may be modified by chapter 146, Laws 1915, requiring certain sales to be set aside on an advanced bid of 10 per cent when the amount is $500 or less, and of 5 per cent in sales over $500, and whether such statute applies in any case to judicial sales, it is not necessary to determine, for the present proceeding is clearly not within the provisions of the statute, but is subject to the general principles stated, and which in their application fully justify the action of his Honor in directing and confirming the sale to the purchaser, L. C. Mosely, as prayed by all the parties who have present interest in the property. Apart from this, the court finds, and the facts, in our opinion, fully justify, his finding that when (277) proper regard is had to the relevant facts, the actual expenditure by Mosely and the enhanced value of the land, due to his energy and diligence, the bid by him is, in the positive, a more desirable disposition of the property.

In any aspect of the matter, therefore, the judgment of his Honor should be upheld.

Affirmed.

CLARK, C.J., concurring. I concur in the result, because the Judge has found as a fact, and there is evidence to support it, that by reason of "the actual expenditure by Mosely and the enhanced value of the land, due to his energy and diligence, the bid by him is

a more desirable disposition of the property" than the increased amount in the enhanced bid offered by the appellant.

There are many authorities that the maker of an advance bid is entitled to appeal, if it is refused *(Attorney-General v. Navigation Co.,* 86 N.C. 408), where the Court entertained such an appeal and affirmed the order of the Judge reopening the bids. "A bidder at a marshal's sale is sufficiently a party to the proceeding to be entitled to appeal." *Kneeland v. Loan & Trust Co.,* 136 U.S. 93; *Blossom v. R. R.,* 1 Wall. 662; *Butterfield v. Usher,* 91 U.S. 248; *Hinkley v. R. R.,* 94 U.S. 468; *Williams v. Morgan,* 111 U.S. 698, and many others.

The Court will not open the bids after confirmation, except in cases of fraud, but the settled practice in our Courts (though the practice is different in some of the other States) is to set aside a sale upon an offer of an advance of 10 per cent, if made before confirmation. *Vass v. Arrington,* 89 N.C. 13; *Blue v. Blue,* 79 N.C. 69; *Wood v. Parker,* 63 N.C. 379; *In re Bost,* 56 N.C. 482; Daniel Ch. Pr. 1465.

In *Dula v. Seagle,* 98 N.C. 458, 460, it is said: "It is well settled that an advance bid of 10 per cent is sufficient grounds for reopening the bidding when the performance of the offer is properly secured." To same effect, *Clement v. Ireland,* 129 N.C. 220, and *White ex parte,* 82 N.C. 377; *Hinson v. Adrian,* 92 N.C. 121; *Childress v. Hart,* 32 Tenn. 487; *Wilson v. Shields,* 62 Tenn. 65; *Reese v. Copeland,* 74 Tenn. 190; *Dupuy v. Gorman,* 77 Tenn. 144; *Todd v. Mfg. Co.,* 84 Va. 586; *Moore v. Triplett,* 96 Va. 603; *Bank v. Jarvis,* 24 W.Va. 805.

This is evidently the legislative construction in this State, for chapter 146, Laws 1915, requires a reopening of the bids upon an advance of 10 per cent where the price does not exceed $500, and 5 per cent where it does exceed that amount, in all cases of a public sale of real estate by an executor or by any one under power of sale in a will or in the foreclosures of mortgages and deeds in trust on real estate, thus extending the protection of reopening the
(278) sale upon an advance bid even where there is default upon a contract between the parties, as in a mortgage or deed of trust. This practice of reopening bidding upon an advance bid has always been followed in our State, and has proved a very great protection to those who are "in the hands of the court."

In a late case *(Harrell v. Blythe,* 140 N.C. 415) Walker, J., held, citing many authorities, that the Court could, even when there is no advance bid, refuse to affirm and order a new sale, in its dis-

cretion, if it deemed the bid inadequate. An advance bid is plenary evidence that the first bid was inadequate.

Cited: *Chemical Co. v. Long,* 184 N.C. 400; *Cherry v. Gilliam,* 195 N.C. 235; *Galloway v. Hester,* 249 N.C. 278.

W. J. WILKINS ET AL. v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 10 October, 1917.)

1. Railroads — Negligence — Fire Damage—Pleadings—Burden of Proof —Nonsuit.

In an action for damages against a railroad company for negligently setting fire to plaintiff's lands, allegations in the complaint that the fire started from defendant's locomotive on its foul right of way, etc., is sufficient to include, as its origin, sparks thrown from the engine cab, and a judgment of nonsuit will not be granted upon the ground that such acts of defendant's employees were unauthorized, for the burden in such respect is upon defendant to show the exercise of due care to avoid the injury.

2. Evidence—Principal and Agent—Declarations—Corroboration.

Where defendant's agent, a witness, has testified that he knew the origin of a fire which damaged the plaintiff's land, and that it did not come from the defendant's engine or right of way, it is competent, in impeachment of his testimony, and not as substantive evidence, to show that after the occurrence he had stated to the witnesses testifying, that it had come from the engine.

3. Negligence — Fire Damage — Cause—Two Fires—Evidence—Trials— Nonsuit.

Where the plaintiff's evidence tends to show, in an action to recover fire damage to his lands, that the fire originated from defendant's locomotive, and on defendant's behalf, that it was caused by a fire on the west side of the right of way, for which it was not responsible, and that it had put out the fire it had caused, which the plaintiff denied, an instruction is held correct, that if the fire from the west side of the track burned the land, or if the two fires met, and the fire from the engine would not have gone on the land but for the fire from the west side, in either event to answer the issue of negligence in the negative; and a judgment of nonsuit, on the theory that the jury could not ascertain which fire caused the injury, is properly denied.

4. Negligence—Fire Damage—Evidence—Direction of Wind.

Where the evidence is conflicting as to whether fire damages claimed in an action against a railroad company came from defendant's locomotive, or from another fire for which it is not responsible, plaintiff's testimony

as to the direction of the wind at the time, tending to sustain his contention, is competent.

5. Evidence—Declarations—Corroborative.

Declarations of a witness made to a party to the action, tending to corroborate the evidence he had already given, is competent for that purpose.

CIVIL action tried before *Lyon, J.*, at the April Term, (279) 1917, of ONSLOW.

This is an action to recover damages for the alleged negligence of the defendant, which the plaintiffs claim resulted in the damage to their lands.

The specifications of negligence in the complaint are:

1. That by reason of defective spark arrester on engine operated by defendant on its right of way, the defendant carelessly and negligently permitted fire to be communicated from its engine over lands to spread to plaintiffs' lands.

2. The defendant carelessly and negligently permitted its right of way to be foul with grass and inflammable matter.

The elements of damages alleged are:

1. That said fire destroyed large quantities of trees, timber, pine straw, woodsmould, lightwood, and other things of great value.

2. And did burn and bake plaintiffs' soil.

The evidence for the plaintiffs tended to prove: That on the morning of 22 April train No. 320, from Wilmington to New Bern, passed Folkstone, and that there was and had been a fire burning on the west side of the railroad for a day or two, but on this morning, as the train passed the section-house, sparks were negligently and carelessly thrown from the engine, or emitted from the smokestack, falling on the right of way of the defendant company; that the right of way was in a foul condition, and that it was covered with inflammable matter, such as wiregrass and dead grass; that this fire burned over to the public road, which paralleled the railroad at that point, or nearly so; that two dead pine trees were set on fire by this fire that was thrown or emitted from the engine; that these trees were left burning there; that the fire from those trees set the woods on fire, and that the fire communicated from that land to the plaintiffs' land and burned over some 425 acres, or about that, and that this fire did considerable damage to their land; that the damage on the 200 acres was $4 per acre; that there was pine and other growth there, and that the damage to the 200 or 265 acres was $4 for the pine and oak and $200 for all the holly, and that the woodsmould was $10 per acre, and that it was all caused by the negligent (280) burning of the woods.

The evidence of the defendant tended to prove: That the fire that burned over the plaintiffs' land was not set out by its engine, or by any one connected with the defendant company; that there was, and had been for several days, a fire burning on the west of the railroad, and that on Tuesday evening it burned up through the bay or near the railroad; that on Saturday morning it crossed the railroad, north of Folkstone, and crossed below, down at some other place, and contends that the fire that was near the section-house was completely extinguished the day that it got out there, and that the other fire that crossed the railroad above the section-house set the two pines afire; that the two fires connected; that the fire from the west burned down to where the other fire was, and that this was the fire that set the trees on fire, and that if the fire that burned the plaintiffs' land caught from the trees, they were set by the fire from the west of the railroad, and that there is no evidence that the defendant set that out or was negligent in permitting the fire on the west of the railroad getting out; that the damages claimed by the plaintiffs are excessive; that an examination of this land was made soon after this fire on the following week, and taking the entire tract of land that was burned over, including the fence, holly, pine, and undergrowth, the damages did not exceed $1 per acre.

There was also evidence on the part of the plaintiff tending to prove that the fire which came from the west side of the railroad was extinguished and did not pass to his land, and evidence on the part of the defendant that this was the fire which caused the damage.

The defendant introduced John Pugh, its section master, who testified among other things, as follows: "I have traced down the Wilkins fire, and I know where it came from. I found that the Wilkins fire was the forest fire that came from the west of the railroad."

This witness was asked, on cross-examination, if he had not told several parties, naming them, that the fire came from the engine of the defendant, and he denied doing so.

The plaintiff was then permitted to prove by these persons that the witness had told them the fire came from the engine, and the defendant excepted.

His Honor explained to the jury that this evidence for the plaintiff could not be considered by them as substantive evidence as to the origin of the fire, and that it was only competent on the credibility of the witness.

There was a motion for judgment of nonsuit, which was overruled, and the defendant excepted.

His Honor charged the jury, among other things, as fol-
(281) lows:

"On the other hand, if you should find that the fire that burned the land was the fire that came from the west side of the railroad, then you would answer the issue 'No,' or if you find that the engine was properly equipped with spark-arrester, and that the engine and train was under proper control and being properly handled, and that the fire did escape from the engine, but did not ignite or burn on the right of way (or set fire to the woods by the right of way), then the defendant would not be liable, because they are not required to keep the woods free from combustible matter."

To so much of the above charge as is included in the parentheses the defendant excepted.

"If you find from the evidence that the first which was seen in the Juniper Swamp pocosin on Thursday or Friday before Saturday on which the plaintiffs claim the fire burned around Folkstone was the fire that burned the lands of the plaintiffs, you will answer the first issue 'No.'

"The plaintiffs claim that the fire which burned over their land was put out by a freight train going toward New Bern (No. 320); hence you will not consider any contention that it was put out by the freight train going toward Wilmington (No. 321), for same has no connection with the alleged origin of the fire in controversy.

"The plaintiffs are not contending that the fire that caused damage to the plaintiffs' woods was put out from the freight train passing Folkstone from New Bern to Wilmington (No. 321). If you do not find from the evidence, and by its greater weight, as to how the fire did burn over the plaintiffs' land, then you will answer the first issue 'No'—that is, if you are not satisfied from the evidence, and by its greater weight, that the fire was caused by the negligence of the defendant, you will answer the first issue 'No'; but if you are so satisfied, you will answer it 'Yes.'

"If the two fires—one from the west and the one originating on the east—if these two fires met, and the fire on the east side would not have burned over the woods but for the fire on the west, then the defendant would not have been liable, because the fire must have originated from the negligence of the defendant to make the defendant liable."

There are other exceptions, which will be referred to in the opinion.

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

E. M. Koonce and G. V. Cowper for plaintiff.
Frank Thompson and L. A. Varser for defendant.

ALLEN, J. The motion for judgment of nonsuit is upon the ground that the evidence shows that the sparks did not (282) come out of the smokestack of the engine, but was thrown from the cab, and as this was unauthorized and not in the performance of a duty, the defendant is not liable therefor, and upon the further ground that the two fires met, for one of which the defendant was not responsible, and that it is impossible to say which fire caused the damage.

The answer to the first position is, that the complaint does not allege that the fire came from the smokestack, but from the engine; and when evidence is offered, conforming to the allegations of the complaint, which connects the defendant with the origin of the fire, a judgment of nonsuit cannot be entered, because the burden is then on the defendant to show the exercise of due care to avoid injury. *Currie v. R. R.*, 156 N.C. 419.

The second position involves a question of fact in controversy, which could only be settled by the jury.

The evidence for the plaintiffs, if believed, established the fact that the fire from the west side of the track was stopped at the public road and did not go on the lands of the plaintiffs, while the evidence for the defendant showed that the fire which came from the engine was extinguished and never reached the plaintiffs' land.

With this sharp conflict between the plaintiffs and defendant, his Honor adopted the only course open to him by submitting the question to the jury under an instruction that if the fire from the west of the track burned the land, or if the two fires met, and the fire that came from the engine would not have gone on the land but for the fire from the west, in either event to answer the issue in favor of the defendant.

The evidence of the declarations of the witness Pugh do not fall within the rule excluding the declarations of an agent as to a past occurrence, and was clearly competent for purposes of impeachment, to which it was confined.

The witness had testified for defendant that he knew where the fire came from which burned the plaintiffs' land, and that it was from the west of the track, and the plaintiff was permitted to impeach him by proving by a number of witnesses he said the fire came from the engine.

Pate v. Steamboat Co., 148 N.C. 573, and *Morton v. Water Co.*, 168 N.C. 587, are directly in point in support of the ruling admitting the evidence.

In the *Pate* case, which was an action to recover damages for death by drowning, the plaintiff contended that the boat was not properly equipped for rescuing passengers who fell overboard, and

that the bateau used for that purpose was in bad condition. The defendant introduced one Jackson, who was operating the bateau, who testified that the bateau was in good condition, and the plaintiff was permitted to prove by one Glover that Jackson told (283) him the bateau was leaking. The Court held that the evidence was competent, and said: "Of course, the declarations of the boat hand, made after the occurrence, are incompetent for the purpose of proving the dangerous condition of the bateau. *Southerland v. R. R.*, 106 N.C. 100. But, having been examined by the defendant as its witness as to the condition of the bateau, it was competent to impeach or contradict his evidence upon that point by his declarations on that subject to Glover. To lay the foundation for offering such impeaching evidence, it was proper to ask the witness, on cross-examination, the question objected to."

This was quoted and approved in the *Morton* case.

These are the exceptions relied upon by the defendant, but we have considered all that are dealt with in the brief, and we find no error.

It was competent to show the direction of the wind on the day of the fire, and that sparks fell from the two dead trees which were burning off the right of way, as the evidence for the plaintiff tended to prove that the fire which caught on the right of way set these trees on fire.

The declaration of Batts to one of the plaintiffs to the effect that he had been in the swamp, trying to put out the fire, was competent as corroborative of Batts, who was a witness.

The evidence of damage to a grapevine to the value of $15 was properly admitted and was covered by the complaint, which, after enumerating certain property which was destroyed, said, "and other things of great value."

No error.

Cited: Hubbard v. R. R., 203 N.C. 678; *Cox v. Freight Lines*, 236 N.C. 80.

E. A. CRUMPLER v. H. J. HINES, ADMR. OF F. R. COOPER.

(Filed 10 October, 1917.)

1. Judgments Set Aside—Motions—Meritorious Defense.

A judgment by default will not be set aside upon defendant's motion on the ground of excusable neglect, unless his averments, made in good faith, establish the fact, if true, that he has a meritorious defense, or the facts so alleged must make out a *prima facie* defense, the ultimate and final determination of these being left to the proper tribunal, if the motion is allowed.

2. Same—Contracts—Beneficial Interests—Pleadings.

A beneficiary under a contract may maintain an action for its breach; and where judgment final for want of an answer has been rendered upon allegations of the complaint that the plaintiff furnished the money for the purchase of certain lands upon the agreement he was to share in the profits, etc., and that the transaction had accordingly been made and a profit obtained, but he had received nothing, a motion by defendant to set the same aside, without a denial of these allegations, fails to state a meritorious defense, nothing else definitely appearing, and the motion will be denied.

APPEAL from the refusal of *Lyon, J.*, to set aside a judgment, heard at May Term, 1917, of SAMPSON. (284)

This is a motion to set aside a judgment by default, on the ground of excusable neglect.

The action was commenced 23 January, 1912. The complaint was filed at February Term, 1914, and the judgment, which the defendant asks to have set aside, was rendered by default for the want of an answer, at August Term, 1916, and this motion was made within one year thereafter.

The complaint alleges that on 4 October, 1909, John E. Fowler bought a tract of land at public sale, at the price of $385; that the plaintiff, at the request of Fowler, advanced the money to pay the purchase price, the said Fowler agreeing to repay said sum and to give to the plaintiff one-half of the profits for which the land should be sold; that on 22 December, 1909, the said Fowler sold said land to F. R. Cooper, the intestate of the defendant, for the sum of $600, and that the said Cooper then agreed that he would pay to the plaintiff the original purchase price and one-half the profits on the sale to him, and would credit said Fowler with the other half of said profits on an open account held by the said Cooper against the said Fowler; that the said Cooper has never paid any part of said amount, and that thereafter he sold said land for the sum of $800.

No answer was filed, and the facts above recited are not denied in the affidavit filed by the defendant in support of this motion, nor does he say that he has a meritorious defense.

Both parties filed affidavits before his Honor, and after consideration thereof, judgment was entered, denying the motion of the defendant, upon the ground that, although excusable neglect had been shown, it had not been shown that there was a meritorious defense, and the defendant excepted and appealed.

Henry E. Faison, I. C. Wright, and B. H. Crumpler for plaintiff.
Butler & Herring for defendant.

ALLEN, J. One who asks to be relieved from a judgment on the ground of excusable neglect must show merit, as otherwise the court would be asked to do the vain thing of setting aside a judgment when it would be its duty to enter again the same judgment on motion of the adverse party. If he is a plaintiff, he must allege facts constituting a cause of action, and if a defendant, facts which will be a defense.

(285) It is not required that these facts be established conclusively on the hearing of the motion, but they must be alleged in good faith, and must, if true, in the one case show a cause of action, and in the other a defense.

In other words, the facts alleged must make out a *prima facie* cause of action or defense, the ultimate and final determination of these being left to the proper tribunal, if the judgment is set aside. *Mœuney v. Gidner,* 88 N.C. 202; *English v. English,* 87 N.C. 497; *Norton v. McLourin,* 125 N.C. 189; *Turner v. Machine Co.,* 133 N.C. 381; *Minton v. Hughes,* 158 N.C. 586.

Tested by these principles, we are of opinion his Honor held correctly that the defendant has not shown a meritorious defense.

He does not deny, even on information and belief, the facts alleged in the complaint, that Fowler bought the land at public sale for $385; that the plaintiff advanced the purchase money under an agreement with Fowler to repay the same, and to give him one-half the profits for which the land should be sold; that Fowler afterwards sold the land to the intestate of the plaintiff for $600, under an agreement to credit Fowler with one-half the profits on an account held against Fowler, and to pay to the plaintiff the other half of the profits and the original purchase price; that the intestate of the defendant has paid nothing and has sold the land for $800.

These facts constitute a good cause of action under the doctrine of *Gorrel v. Water Co.,* 124 N.C. 333, approved and affirmed in *Voorhees v. Porter,* 134 N.C. 603; *Supply Co. v. L. Co.,* 160 N.C. 431; *Withers v. Poe,* 167 N.C. 374, and other cases, that "one not a

party or privy to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach."

This was at one time a much-debated question, relief being denied in some cases on the ground of want of privity, but the principle is now generally adopted as we have stated it. See 6 R.C.L. 884.

Nor are the facts alleged any defense to the plaintiff's action.

The defendant says he has examined the books of his intestate and has found an account against Fowler of $233.87, due 13 January, 1909, and from this he concludes that the claim of the plaintiff is unreasonable, and this is the only fact stated bearing on a defense.

Fowler may be indebted to the intestate, but this could not be alleged to defeat a recovery upon his express promise to pay the plaintiff, and the transaction is not so unreasonable, from the standpoint of the defendant, as his intestate paid nothing and has received a payment of $107.50 on a debt, and a tract of land which he sold for $800.

The affidavits show that the deceased was an honorable attorney, and that cordial, friendly relations existed between him and Fowler. They had many dealings with each other, and both were careless in keeping the accounts between them, growing out of the confidence in each other, and we are constrained to believe this (286) controversy would not have arisen if the deceased was alive.

There is no error.

Affirmed.

Cited: Land Co. v. Wooten, 177 N.C. 250; *Rector v. Lyda,* 180 N.C. 578; *Dixon v. Horne,* 180 N.C. 587; *Bank v. Duke,* 187 N.C. 389; *Turner v. Grain Co.,* 190 N.C. 332; *Taylor v. Gentry,* 192 N.C. 504; *Helderman v. Mills Co.,* 192 N.C. 628; *Glass Co. v. Fidelity Co.,* 193 N.C. 772; *Crye v. Stoltz,* 193 N.C. 804; *Dunn v. Jones,* 195 N.C. 356; *Woody v. Privett,* 199 N.C. 379; *Cayton v. Clark,* 212 N.C. 375.

TOWN OF CLINTON v. HENRY P. JOHNSON ET AL.

(Filed 10 October, 1917.)

1. Cities and Towns—Eminent Domain—Charters—General Statutes.

The right of eminent domain of a municipality can be exercised only in the mode pointed out in the statute conferring it; and where the method prescribed for a city or town in its character is inconsistent with or repugnant to that of chapter 136, Public Laws 1917, entitled "An act to provide for the organization and government of cities," etc., by the express terms of the later statute, the proceedings given under the municipal charter will have to be followed in condemnation of lands for the use of its streets.

2. Municipal Corporations—Condemnation—Trial by Jury.

A provision in a municipal charter for an appeal from the appraisers' valuation of land, taken by it in condemnation, giving the owner the right to a trial by jury, is valid.

CONDEMNATION proceedings, heard upon appeal from the Clerk of the Superior Court of SAMPSON, by *Stacy, J.*, at chambers, 24 August, 1917.

From the judgment rendered, defendant appealed.

No counsel for plaintiff.
Henry E. Faison and Fowler & Crumpler for defendants.

BROWN, J. These proceedings were instituted under sections 2575 *et seq.* of the Revisal, for the purpose of condemning a strip of land belonging to the defendants in the town of Clinton for the purpose of widening one of the public streets. The summons was returnable before the Clerk of the Superior Court of Sampson County when the petition was duly filed. The defendants appeared and moved to dismiss because no copy of the petition was served upon them. Their motion being overruled, they noted their exception, and demurred to the petition, and moved to dismiss because the clerk of the Superior Court had no jurisdiction.

The defendants contend that condemnation proceedings instituted by the plaintiff for the purpose of condemning property to widen streets must be conducted in accordance with the charter of the said town, being chapter 115, Public-Local and Private Laws, Extra Session 1913. The particular section is to be found on
(287) page 216, section 48. It is admitted that these proceedings were commenced under the supposed authority of chapter 136, Public Laws 1917, entitled "An act to provide for the organization and government of cities, towns, and incorporated villages." This act contains the following clause:

"The provisions of this act, so far as they are the same as those of existing general laws, are intended as a continuation of said laws, and not as new enactments, and, so far as they give general powers to cities, are supplementary to and additional to the special charters of cities which have not such powers, unless *inconsistent with or repugnant thereto,* and a repetition of such powers if already possessed by cities by virtue of special charters."

Section 1, chapter 4, of this act, declares that the procedure for the condemnation of land for municipal purposes shall be such as is "provided for the condemnation of land by railroads in sections 2575 to 2598, inclusive, of the Revisal of 1905, and acts supplemental thereto or amendatory thereof."

The charter of the town of Clinton, enacted in 1913, provides a very different method of procedure for the condemnation of property. This law granted to the plaintiff the right of eminent domain, and points out specifically how this right is to be exercised. This act provides that in any case where the owner of the land damaged cannot agree with the commissioners in regard to the value of the land or the amount of damages, the mayor shall issue his warrant to the town constable, commanding him to summon three disinterested freeholders of the town, who, together with two disinterested freeholders to be selected by the landowner, shall determine the value of the property and assess the damages, etc. There are other details provided in the act which it is unnecessary to set out. An appeal is provided for to the Superior Court by the dissatisfied party, and for a jury trial.

It is manifest, without further discussion, that the provisions of the charter of the plaintiff are utterly inconsistent with the method of condemnation provided for railroads in the Revisal. The acts of 1917 especially provide for this contingency and declare that the provisions of that act shall not apply where the provisions of a special charter of a city or town are inconsistent with it. It is well settled that the right of eminent domain can be exercised only in the mode pointed out in the statute conferring it. *Allen v. R. R.*, 102 N.C. 386; *Davis v. R. R.*, 19 N.C. 451.

One marked difference is, that under the charter of the plaintiff a jury trial is provided for, as in civil cases upon appeal, while under the sections of the Revisal referred to in the acts of 1917 there is no such provision.

While it is held in *Davis v. R. R., supra,* that the assessment of damages in condemnation proceedings need not be (288) made by a jury of twelve freeholders, yet it has never been held that the Legislature cannot so provide.

We are of opinion that the demurrer should have been sustained and the proceedings dismissed. The plaintiff should proceed under the provisions of its charter.

Reversed.

Cited: *Long v. Rockingham,* 187 N.C. 204.

ELWOOD H. LEE v. T. J. THORNTON ET AL.

(Filed 10 October, 1917.)

1. Courts—Separation of Witnesses—Appeal and Error.

It is within the discretion of the trial judge to order a separation of the witnesses in the case, and, in the absence of abuse, is not reviewable on appeal.

2. Courts—Discretion—Separate Witnesses—Notice—Neglect of Counsel.

Where the judge has ordered a separation of the witnesses in the case on trial, and the attorney for a party has subpœnaed a witness, who, not having been notified, came into court and remained during the testimony of another witness, the neglect is that of the attorney to have had this witness notified; and not having done so, he is deemed to have waived his right to examine the witness in behalf of his client, and he may not complain that the judge, in the exercise of his discretion, refused to permit this witness to testify.

3. Same—Contempt of Court.

Where an order separating the witnesses at the trial has been made, and thereafter another witness has been subpœnaed, who, in ignorance of the order, attends and remains in court while another witness is testifying, he may not be adjudged in contempt of court, nor will abuse of discretion be attributable to the court in ignorance of the fact.

4. Constitutional Law—Witnesses—Separation—Defendant's Witnesses.

The constitutional right of a defendant to face the witnesses against him is not violated by the judge on trial of a civil action excluding the testimony of the defendant's own witness for remaining in court contrary to the court's order that the witnesses in the case be separated.

WALKER, J., concurring.

APPEAL by defendant from *Devin, J.,* at January Term, 1917, of WAKE.

Peele & Maynard for plaintiff.

Douglass & Douglass and Armistead Jones & Son for defendants.

CLARK, C.J. At the beginning of the trial the court made an order excluding all witnesses in this cause from the court (289) room until called to the witness stand. When the witness, Dr. Pope, was called to the stand, objection was made, on the ground that he had remained in the court room during the examination of the witnesses, which he admitted in reply to a question by the court. The court found as a fact that "This witness, in violation of the instructions of the court to exclude all witnesses, came into the court room and remained here an hour during the examination of the defendant Mason (in whose behalf he was called as a witness). The court, in its discretion, declined to allow the witness to testify." The counsel for the defendants then stated that they proposed to introduce Dr. Pope as a witness for the defendant Thornton and not for the defendant Mason, who was testifying when the said Dr. Pope was in the court room. The court then stated it would allow the witness to testify as a character witness, if desired by the defendants, and allowed counsel to state what they proposed to prove by this witness. The defendants stated that they "proposed to prove by him that he was a practicing physician; had been in attendance on Jim Lee and saw him often about the time of the execution of the Mason and Thornton deeds; that he had frequent conversation with him in reference to the conveyance of his property; that his mind was clear in respect thereto, and that he knew what he was about, and that in his opinion he was competent in every respect to make a deed, and understood the value of his property."

It is of the utmost importance to keep the administration of justice pure at its source. When it is made to appear to the presiding judge that there is danger of the collusion of witnesses if allowed to remain in the court room, by hearing each other's testimony, it is within his discretion to direct the witnesses to be separated. This is a matter of which the presiding judge must judge, and except in cases of abuse of his discretion, such order is not reviewable. *S. v. Hodge,* 142 N.C. 682; *S. v. Lowry,* 170 N.C. 734.

No harm can come from separation of the witnesses, and much injury might result if it is not done when it is made to appear to the presiding judge that there may be collusion among the witnesses, tracking each other's testimony, like sheep jumping over a fence.

The objection that the defendants had the right to face the witnesses against them has no application, for this was a witness on their behalf. The law is thus summed up (38 Cyc. 1369): "The separate examination of the witnesses at the trial is a matter within the discretion of the court, which may order witnesses to be separated and examined, each out of the hearing of the others, or that a witness be excluded while the deposition of another witness is

read. The discretion of the court will not be reviewed on ap-
(290) peal unless there is a manifest abuse thereof." It is further said: "As to whether a particular witness or witnesses should be released or excepted from the rule is within the sound discretion of the court. Where a witness is excused from the rule on the statement of counsel that he will not be called as a witness, it is not an abuse of discretion on the part of the court to decline to permit him to testify even as an impeaching witness. And where witnesses are put under the rule and excluded from hearing the testimony, there is no error in refusing to allow a physician summoned as a witness by defendant to hear plaintiff's testimony so that he may be used as an expert." These propositions are all sustained by numerous citations in the notes, and the last paragraph is almost the same proposition as in the case at bar.

There is no inherent right that witnesses may hear each other testify, and when the court thinks the interest of justice requires that by separation they should be prevented from doing so, lest there be collusion among them, the order must be obeyed, and if it is not, the court can enforce the protection against colluded testimony by excluding such witness from the witness stand.

This point was expressly passed upon and so held in *S. v. J. H. Hodge,* 142 N.C. 682, where the appellant was convicted of murder in the first degree, and this Court said: "We are asked to give a new trial, not for any material evidence excluded, but because the defense states that there was material evidence excluded by the exclusion of a witness who stayed in the court room contrary to the order of the court and without the knowledge of the court. . . . In an indictment for homicide in Massachusetts it was held, upon similar facts, that the exclusion of the witness was in the discretion of the court, though there the evidence was disclosed. *Commonwealth v. Crowley,* 168 Mass. 121. And the same was held in *S. v. Gesell,* 124 Mo. 531; Whart. Cr. Ev. (9 Ed.) 446; Greenl. Ev. (16 Ed.) 432c; *Holder v. U. S.,* 150 U.S. 91; *O'Bryan v. Allen,* 95 Mo. 75; *Jockson v. State,* 14 Ind. 327; *Bell v. State,* 44 Ala. 393; *Bird v. State,* 50 Ga. 589." A writ of error in *S. v. Hodge, supra,* was applied for and refused by the United States Supreme Court.

S. v. Hodge was approved in *S. v. Lowry,* 170 N.C. 734, where the Court said: "The prisoners also except because, after the court had made an order that no witness for the State or for the prisoners should be allowed in the court room during the trial, a witness for the State who remained in the court room was permitted to testify. The prisoners moved for a nonsuit on that ground, and also to set aside the verdict, and excepted to the denial of these motions. But it is a matter in the discretion of the court whether such witness

shall be examined or not. 12 Cyc. 547. The same point was made in *S. v. Hodge,* 142 N.C. 676, and it was held that this was a matter which rested in the discretion of the presiding judge. The same ruling was made in *S. v. Sparrow,* 7 N.C. 487, and *Pur-* (291) *nell v. Purnell,* 89 N.C. 42, and is stated as settled law in the text-books. 1 Greenl. Ev., secs. 431 and 432, and notes, and 2 Bishop New Criminal Proceedings (2d Ed.), secs. 1191 to 1193a."

"The exclusion of witnesses from the court room is a matter in the discretion of the court, and not a matter of right. It may be ordered by the court on its own motion, but it is usual for the State or defendant to ask for it." 12 Cyc. 546.

The defendants contend that this witness was summoned after the general order was given. The judge could not know that such witness was summoned or that he was in the court room, and the defendant was derelict, in that he or his counsel did not direct the officer, in summoning the witness, to inform him of the rule of the court excluding witnesses from the court room. If this negligence were tolerated, then such orders by the court could be easily evaded and made nugatory, and the desired protection of a fair trial vitiated.

The defendants further urge that if the order is disobeyed, there could be punishment for contempt. This witness could not be so punished, for the defendants did not notify him of the judge's order. And even where the witness knowingly disobeys the rule, this is no protection to the defendant who has lost his life or liberty, or to the State which has been baffled in the conviction of the guilty party, nor to either party in a civil action who has lost his property by a verdict procured by a collusion of witnesses who have defied the order of the court. It is futile for the court to have this power if it cannot exert it in the way necessary to prevent the miscarriage of justice by collusive evidence.

Certainly in this case there was no abuse of discretion shown, and the defendant waived the right to use the witness by not informing him of the rule of the court. Besides, the testimony which it is claimed that he would have given as to the mental capacity of Lee could have been given by any other person who knew him sufficiently well. *Clary v. Clary,* 24 N.C. 78.

The judge of a Superior Court is not a mere moderator to preserve order, but, as this Court has often said, he is an essential part of the trial. He is forbidden to express an opinion upon the evidence, but it is his duty to see that a fair and impartial trial is had, which is impossible if witnesses are allowed to sit in the court room and hear the testimony of other witnesses when the court adjudges that

there is danger of collusion in their testimony by tracking each other. If a party permits his witness to remain in the court room after such order is made, or summons a witness thereafter without notifying him of such order, he not only is guilty of a contemptuous disregard of such order, but he waives the right to put such
(292) witness on the stand. It is his own fault, and he has no cause to complain.

Upon consideration of all the exceptions, we find

No error.

WALKER, J., concurring: I joined Justice Connor in the dissenting opinion he filed in *S. v. Hodge*, 142 N.C. 676, and adhere to the views therein expressed, as applied to the facts of that case, but I think this case differs from that in the essential respect that here the disobedience of the witness to the order of the judge was caused by the fault of the defendant, whereas in *S. v. Hodge* this was not the fact. It is suggested by Justice Connor, in *S. v. Hodge*, that this would make a difference, and in such a case the general rule would not be followed, and authorities are cited, and quoted from, to show how the rule is thus qualified.

Justice Connor states, in the *Hodge* case, quoting from Elliott on Evidence, sec. 802: "While there is some conflict among the authorities whether a witness remaining in the court room should be permitted to give testimony, it is held in some jurisdictions that 'where a party is without fault, and a witness disobeys an order for exclusion, the party ought not to be deprived of the testimony of his witness. The latter view would seem to be the better—that is, if the party calling the witness had been guilty of no misconduct, a judge ought not to reject him. So, then in case of refusal by or failure of a witness to leave the room, the proper remedy would seem to be for the court to admit his testimony and punish the witness for contempt of court. Among many other authorities cited to sustain this proposition is *S. v. Sparrow, supra*. In this connection it may be well to note that the case cited in the opinion of *Jackson v. State*, 14 Ind. 327, came under review by the same Court in *S. v. Thomas*, 111 Ind. 516, Judge Elliott saying: 'Where a party is without fault, and a witness disobeys an order directing a separation of witnesses, the party shall not be denied the right of having the witness testify, but the conduct of the witness may go to the jury upon the question of his credibility,' citing Taylor on Evidence. 'But it seems to be now settled that the judge has no right to reject the witness on this ground, however much his willful disobedience of the order may lessen the value of his evidence,' also citing 2 Phil. Ex. 744, saying:

'But it may now be considered as settled that the circumstance of a witness having remained in court in disobedience to an order of withdrawal is not a ground for rejecting his evidence, and that it merely affords matter of observation.' *Thomas'* case was reaffirmed in *Taylor v. State,* 130 Ind. 66."

Following the trend of authority on this question, I am of the opinion that the dissent in the *Hodge* case, which received my concurrence, should not apply here, because this case comes within the exception to the rule that a party who calls a (293) witness who has disobeyed the order of the judge excluding him from the court room must be without fault himself in order to entitle him to demand that the witness be examined and his testimony heard in his behalf, the general rule being that he has the right to swear and examine a witness, and the foregoing authorities showing the qualification of it. It appears in this record that an order was made to exclude the witnesses from the court room, and that the witness in question, Dr. Pope, was subpœnaed after the order was made and the witnesses had retired, and after the subpœna was served upon him he entered the court room and stayed there during the taking of the testimony of one of the witnesses. It does not appear that when he was subpœnaed he was informed by the defendant of the order of the court or in any way apprised of the fact that all the witnesses were directed by the court to leave and remain away from the court room during the trial or during the taking of the testimony. If this had been done, we have no doubt that the witness in question would have complied with the order, and it was owing entirely to the fault of the defendant that the order of the court was not brought to his attention. It is not found as a fact in the case that he was intentionally allowed to enter the court room, nor do I think that it is necessary that such a fact should have been found. It is sufficient, under the foregoing authorities, that his entering and remaining in the court room were due to the fault of the defendant. We have held in numerous cases that a person may waive his constitutional rights either by not claiming or insisting upon them *(Driller Co. v. Worth,* 117 N.C. at p. 515, and cases cited in the annotated edition), or he may waive them by such conduct during the course of the trial as would be inconsistent with any assertion of them, as will appear by the above-cited case and those which have approved it. It may be that the defendant did not know of the presence of the witness in the court room, and very probably that is the case, but he was there, so far as appears, by the fault of the defendant in not giving him proper notice of the previous order made by the judge. Where a party is not in fault, I still ad-

here to the rule as laid down by Justice Connor in the *Hodge* case, and to which I gave my assent at the time. I think it proper to say this much, in order to show the difference between the *Hodge* case and the case at bar, for in the former the defendant was not at fault, while in this case there is evidence sufficient to justify the inference that the presence of the witness was due to the fault or omission of the defendant; and as there is a presumption that the ruling of the court below is correct, if the defendant was not in fault, the fact should have been shown by him. As the case now stands, without any finding of facts by the court in reference to this matter,
(294) we must assume that his Honor based his ruling upon the fact that the defendant was not entitled to be heard through his witness, because he was not without fault in the premises.

Cited: *S. v. Davis,* 175 N.C. 727; *Berry Bros. Corp. v. Adams-Millis Corp.,* 257 N.C. 264.

F. G. HINES v. THE ROWLAND LUMBER COMPANY.

(Filed 17 October, 1917.)

1. Master and Servant — Safe Appliances—Contributory Negligence—Defenses—Instructions.

It is the duty of an employer to furnish his employee a reasonably safe place to work, and implements and appliances reasonably safe with which to do it, which are known, approved and in general use; but ordinarily his failure to have done so will not of itself cut him off from the defense of contributory negligence on the part of his employee being injured in pursuance of the work required of him, a case of this kind not falling within the principle of the *Greenlee* and *Trawler* cases, wherein the injury was caused by the failure of the defendant railroad companies to supply automatic car couplers.

2. Same — Defects—Push Cars—Instructions—Continuing Negligence—Appeal and Error.

Where the evidence is conflicting as to whether the plaintiff, an employee of the defendant, was riding, in the course of his employment, on a push car, or bogie, used chiefly for hauling steel rails for track construction, whether the car should have had a plank bottom or timbers across to lessen the aperture, whether the injury for which the damages are sought was caused by the plaintiff carelessly losing his balance, or by a tree negligently left on the right of way, it is reversible error for the trial judge to charge the jury that if the defendant was negligent in furnishing an antiquated appliance or equipment, hazardous to life and limb, and this was the proximate cause of the injury, the negligence would

be continuing and cut off the defense of contributory negligence, unless the plaintiff's negligence amounted to recklessness.

3. Limitation of Actions—Nonsuit—Statutes.

Where a nonsuit is taken in an action brought within the time prescribed by the statute, the statute of limitations will not have run if suit is again brought within a year from the time of nonsuit. Rev., sec. 370.

CIVIL action, tried before *Cox, J.*, and a jury, at May Term, 1917, of WAYNE.

The action was to recover damages for physical injuries caused by the alleged negligence of defendant company in not keeping its roadway in proper condition, and in supplying a defective car for the work plaintiff, an employee, was engaged in at the time, August, 1911.

On denial of liability, plea of contributory negligence and statute of limitations, the following verdict was rendered. (295)

1. Was the plaintiff injured by the negligence of the defendant, the Rowland Lumber Company, as alleged in the complaint? Answer: Yes.

2. Was the plaintiff guilty of contributory negligence, as alleged in the answer? Answer: No.

3. Is the action barred by the statute of limitations, as alleged in the answer? Answer: No.

4. What amount of damages, if any, is the plaintiff entitled to recover? Answer: $3,750.

Judgment on the verdict, and defendant excepted and appealed.

Langston, Allen & Taylor for plaintiff.

Stevens & Beasley, Murray Allen, and H. W. Stubbs for defendants.

HOKE, J. There was evidence on the part of plaintiff tending to show that defendant was negligent in respect to the condition of its roadway, and on facts not dissimilar to those of *Buchanan v. Lumber Co.*, 168 N.C. 40, plaintiff and others testifying that, in August, 1911, he, an employee of the company, was severely injured as he was going to his work on a push car, or bogie, used chiefly for hauling steel rails for track construction, and the injury was caused by plaintiff's falling through this car in the endeavor to avoid a tree that had been cut away too close to the track, and dragging plaintiff along the track 30 or 40 feet before the car could be stopped.

There was evidence also tending to show negligence in the structure of the car, described by witnesses as a truck car, or bogie, for hauling steel rails, the body consisting of an oblong wooden frame,

9 feet long by 5½ wide, built with four pieces of lumber, 6x8, braced by a piece of same dimensions across the middle, and braced further by iron rods and with steel bars across each end to hold the rails in place, plaintiff himself testifying that in several companies where he had worked before this these cars either had floors on them or, in addition to the cross-brace in the middle, they had pieces of lumber of same dimensions running from each corner, crossing at the center, thus reducing the size of the opening and making them some safer for persons riding on them.

There was evidence on the part of the defendant tending to show that there was no tree nor obstruction near the track, but that plaintiff fell because he had carelessly lost his balance, one witness testifying that plaintiff had said to him that he just happened to jump on the car to ride to save walking and he fell over, and that it was as much his fault as anybody's. And, further, that the car was not designed for a passenger car, and that it was fit and proper for the purpose intended.

On this conflicting testimony, the court having instructed (296) the jury, without apparent objection, as to the duty of the company in respect to its roadway, charged the jury further on the issues as follows:

"The defendant is required to furnish to its employees safe, modern, appliances with which to work, and if the jury shall find that the defendant failed to furnish such appliances and equipment, and furnished in their place antiquated and dangerous appliances and equipment, hazardous to life and limb, and the failure to do so was the proximate cause of plaintiff's injury, such failure on the part of the defendant, if the jury shall so find, was continuing negligence, which would cut off the defense of contributory negligence unless the negligent conduct of the injured employee shall amount to recklessness, and it would be the duty of the jury to answer the first issue 'Yes' and the second issue 'No.'"

While the charge, subject to modification in some instances, as to the use of the term "modern," might be upheld as an abstract proposition when applied to the facts of this record, it could only mean, and was no doubt intended by his Honor to mean, that the evidence as to the structure of the car permitted the inference that the defects suggested might constitute continuing negligence within the principle approved and applied in *Greenlee v. R. R.* and *Troxler v. R. R.*, 122 N.C. 977, and 124 N.C. 189, and the jury were allowed and directed to consider the testimony in that aspect, both on the first and second issues. In this we think there was error, to defendant's prejudice, for which a new trial should be allowed. These cases

of *Greenlee* and *Troxler,* notable decisions in our jurisdiction, were cases in which the defense of contributory negligence was disallowed where an injury had occurred to employees by reason of a failure to equip railroad cars with automatic couplers.

While the position is approved and fully established with us in this and other like cases, it does not at all extend to any and every failure on the part of employers to provide their employees with proper implements and appliances. Speaking to the question in *Hicks v. Manufacturing Co.,* 138 N.C. 330, the Court, in modifying the decision of *Orr v. Telephone Co.,* 132 N.C. 691, said:

"If, however, it was intended by *Orr's* case to decide that in any and every instance where there is a defective appliance negligently furnished by the employer, which becomes the proximate cause of the injury, the defense of contributory negligence is thereby withdrawn, then the Court does not think that the case in this respect was well decided. There is nothing here said which must in any way be construed as indicating a doubt as to the wisdom and correctness of the *Greenlee* and *Troxler* cases, or a desire to modify or question them. They were both cases where there was a failure on the part of the railroad company to supply automatic couplers for the operation of their trains. The occupation was one of (297) imminent peril, which these automatic couplers well-nigh entirely remove, and at a moderate cost. The failure to supply them was causing extended and ever-increasing disaster. Thousands of men throughout all portions of the country were being killed or maimed for life, and conditions were so alarming as to become a matter of national concern and the subject of national legislation. In the presence of such conditions, the Supreme Court of North Carolina, in advance of the operative effect of the national statute, announced the principle in *Troxler's* case as follows: 'Reason, justice, and humanity, principles of common law, irrespective of congressional enactments and Interstate Commerce Commission regulations, require the employer to furnish the employee safe, modern appliances with which to work, in place of antiquated, dangerous implements, hazardous to life and limb, and the failure to do so, upon injury ensuing to the employee, is culpable continuing negligence on the part of the employer, which cuts off the defense of contributory negligence and negligence of a fellow-servant, such failure being the *causa causans.* It is negligence *per se* in any railroad company to cause one of its employees to risk his life and limb in making couplings which can be made automatically without risk.'

These opinions could be well justified and upheld on the ground that a failure to correct an evil of this magnitude, when it could be

accomplished so effectually at an insignificant cost, was such a reckless and wanton disregard of the lives and safety of employees as to amount to an intentional wrong, against which contributory negligence is no defense. They have, however, been approved and accepted as decisions eminently just and proper in applying the principles of the law of negligence to new and changing conditions, and can be upheld and supported both by reason and precedent."

In this estimate of the *Greenlee* and *Troxler* cases it is clear that this car has no proper place. Here, as in other ordinary cases, the defendant is required to supply for its employees "implements and appliances which are known, approved and in general use," and there is testimony on the part of plaintiff tending to establish negligent default in this respect; but neither the car nor the defects suggested present such exceptional or extraordinary conditions as to withdraw the case from the usual and recognized principles in actions of this character and which make contributory negligence on the part of the employee a valid defense.

On the statute of limitations, while the transaction occurred in 1911 and present summons bears date in February, 1916, it appears that an action for the injury was commenced soon after it occurred, in January, 1912, and prosecuted till January, 1916, when a (298) nonsuit was taken, bringing the case directly within section 370, Revisal, allowing an action begun within the time to be prosecuted within one year after nonsuit.

For the error indicated, there should be a new trial of the cause, and it is so ordered.

New trial.

Cited: Hinnant v. Power Co., 187 N.C. 299; *Moore v. Rawls*, 196 N.C. 128.

G. W. WALLS v. W. J. STRICKLAND.

(Filed 17 October, 1917.)

Telephone Companies — Public-service Corporations—Statutes—Courts—Jurisdiction—Corporation Commission.

A telephone company, serving the public, must discharge its duties impartially and without discrimination; and where, in violation of this duty, it refuses to install a telephone instrument and connection in the residence along its lines for one applying for the same, who offers to pay in advance for the same service rendered to others, a *mandamus* will lie;

and the statute giving general control of such companies to the Corporation Commission does not oust the court of its jurisdiction to compel the company to perform a public duty it owes to an individual.

CLARK, C.J., concurring.

BROWN, J., concurring, in which opinion the other justices concur.

APPEAL from *O. H. Allen, J.*, heard at chambers, LEE County, 8 July, 1917.

This is an action for a *mandamus* to compel the defendants, owners of a telephone line, to install a telephone.

The facts are set out in the judgment rendered, which is as follows:

This cause coming on to be heard before the undersigned judge of the Superior Court, at chambers, and being heard, and it appearing that the plaintiff, more than ten days before the return date of the summons, caused summons to be served with a copy of his complaint on the defendant, and that on the return date the parties appeared, and the defendant demurred to the plaintiff's complaint, which demurrer was overruled and defendant excepted, and the defendant filed answer; and that upon the pleadings the parties joined issue, which was heard upon the proofs of the parties, no jury trial being demanded, upon considering the proofs offered and the arguments of counsel, the court finds the facts to be:

1. That the plaintiff is engaged in business in Lee County, and is a resident thereof, and that the defendant is a resident of Chatham County.

2. That the defendant, at and before the commencement of this action, was, and now is, engaged in furnishing tele- (299) phone service to the public generally, with a central office located at Moncure, N. C., with lines extending from this point to Pittsboro, Merry Oaks, Osgood, and by the plaintiff's place of business at Lockville to Sanford; and the defendant has established regular tariffs for residence and business service, and for toll messages over his and connecting lines.

3. That prior to 20 May, 1917, the defendant furnished such service to the plaintiff at regular rates.

4. That on said date the defendant discontinued said service.

5. That said service was not discontinued by reason of any improper use of said 'phone by the plaintiff, or by reason of any failure of plaintiff to observe any rule or regulation established by the defendant for the conduct of his telephone business.

6. That prior to the institution of this action the plaintiff tendered to the defendant all rents due, and the regular rental for one

month in advance for a business 'phone, and demanded that the defendant render him service without discrimination and under the same rules and regulations service is furnished to other patrons of the defendant.

7. That the defendant refused, and still refuses, to furnish said service to the plaintiff.

Upon the foregoing facts the court doth adjudge: That the refusal of the defendant to furnish service to the plaintiff on the same terms and under the same conditions it is furnished to the general public is a discrimination against the plaintiff by the defendant; that said defendant is hereby directed and commanded, on or before 1 August, 1917, to install a telephone instrument in the plaintiff's premises and to connect the same with the telephone system operated by the defendant, and on and after date to furnish to the plaintiff service without discrimination upon the same terms and conditions that service is furnished to the public generally.

It is further ordered that the defendant pay the costs of this action, to be taxed by the clerk.

O. H. ALLEN,
Judge Presiding.

The defendants excepted and appealed, upon the ground that telephone companies being subject to the control and regulation of the Corporation Commission, the courts have no jurisdiction of the action.

Hoyle & Hoyle for plaintiff.
H. A. London & Son for defendant.

ALLEN, J. The error in the position of the defendants is in failing to distinguish between the regulation and control of telephone companies, which, as to individuals and corporations, are (300) committed by statute to the Corporation Commission (Rev. sec. 1096, chap. 966, Laws 1907), whether exclusively so or not we need not say, and the refusal to perform a duty to the plaintiff, arising upon facts that are established.

If the duty exists upon the facts found, there is nothing for the Corporation Commission to hear and investigate, and it only remains for the courts to compel performance of the duty.

The question was considered in *Godwin v. Telephone Co.*, 136 N.C. 259, prior to the amendment of 1907, it is true, but when, as said in the opinion, telephone companies were placed by the Corporation Commission Act "on the same footing as to public uses as railroads," and it was then held that telephone companies, serving the public, must discharge their duties impartially and without dis-

crimination, and that the writ of *mandamus* issued by the courts was the proper remedy to enforce the performance of the duty.

The Court declares the doctrine as follows: "A *mandamus* lies to compel a telephone company to place telephones and furnish telephonic facilities without discrimination for those who will pay for the same and abide the reasonable regulations of the company. This is well settled. *S. v. Telephone Co.*, 52 Am. Rep. 404; Am. and Eng. Ency. (2d Ed.) 1022; 19 *ib.* 877; Joyce on Electric Law, sec. 1036, and numerous cases cited by all these. In *Telegraph Co. v. Telephone Co.*, 61 Vt. 241, 5 L.R.A., 15 Am. St. Rep. 893; *S. c.*, 3 Am. Elec. Cases, at p. 435, it is said: 'A telephonic system is simply for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all.' That case cited many authorities, which are, indeed, uniform, that the telephone business, like all other services fixed with public use, must be operated without discrimination, affording (equal rights to all, special privileges to none). 'Telephones are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public,' is said in *Telephone Co. v. Telegraph Co.*, 66 Md. 399, at p. 414; 59 Am. Rep. 167, which is another very instructive and well-reasoned case upon the same subject. Telephone companies are placed by our Corporation Act on the same footing, as to public uses, as railroads and telegraphs."

This case was approved in *Telephone Co. v. Telephone Co.*, 159 N.C. 16, decided after the amendments of 1907, and the jurisdiction to enforce performance of a duty by *mandamus* was recognized and exercised.

The Court says, in the latter case, of the duty and the remedy: "It is very generally recognized that a telephone company acting under a *quasi* public franchise, is properly classified among the public-service corporations, and as such is subject to (301) public regulation and reasonable control, and is required to afford its service at uniform and reasonable rates and without discrimination among its subscribers and patrons for like service under the same or substantially similar conditions. *Godwin v. Telephone Co.*, 136 N.C. 258. . . . In regard to the form of remedy available where, as in this State, the same court is vested with both legal and equitable jurisdiction, there is very little difference in its practical results between proceedings in *mandamus* and by mandatory injunction, the former being permissible when the action is to en-

force performance of duties existent for the benefit of the public, and the latter being confined usually to causes of an equitable nature and in the enforcement of rights which solely concern individuals. High on Injunctions (4th Ed.), sec. 2. Owing to the public interests involved, in controversies of this character, it is generally held that *mandamus* may be properly resorted to. *Godwin v. Telephone Co., supra; Commercial Union v. Telephone Co., supra; Mahan v. Telephone Co.,* 132 Md. 242; *Yancy v. Telephone Co.,* 81 Ark. 486."

These authorities are decisive against the defendants.

Affirmed.

CLARK, C.J., concurring: The Constitution, Art. I, sec. 19, provides that "The ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." In proceedings before the Corporation Commission there is no jury trial provided, and hence if no appeal lies therefrom by the plaintiff he is deprived of this sacred and inviolable right. It is solely upon the ground that an appeal gives the right of trial by jury that the acts creating Recorders courts have been held constitutional. *S. v. Lytle,* 138 N.C. 738; *S. v. Shine,* 149 N.C. 482, and many other cases. We have held that an appeal lay from the county commissioners. *Young v. Rollins,* 90 N.C. 131; *Lambe v. Love,* 109 N.C. 305. And even that where an act gives no appeal the Court will grant a writ to bring up the case on appeal. *Hillsboro v. Smith,* 110 N.C. 418; *Perry v. Commissioners,* 130 N.C. 560. If no appeal lies from the Corporation Commission, it is unconstitutional, as we held the Recorders' courts would be if no appeal were allowed.

In *Corporation Commission v. R. R.,* 170 N.C. 560, the majority of opinion held that no appeal lay for the plaintiff or petitioner, though Revisal 1070, provides: "From all decisions or determinations made by the Corporation Commission *any party affected thereby* shall be entitled to appeal." And Laws 1907, chap. 469, sec. 6, gave the right of appeal to *"all persons* and corporations affected by the action of the Corporation Commission." The majority, how-
(302) ever, held that an appeal lay only by the Corporation Commission itself from its own decision, or by the defendant corporation.

It was in consequence of this decision, doubtless, that the plaintiff avoided applying to the Corporation Commission in this case, for fear that he would lose his constitutional right of trial by jury, and he had therefore an inalienable and undeniable right to bring this action in a court where he could have a jury trial. However,

since that time, this Court has, I think, in a unanimous opinion, overruled the decision above quoted by ignoring it and passing upon an appeal which was taken from the Corporation Commission to the Superior Court, and from that court to this. *R. R. v. R. R.*, 173 N.C. 413. In this latter case it is recited: "This is an appeal by the petitioner, the Laurinburg and Southern Railroad Company, from a judgment of Wake Superior Court, which judgment affirmed the order of the North Carolina Corporation Commission dismissing the petition filed before the Corporation Commission by the petitioner, setting out the judgment of the Corporation Commission." Of this latter case we took jurisdiction and recognized that the case was properly before us on an appeal by the petitioner to the Superior Court, and thence to this Court.

This was necessarily an overruling of the previous decision, which had held that no appeal lay from the Corporation Commission except by itself or the defendant. Otherwise, this Court was without jurisdiction to render any decision, and the case was *coram non judice*. As this last opinion is unanimous, this should be taken as a reverter to the ruling of the Court, in *S. v. R. R.*, 161 N.C. 270, that an appeal by the plaintiff will be adjudicated in this Court.

The only difference between this last case (173 N.C. 413) and that in 170 N.C. is, that in this latest case the plaintiff is a corporation, but it was not held, and surely will not be held, that a corporation has a right to appeal when an individual has not. The decision in 170 N.C. did not so hold, but was put upon the ground that *the petitioner* has no right to appeal.

The last decision (173 N.C.) accords with *S. v. R. R., supra,* and the wording of the Revisal and the act of 1907 (see 170 N.C. at p. 569); and if the ruling in 173 N.C. is the abiding decision of the Court, there will no longer be cause why, as in this case, plaintiffs should avoid applying to the Corporation Commission, lest they lose thereby their constitutional "sacred and inviolable right" to a jury trial. The matter is settled right by the last unanimous opinion. The maturer judgment of the Court, like that of an individual, should prevail. If, however, there remains any doubt about the matter, every plaintiff has a constitutional right to proceed in every case before the Superior Court instead of before the Corpora- (303) tion Commission. This will greatly reduce the business in that court.

In the case in 170 N.C. 560, *supra,* the plaintiffs, or petitioners, as it may be preferred to call them, sued in their own behalf and interest, as well as on behalf of the public, and they surely could ap-

peal on behalf of any party for whom they could bring an action, whether it was themselves or the public.

Since an appeal admittedly lies, in all cases, by a *defendant,* from the Corporation Commission, and the court above passes upon the law, and a jury upon the facts, the judge and jury are equally of capacity to pass upon identically the same case when the appeal is by the plaintiff. The discrimination which forbids the latter to appeal is created solely by the court, and not by any statute, for Revisal 1074, permits "any party *affected by any decision* of the Corporation Commission" to appeal, and Laws 1907, chap. 469, sec. 6, makes this plainer by providing presumedly in the interest of the public, where an action is on their behalf, "*all persons* and corporations *affected* by the action of the Corporation Commission" may appeal.

The Corporation Commission (originally the Railroad Commission) was established for the very purpose of protecting the public and the individual citizen from arbitrary conduct in the operation of railroads. But if plaintiffs, seeking relief, either for themselves or on behalf of the public, cannot appeal, they are thus deprived of the rights which they had before the creation of the commission, and instead of being protected are subjected to any decision, however arbitrary or erroneous it may be. Even in the matter of fixing rates, an appeal is provided by Revisal 1078, 1079. Revisal 1054, makes the Corporation Commission a "court of record," and if it can appeal from its own decisions we have the singular spectacle that under Revisal 1074, it has ten days to serve on itself an appeal and an assignment of errors in its owns decisions. Surely nothing like this has ever existed before, either here or elsewhere.

I put my concurrence in this case upon the ground that, unless the ruling in 170 N.C. 560, which held that a *plaintiff* cannot appeal, is overruled by the later case in 173 N.C. 413, then the Corporation Commission is an unconstitutional body. If a plaintiff (unless a corporation) is deprived of the right to appeal, and of the right to a jury trial, though all defendants and corporations can appeal, such discrimination is in violation of the fundamental right of the citizen, and entitles this plaintiff, and any plaintiff, to seek his rights in the Superior Court, in all cases.

What litigant, and what counsel, if there is any alterna-
(304) tive, will bring an action in any court where, if unsuccessful, he has no right of appeal, to have the rulings of law or fact reviewed, but his opponent has?

BROWN, J. I fully concur in the opinion of the Court written by Justice Allen, and would have nothing to say, but that I cannot let pass unnoticed the statement in the concurring opinion of the Chief Justice that the case of *Corporation Commission upon relation of W. D. Redfern and others,* 170 N.C. 560, is "overruled by a unanimous Court," by the subsequent case of *State upon relation of Laurinburg and Southern Railway v. Seaboard Air Line,* 173 N.C.; 92 S.E. Rep. 150.

The former case was a controversy over the location of a railroad station, wherein it appeared that the citizens of the community were divided among themselves as to where it should be located. The Corporation Commission visited the place and located the station. The dissatisfied citizens appealed to the Superior Court. The judge of that court dismissed the appeal. This Court affirmed the judgment, holding that upon the facts presented upon that record the appeal was properly dismissed.

The last-named case was a controversy presented to the Corporation Commission between two railroads in regard to certain contractual rights and liabilities at a crossing of the two roads. The commission held that it had no power to interfere with the written contract entered into between the parties. Travis, chairman, concluded the opinion of the commission with there words:

"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."

In the *Redfern* case the controversy arose over a location of a railroad station, a purely administrative matter. The appellants had no personal or property rights involved, and no interest, except what was common to the whole community.

In the *Laurinburg Southern* case property rights and contractual obligations were involved, in which both railroads were interested.

This Court entertained both appeals and held that the record in the *Redfern* case presented no facts that justified an appeal to the Superior Court.

In the *Laurinburg Southern* case the appeal was also entertained by us, and we held that the Corporation Commission properly dismissed the petition, as it had no power upon the fact presented to interfere with the contract entered into by both (305) roads.

It is so manifest that the two cases are perfectly consistent with

each other and in line with well-settled legal principles that I forbear to discuss the matter.

It is stated in that concurring opinion that it was in consequence of the decision of this Court in the *Redfern* case that plaintiff avoided applying to the Corporation Commission, for fear he would lose his constitutional right of trial by jury, and therefore he applied to the Superior Court, where he could get it.

While I think, with entire deference, that the whole discussion is irrelevant to any matter now before this Court, I cannot forbear to say that if such was plaintiff's motive, his conduct is very singular. The record shows that he made no demand for a jury trial, but on the contrary permitted the judge to find the facts about which there appears to be little if any dispute.

I am authorized to say that the other Associate Justices concur with me in this opinion.

Cited: Public Service Co. v. Power Co., 179 N.C. 34; *Public Service Co. v. Power Co.*, 180 N.C. 338; *R. R. v. Power Co.*, 180 N.C. 425; *Grantham v. Nunn*, 188 N.C. 242; *Horton v. Telegraph Co.*, 202 N.C. 615; *Belks Dept. Store v. Guilford County*, 222 N.C. 444.

ISAAC CROOM v. L. H. WHITEHEAD.

(Filed 17 October, 1917.)

1. Descent and Distribution—Evidence—Paternity—Deeds and Conveyances.

Where plaintiff claims the lands in controversy through his father, C., from one he alleges to be his grandfather, and the paternity of his father is denied, and claimed to be one W., it is error to admit evidence from the register of deeds' record of a deed to plaintiff's father from a stranger, showing that W. had been erased and C. interlined, without evidence as to by whom it was made, when or by what authority, or that it so appeared in the original deed; and it is reversible error when the court, in his charge to the jury, upon conflicting evidence, made it material to their consideration upon the issue.

2. Descent and Distribution—Slaves—Statutes—Marriage—Inheritance.

The act of 1866, declaring that former slaves who "now cohabit together in the relation of husband and wife . . . shall be deemed to have been lawfully married as man and wife, at the time of the commencement of such cohabitation," deals with marriage, making the legitimacy of children and the right to inherit lands depend upon their

parents' cohabitation at the birth of the issue, and its continuance to the ratification of the act; while the act of 1879, now Rule 13, sec. 1556, Canons of Descents, does not validate the cohabitation, but simply confers the right on colored children born before 1868 to inherit, and this right is limited to the estates of the parents.

3. Same—Cohabitation—Acceptance—Retroactive Acts.

Where former slaves have cohabited together before and at the time of the ratification of the act of 1866, their continuing in this relation thereafter is construed as their consent to the marriage therein declared to be lawful, and retroactive in the respect that it relates back to the beginning of the cohabitation, without the necessity of their having acknowledged the cohabitation before the clerk, etc., or justice, etc., as directed by the act.

4. Descent and Distribution—Slaves—Statutes—Exclusive Marriage.

Under Revisal, sec. 1556, Rule 13 of Descents, declaring legitimate children of colored parents born at any time before 1 January, 1868, under certain conditions, it is required that cohabitation shall have existed at the birth of the child claiming the inheritance, and the paternity of the party from whom the property claimed is derived must be shown; and under this section and the Laws of 1866 the cohabitation must be exclusive, in that it was a single and not a polygamous relation.

5. Descent and Distribution—Paternity—Declarations—Evidence—Trials—Instructions.

Where an inheritance is claimed by the relation of former slaves declared to be a lawful marriage by the act of 1866, and the evidence is conflicting as to whether the facts establish a lawful marriage within its terms, declarations of the mother as to the paternity of one through whom the claimant seeks to derive title are competent or not depending upon the establishment of the fact of marriage, and under conflicting evidence thereof, such evidence should be admitted on the trial, with instructions to the jury to disregard it if they find affirmatively upon that question.

APPEAL by plaintiff from *Cox, J.*, at the February Term, 1917, of CRAVEN. (306)

This action is for the recovery of a tract of land. The land belonged to Robert Croom, and the plaintiff claims that upon the death of Robert Croom the land descended to Robert's son, Isaiah Croom, who was the father of the plaintiff, Isaac Croom, to whom it descended upon the death of his father, Isaiah. The defendant denied plaintiff's right to possession upon the ground that Isaiah Croom was not the son of Robert Croom. The appeal involves the trial of the issue, whether Isaiah Croom, the father of plaintiff Isaac Croom was the son of Robert Croom.

Robert Croom and Susan Croom, alleged by the plaintiff Isaac Croom to be his grandfather and grandmother, were slaves. The evidence of the plaintiff tends to show that they lived together as man and wife for several years prior to the Civil War, during which

period the plaintiff's father, Isaac Croom, was born; that they continued to live together as man and wife until Robert "was carried South after the first raid of the Yankees"; that when Robert Croom was carried South, Susan had a little black boy, Isaiah, father of plaintiff; that directly after the war Robert came back, and Susan then had two other children; that Robert and
(307) Susan lived together after he came back, and after a year or two Robert and Susan moved near Dover; that after the war Robert Croom and Susan Croom were married by a justice of the peace, Nathan McDaniel.

The evidence of the defendant tended to prove that Robert and Susan did not live together as husband and wife, and that one Wood, and not Robert Croom, was the father of Isaiah.

The defendant was permitted to introduce the declarations of Susan, mother of Isaiah, that Wood was his father, and the plaintiff excepted.

W. H. Waters, a witness for defendant, testified that Susan told him Wood was the father of Isaiah, and that Isaiah was known as Isaiah Wood.

The defendant, in corroboration of the witness, offered in evidence Deed Book No. 159, page 132, from the office of the Register of Deeds of Craven County, showing a deed dated 1 June, 1888, from Mark McClesse to Isaiah Croom, the word "Croom" being interlined in place of the word "Wood," erased.

Objection by plaintiff; objection overruled, and the plaintiff excepted.

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

Dickinson & Land and Rouse & Rouse for plaintiff.
D. L. Ward and D. E. Henderson for defendant.

ALLEN, J. There is no principle which will sustain the ruling of his Honor admitting in evidence the record of the deed from Mark McClesse to Isaiah Croom, on which it appears "Wood," which was first written, was stricken out and "Croom" written in its place. It is not shown who made the change, when it was made, or by whose authority, and there is no evidence that there was a similar erasure and interlineation on the original deed, or that Isaiah Croom or the plaintiff knew of the condition of the record, and neither claimed under a deed to Isaiah Wood. So far as we can see, the register of deeds, when copying the deed on the record, by mistake, first wrote Isaiah Wood as the grantee in the deed and at once corrected the mistake by writing Isaiah Croom, the true grantee.

His Honor admitted the evidence and told the jury it was in corroboration of a witness who testified that the mother of Isaiah told him that Wood was his father, and afterwards, in his charge, he called the evidence to the attention of the jury and told them to take it "into consideration in determining whether this boy was the son of Robert or the son of a man named Wood."

The evidence was conflicting as to the paternity of Isaiah, and when this prominence was given to the change in the (308) record, which was doubtless used before the jury as a declaration of the register of deeds, we cannot say the error is harmless. This is sufficient to dispose of the appeal, but there are other questions of evidence we will consider, as they will necessarily arise on another trial.

The defendant was permitted to introduce the declarations of the mother of Isaiah to the effect he was the son of one Wood, and not of Robert Croom. The competency of this evidence depends on the legal status existing between Robert and Susan Croom at the birth of Isaiah, because if they were then married, and Isaiah was born in wedlock, the declarations of the mother made in 1911 or 1912 would not be competent to prove that Isaiah was not the son of Robert. *West v. Redmond,* 171 N.C. 742.

Robert and Susan were slaves, and the evidence of the plaintiff tended to prove that they were cohabiting as man and wife when Isaiah was born, and that this relationship continued up to and after the ratificafion of the Act of 1866, which is as follows:

"In all cases when a man and woman, both or one of whom were lately slaves and now emancipated, now cohabit together in the relation of husband and wife, the parties shall be deemed to have been lawfully married as man and wife *at the time* of the commencement of such cohabitation, although they may not have been married in due form of law. And all persons whose cohabitation is hereby ratified into a state of marriage shall go before the clerk of the court of pleas and quarter sessions of the county in which they reside, at his office, or before some justice of the peace, and acknowledge the fact of such cohabitation and the time of its commencement, and the clerk shall enter the same in a book kept for that purpose; and if the acknowledgment be made before a justice of the peace, such justice shall report the same in writing to the clerk of the court of pleas and quarter sessions, and the clerk shall enter the same as though the acknowledgment had been made before him, and such entry shall be deemed *prima facie* evidence of all the allegations therein contained."

This statute was considered in *S. v. Harris,* 63 N.C. 3, and the Court said: "The substance of marriage—the consent of the parties

—existing, it was as clearly within the power of the Legislature to dispense with any particular formality as it was to prescribe such. This neither made nor impaired the contract, but gave effect to the parties' consent, and recognized as a legal relation that which the parties had constituted a natural one. So that by force of the original consent of the parties while they were slaves, renewed after they became free, and by the performance of what was required by the statute, they became to all intents and purposes man and (309) wife. This would be so upon the *strictest* construction; much more, then, upon the liberal construction which would be given to a statute of great public necessity affecting the domestic relations of one-third of our people and the morals of society in general."

Soon thereafter it was held in *S. v. Adams,* 65 N.C. 538, which was followed in *S. v. Whitford,* 86 N.C. 639, and in *Long v. Barnes,* 87 N.C. 332, that going before the clerk or a justice of the peace was not essential to the marriage; and in *S. v. Melton,* 120 N.C. 595, that consent followed by cohabitation, existing when the Act of 1866 was ratified, constituted a valid marriage.

It is necessary that the cohabitation should exist at the time of the ratification of the act, because by its terms it only applies to those who "*now* cohabit together in the relation of husband and wife," and the statute operates retrospectively by reason of the language "shall be deemed to have been lawfully married as man and wife *at the time of the commencement of such cohabitation.*"

The validity of the retrospective feature of the statute was recognized in *Baity v. Cranfill,* 91 N.C. 298, and is supported by the reasoning in the other cases cited, and it is said in *S. v. Whitford,* 86 N.C. 639, that living together after the ratification of the act is "plenary," and in *Long v. Barnes,* 87 N.C. 332, "conclusive" evidence of consent.

The result of these cases is that, under the Act of '66, if it is shown that the man and woman, being slaves, lived together as husband and wife at the birth of issue, and if this relationship existed at the time of the ratification of the act, then they are in law husband and wife from the commencement of the cohabitation, and the issue is legitimate and born in wedlock.

Under this construction of the act many children born of slaves who had lived as husband and wife were declared illegitimate because one or both of the parents had died before the ratification of the act, or on account of inability to make proof of cohabitation existing at that time; and to meet this condition, the Act of 1879 was passed (now Rule 13 of the Canons of Descents), which is as follows:

"The children of colored parents born at any time before the first day of January, one thousand eight hundred and sixty-eight, of parents living together as man and wife, are hereby declared legitimate and children of such parents, or either one of them, with all the rights of heirs at law and next of kin, with respect to the estate or estates of any such parents, or either one of them. If such children be dead, their issue shall represent them, with all the rights of heirs at law and next of kin provided by this section for their deceased parents, or either of them, if they had been living, and the provision of this section shall apply to the estate of such children as are now deceased or otherwise." (310)

The two essential conditions necessary to give effect to this last act are "cohabitation existing at the birth of the child, and the paternity of the party from whom the property claimed is derived" *(Woodard v. Blue,* 103 N.C. 116; *S. c.,* 107 N.C. 410), and under both acts the cohabitation must be exclusive in the sense that it must show a single, not a polygamous, relation. *Branch v. Walker,* 102 N.C. 40.

It was not intended to require that living together as husband and wife should be "enduring or in strict personal fidelity while it continued" *(Hall v. Fleming,* at this term), or that a single act of infidelity on the part of the parents should have the effect of destroying the provisions of the statutes, primarily enacted to legitimate the offspring.

There is this marked distinction between the two statutes, which is important in dealing with the competency of the declarations of a parent. The first deals with marriage, and it is because the relationship of husband and wife is established that the children born in wedlock are legitimate, while the Act of 1879 does not validate the cohabitation, but simply confers the right to inherit, and this right is limited to the statutes of the parents. *Bettis v. Avery,* 140 N.C. 187.

Applying these principles, we would hold on the plaintiff's evidence, which, if believed, shows a valid marriage under the act of '66; that the declarations of the mother, tending to prove illegitimacy, were incompetent, but as the evidence as to marriage is conflicting, his Honor could not do otherwise than admit them, but he ought to have instructed the jury in connection therewith, that if they found from the evidence that Robert and Susan were living as husband and wife when Isaiah was born, and that this status existed at the time the Act of '66 was ratified, then they were husband and wife, and in that event they should exclude these declarations from further consideration.

In *Woodard v. Blue, supra,* where there was no marriage under

the act, and the party had to claim under the Act of 1879, if at all, declarations of the mother were received.

In *Erwin v. Bailey, supra,* and in *Mebane v. Capehart,* 127 N.C. 50, in which the marriages were valid under the Act of '66, evidence of quarrels between the husband and wife as to the paternity of the child, and declarations of the mother tending to show illegitimacy, were admitted, but the distinction we have endeavored to point out was not considered, and in the later case both *Woodard v. Blue,* under the Act of '79, and *Erwin v. Bailey,* under the Act of '66, are cited in support of the ruling.

The question of the admissibility of general reputation to prove illegitimacy is not presented, as no witness was asked as to the reputation, but several were erroneously permitted to say he had not heard of Robert and Susan living as husband and wife (311) without stating the reputation as to the fact, or that they knew it. See, on this point, *Spaugh v. Hartman,* 150 N.C. 456, and other cases.

New trial.

Cited: Bryant v. Bryant, 190 N.C. 374.

J. C. LANIER ET AL., v. THE TOWN OF GREENVILLE.

(Filed 17 October, 1917.)

1. Jury Drawing—County Commissions—Sheriff, etc.—Challenge to Panel—Statutes.

Revisal, section 1963, providing for the drawing of a jury by the sheriff, clerk of the board of county commissioners, and two justices of the peace contemplates this to be done on the failure of the county commissioners to draw the jury for the term of court at least twenty days before its commencement, under Revisal, section 1959; and were it otherwise, and a jury were drawn within twenty days before the term commenced (section 1963), the statute would be regarded as directory; and where the parties have not been prejudiced, the irregularity would not entitle the party to disregard the verdict upon challenge to the panel.

2. Same—Deputy Sheriffs—Ministerial Duties—Prejudice—Irregularities.

The provision of the Revisal, section 1963, that the "sheriff," etc., in the "presence of and assisted by two justices of the peace of the county, shall draw such jury in the manner above described," refers to sheriffs in the generic sense, including deputies within its meaning to perform a duty of a ministerial nature in the sheriff's name; and where the deputy thus acts at the request of the sheriff, a challenge to the panel on that account alone will not be sustained.

3. Condemnation—Municipal Corporations—Cities and Towns—Measure of Damages.

The damages recoverable by the owner for his lands taken under condemnation by a city for the widening and improvement of its streets is the difference in value of his land before and after the taking, less the special benefits derived from the increased value by reason of the improvement, but not such as are enjoyed in common with others.

BROWN, J., dissenting; WALKER, J., concurring in the dissenting opinion.

APPEAL by defendant from *Harding, J.*, at the May Term, 1917, of PITT.

This is an action brought by the plaintiffs against the defendant for the recovery of damages alleged to have been sustained by them on account of the taking by the town of Greenville, for the purpose of widening Pitt Street, of a strip of land belonging to them, which the jury found to be 85 feet by 8 8-10 feet wide at one end and 10 6-10 feet wide on the other end.

Prior to the widening of Pitt Street, said street was a narrow alley, undrained, very little traveled, except in case (312) of absolute necessity, and, as one witness expressed it, "a mud hole from beginning to end." On one side thereof was a high board fence, with cedar trees on the part of the street opposite plaintiffs' property, and with no sidewalks whatever. The street in question leads directly from Dickinson Avenue, the main thoroughfare of Greenville, to the river bridge.

The board of aldermen, pursuant to powers vested in it by the charter of the town of Greenville, found it necessary, in order to render said street safe for traffic, and in order to promote the interests of the traveling public coming from the north side of the river, to widen, drain, improve and pave said street and lay thereon concrete sidewalks; and pursuant to resolutions duly passed by the board of aldermen, the said street was widened and drained and asphalt pavement was laid thereon and concrete sidewalks built, by reason of which the plaintiffs brought this action, claiming that they had been damaged in the sum of $1,000, at the same time admitting the power of the board, under the charter of the town of Greenville, to appropriate and use said property for public purposes; the defendant, on the contrary, contending that by reason of the building of said sidewalks and the widening and draining of said street, the plaintiffs' property had been greatly and peculiarly benefited and its value enhanced in excess of any damage that they had sustained.

When the case was called the defendant stated that it was ready for trial, but that there had been no proper jury summoned to try

the case, and entered a challenge to the array, upon the following grounds, to wit:

For that the said jury had not been drawn by the commissioners pursuant to section 1959 of the Revisal of 1905, providing that the jury shall be drawn at least twenty days before each term, and for that said jury had been attempted to be drawn pursuant to section 1963 by a deputy sheriff, the register of deeds, and two justices of the peace, on 12 May, 1917, within less than twenty days before the beginning of the May Term of said court, said court having begun on 21st May, and for said reasons the said challenge to the array was entered.

His Honor denied said challenge, and the defendant excepted, and his Honor found the following facts:

That J. C. Gaskins is register of deeds of Pitt County and clerk to the board of county commissioners; that the jury was drawn on 12 May, 1917; that the said register of deeds, after the board of county commissioners had failed to draw the jury and the board of county commissioners had adjourned and gone to their homes, said register of deeds and clerk to the board of county commissioners of Pitt County, notified the sheriff that it would be necessary for the sheriff and register of deeds and two justices of the peace to draw the jury, as the board of county commissioners had failed
(313) to do so; thereupon the sheriff told his deputy, J. L. Taylor, to attend and assist at the drawing of the jury; that J. L. Taylor is deputy sheriff, J. C. Gaskins is register of deeds and clerk of the board of county commissioners; that B. F. Tyson is a justice of the peace, and that J. T. Smith is justice of the peace; that said Gaskins, register of deeds, J. L. Taylor, deputy sheriff, B. F. Tyson, justice of the peace, and J. T. Smith, justice of the peace, were present in the office of the register of deeds and drew the jury for this term of court in the usual way; that is to say, having a boy under 10 years of age to draw the names of the jurors in Box No. 1; that the jurors were drawn by a boy under 10 years old, and all jurors thus drawn are competent jurors, unless the method of drawing them makes them incompetent as matter of law. The jurors were drawn from Box No. 1, and slips of paper upon which names were written, after being drawn out and copied as jurors, were placed in Box No. 2.

The sheriff and justices of the peace made no formal return to the register of deeds of what they had done in drawing the said names, and that the register of deeds gave a list of the jurors thus drawn, with the usual order to summon sixteen jurors, to the sheriff, and that the register of deeds issued no formal written order for the justices of the peace and the sheriff to meet for the drawing of the

jury, but called them over the telephone, and they did actually appear as above set out in response to the call of the register of deeds.

There were several exceptions to the refusal to give several prayers for instructions, all of which relate to the principle in the following prayer for instruction, which was refused:

"If you find by the greater weight of the evidence that the plaintiffs were the owners of the strip of land alleged to have been taken by the defendant, then I charge you that the damages that the plaintiff are entitled to recover would be the actual value of the land taken at the time of its taking, and in assessing these damages it would be your duty to take into consideration the value of the plaintiffs' property immediately before the taking and immediately after the taking, taking into consideration any enhancement in value of the plaintiffs' property by reason of the improvements which the defendant alleges that it made in widening Pitt Street. If the improvement has increased the value of plaintiffs' property, and you find that the plaintiffs' property has been benefited more than damaged, then the plaintiffs would not be entitled to recover anything, and it would be your duty to answer the issue as to damages 'Nothing'; or if you find that the benefits which the plaintiffs have received—if you find that they have received any—equalize the damage which they have suffered, that is to say, that the benefits accruing to the plaintiffs by reason of the improvements made by the defendant in widening the street are equal to the damages you find that plaintiffs suffered — if you find they (314) suffered any — then it would be your duty to answer the issue as to damages 'Nothing.'"

His Honor charged the jury as to the measure of damages as follows:

"The measure of damages in this particular case is the difference between the reasonable market value of this lot of Lanier's before this strip of land was taken and the reasonable market value of this lot immediately after it was taken, and the difference between the two would be the measure of the damages, that is, whatever you may find that to be, less such peculiar benefits and advantages as have accrued to the land in controversy not common to all other people who live on that street which it improved. It does not mean that because one man has special benefits and two or three others, or all others, have special benefits—it must be some special benefit, some special advantage that is not common and peculiar to every other land or property along the street."

The defendant excepted.

The jury returned a verdict assessing the plaintiffs' damages at

$750, and the defendant appealed from the judgment rendered thereon.

D. M. Clark and J. Conrad Lanier, Jr., for plaintiff.
Albion Dunn for defendant.

ALLEN, J. The defendant does not allege that there was any corruption or intentional misconduct in the drawing of the jury, or that anything was done prejudicial to the development of its defense. On the contrary, the defendant announced its readiness for trial, and, so far as the record shows, the trial was had before an impartial jury, satisfactory to the defendant. We may, then, deal with the legal questions raised by the challenge to the array, uninfluenced by other considerations, and they involve a construction of section 1963 of the Revisal, which reads as follows:

"If the commissioners for any cause fail to draw a jury for any term of the Superior Court, regular or special, the sheriff of the county and the clerk of the commissioners, in the presence of and assisted by two justices of the peace of the county, shall draw such jury in the manner above described; and if a special term shall continue for more than two weeks, then for the weeks exceeding the two, a jury or juries may be drawn as in this section provided."

The challenge of the defendant is on two grounds: (1) That the jury was drawn within less than twenty days of the term of court. (2) That the sheriff of the county was not present in person at the drawing, and was represented by his deputy.

It is to be observed, in the first place, that the section (315) under which this jury was drawn does not require the duty to be performed twenty days before a term of court, and that there is no limitation as to time in the section.

A preceding section (section 1959) does require the commissioners to draw a jury "at least twenty days before each regular or special term of the Superior Court," and in that and succeeding sections the manner of performing the duty is minutely prescribed, and it further appears in the section above quoted (1963) that the clerk, sheriff, and justices "shall draw such jury in the manner above described."

Note that the section does not say "at the time and in the manner above prescribed," and for the reason that the commissioners had all of the time up to twenty days before court within which to draw a jury, and it was only upon their failure that the clerk and other officers had the power to act, which of necessity must be within the twenty days.

If, however, the time for the performance of the duty was fixed

by statute, we would not consider it material on this record, as no rights have been prejudiced, and would follow the rule in *Moore v. Guano Co.*, 130 N.C. 235, where the Court says: "The action of the commissioners, as to time and place of drawing the jury or revising the jury list is concerned, the statute is considered directory; and while it is their duty to do these things at the time and place the law directs them to be done, still if they are not done when and where they should be, but are *properly done* at another time and place, they will not be treated as irregularities. This is because the law directs the commissioners to perform these duties and to prevent delay in the administration of justice such acts are held to be directory, and where no injustice appears to have been done by such irregularity, the Court will, it seems, not make such irregularity a cause for discharging the panel."

The second objection to the jury presents greater difficulty, and its correct determination depends on whether "sheriff of the county," as used in the section, refers to the office or to the man holding the office, and if it refers to the office, whether the duty to be performed is one properly belonging to a deputy. If the sections of the Revisal referring to the duties of sheriff are examined (and there are many of them) it will be found that deputy sheriffs are mentioned in only two or three. The direction is almost invariably that "the sheriff shall," etc., and as said in 35 Cyc. 1489, "The statutes frequently use the word 'sheriff' as a generic term, including not only the sheriff proper, but also deputy sheriffs." It is also generally recognized that the ministerial duties of the sheriff may be performed by the deputy, who acts for the sheriff and in his name.

Again quoting from 35 Cyc. 1516: "While the judicial functions of a sheriff cannot be delegated to another, the (316) ministerial duties of the office may be performed by a deputy sheriff, or under-sheriff, who, however, performs the duties delegated to him, not in his own name or right, but as the representative of the sheriff, although he is recognized as a public officer. There are two kinds of deputies well known in practice: (1) A general deputy, or under-sheriff, who, by virtue of his appointment, has authority to execute all the ordinary duties of the sheriff, and who executes process without special power from the sheriff; and (2) a special deputy, who is an officer *pro hac vice* to execute a particular writ in some certain action and who acts under a specific and not a general appointment of authority.

"Deputy sheriffs are of two kinds: *(a)* A general deputy, or under-sheriff, who, by virtue of his appointment, has authority to execute all the ordinary duties of the office of sheriff (Com. Dig. tit. 'Viscount,' 542, B. 1); one who executes process without special au-

thority from the sheriff, and may even delegate authority in the name of the sheriff, or its execution, to a special deputy. *(b)* A special deputy, who is an officer *pro hac vice* to execute a particular writ on some certain occasion, but acts under a specific and not a general appointment and authority. *Allen v. Smith,* 12 N.J. Law (7 Halst.) 159, 162.

"The deputy is an officer coeval in point of antiquity with the sheriff. The creation of deputies arises from an impossibility of the sheriff's performing all the duties of his office in person. The powers of the deputy have consequently been ascertained at an early date. The general criterion by which to test his authority is declared in the case of *Levett v. Farrar,* Cro. Eliz. 294, in which the Court said that if a writ be directed to the sheriff by the name of his office, and not by a particular name, and doth not expressly command him to execute it in person, the under-sheriff may execute it. *Tillotson v. Cheetham* (N.Y.), 2 Johns. 63, 70." 3 Words and Phrases, 2009.

If the deputy cannot at least perform ministerial duties for the sheriff, why have one? Of what use is the deputy if the sheriff must always be present in the execution of every duty?

Deputies, known as under-sheriffs, are appointed because the duties of the sheriff are more than one man can perform, and these duties frequently require action at different places at the same time, and the transaction of public business would be greatly impeded if their acts, in proper cases, were regarded as invalid and without authority of law.

The duties to be performed in the present case, while important, were simple, requiring no exercise of judgment, and consisted in standing by with three other officers and seeing a boy under 10 years of age take a scroll from one jury box and place it in another.

(317) The officers had no power to pass upon the competency of those drawn, and it does not appear that any name drawn from the first box was disqualified, or that this name was not placed on the list drawn for the term. In our opinion, the duty was ministerial, and one the deputy could perform.

Counsel for the defendant have presented respectable authority supporting the principle embraced in his prayer for instruction and in opposition to the instruction given by his Honor, but we have adhered to the rule, in line with the weight of authority, that in the assessment of damages for land taken for a public improvement, the measure of damages is the difference in value before and after the taking, less the special benefits, and that increased value to the land enjoyed in common with others affected by the improvement is not a special benefit.

The question was considered at the last term in *Campbell v.*

Comrs. of Davie Co., 173 N.C. 500, in which, after laying down the rule that special benefits are those not common to others, Clark, C.J., says: "This is the rule laid down in *Bauman v. Ross,* 167 U.S. 548 (17 Sup. Ct. 966; 42 L. Ed. 270), 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. 266 (45 S.E. 589); *Bost v. Cabarrus,* 152 N.C. 531 (67 S.E. 1006); *R. R. v. Armfield,* 167 N.C. 464 (83 S.E. 809); also 2 Lewis on Em. Dom. 1187, par. 691."

We are less inclined to change the rule since it was held in *Miller v. Asheville, N. C.,* 112 N.C. 768, that it was within the power of the General Assembly to provide by statute that the damages should be reduced "not merely by the benefits special to the plaintiff, but by all the benefits accruing to him, either special or in common with others" *(Campbell v. Comrs.),* and the legislative body has declined to act.

We have examined the other exceptions, and find none justifying a new trial.

No error.

BROWN, J., dissenting. I am of opinion that the challenge to the array should have been sustained upon the ground that the jurors were not drawn by the persons authorized and designated by the statute. The statute, section 1963, is express that the *sheriff of the county* and the clerk of the commissioners, in the presence of and assisted by two justices of the peace, shall draw the jury. The sheriff was not present and did not assist in the drawing, but upon being notified by the clerk to the board of county commissioners that a jury would have to be drawn, simply told J. L. Taylor, his deputy, "to go help draw a jury."

I think the provisions of the statute are mandatory and the duties nondelegable, and that the sheriff has no more power to appoint another to act for him than a member of the board of commissioners or the clerk of the board or the justices of the (318) peace would have.

This is not the case of summoning talesmen under the supervision and direction of the court. It is drawing the regular panel of jurors from the body of the county, from which the grand jurors as well as petit jurors are to be selected. The persons authorized to perform this important function are selected because of their individual personality and supposed responsibility and integrity. The jurors selected may be called upon and pass upon a man's life or death.

To draw the jurors from the box is a judicial function of grave importance, requiring men of undoubted integrity, in order to pre-

vent frauds. The discharge of this duty is entrusted to two judicial officers and two "lay judges," the clerk of the board and the sheriff of the county.

From time immemorial the office of sheriff has been recognized as one of great trust and responsibility, and he who fills it is elected by the people of his county and has the stamp of their approval and the seal of their confidence.

It is very appropriate that he should be named as one to discharge such an important duty as drawing the jurors who are to determine matters affecting the life, liberty, and property of their fellow-citizens.

There is no such office as "deputy sheriff" created by law. He is the sheriff's appointee, and there is no limit to the number he may appoint, as they are paid by him.

Trials by jury lie at the very foundation of our system of jurisprudence, and it is of vital importance to the welfare and safety of the State that the drawing of the jurors should be conducted by those appointed by law and safeguarded by observing the provisions of the statute.

It is, therefore, inconceivable to me that the Legislature should have contemplated that this solemn duty could be delegated by the sheriff or the other responsible officials to whom its discharge is entrusted.

MR. JUSTICE WALKER concurs in this opinion.

Cited: Elks v. Comrs., 179 N.C. 243; *Maney v. Greenwood*, 182 N.C. 579; *S. v. Mallard*, 184 N.C. 670; *Wade v. Hwy. Comm.*, 188 N.C. 211; *Stamey v. Burnsville*, 189 N.C. 41; *Milling Co. v. Hwy. Comm.*, 190 N.C. 698; *Goode v. Asheville*, 193 N.C. 136; *Hanie v. Penland*, 194 N.C. 236; *Ayden v. Lancaster*, 197 N.C. 560; *Ward v. Waynesville*, 199 N.C. 276; *Borders v. Cline*, 212 N.C. 476; *Styers v. Forsyth County*, 212 N.C. 562; *Davis v. Moore*, 215 N.C. 451; *Gowens v. Alamance County*, 216 N.C. 109.

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R. H. HALL v. A. H. DIXON ET AL.

(Filed 17 October, 1917.)

Homestead — Husband and Wife — Deeds and Conveyances — Joinder of Wife—Mortgages—Judgments—Liens—Constitutional Law.

A docket judgment against a husband, constituting a lien on his lands, requires the laying off of his homestead, and in such instance he may not make a valid mortgage, free of all homestead rights, without properly joining the wife in the instrument; and where liens by judgment exist on his lands, and he attempts to mortgage them without joining his wife, the mortgagee can acquire no superior lien to those of subsequent mortgages, duly recorded, in which the wife has joined. Const., Art. X, sec. 8.

CIVIL action, tried before *Lyon, J.*, at March Term, 1917, of DUPLIN, upon an agreed state of facts.

From the judgment rendered, the plaintiff appealed.

George R. Ward for plaintiff.
Stephens & Beasley for defendant.

BROWN, J. The action is brought to subject a certain tract of land to the payment of certain debts secured by mortgage liens thereon, and to foreclose the same. The facts are, that the defendant Dixon and wife executed a mortgage, 5 June, 1903, to J. O. Carr, now the property of J. S. Carr, Mallard & Bryant docketed a judgment against Dixon, 31 July, 1906, which, it is admitted, is now barred by the statute of limitations. On 13 April, 1908, Dixon executed a mortgage to Farrior, Sykes & Co., in which his wife did not join. On 6 February, 1912, Dixon and wife executed a mortgage to Oscar and Jesse Fussell. On 7 August, 1913, Dixon and wife executed a mortgage to Oscar Fussell. All of the mortgages were duly recorded at the time when dated. The land conveyed was worth less than $1,000, 13 April, 1908, and Dixon owned no other land.

It is contended here that the mortgage to Farrior, Sykes & Co., in which Dixon's wife did not join, is void as against the other mortgages and is a fourth lien upon the property. The plaintiff contends that it is not void as against the other mortgages and is a second lien on the property. It is admitted that Dixon's homestead had never been allotted and it is settled by judicial decision that ordinarily in such case the wife's joinder is not necessary to pass title to the homestead. It was first held in *Mayo v. Cotten*, 69 N.C. 294, that section 8, Article X of the Constitution applies only to the conveyance of a homestead which has been laid off, but the rule stated in *Mayo v. Cotten* was modified in *Hughes v. Hodges*,

102 N.C. 248, so far as not to apply when the owner of the
(320) land is embarrassed with debt and his land is subject to be sold to satisfy the lien of a judgment already docketed. In that case it is held that the owner of land can convey the same absolutely or by way of trust or mortgage, free of all homestead rights, without the assent of his wife, except in certain cases, and one of the cases is where no homestead has been allotted, but where there are judgments against him which constitute a lien on the land, and upon which execution might issue and make it necessary to have the homestead allotted.

It is contended by the plaintiff that the case of *Dalrymple v. Cole,* 170 N.C. 102, overrules *Hughes v. Hodges* and does not recognize the above exception to the rule which ordinarily requires the wife to join in the deed in order to convey a homestead. *Hughes v. Hodges* has been cited in many cases and acted upon to such extent that it has practically become a rule of property. The principle laid down in it is recognized in the opinion of the Chief Justice in *Dalrymple v. Cole,* who, after adverting to the ruling in *Mayo v. Cotten,* says:

"The utmost this Court has at any time deviated from that proposition has been in those cases where there was a docketed judgment under which the homestead was required to be laid off. This does not affect this case, as the only judgment here is one for $100, which the defendant alleges that it was agreed should be paid out of the purchase money, and the wife's joinder in the mortgage released both the homestead and her dower as to those liens."

We are therefore of opinion that his Honor correctly held, in view of the fact that there was a judgment docketed 13 April, 1908, and which was a lien upon the land at the time of the execution of the subsequent mortgages, that these mortgages have priority over the mortgages to Farrior, Sykes & Co., in which the wife did not join, and which, therefore, are void.

The judgment of the Superior Court is

Affirmed.

Cited: Dalrymple v. Cole, 181 N.C. 287; *Cheek v. Walker,* 195 N.C. 755.

IRA W. HARDY V. WEST COAST CONSTRUCTION COMPANY AND CITY OF KINSTON.

(Filed 17 October, 1917.)

1. Municipal Corporations — Cities and Towns—Dangerous Conditions—Negligence—Implied Notice.

Municipal authorities are charged with the duty of keeping its streets in a reasonably safe condition, and to exercise a careful supervision over them to that end, and while having street improvements made to see to it that proper lights are placed at night at excavations, piles of dirt and other obstructions incident to such work, so as to warn those passing of the dangerous conditions there.

2. Same—Contracts—Lights.

A contractor to make street improvements for a municipality is liable for his negligence in not placing lights at night to warn the users of the street of dangerous conditions existing there; and where both the contractor and the city have had ample notice to put up the proper lights, and fail to do so, they are each liable to one who has been injured in consequence of their neglect.

3. Same—Joint Liability.

Where a contractor for making street improvements for a municipality digs a ditch across one of its streets, and the location is so filled by a heavy rainfall during the day that the ditch is completely covered and concealed by the water standing there, and it appears that a red light is customarily placed at such points of danger at night, and that a white light indicates that vehicles are to be driven around it: *Held*, a person driving around the white light and, in the absence of the red light, falling into the ditch, may maintain an action against both the contractor and the city to recover damages for a personal injury resulting from the negligent acts, when ample notice had previously been given to the city of the absence of the light.

4. Municipalities — Cities and Towns — Speed Ordinances—Negligence—Proximate Cause.

Where a person driving at night on a city's street is injured by the negligence of the defendant in not having the customary red light to warn persons traveling thereon of the dangerous condition of the street, the fact that he was violating an ordinance regulating the speed of vehicles will not bar his recovery on the ground of contributory negligence, in the absence of evidence that this was the proximate cause.

CIVIL action, tried before *Lyon, J.*, at February Term, 1917, of LENOIR, upon these issues: (321)

1. Was the plaintiff's person and automobile injured by the negligence of the defendants? Answer: Yes.

2. Did the plaintiff, by his own negligence, contribute to his own injury and the injury to his automobile? Answer: No.

3. What damages, if any, is plaintiff entitled to recover of the defendants on account of injury to his person? Answer: $1,000.

4. What damages, if any, is plaintiff entitled to recover of defendants on account of injury to his automobile? Answer: $150.

From the judgment rendered, defendants appealed.

G. V. Cowper, R. A. Whitaker, and T. C. Wooten for plaintiff.
A. D. Ward and Rouse & Rouse for Construction Company.
Loftin, Dawson & Manning for City of Kinston.

BROWN, J. The first four assignments of error are directed to the right of the plaintiff to recover, in any view of the evidence. All the others are alleged errors in the charge of the court.

(322) The evidence of the plaintiff tends to prove that the defendant company was improving the streets of the city of Kinston under a contract with the city. It had been working on the day in question at the intersection of Washington and McLewean Streets, in order that a gas pipe might be laid. During the night it rained very hard. About 7 o'clock p.m. a pipe burst at the point named and the water flooded the street. Both defendants, or their representatives, received this notice, and the city sent one Wiggins there, who drove a stick in the pipe. One Rukenbaker, the representative of the construction company, went there about 7 o'clock. Seeing Wiggins there, he did nothing more. It further appears that during this work, and as a usual custom, a red light was placed as a warning of danger where any point in the street was left in an unsafe condition, and that a white light was merely an indication that there was some object at that point, and that the vehicles should go around it, all of which was well known and understood by the citizens and the defendants. Witnesses for the plaintiff testified that there was no red light at the excavation, but there was a white light on a pile of sand some distance from the point where the injury took place. Although the two men were sent to the place where the injury occurred at 7 o'clock that night, it appears that, even in the condition of the street at that time, no red light or other danger signal or warning to persons not to pass was placed at that point. The rain accumulated to such an extent later in the night that water completely covered the street at this point, so that there was no difference in appearance of the ditch and the other part of the street, and no one traveling the street could tell that there was a ditch or excavation.

Plaintiff, a physician, was returning home in his automobile. He testifies that he knew the work was going on, and that he looked cautiously down East Street and, seeing no red light, drove ahead at anywhere from 10 to 15 miles per hour. He observed the white

light on the sand pile and drove around it, according to regulations. His automobile plunged into the deep excavation, completely hidden by water, and seriously injured plaintiff and damaged the machine.

Taking these facts to be established, we can see no ground for directing a nonsuit or for charging the jury that there is no evidence of negligence.

It is elementary that the municipal authorities are charged with the duty of keeping the streets of the municipality in a reasonably safe condition, and to that end they are required to exercise a careful supervision over them.

Such authorities must exercise such reasonable supervision over street improvement work as to see to it that proper lights at night are placed at excavations and piles of dirt and other obstructions incident to such work.

This particular city has had a similar experience before, and had to pay for the negligence of its servants in this re- (323) spect. In *Kinsey v. City of Kinston,* 145 N.C. 106, it is held: "It is the positive duty of municipal authorities to keep the public streets in a reasonably safe condition for the use of pedestrians. The city is liable in damages to the plaintiff, who, being accustomed to use its sidewalk in going to and from her work, passed in the morning, and, repassing in the evening about 8 o'clock, was injured by falling into a ditch which had been dug across the sidewalk in the intervening time by a contractor for a private person, with notice to and permission of the city, and left without lights, warning signals, or signs at, near, or upon the ditch."

"While a private person is liable to pedestrians for his negligence in permitting a ditch dug across the public sidewalk of the city to remain after nightfall without lights or other warnings, the city is also liable for negligence, when, after granting the permit, it fails to exercise proper supervision and inspection."

To same effect is *Carrick v. Power Co.,* 157 N.C. 379, where it is held that a municipality cannot absolve itself from liability to supervise the streets when work likely to be dangerous is done on them by an independent contractor. We think these cases settle the liability of both defendants upon the facts presented here.

It is contended by the defendants that the plaintiff is guilty of contributory negligence, upon his own evidence, and that the court erred in not so holding. The defendant contends that plaintiff was driving over 10 miles an hour at the time he fell into the ditch, in violation of a city ordinance. Plaintiff says he was driving 10, 12, or 15 miles an hour. He seems unable to give the rate of speed with any accuracy. But, assuming he drove over 10 miles an hour, it does

not follow that the unlawful speed was the cause of his injury. Plaintiff's negligence would not bar recovery, unless it was the proximate cause of the injury. *Clark v. Wright,* 167 N.C. 646; *Sheppard v. R. R.,* 169 N.C. 239.

The court properly instructed the jury that if there was excessive speed, and that was the proximate cause of the injury, to find there was contributory negligence.

According to plaintiff's evidence, he would have driven into the ditch in any event and been injured, whether driving 10 or 15 miles per hour.

The real cause of the injury was the failure to display the red danger light at the point where the excavation crossed the street.

We have examined the charge, and deem it unnecessary to discuss the several exceptions to it. In our opinion, the case was presented clearly and fairly to the jury.

No error.

Cited: Michaux v. Rocky Mount, 193 N.C. 554; *Rouse v. Kennedy,* 260 N.C. 157.

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(324)

J. H. CASHWELL v. FAYETTEVILLE PEPSI-COLA BOTTLING WORKS.

(Filed 17 October, 1917.)

1. Negligence—Explosives—Pepsi-Cola—Res Ipsa Loquitur.

The fact that a bottle of pepsi-cola, filled under pressure, bursted while being handled by a purchaser for resale, and injured him, does not of itself make out a *prima facie* case of negligence against the vendor who had bottled the pepsi-cola, under the doctrine of *res ipsa loquitur,* in the absence of evidence that he had failed in his duty to exercise proper care and attention in selecting the bottles to be thus used and in subjecting them to the pressure required for the purpose.

2. Same—Inspection—Evidence—Prima Facie Case—Trials.

Where there is evidence that a bottle of pepsi-cola exploded in the hands of a purchaser for resale, and other bottles of the vendor had bursted under similar circumstances; that it was the duty of the vendor's employee, engaged in such work, to inspect the bottles before subjecting them to the pressure required, and it appears that an explosion of bottles so filled does not occur in the largest majority of instances: *Held,* sufficient upon the defendant's actionable negligence in failing to exercise due care in regard to filling and selecting the bottle which exploded and caused the injury, and to raise a *prima facie* case of negligence for the

defendant to meet with his proof; and a motion to nonsuit upon the evidence will be denied.

3. Same—Change of Management—Appeal and Error.

Where, upon sufficient evidence, the jury has found that the plaintiff was injured by the defendant's negligence in furnishing him pepsi-cola improperly bottled, testimony admitted in plaintiff's behalf that the management had since been changed, without suggestion that it was because of the negligence of the former manager, who had nothing to do with the bottling of the mixture, is not sufficient to disturb the verdict on appeal.

4. Trials — Attorney and Client—Law—Argument to Jury—Decisions—Facts.

It is proper for an attorney, in arguing his case to the jury, to read the facts in an opinion of the Supreme Court in another case to the extent necessary to apply the principle of law involved in that case to the facts of the case at bar.

5. Instructions — Court — Improper Remarks—Undisputed Facts—Negligence.

Where it is not seriously disputed that the injury for which damages are sought in the action was caused by the bursting of a bottle of pepsi-cola while being handled by a purchaser for resale, and there is evidence that it had been improperly bottled by the vendor, a statement by the judge in his charge to the jury that the plaintiff was injured by the bursting of the bottle, is not improper, when he correctly tells them that it amounted to nothing unless it was caused by defendant's negligence.

6. Vendor and Purchaser—Contracts—Explosives—Pepsi-Cola—Duty Implied.

Under a contract of sale of pepsi-cola bottled by the vendor, the duty is implied that the seller of the mixture, put up in the bottles and heavily charged with carbonic acid gas, would use care therein proportionate to the risks to others, so as to avoid inflicting a personal injury on them from an explosion of the bottles.

7. Negligence — Contributory Negligence—Evidence—Explosives—Pepsi-Cola.

Where the seller of pepsi-cola has failed in his duty to properly bottle the mixture, and an injury is thereby caused to a purchaser for resale by an explosion of one of the bottles, the circumstances of the injury thus caused are insufficient alone as evidence of contributory negligence on the part of the purchaser.

APPEAL by defendant from *Lyon, J.*, at March Term, 1917, of SAMPSON. (325)

Butler & Herring and J. Abner Barker for plaintiff.
F. M. Wooten and Kenan & Wright for defendant.

WALKER, J. The plaintiff sued for personal injuries caused by the bursting of a pepsi-cola bottle, sold to him by defendant, which

he was handling in his business as a storekeeper. He alleged that the explosion was caused by the defendant's negligence. There was evidence tending to show that while the plaintiff was placing some of the bottles taken from a crate on the shelves of his store, one of the bottles burst, or exploded, and so injured his eye that he lost the sight of it.

The plaintiff insisted that the mere fact of the explosion is sufficient to carry the case to the jury, under the doctrine of *res ipsa loquitur,* but we understand that this fact alone was held to be insufficient as evidence of negligence in *Dail v. Taylor,* 151 N.C. 284, where it appeared that the plaintiff in that case had been injured by the bursting of a coca-cola bottle. Before there can be a recovery for negligence, it must be shown that the person who is sought to be held liable is the author of it has omitted some legal duty which he owed to the injured party. Such breach of duty could be said to exist when a vendor sells goods having a latent defect of a kind likely to cause some physical injury to the vendee, and of which the vendor was aware or which he should have ascertained by proper care and attention (Wharton on Negligence, sec. 774; 29 Cyc., pp. 430-431), and may be referred to the general principle announced in the notable case of *Heaven v. Pender,* 11 L.R. (1882-'83), p. 503, where it was said that "Whenever one person is by circumstances placed in such a position towards another that every one of ordinary sense who did thing would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, duty arises to use ordinary care and skill to avoid such danger." *Dail v. Taylor, supra.* Referring to this statement of the principle, it is said in that case by Justice Hoke: First,
(326) "Considering the case in this aspect, it is very generally held that, in a claim of this character, a plaintiff is not required to establish his case by direct proof, but the issue must be submitted to the jury whenever facts are shown forth in evidence from which a fair and reasonable inference of negligence may be made." Speaking to this question, in Sherman & Redfield on Negligence, sec. 58, the authors say: "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. As already stated, the plaintiff is not required to prove his case beyond a reasonable doubt, though the facts shown must be more consistent with the negligence of the defendant than the absence of it. It has never been suggested that evidence of negligence should be direct and positive. In the nature of the case, the plaintiff must labor under difficulties in proving the fact of negligence, and as that fact is always a relative one, it is susceptible of proof by evidence of circumstances bearing more or less directly on the fact of negligence—a kind of evidence which might be satisfactory in other classes of cases open to clear proof. This is on the general principle of the law of evidence which holds that to be sufficient and satisfactory evidence which satisfies an unprejudiced mind." This statement is cited with approval in the opinion of the Court in *Fitzgerald v. R. R.*, 141 N.C. 530-534, and in that case it was held as follows: "Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances; and if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence." There are instances where this requirement is met by simply proving the occurrence and the resultant injury—a doctrine which finds expression in the phrase, *'Res ipsa loquitur,'* and which has been considered and applied in several recent decisions of this Court, as in *Fitzgerald's* case, *supra; Ross v. Cotton Mills*, 140 N.C. 115; *Stewart v. Carpet Co.*, 138 N.C. 60; *Womble v. Grocery Co.*, 135 N.C. 474." Discussing the principle, *"Res ipsa loquitur,"* it is said, in Labatt on Master and Servant, sec. 843, quoted with approval in some of the cases referred to: "The *rationale* of the doctrine is that in some cases the very nature of the occurrence may of itself, and through the presumption it carries, supply the requisite proof; it is applicable when, under the circumstances shown, the accident presumably (327) would not have happened if due care had been exercised. The essential import is that, on the facts proved, the plaintiff has made out a *prima facie* case without direct proof of negligence."

It was contended by the plaintiff, in *Dail v. Taylor, supra,* that the authorities we have cited above applied to his case, and the mere bursting of the bottle was sufficient to show *prima facie,* at least, that there was negligence on the part of the defendant; but this Court thought that the adoption of that view of the law would not be safe, and that some additional evidence should be required to make out a *prima facie* case for the plaintiff. It was ruled, though,

that where it appeared that bottles of the defendant, filled with coca-cola, had exploded on other occasions, under similar circumstances, it was evidence sufficient to be submitted by the court to the jury on the question of negligence, as it was not merely conjectural, but formed a basis for a reasonably safe inference that the defendant had not exercised that degree of care which the law exacted of him, under the circumstances, and was proof of that kind of probability as to the conduct of the defendant which was mentioned in the decisions of the Court already cited and quoted from. This principle of the law has been clearly recognized and applied in numerous cases. In *Simpson v. Lumber Co.,* 133 N.C., at pp. 101 and 102, we said: "Where the plaintiff shows damage resulting from the defendant's act, which act, with the exercise of proper care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence, which cannot be repelled but by proof of care or of some extraordinary accident which renders care useless. *Aycock v. R. R.,* 89 N.C. 321; *Lawton v. Giles,* 90 N.C. 374; *Piggot v. R. R.,* 54 E.C.L. 228; *Craft v. Timber Co.,* 132 N.C. 151; *Ins. Co. v. R. R.,* 132 N.C. 75. In *Aycock v. R. R.,* 89 N.C. 329, the Court, through Smith, C.J., says: 'A numerous array of cases are cited in the note (2 A. and E. R. R. Cases 271) in support of each side of the question as to the party upon whom rests the burden of proof of the presence or absence of negligence, where only the injury is shown, in the case of fire from emitted sparks.' " See, also, *Currie v. R. R.,* 156 N.C. 419, and the more recent case of *Simmons v. R. R.,* at this term. It is contended by the defendant, though, that the class of cases referring to the emission of sparks from railroad locomotives does not apply here, but we do not see why it does not, when there is added to the fact of the explosion proof of similar occurrences; and the further fact, which is not denied, that in almost the largest majority of instances, where filled bottles are sold in the trade, there have been no such explosions. The fact last mentioned leads fairly and reasonably to the conclusion that there was something wrong or a failure to exercise due care in the filling of the bottles which (328) did explode. As the pressure came from the inside, the explosions have taken place outwardly and scattered fragments of the broken glass in every direction. A jury might form more than a mere conjecture, or a guess, that the bottle had been improperly and carelessly charged with the carbonic acid gas. We do not see how the pressure from exploding gas could be otherwise than outwardly, and the manner in which the bottle exploded, and the effect of the explosion, show that the force applied to the walls of the bottle was internal, and there was nothing there that could have

produced the explosion except the gas. It will be well here to refer to the testimony. Will Harrison testified: "I work for defendant; have been its bottler for 10 years. I and the other boy that works there handle all the bottles. When a car of bottles come to the depot, we take them out of the car, inspect them, one by one, and put them in the crates, with racks—each bottle is in a rack to itself. We throw defective bottles away. We then carry the good ones to the storehouse and store them away until we get ready to use them. We take them out and wash them, rinse them and put them in boxes and carry them over to the machines. When we are washing them, we look through for broken or defective bottles and throw them away. None of them are washed by machinery. When we are ready to fill the bottles, we examine them again and throw away all defective ones. . . . I handle the bottles carefully. I am as careful as I can be. After I have the bottles filled, I take four at a time, hold them between me and a light, look for cracked bottles and trash, and set all defective bottles aside. I never let a defective bottle go through the plant if I know it. I am instructed to look over the bottles and set the bad ones aside. I was bottling for the defendant all of the summer and fall of 1914. No one else bottled while I was there. . . . We do not bottle every day, but we do in the summer and fall. I get sick sometimes; cannot tell who bottles when I am sick. In the carbonator there is water and gas, at the same pressure of 75 pounds. The gas from the drum makes the pressure. You can get as high as 200 pounds of gas from the drum. You could get the gauge so that you could get too much gas. . . . I have noticed, in opening pepsi-cola, that if it is not quite full it makes a louder noise than if it is full. This is caused by gas in the bottle." If there is no reliable evidence in this record of what caused the explosion, and that the cause was an irresistible force from within, which force was the expansion of the gas or an excessive quantity of it, there can be no possible way of proving it. On a motion to nonsuit, the plaintiff is entitled to have the evidence receive the construction most favorable to him, and to have rejected all that is unfavorable, so that the portion of it which tends to support his case may alone be taken into account. Thus viewed, we are of the opinion
that there was evidence of negligence, which was properly (329)
left to the jury by the court, under correct instructions.

We do not think that the evidence as to the single change of management is sufficient to justify a reversal. The witness stated that "the management was changed only once; Mr. Hooker purchased the business in February and put a new manager there, and in 1915 Mr. Hooker put Mr. Parsons there." But we do not com-

prehend how there was any harm done, even if there was a change, as it does not appear, even inferentially, that it was made because of any negligence of Hooker or Parsons. They did not handle the bottles personally, nor was any fault in connection with the explosion imputed to them. The evidence as to the many explosions was clearly admissible. *Dail v. Taylor, supra.* The comments of Mr. Butler on *that* case before the jury were legitimate and proper, as they were intended to show that facts, in law, would constitute negligence, and what was relevant evidence of these facts. He was not reading the facts in that case for the purpose of showing how the jury should find the facts to be in this case. The Court said, in *Horah v. Knox,* 87 N.C. 483: "We are unable to see upon what grounds the course pursued in the argument of counsel, in the particular made the subject of exception, can be deemed an abuse of the right expressly given by statute 'to argue to the jury the whole case, as well of law as of fact' (Rev. Code, chap. 31, sec. 57, par. 15), and more especially under the enlarged privilege conferred by a more recent statute (Laws 1874-'75, chap. 144), as interpreted in *S. v. Miller,* 75 N.C. 73. It is true that the statement of facts contained in an adjudicated case cannot be read to the jury as evidence of their existence in another cause, as pertinent to a pending inquiry, as is declared in *Mason v. Pelletier,* 82 N.C. 40; nor can the writings and opinions of medical experts contained in a written treatise be used as evidence before a jury. *Melvin v. Easley,* 46 N.C. 386; *Huffman v. Click,* 77 N.C. 55. But the reading of the reported case was not for such purposes, but to illustrate a principal of law based upon the supposed, though they may have been actual, facts decided by a Court of high authority. Without the facts, the principle expressed in an abstract form would be of little value in instructing the judicial mind. All treatises upon the law illustrate a legal proposition and challenge its acceptance as correct, by reciting the facts and material circumstances under which it has been held, and the practice of reading from them, as from the report of adjudged cases, is universal and unquestioned in an argument upon a point of law arising in the course of the trial. The privilege of counsel may be abused, but unless grossly abused, the corrective must be left in the hands of the judge who presides and conducts the trial, in the exercise of his sound discretion." That case has since been frequently approved. In *Betts v. Telegraph Co.,* 167 N.C., at p. 81, it is
(330) said: "The objection to Mr. Gatling's statement to the Court of the facts in *Spence v. Telegraph Co.,* which was decided here by a *per curiam* order, is not tenable. Counsel was addressing the court upon a question of law, and trying to show the similarity

between the facts of that case and those of this one, for the purpose of arguing to the court that *Spence's* case was an authority for the position he had taken during the trial of this case below." Counsel was acting strictly within his rights, and the cases of *Horah v. Knox,* 87 N.C. 483; *Harrington v. Wadesboro,* 153 N.C. 437; *Chadwick v. Kirkman,* 159 N.C. 259, and *S. v. Corpening,* 157 N.C. 623, fully sustain the ruling of the Court. In those cases the counsel was reading the facts of another case to the jury for the purpose of applying the law of the case to the one in hand, and it was held proper for him to do so. It was not improper in the judge to state to the jury that it appeared that plaintiff was injured by the bursting of the bottle, because there was no serious dispute as to it being the cause of the injury, but he correctly told the jury that it amounted to nothing unless it was caused by defendant's negligence. How could the defendant have been harmed by such a statement from the court? We have commented already upon some of the other exceptions, in passing on the motion to nonsuit. The testimony of Harrison as to the care he used in the examination of bottles for the detection of flaws likely to cause explosions, and the rejection of the suspicious ones, afforded some additional proof to that of the accident in connection with the explosion itself, and the other explosions that had taken place in the warehouse and elsewhere, to show negligence. There can be no doubt that adequate care should have been used by the defendant in examining, inspecting, or testing the bottles previously to discover any defects liable to cause an explosion, or to increase the probability of one, and to "sniff" the bottles for the purpose of expelling the air, in order that they might be properly filled and charged with the gas, but the latter is of an explosive character and should be carefully handled, so that an excessive quantity may not be introduced, for in such a case a slight rise of temperature might produce sufficient expansion of the gas to cause precisely what happened in this case. The great care exercised by Harrison in his inspection and search for cracks and flaws tends to prove that the explosion came from the inside and not because of any defect in the bottle, and resulted from a too careless use of the gas, or from an overcharge of it. From the contract of sale with the defendant, the duty was implied that the seller of the pepsi-cola, put up in bottles and heavily charged with a dangerous and explosive substance, such as carbonic acid gas, would use care and diligence, proportional to the risk of injury, to see that his customer was not unduly exposed to the danger of the bottles bursting and inflicting personal injury. The law is thus stated in 29 Cyc. at pp. 479, 480: "The manufacturer or vendor who deals with (331)

an article imminently dangerous in kind owes to the public a positive and active duty of employing care, skill, and diligence to limit that danger. In such case the liability does not rest upon the ground of warranty, although a warranty may afford an element of the tort by putting the party injured off his guard and so rendering the negligence effective. Nor does it depend on privity of contract, but arises from a duty not to expose the public to danger. Articles of the kind under consideration are *dangerous chemicals, explosives,* poisons, or dangerous drugs. But where the proper care has been used, no liability attaches, nor where the injury occurs through a use of the article other than that for which it was furnished." It is said, at p. 478, that the duty of the seller to exercise proper care in respect to dangerous articles is enhanced in the case of these persons with whom he has contracted, and if the wrongful act be not imminently dangerous to life or property, the negligent vendor is liable only to the party with whom he has a contractual relation. But however this may be, we think that in this case there was some evidence for the jury on the question of negligence, and even strong evidence, that the bottle was excessively filled with gas.

There was no sufficient evidence, in law, to show any contributory negligence of the plaintiff. No obvious danger was presented to him, in the presence of which he continued to handle the bottles, when a man of ordinary prudence and discretion would have refrained from doing so. He had the right to rely on the assurance that the defendant had performed its duty and so inspected and filled the bottle as to prevent any such catastrophe as has resulted in the loss of his eye, or at least reduced the danger to such a minimum as could be attained by the exercise of proper care and caution. A seller may not have knowledge of a danger lurking in his goods, but this lack of knowledge may be produced by his failure to exercise proper care to acquire it; and knowledge is not an essential or requisite element of liability for the consequence, if the dangerous character of the goods could be eliminated by the use of that degree of care which the law requires of him under the circumstances. Abstract propositions of law, not pointed to the facts of the particular case, or not pertinent to them, very often are misleading, and should not be given to a jury for guidance to a correct verdict. There are some other exceptions, but we think that we have fully covered the ground with respect to those having any merit. The material issues and contentions of the respective parties were carefully set forth by the learned judge, and his charge to the jury is free from any just criticism. He was entirely fair to both parties, and so put the case before the jury that there could be no possible misconception

as to the real subject of inquiry or as to the evidence and the law bearing thereon. We are disposed to believe that, upon (332) all the issues, the court was more than fair to the defendant, and the latter has no reasonable grounds for complaint. The charge embraced every essential feature of negligence, contributory negligence, assumption of risks, and damages, and applied the law correctly in every instance.

We have discovered no error in the case, or record, and must therefore decline to dismiss the action or award a new trial, for which the defendant has asked.

No error.

Cited: Avery v. Palmer, 175 N.C. 382; *Grant v. Bottling Co.,* 176 N.C. 259; *Matthis v. Johnson,* 180 N.C. 132; *Newton v. Texas Co.,* 180 N.C. 567; *Freeman v. Ramsey,* 189 N.C. 797; *Lamb v. Boyles,* 192 N.C. 543; *Perry v. Bottling Co.,* 196 N.C. 177; *Broom v. Bottling Works,* 200 N.C. 57; *Broadway v. Grimes,* 204 N.C. 627; *Corum v. Tobacco Co.,* 205 N.C. 215; *Thomason v. Ballard & Ballard Co.,* 208 N.C. 4; *Enloe v. Bottling Co.,* 208 N.C. 308; *Stroud v. Transportation Co.,* 215 N.C. 729; *Calhoun v. Light Co.,* 216 N.C. 259; *Evans v. Bottling Co.,* 216 N.C. 717; *Ashkenazi v. Bottling Co.,* 217 N.C. 553; *Caudle v. Tobacco Co.,* 220 N.C. 110; *Davis v. Bottling Co.,* 228 N.C. 34; *Grant v. Bartlett,* 230 N.C. 659; *Gas Co. v. Montgomery Ward & Co.,* 231 N.C. 274; *Childress v. Motor Lines,* 235 N.C. 530; *Styers v. Bottling Co.,* 239 N.C. 507; *Graham v. Bottling Co.,* 257 N.C. 194; *Jenkins v. Hines Co.,* 264 N.C. 85.

LANIE LEHUE v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 17 October, 1917.)

1. Telegraphs — Negligence—Contracts—Torts—Mental Anguish—Interstate Messages.

An action will lie against a telegraph company failing in its public duty to promptly transmit and deliver a telegram, both in contract or tort; and where the message is intrastate, mental anguish is a legal ground for recovery of actual damages.

2. Same—Measure of Damages.

In an action against a telegraph company to recover damages for its negligent delay in the transmission of a message, the injured party may sue either in contract or tort, the measure of damages in the former being confined to such as were in the reasonable contemplation of the parties

at the time the contract was entered into; and in the latter, such as were reasonably probable under the relevant facts existent at the time of tort committed.

3. Same—Transmittal of Money—Pleadings—Demurrer.

In an action against a telegraph company to recover damages for its negligent delay in transmitting by telegraph money sent by a husband to his wife with which to return home by train, it was alleged in the complaint that the defendant had been informed through its agents that the wife was away from home without money; that the telegram had been promptly transmitted, and while it was in the defendant's office at the terminal point, the wife, the plaintiff in the action, received another message from the defendant, transmitted from a different place from that of the first message, but in the same line of travel, announcing the death of her mother, stating the time and place of burial; that she would have attended the funeral of her mother except for the negligence of the defendant in not giving her the money, and that she had had a conversation with defendant's agent after the telegram of transmittal had been received and in time to have attended the funeral: *Held*, a case for the jury as to whether there was negligence by defendant, the proximate cause of plaintiff's injury.

CIVIL action, heard on demurrer to complaint, before (333) *Devin, J.*, at March Term, 1917, of WAKE.

The action was to recover damages, including that for mental anguish, caused by alleged negligence of the defendant in failing to deliver a telegram.

Judgment overruling the demurrer, and defendant excepted and appealed.

Douglass & Douglass for plaintiff.
Pace & Boushall and A. T. Benedict for defendant.

HOKE, J. It is well established in this jurisdiction that, in proper instances, damages for mental anguish can be recovered for negligent failure to deliver an intrastate message, and that in case of public-service companies an action therefor will lie, either in contract or tort. *Penn v. Telegraph Co.*, 159 N.C. 306; *Va. Peanut Co. v. R. R.*, 155 N.C. 148; *Bright v. Telegraph Co.*, 132 N.C. 317.

In the former case the positions held to be controlling with us are stated as follows:

"Under certain circumstances, substantial damages for mental anguish may be recovered against a telegraph company for wrongful and negligent failure to deliver or correctly transmit a telegraphic message, independently of bodily or pecuniary injury by the sender, addressee, or the beneficiary whose interest therein has been sufficiently made known to the company. Damages for mental

anguish are permitted to be recovered in this State, not only as a rule of interpretation and adjustment of the rights of the parties growing out of the contract between them, but because of our public policy, adopted and recognized as necessary to enforce the proper performance of duties incumbent on telegraph companies as public-service corporations. A party entitled to recover damages from a telegraph company for its failure in its duty to transmit and deliver a message may bring his action either in contract or in tort."

The second case was a suit against a railroad company for negligent delay in the shipment of goods, and, on the character of the action that could be brought, the same general principles were presented and approved.

In the latter action Associate Justice Allen, in his concurring opinion as to the right to sue in tort, quotes with approval from *Merritt v. Earle,* 29 N.Y. 122: "The liability of a common carrier does not rest in contract, but is imposed by law. It exists independently of contract, having its foundation in the policy of the law, and it is on this legal obligation that he is charged as carrier for the loss of property entrusted to him"; and later, in his opinion, proceeds as follows: "We have, then, in the case of a ship- (334) ment of freight, a contract between the shipper and the carrier, by which the carrier has agreed to transport and to deliver, and the law has imposed on the carrier the duty to carry safely and to deliver within a reasonable time; and our next inquiry is, what is the remedy for a breach of the duty imposed by law? I think the shipper may, at his election, sue in contract or in tort. He may treat the obligation imposed by law as entering into and becoming a part of the contract of carriage, in which event his action would be for breach of contract, or he may sue for a breach of the public duty, which has caused him special damage, and his action would be in tort. Elliott on Railroads, Vol. 4, sec. 1693, says: 'Where there is a breach, both of contract and of duty imposed by law, as in case of loss or injury by a common carrier, the plaintiff may elect to sue either in contract or in tort.' "

A perusal of these and other authorities on the subject will disclose, too, that one principal difference as to admeasurement of damages in the two classes of actions is, that in contract the damages were such as were in the reasonable contemplation of the parties at the time the contract is entered into, while in tort they are reasonably probable under the relevant facts existent at the time of tort committed.

In the *Peanut Company* case there had been a shipment of machinery from Petersburg to Williamston, N. C., and there was negli-

gent delay in transit while the goods were at Rocky Mount, continued and persisted in after full notice of special circumstances which made additional damages likely.

In the opinion the Court said: "This, then, being the position of the parties, if the nominal consignee and the president of the company gave the notice embodied in the proposed evidence, and there was negligent delay on the part of the defendant, after being afforded full and reasonable opportunity to correct the wrong, such negligence would constitute a tort, giving plaintiff the right to recover damages on facts as they then appeared. This is one principal difference in the elements of damages obtaining in breach of contract, and consequential damages arising from a tort. In the one case damages are recovered, as a rule, on relevant facts in the reasonable contemplation of the parties at the time the contract is made, and in the other on the facts existent or as they reasonably appeared to the parties at the time or tort committed."

While that was a railroad case, the governing principle is the same, giving the right to sue in tort when there is a breach of contract involving the breach of a duty growing out of the exercise and enjoyment of a public of *quasi* public franchise.

On application of these principles to the facts stated in the complaint and admitted by demurrer to be true, the judgment of the court is clearly correct. From these facts it appears that early
(335) in the morning of 22 November, 1915, plaintiff's husband, at Raleigh, N. C., remitted to plaintiff at Black Mountain, N. C., a telegraphic order for $11.45 with which to pay her fare to Raleigh, to which place she was ready and expecting to go; that the message was promptly sent and received by defendant's agent early in the morning of 22 November, and was not delivered until the middle of the day on 23 November, causing plaintiff to remain at Black Mountain till that time, without money or funds, etc., to her great damage; that at 3 o'clock p.m., while plaintiff was awaiting and expecting money from her husband to enable her to leave for Raleigh, N. C., at 4 p.m., she received a message from Falkland, N. C., announcing the death of plaintiff's mother, to be buried at that place on 23 November, and for lack of said remittance so negligently withheld she was prevented from attending her mother's funeral, to her great damage and mental anguish, etc.

The complaint then proceeds further, as follows:

"That, as plaintiff is informed and believes, the order to pay the plaintiff the sum of $11.45 was promptly sent from Raleigh and duly received by the defendant at Black Mountain early Monday morning, 22 November, to-wit, shortly after 8:30 a.m. of said day,

and that the defendant knew by the sending of the said amount by the plaintiff's husband by telegraph order, and by information given by plaintiff's husband at the time of the sending of said order, that plaintiff had no money with which to pay transportation, and that defendant further knew that when plaintiff received the message announcing the death of her mother, that she had no money for transportation and other expenses, in order that she might attend said funeral, and yet at the same time defendant had in its possession at Black Mountain the said sum of $11.45 and negligently and carelessly failed to notify the plaintiff or to pay over to her the said amount, notwithstanding that plaintiff was in the office of defendant on the afternoon of 22 November, at Black Mountain, and had a conversation with the operator and agent of defendant; that on account of the negligence and carelessness of the defendant in withholding the money sent by telegraph order from Raleigh, which defendant knew was for transportation, and especially withholding same and failing to give plaintiff notice that the same had been received at Black Mountain, after defendant knew that plaintiff had received a message announcing the death of her mother, and when defendant well knew that plaintiff had no money to pay railroad fare, the plaintiff was greatly inconvenienced, harassed, worried, humiliated, and suffered great mental anguish in being prevented from attending her mother's funeral and burial, and has been injured and damaged in the sum of $5,000."

While the defendant company did not know that plaintiff would need this money for the purpose of attending her (336) mother's funeral at the time of the contract entered into for sending the message, here are allegations that defendant, knowing that she was without funds and that she had received a message announcing her mother's death, negligently and carelessly failed to give her the money or notify her it was there, though she was in the office of the company on the afternoon of 22 November and had a conversation with the company's agent and operator. If these allegations are established at the time it would constitute a tort on the part of the company and justify an award of any direct damages for reasonable additional expenses incident to plaintiff's prolonged stay at Black Mountain, and also for mental anguish for being prevented from attending her mother's funeral, if that was in consequence of the company's default, and such consequence, in the judgment of the jury, was reasonably probable under all the facts as they existed at the time of tort committed.

There is no error, and this will be certified, that the case be proceeded with in accordance with this opinion.

Affirmed.

JOHN W. BROWN ET ALS. V. ÆTNA LIFE INSURANCE COMPANY.

(Filed 17 October, 1917.)

Insurance—Policy—Assignments—Children of Two Marriages—Descriptio Personarum.

Where the insured has assigned his policy of life insurance to the children of himself and his wife by a second marriage, giving his own name and that of such wife, and it appears that at the time he had children by both marriages, the naming of himself and his second wife are words *descriptio personarium*, and only the children of the second marriage may take under the terms of the assignment upon the maturity of the policy by the death of the insured.

CONTROVERSY without action, submitted to *Devin, J.*, at June Term, 1917, of WAKE.

From judgment for plaintiffs, defendants appealed.

B. S. Royster for plaintiff.

Tasker Polk and Murray Allen for defendants.

BROWN, J. The defendant insurance company issued a policy upon the life of William T. Johnson, now deceased, which was assigned by insured in these words:

"For value received, I hereby transfer, assign, and turn
(337) over unto the children of William T. Johnson and Bettie Hall Johnson all my right, title, and interest in policy No. 269047, issued by the Ætna Life Insurance Company of Hartford, Conn., on the life of William T. Johnson, and all benefits and advantages to be derived therefrom."

The deceased was married twice, Bettie Hall Johnson being his second wife, by whom he had three children, who are defendants. The plaintiffs are the three children by his first wife, who sue to recover half the proceeds of the policy, which they allege were wrongfully paid to codefendants.

We are of opinion that the judge below erred in holding that plaintiffs are equally entitled with the codefendants.

The words, "William T. and Bettie Hall Johnson," are *descriptio*

personarum, and only the children of both, and not the children of each, answer this description. The child of William T. and Bettie H. Johnson would undoubtedly mean the *child* of both, and not the child of one only. The use of the plural, *children,* should have no effect upon the modifying language.

If it was the purpose of the assignor to assign the policy to his six children, why add the words, "and Bettie Hall Johnson"? They are clearly unnecessary, if such was his purpose. Had he not added those words, all his children would take under the assignment.

This is the view of the Supreme Court of Massachusetts in *Crapo v. Pierce,* 187 Mass. 141, wherein it was held that the expression, "the children of said F. and wife," as used in a will, meant only the children of their marriage, and did not mean the children of each of them, so that the child of F. by the former marriage was excluded from the distribution.

The Court says: "If she had said the children of 'said Frederick,' and gone no further, those born of both marriages would have been included; but the qualifying words, 'and wife,' are used and constitute a limitation which cannot be rejected, and narrows the gift. The whole phrase, then, should be read collectively as she used it, and not distributively to mean the children of Frederick and the children of Anna. *Luce v. Harris,* 79 Pa. St. 432; *Gelston v. Shields,* 78 N.Y. 275. By this interpretation the words plainly identify 'children' to be the issue of Frederick by 'his present wife,' and do not include the appellant." To the same effect are *Evans v. Opperman,* 13 S.E. 312; *Ins. Co. v. Clough,* 68 N.H. 298; *Lockwood v. Bishop,* 51 How. Pr. N.Y. 221.

The point appears to have been heretofore decided by this Court in *Davenport ex parte,* 75 N.C. 176. In that case there was a devise as follows: "I give to Chloe D. and husband, and Catherine H. and husband, and Alfred D. and wife, . . . my tract of land, . . . etc. The said Chloe and husband, and Catherine and (338) husband, and Alfred and wife, to hold their part of said land during their lives, and then to their children."

"The court held that only the children of Catherine Harrell begotten by Henry Harrell, the children of Chloe Davenport begotten by David Davenport, and the children of Alfred Davenport by his wife Penelope, are entitled, and not the children of said Catherine, Chloe, and Alfred generally."

If there were no children in existence who could answer the description of "the children of William T. Johnson and Bettie Hall Johnson," in the sense of being the children of their marriage, this assignment might be subject to the construction contended for by the plaintiffs. This situation arose in *Cooper v. Cannon,* 62 N.C. 83.

The testator directed that property remaining at the death of his wife should be "divided amongst our next of kin." It appeared that there were persons who were next of kin to the husband, and there were persons who were next of kin to the wife, but there were no persons who were next of kin to both husband and wife. It was held that the estate must be divided into two equal parts, and one part distributed among the next of kin to the husband and the other part among the next of kin to the wife. But the Court said: "If there were persons next of kin to both husband and wife, they would fit the description, *our* next of kin, and they would take the whole."

There are a few cases, such as *Stigler v. Stigler,* 77 Va. 163, that give color to the contention of plaintiffs. The *Stigler* case has been clearly distinguished by the Supreme Court of Texas in *Evans v. Opperman, supra,* but the great weight of authority is in line with our own Court.

Reversed.

UNIVERSITY OF NORTH CAROLINA v. ANDREW MARKHAM ET AL.

(Filed 17 October, 1917.)

Descent and Distribution—Statutes—Illegitimates.

Rule 10 of Descents, Revisal, sec. 1556, providing that "illegitimate children shall be considered legitimate as between themselves and their representatives, and their estates shall descend accordingly in the same manner as if they had been born in wedlock," refers by express terms to Rule 6, so far as it relates to the mother of the *propositus*, which provides that where "the person last seized shall have left no issue capable of inheriting, nor brother, nor sister, nor issue of such, the inheritance shall vest in the father, if living, if not, then in the mother, if living"; and where one is claiming the inheritance through a legitimate line of ancestry and through the legitimate mother of an illegitimate *propositus*, the fact that the mother was living at the death of her illegitimate child is made a condition precedent under Rule 6 to the vesting of the estate, and the claimant cannot recover should the *propositus* have outlived the mother.

CIVIL action tried before *Devin, J.,* at March Term, 1917, (339) of WAKE.

This action was brought by the University of the State against defendants to recover a lot in the city of Raleigh, N. C., at the northeast corner of Swain and Davie streets, where they intersect each other, which land is fully described in a certain deed reg-

istered in the county of Wake (Book 214, p. 160), where the metes and bounds are given. There was a judgment against the defendants, heirs at law of Jane Stallings, who had been made parties to the action by publication of the summons, as directed by the statute. The defendants Andrew and wife, Annie Markham, were allowed to withdraw without the payment of costs. After this judgment was entered, C. E. Cope, claiming to be the heir at law of Jane Stallings, moved, upon affidavit, alleging the fact that he be made a party defendant in order that he might assert his right and title to the land as against the University, which claimed the land by escheat, and upon this motion the following judgment was rendered, the facts being recited therein:

This cause came on to be heard before W. A. Devin, judge, at the March Term, 1917, of the Superior Court of Wake County, upon motion of C. E. Cope by his attorney, Robert C. Strong, that he be made a party and to set aside the judgment theretofore rendered in favor of the University and against the defendants, to the effect that the lands of Jane Stallings, the *propositus*, had escheated to the University of North Carolina upon the ground that the *propositus* was illegitimate, died intestate, and without heirs at law. C. E. Cope claimed the land as the heir at law of Jane Stallings, deceased. The plaintiff denied that C. E. Cope was an heir at law of Jane Stallings, deceased, admitting the allegations contained in the affidavit, and the answer proposed to be filed by C. E. Cope in this cause, for the purpose of this motion, and as if upon demurrer. The allegations, admitted as aforesaid, and having a bearing upon the question which is presented by the motion are as follows:

"C. E. Cope alleged that the said Jane Stallings was an illegitimate child of Charity Stallings; that the said Charity Stallings died intestate before Jane Stallings, without other issue or representative thereof, and without brother or sister, excepting one sister, who married John King; that of this last marriage, Margaret, the mother of the defendant C. E. Cope, was born; that Charity Stallings and Mrs. King were born of the same parents in lawful wedlock; that Margaret Cope was the legitimate child of Mrs. King; that C. E. Cope is the legitimate child of Margaret, and that Jane (340) Stallings, the *propositus*, had no issue, and died intestate. Margaret Cope is dead, without leaving a last will or testament."

The court found that, taking the allegations of the proposed answer and affidavit as above set forth to be true, C. E. Cope had not shown that he has "a probable cause of action," in that, as matter of law, he is not an heir at law of Jane Stallings, and therefore, and upon that ground only, the motion was denied.

Judgment was rendered for the plaintiff, to which C. E. Cope excepted and appealed.

The foregoing is settled as the case on appeal.

W. A. DEVIN, *Judge.*

Appellant not represented in this Court.
Robert C. Strong for defendants.

WALKER, J., after stating the case: There is a question in this case as to whether all necessary parties are before the court, but as the point was not made and we consider it quite immaterial in view of our opinion upon the other matter, we will omit any further reference to it.

We agree with Judge Devin, who presided at the hearing, that C. E. Cope has no interest in the property which he claims. The claimant derives his right, if he has any, solely through his mother and grandmother by descent, and his claim is based upon the contention that his grandmother inherited from her sister, Charity Stallings, who was a legitimate child. Descents in this State are regulated, not by the common law, but by our statutes (Revisal, chap. 30) and amendments thereto *(Sawyer v. Sawyer,* 28 N.C. 407), not intimating, though, that even at common law the claimant could succeed in establishing his title. The case is controlled by Rules 6 and 10 of the Statute of Descents, Revisal, sec. 1556. It must be understood that Jane Stallings, who purchased the land and was the illegitimate child of Charity Stallings, is the *propositus,* or source of the title; the stock of descent began with her, and the claimant must trace his title to her by some rule authorizing him to do so. Jane Stallings left no issue, brother nor sister, nor issue of such, and she survived her mother, who left a legitimate sister of the whole blood (Mrs. King), and it is through a supposed course of descent from Jane Stallings (illegitimate) to her mother, Charity Stallings (who was not living at the time of Jane's death), and then to Mrs. King, and from her to her daughter Margaret Cope, and from the latter to her son C. E. Cope, that the latter claims to have derived title to the land, Mrs. King and Mrs. Cope being dead.

With these facts before us, it is well to refer to our statute
(341) on the subject, which is Rule 10 of Revisal, sec. 1556, relating to descent from and among illegitimates, which provides: "Illegitimate children shall be considered legitimate as between themselves and their representatives, and their estates shall descend accordingly, in the same manner as if they had been born in wedlock. And in case of the death of any such child or his issue without leaving issue, his estate shall descend to such person as would in-

herit if all such children had been born in wedlock: *Provided,* that when any illegitimate child shall die without issue, his inheritance shall vest in the mother in the same manner as is provided in Rule 6 of this chapter."

It will be seen from this literal recital of the statute that illegitimates are deemed, in law, legitimate as between themselves and their representatives, and their estates descend accordingly—that is, as if they had been born in wedlock. There is nothing dubious about this part of the statute, but, on the contrary, its language is plain, direct, and perfectly intelligible. The statute, therefore, further provides that where there are legitimate and illegitimate children of the same mother, and one of them, whether of one class or the other, shall die without leaving issue, or if having issue, one or more of such issue should die without leaving issue, the descent will be the same as if all of the children had been legitimate, or born in lawful wedlock. But this does not exhaust the provisions of the statute, as the course of descent is further extended, so as to direct the inheritance from an illegitimate if he dies without issue, and in that event his mother takes from him, in the same manner as provided in Rule 6. We, therefore, turn to that rule and find that the inheritance will only vest in the mother when she is living at the death of her child, as the following language plainly shows: "Collateral relations of the half blood shall inherit equally with those of the whole blood, and the degrees of relationship shall be computed according to the rules which prevail in descents at common law: *Provided,* that in all cases where the person last seized shall have left no issue capable of inheriting, nor brother nor sister, nor issue of such, the inheritance shall vest in the father if living, and if not, then in the mother *if living.*"

It is said in *Sawyer v. Sawyer,* 28 N.C. 407: "If the *propositus* had died without leaving any one who could succeed to the inheritance, but collaterals on the part of the mother, the land would have escheated to the University." The child of Zelia Sanderson was the *propositus* in that case, and was legitimate. She acquired her estate by devise from her grandmother, and was, therefore, a purchaser —as Jane Stallings was in this case. It is true that the *Sawyer* case was decided upon a construction of another part of the statute (Rule 5), but the language we have quoted is relevant also to this discussion. The mother can inherit from her child only when she survives the child. The word "if" is one of condition, and (342) the estate will not vest if it is not complied with, it being, in this case, a condition precedent.

Rule 9 has no application to our facts, as it relates to descents from the mother to her illegitimate child, or its descendants, in de-

fault of legitimate issue, and excludes the illegitimate child and its descendants from inheriting, as representative of its mother, any part of the estate of her kindred, either lineal or collateral. It manifestly has no bearing upon our case, as this inheritance proceeds from the child and not from the mother, being, therefore, the reverse of the one mentioned in Rule 9.

The cases cited by the learned counsel for the claimant, C. E. Cope, are not in point. *Kenney v. R. R.*, 167 N.C. 14, was decided upon Revisal, sec. 137, as to the distribution of the personal property of an illegitimate child, which is differently worded, and throws no light upon the subject. In that case the only point decided as to the distribution was that the half-brothers and the sister of the deceased, who was illegitimate, will take from him, this being within the spirit and according to the very letter of the section. *Powers v. Kite*, 83 N.C. 156, is equally foreign to the facts appearing in this record. The decision there was confined to Rule 8, which provides: "When any person shall die, leaving none who can claim as heir to him, his widow shall be deemed his heir, and as such shall inherit his estate." Revisal, sec. 1556. The Court referred to Rule 11, now Rule 10, only for the purpose of showing that Silas Powers' widow could not inherit from him, as he had a sister, who was legitimate and his heir, under that section. This excluded his widow as heir, under Rule 8, as she could be his heir *only* when there was no one who could claim as heir to him. *Arrington v. Alston*, 4 N.C. 727; *Flintham v. Holder*, 16 N.C. 345; *McBryde v. Patterson*, 78 N.C. 412.

Our case is different from all those relied on by counsel. Rule 10 plainly provides that the mother shall be heir to her illegitimate child only in the event that she outlives him. It is like limitations in wills and deeds, which have frequently been before us for interpretation, where real property is given to one for life and then to another if living at the death of the life tenant. We have always held that the second estate is a contingent remainder and will not vest unless the person to whom it is given is living at the expiration of the particular estate. "A conveyance of land to the wife for life, with remainder over after the expiration of her life estate to the children of her present marriage, now or that are hereafter born thereof, and the lawful descendants of said children 'that are living at her death,' does not convey a vested interest to the remaindermen at the time of its execution, but a contingent one, to be vested in such as are alive at the designated time and then fill the description." *James v. Hooker*, 172 N.C. 780. See, also, *Vinson v.*
(343) *Wise*, 159 N.C. 653; *Latham v. Lumber Co.*, 139 N.C. 9; *Bowen v. Hackney*, 136 N.C. 187; *Whitesides v. Cooper*, 115

N.C. 570; *Watson v. Smith,* 110 N.C. 6; *Irvin v. Clark,* 98 N.C. 437.

We are of opinion, therefore, and so decide, that the claimant, C. E. Cope, is not an heir of Jane Stallings, and therefore has no interest in the action which entitles him to have the judgment set aside for the purpose of allowing him to file an answer contesting the plaintiff's rights.

Affirmed.

Cited: Wilson v. Wilson, 189 N.C. 88; *Bryant v. Bryant,* 190 N.C. 374; *Pappas v. Crist,* 223 N.C. 268; *Bd. of Ed. v. Johnston,* 224 N.C. 88.

EX PARTE GARRETT ET ALS.

(Filed 17 October, 1917.)

Judicial Sales—Partition—Increased Bid—Statutes—Rights of Purchaser.

Where the court has sold lands upon petition of tenants in common, and no objection to the price the lands brought, or increase of the bid has been made within the twenty days allowed by the statute (Revisal, sec. 2513), and the purchaser moves promptly for confirmation, an increased bid, made thereafter and subsequent to the purchaser's motion to confirm the sale, does not defeat the purchaser's right to his deed, and his motion should be allowed, as a matter of right, under the express terms of the statute. *Upchurch v. Upchurch,* at this term, cited and applied.

APPEAL by R. S. Jones from *Devin, J.,* at May Term, 1917, of WAKE.

This is a special proceeding or the sale of land for partition.

An order of sale was made, according to the prayer of the petition, on 27 November, 1916, and pursuant thereto the land was sold on 2 January, 1917, when the appellant, Robert S. Jones, was the last and highest bidder, at the sum of $1,200.

The commissioner filed his report of sale on 3 January, 1917, in which he reports, among other things, "That the sale was fair and open and well attended, and he recommends that, unless the bid is raised within twenty days, that the sale be confirmed and title made to the purchaser."

The bid was not raised within the twenty days, nor was any exception filed to the report of the commissioner, and on 24 January, 1917, the purchaser, Robert S. Jones, who was ready, able and will-

ing to comply with his bid, appeared before the clerk and demanded that the sale be confirmed.

Thereafter the commissioner reported that one Lee Richards was offering to raise the bid to $1,500.

The clerk entered judgment confirming the report, upon the ground that the purchaser had the legal right to pay his bid and to receive the title to the land.

The petitioners appealed to the judge of the Superior
(344) Court, who reversed the judgment of the clerk, and ordered a resale of the land, and the purchaser appealed to the Supreme Court.

Peele & Maynard for petitioners.
J. C. Little for R. S. Jones, purchaser.

ALLEN, J. The statute regulating the confirmation of sales in partition proceedings (Rev., sec. 2513) was fully considered, at the last term, in *Upchurch v. Upchurch,* and Justice Hoke, speaking for the Court, then said, upon facts presented by this record: "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."

The reasons for adopting this construction of the statute are stated in the opinion, and it may be added that parties will be encouraged to buy, and the proceeds of sale increased, if it is known that the highest bidder may have his rights definitely settled within the time fixed by the statute.

It may also be noted that in all special proceedings, except for partition, in which a report is to be filed, the statute (Rev., sec. 723) provides that if no exception is filed to the report within twenty days the court *may* confirm the same, on motion of any party, while in the statute before us, referring to partition, the word used is *shall,* thus indicating a purpose to distinguish between the two, and in one case resting a discretion in the court, and in the other making it obligatory to act.

All the parties to this record are adults, and their attorney, who conducted the sale as commissioner, gave notice that the sale would be confirmed if no advance bid was made within twenty days, and the purchaser moved promptly for confirmation of the report.

If the petitioners had entered into a written contract to sell for $1,200, the court would have compelled performance, in the absence of fraud or mistake, which is not alleged, although some one had offered the increased price of $1,500, and they are in no better condition when they have asked the court to sell for them and the purchaser has complied with the statute under which they sell.

The judgment of the Superior Court is reversed, with directions to enter judgment in accordance with this opinion, (345) the purchaser's rights being determined by the record as it stood when his motion to confirm was made.

Reversed.

Cited: Perry v. Perry, 179 N.C. 448; *McCormick v. Patterson,* 194 N.C. 219.

IN RE STATE EX REL. S. B. McLEAN, SOLICITOR, v. JAMES H. JOHNSON.

(Filed 17 October, 1917.)

Attorneys at Law—Disbarment—Statutes.

An attorney who has had sentence suspended for violating the prohibition law with respect to the sale of vinous liquors, has afterwards been convicted, and appealed, with sentence affirmed, been pardoned by the Governor, and continued the acts of violation, will be disbarred from the practice of the law as one "unfitted to be trusted in the discharge of his profession." Revisal, sec. 211.

APPEAL by defendant from *Connor, J.,* at Fall Term, 1917, of CUMBERLAND.

This proceeding, to disbar the defendant, was in this Court (171 N.C. 799), and the ruling below, that the Superior Court had no jurisdiction, was reversed. It now comes up on appeal by the solicitor from a ruling that the facts found are not sufficient to justify disbarment of defendant.

The court found as facts that the defendant, while holding license to practice law, was convicted by a jury in the Superior Court of Cumberland, at August Term, 1913, of selling wine contrary to law; that at said term there were at least four of these

cases in which he pleaded guilty, or was convicted, or entered a plea of *nolo contendere;* that at May Term, 1914, of said court, he was again convicted of selling wine contrary to law, and was fined $500, "with the understanding that the defendant is to sell out his place of business and move from that neighborhood, and that he is not to engage in the manufacture of wine in any place in North Carolina." He was further required to give bond to appear for two years and show that he had not violated the laws of North Carolina. Said judgment was not complied with by the defendant, and he failed to pay the fine imposed. He did not sell out his place of business nor move from the neighborhood, and has failed to appear at the terms of court to show good behavior, as provided in the judgment.

At May Term, 1915, of Cumberland, the defendant was again convicted of selling wine contrary to law, and was sentenced to three months in jail and to be put to work on the public roads. On appeal, the conviction was sustained *(S. v. Johnson,* 170 N.C. 685), but the defendant received a pardon from the Governor, conditioned
(346) on his good behavior. Disregarding the conditions, at August Term, 1916, of Cumberland, he was again convicted of selling wine contrary to law, but he was not sentenced, and prayer for judgment was continued, under a bond to appear from time to time and show good behavior. From refusal to disbar the defendant, the State appealed.

Attorney General for the State.
No counsel for defendant.

CLARK, C.J. The court found as a fact that as to the several convictions prior to May, 1915, the defendant believed that he had a right to sell, on the ground that the local prohibition law of Cumberland (under which the manufacturer had the right to sell wine made from grapes grown on his own land, in quantities of not more than two gallons) had not been repealed by Revisal, 2061, the State Prohibition Law, which had been ratified on a referendum to the people of the State by a majority of 44,000 votes, and that he had been so advised by an ex-solicitor. This Court has observed, "Ignorance of the law excuses no one, and the vicarious ignorance of counsel has no greater effect." *S. v. Downs,* 116 N.C. 1066; *S. v. McLean,* 121 N.C. 601. As the defendant was a lawyer himself, there was all the less excuse for his basing his disregard of the law upon his ignorance. However, he had the full benefit of this defense, for in all the convictions prior to May, 1915, no sentence whatever had been imposed upon him.

The conviction of May, 1915, was after he had been enlightened, but he procured a pardon from the Governor from that sentence, upon condition of his observing the law thereafter. Notwithstanding the continued and remarkable leniency shown the defendant, he was again convicted, in August, 1916.

When this case was here before *(S. v. Johnson,* 171 N.C. 799), the Court held that Revisal, 211, is still in effect, and that the act of 1907, chap. 941, was merely additional and not a repeal thereof. Revisal, 211, reposes in the courts specific authority to disbar an attorney who has "been convicted, or in open court confessed himself guilty, of some criminal offense showing him to be unfit to be trusted in the discharge of the duties of his profession." The law is an honorable career, and in no profession should the moral tone be higher; in none is the average of ability greater and the confidence reposed by the public more implicit. To a marked extent the government of the country is committed to their care, and almost entirely as to the courts. The defendant, as a lawyer, took an oath to "maintain and support the Constitution and the laws."

In England and in many States of this country there is an "habitual criminals statute," under which persons who have (347) been convicted formerly of the same offense are punished more severely than for a first offense *(Moore v. Missouri,* 159 U.S. 673; 1 McClain Cr. Laws 528), and this has been held constitutional *(Sturtevant v. Com.,* 158 Mass. 598; *McDonald v. Mass.,* 180 U.S. 311; 12 Cyc. 949). In this State this provision (Revisal 3249) applies, especially on a second conviction of larceny (Revisal 3500, 3506; *S. v. Davidson,* 124 N.C. 842), but it has also been held that where one has been convicted oftener than once of violation of law the court is entitled to consider it in the *quantum* of punishment imposed, not to exceed the statutory maximum. *S. v. Wilson,* 121 N.C. 654; *In re Holley,* 154 N.C. 163.

From the number of convictions, the defendant may well be styled a professional "blind tiger." This offense has almost necessarily as adjuncts a continued defiance of the law by secret sales, often through disreputable characters, whom the seller must use, and sales are usually made in questionable places.

It is impossible to conceive that the profession of the ministry or of medicine would tolerate for one moment in their ranks an habitual violator of the laws. When recently a member of the medical profession was convicted of a heinous offense in Charlotte *(S. v. Summers,* 173 N.C. 775), that profession, refusing to shield the offender, asked for his punishment, or at least refrained from joining in the application for his pardon.

It is impossible that the courts, which must rely, to a large extent, upon the legal profession for the maintenance of respect for the administration of justice, should hold worthy of a place in its ranks any one who, in spite of repeated acts of clemency, has continued to violate the law. We cannot believe that a professional "blind tiger," or any habitual criminal, nor one who has been sentenced to the roads for three months for selling liquor unlawfully, and whose sentence was affirmed by this Court on appeal, should occupy a place in the honorable profession to which we belong.

The judge below, after finding the above facts, held that "The criminal offenses of which respondent James H. Johnson has been convicted, or in open court confessed himself guilty, as above set forth, are not such as show him to be unfitted to be trusted in the discharge of the duties of his profession, within the meaning of Revisal, sec. 211," and declined to disbar him. This was a conclusion of law, and is erroneous. Those who aid in the administration of the law, whether as judge or counsel, should have clean hands, be respecters and not violators of the laws. Like Gamaliel, they should be learned in the law, and of an honorable report among all men.

(348) In *Ex parte Moore,* 63 N.C. 397, the Court served a rule for contempt, with a view of disbarring 108 members of the bar who had joined in signing an article reflecting on the Court, which was published in the newspapers of the State. The Legislature, in passing the subsequent act, now Revisal 939-945, restricting the power of the court in cases of contempt committed out of the presence of the court, intended to forbid the disbarring of counsel in such cases as punishment for contempt. It was not intended to restrict the right to disbar in cases calling for disbarment which was not imposed under the power to punish for contempt. There has been some confusion in not distinguishing between disbarment for contempt, which was restricted by the statute, and disbarment on account of the misconduct of counsel in matters affecting his fitness to be a member of the bar. *Ex parte Schenck,* 65 N.C. 353, and *Ex parte Biggs,* 64 N.C. 202, came under the former head, and the rule was discharged because the libel charged did not affect his fitness "to be trusted in the duties of his profession."

In *Kane v. Haywood,* 66 N.C. 1, where the motion was to disbar because of misconduct as counsel in the misuse of funds coming into his hands, the court, mistakenly, as it seems to us, held that as the defendant could not be disbarred for contempt in not paying the money into court because he was unable to do so, that the act of 1871, restricting the power of the court to disbar for contempt, deprived the court of the power to disbar for the willful and corrupt

conduct in appropriating the money of his client. The decision in that case has never been satisfactory to the profession, and "suspicion was not absent," as Cæsar said of Orgetorix, that the court extended the meaning of the act which deprived them of the power to disbar for contempt to a case to which it did not apply. This has been cured by Revisal 212, which requires the court to disbar any lawyer who shall appropriate property or money of his client.

In re Applicants for License, 143 N.C. 1, did not pass upon the point now before us, but simply held that in examing students for license the court was not acting as a judicial body and was restricted to the requirements provided by the statute, which were that the applicants should be found to have a competent knowledge of the law and should furnish a certificate of moral character, signed by two reputable members of the bar; and hence the Court could not go into an investigation of the character of the applicant of its own motion. This was remedied by the provision now in Revisal 207, that the applicants shall not only satisfy the Court of their competent knowledge of the law, but of their upright character.

In re Ebbs, 150 N.C. 44, held, by a divided Court, that counsel convicted of felony in another State could not be disbarred in this State, though it would be otherwise if the conviction had taken place in our own courts. Revisal, 211a, provides that an attorney at law *must* be disbarred upon conviction of felony or for (349) appropriation of the money of his client. And 211b gives the court power, in its discretion, to disbar an attorney upon being found guilty of conduct in his profession involving willful deceit, or soliciting, directly or indirectly, professional business.

In *S. v. Johnson* (this defendant), 171 N.C. 799, the Court held that the Court was not deprived by the statutes above cited from disbarring a lawyer when his conduct is such as to render him unfit to practice law, and that Revisal, sec. 211a and 211b, did not restrict the authority to disbar in cases coming under Revisal 211.

This case will be remanded to the court below, with instructions that the decree of disbarment shall be entered upon the records of that court, that it may be known that the law will be enforced against all alike. He who habitually violates the law is "unfit to be trusted in the discharge of the duties of his profession," and is not worthy to sit among those who as officers of the court aid in the administration of justice. The order refusing to disbar the defendant is

Reversed.

Cited: Committee On Grievances of Bar Assoc. v. Strickland, 200 N.C. 632; *S. v. Harwood,* 206 N.C. 89; *In re West,* 212 N.C. 194.

BANK OF BRUNSWICK v. J. W. THOMPSON ET ALS.

(Filed 17 October, 1917.)

Banks and Banking — Deposit—Counterclaim—Payment of Unauthorized Checks—Burden of Proof.

Where a bank sues its depositor on a note, with counterclaim set up in the answer that the bank had funds of the defendant on deposit which it had paid out on unauthorized checks, and both the execution of the note sued on and the amount of the deposit are admitted: *Held*, banks assume the responsibility for the erroneous payment of checks not drawn or authorized by the depositor, with the burden on the bank, pleading proper payment of the checks, to show it.

APPEAL by plaintiff from *Bond, J.*, at June Term, 1917, of BRUNSWICK.

This action was brought upon a note for $225 and interest. The defendants admitted the due execution of the note, but claimed that there should be a credit entered on it for $195 which had been wrongfully charged up by the bank against the deposits of the defendant, J. W. Thompson, in said bank, one being an alleged check of 9 April, 1913, for $95, and the other an alleged check for $100 charged against the defendant, J. W. Thompson, on 26 September, 1913, and denied the validity of said checks, which sums the defendants pleaded as a counterclaim.

The court charged the jury that "Plaintiff bank having (350) admitted receiving as a deposit the proceeds of the $225 note sued upon, the burden was upon the plaintiff to satisfy the jury by the preponderance of the evidence that the amount of the two checks in question had been properly paid out by the plaintiff bank upon a proper order or authority of the defendant, J. W. Thompson, and had therefore been properly charged against him." This is the only exception. The jury found in favor of the defendants, and the court rendered judgment in favor of the plaintiff for the amount of the note credited by said counterclaim.

Robert Ruark and C. Ed. Taylor for plaintiff.
E. K. Bryan for defendants.

CLARK, C.J. This case stands thus: The note sued on is admitted by the defendants. The deposit of the proceeds in plaintiff bank is admitted, which is the counterclaim. The burden is therefore upon the bank to relieve itself of liability for said deposit by proof of payment. This the bank should be able to do by production of the checks, or otherwise, if checks had been lost. The defendant, of course, could not produce the check which he claims was not given

by himself or by his authority. Payment of the deposit being pleaded by plaintiff, the burden is on him who asserts it. *Zachary v. Phillips,* 101 N.C. 571; *McBrayer v. Haynes,* 132 N.C. 610; *Guano Co. v. Marks,* 135 N.C. 59.

When one has a deposit in bank, it is held subject to his order, and the bank assumes the responsibility for the erroneous payment of any check not drawn nor authorized by the depositor, and the burden of proof is upon the bank. This is elementary law.

The plaintiff relies upon *McQueen v. Bank,* 111 N.C. 509, in which the bank admitted that the plaintiff had deposited with it a sum of money, but pleaded in its answer that the balance not drawn out had been assigned to it. It failed to offer any evidence in support of such allegation, and it was held that the plaintiff was entitled to recover the full amount of the deposit, upon the pleadings. That case is in point for the defendant, for here the counterclaim by the defendant is for the amount of such deposit, and the burden is upon the plaintiff to account for the same.

No error.

Cited: Arnold v. Trust Co., 218 N.C. 436; *Sides v. Bank,* 246 N.C. 674.

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S. B. CHANCEY v. NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 17 October, 1917.)

1. Negligence—Proximate Cause—Burden of Proof.

In order to recover damages for an alleged negligent act of another, the plaintiff must show that the defendant was guilty of the act alleged, and that it was the proximate cause of the injury, or from which the damages immediately resulted as the *causa causans,* without which it would not have occurred.

2. Pleadings — Demurrer — Carriers of Passengers—Negligence—Proximate Cause.

Where, in an action to recover damages of a railroad company, the complaint alleges as the ground of the action the defendant's failure to properly light the cars of the train on which he was a passenger; that they were overcrowded, which caused the plaintiff to be robbed of a certain sum of money, the statements made are insufficient to show that the unlighted and overcrowded cars were the cause of the robbery, and it being upon the plaintiff to allege facts from which the proximate cause would appear, and not merely his own opinion, a demurrer to the complaint is good.

CHANCEY *v.* R. R.

CIVIL action, tried before *Bond, J.*, at April Term, 1917, of COLUMBUS.

Defendant appealed.

Plaintiff not represented in this Court.

Theodore W. Reath, William B. Guthrie, and Rountree & Davis for defendant.

WALKER, J. This appeal was taken from a judgment on a demurrer to the complaint, and the sole question presented is, whether the facts alleged by the plaintiff are sufficient to constitute a cause of action for negligence. The complaint states that plaintiff was a passenger on defendant's train, having purchased a ticket from Petersburg to Hopewell, in the State of Virginia; that the cars "were without any light and very dark, and badly overcrowded, many passengers, with this plaintiff, being forced to stand for want of seats"; that plaintiff had in his pocket $86.15, and that "by the gross negligence of the defendant, its agents, servants, and employees, in failing to light said cars and provide seats for its passengers, and because of their crowded condition, plaintiff was assaulted and robbed of $86"; and that, on arriving at Hopewell, plaintiff was greatly embarrassed and humiliated because he had only 15 cents, having been robbed of $86.

In its last analysis the complaint alleges that the failure to properly light the cars, and the overcrowding of them, caused the plaintiff to be assaulted and robbed, and that such robbery caused
(352) him, upon arriving at Hopewell, to be greatly embarrassed and humiliated. The assault is not described with any particularity, so that we can understand how it came about, and seems to be only the pleader's conclusion as to its character, and not a statement of the facts, so as to afford us an opportunity to form an opinion as to what caused it.

In order to warrant recovery for negligence, it is incumbent upon the plaintiff to allege and show that the defendant was guilty of some negligent act which was the proximate cause of the injury. *Ramsbottom v. R. R.*, 138 N.C. 38; *Brewster v. Elizabeth City*, 142 N.C. 9. The law looks to the immediate, not the remote, cause of damage, the maxim being *Causa proxima et non remota spectatur.* Where the damage resulted from the act of another, but is too remote, or, in other words, flows not naturally, legally, and with sufficient directness from the alleged negligence, the plaintiff will not be entitled to recover. The imputed act of negligence must be *causa causans* of the injury or loss, or the direct and proximate, or efficient, cause thereof. Broom's Legal Maxims, marg. pp. 206, 217, and 223.

This is familiar learning. The rule was recently stated to be, that however negligent a party is, if his act stands in no causal relation to the injury, it is not actionable. *McNeill v. R. R.*, 167 N.C. 390. In *Mills v. R. R.*, 172 N.C. 266, an action was brought by a passenger for an assault upon him by another passenger, and it did not appear in evidence that the conductor or other employee of the company knew of the imminence of the assault. The case was submitted to a jury, who found a verdict against the defendant, which, upon appeal, was reversed. Justice Hoke, speaking for the Court (on page 267), said: "Railroad companies, in the exercise of their franchise as common carriers of passengers, are held to a high degree of care in looking after the safety of passengers upon their trains. In furtherance of this obligation, their conductors and station agents are constituted by the State statutes special policemen, to enable them the better to perform their duty, and the company is responsible for assaults and actionable wrongs committed upon them by other passengers or third persons which could have been provided against or prevented by the utmost vigilance and foresight. While this is the standard of care imposed in such cases, it is also well recognized here and elsewhere that these companies are not insurers of the safety of passengers and are not liable for injuries which, in the exercise of such care, their conductors, employees, agents, etc., could not have reasonably foreseen and prevented." And it was held, in *Garland v. R. R.*, 172 N.C. 638, that "A wrong-doer is responsible in damages resulting directly and proximately from the tort he has committed; but if the cause is remote in efficiency and does not naturally result from the tort, it will not be considered as proximate." And, again, in *Penny v. R. R.*, 153 N.C. 296, this Court said: "The accidental wounding of plaintiff did not (353) follow in direct sequence from the act of Van Amringe, assuming for the sake of argument that the latter was guilty of negligence in lending his pistol to LaMotte. *Ramsbottom v. R. R.*, 138 N.C. 39. In this case it is held by Mr. Justice Hoke that the proximate cause of an injury is one that produces the result in continuous sequence, without which it would not occur, and which a man of ordinary prudence could reasonably be expected to foresee. There is, in legal parlance, no direct causal connection between the act of Van Amringe in loaning the pistol and the unforeseen accidental injury to plaintiff by Galloway. *Harton v. Telegraph Co.*, 146 N.C. 429; *McGee v. R. R.*, 147 N.C. 142; *Bowers v. R. R.*, 144 N.C. 684; 1 Street's Foundations 120. To constitute liability, there must not only be a breach of duty owing by the defendant to the plaintiff, and injury to the latter, but the breach of duty must be the cause, and the proximate cause, of the injury. So far as the act of Van

Amringe is concerned, it is a case of *post hoc,* but not of *'ergo propter hoc,'* as was suggested by Manning, J., in *Hudson v. McArthur,* 152 N.C. 452." It was said by the late Justice Vaughan Williams, in *McDowell v. R. R.,* 2 K.B. 331, on p. 337: "In those cases in which a part of the cause of action was an interference of a stranger or a third person, the defendants are not held responsible unless it is found that which they do, or omitted to do—the negligence to perform a particular duty—is itself the effective cause of the accident." That case is instructive and relevant to this opinion. It was held there that the servants of the defendant had been guilty of negligence in not properly placing the railway van, but that it having been interfered with by trespassers, the negligence of the defendant's servants was not the effective cause of the accident, and the defendant was exonerated. In *Burt v. Advertising Newspaper Co.,* 154 Mass. 238, Mr. Justice Holmes uses this language: "Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts any more than a particular act of this or that individual."

But there are cases more directly in point, and which seem to follow closely the facts alleged in this complaint. It appeared, in *Cobb v. R. R.* (1893), 1 Q.B. 459, that the plaintiff brought an action to recover damages from a railroad company for a sum of money which he alleged had been taken from his person by robbery, as a consequence of the company's negligence in allowing the carriage to be overcrowded. L. J. Bowen said of these facts: "The second point argued was this: It was said that the overcrowding of the carriage had caused damage to the plaintiff by occasioning the robbery. It seems to me impossible to treat the alleged damage as other-
(354) wise than too remote, according to English law. The law is, that the damage must be the direct and natural consequence of the breach of obligation complained of. The law is the same in this respect with regard both to contracts and to torts, subject to the qualification that in the case of the former the law does not consider too remote damages which may be reasonably supposed to have been in the contemplation of the parties when the contract was made It cannot fairly be said that the robbery was the natural consequence of overcrowding the railway carriage." The *Cobb* case was carried by appeal to the House of Lords, and is reported in Appeal Cases 419. Lord Selborne, then the Chancellor, speaking to the question, said (on p. 424): "As to this, I do not think it necessary to say more than that, on the plaintiff's pleading, it is not shown that the overcrowding of the carriage did in fact conduce in any way, directly or indirectly, to the robbery; and on the assumption that,

under some possible circumstances, this might have been actionable negligence, it would, in my judgment, be indispensable, for that purpose, to state and prove some actual connection between the overcrowding and the loss. It is not, in my opinion, enough to suggest (as the plaintiff does) that to suffer such overcrowding was to 'facilitate the hustling and robbing of the plaintiff.' As the case is stated by him, nothing turns upon the fact that the robbery was committed by a 'gang' of more than nine persons." It was held, in *Metropolitan Railroad Co. v. Jackson,* Fed. App. Cases 193, that the overcrowding of a car was not the proximate cause of an injury by the slamming of a door of the carriage upon the plaintiff's thumb, which was caused, unconsciously and not intentionally, by a guard of the defendant who closed the door. There are many similar cases in England and in this country which could be cited for the purpose of showing that the allegations of the plaintiff's complaint are not sufficient to constitute a cause of action, because there was no causal connection between the supposed negligent act of the defendant and the injury which it is alleged resulted therefrom.

We are therefore of the opinion, and so decide, that the learned judge who presided at the trial was in error when he overruled the demurrer. It should have been sustained and the action dismissed, and it is so ordered.

Reversed.

Cited: Hudson v. R. R., 176 N.C. 492; *Johnson v. Telegraph Co.,* 177 N.C. 33; *Whitehead v. Telephone Co.,* 190 N.C. 199; *Campbell v. Laundry,* 190 N.C. 654; *Hall v. Rinehart,* 192 N.C. 708; *Burke v. Coach Co.,* 198 N.C. 13; *Hamilton v. R. R.,* 200 N.C. 565; *S. v. Durham,* 201 N.C. 732; *Ward v. R. R.,* 206 N.C. 532; *Farfour v. Fahad,* 214 N.C. 287; *Leary v. Bus Corp.,* 220 N.C. 757; *Ross v. Greyhound Corp.,* 223 N.C. 243; *Smith v. Cab Co.,* 227 N.C. 574; *Casey v. Grantham,* 239 N.C. 134.

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BRANCH SAW COMPANY v. J. N. BRYANT.

(Filed 17 October, 1917.)

1. Vendor and Purchaser—Contracts—Proposed Purchaser—Cancellation—Acquiescence—Burden of Proof.

The purchaser may not receive from the vendor goods he has agreed to purchase, and then return them to the vendor and cancel the contract

without the latter's consent; and where the purchaser contends that he had made the vendor a proposition of this character, and that he had received and kept the goods, it is incumbent upon him to prove such facts.

2. Same—Carriers of Freight—Principal and Agent—Personal Delivery—Evidence.

A contract of carriage by freight is not one of personal delivery to the consignee, and the fact that a purchaser of goods redelivered them to the carrier, under its ordinary bill of lading, properly addressed to the vendor, is not sufficient evidence of a redelivery to the vendor, upon the defense that the vendor had received the goods and kept them under the purchaser's proposition to cancel the contract of sale, the carrier in receiving the reshipment being regarded as the agent of the purchaser.

CIVIL action, tried before *Bond, J.*, at February Term, 1917, of NEW HANOVER.

The plaintiff seeks to recover the sum of $144 for the alleged shipment of a certain lot of saws ordered by the defendant. The defendant avers that the saws were to be delivered in May, but were not delivered until July of the same year, and that, after inspecting the saws, he ascertained that they were not of the kind that he had purchased, or that the plaintiff had represented them to be. It was in evidence that, after receiving the saws, or after they had arrived at a place where he had the opportunity of inspection, the defendant wrote several letters to the plaintiff, in which he stated that, owing to his depressed financial condition, he could not pay for the saws, and requesting that the plaintiff have the Atlantic Coast Line Railroad Company, at Wilmington, N. C., return the saws to it, as he was in "bad shape." The defendant shipped the saws by rail to the plaintiff and advised it of the shipment by letter, but there was no evidence that the plaintiff received or accepted the saws, except the fact of the reshipment, and that the defendant notified the plaintiff by letter of what he had done. There was a verdict for the plaintiff, and judgment thereon, from which the defendant appealed.

W. P. Mangum Turner for plaintiff.
McClammy & Burgwyn for defendant.

WALKER, J., after stating the case: It is perfectly evident that the defendant having contracted to buy the saws, and the jury having found, under the charge of the court, that they were of the
(356) kind and quality ordered by the defendant, the latter had no right to return them to the plaintiff without its consent, and it was not bound, therefore, to receive them, and could reject the proposal of the defendant that it take them back and cancel the contract. *Medicine Co. v. Davenport,* 163 N.C. 294. The evidence,

instead of showing that the plaintiff consented that they might be returned to it, and the defendant discharged from liability under the contract, tends to show very strongly that the plaintiff refused to comply with the defendant's request, and it then devolved upon the defendant to show, by affirmative evidence of some kind, that the saws were actually received by the plaintiff, and that it retained them. This, of course, would discharge the defendant, as the case above cited shows. The failure of the plaintiff to answer the defendant's letters, or his decision to ignore his offer of settlement, is evidence that the plaintiff was not content with his proposals, and actually refused to accept them. The delivery of the saws to the railroad company, properly addressed to the plaintiff, and the payment of the freight, do not constitute such evidence of a delivery to the plaintiff as is required in such cases, the carrier being the agent of the defendant to deliver the goods, and it being incumbent upon the defendant to show that his agent actually made the delivery, and that the plaintiff accepted the goods. It is stated in a text-book of high authority that in a case of land carriage it seems to have been thought by the early judges that personal delivery was implied in the contract, in the absence of stipulation or usage authorizing some other kind of delivery. This is still the presumption as to expressmen, express companies, and other carriers holding themselves out as having facilities for making personal delivery. Until reasonable effort to deliver in person has been made, an express company remains liable as carrier. If, however, by custom or regulation of the express company, limits are fixed beyond which it does not make personal delivery, when the character of such custom or regulation is known to the consignee, he must govern himself accordingly. The author then proceeds to say: "The rule requiring personal delivery does not apply to railroad companies, as they have no facilities for taking the goods to the residence or places of business of the consignee, and the general usage of their business does not require them to do so, and the same principle is applicable to special transportation companies." 6 Cyc., pp. 466, 467.

Treating of this matter in 4 Ruling Case Law, at sec. 276, pp. 821, 822, it is stated, with reference to express and railroad companies and carriers by water: "With respect to the carriers by water, however, the common law does not require an actual or manual delivery of the goods into the possession of the consignee, or at his warehouse, in order to discharge the carrier from his liability as such. Vessels are necessarily confined to water; (357) they only carry from port to port, or from wharf to wharf. Consequently, general custom, arising from necessity and the convenience of commerce, sanctions a discharge of their cargoes on the

wharves or at public landings as a sufficient and proper delivery. When railways took the place of conveyances drawn by animals, as their routes are in a measure permanently fixed and not easily varied to suit the convenience or accommodation of the public, necessity seemed to require a relaxation of the rule of the common law requiring common carriers by land to deliver to the consignee personally; consequently, on the ground that a railway has no means of delivery beyond its own lines, universal custom seems to have settled it as being the most reasonable rule that railway companies may discharge themselves of their liability as common carriers by substituting in place of a formal personal delivery a delivery at the warehouse or depot provided by the companies for the storage of goods. Express companies, however, are, from the nature of their business, held to a very strict degree of responsibility, and must ordinarily make an actual personal delivery." In this State we have a regulation of the Commerce Commission regarding this matter which conforms substantially to the rule as above stated. It therefore follows that there can be no presumption, even *prima facie*, that the plaintiff received the goods, from the mere fact that they were delivered to the railroad company for transportation to it. If the plaintiff actually received the goods, it is very strange that the defendant did not show by evidence, which was certainly available to him, that his agent, the railroad company, actually made a personal delivery of them to the plaintiff. This fact, if it existed, could easily have been shown by the railroad's agent at the other end of the line, who knew of the delivery, if it was made.

We have examined the charge of the court very carefully, and find that every essential question of fact was submitted to the jury by the judge, and the verdict, when construed with reference to the evidence and instructions of the court, is equivalent to a finding that the plaintiff delivered the goods within a reasonable time after order for them was filed, and that the saws were of the kind and quality which were contracted to be sold to the defendant, and the jury further found that there has been no revocation of the contract.

We conclude that there was no error in the ruling of the court below.

No error.

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FAYETTEVILLE LIGHT AND POWER COMPANY v. THE LESSEM COMPANY AND J. I. LESSEM.

(Filed 17 October, 1917.)

Arrest and Bail—Bonds—Court's Discretion—Appeal and Error.

Where plaintiff, in arrest and bail, in an action for conversion of personal property, has given the bond in the amount fixed by the clerk, upon which the defendant has been arrested, and who thereafter moves in the Superior Court to vacate the order of arrest, among other things, upon the ground that the bond required of plaintiff was insufficient in law, the court, within its discretion, may increase the bond required of the plaintiff, from which order no appeal will lie, in the absence of abuse of this discretion.

APPEAL by plaintiff from *Bond, J.*, at September Term, 1917, of CUMBERLAND.

This was a motion in an action which was brought by the plaintiff to recover the sum of $1,430 for the conversion of certain personal property by the defendant belonging to the plaintiff. The necessary ancillary in arrest and bail was taken out by the plaintiff upon his deposit of the amount of $250 with the clerk in lieu of the usual prescribed bond, the clerk having fixed the amount of the deposit. An order for the arrest of the defendant, J. I. Lessem, was issued, and he was required to give bail in the sum of $1,500, which was afterwards given. The defendant corporation moved to dismiss the action, as no liability was alleged against it. The defendant, J. I. Lessem, moved to vacate the order of arrest, upon the ground that the facts stated in the affidavit were not true, and the security required of the plaintiff was not such in amount as the law required, and the bail required of him was excessive, it being greater than that required of the plaintiff. The judge ordered the plaintiff to raise the amount of its undertaking from $250 to $1,000, to which the plaintiff excepted and appealed. The defendant also appealed from the ruling of the judge against him, and reserved all of his exceptions, but has not docketed his appeal at this term. The time for docketing not having expired, and the defendant not having docketed his appeal here, the only question before this Court arises upon the plaintiff's appeal.

Sinclair, Dye & Ray for plaintiff.
E. G. Davis and Q. K. Nimocks for defendant.

WALKER, J., after stating the case: The sole question is as to whether the judge had the power to increase the amount of plaintiff's undertaking.

Revisal, sec. 730, provides: "Before making the order, the (359) court or judge shall require a written undertaking on the part of the plaintiff, with sufficient surety, payable to the defendant, to the effect that if the defendant recover judgment the plaintiff will pay all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least $100." The plaintiff complied with this section when, under the order of the clerk, it made the deposit of the sum of $250, and the judge clearly had the discretion to raise the amount to $1,000 and to order an undertaking in that amount to be executed and filed by the plaintiff, or that it leave the deposit with the clerk and give bond for the difference between this amount and $1,000. The matter of fixing the amount of bonds for the security of costs, and in other like cases, is left to the discretion of the court, and where there is no abuse of that discretion the exercise of it will not be revised by this Court, and the order of the judge in such a case is not reviewable here. *Marsh v. Cohen,* 68 N.C. 283; *Cushing v. Staron,* 104 N.C. 341; 5 Corpus Juris. 499.

There is generally no question of law involved in increasing or diminishing the amount of a bond, whether given for the prosecution of a suit or for the defense of it, under the statute, where the action is one for the recovery of land. Such questions are within the sound discretion of the court, from the exercise of which no appeal will lie, unless there has been a gross abuse of the discretion. There is no suggestion of such in this case, and if there had been, no proof is found in the case to justify it. That the court has the power to increase or diminish a bond for costs, or which is given during the pendency of a suit, is shown very clearly and fully by our decisions. It was said in *Vaughan v. Vincent,* 88 N.C. 116, at p. 118, that where a court can require a bond to be given by a party, whether it be plaintiff or defendant, it may direct that the bond be increased if in its judgment such an order is necessary for the protection of any party. The same was said in *Rollins v. Henry,* 77 N.C. 467, where the defendants were required to give bond under C.C.P., sec. 382, which was not only for the costs, but for the purpose of securing to the plaintiff the benefit of his recovery in damages. The Court held that the bond could be increased in the discretion of the court. Other cases on the same subject are *Jones v. Cox,* 46 N.C. 373; *Adams v. Reeves,* 76 N.C. 412, and *Kenny v. R. R.,* 166 N.C. 566.

As the ruling of the judge, by which the plaintiff's bond was increased in amount, was solely a matter of discretion, it is not reviewable by us, and the appeal was improvidently taken.

Appeal dismissed.

Cited: Texas Co. v. Fuel Co., 199 N.C. 496; *Luff v. Levey,* 203 N.C. 784.

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G. F. BRYANT ET AL. v. SAMPSON LUMBER COMPANY ET AL.

(Filed 17 October, 1917.)

1. Railroads — Lumber Roads — Independent Contractors — Evidence — Fires.

In an action to recover fire damages to lands, defended under the doctrine of independent contractor in operating a steam-driven train, the principle relied on can have no application if the fire originated by sparks from the locomotive falling upon a foul right of way of the defendant, and especially is the doctrine not applicable when the jury have found under the evidence and a proper instruction that under an agreement between them the defendants were coprincipals.

2. Railroads—Lumber Roads—Lessor and Lessee—Negligence.

A lumber road used for hauling logs, etc., operated under a *quasi* public franchise, hauling freight for third persons, for hire, may not be leased to another so as to relieve the lessor of responsibility for the negligence of the lessee in its operation, except by express legislative sanction.

3. Same—Master and Servant—Employer and Employee—Scope of Employment—Evidence.

Where there is evidence that defendant's defective locomotive, traveling over defendant's foul right of way, set out sparks by which fire damage was caused to plaintiff's land, and that at the time it was in charge of defendant's general manager and answering an urgency call from another of defendant's engines to aid in putting out fires on other lands, it is sufficient to show that the employees on the train were acting within the scope of their employment, especially when there are pertinent facts in evidence which permit the inference that in helping their neighbors they were also acting in protection of the defendant's own property.

THESE were two actions brought against the defendants for the alleged negligent burning over of two tracts of land in CUMBERLAND County, which by consent were consolidated and tried at March Term, 1917, of said county, before *Connor, J.,* and a jury.

On denial of liability, plea of independent contractor, etc., the jury rendered the following verdict:

1. Is the plaintiff, G. F. Bryant, the owner and in possession of the land described in the complaint? Answer: Yes.

2. Are the plaintiffs, G. F. Bryant, Susan A. Bryant, Pennie P. Strickland, D. T. Horne, Dolly Horne, and Molly Horne, the owners and in possession of the lands described in his complaint? Answer: Yes.

3. Did the defendant, Sampson Lumber Company, its agents, servants, or employees negligently set out fire which was directly communicated to the lands of G. F. Bryant? Answer: Yes.

4. Did the defendant, Sampson Lumber Company, its agents, servants, or employees negligently set out fire which was directly communicated to the lands of G. F. Bryant and sisters? Answer: Yes.

5. Did the defendant, B. Vandegrift, his agents, ser-
(361) vants, or employees negligently set out fire which was directly communicated to the lands of G. F. Bryant? Answer: Yes.

6. Did the defendant, B. Vandegrift, his agents, servants, or employees negligently set out fire which was directly communicated to the lands of G. F. Bryant and sisters? Answer: Yes.

7. What damages, if any, is the plaintiff, G. F. Bryant, entitled to recover? Answer: $1,472.50.

8. What damages, if any, are the plaintiffs, G. F. Bryant and sisters, entitled to recover? Answer: $150.

Judgment on the verdict, and defendants excepted and appealed.

Bullard & Stringfield and Sinclair, Dye & Ray for plaintiff.
Rose & Rose for defendants.

HOKE, J. It was urged for error that the plaintiff should have been nonsuited as to the Sampson Lumber Company, because, if there was any negligence shown, it was on the part of B. Vandegrift or his employees, and while he was operating the railroad of the codefendant as an independent contractor.

If it be conceded that the contract introduced in evidence, of itself and standing alone, would establish the relationship contended for by the company, the evidence tended to show that the fire originated by sparks from the engine falling on a foul right of way belonging to the lumber company, and under the principles recognized in *Thomas v. Lumber Co.*, 153 N.C. 351, the defense suggested could not be maintained, a decision approved in *Strickland v. R. R.*, 171 N.C. 755, and *Dunlap v. R. R.*, 167 N.C. 669, and many other cases. See also, *Knott v. R. R.*, 142 N.C. 238.

On the record, however, the position is not open to defendant, as the jury, under the charge of the court, have necessarily found that the parties were not at the time operating under the contract

relied on by defendants, but under a subsequent agreement, which constituted Vandegrift the managing agent and vice-principal of the company. Apart from this, there are facts in evidence tending to show that, while this was primarily a lumber road, used for hauling out logs, etc., it was a standard-built railroad, operated under a *quasi* public franchise, hauling freight for third persons, for hire, and except by express legislative sanction, it was not within the power of the owner, the lumber company, to contract or lease its road to its codefendant or other, so as to relieve it of responsibility for negligence in its operation. *Logan v. R. R.*, 116 N.C. 940; *Aycock v. R. R.*, 89 N.C. 321. It was further insisted that a judgment of nonsuit should have been allowed as to both defendants, on the ground that, at the time and place the fire originated, the employees of the defendants, operating the engine and train, (362) were not acting in the course and scope of their employment. There was ample evidence of negligence, both as to a defective engine and a foul right of way, and the motion is made on facts tending to show that the fire may have originated when an engine drawing several cars, with 25 or more employees aboard, was going up the road in response to an urgency call from another engine of the defendants to aid in putting out another fire in that vicinity and on lands of other owners. The testimony shows that Vandegrift himself, the independent contractor, according to defendant's version, and the general manager and agent of his codefendant, as plaintiff contends and the jury have found, was also aboard, and the movement of the train under such circumstances for the purpose indicated, is, to our minds, clearly within the course and scope of his authority. Unquestionably so, when there are pertinent facts in evidence which permit the inference that in helping their neighbors they were also acting in protection of their own property.

There is no error, and the judgment on the verdict is affirmed.

No error.

Cited: Watkins v. Murrow, 253 N.C. 659.

FIRST NATIONAL BANK OF LUMBERTON v. A. L. McCASKILL AND WIFE.

(Filed 24 October, 1917.)

Judgments—Evidence—Deeds and Conveyances—Husband and Wife.

A judgment rendered in the Federal Court declaring a due from the husband to his wife fraudulent and void as to his creditors, and executed with the fraudulent knowledge of the wife, is one *in rem*, and may be received in evidence in an action brought in the State court by a different creditor attacking the deed upon the same ground, though not conclusive.

APPEAL by plaintiff from *Connor, J.*, at April Term, 1917, of CUMBERLAND.

In February, 1911, the defendant, McCaskill, became indebted to the plaintiff on a note for $1,000 and interest. On default, judgment was obtained at September Term, 1915, of Cumberland, and the execution thereon was returned unsatisfied. By deed, dated 29 July, 1913, McCaskill conveyed to his wife all the property owned by him, which was registered in Cumberland 27 September, 1913. This deed is attacked by the plaintiff as being in fraud of its rights as a creditor of McCaskill at the time of its execution and registration.

After proving the indebtedness to the plaintiff as alleged in the complaint, the plaintiff introduced the record of a judgment obtained in the U. S. District Court in the Eastern District of North
(363) Carolina by the Citizens Bank of Norfolk, Va., against said McCaskill, showing service of summons on 13 September, 1913, and that judgment was rendered for the sum of $10,000. It was two weeks thereafter that the alleged fraudulent deed was filed for registration. It was in evidence that said deed covered all the lands McCaskill owned. In addition to unsecured debts, it was shown that McCaskill was also indebted to the Jefferson Standard Life Insurance Company and others in mortgages aggregating about $14,000.

On the issue of fraud in said deed, and also to prove knowledge of its fraudulent character by the *feme defendant*, the plaintiff put in evidence, in proof of its allegation in the complaint, a certified copy of the record in the Federal Court in the above suit entitled *Citizens Bank of Norfolk, Va., v. A. L. McCaskill and his wife* (these defendants), wherein that Court (H. G. Connor, Judge), after full hearing and argument by counsel on both sides, entered a decree that the deed in dispute "was executed by the defendant McCaskill for the purpose and with the intent of hindering and delaying and defeating" the plaintiff therein in the collection of its judgment of $10,000; and further, "That the defendant Nancy McCaskill, the grantee in said deed, knew of the said purpose and in-

tent of the defendant A. L. McCaskill." It was further adjudged in said decree that said deed was "null and void and of no effect" as against the Norfolk bank. There was also an order in that suit, duly recorded in the office of the register of deeds of Cumberland, directing him to make an entry to the effect that such deed had been declared null and void, and was therefore canceled. A certified copy thereof has also been filed in the office of the clerk of the Superior Court of Cumberland, together with a full transcript of the record in the Federal Court. The judge below sustained the defendant's objection to this evidence, and the plaintiff excepted.

Rose & Rose for plaintiff.
Sinclair, Dye & Ray for defendants.

CLARK, C.J., after stating the case: The general rule that judgments are binding only on parties and privies is subject to several exceptions, and especially where the judgment is *in rem.* Greenleaf Ev. (Lewis Ed.), sec. 525, p. 823; Bigelow on Estoppel (5 Ed.), 221, 229.

In *Ennis v. Smith,* 14 Howard (U.S.) 400, in which the will of General Kosciusko and the genealogy of his family were in question, the United States Supreme Court held: "The documentary proof in this cause from the Orphan's Court, of the genealogy of the Kosciusko family and of the collateral relationship of the persons entitled to a decree, and also of the wills of General Kosciusko, are properly in evidence in this suit. The record from (364) Grodno is judicial; not a judgment *inter partes,* but a foreign judgment *in rem,* which is evidence of the facts adjudicated against all the world."

It may be of interest to note, in passing, that Kosciusko was the famous Polish patriot who, coming to this country in our Revolution, became adjutant on Washington's staff, and at the end of the war was made a brigadier-general and voted a donation of land by Congress. In 1793 he became general in chief of the Poles in their war against Russia, Austria, and Prussia at the second partition of their unfortunate country. His statue stands on the square opposite the White House at Washington.

In line with these principles of law, this Court held, in *Latham v. Wiswall,* 37 N.C. 294, that a decree for the sale of the estate of a lunatic for the payment of debts was a decree *in rem,* and creditors are bound by it though not parties to the proceeding.

In *Bank v. Comrs.,* 116 N.C. 339, it was held that a decree in a suit by *R. R. Co. v. The Town of Oxford,* on the validity of a bond issue, was binding on the commissioners in a subsequent suit against

them by the holder of certain of these bonds though the parties to the second suit were not those in the first suit. In *Sly v. Hunt* (Mass.), 21 L.R.A. 680, it was held that a probate of a contested will is conclusive as against the world.

The decree of the Federal Court adjudging that this identical conveyance was made by the defendant in fraud of creditors is competent evidence, though not conclusive. A judgment is, so to speak, a *quasi* admission on the part of the party against whom it is rendered. It is at least evidence against him which it is encumbent upon him to rebut. It would not be competent for him if the judgment was in his favor, as the plaintiff was not a party to that action; but it is evidence against the defendant. Such judgment cannot be pleaded as an estoppel, nor is it conclusive against the defendant. But this judgment, being *in rem*, is evidence just as a judgment of a criminal offense could be so used.

In re Skinner, 97 Fed. 190, held that a judgment rendered by a State Court in which the bankrupt, his wife, and the trustee, were all parties, finding that a conveyance by the bankrupt to his wife was fraudulent as to creditors and should be set aside, was conclusive evidence to that effect in the bankrupt Court on an application for his discharge, which was opposed by creditors on the ground that such conveyance was a concealment of assets.

The deed declared void as to one creditor is void as to all the creditors then existing. *Hoke v. Henderson*, 14 N.C. 12, which is quoted in *Clement v. Cozart*, 112 N.C. 412, which holds that "A voluntary conveyance where the grantor did not at the time
(365) of the grant retain property fully sufficient and available for the satisfaction of his then creditors is fraudulent in law as to existing creditors. And if such conveyance shall be declared void at the suit of an existing creditor, all creditors—those existing at the execution of the conveyance and all subsequent creditors—will be entitled to come in and participate in the fund arising from a sale of the property, subject to priorities and to the maxim *vigilantibus non dormientibus leges subvenient.*" To same purport, 1 Moore on Fraudulent Conveyance, 70 and 2 Do. 575.

In *Sibley v. Stacey*, 53 W.Va. 292, it was held that a decree adjudging a conveyance fraudulent and void as to one creditor inures to the benefit of all other creditors in the same class. In *Curlee v. Rembert*, 37 S.C. 214, it was held that a conveyance cannot be void as to one creditor and valid as to another creditor in the same class. In *Savage v. Knight*, 92 N.C. 493, it was held that "a deed fraudulent and void as to one creditor is void as to all." To the same purport, *Eppright v. Kauffman*, 90 Mo. 25.

"A record may also be admitted in evidence in favor of a

stranger, *against* one of the parties, as containing a solemn admission or judicial declaration by such party in regard to a certain fact." Greenleaf Ev. (Lewis Ed.), sec. 527a, p. 825.

In 11 A. & E. (2 Ed.) 391, it is said: "Where there is jurisdiction of the person and the subject-matter, and the judgment is not the result of fraud and collusion between the parties to it, and the record is material only to establish the fact of such judgment and *those legal consequences which result from that fact,* the record must be regarded as conclusive even as to strangers. The object of this rule is to give stability and security to judgments, decrees, and sentences when made by courts having jurisdiction of the person and the subject-matter, and they are, therefore, founded on and supported by a sound public policy which admits an inflexible adherence to them."

In excluding this evidence there was

Error.

HOKE and ALLEN, JJ., dissenting.

Cited: Meacham v. Larus & Bros. Co., 211 N.C. 648; *Warren v. Ins. Co.,* 215 N.C. 404; *Leary v. Land Bank,* 215 N.C. 506; *Current v. Webb,* 220 N.C. 428; *Welch v. Welch,* 226 N.C. 543; *Trust Co. v. Pollard,* 256 N.C. 81.

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W. B. COOPER v. G. A. CLUTE.

(Filed 24 October, 1917.)

1. Courts—Verdict Set Aside—Discretion—Appeal and Error.

A motion to set aside a verdict as being contrary to the weight of the evidence must be addressed to the sound legal discretion of the trial judge, and in the absence of abuse of this discretion is not reviewable on appeal.

2. Contracts — Breach — Measure of Damage—Vendor and Purchaser — Cotton.

Upon seller's breach of contract to deliver a definite number of bales of cotton at a certain place and time, the vendor's measure of damages is the difference between the contract price and the actual or market value of the property at the time and place of the delivery, and special damages are not recoverable when the parties have only contemplated the delivery of the cotton without further evidence.

3. Same—Compress Charges—Nominal Damages.

Where the vendor sells his baled cotton, held in storage by a warehouseman, and the latter has had the cotton compressed and sold it to another without the knowledge of the vendor, evidence that the warehouseman sold the cotton at the same price, with compress charges added, is not evidence that the purchaser had been damaged by the vendor's breach of contract.

CIVIL action tried before *Bond, J.*, at May Term, 1917, of NEW HANOVER, upon these issues:

1. Did defendant Clute contract and agree to sell and deliver to plaintiff Cooper 1,430 bales of cotton at 10⅞ cents per pound basis middling, as alleged in complaint? Answer: Yes.

2. Was plaintiff Cooper ready, able and willing to receive and pay for said cotton and comply with his part of said contract? Answer: Yes.

3. Was defendant Clute caused to make said contract by false and fraudulent statements made by plaintiff Cooper, or his agent, intended to, and which did, deceive him as to market price of cotton at that time in Wilmington, as alleged in answer? Answer: No.

4. Was said contract made for cotton not compressed, both supposing said cotton had not been compressed, when in fact it had been compressed at that time? Answer: Yes.

5. Would plaintiff Cooper have received the cotton as compliance with the contract if defendant Clute had offered to deliver it? Answer: Yes.

6. Could defendant Clute have gotten cotton from Sprunt with which to comply with his contract with plaintiff Cooper? Answer: No.

7. Did defendant Clute wrongfully break his contract and fail to deliver the cotton according to its terms? Answer: Yes.

8. Was it within contemplation of both parties to the contract that plaintiff was buying the cotton to sell again? Answer: Yes.

9. What, if anything, could plaintiff Cooper have made (367) by selling the cotton within reasonable time if defendant Clute had delivered it according to his contract? Answer: Nothing.

10. What was market price per pound of the cotton at place at which it was to be delivered, on Wednesday, 23 February, 1916? Answer: 10⅞ cents.

11. What was market value per pound of the cotton at place at which it was to be delivered on Saturday, 26 February, 1916? Answer: 10⅞ cents.

12. Under the contract, was delivery to be made on Wednesday,

23 February, 1916, or on Saturday, 26 February, 1916? Answer: Saturday, 26 February, 1916.

13. When Clute made the contract, had his cotton been compressed by Sprunt without his knowledge? Answer: Yes.

14. What was the weight per bale of the cotton? Answer: 468 1-10 pounds.

15. Did said cotton grade ⅛ cent per pound above middling? Answer: Yes.

16. Was the bargain between the plaintiff and defendant made with reference to the same 1,430 bales of cotton stored in warehouse of Wilmington Compress and Warehouse Company? Answer: Yes.

17. At the time bargain was made between plaintiff and defendant, had Sprunt & Son agreed to sell the cotton to another buyer, defendant Clute not knowing of same? Answer: Yes.

18. At that time bargain was made between plaintiff and defendant had Sprunt & Son sold and delivered the cotton to another buyer? Answer: Yes.

19. Would defendant Clute have made the contract with plaintiff Cooper if he had known the cotton had been compressed, and that Sprunt & Son had agreed to sell or had delivered it to another buyer? Answer: No.

20. Did defendant Clute, when he failed to deliver the cotton, have the right to call on Sprunt & Son for cotton to deliver to Cooper in place of the cotton which Sprunt & Son had compressed? Answer: No.

21. What damages, if anything, is plaintiff Cooper entitled to recover of defendant Clute? Answer: One penny.

The court rendered judgment against the defendant for one penny and costs. Plaintiff and defendant excepted and appealed.

John D. Bellamy & Son, McClammy & Burgwyn for plaintiff.
Rountree & Davis, Kenan & Wright for defendant.

PLAINTIFF'S APPEAL.

BROWN, J. There are seven assignments of error by plaintiff. Five of them aver that the court erred in refusing to set aside the verdict upon certain issues, and the sixth avers that the court erroneously refused to set aside the verdict upon all the is- (368) sues, based upon the ground that it was contrary to the weight of the evidence.

This is a matter in the sound discretion of the Superior Court, and will not be reviewed, in the absence of evidence of an abuse

of such discretion. *Bird v. Bradburn,* 131 N.C. 488; *Collins v. Casualty Co.,* 172 N.C. 549.

The seventh assignment avers that the court erred in failing to give judgment for the plaintiff for the difference between 10⅞ cents, the contract price of the cotton, and 11.03 cents, the price which it was admitted the defendant obtained from Sprunt for the sale of the said cotton, and the costs of the action, and in signing the judgment set out in the record.

The findings of the jury established that the defendant entered into a contract with plaintiff to deliver to him at the Hilton compress, near Wilmington, 1,430 bales of cotton, not compressed, at the price of 10⅞ cents per pound, delivery to be made on 26 February, 1916; that plaintiff was ready, able and willing to take and pay for the cotton according to contract; that defendant failed to deliver the cotton, and that its market value at time and place of delivery was 10⅞ cents per pound.

The measure of damage to be recovered for breach of an executory contract of this character is well settled to be the difference between the contract price and the actual or market value of the property at the time and place of the breach of the contract. Under this rule, if the market value is the same as the contract price when the contract is breached, only nominal damages can be recovered. 39 Cyc. 1992; *Lumber Co. v. Mfg. Co.,* 162 N.C. 395; *Berbarry v. Tombacher,* 162 N.C. 499.

There are cases where the evidence warrants the allowance of special damage, but we see nothing in this case that takes it out of the general rule.

There is no evidence that the contract had been entered into by plaintiff for the purpose of filling contracts made by him, as in *Johnson v. R. R.,* 140 N.C. 574, and that such purpose was within the knowledge or contemplation of both parties when the contract was made. While it is found that plaintiff purchased the cotton to sell again, it is also found that, had the cotton been delivered and resold within a reasonable time, plaintiff would have made nothing by the transaction.

Plaintiff contends that the court should have rendered judgment for plaintiff for the difference between 10⅞ cents, the contract price, and 11.03 cents, which plaintiff claims the defendant received from Sprunt for the cotton. The plaintiff tendered no such issue, and there is no finding of fact that defendant received 11.03 cents for the cotton. But that is immaterial. The written contract shows that the defendant did not sell to plaintiff any particular cotton. Defendant could have performed the contract by purchasing similar
(369) cotton on the market and making the delivery.

If he failed to do so, in the absence of proof of special damage, the defendant can be held only for its value as fixed by the jury, less the contract price. The evidence is that the cotton that Sprunt held for defendant under a storage contract had been compressed and sold by Sprunt, without defendant's knowledge, before the contract sued on had been entered into. The defendant would not be required to deliver compressed cotton in discharge of a contract calling for uncompressed cotton, the former being worth more. Therefore, the terms of settlement between Sprunt and defendant have no relation to this controversy. The question here is not what plaintiff would probably have made by a performance of the contract by defendant (the jury find that he would have made nothing), but what was he damaged by defendant's failure to perform it?

The evidence is conflicting as to the value of similar cotton at place of delivery on 26 February, 1916, but the jury have fixed it at 10⅞ cents, which is the contract price. It therefore follows that the plaintiff has sustained no actual damage.

DEFENDANT'S APPEAL.

The defendant in his answer alleges that the contract to sell was entered into under a mutual mistake, and asks a rescission. No such issue was submitted, and there is no evidence to support the contention.

The fact that defendant did not know that his cotton had been compressed and sold by Sprunt at the time he entered into the contract with plaintiff does not excuse him for its breach. No actual damage having been proven, he is nevertheless liable for nominal damage. *Berbarry v. Tombacher, supra.*

No error.

Cited: *Davis v. Wallace,* 190 N.C. 547; *Brantley v. Collie,* 205 N.C. 231.

FARQUHAR COMPANY v. HARDY HARDWARE COMPANY.

(Filed 24 October, 1917.)

1. Vendor and Purchaser—Consideration of Worthless Goods—Evidence—Questions for Jury.

In the vendor's action to recover upon notes given for a certain machine, the purchaser may not avoid payment upon the ground that the machine was worthless and the contract failed for want of consideration, when the machines are shown to do the work when properly handled;

and upon conflicting evidence, the question is one for the jury. *Hall Furniture Co. v. Cram Mfg. Co.*, 169 N.C. 41; *Bland v. Harvester Co., id.*, 418, cited and distinguished.

2. Vendor and Purchaser—Contracts, Written—Warranty—Forms.

When the contract for the sale of certain machines provides that the purchaser shall have one week in which to make complaints, and there is evidence tending to show that the machines were delivered to him for inspection, and that he kept them several weeks without complaint; that he had paid a part of the purchase price after delivery, and given notes, the subject of the suit, for the balance, without effort on his part to test the machines or offer to return them, in the vendor's action to recover the purchase price the defense that the machines were worthless is not available.

3. Same—Waiver.

Where the vendor of a certain machine is released from liability, under the terms of his contract, for imperfections therein, he does not waive his contractual rights by rendering gratuitous services to the purchaser in an effort to give him perfect satisfaction.

4. Same—Parol Evidence.

Where the terms of a contract of sale of a certain machine provides that the purchaser shall make whatever complaint he has within a week, notifying the vendor of defects which he agrees to remedy, and that it will not be taken back except in case of imperfection which it fails to correct, and that no officer or agent had the power to change this warranty, etc.: *Held*, parol evidence of promises or representations by the vendor's officers or agents tending to contradict the writing is inadmissible, and the purchaser is held to a compliance with the written terms of the contract.

5. Bills and Notes—Negotiable Instruments, Guarantors of Payments.

Where guarantors on a note, in consideration of receiving a certain part thereof, guarantee the payment of the note at maturity, and if it is "not paid at that time, agree to pay immediately the amount due thereon," they are guarantors, for a valuable consideration, of payment and not for collection, and are held to the express terms of their promise; and upon default of the principal it becomes their duty to immediately pay the amount then due on the note.

CIVIL action, tried before *O. H. Allen, J.*, and a jury, at (370) March Term, 1917, of HALIFAX.

Suit was brought by the plaintiff against the Hardy Hardware Company for the recovery of the amount of certain notes, described in the complaint and endorsed by the defendant, as follows:

"For value received, we hereby guarantee the payment of, and endorse this promissory note, waiving protest and notice thereof, agreeing, in case note is not paid at maturity by makers, to pay immediately the amount due thereon. Hardy Hardware Co."

There notes were given by the makers as part payment on the purchase price of certain peanut pickers sold by the plaintiff to

them under a written contract, which, in each case was separate and distinct, but identical in terms. Among the provisions contained in said contract is the following: "It is further understood and agreed that, except the printed warranty, the foregoing lease contains the only terms, conditions and contract upon which the prop- (371) erty described above is delivered to the lessee, and that the same cannot be varied, altered or controlled except by agreement in writing, signed by both parties hereto. This agreement is subject to the approval of the credit department of the lessors, and their printed warranty is hereby made a part of this agreement." The printed warranty is as follows: "All articles manufactured by A. B. Farquhar Company, Limited, are warranted by it to be well made and of good material, and in no instance will be taken back, except in case of imperfection which it fails to correct. A fair trial — say one week—is to be allowed after receipt of machinery, and in case of any dissatisfaction on the part of the lessee or purchaser it must be made known to it or its sales agents within that time, and opportunity be given to make it as represented. In case of failure, the machinery will be replaced, or if returned by instructions from its main office at York, Pa., payment will be refunded. Parts breaking within one year from date of shipment, because of defect, shall be replaced, on delivery of the broken parts to A. B. Farquhar Company, Limited, York, Pa. This is the extent of its liability for damage caused by breakage, etc. No officer, agent, or employee has the power to change this warranty, and it may not be changed except in writing, over the seal of the company."

The purchase price of each machine was $400. Several of the parties, G. K. Moore, L. H. Kitchen, Balfour Dunn, J. T. Riddick, and J. A. Kitchen, who signed the notes, made cash payments, at different times, after trying out the machines and without having made any complaint as to their condition. The appellant contends that the machines never picked a peanut, were of no commercial value, completely worthless, and merely of an experimental character. H. P. Goodling, the sales manager, testified that the machines had been on the market four or five years, but that the 1913 machine was an improved model, which was tested very successfully, and placed on the market in 1913. There seems to be no evidence that a machine of the same type in any other community had failed to give satisfaction. J. A. Kitchen testified: "While going, it was the best machine I ever saw." And again: "I threshed part of my peanuts with it, and the other part with the Champion thresher." L. H. Kitchen stated that he picked about 275 bags of peanuts about the first or middle of November, 1913, and did not sign the notes until December of that year. "I still believe that my brother's opinion is

correct, and that with certain changes the machine would be all right." Herbert Johnson testified: "I tried one of the machines during the 1914 season, which was more than a year after it was bought, and it picked some peanuts." Balfour Dunn stated: "It did as pretty work as any machine I ever saw for the time being, just as long as it ran. I got it in 1913 and used it in 1913 and
(372) 1914, and gave it up in 1915. I got off to the number of 306 bags in 1913, which was all my crop." D. K. Moore testified: "I picked 400 or 500 bags for myself."

Langston, Allen & Taylor and E. L. Travis for plaintiff.
Stuart Smith, R. C. Dunn, and W. E. Daniel for defendant.

WALKER, J., after stating the case: There is evidence to show that the machines were, if properly handled, fit for the purpose for which they were intended—that is, to pick peanuts. It would appear, upon the defendant's own showing, that there was not a failure of consideration, and that the court was correct in submitting the case to the jury upon the evidence. There also was a separate consideration between the guarantor and the plaintiff, in that the guarantor received 25 per cent of the cash payment and was to receive 25 per cent of the notes in consideration of his handling the machines and guaranteeing the notes.

The appellant relies on the cases of *Hall Furniture Co. v. Crane Mfg. Co.*, 169 N.C. 41, and *Bland v. Harvester Co.*, 169 N.C. 418. Upon analysis of these cases, however, it will be seen that not only do they sustain the position of the plaintiff in regard to these exceptions, but also with respect to practically all of the other exceptions involved. The case of *Furniture Co. v. Mfg. Co., supra,* deals with an entirely different state of facts. There the plaintiff had purchased a second-hand hearse *without seeing it.* When it came, as the evidence disclosed, the hearse was of no value and worthless; there were no proper wheels, as those sent with it were not of sufficient strength to hold it up; the top was worn out and rotten, and a part of the woodwork was decayed and in bad condition. The plaintiff refused to accept it, and brought suit to recover the purchase price, which was paid in advance, relying on *S. F. Medicine Co. v. Davenport,* 163 N.C. 294. Clearly, therefore, under the principle that the seller shall at least furnish merchantable and salable goods, the plaintiff was entitled to recover fully. Here, however, the defendant took the peanut pickers from the depot and delivered them to the purchasers. They were inspected before any note was signed, and were kept in their possession for several weeks without any effort on their part or an offer to return them to the seller. The

contract provided that they should have one week to make complaints, and notwithstanding this fact they had kept them in their possession for some time, paid a part of the purchase price, and signed notes for the difference. If the pickers did not come up to the warranty in the printed contract, it was the duty of the plaintiff to return them, or offer to return them, to the defendant within a reasonable time. *Parker v. Fenwick,* 138 N.C. 209; *Mfg. Co. v. Lumber Co.,* 159 N.C. 508.

In an action for breach of warranty, as to the kind and quality of goods which are sold, there is an implied under- (373) taking that the goods shall be of some value and reasonably suited to the uses for which the seller knew they were bought, but here it appears that the purchaser actually used them for the purposes for which he purchased them. *Bland v. Harvester Co.,* 169 N.C. 418, where the Court discusses the principle established in *Furniture Co. v. Mfg. Co., supra.,* and distinguishes it from the principle applied in the *Bland* case, which is the one involved in our case. The plaintiff did not waive its contractual rights by rendering services to the purchasers gratuitously during the season in the effort to give them perfect satisfaction. It was said in *Piano Co. v. Kennedy,* 152 N.C. 196: "We have recognized the principle that there can be no implied warranty of quality in the sale of personal property where there is an express warranty, and that where a party sets up and relies upon a written warranty he is bound by its terms and must comply with them (30 A. and E., p. 199; *Main v. Griffin,* 141 N.C. 43), and the further principle applied by us in that case, that a failure by the purchaser to comply with the conditions of the warranty is fatal to a recovery for breach of the warranty in an action on it, or where, as in this case, damages for the breach are pleaded as a counterclaim in an action by the seller for the purchase money." The Court stated, in *Guano Co. v. Live Stock Co.,* 168 N.C. 447: "A party who relies upon a written contract of warranty as to quality or description of the property he has purchased is bound by the terms of the warranty. *Machine Co. v. McKay,* 161 N.C. 586. He is not only held to the terms of the contract into which he has deliberately entered, but he is not permitted to contradict or vary its terms by parol evidence, as 'the written word must abide' and be considered as the only standard by which to measure the obligations of the respective parties to the agreement, in the absence of fraud or mistake, or other equitable element. 35 Cyc. 379. There are numerous cases decided by this Court illustrative of this elementary rule in the law as to written contracts. *Moffitt v. Maness,* 102 N.C. 457; *Cobb v. Clegg,* 137 N.C. 153; *Basnight v. Jobbing Co.,* 148 N.C. 356; *Walker v. Venters,* 148 N.C.

389; *Medicine Co. v. Mizzell, ib.* 384; *Walker v. Cooper,* 150 N.C. 128; *Woodson v. Beck,* 151 N.C. 144; *Machinery Co. v. McClamrock,* 152 N.C. 405; and especially *Fertilizer Works v. McLawhorn,* 158 N.C. 275." See, also, *Bland v. Harvester Co., supra.* There was no evidence of authority upon the part of the agent to waive any provision of the contract and to make an oral agreement. If, therefore, there was any defect or other ground of complaint, or if the machines had been worthless or without value, the duty of the purchaser was clearly defined in the contract, and having failed to comply with the terms therein stated, he must take the consequences or be held to the terms of his written agreement. *Piano Co.* (374) *v. Strickland,* 163 N.C. 251. Otherwise, written contracts would be of little or no value or efficiency if they can so easily be destroyed by oral evidence.

It is said by the Court, in *Piano Mfg. Co. v. Root,* 54 N.W. 924, when speaking of a contract in practically identical terms as this one, that the warranty could not be added to or changed by proof on the part of the purchaser after he signed and delivered the order, of a contemporaneous oral agreement, that if the machine ordered did not do good work the buyer need not keep it, or that he was informed by the agent of the seller that he would not be bound by the terms of the written order. The Court, in *Buffalo Pitts Co. v. Shriner,* 41 Wash. 146, held incompetent "oral representations of the agent of the seller beforehand as to the character, material and quality of the machinery, which induced the buyer to sign the order, and subsequently to execute the notes and mortgage which it was sought to foreclose in payment of the machinery purchased." The rule is also stated in *McGraw v. Fletcher,* 35 Mich. 104, to the effect that if there is an express warranty as to the working qualities of machinery, this excludes any implied warranty as to its fitness. There were several attempts made to introduce testimony for the purpose of contradicting or varying the written terms of the contract, but such efforts must prove unavailing and result in complete failure. The rule has been well established for many years, and is such a wholesome one, being founded on the greatest wisdom, that we must not relax it in the slightest degree. We have been too often warned against the slightest departure from this principle to venture now upon any course of decision which would impair its value or diminish its force. We have very recently adverted to this rule and the importance of safeguarding it against anything which might weaken its foundation, in *Potato Co. v. Jenette,* 172 N.C. 1, at p. 3, where we said: "The parties had the legal right to make their own contract, and if it is clearly expressed it must be enforced as it is written. We have no power to alter the agreement, but are bound

to interpret it according to its plain language. There is no rule of evidence better settled than that prior negotiations and treaties are merged in the written contract of the parties, and the law excludes parol testimony offered to contradict, vary, or add to its terms as expressed in the writing. *Moffitt v. Maness,* 102 N.C. 457. The principle lies at the very foundation of all contracts, and if permitted to be violated the ultimate injury to the commercial world and to society generally would be incalculable and certainly far-reaching. It is unfortunate that loose *dicta* in occasional and ill-considered cases are to be found which seem to be hostile to this safe and sound axiom of the law, because they have strained the law in order to defeat or circumvent some suspected fraud, perhaps gross and vicious; but the method of preventing the consummation (375) of the wrong will be far more disastrous in its results than a steady adherence to the rules of the law, although in special cases actual imposition or fraud may be perpetrated. The rules of law are and must needs be universal in their application, this being essential to certainty in business transactions and to the integrity of contracts; for otherwise "commerce may degenerate into chicanery and trade become another name for trick." *Benwick v. Benwick,* 3 Harris 66. It was there further stated that the plausible argument of Cicero in opposition to the usual rule preferring the written to the oral proof has been consistently repudiated by the courts from his day to the present time. The written word is more enduring, and not exposed to the corrupting influences to which oral proof is subjected—not to say anything concerning the frailty of human memory, which greatly impairs its reliability. This case is much like *Medicine Co. v. Mizell,* 148 N.C. 384, where it was attempted to show the conduct and oral declarations of an agent in contradiction of the writing. The Court said: "It is positively stated in the order, as we have said, that there is no agreement, verbal or otherwise, affecting the terms of the order, except the one expressed therein, and to this the defendant freely assented by signing the written instrument. The well-settled rule of the law forbids him now to show the contrary by oral testimony. It was, therefore, improper to admit the evidence to show that the goods were to be returned, at his option, if not sold within ninety days, as this clearly contradicts the express terms of the contract," citing *Moffitt v. Maness,* 102 N.C. 457.

The buyers in this case did not comply with the terms of the contract of warranty, by which they were strictly bound, and cannot rely upon the oral statements, even in the form of promises which are alleged to have been made by some officer or agent of the plaintiff, as a waiver of its stipulations, because it is expressly agreed in the warranty that no such oral statement shall be binding

upon the seller. There is nothing that amounts to an estoppel or waiver, but on the contrary all of the evidence proposed to be introduced by the defendant, if admitted, would violate the well-settled rule of law, and lead in the end to disastrous results. When a party makes a contract and reduces it to writing, he must abide by its terms as he has plainly stated them. This case is governed by *Allen v. Tompkins,* 136 N.C. 208; *Frick v. Boles,* 168 N.C. 654, and that line of cases, several of which are cited in *Frick v. Boles, supra.* The defendant should have complied with the plainly expressed terms of the contract and pursued the course therein indicated, as they had solemnly agreed to do. We cannot help them when they fail to help themselves, for the law lends its aid to the vigilant and denies it to those who sleep upon their rights. Parties should
(376) assert their rights in due season and according to their own stipulations, where they claim under a contract. The contract provided a method of relief in case of any defect in the machines, which, so far as appears, was reasonable and lawful, and there was a further stipulation inserted in the writing that "the same cannot be varied, altered, or controlled except by agreement in writing, signed by both parties hereto," and that the writing "contains the only terms, conditions and contracts upon which the property described above is delivered to the lessee." We would greatly impair the obligation of contracts and public confidence in their integrity should we allow one party to depart from his agreement and hold the other to a strict compliance with its terms. This idea is thus well expressed in *Meekins v. Newbury,* 101 N.C. 18, and from it and other cases we thus formulate the rule: When parties have deliberately put their engagements into writing in such terms as import a legal obligation, without any uncertainty as to the subject or extent of their engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversations or declarations at the time when it was completed, or afterwards, is rejected, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice possibly of one of the parties. *Sparks v. Messick,* 65 N.C. 440; *Guano Co. v. Live Stock Co., supra; Parker v. Fenwick,* 138 N.C. 209; *Robinson v. Huffstetler,* 165 N.C. 459; 17 Cyc. 597, 598. "The rule, however, goes even further than this, and it has been established that where the instrument is free from ambiguity and is in itself susceptible of a clear and sensible construction, parol or extrinsic evidence is not admissible even to explain its meaning or determine the construction of the writing." 17 Cyc. 598.

If we should decide otherwise in this case and hold the evidence to be competent, it would be making a contract for the parties which they did not make for themselves.

The guaranty of the defendant, Hardy Hardware Company, is an absolute one—a guaranty of payment, and not merely of collection. They, for a valuable consideration, guarantee the payment of the notes at their maturity, and if they are not paid at that time they "agree to pay immediately the amount due thereon." Joyce on Suretyship (2d Ed.), 348. "Such a guaranty is an absolute promise that the principal will perform, in accordance with the provisions of his contract. It is an absolute promise that a particular thing shall be done, and the guarantor thereby assumes an active, absolute duty to see that it is done, and must, at his peril, perform the promise." The undertaking, or obligation, is unconditional, and in default of the principal it becomes the duty of the guarantor to immediately pay the amount due thereon. *Cowan v.* (377) *Roberts,* 134 N.C. 415; *Nudge v. Varner,* 146 N.C. 147; *Bank v. Moore,* 138 N.C. 529.

The whole case resolves itself into the question whether, when parties not only fully agree upon their contract, but reduce it to writing, so as to fix its terms by language of their own, deliberately chosen to clearly state its terms, they can afterwards by oral evidence prove a different one, especially when one of the stipulations of the contract positively excludes any and all such evidence, and making the writing the only and exclusive expression of the agreement. There is but one answer to such a question, that the Court will not permit the contract to be modified or annulled in any such way. It would be unsafe to do so, as it would destroy confidence in the integrity of contracts, and, besides, would allow one of the parties to do what he had promised should not be done. It would be unjust to interfere with contractual rights in this way. Parties must be held to the performance of their agreements as made by them.

It results that the rulings of the court were correct.

No error.

Cited: Jerome v. Setzer, 175 N.C. 391; *Ward v. Liddell,* 182 N.C. 225; *Fay v. Crowell,* 182 N.C. 535; *Colt v. Kimball,* 190 N.C. 172; *Watson v. Spurrier,* 190 N.C. 730; *Gravel Co. v. Casualty Co.,* 191 N.C. 317; *Poovey v. Sugar Co.,* 191 N.C. 725; *Gibbs v. Motor Corp.,* 203 N.C. 355; *Breece v. Oil Co.,* 209 N.C. 530; *Petroleum Co. v. Allen,* 219 N.C. 463; *Whitehurst v. F. C. X.,* 224 N.C. 636; *Stokes v. Edwards,* 230 N.C. 310; *Lilley v. Motor Co.,* 262 N.C. 471.

T. C. WAGSTAFF v. CENTRAL HIGHWAY COMMISSION.

(Filed 24 October, 1917.)

1. Constitutional Law—Amendments.

Whether an amendment to an act authorizing the issuance of bonds, etc., by a county for road purposes is material and required to be passed in accordance with Art. II, sec. 14, as to the separate readings on different days, upon "aye" and "no" vote, is a question of law for the court, under the facts, and not controlled by an agreement between the parties.

2. Same—Roads and Highways—Immaterial Amendments.

An act passed systematizing the road law of a county, allowing it to issue bonds therefor, and restricting it as to a township that had already issued bonds for the purpose under a former special act by providing that if these bonds cannot be taken care of out of the present issue, the amount of the issue should be reduced in a certain sum, is not rendered invalid (Constitution, Art. II, sec. 14) by an amendment not passed in accordance with the constitutional provision, when it does not affect the taxing or other financial features of the act, or increase either the taxes or impose any additional burden on the taxpayer.

3. Same—Townships—Equality of Taxation.

An act systematizing the road law of a county, providing for bonds in a certain amount, and that the bonds of a certain township duly authorized and outstanding should be taken up or exchanged by the county bond issue, or the amount of the township bonds should be deducted from the authorized amount of the county issuance, does not by this provision render the act invalid, when the effect is not to require the township having issued the bonds to pay for the improvements in other townships, or other townships to be taxed without benefit.

4. Constitutional Law—Bonds—Statute.

A statute authorizing the issuance by a county of road bonds falling due in installments of ten years, in the discretion of the county highway commission, is constitutional, but the county is without power, unless so authorized by statute, to issue bonds falling due in intervals of five years.

APPEAL by plaintiff from *Connor, J.*, at chambers, 22 Sep-
(378) tember, 1917, from PERSON.

This is a controversy without action, submitted under Revisal 803, to determine the validity of chapter ....., Public-Local Laws 1917, authorizing the Central Highway Commission of Person County to issue and sell bonds of said county to procure money to build and improve and maintain the public roads of said county, and to issue said bonds maturing serially at intervals of five years. Said act was duly submitted to the voters of the county, under the provisions of the act, and was declared adopted on a canvass of the returns.

Roxboro Township, in Person County, under authority of chapter 449, Public-Local Laws 1915, issued and sold road bonds to the

amount of $75,000 for the benefit of the roads in said township, and most of the money has been so expended, and contracts have been made that will consume the balance, said bonds running for a period of forty years from date of issue, and bearing interest at the rate of 5 per cent, interest payable semiannually.

For the purpose of paying interest and creating a sinking fund (which must be at least 1 per cent annually of the entire issue), and to maintain the roads of Roxboro Township, the County Commissioners of Person, under the authority of said act, levied for the year 1916 40 cents on each $100 of property and $1.20 on each poll in Roxboro Township. No levy has been made under the provisions of said act for 1917.

The General Assembly of 1917, for the purpose of creating a uniform road system for Person County, enacted chapter ....., Public-Local Laws 1917, being House bill No. 14 and Senate bill No. 223. Section 1 of said act provides for submitting to the voters of Person the question of issuing bonds to an amount not exceeding $300,000. Section 6 of said act provides that the money received from the sale of said bonds shall be apportioned among the nine townships in said county, and that not less than $25,000 shall be expended in road work in each township. It further provides that the highway commission, before these bonds are issued, shall, if possible, provide for retiring the $75,000 Roxboro Township road bonds (379) authorized by chapter 449, Public-Local Laws 1915, and if said bonds cannot be retired, then $75,000 of the issue provided for by the act in question shall not be issued, and said amount shall be withdrawn from the portion of said bond issue which would otherwise be apportioned to Roxboro Township.

It is agreed that the highway commission has not succeeded in retiring the aforesaid $75,000 Roxboro Township road bonds, but they are outstanding and unpaid. Section 10 of the act provides that the Commissioners of Person shall annually levy not more than 50 cents on each $100 worth of property and not more than $1.50 on each poll to pay the interest on the bonds authorized by this act of 1917, and to maintain the roads in good order, and in accordance with said authority the commissioners, at the instance of the highway commission, have levied at that rate for said purpose for the year 1917.

It is agreed that a number of amendments were made on third reading in the Senate to House bill No. 14, Senate bill No. 223, and said amendments were acceded to in the House, but without said acquiescence being made in the mode required by section 14, Article II.

The court held that none of the amendments are material; that the statute is valid and authorizes the defendant to issue and sell bonds as therein provided, and that it may issue said bonds maturing serially at intervals of five years. From such judgment the plaintiff appealed.

William D. Merritt for plaintiff.
C. A. Hall and F. O. Carver for defendant.
Manning & Kitchin and Douglass & Douglass amici curiæ.

CLARK, C.J. House bill No. 14 was introduced in the House of Representatives of 1917 and passed its three several readings on three different days, the second and third readings having been by roll-call, with yeas and nays duly entered on the Journal, as required by section 14, Article II of the Constitution. In the Senate it was bill No. 223 and passed that body in the same manner, except that upon its third reading in the Senate certain amendments were adopted and the bill passed its third reading as amended. The bill as amended was duly concurred in by the House of Representatives, but not in the manner required by section 14, Article II of the Constitution.

It is admitted by plaintiff that the amendments to sections 2, 5, 8, and the new section, 12-B, are not material. While such admission would not be binding on the courts, we concur that they are not material and do not invalidate the act in purview of the decision in *Glenn v. Wray*, 126 N.C. 730.

(380) The plaintiff contends that the following amendments were material and rendered the bill invalid by reason of their not having passed the House in the manner required by the aforesaid provision of the Constitution, to-wit:

Section 7 was amended by inserting, *"Provided,* all roads shall be laid out and constructed under the supervision of a competent and expert engineer acceptable to the central highway commission." Section 11 was amended so as to require that the sinking fund should amount to at least 1 per cent of the entire issue annually, the words *"annually"* and *"at least 1 per cent of the entire issue"* having been inserted. A new section was inserted, as follows: "Sec. 12a. In the event that the $75,000 of road bonds mentioned in section 6 hereof cannot be retired or exchanged, then it shall be the duty of the central highway commission created herein to assume the payment of the interest on said bonds and provide a sinking fund for the payment of the same, as is set out in chapter 449, Public-Local Laws of 1915, out of the funds received from the an-

nual levy of taxes on the taxable property and polls in Roxboro Township under this act: *Provided,* that in no event shall the annual levy on the taxable property and the poll tax in Roxboro Township exceed 50 cents on each $100 worth of taxable property and $1.50 on the poll when combined, under this act and chapter 449, Public-Local Laws 1915."

Subsequently, the General Assembly amended chapter ....., Public-Local Laws 1917, by adding to the act before us the following as "Section 14. In the event the provisions of this act are adopted by the voters of Person County in the manner provided by said act, then all laws and clauses of laws enacted prior to this session of the General Assembly providing for the levying of any taxes for the building or maintenance of public roads in the county of Person, or in any of the townships thereof, are hereby repealed, it being the purpose of this act to make uniform taxation for public roads in all the townships of said county of Person, and to limit such taxation to the rates and amounts herein provided for, in case the provisions of this act are adopted in the manner provided for in said act."

We do not think that the amendments to section 7, and section 11, in any wise affect the validity of the statute. They do not affect the taxing or other financial features of the act, and do not increase either the taxes or the obligation authorized, or impose any additional burden on the taxpayers, and therefore it was not required that the act as thus amended should again pass three several readings on three different days in the House and Senate, with the yeas and nays recorded on the second and third readings in each house.

Section 12 does nothing more than to direct more clearly the manner in which certain acts authorized by the original (381) bill should be performed. Section 14 is subject to the provisions of section 6.

The intent of the Legislature was to establish a uniform system of road construction for the county of Person, which was to include Roxboro Township, and to provide for the taking over of the roads already built or being built by Roxboro Township, making them a part of the county system; also, to pay the debt ($75,000) issued by Roxboro Township for road purposes, under chapter 449, Public-Local Laws 1915, either by buying them or exchanging county bonds for them, using Roxboro Township's share of the proceeds of the county bonds for that purpose, or if that should be impracticable, then payment of said bonds should be assumed by the county. The object was to prevent Roxboro Township from being taxed to pay the county bonds, and also to pay her own bonds, and therefore the statute (section 6) provides that if the Roxboro Township bonds

"cannot be retired or exchanged, then in that event $75,000 of the issue herein provided for shall not be issued, and this amount shall be withdrawn from the portion of said bond issue which would otherwise be apportioned to Roxboro Township." That is by authority of the act there are outstanding $75,000 bonds issued under the act of 1915 by Roxboro Township, and $225,000 shall be issued by the county, Roxboro Township being credited on its proportionate part of principal and interest of $300,000, with the payment of principal and interest on the $75,000 bonds already issued by it for the construction and maintenance of the roads in that township.

There is no inhibition in the Constitution upon the authority of the Legislature to authorize (section 2) the issuance of bonds falling due in installments of ten years, in the discretion of the central highway commission, at intervals. It is a matter that rests within the province of the Legislature. Such provision does not, however, authorize the issuance of bonds falling due at intervals of five years.

We think that all the power and authority to borrow money, pledge the faith of the county, and to levy taxes which are conferred by chapter ....., Public-Local Laws 1917, are to be found in the original bill, and that such power was in no wise increased or affected by the amendments, and hence that such amendments are not material and did not require that the bill as amended should be read again three times in each house, with the yeas and nays recorded on the second and third readings in each house.

There is nothing in this case that raises the question of the validity of the poll tax authorized by the acts. It does not appear that, added to the poll tax already existing, the amount of the poll tax would exceed the constitutional limitation of $2; but if it did, speaking for myself only, the Constitution would simply restrict
(382) and forbid any addition by the act to the poll tax which would make the total poll tax exceed $2. It is true that the Constitution also provides that the poll tax can be applied only to education and the support of the poor; but again speaking only for myself, this does not forbid the levying of the poll tax under this statute provided, or until, the aggregate amount shall attain the limitation of $2; but the poll tax, whenever levied, cannot be applied to any other purpose than that specified in the Constitution. Neither of these matters would in any wise affect the validity of the bonds, as the purchaser thereof would take with notice that the poll tax cannot exceed $2 and cannot be applied to any other purposes than education and the support of the poor. These questions, as already stated, are not presented by any exception in this record.

With the modification that the act confers discretion to issue

bonds falling due at intervals of ten years, but not at intervals of five years, the judgment is

Affirmed.

Cited: Guire v. Comrs., 177 N.C. 519; *Comrs. v. Trust Co.*, 178 N.C. 173.

UNIVERSAL OIL AND FERTILIZER COMPANY v. R. A. BURNEY.

(Filed 24 October, 1917.)

1. Evidence—Letters—Handwriting.

When the contents of letters written by a party to an action are relevant to the inquiry, it is not required that the witness should have seen the person write before he is permitted to identify the letter by the handwriting, for it is sufficient if he can do so from correspondence formerly had between them.

2. Evidence — Lost Letters — Handwriting—Identification—Correspondence.

Where the purchaser of goods sues his vendor for damages in his failing to deliver them in accordance with his contract, and the quantity of the purchase is in dispute, and a letter previously written by the vendor to the purchaser is relevant to the inquiry, it is not required that the purchaser notify the vendor to produce a copy of this letter in order to introduce parol evidence of its contents, it appearing that the purchaser had made proper and sufficient search for the original and there is no evidence that a copy had been made.

3. Vendor and Purchaser — Measure of Damages — Evidence — Damages Minimized.

Where the vendor sold a large quantity of cotton seed, being informed by the purchaser that orders for a manufactured product therefrom would be taken against this specific purchase, and the purchaser breaches this contract and is sued for the difference in the price agreed and that required to get the cotton seed elsewhere, and there is evidence that this was done on the open market at the then prevailing prices: *Held*, while the purchaser is required to exercise reasonable business prudence to minimize his loss, evidence as to a price offered another by the vendor, less than the contract price, without indication to exact time or price or quantity, is too indefinite, and, on appeal, it being incumbent on defendant to show prejudicial error, an exception to the ruling out of the evidence will not be sustained.

4. Evidence—Contracts—Local Customs—Burden of Proof—Vendor and Purchaser.

While a contract may be explained and interpreted by reference to a general custom or usage, so all-prevailing that the parties may be pre-

sumed to have contracted with reference to it, the doctrine can have no application to a purely local custom among the merchants of a town to receive goods from the carrier at the boat landing in an unusual manner, in modification of a contract, and the burden is on the party setting up the custom to show that his adversary party knew of this custom and contracted with regard to it.

CIVIL action, tried before *Bond, J.,* and a jury, at April (383) Term, 1917, of NEW HANOVER.

The action was chiefly to recover damages for an alleged breach of contract on the part of defendant in the sale and delivery of a certain amount of cotton seed, plaintiff's evidence tending to show that in February, 1912, plaintiff bought and defendant sold and agreed to deliver at the boat at White Oak Landing 8,000 to 10,000 bushels of cotton seed for purposes of manufacturing and resale, at the contract price of 24 cents per bushel, or $16 per ton; that after delivering about 2,300 bushels, defendant, in breach of its contract, failed to deliver the remainder, and plaintiff was thereby forced to go on the market for the remainder of the seed, or 5,650 bushels of them, at an advanced price, being the amount required to fill its contracts, made in reliance on defendant's agreement, and to plaintiff's damage $360.75.

The evidence of plaintiff tended further to show that the contract for said purchase was in parol and made by its purchasing agent, A. A. McQueen, and that at the time the sale was made said agent notified defendant that the seed were being bought for manufacturing, and that disposition of the product would be made in reliance upon defendant's agreement, McQueen testifying, among other things, as follows: "I insisted on Mr. Burney's not putting in any more seed than he actually had, as Mr. Worth (manager) would sell the product of these seed against the seed he was buying—he would sell oil against these seed. Mr. Burney said he had 8,000 bushels of seed of his own, and insisted on wiring for sacks, so that they could be shipped immediately; they were to be shipped as soon as the sacks could come, plaintiff having agreed to supply the sacks." And again, "I told Mr. Burney that Mr. Worth had sold the cake against this lot of seed and was anxious to get it." Additional claim was made, with evidence to support it, for a quantity of sacks sup- (384) plied by plaintiffs, pursuant to agreement, and which defendant had never returned or accounted for.

Defendant averred and offered evidence tending to show that he only contracted for 6,000 bushels of seed, and that he had delivered as much as 3,316 bushels, and that his reason for not making further deliveries was because of plaintiff's failing to supply sacks that were suitable for shipment; that they were not delivered on the boat, but

were left on the river bank, in care of boys who were kept there by local merchants of White Oak to overlook and care for freight of that kind at the landing, this being a custom which prevailed there with the merchants and shippers.

Defendant contended further that he had not been paid for all the seed he had shipped, and that as a fact there would be due defendant on correct settlement $36.30, which he demanded as a counterclaim.

On issues submitted, the jury rendered the following verdict:

"Is defendant, Burney, indebted to plaintiff, and if so, in what amount?" Answer: "Yes, $393.32, with interest from 15 March, 1917."

Judgment on the verdict, and defendant excepted and appealed.

W. P. Mangum Turner for plaintiffs.
McClammy & Burgwyn for defendants.

HOKE, J. The jury have accepted plaintiff's version, that there was a breach of contract on the part of defendant, assessing plaintiff's damages at $393.32, and on careful consideration of the record we find no error that would justify us in disturbing the results of the trial.

It was objected for defendant that the witness, Worth, examined for plaintiff in reference to a letter purporting to have been written by defendant, Burney, was allowed to testify to the handwriting of defendant, having never seen him write, but having received letters from him in the course of business. It is well recognized that, in order to speak to this question, a witness is not required to have seen the person write, and on the facts in evidence, authority with us is against defendant's position. *Morgan v. Fraternal Association,* 170 N.C. 75-82, citing *Nicholson v. Lumber Co.,* 156 N.C. 59; *Tuttle v. Rany,* 98 N.C. 513. *Morgan's* case was not unlike this, and the opportunity of the witness to familiarize himself with the handwriting was not greater, and it was held, on this subject: "Where the Insurance Commissioner has testified that he is familiar with the signature to a letter sought to be introduced in evidence from correspondence with the writer through his department, and he could testify to the handwriting," etc.

It was objected further that this witness, Worth, who was general manager of plaintiff company, was allowed to speak to the contents of the letter in question, the witness having said that he had looked for the letter and had not been able to find it; that (385) his letter-book contained an entry showing that such a letter had been received, but that he was unable to find it; that he could

not find any of the company's correspondence for January, February, or March, April, or May, 1912; that they had moved three or four times in the last five years, and he couldn't find the correspondence anywhere.

The contract here was made by the purchasing agent, McQueen, and was in parol. The letter in question from defendant, Burney, previous to the contract, contained an offer to sell plaintiff 8,000 to 10,000 bushels of cotton seed, and so was in direct support of plaintiff's claim that such was the contract. Defendant, as we understand the record, does not contend that the proof of loss of the original is insufficient, but bases his objection on the fact that no notice was shown for defendant to produce a copy, and unless that was done, parol evidence of the contents of the lost original is not permissible.

In the application of what is termed the best evidence rule, there is decided conflict of authority on the question whether there are degrees of secondary evidence. An intelligent writer on the subject (Jones on Evidence (2d Ed.), sec. 228) lays it down as the English rule that no such degrees are recognized, and that the position is supported by the cases in Massachusetts, Indiana, Michigan, and Nebraska. The author also states that the current of American authority is to the contrary, and, under this, termed the American rule, that parol evidence of a lost original will not be received when there is shown to be a dependable copy in existence and available as evidence, or until proper effort is made to procure it. In case of private writings, a decision in this State *(Osborne v. Ballew,* 29 N.C. 415) seems to favor the English rule, but it is not now necessary to decide the question, for under either rule it is held that before the principle is recognized or enforced, it must be shown that there is a copy in existence, to be procured by proper procedure. Jones on Evidence, sec. 229. Defendants object and except because they were not notified to produce a copy, and we find nowhere in the record that such a copy was made or held by defendant.

Again, it appeared that a witness for defendant, J. R. Hunt, had testified that he lived at White Oak in 1912 and in the spring of that year, and McQueen, plaintiff's purchasing agent, had made him an offer for cotton seed at some price below 24 cents per bushel, which was declined; and it is insisted that error was committed in excluding a question and answer of this witness to the effect that if plaintiff had offered as much as 24 cents witness would have sold.

It is well understood that in case either of tort committed or contract broken, it is "the duty of the injured party to do what reasonable business prudence requires in order to minimize his loss." (386) *Cotton Oil Co. v. Telegraph Co.,* 171 N.C. 705-708, and au-

thorities cited. But the proposed question and answer of the witness here is entirely too indefinite to call for or permit the application of any such principle. It does not appear what was the price offered, nor whether the time when it occurred would have tended to relieve plaintiff, nor the amount of seed that the witness had.

It is incumbent upon a party who assails the validity of a trial to show that prejudicial error has been committed, and on the facts presented this exception must be disallowed. *In re Smith's Will,* 163 N.C. 466. And the same position will suffice for a principal objection to the charge of the court that, after instructing the jury, they could allow as damages the difference between the contract and market price; "that if defendant knew that plaintiff had made bargains by which they were to use this seed, and plaintiff was forced to go into the market and buy the seed at a higher price to take the place of the seed which, if any, he had wrongfully failed to furnish, the added cost of the seed would be an additional element of damages." There is evidence on the part of plaintiff to the effect that at the time of the contract defendant knew plaintiff was buying these seed to manufacture, and that he had sold his product of the mills "against the seed plaintiff was then buying of defendant"; and on this evidence we incline to the opinion that the charge of his Honor can be fully sustained as given. *Tillinghast v. Cotton Mills,* 143 N.C. 268; *Machine Co. v. Tobacco Co.,* 141 N.C. 284; *Lewis v. Rountree,* 79 N.C. 122.

In *Machine Co.* case, *supra,* it was held that when one violates his contract he is liable for such damages, including gains prevented, as well as losses sustained, as may fairly be suffered to have entered into the contemplation of the parties when they made the contract.

But in any event there is nothing in the record to show that in buying these seed to protect itself against the consequences of defendant's breach the plaintiff paid anything above the market value, or that he purchased at the time otherwise than at the market price. On this question the language of the witness, Worth, is that he sold 110 tons of cake to the Exchange Cotton and Oil Company, of Kansas City, and failing to get the seed from Mr. Burney, he had to buy them, because these parties required his company to line up to their contract and deliver the cake. "So I went on the open market and bought seed at the best price I could. I bought from the North Carolina Cotton Oil Company and paid the prices as follows." There is nothing to show that plaintiff bought, except when compelled to do so by the obligation into which his company had entered, nor, as stated, that he paid more than the market price at the time the purchase was made; and no prejudicial error being made to appear, this exception also must be overruled. Defendant also (387)

objects and assigns for error that the court, in charging the jury as to the existence of the usage or custom in delivering goods on the river bank, in care of boys there employed to look after them by local merchants, instead of delivering them f. o. b. on the boat, as the contract in terms specified, instructed them, among other things, that if the oil company knew nothing about such a custom it was the duty of defendant to deliver to the steamboat company and not have them in custody of the employees of these merchants.

It is established doctrine that the terms of a contract may be explained and interpreted by reference to a prevailing custom or usage, and it is recognized further that such a custom may be so general and all-pervading that the parties may be presumed, in some instances conclusively presumed, to have made their contract in contemplation of it, but such a presumption is not permissible in respect to a custom of this kind, the usage at a local steamboat landing. In such cases, unless the parties knew of it, they could not have contracted in reference to it; and on the facts in evidence the charge of his Honor is undoubtedly correct. *Gilmer v. Young,* 122 N.C. 806; *Chateaugay Ore Co. v. Blake,* 144 U.S. 476; *Pennel v. Transportation Co.,* 94 Mich. 247; Clark on Contracts, 328; Jones on Evidence (2d Ed.), sec. 464.

In the citation to Clark, *supra,* it is said: "It is a general rule that the usage must have been known to the parties, but if a usage is established and general, it is presumed to have been known to them, and is obligatory without proof of knowledge; and even in case of ignorance, if it is not a general usage, or if from want of informants or any other reason it cannot be held to be established in the sense in which we have used that term, then it must be affirmatively shown that the parties had knowledge of the usage at the time of contracting, and contracted with reference to it."

And in Jones on Evidence: "There are certain commercial customs and usages of which every person in the community is deemed to be cognizant—such, for example, as those belonging to the law merchant; but the usages of special trades and those local usages which may be limited to certain communities cannot, of course, be presumed to be known at all. These have been called usages as distinguished from the generally recognized customs of times. In respect to these usages, there should be proof either of actual knowledge on the part of the person to be affected, or proof of circumstances from which such knowledge may be fairly inferred."

The remaining exceptions are without merit, some of them being

abandoned by appellant; and on the record the judgment for plaintiff is affirmed.

No error.

Cited: Cohoon v. Harrell, 180 N.C. 41; *McDearman v. Morris,* 183 N.C. 78; *R. R. v. Fertilizer Co.,* 188 N.C. 140; *Perry v. Surety Co.,* 190 N.C. 292; *Braswell v. Bank,* 197 N.C. 232; *Pemberton v. Greensboro,* 208 N.C. 470; *Troitino v. Goodman,* 225 N.C. 416; *Lee v. Beddingfield,* 225 N.C. 574; *In re Will of Bartlett,* 235 N.C. 492.

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W. W. ROGERS, P. H. MITCHELL, F. D. FLYTHE, E. M. WOOTEN, AND JOHN EARLY v. C. G. POWELL, J. A. WILLIAMS, M. D. GATLING, AND J. R. GARRETT.

(Filed 24 October, 1917.)

School Districts—Board of Trustees—Injunction—Quo Warranto—Statute.

Individuals claiming to comprise the board of trustees of a school district *de jure* may not enjoin those in possession under a colorable claim of right as such board, from their performance of their duties, as such, and require the defendants to turn over to them the school buildings, etc., and not interfere with them in the control and management of the property, and thus determine collaterally the question of title, for the interests of the public are involved; nor would remedy by injunction be permitted in *quo warranto* proceedings, where the title to office is directly involved. Revisal, sec. 836; *Salisbury v. Croom,* 167 N.C. 223, cited and distinguished.

CLARK, C.J., dissenting.

CIVIL action, from HERTFORD, heard on return to preliminary restraining order, before his Honor, *H. W. Whedbee, Judge,* presiding in the courts of the Third Judicial District, Fall Term, 1917.

The action was instituted by plaintiffs, claiming to be the regular Board of Trustees of Ahoskie School District No. 11, seeking an injunction to require defendants, also claiming to be the regular board, to turn over to plaintiffs the school building, etc., and to enjoin defendants from interfering with plaintiffs in the control of said property and in the management of said school and its affairs.

From judgment dissolving the restraining order, the plaintiffs appealed.

Winborne & Winborne and Pruden & Pruden for plaintiff.

Winston & Matthews and W. R. Johnson for defendant.

HOKE, J. Chapter 210, Private Laws 1909, provides for creation of Ahoskie School District No. 11, incorporating a board of trustees of six members for the governance of the school and its affairs, who shall hold office for six years, and to be divided into classes, so that two shall go out by expiration of term every two years. In case of *ad interim* vacancies, they shall be filled by the remaining members of the board by a majority vote thereof until the next general election, when such vacancies shall be filled by an election of the voters of the district.

A perusal of this record will disclose that this is a contest between two rival boards of trustees, each claiming to be *de jure,* and where the defendants are and have been in the actual enjoyment of the office in dispute are in full exercise of the control and management of the school and its affairs have employed the teachers (389) for the incoming school year and are in under color, one of the defendants having been regularly elected by the voters and three others having been appointed to fill vacancies at a meeting held for the purpose and claiming to have authority to make such appointments.

Upon such a record, our authorities are to the effect that it is not open to plaintiffs to have the question determined in an action of this character where the title is only presented as a collateral issue, but that the parties should try out the question of title in an action properly constituted and brought directly for the purpose. *Midgett v. Gray,* 158 N.C. 133; *Rhodes v. Love,* 153 N.C. 468; *Patterson v. Hobbs,* 65 N.C. 119. The question presented was fully discussed in one of the cases cited *(Rhodes v. Love, supra),* Associate Justice Walker delivering the opinion, and where it was held, among other things:

"That action by *mandamus,* brought by one claiming to be the duly elected and qualified treasurer of a graded school committee to compel the present occupant to deliver to him the books and papers of the office alleged to be wrongfully withheld, is not the proper remedy, and the action will be dismissed when the pleadings put the title to the office in issue, and that is the real matter in controversy.

"The title to a public office in dispute between two rival claimants must be determined by an action of *quo warranto,* or by an action in the nature of *quo warranto,* especially when the defendant is in possession of the office under a claim of right in him to hold it and exercise its function or perform its duties; and a *mandamus* to compel the surrender of the books and papers will not lie until the claimant has established the disputed title."

It may be well to note that defendants do not contend but that

two of plaintiffs, W. W. Rogers and P. H. Mitchell, have full right to membership, they having been duly elected thereto by the voters at the election in May, but this is a contest between the two boards, and the defendants being in possession and exercise of the offices and under colorable claim of right their position can only be questioned by suit brought directly for the purpose. *Fuel Co. v. Staton,* at present term; *Comrs. v. McDaniel,* 52 N.C. 107; *Burke v. Elliott,* 26 N.C. 355; *Tar River Co. v. Neal,* 10 N.C. 520; *Brown v. O'Connel,* 36 Conn. 432; 8 Am. and Eng. Enc. (2d Ed.), p. 783 *et seq.*

And being, as stated, a contest between two rival boards, while it is admitted that two of plaintiffs are entitled to membership, the rightful organization of plaintiffs as a board is earnestly denied, and, furthermore, is involved in substantial doubt. To restrain the defendants, therefore, from any and all "interference in the affairs of the school" might result in serious hindrance and leave this important work for the time being entirely without official supervision or control. Under such conditions, the public interests should (390) receive due consideration in determining the right to injunctive relief. *Jones v. Lassiter,* 169 N.C. 750.

A position fully recognized in cases of this character by our statute law, even in actions brought for the direct purpose of trying the title, sec. 836, Revisal, chap. 12, sub-chap. XL, title *Quo Warranto,* making provision as follows: "In any civil action pending in any of the courts of this State wherein the title to any office is involved, the defendant being in the possession of said office and discharging the duties thereof, shall continue therein pending such action, and no judge shall make any restraining order interfering with or enjoining such officer in the premises; and such officer shall, notwithstanding any such order, continue to exercise the duties of such office pending such litigation and receive the emoluments thereof."

There is nothing in the case of *Salisbury v. Croom,* 167 N.C. 223, cited for plaintiff board, that in any way militates against our present decision. That was a contest between two individuals, each claiming to be the rightful member of the board of directors of the Central Hospital, and the question as to which of two rival boards had the right of present control of the property was in no way presented. The Court held that defendant Croom, having been appointed and duly confirmed by the Senate, was entitled to the position, and the official board was right in accepting him as such.

The same position is recognized here as to two of plaintiffs who were duly elected by the voters. No one disputes their right as members or to act as such. The third member who was so elected positively declined to serve, and this is one of the vacancies filled by the

old board, claiming the right to do so under this statute of incorporation. It was stated on the argument, and accepted as true, that an action in the nature of *quo warranto* has been instituted for the purpose of determining this question between these boards, and for that reason we have not deemed it advisable to refer in detail to the testimony bearing on the claims of the respective parties. But a casual perusal of the record and facts in evidence disclose that defendant board is in possession and control of the school, its buildings and other property, and at least in under color of right, and under the principles stated their management and efforts to carry on the school and serve the public should not be interfered with by injunction until the issue has been finally decided in this action brought directly for the purpose.

There is no error in dissolving the injunction, and the judgment of the Superior Court to that effect is

Affirmed.

CLARK, C.J., dissenting: This is not a *quo warranto* to (391) try the title to office, but simply an injunction, which was temporarily granted, to restrain intruders from exercising certain duties when, upon unquestioned facts, they were acting without authority.

The Ahoskie School District had six trustees. On 7 May, 1917, an election was had for three members of said board. The encumbents, candidates for reëlection, were defeated and three new members elected. The regular day for the session of the board at which the new members should have appeared to take their seats was the first Tuesday in June following—*i. e.*, 5 June. But three of the old board, C. G. Powell, J. A. Williams, and M. D. Gatling (the last two of whom had been defeated of reëlection) met in session on 21 May, without notice to the newly elected trustee, and, assuming themselves to be the board, and without notice to him, declared vacant the position of one of the absent members (A. E. Garrett) and assumed to elect in his place one A. B. Cowan; and then again on 25 May they met, with Cowan present, and declared vacant the place of another absentee, L. T. Sumner, and elected to fill the same J. R. Garrett, and subsequently, upon the resignation of A. B. Cowan, they elected M. D. Gatling (who had been defeated at the election) in his place. On the first Tuesday in June, Powell (one of the three), J. R. Garrett, and A. B. Cowan, both of whom had been elected as above set out, without authority, met with said Gatling and declared the office of W. L. Curtis, one of the newly elected members, vacant because he had not qualified and appointed J. A. Williams

(who had been defeated at the election) in his place, and then invited the other two newly elected members to sit with them, which was declined.

This was an injunction, brought by P. H. Mitchell and W. W. Rogers, two of the new members elected on 7 May, asking an injunction against C. G. Powell, one of the old members, and his three associates, who had all been illegally chosen in the ingenious manner just narrated, as intruders, from taking possession of the school building and property and interfering in any way with the management of the school.

A temporary restraining order was granted by Kerr, J., 28 July, 1917, returnable before Whedbee, J., 14 August, 1917, when it was dissolved, and the plaintiffs appealed.

It is apparent from this summary that the defendants were usurpers and should have been restrained until there was a legal meeting of a majority of the board.

The defendant's right to exercise any authority depends entirely upon the validity of the meeting on 21 May. That meeting was an absolute nullity, because, in the best view for the defendants, there were only three members present, which is not a majority of six, *Cotton Mills v. Comrs.*, 108 N.C. 678; Rev. 2831(2); and furthermore it was not held at the regular time, the first (392) Tuesday in June. *Moore v. Comrs.*, 113 N.C. 128. The action taken by them in declaring the seat of one of the absent members vacant and attempting to fill it was a nullity, for three members out of six had no authority to take this or any other action, and consequently the subsequent meeting of these three men with the substitute chosen by them on 21 May, and all their subsequent conduct which reinstated two of the very men the people had put out, is invalid, because it is all based upon the meeting of 21 May, which was itself a nullity.

We do not know, and it is immaterial, what was the issue at the election on 7 May. But we do know that the three members of the old board were defeated for reëlection, and that the three new members were elected in their stead, and yet two of the men defeated by the people kept the new members out till they reinstated themselves.

Under a government which rests upon the consent of the governed, the voice of the people, whether in a school district or a township or in the State or nation, legally expressed, should govern. It matters not that this is only a school district. The methods herein attempted to set aside the duly expressed will of the people in this

school district if attempted on a larger scale would have had serious consequences.

Of the three men who met on 21 May, two had been defeated of reelection. But if it be conceded that they were all three *prima facie* trustees of the school on 21 May, they were not a majority of six, and their conduct in vacating the office of an absent member and electing a substitute was without color of authority, and all subsequent action is vitiated thereby. Water cannot raise above its source, and as the meeting on 21 May was invalid, no subsequent action dating back to that meeting has any validity.

The courts should give no countenance to such disregard of the public will and to the methods thus resorted to to set it aside. The court should have continued the injunction and should have issued a mandatory injunction that the two newly elected members of the board (the other one of them not having accepted) and Powell, who was the only one of the three whose seats were not lost at the election or who was not holding another office in violation of the Constitution, should meet and organize. As there were then only three legal members of the board (two of the plaintiffs and Powell), they would have been the entire board, and these three could legally have filled vacancies till next election.

The arguments of defendants, appealing to technicalities based upon this being a *quo warranto,* is simply the traditional red herring drawn across the trail to divert attention from the real issue. We were told in the argument by counsel on both sides that a (393) *quo warranto* is pending in the court below to decide the title, and, pending such decision, the court should have continued the injunction with a mandatory order for the three valid members, as above stated, to hold a meeting and conduct the school until the *quo warranto* is decided. *Tise v. Whitaker,* 144 N.C. 507.

Nothing is more to be reprehended than conduct designed to set aside and thwart the popular will, whether this is done by force, by fraud, or by *finesse.* A loyal observance of the declaration of the people at the ballot box is the first duty of every citizen under our form of government.

Cited: Alexander v. Lowrence, 182 N.C. 643; *Freeman v. Ponder,* 234 N.C. 301; *Edwards v. Bd. of Ed.,* 235 N.C. 351.

J. SPRUNT NEWTON v. THORNE CLARK ET AL.

(Filed 24 October, 1917.)

1. Equity—Deeds and Conveyances—Reformation.

A deed will not be reformed into a mortgage in the absence of allegation and proof that it was not executed as it was intended to be, or that the clause of defeasance was omitted by reason of ignorance, mistake, fraud or undue advantage.

2. Trusts and Trustees—Deeds and Conveyances—Parol Trusts—Statute.

Parol evidence that a deed to lands was made upon agreement to reconvey the lands to the grantor upon a certain contingency is incompetent to establish a parol trust in the grantors' favor, and is inadmissible under the statute of frauds.

CLARK, C.J., did not sit.

APPEAL by plaintiff from *Connor, J.*, at the April Term, 1917, of CUMBERLAND.

This is an action brought for the purpose of having a certain deed, absolute in form, declared to be a mortgage.

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

Bullard & Stringfield for plaintiff.
Robinson & Lyon and Manning & Kitchin for defendant.

ALLEN, J. There is neither allegation nor proof that the deed which the plaintiff asks to have reformed was not executed as it was intended to be, or that the clause of defeasance was omitted by reason of ignorance, mistake, fraud or undue advantage, and this, under our authorities, is fatal to the plaintiff's action.

Pearson, J., stated the principle clearly and succinctly in *Sowell v. Barrett,* 45 N.C. 54, as follows: "Since *Streator* (394) *v. Jones,* 10 N.C. 423, there has been a uniform current of decisions by which these two principles are established in reference to bills which seek to correct a deed, absolute on its face, into a mortgage or security for a debt: (1) It must be alleged, and of course proven, that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage; (2) the intention must be established not merely by proof of declarations, but by proof of facts and circumstances, *dehors the deed,* inconsistently with the idea of an absolute purchase. Otherwise, titles evidenced by solemn deeds would be at all times exposed to the 'slippery memory of witnesses.' These principles are fully discussed in *Kelly v. Bryan,* 41 N.C. 283, and it is useless to elaborate them again."

This excerpt from the opinion has been quoted literally and with approval in *Bonham v. Craig,* 80 N.C. 224; *Watkins v. Williams,* 123 N.C. 170; *Porter v. White,* 128 N.C. 43, and the same principle is declared in different language in *Kelly v. Bryan,* 41 N.C. 286; *Brown v. Carson,* 45 N.C. 272; *Briant v. Corpening,* 62 N.C. 325; *Edgerton v. Jones,* 102 N.C. 283; *Norris v. McLam,* 104 N.C. 160; *Sprague v. Bond,* 115 N.C. 532.

Nor does the alleged agreement, if established, raise a trust in favor of the plaintiff. This question was dealt with in *Bonham v. Craig,* in which the authorities are discussed, and the Court says: "Nor will it avail the plaintiff to treat the alleged agreement as raising a trust which, not being within our statute of frauds, may be enforced upon sufficient parol proof. The case made in the complaint on which relief is sought is the omission to insert in the deed a clause limiting the estate conveyed upon the grantee's undertaking to restore the property and reconvey title when the grantor returned, and the equity arising out of his refusal to do so. This is not a trust within the scope of any of the numerous adjudications to which our attention was called in the elaborate argument of counsel. It involves the question of the admissibility of evidence outside of the deed to control its operation and impose upon the grantee an obligation, on the contingency which has happened, to reconvey the land. Upon principle and authority, we think this cannot be done." This is approved in *Gaylord v. Gaylord,* 150 N.C. 228.

The case of *Ray v. Patterson,* 170 N.C. 226, is not in conflict with these authorities. The question presented by the appeal in the *Ray* case was as to the degree of proof required, whether by a preponderance of the evidence or by evidence clear, strong and convincing, and there was also present in that case the fact found by the jury that the defendants at the time the deed was executed by the plaintiff and which he was asking to have reformed were the owners of mortgages upon the land, thus introducing into the case
(395) the doctrine peculiarly applicable to dealings between mortgagor and mortgagee, which does not appear in this record.

Not only is the case not opposed to the doctrine we have declared, but it clearly recognizes the same principle, when it is said in the opinion, "Equity will reform a written contract or other instrument *inter vivos* where, through mutual mistake of the parties or the mistake of one of them, induced by the fraud or inequitable conduct of the other, it does not as written truly express their agreement."

The judgment of nonsuit was properly allowed.
Affirmed.

CLARK, C.J., not sitting.

Cited: Williamson v. Rabon, 177 N.C. 304; *Newbern v. Newbern,* 178 N.C. 5; *Ricks v. Brooks,* 179 N.C. 207; *Chilton v. Smith,* 180 N.C. 474; *McRae v. Fox,* 185 N.C. 348; *Perry v. Surety Co.,* 190 N.C. 289; *Waddell v. Aycock,* 195 N.C. 270; *Burton v. Ins. Co.,* 198 N.C. 502; *O'Briant v. Lee,* 212 N.C. 802; *Davenport v. Phelps,* 215 N.C. 328; *Winner v. Winner,* 222 N.C. 417; *Mayland v. R. R.,* 251 N.C. 787; *Schmidt v. Bryant,* 251 N.C. 841.

J. P. QUELCH ET AL. V. D. K. FUTCH.

(Filed 24 October, 1917.)

Limitations of Actions—Nonsuit—Statutes.

In action to recover lands wherein the plaintiff depends upon a nonsuit in a former action to repel the bar of the statute of limitations, Revisal, sec. 370, it is necessary for him to bring himself within the meaning of the statute and show identity of parties, cause of action, and title, or that he is the "heir at law or representative" of the former plaintiff, the second action being regarded as a continuance of the writ in the first one; and it is insufficient if the plaintiff in the second action was a grantee of the plaintiff in the first one before the latter commenced his action.

APPEAL by plaintiff from *Lyon, J.,* at the Spring Term, 1917, of NEW HANOVER.

This is an action to recover land.

During the progress of the trial the plaintiffs offered in evidence the summons, complaint, answer, and judgment of nonsuit in a case begun on the ..... day of ....., 191...., by Thomas R. Williams against the defendant herein, D. K. Futch, seeking to recover for himself the property in controversy in this action. At the trial of that action the plaintiff suffered a nonsuit, and this action was begun by J. P. Quelch in less than twelve months thereafter. At the time that Thomas R. Williams instituted the suit referred to, he had made deeds referred to in the record herein, and J. P. Quelch had his deed and was living on the tract described by metes and

bounds in the deed from Thomas R. Williams to R. L. Kirkwood, assignee.

At the conclusion of the evidence the plaintiff prayed the (396) court to charge the jury with reference to defendant's plea of adverse possession under color, and more especially with regard to the tract of 18½ acres claimed by deed under deed from Worth, that the statute of limitations ceased to run on the date of the institution of the suit by *Thomas R. Williams v. D. K. Futch.* His Honor refused to so charge the jury, and charged the jury "that the date when the statute of limitations ceased to run in defendant's favor was the date of the institution of this action on the ..... day of ....., 191...," and the plaintiffs excepted.

From the judgment rendered plaintiffs appealed.

Kenan & Wright and McClammy & Burgwyn for plaintiff.

John D. Bellamy & Son, W. P. Gafford, and E. K. Bryan for defendant.

ALLEN, J. The only question presented by the appeal is whether the plaintiff has brought himself within section 370 of the Revisal, so that he may have the benefit of the action instituted by Thomas R. Williams against the defendant to defeat the claim of adverse possession.

The statute provides, in substance, that if a judgment of nonsuit, etc., is entered in a pending action, "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," and its effect, when its terms are complied with, is to cause the new action to relate back to the commencement of the first action, and to stop the running of the statute of limitations at that time.

It is clear that the plaintiff does not come within the language of the statute, because he was not the plaintiff in the former action, and it does not appear that Williams, who was plaintiff, is dead, or that the present plaintiff is his heir or representative. Nor is he within the equity and spirit of the statute, which is based upon substantial identity of parties, cause of action, and title, and because of these the two actions are treated as one, and the second action as a continuance of the writ in the first.

"The two suits must, it is said, be for substantially the same causes and the parties in each suit identical." 17 R.C.L. 814; *Hughes v. Brown,* 88 Tenn. 578. "The object is to preserve the right of any person having it at the time of instituting an action on his title." *Long v. Orrell,* 35 N.C. 129.

The second action must be "based upon the same cause of action and title." *Martin v. Young,* 85 N.C. 158.

These conditions do not exist in the present action, as Williams, the plaintiff in the former action, had executed the deeds under which the plaintiff in this action claims, before his action was instituted, and he could not therefore be claiming by the (397) same title as the present plaintiff.

No error.

Cited: Cooper v. Crisco, 201 N.C. 741; *Loan Co. v. Warren,* 204 N.C. 52; *Mathis v. Mfg. Co.,* 204 N.C. 436; *Goodson v. Lehman,* 225 N.C. 518.

W. H. HUNT, RECEIVER, v. THE FIDELITY AND CASUALTY COMPANY OF NEW YORK.

(Filed 24 October, 1917.)

Insurance—Employer and Employee—Policies—Contracts—Injury—Notice—Trials—Questions for Jury—Appeal and Error.

Where, under the terms of an employer's indemnity policy of insurance, the insured was required to give "immediate written notice of any accident sustained by an employee" and "immediately" forward the summons in the action to insurer; and there is evidence that an employee had been injured and the employer did not give the notice required for about a month, not knowing that the employee was seriously injured or contemplated bringing suit, and upon ascertaining this fact sent the received notice to the insured within twenty-four hours and at once notified the insurer upon action commenced, kept it advised of the progress thereof, and its manager was present at the trial: *Held,* sufficient to be submitted to the jury upon the question as to whether the assured had complied with the requirements of the policy as to giving notice or a waiver by the insurer of its terms as to the summons, and an instruction directing a negative finding was reversible error.

APPEAL by plaintiff from *Kerr, J.,* at February Term, 1917, of GRANVILLE.

The International Furniture Company took out an employer's liability insurance policy in the defendant company to the amount of $10,000 against liability for damages on account of bodily injuries or death suffered by any of its employees while engaged in its employment, with stipulations that the insured should give immediate written notice of any accident sustained by an employee to the insurer or to its agent who had countersigned the policy, and of any

claim for damages on account thereof, with full particulars, and if any suit should be instituted against the assured on account of said accident it should immediately forward the summons served on it to the insurer. The policy was countersigned "J. R. Roller & Sons Co., J. R. Hall, Manager."

Thereafter, on 11 August, 1914, during the life of the policy, an employee, R. L. Ingold, was injured. The insured, on 12 September, sent a written notice to J. R. Hall, manager of the J. R. Roller & Sons Co., who had countersigned the policy. It did not, however, forward the summons to the defendant's home office, but there was evidence by the president and general manager of the assured that he did not know that Ingold was seriously injured or that he
(398) contemplated bringing action against the assured for his injury, and that within a few hours, in less than a day's time, after learning this, he caused the bookkeeper of the furniture company to give notice in writing to John R. Hall, manager of the J. R. Roller & Sons Co., agents of the defendant, and who had countersigned the policy of insurance, that Ingold had received an injury, and as soon as Ingold informed him that he expected to hold his company liable he caused the written notice to be given to the defendant's agents, and was advised by said Hall that he had received and forwarded said notice to defendant, and that on the same day he received a letter from said Hall, which had crossed his letter of the same date, giving him written notice, in which he said, "Please let us have report of injury sustained by Mr. R. L. Ingold on 12 or 15 August. We are enclosing report blank." Signed, "J. R. Roller & Sons Co., J. R. Hall, Manager." The witness further testified that he did not remember whether he gave Hall the summons in the action, but that he told him about the suit, and kept him advised as to its progress, and that Hall was present at the trial at which judgment was taken by Ingold against the assured.

The parties agreed that the first two issues should be answered that the policy was issued as alleged, and that Ingold was injured while in the employment of the assured and had recovered judgment against it for $1,606.30. The court intimated that it would suggest that the plaintiff take a nonsuit, but instead instructed the jury to find as to the third and fourth issues "that the assured did not give notice of the injury and claim of said employee, as required by the terms of the policy, to the insurer or its agent, and forward the summons in the action against the assured to the insurer, and to find that the plaintiff was entitled to recover nothing," and rendered judgment accordingly. Plaintiff appealed.

A. W. Graham & Son and John W. Hester for plaintiff.
B. S. Royster for defendant.

CLARK, C.J. It appears from the evidence that the injury to Ingold at first appeared slight, and the assured did not have reasonable ground to apprehend an action for damages; and that as soon as it received notice that Ingold intended to bring action, written notice of the injury and of the claim was at once furnished to the countersigning agents of the defendant within 24 hours, and that when the summons was served the said agents were at once notified thereof, were kept informed of the progress of the action at every step, and the manager of said agency was present at the trial. There was conflicting evidence, which raised a mixed question of law and fact, and the court should have submitted to the jury the question whether there had been compliance with the terms (399) of the contract, or a waiver thereof, under proper instructions.

It was error to instruct the jury to answer the issues in favor of the defendant.

Error.

Cited: Ball v. Assurance Corp., 206 N.C. 91; *Henderson v. Ins. Co.,* 254 N.C. 332.

LOUIS GOODMAN, TRUSTEE IN BANKRUPTCY OF THE A. D. RICH COMPANY, A CORPORATION, v. J. F. WHITE.

(Filed 24 October, 1917.)

1. Corporations—Secret Profits—Promoters—Trusts and Trustees—Actual Value—Burden of Proof—Consideration.

The promoters of a corporation are held to the duties of trustees and the obligation of directors, and may not take a secret or undisclosed profit in the organization by ways of shares therein or otherwise; and where the business of a partnership has been incorporated, and it appears that a member of the firm has been bought out by a third person with money he has obtained from the bank on his own note, which is subsequently taken up by that of the corporation and paid by the corporation: *Held,* stock issued in the corporation to such third person is without consideration, the burden being on him to show the contrary, and he is liable to the receiver, in an action to recover the unpaid subscription.

2. Corporations—Subscriptions—Money Value—Directors—Statutes.

The subscriptions to the capital stock of a corporation constitute a trust fund for the benefit of creditors, and under our statutes a money payment is required, except when stock certificates are issued for merchandise or other property, the property shall be taken at its true value as ascertained by the directors, when acting within the terms of the statute, whose judgment then shall be conclusive, in the absence of fraud. Revisal, secs. 1160-1161.

CIVIL action, tried before *Bond, J.*, at April Term, 1917, of NEW HANOVER.

The action is brought to recover $8,200 on the defendant's subscription, at par, to 82 shares of stock of The A. D. Rich Company, a bankrupt corporation. The subscription is admitted, and also all the allegations of the complaint, except two alleging that the stock has not been paid for. It is admitted that the plea of payment is the only issue before the Court.

His Honor instructed the jury that, upon all the evidence, the plea of payment was not sustained, and directed a verdict for plaintiff. Defendant excepted, and from the judgment rendered appealed.

Kenan & Wright and E. K. Bryan for plaintiff.
Robert Ruark for defendant.

BROWN, J. Viewing the evidence in its most favorable (400) light for defendant, it discloses these facts:

A. D. Rich and one Sneed owned a furniture business in Wilmington, known as The Poore-Sneed Furniture Company. Rich and defendant agreed to buy out Sneed's half interest and to convert the business into a corporation, to be promoted and organized by them and called The A. D. Rich Company, with a certain capitalization. Sixty per cent of the stock was subscribed for and to be issued to Rich, and 40 per cent, 82 shares, was subscribed for and to be issued to defendant.

Before the corporation was incorporated, Sneed's interest in the furniture company was purchased for $4,000. All of this money was obtained by defendant from a bank, on his note, which it was agreed between the two promoters should be taken up by the corporation after its organization. Afterwards, the corporation was organized, and took over the entire stock and business of the Poore-Sneed Furniture Company, and then it took up the $4,000 note of defendant with the bank and substituted its own note therefor.

The defendant testified: "I paid $4,000, or loaned Rich the money to pay for it. I did not pay one dollar of it that was not afterwards

assumed by some one else. The $4,000 was assumed by The A. D. Rich Company."

The basis of the plea of payment is set forth in the statement made by defendant's counsel to the Superior Court: "We do not contend that Mr. White paid over to The A. D. Rich Company, as such, in cash for the stock issued to him, but that the stock issued to him was paid in the transfer of the assets of the Poore-Sneed Company, first to Rich and White, and later by Rich and White to The A. D. Rich Company."

As we understand it, the contention of defendant is that he borrowed $4,000 and purchased Sneed's half interest in the furniture company and let the A. D. Rich corporation take it as soon as it was incorporated; that the corporation paid defendant's $4,000 note, and in addition issued to him $8,200 in stock as the consideration, thus paying $12,200 in money and stock for what cost the defendant only $4,000.

Such a transaction as that cannot be upheld. It is *contra bonos mores* and against sound public policy, as well as the statutes of this state.

The defendant and his associate, Rich, were the promoters of the A. D. Rich corporation, and as such occupied a fiduciary relation to it. Promoters occupy such a relation of trust and confidence towards the corporation they are calling into existence as requires the same good faith on their part which the law exacts of directors of corporations and other fiduciaries.

"They are trustees," says 10 Cyc. 274, "in a sense which disables them from taking to themselves a secret profit made out of their trust to the detriment of the future corporation or its members." In organizing the intended corporation, the promoters (401) are reguired to see that it is provided with a board of directors which in dealing with them will act independently for the corporation, and not for them. The promoters must also make a full and fair disclosure to the directors of their interest and of all the facts concerning the property they propose to sell to the corporation. 10 Cyc. 275; *Erlanger v. Phosphate Co.*, 3 App. Cases 1218.

The common form which such breaches of trust upon the part of promoters generally takes is to purchase property at one valuation and to sell it to the corporation at a much higher, without making full disclosure. Such transactions, says Judge Thompson, can never be allowed to stand where justice is properly administered. 10 Cyc. 276; *Parker v. Nickerson*, 137 Mass. 487; *Simmonds v. Oil Co.*, 100 Am. Dec. 628.

It is elementary learning now that the subscriptions made to the capital stock of a corporation constitute a trust fund for the pro-

tection and security of its creditors. In order that such subscriptions may be protected in their integrity and not become a means of deceiving those who deal with the corporation, our statute provides that "Nothing but money shall be considered as payment of any part of the capital stock of any corporation, organized under this chapter, except as herein provided in the case of the purchase of property or labor performed." Revisal, sec. 1160.

Section 1161 provides how and under what conditions the corporation may take property necessary for its business in payment for its stock, declaring that the property shall be taken at its true value, to be ascertained by the directors, and "that, in the absence of fraud, the judgment of the directors as to the value of the property shall be conclusive." This subject is fully discussed in *Hobgood v. Ehlen,* 141 N.C. 345, where it is held: "In the absence of charter restrictions, a corporation may take property which is reasonably necessary for its legitimate business in payment of its stock, but when so received the property must be taken at its reasonable monetary value. Although a margin may be allowed for an honest difference of opinion as to value, a valuation grossly excessive, knowingly made, while its acceptance may bind the corporation, is a fraud on creditors, and they may proceed against the stockholder, individually, who sells the property, as for an unpaid subscription."

The burden of proof upon a plea of payment is on the one pleading it, the defendant in this case. He admits that the stock was not paid for in money, but in property. He must therefore establish that the property was taken in payment at its true value, and, further, that such value was approved by a board of directors acting independently in the interest of the corporation, whose judgment
(402) is conclusive, except in case of fraud.

The defendant has failed to establish either of these essential requirements of the statute. According to his own evidence, defendant purchased Sneed's interest in the furniture company for $4,000 and transferred it to the corporation for $12,200, of which $8,200 was in the corporate stock subscribed for, at par, and $4,000 in defendant's note, which the corporation took up for him.

There is no evidence that the board of directors, acting independently in the corporation's interest, fixed the value at which the property was taken. In fact, there is no evidence there was a board of directors, although we assume there was. But who constituted the board? Necessarily, the defendant, his son (who owned one share), and Rich, for they owned the entire capital stock of the corporation.

Is it to be supposed for a moment that a directorate so constituted would act independently in the corporation's interest in purchasing property from one of its members?

The law forbids that the same person shall act as buyer and seller, both. This is a clear case where the promoter and subscriber should be made to pay for his stock, and is very similar to *Hobgood v. Ehlen, supra.* We think his Honor was correct in directing a verdict for plaintiff.

No error.

Cited: *Gover v. Malever,* 187 N.C. 776; *Tire Co. v. Kirkman,* 193 N.C. 536; *Wilson v. McClenny,* 262 N.C. 129.

J. W. STEWART v. MUNGER & BENNETT, INC.

(Filed 24 October, 1917.)

1. Injunction — Mortgage — Equity — Foreclosure — Insolvency — Pleadings—Title to Lands—Statute—Courts—Bonds of Indemnity.

M. mortgaged land, and timber standing thereon, to L., who assigned the mortgage notes to the plaintiff to secure him as an endorser on notes of L., on which, as such surety, the plaintiff was compelled to pay large sums of money. Thereafter, M. mortgaged the same property to the plaintiff to secure a note given for borrowed money. Both of the above mortgages were duly rgistered, and then M. attempted to convey the property to L., subject to the second mortgage, who conveyed, or attempted to convey, it to the defendant. The defendant entered upon the land and began to cut the timber which plaintiff's action seeks to enjoin without allegation of defendant's insolvency, with averment that the value of his security consists in the standing timber and not in the land: *Held,* not an action as in tort for trespass, but in the nature of a bill in equity for foreclosure and an injunction to protect the security, which does not require an allegation of defendant's insolvency; and it appearing that plaintiff stood by and permitted defendant to make extensive and expensive preparations for cutting and removing the timber, without objecting, the judge may require that a sufficient bond be given, in lieu of an injunction, to secure plaintiff from loss, and if proper he may appoint a receiver to inspect the cutting and removal of the timber.

2. Injunctions — Pleadings — Insolvency — Courts — Equity — Statutes —Receivers.

Revisal, sec. 807, making it unnecessary to allege defendant's insolvency to enjoin a trespass continuous in its nature, or the cutting or destruction of timber trees, construed with section 809, does not deprive the courts of their discretionary power to require a bond to secure the plaintiff against damages, or to appoint a receiver, where there is a *bona fide* contention as to the title to lands or timber trees thereon.

3. Mortgage—Lands—Timber—Trusts and Trustees.

Where one has acquired land and timber growing thereon, subject to

the equitable rights existing under a prior registered mortgage, in an action to prevent the cutting of the timber, and the consequent impairment of the security, he is to be regarded as a trustee of the creditor to the extent of this equitable right of the latter.

4. Injunctions—Timber—Lands—Title—Statute—Equity.

Where the plaintiff's action is to enjoin the impairment of his security, by mortgage on lands and timber growing thereon, in the nature of a suit to foreclose and preserve his security intact, the action, where his right is denied, involves the title to the timber, wherein an allegation of defendant's insolvency is not required under Revisal, secs. 807, 808, 809.

5. Mortgages—Legal Title—Assignments—Outstanding Equities—Merger Liens.

Where the mortgagee of lands has assigned the notes secured by the mortgage to another to obtain his endorsement as surety on a note, and the latter has been required to make payments, as such surety, the fact that subsequently the principal on the note acquired the mortgagor's equity in the lands, does not affect a merger of the equitable and legal title so as to defeat the superior rights of a holder of one of the notes secured by the mortgage to have the mortgage foreclosed and to enforce his lien.

CIVIL action, heard by *Stacy, J.*, on a motion for an in-
(403) junction, at chambers, 15 June, 1917, from CRAVEN.

Plaintiff brought this suit to foreclose a mortgage executed 1 May, 1906, by Maxwell Brothers Lumber Company, on land, timber trees, and other property therein described, to M. D. Lane, for the purpose of securing the payment of sixteen notes, two for $2,537.50 and $1,250, respectively, and each of the other fourteen notes for $2,500, some of them due 1 July, 1907; others, 1 October, 1907, and the remaining ones at different dates thereafter; the whole amount thus secured being $38,787.50. The mortgage was duly registered in Craven County on 15 May, 1906. M. D. Lane assigned to the plaintiff the notes secured by the mortgage for full value, and for the purpose of indemnifying plaintiff as surety or endorser of M. D. Lane on certain notes, also described in the complaint. The plaintiff was compelled to pay some of the notes on which
(404) he was surety, or endorser, to the amount of $9,814.32.

Defendant entered upon the land, and has cut and removed large quantities of timber trees thereon, the land having little or no value apart from the timber. On 21 January, 1910, Maxwell Brothers Lumber Company executed to the plaintiff their note for $1,060.83, payable six months after date, with interest from date, and secured the payment of the same by a mortgage on the same property as is described in the first mortgage, except the timber rights on two of the tracts of land. All the mortgages and deeds were promptly and duly recorded. That nothing has been paid on the

note for $1,060.83, except the sum of $500, on 19 February, 1914, and the balance thereof has been due and payable for some time; that afterwards the Maxwell Brothers Lumber Company conveyed the lands to M. D. Lane, subject, however, to the mortgage of 21 January, 1910, to the plaintiff, and M. D. Lane then conveyed, or contracted to convey, to the defendant corporation all the standing timber trees on the said land, with the right to cut and remove the same.

Plaintiff alleges that there is now due to him upon said notes and mortgage the sum of $10,275.15, and that if the defendant is permitted to cut the timber, or to continue to cut the same, as it is now doing, it will destroy the same, it being the most valuable part of the security for the payment of his notes, it having already cut 8,000,000 feet, valued at $25,000. The following allegations appear in the complaint:

"1. That notwithstanding this plaintiff's notes and mortgage, held as hereinbefore set out, the defendants have failed and refused to pay any amount whatever thereon to this plaintiff, and threaten to continue to cut and remove the timber from the aforesaid lands and every part thereof.

"2. That said lands are valuable chiefly for the timber thereon, and if the defendants are allowed to continue to cut and remove the timber from said lands this plaintiff's security will be seriously impaired, if not entirely destroyed, and he will be without remedy.

"3. That this plaintiff has notified the defendants of its claim against the aforesaid timber, and the defendants have failed to make any arrangements therefor, but are continuing to cut and remove the timber from the aforesaid lands.

"4. That there is no cleared land of any extent embraced within the boundaries of the lands described in said deed, and no cultivated area thereon."

The motion came on to be heard before the judge at the time and place appointed in the order temporarily restraining the defendants from cutting timber or removing the same from the land, and after argument by counsel, and consideration of the matter, the motion for a continuance of the injunction was refused, and the plaintiff appealed.

Moore & Dunn for plaintiff. (405)
T. D. Warren for defendants.

WALKER, J., after stating the case: It has been fairly well settled that a court of equity will not enjoin an ordinary trespass, such as entering upon land and working turpentine trees, or cutting wood

and making staves thereon, unless irreparable injury is threatened —that is, one for which there can be no sufficient recompense in money. It is therefore held that in such cases an averment of the defendant's insolvency is necessary, for if he is not insolvent and the plaintiff can recover an equivalent in money for the loss sustained by the trespass, the damage cannot in any proper sense be called irreparable. *Gause v. Perkins,* 56 N.C. 177; *Sharpe v. Loane,* 124 N.C. 1; *Lewis v. Lumber Co.,* 99 N.C. 11. By statute (Laws 1885, chap. 401; Revisal, sec. 807) it is provided: "That in an application for an injunction to enjoin a trespass on land, it shall not be necessary to allege the insolvency of the defendant, when the trespass complained of is continuous in its nature or is the cutting or destruction of timber trees." This act, as construed, does not deprive the court of the discretion to require a bond to be given by the defendant to secure plaintiff's damages, or to appoint a receiver instead of issuing an injunction. *Ousby v. Neal,* 99 N.C. 146; *McKay v. Chapin,* 120 N.C. 159; *Kistler v. Weaver,* 135 N.C. 388. By Laws 1901, chap. 666 (Revisal, sec. 809), it is provided that when there is a *bona fide* contention as to the title of the land or the timber trees thereon, no order shall be entered permitting either party to cut the trees, except by consent, until the title shall determined, and that if the claim of one of the parties is not asserted in good faith and based upon evidence establishing a *prima facie* title, then, upon the motion of the other party, if he shall satisfy the court of the *bona fides* of his claim, and produce evidence showing a *prima facie* title, he may be allowed by order to cut the timber trees upon giving bond as required by law.

We do not deem this case as one in tort for trespass upon the land, but as an action in the nature of a bill in equity to foreclose the mortgage described in the complaint, and to protect by injunction the rights of the plaintiff until a foreclosure can be had. There could not be an action of trespass, because the plaintiff has neither the actual nor constructive possession of the land. *Drake v. Howell,* 133 N.C. 162. He is the holder merely of the notes secured by the mortgages, the entire legal title being in the defendants, under the deeds from Maxwell Brothers Lumber Company to M. D. Lane, and the latter to it. His only security for the payment of his notes is the lien he has acquired on the timber trees by virtue of the mortgages, and it would be strange, and certainly unjust, if the defendant can be permitted to seriously impair this security by cut-
(406) ting down the trees so that it will probably become insufficient, and more surely so if they can make it wholly unavailable by destroying the trees altogether. We find it declared in 1 Pingrey on Mortgages (1893), sec. 863: "Courts of equity will in-

terfere to prevent the commission of waste by the mortgagor in possession. This interference is based upon two grounds — (1) the right of the mortgagee to the protection of the entire security unimpaired during the life of the mortgage; (2) as between the mortgagor and mortgagee, the latter is deemed in law the owner of the fee, and as such entitled to protection. And where the mortgage is considered but a lien, the mortgagee is entitled to protection of equity against the commission of waste. The mortgagor in possession may exercise all acts of ownership if he does not impair the security; he must not depreciate the value of the premises and render the security insufficient." He further says that the mortgagee's lien will be protected in equity, and his ordinary remedy against the mortgagor to preserve and safeguard his lien is by bringing a bill in equity for an injunction. Some authorities hold that the mortgagee is entitled to have restrained any acts of waste by the mortgagor in possession which may diminish the value of the property subject to the lien, while others say that equity will not interfere in such cases unless the acts complained of are such as may render the property insufficient for the satisfaction of the debt, or of doubtful security; while others hold that equity will not interfere unless the sufficiency of the security is threatened. Pingrey, sec. 866. It is further said, quoting from this authority: "The rule is well settled that when the mortgagor is committing waste which impairs the security or renders it insufficient, chancery, at the suit of the mortgagee, will restrain him by injunction." *Harris v. Bannon,* 78 Ky. 568, holds the same doctrine, that upon application of a mortgagee, a court of equity will restrain the mortgagor from committing waste when it appears that the mortgage security will be endangered unless the court interferes. The principle, in another form, is thus stated in Pingrey, p. 883: "The mortgagee is entitled to be protected from acts of waste which would so far impair the value of the property as to render the security of doubtful sufficiency," citing *Moriarty v. Ashworth,* 43 Minn. 1, 2, 3. Not only must it be considered that the mortgage is held to secure payment of the debt, and not for the purpose of converting the mortgagee into a purchaser, but that if the debt is not yet mature it is to be considered whether, during the time of any probable delay, the present value of the property may not become depreciated from causes not known. Pingrey, p. 884.

There is a perfect analogy between the case of the mortgagee holding notes secured by the mortgage, or some of them, in his relation to the mortgagor in possession committing waste upon the land, or the timber standing thereon, and that of the (407) plaintiff towards M. D. Lane, mortgagee, and the defendant, his assignee, the latter being on the land and alleged to be wasting

the timber. So that, the authorities cited apply to the facts of our case.

There can be no doubt, therefore, that the court has the power to protect the plaintiff's security against serious impairment. The defendant, when it acquired title to the timber from M. D. Lane, the original mortgagee, took it charged with the plaintiff's lien upon the timber, or his equity to have satisfaction of his debt out of it. It is a trustee to this extent for the plaintiff, and is guilty of a breach of his trust in committing waste by cutting timber and thus destroying the property it holds in trust, or impairing its value as a security.

This is not an action of trespass, wherein formerly it was required, and even now in some cases it is necessary, that plaintiff should allege and show insolvency of the defendant, or irreparable damage, in order to obtain an injunction against injury to land or timber. *Thompson v. Williams,* 54 N.C. 176; *Gause v. Perkins,* 56 N.C. 177; *Parker v. Parker,* 82 N.C. 165; *McCormick v. Nixon,* 83 N.C. 113; *Lumber Co. v. Wallace,* 93 N.C. 23. But the allegation of insolvency is no longer necessary where the unlawful and injurious act consists in a wrong, "continuous in its nature, or is the cutting or destruction of timber trees." Revisal, secs. 807, 808, 809. While those sections relate primarily to actions concerning title to land, or timber thereon, or to trespass committed by cutting timber and removing it from land, we are of the opinion that they apply, in principle, to a case like this one, where, though it be an action to foreclose a mortgage or deed of trust, it nevertheless indirectly involves a controversy as to the right or title to the timber, which is a part of the security, and the action is so analogous to the ones described in those sections as to come fairly within their equity. But we need not rely on them alone, as, independently of them, the plaintiff has a clear equity to have his security safeguarded by an order or decree of the court, so that it will not be in danger of destruction or substantial diminution, as we have already shown by reference to the authorities. While we are of the opinion that plaintiff is entitled to relief, we do not deem it necessary in this case, upon a review of the pleadings and affidavits, that resort should be had to so drastic a remedy as that of injunction, because we believe that the plaintiff's rights may be fully secured to him without seriously interfering with the operation of the defendant's extensive plant, which it has constructed at great expense to carry on the business of cutting and removing the timber for commercial purposes. Several of our cases justify a milder process for dealing with the matter, and we think it should be adopted, especially as plaintiff has been

(408) somewhat slow, if not remiss, in prosecuting his right, and

looking on while defendant, if his evidence be true, was investing large sums of money in his plant and business. This Court said, in *Ousby v. Neal,* 99 N.C. 146, where an injunction against cutting timber was the relief sought by the plaintiff: "The purpose of this action is to recover damages for the alleged trespasses mentioned in the complaint, and to perpetually enjoin the defendant from trespassing on the lands described. It is insisted by the plaintiffs that it was intended by the act just recited that, in trespasses of the character complained of, the injunction should not only issue, without any allegation of the insolvency of the defendant, but should be continued to the hearing. While the statute relieves plaintiffs of the necessity of alleging the insolvency of defendants in trespasses of the class named, we apprehend it was not the purpose of the law to limit the power of the court in the exercise of its discretion in making such orders as will protect the rights of all parties in respect to the subject-matter about which the litigation may be pending."

But the cases of *Lumber Co. v. Wallace,* 93 N.C. 22, and *Lewis v. Lumber Co.,* 99 N.C. 11, suggest a very appropriate procedure in such circumstances as those in this record, and one which is fair and just to both parties. In those decisions the Court substantially said: The defendant is extensively engaged in the manufacture of lumber, and prosecutes his business at great expense, having constructed a large plant and employed many laborers, etc., for the purpose of conducting it successfully. This work, being a legitimate one, should not be stopped by injunction if this can be avoided consistently with the rights of the plaintiff. It is against the policy of the law to restrain lawful industries and enterprises affecting the public interest, and it should not be done except in extreme cases, where there is no other way to proceed in the administration of justice. We therefore think that the court below, instead of granting the injunction, should have required the defendant to execute a bond in a sufficient amount and with approved security, payable to the plaintiff, with the condition inserted therein that the defendant will pay to the plaintiff such a sum as the court may finally adjudge to be due by him. The court may, if it deems it proper under the circumstances, appoint some person (called in those cases a receiver) to inspect the cutting and removal of the timber on the land described in the complaint, so as to ascertain its quantity, and to keep a true account thereof, and make report to the court at such time as may be required. If defendant does not give bond as directed by the court, the latter may make such other order as it may deem proper in the premises.

It cannot be successfully denied that if the plaintiff has the equity which he alleges in his complaint, he is entitled to have it en-

forced, and if the defendant continues to do what he says he
(409) will do unless restrained by the court, the result will surely be that plaintiff's security for the payment of his notes will be gravely menaced, if not totally destroyed.

There was a contention of the defendant which should perhaps be noticed before closing this opinion, which was that when M. D. Lane purchased the equity of redemption from the mortgagor there was a merger of the legal and equitable title in him, but we do not see how this can be, or at least we may say there was not an entire merger, as the notes secured by the moragage had been acquired by the plaintiff, and the mortgagee and mortgagor could not then defeat his equity or destroy his security under the mortgage. There will be a merger only to the extent that the mortgagee has acquired the equity, and his purchase of the equity of redemption will not constitute a complete merger unless he holds all of the debts secured by the mortgage. If any of the outstanding debts are held by others, their rights are preserved and remain intact, and the merger takes place, if at all, only subject to those rights or to the satisfaction of the unpaid debts. "Under the rules of law, the ordinary consequences of the purchase or acquisition of the equity of redemption in mortgaged premises by the mortgagee is to merge the two estates, vest the mortgagee with the complete title, and put an end to his rights or title under the mortgage. But to this end, it is necessary that, holding the mortgage already, he should acquire nothing less than the complete legal title in fee, and that the two estates or interests should unite in the same person in the same right. Further, this rule is not invariably applied in equity, but may be disregarded and the fusion of the two estates prevented when, in the particular case, this is required by justice, the well-established principles of equity, or the intention of the parties, the mortgagee having an election in equity to prevent a merger and keep the mortgage alive." 27 Cyc. 1377(2). And again, at p. 1379, it is said: "If the holder of one of several bonds secured by the mortgage acquired the whole property, his bond is satisfied, *although the mortgage will continue as security for the holders of the other bonds,*" citing *Rothschild v. Bay City Lumber Co.*, 139 Ala. 571, where it was held: "A grantee, under a duly recorded deed, of the trees standing on the mortgaged land is not prejudiced in his right to redeem from the mortgage by the fact that the mortgagee, subsequent to such deed, took a deed of the land from the mortgagor." And it was held in *Stevenson and Woodruff v. Black,* 1 N.J. Eq. (1 Braxton) 338: "It is a general rule that where there is a bond and mortgage, the assignment of the bond operates as an assignment of the mortgage; the bond is the principal and the mortgage is the incident. Where a

mortgagee assigns one of the bonds secured by the mortgage, retaining the mortgage himself, the assignee becomes equitably interested in the mortgage to the amount of his debt or bond, and the holder of the mortgage a trustee for the assignee of the bond, (410) *pro tanto*. His claim is upon the mortgage or the estate bound by the mortgage, and that claim remains, no matter in whose hands the estate may be. The assignee of the mortgage stands, *quoad*, in the shoes of the mortgagee; his rights and liabilities are the same, and not different. If a mortgagee, or assignee holding one of the bonds secured by a mortgage, becomes the purchaser of the equity of redemption, that part of the mortgage debt due to himself on the bond he holds is extinguished." It follows from the authorities that the equity of the plaintiff has not been at all impaired or affected by the transactions between the other parties. His rights are still superior to theirs.

There was error in the ruling of the learned judge. Let this case be remanded to the court below, with instructions to enter a decree in substantial agreement with that suggested in this opinion and founded on the two cases of *Lewis v. Lumber Co., supra* and *Lumber Co. v. Wallace, supra;* and, further, to make the mortgagor, Maxwell Brothers Lumber Company, and the mortgagee, M. D. Lane, parties, either plaintiffs or defendants, in the way provided by the statute, as it appears that they have, or may have, an interest in the result of the action.

It is so ordered.

Error.

Cited: Hurwitz v. Sand Co., 189 N.C. 5; *Bank v. Jones*, 211 N.C. 319; *Lawhon v. McArthur*, 213 N.C. 261; *Huskins v. Hospital*, 238 N.C. 361; *Lance v. Cogdill*, 238 N.C. 504.

C. W. BROADFOOT v. ATLANTIC COAST LINE RAILWAY COMPANY.

(Filed 24 October, 1917.)

Railroads — Negligence—Fires—Evidence—Questions for Jury—Trials—Burden of Proof.

Evidence tending to show that a fire started on top of an embankment the height of a locomotive smokestack, and a short distance from the track, the wind blowing therefrom, soon after defendant railroad company's train had passed; that there was no other fire on the opposite side of the track, is sufficient to be submitted to the jury upon the defendant's

negligence in setting out the fire; and if the jury should find accordingly, it would be incumbent on defendant to satisfy them that its engine was equipped with a proper spark-arrester, in good condition, properly operated by a competent engineer, and that the right of way where the fire started was reasonably clear and free from combustible matter.

CIVIL action, tried before *Connor, J.*, at March Term, 1917, of CUMBERLAND, to recover damages for negligently burning over plaintiff's land.

At the conclusion of all the evidence, the judge intimated (411) that he would charge the jury that there was no evidence of negligence. The plaintiff submitted to a nonsuit and appealed.

Cook & Cook and John G. Shaw for plaintiff.
Rose & Rose for defendant.

BROWN, J. Plaintiff testified that he was at home, about 1½ miles away, and saw the smoke in the direction of his land, which lay on the east side of the defendant railroad; that he went immediately to where the smoke was, and the fire was burning and smouldering on the east side of the railroad, on the right of way, on top of an embankment, which is about the height of the top of a smokestack of an engine, which evidently is only a few feet away from the track itself. The wind was blowing from the west to the east, in the direction of plaintiff's land, and carried the fire to and burned over this land. There was no fire on the west side of the track.

Another witness testified that he was not far away from plaintiff's land; that a train passed by, and about the time it had gotten out of hearing he noticed smoke on the right of way of the defendant. This was identified as the same fire that plaintiff had testified to.

We are of the opinion that the evidence is sufficient in probative force to be submitted to the jury for their consideration. If they are not satisfied by it that the fire was started on the right of way by sparks escaping from defendant's engine, the defendant would be entitled to a verdict. But if the jury should find that the fire was started in that manner, then it would be incumbent on the defendant to satisfy the jury that its engine was equipped with a proper spark-arrester, in good condition, properly operated by a competent engineer, and that the right of way where the fire started was reasonably clear and free from combustible matter. *Currie v. R. R.*, 156 N.C. 419; *Williams v. R. R.*, 140 N.C. 624.

The rule governing actions of this character is clearly stated in the latter case.

New trial.

Cited: *Mewborn v. Moseley,* 177 N.C. 113; *Betts v. R. R.,* 230 N.C. 610; *Gainey v. R. R.,* 235 N.C. 116.

W. B. COOPER ET AL., v. G. W. EVANS.

(Filed 24 October, 1917.)

Judgment — Pleadings—Admissions—Verdict—Claim and Delivery—Statutes.

In claim and delivery for a mule, alleging ownership, a wrongful withholding and damage, which the answer denies, alleging that plaintiff's claim was based on a chattel mortgage given by the defendant to secure balance of the purchase price, evidenced by a note, and setting up counterclaim for breach of warranty of the mule, and the note and mortgage are admitted by plaintiff's reply, with issue joined on the warranty, breach, and consequent damages: *Held,* upon the admissions and finding for plaintiff by the jury, allowing a deduction for defendant's counterclaim, a judgment in full adjustment of the litigation was proper, and, without valid objection by the defendant, that it embraced a recovery for the plaintiff on the mortgage note. *Semble,* plaintiff, in strictness, should have set forth his special interest in the property. Revisal, sec. 791.

(412)

CIVIL action, tried before *Bond, J.,* and a jury, at March Term, 1917, of BRUNSWICK.

The action was claim and delivery for a mule, on averment of ownership, a wrongful withholding, and damage.

Defendant answered in partial denial and also by way of counterclaim, alleging that plaintiff's claim was based on a chattel mortgage given by defendant in purchase of the mule at the price of $240, $100 paid in cash, balance evidenced by note and mortgage sued on. Further, that there was a false warranty in sale, and breach, to plaintiff's damage.

Plaintiff replied, admitting mortgage, purchase price, and payment, and denying facts as to warranty, breach, etc.

On issues submitted, the jury rendered verdict as follows:

1. What was the value of the mule in controversy at the time of replevy by defendant Evans? Answer: $75.

2. Did plaintiff falsely warrant said mule as being a first-class 7-year-old mule, as alleged, and did said warranty, if made, induce the sale? Answer: Yes.

3. If so, what damage, if any, did defendant Evans sustain thereby? Answer: $25.

The court, after reciting the verdict, entered judgment:

It is now, on motion of H. L. Lyon and John D. Bellamy, attorneys for plaintiff, ordered and adjudged that the plaintiff is the owner and entitled to the immediate possession as mortgagee of the mule described in the complaint. It is further ordered that the plaintiff is entitled to recover of the defendant the sum of $150 and interest on the same from 9 May, 1914, and costs of action, less the sum of $25 found to be due the defendant as damages. It is further ordered that if possession of said mule is gotten by the plain-
(413) tiff, that he be sold at the courthouse door in the county of Brunswick, after first advertising time of sale for ten days, and the proceeds applied to the discharge of this judgment and costs. It is further ordered that if possession cannot be had of said mule, then and in that event it is ordered that the plaintiff recover of Noah Bennett, surety, the sum of $75, with interest from 9 May, 1914, and the costs of this action, to be taxed by the clerk, less the sum of $25 found by the jury to be due the defendant as damages.

Defendant, having duly excepted, appealed.

John D. Bellamy & Son for plaintiff.
Robert Ruark for defendant.

HOKE, J., after stating the case: It is chiefly objected to the validity of the proceeding below that the court was without power to enter judgment on the note, when it was not mentioned in the complaint, the same only containing direct averment of ownership and an unlawful withholding of the possession, without more. It may be that the plaintiff, in strictness, should have set forth his special interest in the property (Revisal, sec. 791), but, conceding that on allegations and direct denial of ownership, the issue should be determined as the parties have seen fit to present it in their pleadings, we are of opinion that no such position is open to defendant on this record, wherein it appears that on allegations of ownership by plaintiff, defendant has answered, setting out the entire transaction, the purchase of the mule for $240, payment of $100 on the purchase price, a mortgage to secure the same, the alleged false warranty, breach, and consequent damage. The plaintiff thereupon files a reply, admitting the note, payment, and mortgage, and joins issue on the warranty, breach, and consequent damage.

These disputed questions having been settled by the verdict, we have, then, by the admissions of the parties and the findings of the jury, the entire facts determinative of the controversy, and it was right and proper to enter judgment in full adjustment of the litigation between them.

It has been said that "Both the spirit and letter of our present Code designs and contemplates that all matters growing out of or connected with the same controversy should be adjusted in one and the same action." *Smith v. French,* 141 N.C. 1, 6, 10. And not only is this true with us as a matter of general policy, but in cases of this same character there are direct decisions approving the course pursued in the present instance. *Smith v. French, supra; Taylor v. Hodges,* 105 N.C. 344; *Griffith v. Richmond,* 126 N.C. 377.

In the last case it was held that where the action is brought to recover property to secure a debt, in order to avoid circuity of action, when the debt is denied, the issues and judgment should cover the whole case, including the balance due on the debt. (414)

There is no error, and the judgment entered is affirmed.

No error.

Cited: In re Utilities Co., 179 N.C. 151; *Sewing Machine Co. v. Burger,* 181 N.C. 251.

THE McCASKEY REGISTER COMPANY v. W. J. BRADSHAW.

(Filed 24 October, 1917.)

1. Pleadings — Counterclaims—Interpretations—Allegations, Sufficient — Vendor and Purchaser.

Upon the principle that, under our Code practice, pleadings should be liberally construed and sustained when it can be seen from their general scope that a party has a good cause of action or defense, though imperfectly alleged, it is held in this action, to recover of the purchaser a balance due on a cash register, that an answer setting up a counterclaim that it was understood by the parties that it could be used and of service in keeping accounts, but in fact it was worthless and could not be properly worked: *Held,* there is an implied warranty that the machine should be of some value and fit for use, and the counterclaim was sufficiently alleged.

2. Contracts—Fraud—Allegations—Pleadings—Vendor and Purchaser.

Semple, the representations alleged to have been made by the vendor in this case were sufficient upon the question of fraud, except for the absence of allegation that they were false, or were knowingly so to the vendor, or made with fraudulent intent.

3. Vendor and Purchaser — Worthless Goods — Complaint — Delay Explained.

The delay of the purchaser of a cash registering machine in making complaint that the machine was unfit and worthless may be explained by his continuous effort to have the vendor remedy the defects and comply with his contract, and the latter's unfulfilled promises to do so.

REGISTER CO. *v.* BRADSHAW.

APPEAL by defendant from *Bond, J.*, at February Term, 1917, of NEW HANOVER.

This is an action to recover $302, alleged to be the balance due on the purchase price of a McCaskey register.

The defendants admitted the execution of the contract for the purchase of the register, and the balance due thereon.

The defendants also allege, by way of set-off and counterclaim, that they were induced to buy the register upon the representation that they would save the cost of a bookkeeper by doing so; that it would keep an accurate stock list of their goods, wares, and merchandise; that at the time of the sale the plaintiffs agreed to properly install the register and to send an agent to the place of business of the defendants for that purpose; that an agent was sent and pretended to install the register, and stated that it was all
(415) right, but after operating the same according to instructions the defendants discovered that the machine did not properly register purchases or sales, nor did it do anything as it was represented it would do, and on the contrary it caused the defendants to get their business into confusion, and compelled an outlay of about $100 to have the books of the defendant put in proper form; that complaint was made, and the district manager of the plaintiff went to the place of business of the defendants and examined the machine and agreed that the machine was improperly installed and would not do the work, and he agreed to send the State agent to the plaintiff to properly install the same; that the State agent did not go to see the defendants, and that the defendants, after repeated efforts to have the machine installed, notified the plaintiff at its home office of the imperfect condition of the machine and of its absolute worthlessness, and that the plaintiff declined to put the machine in condition so it would operate; that the plaintiff sold to them a worthless machine that has not been properly installed, and has not properly worked and could not properly work, and that the sale was made fraudulently and with the intent to cheat, deceive and defraud the defendants.

His Honor held that the allegations of the answer were not sufficient as a set-off or counterclaim, and rendered judgment in favor of the plaintiff, upon the pleadings, for the balance due on the purchase price of the register, and the defendants excepted and appealed.

John D. Bellamy & Son for plaintiff.
McClammy & Burgwyn for defendants.

ALLEN, J. His Honor's ruling proceeds upon the idea that the answer does not allege a defense or counterclaim, and as the defend-

ants have admitted the execution of the contract, and the balance due thereon, that the plaintiff is entitled to judgment.

The answer is not specific and leaves much to inference, but "if it can be seen from its general scope that a party has a cause of action or defense, though imperfectly alleged, the fact that it has not been stated with technical accuracy or precision will not be so taken against him as to deprive him of it."

The pleading must be construed "liberally," and "it must be fatally defective before it will be rejected as insufficient." *Brewer v. Wynne,* 154 N.C. 471.

Applying these principles, we cannot say the defendants are entitled to no relief.

The action was commenced within six months after the execution of the contract, and the purpose for which the register was bought was known to the plaintiff. The defendants were engaged in the mercantile business, and it was understood by the parties that the defendants were buying a machine which could be (416) used and would be of service in keeping their accounts. This is what the defendants agreed to pay for, and they allege in the answer that the plaintiff "sold to them a worthless machine that has not been properly installed and has not properly worked and could not properly work," and that the sale was made "willfully and fraudulently, with the intent to cheat, deceive and defraud these defendants."

If these allegations are true — and for the purposes of this appeal the defendants are entitled to have them so considered — there was error in rendering judgment for the plaintiff on the pleadings, because of the implied warranty that goods sold are of some value and fit for use. *Ashford v. Shrader,* 167 N.C. 48; *Furniture Co. v. Mfg. Co.,* 169 N.C. 44.

In the last case the Court says: "It was decided in *Ashford v. Shrader,* 167 N.C. 48, that although there is no implied warranty as to quality in the sale of personal property, the seller is held to the duty of furnishing property in compliance with the contract of sale — that is, at least merchantable or salable; and to this we may add that it shall be capable of being used, if intended for use.

"This decision, and others of like import in our reports *(Medicine Co. v. Davenport,* 163 N.C. 297; *Tomlinson v. Morgan,* 166 N.C. 557; *Grocery Co. v. Vernoy,* 167 N.C. 427), rest upon the presumption that both buyer and seller are acting honestly and with no intention to cheat or defraud, and as 'the purchaser cannot be supposed to buy goods to lay them on a dunghill,' as expressed by Lord Ellenborough, in *Gardner v. Gray,* 4 Campbell 143, it will not

be assumed that the seller desires to obtain money for a worthless article."

The defendants clearly bring themselves within this rule, as they alleged that the register was "worthless" and "could not properly work."

Nor would we be inclined to hold that the representations alleged to have been made may not be sufficient as a basis for relief on the ground of fraud, under the authority of *Whitehurst v. Ins. Co.*, 149 N.C. 273; *Unitype Co. v. Ashcraft*, 155 N.C. 67, and cases cited, but there is no allegation that the representations were false, or that the party making them knew they were false, or that they were made with fraudulent intent.

The delay of the defendants in setting up their claim, and the failure to return the property, if required to do so (see *Robinson v. Huffstetler*, 165 N.C. 459), is explained in the answer by the efforts made to have the register properly installed, and the repeated promises of the plaintiff to send its agent to the place of business of the defendants for that purpose.

Reversed.

Cited: Poovey v. Sugar Co., 191 N.C. 725; *Swift & Co. v. Aydlett*, 192 N.C. 335; *Williams v. Chevrolet Co.*, 209 N.C. 31; *Aldridge Motors v. Alexander*, 217 N.C. 754; *Laundry Machinery Co. v. Skinner*, 225 N.C. 292.

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STATE EX REL MATTIE L. ANDERSON-OLIVER AND HUSBAND, v. UNITED STATES FIDELITY COMPANY AND E. E. GORHAM, ADMINISTRATOR.

(Filed 31 October, 1917.)

1. Limitations of Actions—Guardian and Ward—Surety.

An action against a guardian and his bondsman, where no final account has been filed, is barred after three years from the time of default and, at farthest, within three years from the ward's coming of age. Rev., sec. 395, subsec. 6.

2. Limitations of Actions—Foreign Corporation—Process—Service—Statutes—Pleas in Bar.

Where foreign corporations come into the State to do business after the enactment of a statute providing a method of personal service on them, reasonably calculated to give them full notice of the pendency of suits against them, the statutory provisions are regarded as conditions on which

they are allowed to do business within the State, and their doing so here thereafter is an acceptance by them of the statutory method and in recognition of its validity to confer jurisdiction on our courts by service thereunder.

3. Same—Guardian and Ward—Process—Service—Pleas in Bar.

Under the provisions of Revisal, section 1243, requiring foreign corporations doing business within the State to have an officer here upon whom process can be served, etc., of section 440, providing that service of process may be made on certain officers or agents of such corporation, and of section 4750 "authorizing service on the Insurance Commissioner," etc.: *Held*, the statute of limitations is not suspended against the surety on a guardian bond by reason of such surety being a foreign corporation (section 395) when it is shown that it continuously had a general agent within the jurisdiction of our courts for executing judicial bonds and collecting premiums thereon for the company and had complied with section 440 authorizing service of process on the Insurance Commissioner.

CIVIL action tried before *G. W. Connor, J.*, and a jury, at the April Term, 1917, of CUMBERLAND.

The action was instituted to recover on a guardian bond executed by John C. Gorham and the Fidelity Company as surety to recover an amount alleged to be due the ward, *feme* plaintiff.

On denial of liability and plea of statute of limitations, the jury rendered the following verdict:

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

2. What amount is plaintiff entitled to receive of defendants? Answer: $7,610.12, with interest from 5 June, 1904.

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

Sinclair, Dye & Ray for plaintiff. (418)
E. G. Davis for defendant.

HOKE, J. On the hearing there was evidence tending to show that in December, 1904, John C. Gorham, intestate, qualified as guardian of *feme* plaintiff and gave bond with defendant company, a foreign corporation, as surety; that on 9 November, 1906, said guardian filed an annual account showing receipt of guardianship funds, with a balance then due of $1,464.23, and that no other account was ever filed by him; that during his guardianship he received other funds belonging to his ward for which he has failed to account, and died on 28 February, 1910, owing said ward a balance of $7,610.12, with interest, etc.; that soon after his death defendant E. E. Gorham qualified as his administrator, and judgment for

said amount has been duly entered against him; that the ward became of age on 25 April, 1911, and two years thereafter she, through her attorneys, demanded an accounting and settlement of the defendant company of all amounts due by reason of said guardianship; that some time thereafter (precise date not given) she intermarried with coplaintiff, and on 12 January, 1917, instituted the present action.

It was further shown that Q. K. Nimocks, resident in Fayetteville, N. C., was general agent of defendant bonding company in Cumberland and several other counties, and has been since the company began business in the State in 1896; that he is general agent for the company for executing their judicial bonds, collects premiums on such bonds written by him, and has done so since he has served as general agent, etc.

Upon these, the facts chiefly relevant, his Honor, in effect, instructed the jury that if they believed the evidence they would answer the issue as to statute of limitations "No," and in this we think there was error which entitles appellant to a new trial. The guardian having filed no final account, the statute of limitations applicable is three years from the time of default and, at farthest, within three years from the ward's coming of age. *Self v. Shugart,* 135 N.C. 185; Revisal, sec. 395, subsec. 6.

This being true, on the facts in evidence, plaintiff's cause of action is clearly barred unless it is preserved by reason by section 366 of the Revisal, which suspends the running of the statute in certain cases on account of absence from the State, and this, in the present instance, because of the fact that defendant is a foreign corporation.

Considering the case in that aspect, under the decision in *Volivar v. Cedar Works,* 152 N.C. 656 (opinion by Associate Justice Brown), it is established with us that where a foreign corporation has complied with provision of our statute, Rev., sec. 1243, by maintaining an agent in the State upon whom valid service of process may be had, our statute of limitations is available for its protection (419) as in case of citizens and residents within the State. And a perusal of this well-considered decision and others to like purport will show that the principle is not restricted to cases where there has been formal compliance with the statutory requirements for domesticating these corporations and the appointment of process agents, but it extends and should apply to all cases where such corporations doing business or holding property within the State have been continuously for the statutory period subject to valid service of process, so as to confer jurisdiction on our courts to render binding judgments *in personam* against them. *Turcot v. R. R.,* 101 Tenn.

102; *Huss v. Central Bank Co.*, 66 Ala. 472-475; *Pa. Co. v. Sloan*, 1 Ill. App. Ct. 364; *Lidway v. Live Stock Co.*, 187 Mo. 649, and see generally *So. Ry. v. Greene*, 216 U.S. 400; Murfree on Foreign Corporations, sec. 94; 13 Am. and Eng. Enc. (2d Ed.) 904.

Authoritative cases on the subject are to the effect, further, that when a State by its statutes has established and provided a method of personal service of process on foreign corporations doing business therein, one that is reasonably calculated to give full notice to such companies of the pendency of suits against them, these provisions are to be regarded as conditions on which they are allowed to do business within the State, and when they afterwards come into the State and enter on their business they are taken to have accepted as valid the statutory method provided, and such a service will be held to confer jurisdiction. *St. Clair v. Cox*, 106 U.S. 350-356; Beale on Foreign Corporations, secs. 74 and 266.

In citation to Beale, sec. 266, it is said: "The consent to be sued may be implied from the conduct of the foreign corporation. If the law of the State provides that a foreign corporation doing business in the State shall be liable in its courts after process served in a prescribed manner, this is to be regarded as the expression of the will of the State that a foreign corporation shall do business in the State only on condition that it consent to be sued," etc.

Referring, then, to our State legislation on the subject as to foreign corporations generally, Revisal, section 1243, provides that every corporation doing business in this State, whether incorporated under its laws or not, shall have one officer in the State upon whom process can be served, etc., and that such process may be properly served by leaving a true copy of the process with the Secretary of State, etc. And in foreign companies doing business within the State, we have held that valid service of court process can be made in the manner indicated, and also on officers and agents of the company, in cases specified as to foreign corporations in the general provisions of section 440 of the Revisal, construed in *Whitehurst v. Kerr*, 153 N.C. 76, and other cases.

As to companies coming under the general insurance laws of the State, and who have obtained license to do business (420) here under its laws, the method of service is provided in section 4750 of Revisal, "authorizing service on the Insurance Commissioner, its general agent for service, or on some officer of the company." And as to building and loan associations, provision for service is made in Revisal, section 3906.

If these last mentioned companies are doing business without

such license, they are no doubt subject to service under the general provisions of the former sections of the Revisal, sections 1243-440.

Considering the record in view of these principles and the statutory provisions applicable, there has not been a time during the entire period covered by these transactions when valid service on defendant company could not have been had, and if the facts as now presented are accepted by the jury, plaintiff's cause of action is barred.

For the error indicated, plaintiff is entitled to a new trial of the cause, and it is so ordered.

New trial.

Cited: Oliver v. Fidelity Co., 176 N.C. 599; *Hatch v. R. R.,* 183 N.C. 626; *Lunceford v. Association,* 190 N.C. 315; *Leggett v. Bank,* 204 N.C. 152; *Steele v. Telegraph Co.,* 206 N.C. 223; *Smith v. Fidelity Co.,* 207 N.C. 369; *Hicks v. Purvis,* 208 N.C. 659; *Parris v. Fischer & Co.,* 219 N.C. 296; *Highway Comm. v. Transportation Corp.,* 225 N.C. 203; *Harrison v. Corley,* 226 N.C. 189.

EMMA FARRINGTON v. W. L. McNEILL.

(Filed 31 October, 1917.)

1. Contracts—Written Statute of Frauds—Parol Evidence—Consideration—Bills and Notes—Seals.

A defendant sued on his note by the original payee may show by parol that the entire transaction was not put in writing; that it was given for a certain interest in land upon the contingency of the success of the payee's action to recover the land and a complete failure of consideration arising from an unsuccessful outcome of the action, and the fact that the note was under seal does not affect the result as between the original parties.

APPEAL by defendant from *Harding, J.,* at the April Term, 1917, of ASHE.

This was an action begun before a justice of the peace to recover on a bond for $40 and interest, dated 4 July, 1910, which was tried on appeal in the Superior Court. The bond was as follows:

$40.00.

Two years after date, I promise to pay Emma Farrington forty dollars, for value received, at 6 per cent per annum, it being pur-

chase money for my interest in the land known as the Josh Cox home place.

4 July, 1910. W. S. MCNEILL. (SEAL)

Witness: S. S. REVIS, *J. P.*

The execution of the note was admitted. The complaint and answer were verified. The answer averred that "At the (421) time of the execution of the said note, one E. F. Stafford had a mortgage upon the lands hereinafter mentioned and claiming the same, and also W. E. Cox had a claim upon said land, which was known as the Jesse Cox land, and the plaintiff, a daughter of Joshua Cox, deceased, having a claim on said land as one of his heirs, the defendant executed to the plaintiff the note sued on with the distinct understanding and agreement between them at the time of the execution of the note, and as a part of the agreement, that this defendant should pay said note only in the event that the said Elizabeth Cox recovered said land as against both E. F. Stafford and W. E. Cox, but that the said Elizabeth, in the suit brought by E. F. Stafford against her, lost said land, as shown by the record of the judgment in the Superior Court in that case, and this defendant pleads said failure of consideration."

The plaintiff objected to any evidence to show any oral agreement as pleaded, upon the ground that it would vary or contradict the written instrument. There was much evidence in support of this allegation. The court charged the jury that such evidence "contradicts the terms of the written contract and is incompetent, and the jury, if they believed the evidence, should answer the issue '$40, with interest from 4 July, 1910'." Verdict for the plaintiff. Appeal by defendant.

Charles B. Spicer for plaintiff.
T. C. Bowie for defendant.

CLARK, C.J. "Where the contract sued upon contains only a part of the agreement between the parties, it is competent to show the other part by parol evidence." *Faust v. Rohr,* 167 N.C. 360; *Buie v. Kennedy,* 164 N.C. 290; *Audit Co. v. Taylor,* 152 N.C. 272; *Colgate v. Latta,* 115 N.C. 127.

This evidence was also competent to show that the note sued upon was executed upon the condition of a contingency as to its payment. *Hughes v. Crooker,* 148 N.C. 318; *Pratt v. Chaffin,* 136 N.C. 350; *Quin v. Sexton,* 125 N.C. 447; *Bresee v. Crumpton,* 121 N.C. 122; *Penniman v. Alexander,* 111 N.C. 427.

The evidence is also competent to show failure of consideration. *Martin v. Mask,* 158 N.C. 444, where the Court cited several authorities that a separate parol agreement entered into at the time of the contract is competent when it does not contradict or vary the contract, but merely tends to show that the written contract was only a part thereof. For instance, in *Braswell v. Pope,* 82 N.C. 57, it was held competent to prove that notes payable in money were to be surrendered upon the maker signing a judgment (422) and a certain mortgage as security for the money. In *Penniman v. Alexander,* 111 N.C. 427, it was held: "The maker of a promissory note or other similar instrument, if sued by the payee, may show as between them a collateral agreement putting the payment upon a contingency." In *Evans v. Freeman,* 142 N.C. 61, it was held that the maker of a note for the purchase money of a stock feeder could prove by parol that at the time the note was given it was agreed that it should be paid only out of the sales of the stock feeder; and in *Kernodle v. Williams,* 153 N.C. 475 (just reaffirmed at this term in *Kernodle v. Kernodle*), it was held that it was "competent to prove a parol agreement that the children should pay only so much of the note given their father as was necessary to pay his debts, and that the balance should be accounted for as an advancement"; and, further, it was said, which is applicable to this case: "The evidence, if believed, proved a total failure of consideration as to the note sued on." *Carrington v. Waff,* 112 N.C. 119.

In *Nissen v. Mining Co.,* 104 N.C. 310, it was held that while parol evidence cannot be admitted to contradict or vary the terms of a written contract, it is competent to admit parol testimony, when the written contract does not include the entire agreement of the parties, which was partly oral and partly in writing.

In this case the agreement, so far as the amount and rate of interest and date of payment are concerned, was in writing and put in evidence. The defendant did not offer evidence to contradict or vary this agreement in any respect, but merely to show a further oral agreement that if the land for which the note was given, and which Stafford was seeking to recover, was recovered by him in such suit, that in such event she was not to pay the note. That is, the payment of the note was made dependent upon a condition subsequent, and that the liability was feasible upon the happening of a certain event which has since occurred.

It was competent to prove such collateral agreement making the note non-payable upon a contingency which would deprive the note of all consideration. It is true, the note in this case is under seal,

which purports a consideration, but such presumption is rebuttable as between the parties thereto.

Error.

Cited: Thomas v. Carteret, 182 N.C. 378; *White v. Fisheries Co.,* 183 N.C. 229; *Watson v. Spurrier,* 190 N.C. 731; *Patterson v. Fuller,* 203 N.C. 791; *Lentz v. Johnson & Sons,* 207 N.C. 617; *Ins. Co. v. Morehead,* 209 N.C. 177; *Lerner Shops v. Rosenthal,* 225 N.C. 320; *Perry v. Trust Co.,* 226 N.C. 670.

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R. Q. BROWN v. S. C. TAYLOR.

(Filed 31 October, 1917.)

1. Motions—Process—Service—Special Appearance.

A special appearance for the purpose of a motion to strike out the return of service on a summons, on the ground that the endorsement was unlawfully made, is the proper procedure.

2. Process—Nonresidence—Parties—Service in State.

The principle which protects nonresident suitors and witnesses from service of civil process while in attendance on the courts of this forum is for the purpose of enabling the courts the better to administer full and adequate justice in a cause pending before it, and does not extend to cases where the litigant or witness comes within the jurisdiction for his own private purposes or personal advantage, as where, after the issues have been determined, the party has returned to attend a judicial sale to protect his interest thereat.

3. Contracts—Support—Consideration.

A contract made between plaintiff and defendant, whereby the former should care for the mother-in-law of the parties at his home, in consideration of the defendant's furnishing servants, stated sums of money, etc., is supported by a sufficient consideration to maintain an action thereon. *Institute v. Mebane,* 165 N.C. 644, cited and applied.

4. Courts — Jurisdiction—Pleadings—Amount Demanded—Good Faith—Judgments.

Objection to a judgment rendered in the Superior Court that the amount was cognizable in the court of a justice of the peace cannot be sustained when the amount demanded in the complaint, in good faith, exceeded the sum of $200.

CIVIL action, tried before *Long, J.,* and a jury, at October Term, 1916, of WAYNE.

It appeared that Mrs. Elizabeth Taylor is the mother of codefendant and of plaintiff's wife, and the action is to recover damages for an alleged breach of contract made between plaintiff and defendant, stipulating for care and provision for Mrs. Elizabeth Taylor in the home of plaintiff, and indicated in the response to the issues.

On the return of the summons, personal service having been made within the State, defendant, a citizen resident of the State of Florida, entered a special appearance and moved to strike out the return of service on facts showing that at the time same was made he was in this State for the purpose of attending a sale, under court decree, of land in which he had a one and one-third interest, and he being a party to the cause in which the sale was ordered. Motion overruled, and exception noted.

Defendant then answered in denial of liability, and the cause being afterwards submitted to the jury, the following verdict was rendered:

1. Did the defendant make the contract with the plain-
(424) tiff to furnish servants at all times to render sufficient attention to the household work at plaintiff's house in consideration of plaintiff allowing his wife to abandon her household work entirely to bestow care on Mrs. Taylor, as alleged in the complaint? Answer: Yes.

2. If such contract was made, did the plaintiff comply with its terms, as alleged? Answer: Yes.

3. If such contract was made, did the defendant comply with its terms? Answer: No.

4. Were the matters and things in controversy in this action set up in the pleadings and adjudicated and settled in the action in Duplin County, entitled "Sam C. Taylor, et als. v. R. Q. Brown"? Answer: No.

5. What amount, if anything, is plaintiff entitled to recover of defendant for and on account of first cause of action alleged in the complaint? Answer: $406.

6. Did the defendant agree to pay plaintiff $10 per week for eight weeks, as alleged in the fourth paragraph of the complaint? Answer: Yes.

Judgment on the verdict, and defendant excepted and appealed.

W. S. O'B. Robinson & Son and A. S. Grady for plaintiff.
Langston, Allen & Taylor and Stevens & Beasley for defendant.

HOKE, J., after stating the case: Under our procedure, the defendant has taken the proper steps to present the question as to the validity of the service upon him *(Cooper v. Wyman,* 122 N.C.

784), but we are of opinion that the facts in evidence do not bring his case within the principle which, as a rule, protects nonresident suitors and witnesses from services of civil process while in attendance on the courts of the forum.

The general principle is fully recognized *(Cooper v. Wyman, supra; Ballinger v. Elliott,* 72 N.C. 596; *Barber v. Knowles,* 77 Ohio St. 81; *Martin v. Balin,* 76 Ark. 158; *Mallory v. Brewer,* 7 S. Dak. 587); but, as shown in well-considered decisions here and elsewhere, it is established and allowed to prevail for the purpose of enabling the courts the better to administer full and adequate justice in a cause pending before it, and does not extend to cases where the litigant or witness comes within the jurisdiction for his own private purposes or personal advantage. *Greenleaf v. Bank,* 133 N.C. 292-302; *Brooks v. State, Ex re* Richards, Amer. Anno. Cases (1915), 1133; 79 Atlantic 790 (Del.).

In *Greenleaf v. Bank, supra,* it was shown that A. D. Bissel, vice-president of the Peoples Bank of Buffalo, N. Y., and a resident of said State, was in North Carolina at the time of service, for the sole purpose of representing his bank at a judicial sale in a cause to which his bank was a party; and in refusing to set aside service, it was held "That an officer of a corporation, while in (425) the State attending a judicial sale to which his company is a party, is not exempt from service of summons in an action against the corporation." And the present Chief Justice, in his concurring opinion, states the doctrine applicable, and the principle upon which it rests, as follows: "Equally unfounded is the claim that service upon the other defendant, the officer of a corporation *(Jester v. Steam Packet Co.,* 131 N.C. 54), was invalid because made when he was attending a sale of land under a decree of court. Such sale may, like other acts, come before a court for review, but the sale itself is not a judicial proceeding, and no exemption from service of process extends to it. Such exemptions are restricted to nonresident witnesses and parties, and are permitted, not on their own account or for their own benefit, but for the benefit of the court in obtaining evidence at a trial, when the court cannot compel the presence of those who can testify to facts in issue in the litigation. This can have no application to the attendance of a party at a sale, under a decree in the cause, for his own convenience or benefit."

The case seems to be decisive, in this jurisdiction, of the question presented, and to like effect, in *Brooks v. Oats, ex parte, supra,* it was held: "The privilege of parties to judicial proceedings, as well as witnesses, attorneys, judges, jurors, and certain other officers of the court, of going to the place where they are held, and remaining as long as necessary, and returning, wholly free from the restraint

of process in other civil proceedings, is settled. But the rule is limited to those persons whose duty requires their attendance upon the court, and whose presence is necessary to the court in the performance of its function of administering justice, and in no instance is immunity given a person who appears before the court in any capacity, unless his appearance be in response to a duty or his presence be necessary to the court."

In *Malloy v. Beaver,* 7 S. Dak., *supra,* Corson, P. J., delivering the opinion, states the general principle as follows: "The rule is founded upon principles of public policy and the due administration of justice, which is subserved by the presence of witnesses to give their evidence orally before the court. The privilege protects a witness in going, staying, and returning to his home, provided he acts in good faith and without unreasonable delay. This immunity from such service, depending as it does on grounds of public policy, does not require statutory authority to enable courts to enforce this rule and set aside a summons improperly served. The object of affording such immunity is to encourage witnesses from other States to come forward voluntarily and testify, and the rule exempting such witnesses from the service of process while so attending in another State commends itself to the courts as a wise and proper one."

(426) And the case of *Stewart v. Ramsey,* current S.C. Reporter, Vol. 37, No. 3, p. 44, issued 1 January, 1917, to which we were cited by counsel, is to like effect.

True, there are decisions which exempt a suitor from service when he was attending the taking of depositions, and another where he was present in the jurisdiction of the forum at the request of his counsel and to aid him in arguing a demurrer *(Kline v. Lant,* 68 Fed. 436; *Plimpton v. Winslow,* 9 Fed. 365; *Bridgers v. Suedon,* 7 Fed. 36); but these cases are illustrative and in support of the position, as stated, that the immunity is not on personal grounds, but exists and is recognized when in furtherance of the administration of justice and the proper disposition of matters before the court. And in the present case the facts showing that the disputed issues had been determined, and that the defendant had come into the State to attend the sale, and, so far as appears, for his own personal interest and advantage, we are of opinion that his application to set aside the service was properly disallowed.

The objection insisted on, that the contract in question was without consideration, cannot for a moment be entertained. In a recent and well-considered opinion on the subject by Associate Justice Allen, in the case of *Institute v. Mebane,* 165 N.C. 644-650, he quotes with approval from 9 Cyc. 312, as follows: "There is a consideration if the promisee, in return for his promise, does anything

legal which he is not bound to do, or refrains from doing anything which he has the legal right to do, whether there is any actual loss or detriment to him, or actual benefit to the promissor or not." Neither the plaintiff nor his wife were under any legal obligation to support Mrs. Elizabeth Taylor, nor to make provision for her care and comfort, and plaintiff's agreement to do so is a valid consideration, and one both full and adequate for the promise on which defendant has been held liable. See 6 R.C.L. 656-657, title, Contracts, sec. 68.

And the further exception that no judgment should be allowed in the second cause of action, because the same was only for $80 and within the jurisdiction of a justice of the peace, must also be overruled; the aggregate of plaintiff's demands, made in good faith, being cognizable in the Superior Court. *Sloan v. R. R.*, 126 N.C. 487.

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

No error.

Cited: Winder v. Penniman, 181 N.C. 8; *Fisher v. Lumber Co.,* 183 N.C. 489; *Exum v. Lynch,* 188 N.C. 396; *Williams v. Williams,* 188 N.C. 730; *Fawcett v. Fawcett,* 191 N.C. 681; *Warren v. Bottling Co.,* 204 N.C. 291; *Denton v. Vassiliades* 212 N.C. 515; *Hare v. Hare,* 228 N.C. 741; *Casualty Co. v. Funderburg,* 264 N.C. 134.

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LA SALLE EXTENSION UNIVERSITY v. R. M. OGBURN.

(Filed 24 October, 1917.)

1. Contract—Breach—Correspondence Schools.

An agreement to take a correspondence course of study and to pay express charges on the "text," which the teacher should prepay and include in the account rendered to the student, does not permit the latter to declare his contract at an end and avoid performance on his part upon receiving a statement from the teacher showing that such charges amounted to $1 on the "text" that had been sent according to the contract.

2. Same—Repudiation—Damages—Election.

One who has agreed to take a course of study from a correspondence school at a certain price may not, without legal cause, declare the contract terminated during the period of its existence, and by refusing to pay compel the teacher to sue at once for the damages that had accrued to that

time; for the latter, at his election, may continue to perform his part of the contract according to its terms, and then sue for damages accruing to him upon the entire contract, or upon the different installments as they mature.

3. Contracts—Breach—Entire Damage—Correspondence Schools.

One who has agreed to take a course of study from a correspondence school, with express provision that in the event any one installment be not paid sixty days after it becomes due, etc., the unpaid balance of the contract shall immediately become due, is held to the terms of his agreement; and when he breaches his contract within the period prescribed for the course, and prevents performance by the other party, he will be held liable for the full balance of payment specified in the contract.

4. Evidence—Statements—Statute—Correspondence Schools.

An account for services rendered by a correspondence school comes within the meaning of Revisal, sec. 1625, and chapter 32, Public Laws 1917, and where the statute is complied with, is properly received as evidence in an action to recover them.

5. Contracts—Breach—Benefits Accepted.

A party may not repudiate his contract by accepting the part which is beneficial to him and refusing performance of the balance.

CIVIL action, tried before *Harding, J.*, and a jury, at February Term, 1917, of FORSYTH.

Plaintiff sued for the recovery of $60, with interest, from 20 November, 1912, alleged to be due upon an account for services rendered in the department of higher accountancy, a branch of the La Salle Extension University. The course of instruction given therein by correspondence is outlined and the necessary books described in the written contract signed by the respective parties and admitted by them to be their agreement. The following clause was inserted therein: "Please enter my enrollment for the complete university course of instruction in higher accountancy for a period of (428) one year, including text and service as outlined above, for which I agree to pay to your order the sum of $66, total amount, payable as indicated below. Express charges on text to be prepaid by the university and included in my account. All payments (except first payment, which should be made to the representative at the time of giving application) are to be sent by mail to the order of La Salle Extension University, Chicago. This enrollment is not subject to revocation. No verbal modifications or representations, except as herein expressed in writing, will be recognized, and no reduction in fees will be made on account of withdrawal. In the event of any one payment becoming delinquent sixty days without special consent of the university, the unpaid balance becomes immediately due and payable. Received, $6. Balance at $6 month."

At the trial plaintiff introduced an itemized statement of its account, duly verified. Defendant objected to the admission of the statement, but the objection was overruled, and he excepted.

Defendant testified: "I signed the contract according to its date, 12 June, 1912. I received a statement, or demand, for payment from plaintiff the first of the following month, which was July. That statement was destroyed, because I thought the account was closed. I wrote plaintiff it was incorrect. I wrote them I did not owe them the amount of the statement sent me. The letter I wrote them was written on stationery of the Maline Mills. I did not have any letter from them with a statement. I did receive a statement, but there was no letter with it. The letter to which I have just testified is not any of the letters which have been produced here in response to the notice from me to the plaintiff to produce all the correspondence. I wrote them this statement of account was not according to the contract, and I thought best for me to just stop if it was to cost me $1 extra every month, and asked them not to send any more lessons. The first lesson came in, and I had not gotten that up and sent to them before I got this statement, and immediately upon receipt of the statement I wrote them, as stated above, that the statement was incorrect, and asked them not to send any more lessons to me. I wrote them that I would not take any more lessons, and, if I remember correctly, that I had the text-books and they had $6 of my money, and I thought it was an even break, and we would just call it off, and asked them to stop sending the lessons. They did not stop sending the lessons, but I returned them as soon as they came in, without opening them, and several of them were returned from the postoffice. I never carried them away from the postoffice. On 8 November, 1912, I received a letter from plaintiff, and my reply is on the bottom of the letter." The following is the letter, and reply of defendant, signed by the respective parties, which the defendant offered in evidence:

"Dear Sir: Your answering any one or all of the following questions will be appreciated: 1. Have you any grievance? (429 2. Are you unable to make payments? 3. Do you feel that your not taking up the work is any just reason for not remitting? If you have a grievance, or are unable to make payments, or if there is any other reason for your not remitting, are we not entitled to an explanation?"

"Gentlemen: I made a contract with your salesman for one course of instruction in higher accountancy for $66, and intended taking the course, but upon receiving statement from your bankers for $67, less payment of $6, I decided that I'd better drop it before investing any more money, as you might add another dollar for

each month, and as that is pretty expensive (?) collecting, thought I'd save you and myself money by taking this step. Will keep the books, but will mail you the lessons, as I've not looked at any but the first two."

In the next letter of the correspondence, dated 19 March, 1913, plaintiff asks the defendant why he has not remitted the amount then due, or at least a part of it, and then says: "I will appreciate your courtesy if you will let me hear from you by return mail, and if you have any grievance and will let me know what it is, I assure you I will do everything in my power to adjust it to our mutual satisfaction. Thank you in advance for the courtesy of an early reply." To this defendant replied on the back of the letter as follows: "If you want to do me a favor, you'll see that every one connected with your company stops writing me letters. I canceled this contract when I received the first statement, because your salesman did not turn in contract according to the duplicate he left me. I've written you an explanation once or twice before, and I promise you this is the last communication you'll receive from me." Defendant further testified that he did not remember exact form of the statement, whether it was in two columns, one showing amount of whole debt, and balance of debt in the other, but it was "for the whole thing, with $1 added." He then said: "I worked up the first lesson, but refused to have anything further to do with the other lessons after I got the statement."

The court overruled defendant's motion for a nonsuit, and he excepted. Defendant then requested these instructions:

1. That if the jury believe the evidence, they are instructed to answer the issue "Nothing."

2. That if the jury believe the evidence, the contract between the plaintiff and defendant was an executory contract, or a contract to be performed in the future on the part of the plaintiff; and if the jury should find from the evidence that the contract was breached by the defendant in refusing to accept and pay for the lessons to be furnished under such contract, it was the duty of the plaintiff to stop sending the lessons after it had notice that the defend-
(430) ant had repudiated the contract; that in such event the plaintiff would be entitled to recover the damages only which had accrued to it up to the time the contract was breached, if you find from the evidence that the contract was breached by the defendant; that the plaintiff could not continue the performance of the contract on its part after notice of the repudiation by the defendant, under such circumstances, and recover the full amount specified in the contract.

The court refused to give the same, and defendant again excepted.

The court instructed the jury that if they believed the evidence in the case the issue should be answered in favor of the plaintiff—that is, for $60 and interest from 20 September, 1912. Defendant excepted. Verdict and judgment for plaintiff. Defendant appealed, after submitting the usual motions and reserving his exceptions.

William H. Beckerdite for plaintiff.
Louis M. Swink and Gilmer Korner, Jr., for defendant.

WALKER, J., after stating the case: There is no merit in the defense. A recovery is resisted simply on the ground, which is the sum and substance of it, that plaintiff charged $1 more in the statement of the account than he thought was the amount due by him. This $1 was the express charges "on the text," which is expressly allowed to the plaintiff in the contract, and had been prepaid by it. The language of the agreement in this respect is: "Express charges on text to be prepaid by the university and included in my account." The statement sent to the defendant was correct, but if not so, because of the $1 item being inserted in it, the defendant could not abandon the contract, but should have paid what was then due on it and declined to pay the $1. He would then have been within the law, but when he repudiated the contract entirely he certainly went too far and beyond the pale of the law. The overcharge, if any was made, did not warrant his refusal to pay anything, or was no such breach of the contract, if breach at all, as justified his conduct. Nor could defendant break the agreement by refusing to pay, and compel the plaintiff to sue at once for his damages. The latter may refuse to treat the renunciation by the other party as a breach, and may continue to perform the contract *in omnibus*, as it is expressed, to the time when full performance on his part is required by its terms, or he may elect to sue at once for the breach, the option being his to adopt either course at his will. A party is entitled to the full benefit of the contract if he claims it. We said, in *Edwards v. Proctor*, 173 N.C. 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 rela- (431) tion they have assumed. The promise, 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," citing Clark on Contracts (1904), pp. 445, 447; *Frost v.*

Knight, L.R., 7 Exch. 111. The subject is fully discussed in the principal case. In *Vittum v. Estey,* 67 Vt. 158, the Court says: "As to a breach by renunciation, it is settled law in England and in 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 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." So we see that the innocent party has an election to proceed with the execution of the contract until there has been full performance by him and then sue for damages, which will extend to the whole contract and will compensate for the benefit he would have derived therefrom if the delinquent party had also kept his promise and fully performed his part of the agreement. 9 Cyc. at p. 637, says: "The renouncing party cannot force the other, nor is the other bound, to sue for a breach of the contract before the day fixed for performance arrives, and have the damages assessed as of the time of the renunciation. The party keeping the contract, in other words, need not mitigate the damages by treating as final the premature repudiation." This is the general rule, and while there may be a few cases apparently looking the other way, it will be found upon a close examination of their facts that they are made exceptions to the rule because of special circumstances which made it inapplicable. The rule holds good where, if there is a renunciation, the damages recoverable in an action for the breach before the full time of performance has arrived will not be an adequate compensation for the same. There may be exemptions from the operation of the general rule in cases where the claims of the injured party can be satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted. *Marsh v. Blockman,* 50 Barb. (N.Y.) 329; *Watson v. Smith,* 7 Oregon 448. Here the money was payable in installments as the work was periodically done, and the case is like *Smith v. Lumber Co.,* 142 N.C. 26. But it is not necessary to invoke this principle in order to decide our case, as the contract expressly provides that in the event of any one installment not being paid for sixty days after it
(432) becomes due, and without the consent of the university, the unpaid balance of the amount payable, under the terms of the contract, shall immediately become due. We see nothing in the correspondence indicating that the plaintiff made any excessive demands upon the defendant or called for more than was due. The statement sent at first to defendant was manifestly intended to show

what was due in all, and not as a demand for more than the installment, which was then payable. In his eagerness to rid himself of an undesirable bargain, he unconsciously misconstrued his own deliberate contract, which is plainly expressed to the contrary of what he contends is its proper meaning. If he had appealed to the generosity of his creditor, instead of repudiating his solemn agreement, he would perhaps have received a more acceptable response from it, and one which might have relieved him of his present embarrassment; but this was not done, and we must view the situation in the clear light of the law. The case comes within the principle of *Teeter v. Horner Military School,* 165 N.C. 767.

The objection to the statement of the account as evidence under the statutes (Revisal, sec. 1625, and Public Laws 1917, chap. 32) cannot be sustained. It is answered squarely by the terms of those acts. This is "an account for goods sold and delivered, for services rendered and labor performed," which is the language of the Public Laws of 1917, chap. 32. It was ratified 12 February, 1917, and took effect from that time. The trial took place 22 February, 1917, so that the act applies to this case and brings it within the principle stated in *Carr v. Alexander,* 165 N.C. 665.

There is really no disputed fact in this case, and the charge of the court, therefore, was correct, both in form and substance, and it follows that the motion for a nonsuit was properly denied.

If the defendant could dictate to the plaintiff when their contract should cease and be determined, and could correctly and legally insist that he was liable only for damages at the time of the breach, and not to the full extent of the benefit which would have accrued if the contract had been fully performed according to its terms, as settled by the parties, it would seriously impair the value of contracts. In *Teeter v. Horner Military School, supra,* we said, in regard to a similar contract, where there was an advance payment for a period of the school term which was unexpired when plaintiff's son was expelled for good cause: "An examination of our cases, while they do not deal with the subject in every phase presented in this record, will show that we have substantially approved the doctrine as already stated. It is founded upon justice and common sense, and should prevail, as in no other way could our schools be successfully conducted," citing *Horner & Graves v. Baker,* 74 N.C. 65; *Horner School v. Westcott,* 124 N.C. 518. A contract is not made to be broken, but to be kept, and it is implied that neither party (433) will do anything to prevent this performance or to disappoint the just expectation of the other party that it will be carried out in accordance with its terms.

It may also be said that defendant could not reject a part of the

contract and accept another part. He could not keep that which was beneficial, viz., the text-books sent to him, and refuse to perform the part which he did not like. He must reject all or none, as this is the essence of fairness. *Publishing Co. v. Barber,* 165 N.C. 478; *Rudasill v. Falls,* 92 N.C. 222; 31 Cyc. 1257, 1258; *Brimmer v. Brimmer Co.,* at this term.

There is no harshness in requiring the defendant to do what he promised should be done by him, and it is no reason, in law or in morals, for breaking the contract that he had acted improvidently in making it. The defendant did not even ask that he be allowed to compensate the plaintiff as of the time of the breach by him, but repudiated the contract and broke off relations with the plaintiff, refusing peremptorily even to answer its letters, which were conciliatory in their tone.

There was no error committed at the trial of the case.

No error.

GEORGE L. BAKER v. G. B. AUSTIN.

(Filed 31 October, 1917.)

Deeds and Conveyances — Warranty—After-acquired Title—"Feeding an Estoppel."

A conveyance of all the grantor's interest in a described tract of land, setting out that it is "my entire interest in my father's land, the deceased, where my mother now lives," with full covenants of seizin and warranty, and the land belonged to the mother of the grantor, who lived thereupon, and died seized and possessed thereof, and devised the grantor an interest therein: *Held,* the devise of such interest fed the estoppel under the grantor's previous deed, and he will not be allowed to recover against it.

APPEAL by plaintiff from *Harding, J.,* at April Term, 1917, of ASHE.

The plaintiff, on 4 July, 1888, conveyed to his half-brother, "William Baker, all of my entire interest in my father's land, the deceased, where my mother, Frankie Baker, now lives, the land known as the Robert Baker land, bounded" (describing it). In the *habendum* there is this language: "To have and to hold the same to the said William Baker, his heirs and assigns; that I am lawfully seized in fee of the premises; that they are free from all encumbrances; that I have a good right to sell the same to said (434) William Baker, his heirs and assigns, and that I will warrant

and defend the same against the lawful claims and demands of all persons."

By mesne conveyance said tract has been conveyed to the defendant. The land in question belonged to William Baker's mother, Frances Baker, who died seized in fee simple. George L. Baker's father died in 1881. When his mother died, in 1907, she devised this tract of land to himself and others, under which will the plaintiff claims that he is the owner in fee of 53/147 undivided interest in said tract, and he asks to be let into possession of said undivided interest in said land as tenant in common with the defendant.

The defendant claims that, as to the interest the plaintiff acquired by his mother's will, he is estopped by his deed of warranty, above set out.

The court held that the warranty estopped the plaintiff from claiming an interest in the land as devisee of his mother, and nonsuited the plaintiff, from which he appealed.

R. A. Doughton, R. L. Ballou, and G. L. Park for plaintiff.
T. C. Bowie for defendant.

CLARK, C.J. The defendant contends that this is a case of "feeding an estoppel." The plaintiff conveyed "all of my entire interest in my father's land . . . where my mother Frances Baker now lives, the land known as the Robert Baker land," giving the boundaries. The reference to "my father's land" was merely descriptive of the land and was not restricted to the interest which he had acquired from his father. But to put the matter beyond all doubt he conveys the land in fee simple, with covenant of seisin in fee, covenant against encumbrances, covenant of right to convey, and adds, "I will warrant and defend the same against the lawful claims and demands of all persons." The conveyance was of his entire interest in that tract of land, and though he mistakenly described it as his father's land, that did not change the fact that he conveyed "all of my entire interest" in that land, whose identity is fixed beyond question by stating that it is the place on which his mother then lived; that it was known as the Robert Baker land, and giving the boundaries. Though at the time he had no interest in the land when the title to the 53/147 was afterwards devised to him, this fed the estoppel, and he cannot now recover against his deed, with warranty, of said land.

This is well settled: "Where a deed is sufficient in form to convey the grantor's whole interest, an interest afterwards acquired passes by way of estoppel to the grantee." *Buchanan v. Harrington,* 141 N.C. 39; *Hallyburton v. Slagle,* 132 N.C. 947; *Foster v. Hackett,* 112 N.C. 546; *Bell v. Adams,* 81 N.C. 118; *Wellborn* (435)

v. Finley, 52 N.C. 228; *Armfield v. Moore,* 44 N.C. 162; *Taylor v. Shufford,* 11 N.C. 116.

The general rule is thus stated 16 Cyc. 689, with full citations in the notes: "If a grantor having no title, a defective title, or an estate less than that which he assumed to grant, conveys with warranty or covenants of like import, and subsequently acquires the title or estate which he purported to convey, or perfects his title, such after-acquired or perfected title will inure to the grantee or to his benefit by way of estoppel."

In *Olds v. Cedar Works,* 173 N.C. 164-166, in a very interesting discussion, Allen, J., cites the authorities and points out 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, and adds: "Where there is a covenant of warranty, the deed not only destroys the right of action in the grantor and his heirs to the after-acquired estate by rebutter, but it also passes the title to the grantee by estoppel by warranty." We can add nothing to what is there so well said.

The judgment of nonsuit is

Affirmed.

Cited: Cook v. Sink, 190 N.C. 626; *Crawley v. Stearns,* 194 N.C. 17; *Woody v. Cates,* 213 N.C. 794; *Barnes v. House,* 253 N.C. 449.

M. H. BRIMMER v. M. H. BRIMMER & CO.

(Filed 31 October, 1917.)

1. Appeal and Error—Answer to Issues—Harmless Error.

Exception to the admission of evidence relating to issues answered by the jury in appellant's favor is immaterial on appeal.

2. Evidence—Nonsuit—Pledge—Burden of Proof—Trials.

In an action to recover personal property, defended on the ground that it had been left with the defendant as security for a debt, the burden is on the defendant to establish his defense, and when there is evidence that title to the property is in the plaintiff, the defendant's motion to nonsuit upon the evidence is properly denied.

3. Judgments—Issues.

An affirmative finding of an issue that plaintiff is entitled to the proceeds of sale of personal property claimed by the defendant in an action

to recover it, as a pledge for plaintiff's debt, is sufficient for judgment that plaintiff recover such sum.

4. Corporations — Mortgages—General Manager—Principal and Agent—Directors.

While ordinarily a general manager of a corporation is without implied authority to pledge corporate property for the payment of its debts, unless by resolution of the board of directors, the doctrine is subject to the rule that he may have such power when incidentally necessary to the carrying on of the business under his general authority, as such manager, and that acts of such character are binding upon their ratification by the company in accepting benefits thereunder.

5. Same—Evidence.

A funeral corporation was heavily indebted to a livery stable for furnishing it carriages for funerals, where its "dead wagon" was kept at the time and continuously thereafter; and to obtain further credit at the stable the manager of the corporation pledged the "dead wagon" of which the corporation received benefit with the knowledge and consent of the president. After insolvency, the receiver sued the owners of the stable for the wagon, and it is *Held*, there was evidence sufficient to bind the funeral corporation or its receiver to the pledge made by its general manager, there being evidence both as to his authority and the ratification of his act by the corporation.

6. Appeal and Error—Courts—Determinative Issues.

When the controversy is made to depend upon the authority of a general manager of a corporation to bind the latter by his act, with evidence that it was necessary to the carrying on of the corporation's business and of its subsequent ratification, and the trial judge has failed to submit an issue properly determinative of this question, a new trial will be ordered on appeal.

APPEAL by petitioner from *Bond, J.*, at the April Term, 1917, of NEW HANOVER. (436)

This is a petition filed by the receiver of the M. H. Brimmer Company against the Schloss-Bear-Davis Company to recover a certain "dead wagon," or the proceeds thereof.

The Brimmer Company was in business as an undertaker, and it was admitted that it bought the wagon, which was in possession of the Davis Company at the commencement of the action, the Davis Company claiming that it had been pledged as security for debt by M. H. Brimmer, general manager of the Brimmer Company.

The receiver denied that the wagon was left with the Davis Company as a pledge, and also denied that Brimmer had any authority to pledge the wagon.

Both parties introduced evidence in support of their respective claims.

The receiver introduced the deposition of M. H. Brimmer, who,

among other things, was permitted to answer the following question:

Q. State in full the circumstances of your placing the "dead wagon" in the livery stables of Schloss, Bear & Davis Co.?

The deposition and the answer to the question were objected to by the defendant and exception duly taken to their admission.

The plaintiff also introduced as a witness L. W. Moore, president of the Brimmer Company, who was asked the following questions by the defendant on cross-examination:

Q. How much did your concern owe when it went into (437) the hands of a receiver?

Objection by plaintiff; objection sustained; defendant excepted.

Q. I ask you if it was not hopelessly insolvent?

Objection by plaintiff; objection sustained; defendant excepted.

Q. I will ask you if you had enough assets in your concern when it went into the hands of a receiver to pay 2 cents on the dollar?

Objection by plaintiff; objection sustained; defendant excepted.

The following is the verdict returned on the minutes:

1. Did M. H. Brimmer, manager of M. H. Brimmer Company, deliver said "dead wagon" to Schloss-Bear-Davis Company and pledge it to be security for what was due them by said Brimmer Company? Answer: Yes.

2. What sum is due to Schloss-Bear-Davis Company by said M. H. Brimmer Company? Answer: $548.75.

3. Was said Brimmer, manager, authorized by directors of said company to pledge its property or any part of same to secure payment of debt to Schloss-Bear-Davis Company? Answer: No.

4. Is petitioner C. C. Bellamy, receiver, entitled to money for which said "dead wagon" was sold, by agreement, leaving said money to stand in the place of said wagon? Answer: Yes.

Judgment was rendered in favor of the receiver upon the verdict, and the defendant appealed, assigning the following errors:

1. The court erred in overruling the defendant's objection to the introduction of the deposition of M. H. Brimmer, as set out in the first exception.

2. The court erred in overruling the defendant's objection to the question: "State in full the circumstances of your placing the 'dead wagon' in the livery stable of Schloss, Bear & Co.," as set out in the second exception.

3. The court erred in sustaining the objection of the plaintiff to the question: "How much did your concern owe when it went into the hands of a receiver?" as set out in the third exception.

4. The court erred in sustaining the objection of the plaintiff

to the question: "I ask you if it was not hopelessly insolvent," as set out in the fourth exception.

5. The court erred in sustaining the objection of the plaintiff to the question: "I will ask you if you had enough assets in your concern when it went into the hands of a receiver to pay 2 cents on the dollar?" as set out in the fifth exception.

6. The court erred in overruling the defendant's motion for nonsuit, as set out in the sixth exception.

7. The court erred in signing the judgment set out in the record and in holding that the Schloss, Bear & Davis Co. (438) did not hold a lien upon the "dead wagon," as set out in the seventh exception.

No counsel for receiver.
McClammy & Burgwyn for defendant.

ALLEN, J. It is not necessary to consider the first and second assignments of error because the deposition of M. H. Brimmer has no bearing upon any issue except the first, which was answered in favor of the defendant.

The third, fourth, and fifth assignments of error are without merit. The record does not show what would have been the answer of the witness to the questions propounded to him, but if we assume that the purpose was to show the insolvency of the Brimmer Company, this was not relevant to any issue before the jury, and it was not in controversy, because the record shows that the petitioner was appointed receiver on account of insolvency.

The motion for judgment of nonsuit was properly overruled, as it was admitted that the Brimmer Company had bought the wagon, and that it was the owner, unless the defendant could establish that it had been left in its possession as a pledge, and the burden was on the defendant, as his Honor charged, to satisfy the jury of the facts upon which it relied to show that it was entitled to retain the wagon or its proceeds.

The seventh assignment presents the question as to whether the verdict is sufficient to support the judgment, and there can be no doubt that the answer to the fourth issue, standing alone, justified his Honor in holding that the receiver was entitled to the proceeds of the sale of the wagon, as it so finds in no uncertain language.

It appears, however, that the fourth issue was not answered by the jury, and that, on the contrary, his Honor submitted only the first issue to the jury and reserved the others to be answered by himself as matters of law, and as there was no evidence of a meeting of the directors conferring power on the manager to pledge the

wagon, he answered the third issue "No"; and being further of opinion that if there was no meeting of the directors, the manager was without authority, he answered the fourth issue "Yes."

There is no specific exception taken to this action of the judge, but it is important as it throws light on the trial, and shows that the case was tried upon the theory that the manager was without authority, unless the directors by resolution authorized his action.

After the first issue was answered, the only fact in dispute (439) was whether the manager, Brimmer, had authority to make the pledge, and if this could be shown otherwise than by a resolution of the directors, the issues are not determinative of the controversy, if the first is not inconsistent with the fourth, and if there is evidence supporting a finding in favor of the defendant on the question of authority, the judgment ought to be reversed.

The authority of a managing agent is broad (Tiffany Agency, 216), but generally he cannot by virtue of his office sell, mortgage, or pledge the corporate property. *Duke v. Markham,* 105 N.C. 131; 7 R.C.L. 645; *Buckwald Transfer Co. v. Hurst,* 19 Ann. Cas. 169, and note.

The rule is not, however, inflexible, and is applied reasonably, taking into consideration the business, the duties to be performed, the relation of the property dealt with to the business and to the other property, the surrounding circumstances and the principle that he "has the implied power, in the absence of express limitations, to do all acts on behalf of the corporation that may be necessary or proper in performing his duties." Clark on Corporations, 494.

"It is a general principle, applicable in all such cases, whether the agency be general or special, unless the inference is expressly negatived by some fact or circumstance, that it includes the authority to employ all the usual modes and means of accomplishing the purposes and ends of the agency, and a slight deviation by the agent from the course of his duty will not vitiate his act, if this be immaterial or circumstantial only, and does not, in substance, exceed his power and duty. Such an agency carries with and includes in it, as an incident, all the powers which are necessary, proper, usual and reasonable as means to effectuate the purposes for which it was created." *Huntley v. Mathias,* 90 N.C. 103.

"The power of an agent, then, to bind his principal may include not only the authority actually conferred, but the authority implied as usual and necessary to the proper performance of the work intrusted to him, and it may be further extended by reason of acts indicating authority which the principal has approved or knowingly or at times even negligently permitted the agent to do in the course of his employment." *Powell v. L. Co.,* 168 N.C. 635.

"The principal is held to be liable upon a contract duly made by his agent with a third person: (1) When the agent acts within the scope of his actual authority. (2) When the contract, although unauthorized, has been ratified. (3) When the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his authority, the term 'apparent authority' including the power to do whatever is usually done and necessary to be done in order to carry into effect the principal power conferred upon the agent and to transact the business (440) or to execute the commission which has been intrusted to him." *Wynn v. Grant,* 166 N.C. 47.

In the application of this doctrine it was held in *Huntley v. Mathias, supra,* that an agent traveling through the country to sell engines had implied authority to hire a horse, and in *Brittain v. Westall,* 137 N.C. 32, that an agent to buy, to whom money had not been furnished, could buy on credit and bind his principal.

It is also well settled that although the agent has no authority, express or implied, that the principal is responsible for his acts if he ratifies them; that taking benefit of the transaction with knowledge is a ratification *(Starnes v. R. R.,* 170 N.C. 224), and that when the agent acts outside of his powers, the principal must adopt the whole transaction or repudiate the whole. "He cannot accept the beneficial part and reject what is left of it." *Pub. Co. v. Barber,* 165 N.C. 482.

Is there evidence of authority or ratification?

The Brimmer Company was in business as an undertaker and the defendant company was in the livery business.

The evidence tends to prove that the Brimmer Company did not own horses and carriages, and that they were necessary in the conduct of its business; that it had been hiring from the defendant, and owed it a considerable account; that the defendant refused to permit the further use of the horses and carriages without security; that Brimmer, the manager, then pledged the wagon, and with the understanding that the defendant would continue to furnish the horses and carriages; that the president of the company was told of the pledge and the agreement; that the company continued to hire the horses and carriages and permitted the wagon to remain in possession of the defendant, and that when the defendant went to see the president about the account he said the defendant could hold the wagon until it was paid, the last statement appearing in the recital of the evidence in the charge.

It appears, therefore, that authority to bind the principal may exist without a resolution of the directors, and that ratification is as effectual as previous authority, and as there is evidence of authority

and ratification, and no issue was submitted to cover these important contentions of the defendant, there must be a new trial, because, as said in *Tucker v. Satterthwaite,* 120 N.C. 122, "It is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising in the pleadings, and that in the absence of such issues or admissions of record equivalent thereto sufficient to reasonably justify, directly or by clear implication, the judgment rendered therein, this Court will remand the case for a new trial."

New trial.

Cited: Mfg. Co. v. McPhail, 179 N.C. 387; *Bobbitt v. Land Co.,* 191 N.C. 328; *Bank v. Skult,* 198 N.C. 593; *Tesh v. Rominger,* 215 N.C. 55; *Maxwell, Comr. v. Ins. Co.,* 217 N.C. 766; *Tuttle v. Bldg. Corp.,* 228 N.C. 511; *Research Corp. v. Hardware Co.,* 263 N.C. 721.

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(441)

L. L. KERNODLE v. JOHN D. KERNODLE AND WIFE.

(Filed 31 October, 1917.)

Bills and Notes—Contracts—Parol Evidence.

The evidence tending to show that the bond sued on in this case, under a contemporaneous verbal agreement, was only to be accounted for as an advancement upon the death of the maker's father, provided sufficient funds were left for the purpose, was properly admitted by the trial judge under the authority of *Kernodle v. Williams,* 153 N.C. 475.

BROWN, J., dissenting.

APPEAL by plaintiff from *Kerr, J.,* at May Term, 1917, of ALAMANCE.

This is an action on the following bond:

$1,866.

One day after date, we jointly promise to pay L. L. Kernodle $1,866 for value received. This 3 October, 1907.

(Signed) J. D. KERNODLE. (SEAL)

CORA H. KERNODLE. (SEAL)

The defendants, in their answer, admitted the execution of the bond, and set up the defense that the bond was intended to answer

the purpose of a memorandum of the amount stated therein, which was only to be accounted for by J. D. Kernodle as an advancement upon the death of his father, the plaintiff, provided sufficient funds should be left to him by his father for that purpose.

The evidence of the defendants in support of their defense was objected to by the plaintiff, and exception taken to its admission.

Both parties introduced evidence, and at the conclusion of the evidence his Honor held that the burden of proof was on the defendants, and that they were entitled to open and conclude the argument before the jury, to which plaintiff excepted.

There was a verdict and judgment for the defendants, and the plaintiff appealed.

W. H. Carroll for plaintiff.

J. S. Cook, J. J. Henderson, S. M. Gattis, and Parker & Long for defendant.

ALLEN, J. We have examined the full and complete brief of the learned counsel for the plaintiff, discussing the admissibility of parol evidence when a writing is in existence relating to the subject-matter, but we find the precise question presented by this record has been heretofore decided in favor of the defendants, and we rest our judgment on that decision.

In *Kernodle v. Williams*, 153 N.C. 475, the plaintiff was the same as in this case, and the defendants were a daughter (442) and her husband, while in the present action they are a son and his wife.

The action was on a bond promising to pay money, and the defense that after the payment of certain amounts, which were paid, that the remainder of the bond was to be accounted for in a settlement of the father's estate as an advancement, and was not to be paid unless needed for the payment of debts.

It was held that parol evidence was properly admitted to establish the defense, one of the head-notes being as follows: "The father sued his daughter and son-in-law to recover upon a bond given him by them in a certain sum due one day after date: *Held*, it was competent to show in defense by parol evidence that by a contemporaneous oral agreement the defendants were to pay and did pay certain amounts upon the bond, and that the balance was only to be accounted for in settlement with the father's estate as an advancement, and that no actual payment thereof was to be made unless needed to pay debts of the estate."

The order of argument before the jury is committed to the dis-

cretion of the trial judge, except when the defendant introduces no evidence, and his action is not reviewable. Rule 6, 164 N.C. 563.

No error.

BROWN, J., dissenting: I admit that the point presented by this appeal is identical with that presented in *Kernodle v. Williams,* 153 N.C. 475. My views are very fully and clearly presented in the dissenting opinion by Justice Manning in that case. I heartily concur with what is said by Justice Shepherd in *Moffett v. Maness,* 102 N.C. 457, that "There is too great a tendency to relax the well-settled rules of evidence against the admissibility of parol evidence to contradict, vary, or add to the terms of a written contract."

H. G. KIME v. W. J. RIDDLE.

(Filed 31 October, 1917.)

1. Vendor and Purchaser—Representations—Contracts—Warranties.

Where, in the sale of a horse, the vendor represents to the purchaser that the animal was sound and all right for the latter's purposes, it is not open to the vendor's objections that the court left the question of warranty and breach thereof to the jury upon conflicting evidence under proper instructions.

2. Same—Breach—Intent—Trials—Questions for Jury.

Where the statement of the vendor to the purchaser of a horse as to the animal's condition, relied on as a warranty, is in dispute, it is for the jury to determine the fact in regard thereto; and where the statement is admitted, the question of warranty often depends upon the intent with which it was uttered, presenting a mixed question of law and fact for the jury; but where the statement is admitted and the intent is clear and unequivocal, it may be construed as a warranty, as a matter of law.

3. Vendor and Purchaser — Warranty — Breach—Measure of Damages—Evidence.

Upon vendor's breach of warranty in the sale of a horse, the purchaser's measure of damages, unless in exceptional cases of special damage, is the difference between the value of the animal as warranted and as delivered, and evidence as to its condition and value may be competent and relevant to the questions of warranty and damages.

4. Vendor and Purchaser — Warranty—Contracts—Breach—Exchange — Waiver.

Where a vendor has breached his warranty to take back the horse sold, and the purchaser has in consequence exchanged the animal for another, such exchange is not a waiver by the purchaser of his right to recover his damages arising from the vendor's breach.

KIME *v.* RIDDLE.

CIVIL action, tried before *Kerr, J.*, and a jury, at May Term, 1917, of ALAMANCE. (443)

Plaintiff sued upon a note for $150, given by the defendant to him for the price of a gray horse. Defendant set up a counterclaim, after admitting the execution of the note, and alleged therein that plaintiff had expressly warranted the gray horse to be sound and all right, and one that would do defendant's business, and after he was tried, if the representation or warranty was found to be untrue, plaintiff would make it good by exchange for another horse or in money. Defendant gave another horse, valued at $75 and the note for $150 to plaintiff for the gray horse. The latter proved to be unsound, defendant testifying that "The gray horse was poor and there was something wrong with him, which I supposed to be kidney trouble. He was not able to do a day's plowing." He then took the horse to plaintiff, who refused to receive him, advising defendant to exchange him with some one for another horse, and stating that he had no horse to give him in the place of the gray animal. As plaintiff refused to take back the gray horse, defendant exchanged him for a black mare. The jury rendered the following verdict:

1. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: $150 and interest from 21 March, 1912.

2. Did the plaintiff warrant the gray horse, as alleged in the answer? Answer: Yes.

3. Was there a breach of said warranty? Answer: Yes.

4. What damage, if any, has defendant sustained because (444) of said false warranty of the gray horse? Answer: $197.

5. Did the defendant, by his conduct in trading the gray horse for the black mare, waive any warranty of the gray horse? Answer: No.

Judgment on the verdict, and plaintiff appealed.

W. H. Carroll and E. S. Parker, Jr., for plaintiff.
William I. Ward for defendant.

WALKER, J., after stating the case: There was practically no controversy as to the warranty of the gray horse, though if there had been plaintiff would have no ground of complaint, as the court required the jury to find whether or not there was such a warranty. There was some dispute as to subsequent events, and particularly as to what occurred when the defendant went to the plaintiff's stable with the gray horse for the purpose of returning him and getting another horse in his place, as the gray horse was not such as represented in the warranty. This controversy was fairly submitted to

the jury by the court, and the facts were found to be contrary to the plaintiff's contention and the evidence upon which he relied. Where there is a dispute as to the facts, whether there was a warranty, becomes a question for the jury. Unless the language is clear and unquestioned, so that upon the face of it there is a warranty, as matter of law the jury should determine, as a mixed question of law and fact, whether there was a warranty, as it often depends upon the intention of the parties. *McKinnon v. McIntosh,* 98 N.C. 89; *Unitype Co. v. Ashcraft,* 155 N.C. 63; *Robertson v. Halton,* 156 N.C. 215; *Hodges v. Smith,* 158 N.C. 256. Whether the affirmation as to the soundness of a horse amounts to a warranty depends upon the intention of the parties, was held in *Turner Bros. v. Clarke,* 143 Ga. 44. When the statements made by the seller are nothing more than a mere commendation of his goods, which is usual in sales — a puffing of wares, as it is sometimes called — there is no warranty or deceit. *Cash Register Co. v. Townsend,* 137 N.C. 652. The matter is fully discussed and the distinctions stated in *Robertson v. Halton, supra.* But sometimes what is said by the seller will of itself constitute a warranty, and the only question would be whether he used the words, if the evidence in regard to it is conflicting. There was no error in leaving the question to the jury in this case, so far as plaintiff is concerned.

The rule of damages was correctly laid down by the Court and as it is stated in *Robertson v. Halton, supra,* citing *Marsh v. McPherson,* 105 U.S. viz.: "The difference in actual value between the article as warranted and the article as delivered is all that can be properly recovered as damages, unless in exceptional cases
(445) of special damages. Whatever that difference in the actual circumstances of the case is shown to be is the true rule and measure of damages, where the articles delivered are not what the contract calls for." The evidence as to the condition and value of the gray horse was clearly relevant to the question whether there had been a warranty, and also to the issue of damages.

We do not see how the exchange of the gray horse for the black mare, after plaintiff had refused to take back the gray horse in violation of his contract of warranty, can affect the right of defendent to recover on his counterclaim. There was no waiver or abandonment of the warranty. The defendant merely did what the warranty required him to do, and plaintiff was in default when he refused to comply with his promise, so that the gray horse belonged to the defendant, with the right to sue for the damages resulting from a breach of the warranty. The jury found, under the evidence and charge of the court, that plaintiff had first broken the contract, and

this clearly established defendant's counterclaim and right to compensation for the breach. The other evidence was competent on the fourth issue as to damages. We may add that the court submitted the question as to a waiver or abandonment of the warranty to the jury, and the answer to the last issue was adverse to the plaintiff's contention.

The real and decisive question was one of fact, and it has been settled against the plaintiff.

No error.

Cited: Troitino v. Goodman, 225 N.C. 413; *Hendrix v. Motors Inc.,* 241 N.C. 646.

W. F. TALLEY v. THE HARRISS GRANITE QUARRIES COMPANY.

(Filed 31 October, 1917.)

1. Pleading—Proof—Substantial Variance—New Cause of Action.

The liberal construction given to pleadings under our Code system does not avoid the necessity that the proof must correspond with the allegation, for proof without allegation is as unavailing as allegation without proof; and where the difference between the allegation of the pleading and the proof is substantial, so as to grossly mislead the other party, amounting to alleging one cause of action and proving another, it is not allowed.

2. Same—Fellow-servant Act—Railroads.

Where the plaintiff's recovery for damages for a personal injury is confined by the pleadings to an alleged negligent order given by defendant's foreman to plaintiff's coemployees, he will not be permitted to recover upon the theory that defendant had failed to furnish sufficient help for the work then being done; nor, except in suits against railroads, can a recovery be had for damages for a personal injury solely arising from the negligent acts of a fellow-servant.

3. Instructions—Requests—Issues.

Exceptions to the refusal of the court to give requested instructions are not tenable on appeal when they have been substantially incorporated in the general charge, or where they are not properly addressed to the issues.

CIVIL action, tried before *Long, J.,* at November Term, 1916, of ROCKINGHAM. (446)

Plaintiff alleged that on 10 September, 1915, he was an employee of the defendant quarries company and was called upon by the foreman to assist in removing a heavy cable, attached to a

smokestack, to a new anchorage, and in order to do so properly it was necessary to carry it around a pit about 150 feet in depth. He was instructed to take hold of the cable, with another man, at the end of it furtherest from the smokestack, and eight or ten other men were ordered to grapple the cable at a place between the plaintiff and the smokestack, which they did, for the purpose of holding in the slack and preventing the cable from swagging into the pit. The cable extended beyond where plaintiff was directed to go. "When plaintiff reached a given point, carrying the cable, and had gone down the edge of the pit about 4 feet, E. C. Frady, foreman, directed the men holding the cable in a curve around the pit to let go, and instructed the plaintiff to hold on; that the eight or ten men holding the slack in the cable turned loose, as directed, and the cable swung out over the pit with great force and jerked plaintiff to the ground, wrenching and tearing the muscles of his back." These allegations, in section 6 of the complaint, are substantially repeated in section 7. And in reply to the answer, the same averment is again made, in these words: "The order of the foreman of defendant, given to the men holding back the weight of the cable, 'to turn loose,' which order was obeyed and the obeying of said order, under the direction and in the presence of said foreman, caused this plaintiff to be violently thrown to the ground and seriously injured, which result could not have been known or foreseen by this plaintiff, as he was engaged in carrying the cable at the furtherest point, the force and effect of said order being known only to the said foreman, or should have been known by him."

The court instructed the jury that unless the plaintiff had proven by a preponderance of the evidence that the foreman, E. C. Frady, ordered the men, except plaintiff and the man with him, to turn loose the cable, they should answer the first issue "No," and if the injury resulted, not from a negligent order of the foreman, E. C. Frady, to let go the cable, but solely from the negligent act of the men, or servants of the company, in turning it loose, they being fellow-servants of the plaintiff, the jury would leave out of consideration the negligent act of such fellow-servants; and if it was found

(447) that the injury was caused proximately by the negligent act of the fellow-servants of the plaintiff, and not by reason of an order given by the foreman, the jury would answer the first issue "No"; but if Frady gave the order and this proximately caused the injury, the jury should answer the first issue "Yes." The court instructed the jury, in response to plaintiff's prayers for instructions as to assumption of risk and as to the duty of the master to provide a reasonably safe means and methods for his servant to

perform his work, such as proper help and a reasonably safe place to work, with proper tools and appliances with which to do his work. The court substantially gave all of the instructions requested by the plaintiff, except the fifth, and there was no allegation as to this one, as the court stated at the time. The jury answered the issue as to negligence in favor of the defendant. Judgment thereon, and plaintiff appealed.

J. R. Joyce and J. M. Sharp for plaintiff.
McMichael & Ray and John M. Robinson for defendant.

WALKER, J., after stating the case: It has so often been said as to have grown into an axiom that proof without allegation is as unavailing as allegation without proof. There must, under the old or new system of pleading, be *allegata* and *probata*, and the two must correspond with each other. When the proof materially departs from the allegation, there can be no recovery without an amendment. *McKee v. Lineberger*, 69 N.C. 217; *Brittain v. Daniels*, 94 N.C. 781; *Faulk v. Thornton*, 108 N.C. 314; *Pendleton v. Dalton*, 96 N.C. 507; *Hunt v. Vanderbilt*, 115 N.C. 559; *Green v. Biggs*, 167 N.C. 417. It was never intended, even by our liberal Code system, that a plaintiff should be allowed to prove a cause of action which he has not alleged. *McNeill v. R. R.*, 167 N.C. 390; *Kivett v. Telegraph Co.*, 156 N.C. 296; *Anthony v. Seagle*, 98 N.C. 553; *Willis v. Branch*, 94 N.C. 142. When the difference between the allegation of the pleading and the proof is substantial, so that the other party is grossly misled by it, and it really amounts to alleging one cause of action and proving another, it is not a variance merely, but a failure of proof. *Anthony v. Seagle, supra; Willis v. Branch, supra.* The rule is founded on wisdom, and is a just one, for it cannot be supposed that a party has to come prepared to answer a cause of action not alleged by his adversary and quite different from the one which is alleged. It would greatly embarrass him in his defense were it otherwise, and he should not be prejudiced by something which is attributable to the pleader's own fault, and not to any on his part. We give a broad meaning to the pleading, so as to exclude mere technicalities and to put the case upon its merits, if it will not prejudice the other side. This is the principle for determining the effect of a pleading, as stated in *Blackmore v. Winders*, 144 N.C. 215: "The uniform rule pre- (448) vailing under our present system is, that for the purpose of ascertaining the meaning and determining the effect of a pleading, its allegations shall be liberally construed, with a view to substantial justice between the parties. Revisal, sec. 495. This does not mean

that a pleading shall be construed to say what it does not, but that if it can be seen from its general scope that a party has a cause of action or defense, though imperfectly alleged, the fact that it has not been stated with technical accuracy or precision will not be so taken against him as to deprive him of it. *Buie v. Brown,* 104 N.C. 335. As a corollary of this rule, therefore, it may be said that a complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements; for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient." This case was approved in *Brewer v. Wynne,* 154 N.C. 467, where other cases are cited. But while this is the correct rule, it must be remembered that the defendant has some rights which should be respected and safeguarded, and he should not be required to prepare himself to meet his adversary on a ground not chosen by him in his pleading. If it is merely a variance in proof, and can be remedied without serious harm to him by amendment, the court has the power to grant the necessary relief, but not to convert the cause of action, which is stated, into an entirely different one. *McLaurin v. Cronly,* 90 N.C. 50.

In our case the sole allegation is that the defendant's foreman, who was in charge of this gang of workmen, gave a negligent order to some of them to turn loose the cable. This is the gravamen of the complaint, and upon it the plaintiff elected to rest his case and his legal right to a recovery of damages. This allegation he did not establish, as the verdict declares that no such order was given by the foreman. The finding, of course, is fatal to plaintiff's success. But if he had alleged any other act of negligence, such as a failure by the defendant to have a sufficient number of men to move the cable, there would be no evidence of it, as the gang was sufficient, and it seems that the accident could have occurred in only one of two ways, viz., the negligent order of the foreman, which was obeyed by the servants of defendant, or their own negligent act in turning loose the cable without any order from their foreman. There was no such order, and in the latter case the defendant would not be responsible for the negligent act of a fellow-servant, as this is not a railroad company, and the fellow-servant doctrine still exists
(449) in cases like this one.

If under our ruling the prayers for instructions were material, they were substantially given, or concluded improperly, as,

for example, the fifth prayer, which asked the court to charge upon matters alleged therein that plaintiff would be entitled to recover. *Witsell v. R. R.*, 120 N.C. 557; *Ruffin v. R. R.*, 142 N.C. 120; *Roberts v. Baldwin*, 155 N.C. 276. The jury having found that no such order as alleged was given by the foreman, the case was cut up by the roots.

In no phase of the case was there any error in the court's rulings. The other objections became immaterial, in the view taken by us, and must fall with the principal exception.

No error.

Cited: *Muse v. Motor Co.*, 175 N.C. 470; *Richardson v. Cotton Mills*, 189 N.C. 654; *Morgan v. Bank*, 190 N.C. 214; *Michaux v. Rubber Co.*, 190 N.C. 619; *Dorsey v. Corbett*, 190 N.C. 785; *Balentine v. Gill*, 218 N.C. 498; *Whichard v. Lipe*, 221 N.C. 54; *Roberts v. Grogan*, 222 N.C. 33; *Suggs v. Braxton*, 227 N.C. 52; *Stafford v. Yale*, 228 N.C. 222; *Flying Service v. Martin*, 233 N.C. 20; *Wilson v. Chandler*, 235 N.C. 376; *Sale v. Hwy. Comm.*, 238 N.C. 606; *Poultry Co. v. Equipment Co.*, 247 N.C. 572; *Lumber Co. v. Chair Co.*, 250 N.C. 74.

SELLARS HOSIERY MILLS v. SOUTHERN RAILWAY COMPANY AND ATLANTIC COAST LINE RAILWAY COMPANY.

(Filed 31 October, 1917.)

1. Carriers of Goods—Statute—Penalties—Parties.

Where an intrastate shipment of goods is transported over connecting lines to its destination, it is proper for the trial court to make both roads parties to an action to recover the penalty for the failure to transport safely and within a reasonable time (Revisal, sec. 2632), the burden being upon each defendant to show that it had not failed in its duty.

2. Same—Amount Involved—Courts—Discretion.

Where one of a connecting line of carriers had been sued in a justice's court for the statutory penalty (Revisal, sec. 2632), in failing to transport the shipment within a reasonable time, and appealed to the Superior Court from an adverse judgment, it is proper for the court, in its discretion (Revisal, sec. 507), to order the other carrier to be made a party therein, though the amount involved was less than $200, without the necessity of remanding the case to the justice's court for that purpose.

BROWN, J., dissenting, in which WALKER, J., concurs.

APPEAL by defendant, Atlantic Coast Line Railroad Company, from *Kerr, J.*, at May Term, 1917, of ALAMANCE.

This action was begun against the Southern Railway Company for the sum of $14 and interest from 23 May, 1916, under Revisal 2632, for failure to transport and deliver within a reasonable time a shipment of yarns from Weldon, N. C., to Burlington, N. C. Judgment was rendered by the justice against the Southern Railway Company for $14, and it appealed. When the case was called in the Superior Court the court ordered that the Atlantic Coast Line Railroad Company be made a codefendant, and an *alias* summons
(450) was issued accordingly, which was duly served. The attorneys for that company entered a general appearance at January Term, 1917. After the filing of the complaint, the counsel for said company moved to dismiss, 2 March, 1917, on the ground that the Superior Court of Alamance had no jurisdiction.

At May Term, 1917, the court refused to dismiss the action as to the Atlantic Coast Line Railroad Company, to which it excepted, and submitted the issues to the jury, which found that there was a failure by both companies to transport said shipment of yarns in a reasonable time, and that the plaintiff recover of the Southern Railway Company the sum of $3 and of the Atlantic Coast Line Railroad Company $13. The court rendered judgment accordingly and directed the costs to be divided equally between the two defendants. The Atlantic Coast Line Railroad appealed.

No counsel for plaintiff.

Rose & Rose for defendant Atlantic Coast Line Railroad Company.

CLARK, C.J. The sole question presented is as to the power of the court to amend by making the Atlantic Coast Line Railroad Company a party defendant, when the sum sought to be recovered is less than $200.

The action was properly pending on appeal in the Superior Court. The Atlantic Coast Line Railroad Company was made party defendant and summons duly served. Said defendant entered a general appearance in the action and took no exception.

There was but one contract of carriage in this case, *i. e.*, to transport the goods safely and in a reasonable time from Weldon to Burlington, and to that contract both these defendants were parties, acting through the agent at Weldon. It was very proper that both railroads should be made party to this action, for Revisal 2632, prescribes as a penalty $10 for the first day's delay (where the shipment is less than a car-load) and $1 per day for each succeeding day. It

must be determined, therefore, whether the first day's delay was on the Atlantic Coast Line or on the North Carolina Railroad, in the same action, since in separate actions the plaintiff might get the $10 assessed twice, or not at all, which could not occur when both carriers are made parties.

The action being regularly in the Superior Court on appeal, there is nothing that forbids additional parties being made, in order to have a full determination of the whole controversy, though less than $200 may be recovered against such additional parties. This often happens, especially in actions in the nature of a creditor's bill, but it is not restricted to such cases. It is not necessary to bring the second action in a justice's court and then consolidate on appeal. This might be impracticable, especially in cases where the additional party resides in another county. (451)

Revisal 507, does not require that to "add or strike out the name of any party" such party must be necessary. It is left to the discretion of the judge, who can, if the party proves unnecessary, subsequently strike out the name or exempt him from payment of costs.

It is evident by the verdict in this case that the Atlantic Coast Line Railroad Company had unreasonably delayed this shipment in its transit from Weldon to Selma four days, and that the Southern Railway Company had unreasonably delayed the shipment three days. Instead of splitting the matter up into two actions, the court properly made the Atlantic Coast Line Railroad a party defendant and disposed of the whole cause in one action. It would have been a useless consumption of public time, and a great addition of costs, both to the plaintiff and defendants, to go over the same evidence in two different trials. The unreasonable delay in the transit of the goods between Weldon and Burlington, and the apportionment of the number of days of such unreasonable delay, could be better made by uniting both companies in this action, as they were united in the contract and in the transportation.

Under the Carmack Amendment, when it is an interstate shipment the plaintiff can recover against the initial carrier if he so elect. There are numerous cases in our courts where the action has been brought against the last carrier, leaving it to recover against its predecessors in the course of transportation for their share of the recovery. *Mills Co. v. R. R.*, 119 N.C. 693. Most of these cases were for damages for injuries sustained in transit. But the principle is the same, and where goods have passed over two or more lines in transit, and a penalty for unreasonable delay is to be assessed, it is proper that both lines should be made parties defendant for the apportionment of the delay. The presumption of liability, when unrea-

sonable delay is shown, lies against each of the carriers in whose possession the goods are shown to have been in the course of transportation; and the burden of proof is upon each to rebut such presumption of negligence as to itself. *Furniture Co. v. Express Co.*, 144 N.C. 639.

This is not a question of jurisdiction, but merely of the discretionary power of the court to amend by making an additional party defendant. Both these defendants were parties to the contract sued on, to transport the goods safely, without unreasonable delay. While they might have been sued separately at the will of the plaintiff, the court properly had the other defendant brought in. It was not necessary to remand the cause to the justice of the peace, that he should make the additional party, thus necessitating another appeal.

There is no other assignment of error, and in this we find
(452) the judge acted within his authority, as conferred by Revisal 507.

No error.

BROWN, J., dissenting: This action was brought in a justice's court against the Southern Railway to recover a penalty imposed by the statute for delay in transporting freight over its line from Selma to Burlington. An appeal was taken by the Southern Railway to the Superior Court. That court entered an order making the Atlantic Coast Line a party defendant and directing a summons to issue. The Coast Line appeared and moved to dismiss the proceeding as to it—

1. Because it is not a necessary or proper party.
2. Because the Superior Court had no jurisdiction.

I am of opinion that the motion should have been allowed on both grounds.

I admit that either or both of the defendants would be liable to plaintiff for a breach of the contract of shipment for damages arising out of unreasonable delay, for the reason that they are connecting carriers as to this shipment, the Coast Line having issued a through bill of lading from Weldon, N. C. on its line to Burlington, N. C., on the Southern Railway.

This is true as to interstate commerce by virtue of the Carmack Amendment, and held by this Court in respect to both kinds of commerce before that amendment, in *Rocky Mount Mills v. R. R.*, 119 N.C. 694. But a penalty stands upon a different footing and does not arise out of any contract between the parties.

A penalty is a sum of money which the law exacts the payment of by way of punishment for doing some act which is prohibited, or omitting to do some act required by law to be done. 30 Cyc. 1335.

Where a penalty is given to a party injured, the amount is not affected by or connected with his actual pecuniary loss. 35 Cyc. 1336.

A penalty may be repealed by law pending a civil action for damages and penalty, and the former will not be affected, although the latter cannot be recovered.

I do not think the Legislature intended (even if it had the power) to make one railroad liable for the penalty incurred by another. That would be in effect to make one corporation suffer for the sins of another that it had no power to prevent.

The one corporation in this cause contracted to become liable for damages to plaintiff for the negligence of the other, but it did not thereby render itself amenable to the punishments inflicted by law upon that other for its violation of the statute.

As the Coast Line is not liable for the statutory penalty incurred by the Southern Railway, it is not a necessary or (453) proper party to this action, instituted in the justice's court against the Southern to recover such penalty and nothing else.

The sum demanded of the Coast Line in this action is only $14 and is exclusively within the jurisdiction of a justice of the peace. The jurisdiction of the Superior Court is purely derivative, growing out of and confined to the right of appeal, and the General Assembly has no power to make it otherwise. *Rhyne v. Pipscombe,* 122 N.C. 650.

The only method, therefore, by which the defendant can be brought into the Superior Court in a civil action upon a matter arising on contract, involving an amount less than $200, is by an appeal from a judgment rendered against him in the justice's court.

While there may have been some conflict of opinion as to the powers of the Superior Court when a case reaches that court by appeal from a justice of the peace, this Court has in none of its opinions gone further than to say that "On appeals from a justice of the peace the Superior Court may allow amendments such as filling in blanks in the summons, to *show,* but not to *confer* jurisdiction." *Baker v. Brem,* 126 N.C. 367; *McPhail v. Johnson,* 115 N.C. 298; *Sheldon v. Kivett,* 110 N.C. 408; *Leathers v. Morris,* 101 N.C. 184; *Bank v. McArthur,* 82 N.C. 107. In *Shell v. West,* 130 N.C. 171, this Court held, in an opinion by Clark, J., that on an appeal from a justice's court an amendment in the Superior Court making an additional party, which essentially changed the nature of the action, should not be allowed.

The justice of the peace acquired no jurisdiction over the Atlantic Coast Line and could acquire none, except in the manner specified in the statute. As the justice of the peace acquired no jur-

isdiction over the Coast Line, the Superior Court acquired none by reason of the appeal of the Southern Railway.

It is said in *McLaurin v. McIntyre,* 167 N.C. 353, by Justice Allen: "In *Boyette v. Vaughan,* 85 N.C. 365, the Court said, in a unanimous opinion: 'It is the jurisdiction of the justice of the peace which, on appeal, gives jurisdiction to the Superior Court, and, of course, if the justice had no jurisdiction, the Superior Court could have none.' And again, in *Ijames v. McClamrock,* 92 N.C. 365: 'The jurisdiction of the Superior Court in appeals from justices' courts is entirely *derivative.* If the justice in such cases has no jurisdiction of the action, the Superior Court can derive none by appeal.' "

Both of these cases were cited and approved in *Robeson v. Hodges,* 105 N.C. 49, in an opinion written by the present Chief Justice, in which he quotes from the first that "It is the jurisdiction of the justice of the peace which, on appeal, gives jurisdiction to the Superior Court, and, of course, if the justice had no jurisdic-
(454) tion, the Superior Court could have none, and, therefore, by allowing an amendment in the transcript, which enlarges the cause of action beyond the jurisdiction of the justice, it must necessarily oust itself of jurisdiction." And the same learned judge concurred in the opinion written by Chief Justice Furches in *S. v. Wiseman,* 131 N.C. 797, in which it was said: "In cases where bills are found in the Superior Court, its jurisdiction is original. But in cases of appeal from justices of the peace its jurisdiction is derivative, and it has no more or greater jurisdiction than the justice of the peace had; and if the justice had none, the Superior Court had none."

In a long line of decisions this Court has held that the jurisdiction of the Superior Court in appeals from a justice of the peace is entirely derivative, and if the justice of the peace had no jurisdiction of the action as to the Coast Line the Superior Court can derive none by amendment. A large number of these cases are collected in Clark's Code (3d Ed.), on p. 811.

For these reasons, I am of opinion that the action should be dismissed as to the Atlantic Coast Line.

MR. JUSTICE WALKER concurs in this opinion.

Cited: Cook v. Bailey, 190 N.C. 601; *Albertson v. Albertson,* 207 N.C. 551.

R. H. PRUITT, J. E. NEWMAN ET AL., v. MARY BETHELL.

(Filed 31 October, 1917.)

Nuisance—Abatement—Special Damages—Sickness—Mosquitoes.

An action by an individual to abate a nuisance cannot be successfully resisted on the ground that no special damage to the plaintiff has been shown, when it appears that the nuisance complained of was by defendant causing water to be ponded on adjoining lands, which bred fever-carrying mosquitoes, thereby inflicting sickness on the plaintiff and his family, though others in the community suffered sickness from the same cause. Revisal, sec. 825.

APPEAL by both parties from *Harding, J.*, at February Term, 1917, of ROCKINGHAM.

The plaintiffs, owners of land adjoining and adjacent to Wolf Island Creek, above the defendant's dam and pond, declared on two causes of action — (1) for the abatement of the dam and pond as a nuisance, because it created conditions where the anopheles mosquito was bred in large quantities, which infected the plaintiffs and their tenants with germs of malarial fever; and (2) to recover damages, for that the dam caused the water to be ponded on their bottom lands, rendering them unfit for cultivation. The own- (455) ership of the land was not in dispute. The jury found that the defendant maintained on the premises a public nuisance, as alleged in the complaint. There were several issues submitted as to damages for injury to the land of the several plaintiffs, which were found against them. The plaintiffs' appeal was for alleged error as to these latter issues, but they do not press that appeal in this Court.

The court, upon the finding on the first issue, adjudged that "the defendant abate said nuisance within 90 days after final decree herein, by tearing out said dam and removing the same, and by taking all other reasonably necessary steps as will prevent a continuance of the conditions creating and constituting said nuisance, so far as the same are within her control." The defendant appeals from this judgment and assigns as error the judgment that the defendant shall abate the nuisance by tearing out and removing the dam.

J. M. Sharp, J. R. Joyce, P. W. Glidewell, and Manly, Hendren & Womble for plaintiff.

Jerome, Scales & Jerome for defendant.

CLARK, C.J. The defendant contends that a public nuisance cannot be abated in a civil action by a private individual without showing some special damage to the plaintiff; that the State alone

can abate a public nuisance, in the absence of special damage to the individual, and points out that the jury have found that there was no damage shown to the lands of the plaintiffs by reason of ponding water thereon.

The latter allegation, which the jury negatived, was on the second cause of action. As to the first cause of action, the case on appeal states "there was evidence introduced tending to show that the defendant's dam and pond, for the reasons alleged in the complaint, created numerous stagnant pools and ponds in the lowlands adjacent and adjoining the creek, where the anopheles mosquito was hatched and lived in vast numbers. *There was no dispute* about the existence of these breeding places, the witnesses on both sides testifying to their existence to the vast number of mosquitoes that hatched and lived in and around these pools and ponds. Nor was there any dispute about the existence of malaria, fever, and chills in the neighborhood, which was caused by the anopheles mosquito; *nor was it disputed* that the plaintiffs, their families, and tenants, as well as practically all those living near the dam and the creek for a distance of several miles up the creek, suffered from chills and fever caused by the anopheles mosquito, and in consequence thereof incurred medical bills and lost time from their work, and were injured in their health and
(456) in the comfortable enjoyment of their homes, and that their work on the farm and the cultivation of the farm was interfered with on account of the chills and fever."

"It was further in evidence that this condition has existed for several years prior to the trial, increasing within the last two or three years, and that the mosquitoes that hatched and lived in and around the pond and pools, created by the dam and pond, were the cause of the chills and fever with which the plaintiffs and their tenants and others suffered. This evidence came in part from facts elicited on cross-examination of defendant's experts as to the flight and range of the mosquito."

There was detailed evidence set out in the record bearing particularly on the extent to which plaintiffs and their tenants suffered and were injured by reason of said chills and fever.

The defendant contends strenuously that the plaintiffs are not entitled to judgment for the abatement of a public nuisance, quoting *Dunn v. Stone,* 4 N.C. 241 (decided in 1818), as follows: "For any of those acts which are in the nature of a public nuisance, *no individual is entitled to an action* unless he has received extraordinary and particular damage not common to the rest of the citizens." The defendant also relies upon *McManus v. R. R.,* 150 N.C. 656, in which Hoke, J., said: "It is very generally held, uniformly, so far as we have examined, both here and elsewhere, that in order

for a private citizen to sustain an action by reason of a public nuisance, he must establish some damage or injury special and peculiar to himself and differing in kind and degree from that suffered in common with the general public." But in this case there was a finding that the plaintiffs did establish some damage or injury special and peculiar to themselves and differing in kind and degree from that suffered in common with the general public, "as alleged in the complaint."

In *McManus v. R. R.*, Hoke, J., quoted from Chief Justice Bigelow in *Wesson v. Washburn,* 95 Mass., as follows: "But there is another class of cases, in which the essence of the wrong consists in an invasion of private rights, and in which the public offense is committed, not merely by doing an act which causes injury, annoyance, and discomfort to one or several persons who may come within the sphere of its operation or influence, but by doing it in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience and a wrong against the community, which may be properly the subject of a public prosecution. But it has never been held, so far as we know, that in cases of this character the injury to private property, or to the health and comfort of individuals, becomes merged in the public wrong so as to take away from the persons injured the right which they would otherwise have to maintain actions to recover damages which each may have sustained (457) in his person or estate from the wrongful act. . . . The real distinction would seem to be this: that when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused to individuals. In such case the act of itself does no wrong to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong, by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance." See *Mfg. Co. v. R. R.,* 117 N.C. 579.

To this Judge Hoke added (150 N.C. at p. 661): "Where a nuisance has been established, working harm to the rights of an individual citizen, the law of our State is searching and adequate to afford an injured person ample redress, both by remedial and preventative remedies, as will be readily seen by reference to numerous decisions of the Court on the subject. Revisal, sec. 825; *Cherry v. Williams,* 147 N.C. 452; *Pedrick v. R. R., supra; Reyburn v. Saw-*

yer, 135 N.C. 328; *Mfg. Co. v. R. R., supra; Raleigh v. Hunter,* 16 N.C. 12; *Tarboro v. Blount,* 11 N.C. 384; *R. R. v. First Baptist Church,* 108 U.S. 318."

The opinion in the *McManus* case is a very interesting, valuable and full discussion of the subject, and is conclusive of this controversy. It appears in this case that it is alleged, and there was evidence, that the plaintiffs did sustain special damages in the manner above set out, on which the jury have found on the first issue the nuisance "as alleged in the complaint." This is not negatived by the finding on the second cause of action that the land of the plaintiffs was not damaged by water being ponded thereon.

Indeed, Revisal, 825, has modified the former law as to public nuisances, and provides: "Injuries remediable by the old writ of nuisance are subjects of action as other injuries, and in such action there may be judgment for damages or for the removal of the nuisance, or for both."

In the *McManus* case, *supra,* there were no admissions, evidence, or findings of injuries special to the plaintiffs, as in this case. And the jury responded to the issues that there was a public nuisance, but that the plaintiff had suffered no special damage thereby. In this case it was "without dispute" that the plaintiff suffered from malaria caused by anopheles mosquitoes, which were numerous, and it was alleged and is found by the jury that the breeding places were created by the defendant's dam, which was a nuisance, work-
(458) ing harm to the rights of the individual citizens, who were the plaintiffs.

It was neither alleged, nor in proof, that the judgment of abatement by removing the dam was too drastic, in that the same result could have been attained by the defendant (as in New Jersey and elsewhere) systematically oiling the surface of the breeding places of the mosquito, caused by the dam, nor did the defendant offer to do this, nor request an alternative judgment permitting her to resort, in the first instance, to this method of abatement of the nuisance.

In both appeals

No error.

Cited: Haggard v. Mitchell, 180 N.C. 258; *Elliott v. Power Co.,* 190 N.C. 65; *Barrier v. Troutman,* 231 N.C. 50; *Morgan v. Oil Co.,* 238 N.C. 195; *Moore v. Plymouth,* 249 N.C. 431.

M. B. LINDSEY v. MITCHELL & McCAULEY AND CITY OF BURLINGTON.

(Filed 31 October, 1917.)

1. Pleadings, Inconsistent—Motions—Procedure.

Where the plaintiff's reply to the answer is entirely inconsistent with his allegations in the original complaint, the defendant's remedy is by motion to strike out the offending parts of the reply, and usually the objection will not be considered after verdict.

2. Same—Mechanics' Lien—Vendor and Purchaser.

One who, under an agreement with the owner of a building, has had lumber shipped to himself and paid the draft therefor, and the lumber has been used in the building, acquires ownership of the lumber to an extent sufficient to protect his payments; and an allegation of this kind, in his reply to an answer, is not inconsistent with averments in his original complaint to enforce his claim that he had supplied building material which had been used in the building.

CIVIL action, tried before *Kerr, J.*, and a jury, at May Term, 1917, of ALAMANCE.

Verdict and judgment for plaintiff, and defendants Mitchell & McCauley appealed.

D. R. Fonville, Long & Long, and E. S. W. Dameron for plaintiff.

W. H. Carroll and Parker & Long for defendant.

HOKE, J. Plaintiff alleged in his complaint, and on the trial offered evidence, tending to show that defendants, Mitchell & McCauley, were contractors, who had constructed a public graded-school building for the city of Burlington; that plaintiff had supplied building material which had been used in said building, an itemized statement of the amount being filed and exhibited, and there was a balance due plaintiff thereon of $1,211.88; that on notice, duly filed, the city of Burlington had retained (459) from sum due contractors an amount sufficient to pay plaintiff's claim, and same was ready and available for the purpose.

Defendants answered, admitting that plaintiff had supplied material which had been used in the building, and the amount alleged was still unpaid, but averred that plaintiff had supplied the lumber pursuant to a contract defendants had made with one Sprott, and had in effect taken over their contract with Sprott; that the lumber so supplied was in breach of the contract made with Sprott, both as to the time of delivery and quality of some of the material, whereby the defendants were forced to go into the market and buy certain material at an advanced price, to defendant's damage.

Plaintiff, replying to counterclaim, denied that he was in any way acting for Sprott or under Sprott's contract, but alleged that on certain shipments of lumber by Sprott, plaintiff, at defendants' request and for their accommodation, had paid drafts for lumber shipped with bill of lading attached; that this lumber so supplied by plaintiff had been used in the building and was part of the account contained in the itemized bill on which there was the balance due, as stated.

Defendants filed a rejoinder, in which they denied making any request to plaintiff to take up the drafts and pay for the lumber, and again averred that plaintiff had supplied the lumber under their contract with Sprott and thereby became responsible on the counterclaim set up in their answer.

On issues submitted, the jury rendered the following verdict:

1. Are the defendants indebted to the plaintiff for material furnished? If so, in what amount? Answer: $1,211.88, interest from 28 August, 1916.

2. Did the plaintiff take over and assume the contract made between one Sprott and the defendants concerning the furnishing of framing for the Burlington School building? Answer: No.

3. What, if any, damages have the defendants sustained by reason of the plaintiff's failure to comply with said contract? Answer: .....

There was judgment on the verdict for plaintiff, and defendants, the contractors, appealed, assigning for error, chiefly, as we understand their position, that plaintiff's reply is entirely inconsistent with his claim as presented in the original complaint, and to such an extent that plaintiff should be held estopped from maintaining the positions contained therein.

It is well understood that in proper instances a party to a suit should not be allowed in the course of litigation to assert and maintain radically inconsistent positions. The authorities cited by appellant are in full support of the general principle contended for *(R. R. v. McCarthy,* 96 U.S. 258; *First National Bank, etc., v.* (460) *Dovetail, etc., Co.,* 143 Ind. 534-538); and a recent case in our own Court *(Brown v. Chemical Co.,* 165 N.C. 451) is to the same effect, though, as a matter of pleading, the remedy is by motion to strike out the offending portions, and usually the objection will not be considered after verdict. 6 Enc. Pl. and Pr., 460-470.

On perusal of the proceedings in the present instance, however, we are of opinion that there is no essential inconsistency in plaintiff's pleadings or in the evidence offered in support of his claim.

In the complaint he alleges generally that he sold and delivered

lumber to be used in the building; that it was so used, and there is a balance due. In the reply, reaffirming the general averments of the complaint, he alleges that, the lumber being shipped to him, he paid the draft, and, holding the bill, he delivered the lumber for uses stated, and that he did this for the convenience and at the request of the parties.

Under our decisions, this would give him the ownership of the lumber to an amount sufficient to protect his payments. *Mfg. Co. v. Tierny,* 133 N.C. 631; *Dows v. Exchange Bank,* 91 U.S. 618. And in either aspect, the jury having found that in doing this the plaintiff did not take over or assume the contract between the appellants and Sprott, we see no reason why he should not assert his claim as material man for the balance due him on his account.

There was ample evidence to support the verdict, and in our opinion the judgment in plaintiff's favor should be affirmed.

No error.

Cited: *King v. R. R.,* 176 N.C. 306; *Hill v. R. R.,* 178 N.C. 612; *Ingram v. Power Co.,* 181 N.C. 360; *Kannan v. Assad,* 182 N.C. 78; *Walker v. Burt,* 182 N.C. 330; *Berry v. Lumber Co.,* 183 N.C. 386; *Shipp v. Stage Lines,* 192 N.C. 478; *Leggett v. College,* 234 N.C. 597.

LESTER CROUSE AND MARY E. BARHAM v. DAVIS BARHAM AND OTHERS, CHILDREN OF MARY E. BARHAM, DEFENDANTS, AND LEWIS C. CHRISMAN AND OTHERS, INTERPLEADERS.

(Filed 31 October, 1917.)

1. Wills—Interpretation—Intent—Circumstances of Testator.

The primary object in interpreting a will is to ascertain the intent of the testator from the context thereof, and in proper instances there will be considered the condition of the testator's family and the circumstances surrounding him; and where the intent is clear, words may be supplied, transposed, or changed to effectuate this intent.

2. Same—Adopted Children—Remaindermen—Estates.

Where the testator, owning only one tract of land, devises land "on which I now reside" to his wife in one item, immediately followed in another item by a devise to his adopted children, "Lester Crouse and Mary E. Barham and Mary E. Barham, to have," etc., to be divided between them "by three disinterested persons at my wife's death": *Held,* though the will was obscurely drawn, the intent of the testator, as gathered from the language of the will and circumstances surrounding the testator, was

evidently to devise the remainder in fee in the lands, upon his wife's death, to his adopted children, specifically named by him in his will.

3. Wills—Intent—Intestacy.

In construing a will, the courts do not favor an interpretation which leads to intestacy in part.

PETITION for partition, tried before *Connor, J.*, at Septem-
(461) ber Term, 1917, of ALAMANCE.

The petitioners are the two devisees under the will of Henry G. Chrisman; the defendants, Davis Barham and others, are the children of Mary E. Barham; the interpleaders, Lewis C. Chrisman and others, are the brothers and sisters, heirs at law of the testator, Henry G. Chrisman.

The matter before the court is the proper construction of the will of said Chrisman, which reads as follows:

"I, Henry G. Chrisman, of the aforesaid county and State, being of sound mind, but considering the uncertainty of my earthly existence, do make and declare this my last will and testament.

"First. My executor hereinafter named shall give my body a decent burial, suitable to the wishes of my friends and relatives, and pay all funeral expenses, together with all my just debts, out of the first moneys which may come into his hands belonging to my estate.

"Second. I give and devise to my beloved wife, Mary J. Chrisman, the tract of land on which I now reside, containing one hundred and forty acher; aulso the Tomas Place, twenty-two acher; aulso the place I got from my father, containing thirty-eight achers, and aul my intier stock, horses and cattel, grain and feed, to have her lifetime, with a decent burial with the tome Rocks, to cast one hundred and twenty-five dollars.

"Third. I give and devise to Lester Crouse and Mary E. Barham and Mary E. Barhem, to have, and her children, to be divided between Lester Crouse and Mary E. Barham.

(Turn over)

"I aulso want the land devided by three disinterested persons at my wife's deth."

It is admitted that Mary J. Chrisman is dead.

The court rendered judgment that the plaintiffs are the owners in fee as tenants in common of the land described in the will, and rendered judgment accordingly, from which the interpleaders, Lewis C. Chrisman and others, the heirs at law of the testator, appealed.

Parker & Long for plaintiffs.
W. H. Carroll for interpleaders.

BROWN, J. It is unnecessary to consider whether the children of Mary E. Barham took any estate under the will (462) of Henry G. Chrisman, as they did not appeal, and appear to be content with the judgment of the court in favor of their mother.

The interpleaders, the brothers and sisters of the testator, alone appealed. They admit that the testator, "by his last will and testament, did devise and bequeath *all* his *real* and *personal* property to his wife, Mary J. Chrisman, for the term of her natural life. And these defendants aver that, subject to the life estate given and devised to Mary J. Chrisman, their brother, Henry G. Chrisman, died intestate."

The contention is that the will, in so far as it undertakes to devise anything to plaintiffs, is void for uncertainty and lack of any designation of the property intended to be devised.

In the construction of a will the primary object is to ascertain from the context of the will, as well as the condition of the testator's family and the circumstances surrounding him, his real intention. The will of the testator is crudely and inartificially drawn, but there are two pregnant facts that indicate plainly his purpose:

1. The objects of his bounty were his wife and the two plaintiffs, the infants whom he had taken into his family and reared as his own children. It was natural and proper that he should provide for them.

2. The testator was dealing with his entire estate, and it is manifest he did not intend to die intestate as to any part of it.

It is admitted in the answer of the interpleaders that testator devised all his real and personal property to his wife for her life. In that item of the will the land is specifically described as the land "on which I now reside." It is not contended that he owned any other land. Immediately following this item is the devise to plaintiffs, "to be divided between Lester Crouse and Mary E. Barham." What was it that was to be divided? Evidently, the property described in the preceding item and devised to the wife for her life.

The connection between the second and third items of the will is so close that it is not necessary to supply the word "property" in the third item. It is so perfectly manifest that such was testator's meaning and purpose that the court would read it into the will if necessary to effectuate testator's plain intent, for no rule of law is better settled than that in the construction of a will the intention of the testator apparent in the will must govern, and that in order to effectuate such intention words may, when necessary, be supplied, transposed, or changed. 1 Jarman Wills, 427; *Sessoms v. Sessoms,* 22 N.C. 453; *Dew v. Barnes,* 54 N.C. 150.

In the case of *Baker v. Pender,* 50 N.C. 355, the Court transposed sentences in a will, and said: "To give it this reading requires only the transposition of two sentences, which is allowed by
(463) a well-settled rule of construction, when necessary to express the intention."

In *Haverton v. Henderson,* 88 N.C. 601, Chief Justice Smith says: "The numerous cases in the argument for defendant show that we are warranted in interpreting an omitted word when demanded by the context, and indispensable to point the meaning of a clause."

Again, the testator clearly indicates what land he is devising when he says: "I also want the land divided by three disinterested persons at my wife's death." Divided among whom? Evidently, between the persons to whom he intended it should go at his wife's death.

As the testator was disposing of all he had to his wife, what was there to give to his adopted children except the reversionary interest? Unless he intended the land for them, why did he mention their names in his will? He had nothing else to give them.

He evidently did not intend to dispose of a life estate in his land and die intestate as to the reversion.

The law does not favor a condition of intestacy, and we should be slow to adopt a construction leading to such result. *Faison v. Middleton,* 171 N.C. 170.

It is not necessary to adopt it here, as it is manifest that the testator intended to dispose of his entire estate to those nearest to and dependent on him; and while his language is crude and his spelling bad, we think he accomplished his purpose.

In this appeal we do not undertake to pass on the testator's title to the land he has devised.

The costs of this Court will be taxed against the interpleaders.

No error.

Cited: Morris v. Waggoner, 209 N.C. 186; *Rigsbee v. Rigsbee,* 215 N.C. 759; *Williams v. Rand,* 223 N.C. 736; *Ferguson v. Ferguson,* 225 N.C. 378; *Saint Mary's School v. Winston,* 230 N.C. 329; *House v. House,* 231 N.C. 220; *Coppedge v. Coppedge,* 234 N.C. 175; *Hubbard v. Wiggins,* 240 N.C. 207.

JAMES HAUSER, BY HIS NEXT FRIEND, SALLIE HAUSER, v. THE FORSYTH FURNITURE COMPANY.

(Filed 7 November, 1917.)

Master and Servant — Contributory Negligence — Factories — Children— Statute—Presumptions.

In favor of an employee, not an apprentice, at defendant's factory, under the age of 13 years, contrary to the provisions of the statute (Pell's Revisal, sec. 1981b), and injured through its negligence, there is a *prima facie* presumption that he was not guilty of contributory negligence, and in such case it is the duty of the trial judge to instruct the jury that in determining the issue the evidence should be considered and passed upon in reference to that presumption, and a charge which fails to recognize such presumption, or ignores it and instructs the jury on the issue according to the principles of law ordinarily applied to cases of adults, is reversible error.

CIVIL action, tried before *Adams, J.*, and a jury, at September Term, 1916, of FORSYTH. (464)

The action was to recover damages for physical injuries suffered by plaintiff, a minor, when in the company's factory as an employee, contrary to the provisions of the statute (Pell's Revisal, sec. 1981b), and attributed also to positive negligence on the part of defendant.

On denial of liability and plea of contributory negligence, the jury rendered the following verdict:

1. Was the plaintiff, at the time of his alleged injury, under 13 years of age, as alleged in the complaint? Answer: Yes.

2. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

3. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: Yes.

4. What damage, if any, is the plaintiff entitled to recover? Answer: Nothing.

Judgment on the verdict for plaintiff, and defendant appealed, assigning for error the charge of his Honor on the question of contributory negligence, as follows:

"If you find from the evidence that the plaintiff was forbidden by Dorse, as the servant of defendant, to swing from the safety-rod on the elevator, and that he intentionally or knowingly disobeyed the order and attempted to catch hold of the safety-rod while the elevator was in motion, and fell, and was thereby injured, you will find that the plaintiff was negligent. And if you further find that he would not have been injured if he had not disobeyed the instructions, then, nothing else appearing, his disobedience of orders would be deemed to be the proximate cause of his injury, and in that event you would answer the third issue 'Yes.'"

J. C. Wallace and Hastings, Stephenson & Whicker for plaintiff.
Manly, Hendren & Womble for defendant.

HOKE, J. It was admitted on the hearing that the plaintiff, at the time he was injured, was not serving in the capacity of apprentice, and this being true, it is established by the verdict that plaintiff has been injured by the negligence of defendant company when he was at their factory as an employee, contrary to the provisions of our statute law (Pell's Revisal, sec. 1981b), and that recovery has been denied on the ground of contributory negligence.

It is recognized with us that the defense of contributory negligence, in proper instances, may be available in these cases, but it is also clearly held that the presumption is against it, and that where a minor is injured when serving as an employee contrary to
(465) the provisions of the statute, the court should instruct the jury, in this or some equivalent terms, that the evidence should be considered and the issue determined in view of such presumption. *Pettit v. R. R.*, 156 N.C. 119-127; *Leathers v. Tobacco Co.*, 144 N.C. 330; *Rolin v. Tobacco Co.*, 141 N.C. 300.

In *Leathers'* case, *supra,* it was directly held: "That, under the age prohibited by the statute, the presumption is that the child injured while working in a factory or manufacturing establishment is incapable of contributory negligence, subject to be overcome by evidence in rebuttal under proper instructions from the court." And in *Rolin's* case, on this subject: "A child under 12 years of age is presumed to be incapable of so understanding and appreciating dangers from the negligent act, or conditions produced by others, as to make him guilty of contributory negligence. Contributory negligence on the part of a child is to be measured by his age and his ability to discern and appreciate the circumstances of danger. He is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his age may be expected to possess; and this is usually, if not always, when the child is not wholly irresponsible, a question of fact for the jury."

And in the case of *Pettit v. R. R., supra,* Associate Justice Allen gives a full and careful synopsis of several decisions of the Court on the subject, including *Starnes v. Mfg. Co.*, 147 N.C. 563, and others, and closes with the statement relevant to this question: "That in addition to the usual presumption against contributory negligence, there is a presumption that the child has not the capacity to appreciate the danger of his employment, but this presumption may be rebutted."

From a perusal of these decisions it will appear that a presumption against contributory negligence in cases of this character is

recognized with us as an essential feature of the doctrine of contributory negligence, and a charge, therefore, which fails to make any reference to it, but instructs the jury just as in cases of adults, should be held for reversible error.

It is not a mere omission in reference to a "subordinate feature of the cause, or some particular phase of the testimony," but is to be considered as a "substantial defect," which may be raised by an exception properly entered and requiring that the issue be submitted to another jury.

The general position applicable has been stated in the recent case of *S. v. Merrick,* 171 N.C. 788-795, as follows: "And, further, the authorities are as one in holding that, both in criminal and civil causes, a judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect. Charged with the duty (466) of seeing that impartial right is administered, it is a requirement naturally incident to the great office he holds, and made imperative with us by statute law. Revisal, 535: 'He shall state in a plain and correct manner the evidence in the case, and explain the law arising thereon,' and a failure to do so, when properly presented, shall be held for error. When a judge has done this, charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it, by prayers for instructions or other proper procedure; but, as stated, the judge is required to give correct charge concerning it," citing *S. v. Foster,* 130 N.C. 666; *S. v. Barham,* 82 Mo. 67; *Carleton v. State,* 43 Neb. 373; *Simmons v. Davenport,* 140 N.C. 407.

For the error indicated, the plaintiff is entitled to a new trial, and it is so ordered.

New trial.

CLARK, C.J., concurring in result: Laws 1907, chap. 463; Pell's Revisal, 1981b, raised the age within which a child cannot be employed in a factory by providing that between the age of 12 and 13 no child can be employed in a factory, except when an apprentice, "and only then after having attended school four months in the preceding twelve months." In this case it was admitted that the child injured was not serving in the capacity of an apprentice, and the verdict determines that he was under the age of 13, and that he was injured by the negligence of the defendant. Upon this verdict and admission, I think that judgment should be entered upon the ver-

dict, but for the fact that no damages were assessed, and that the case should go back upon the issue as to the *quantum* of damages only.

The same chapter (463, Laws 1907, secs. 3 and 5; Pell's Revisal, 3362) makes any mill owner, superintendent, or manufacturing establishment which "shall knowingly and willfully violate" the law in regard to working children under the age limited by the statute "guilty of a misdemeanor, and upon conviction he shall be punished at the discretion of the court." As the offense committed here by the defendant is a crime, under the laws of the State, it would seem clear, beyond all controversy, that contributory negligence can be no defense, and that the defendant is liable for any damage caused to one in his employment when such employment is indictable.

I concur that it was error, in any aspect, to submit the case to the jury upon the defense of contributory negligence, in the same terms as if the party injured were of the age of legal discretion and were legally in the employment of the defendant. To do this (467) virtually repeals the statute which makes such employment a crime by putting those of adequate age and those within the prohibited age upon the same basis.

But the law goes further. The defendant was committing a crime when he exposed the plaintiff within the prohibited age to the danger whereby he was injured. It is not, therefore, a matter of contributory negligence, nor even of negligence on the part of the defendant. There can be logically and justly but one inquiry, and that is the amount of damage sustained by the child when thus exposed by the defendant to injury in violation of the penal law.

It is very hard to get away from the influence of the common law under which women and children had no rights which the stronger were compelled to respect. The "common law" was the general law of England, as distinguished from countless local customs, and was simply and necessarily "judge-made" law, formulated in a rude and barbarous age. There were no lawyers in England till 1291 (Ridge's Cons. Law of Eng., 245), and down to the Protestant Reformation under Henry VIII the judges, with the exception of a few laymen, were usually ecclesiastics, who were, of course, Catholic priests, for there were no other clergy. Maitland & Montague, Eng. Legal History (Colby Ed.), p. 97. Bracton and almost all the other law writers of the formative period of the common law were in church orders, and the lord chancellors were bishops or archbishops (with the exception of one woman, Eleanor of Provence), almost without a break till the Reformation. The first lord chancellor who was appointed

from the outside, Sir Robert Bourchier, in 1341, was a soldier and not a lawyer.

The Catholic Church, which had begun some centuries before to require celibacy to some extent of its clergy, made this an absolute requirement by order of Pope Gregory VII (Hildebrand), in 1075, shortly after the Norman Conquest, and it could hardly be expected that the common law, which so largely was created by unmarried priests (the judges of England), should have woven into it an adequate consideration of the rights of women and children. Indeed, it is not too much to say that all social progress has been by modification or repeal of the judge-made "common law" of those centuries.

In Chaucer's Canterbury Tales, the "Clerke's Tale" *(i. e.,* the priest) narrates the story of the "Patient Griselda," who for ages has been the model wife, in the view of those who believe in the unrestricted supremacy of man and the utter subjection and effacement of women and children. When she was told by her husband that he would take the life of their only son, without demur she patiently replied:

> "Ye ben my lord; do with your owen thing,
> Right as you list, asking no rede of me. . . .
> Wherefore I you pray, Do your pleasaunce."

This was written in the last quarter of the fourteenth century, and to some extent may have expressed the views (468) of the priest-judges who were then making the common law of England. This was certainly the law of Rome in its earlier and ruder days. After the Protestant Reformation, when the judges were usually lawyers, they were largely governed by precedent, as now, and, the dominant class in England being the employing class, the employed had slight recognition in the law.

In that excellent book, "A Century of Law Reform," it is pointed out that for a long time the wages of labor were prescribed by the law made by the nobility and other landowners, and it was a hanging offense for an employee to exact more than the prescribed wages, or to unite with his fellows to request an increase of pay. A labor union, until very recent years, was a conspiracy, under the laws of England.

We cannot go back to the ideas formulated by such judges, and even by the parliaments of those days, to interpret a statute made in a free country in the twentieth century, under which it is an indictable offense to employ a child under the specified age, which would rob him of the birthright of youth and expose him to dangers which are, in law, beyond his years to comprehend.

When a child is thus employed contrary to an act which makes it an indictable offense, it is a misinterpretation of the law to say that he can be guilty of contributory negligence. Indeed, it is not essential to show that the employer has been guilty of negligence. The fact that, knowingly and in violation of law, he is illegally exploiting the child, makes the employer as to that employment a criminal (Revisal, 3362), and he is liable civilly for all injury that may come to the child in the course of his employment while thus illegally employed. Nay, more: if the child is killed, the employer is not only liable for damages, but for manslaughter, one form of which is defined to be, "If one unintentionally kills another, without malice, in doing an unlawful act not amounting to felony nor naturally dangerous to life." 21 Cyc. 761; *S. v. Hall,* 132 N.C. 1094. If the act was known to the defendant to be likely to cause death or serious bodily harm, although no deadly weapon is used, such unintentional killing is murder; or if the act is done while engaged in the commission of some other felony, it is murder. 21 Cyc. 761, and cases there cited.

The statutes of today are the formulated legal expression of the will of the people of this day and generation, and they must be construed in that light, and not according to the views of the priests and other judges, whether laymen or lawyers, whose decisions created the "common law" under which women, children, and laborers were alike submerged.

Under our statute it was indictable for this defendant to employ this child. The child was injured in that employment. The defendant cannot defend himself from liability upon the ground that
(469) the child contributed to his own injury. It was to prevent giving the child the opportunity to contribute to his own injury, and to forbid the employer opportunity, by his negligence, to injure the child, that the statute was enacted. If this were not so, the statute is useless and does not express the motive and cause of its enactment.

The world moves on to a higher plane, and the law must move with it to a juster and a clearer regard of the rights of those who have so long needed its protection and have asked it in vain.

Cited: Satchell v. McNair, 189 N.C. 476; *Nichols v. Fibre Co.,* 190 N.C. 7; *Wilson v. Wilson,* 190 N.C. 821; *Cook v. Mebane,* 191 N.C. 12; *Darden v. Baker,* 193 N.C. 389; *Williams v. Coach Co.,* 197 N.C. 16; *Tart v. R. R.,* 202 N.C. 55; *Switzerland Co. v. Hwy. Comm.,* 216 N.C. 461; *Mack v. Marshall Field Co.,* 218 N.C. 701; *Ryals v. Contracting Co.,* 219 N.C. 482; *Smith v. Kappas,* 219 N.C.

852; *McNeill v. McNeill,* 223 N.C. 183; *Metcalf v. Foister,* 232 N.C. 361; *Peek v. Trust Co.,* 242 N.C. 19.

BOARD OF EDUCATION v. BOARD OF COUNTY COMMISSIONERS OF GRANVILLE COUNTY.

(Filed 7 November, 1917.)

1. Public Schools—High Schools—Special Tax—Statutes—Constitutional Law.

Chapter 820, Laws 1907, and subsequent amendatory acts, under the provisions of which high schools may be established and made a part of our public-school system, under regulation and control of the public-school authorities, and extending to all portions of the State, is within the intent and meaning of our Constitution, Art. IX, sec. 1, declaring that knowledge is necessary to good government and happiness, and that "schools and means of education should be forever encouraged"; section 2, directing taxation by the Legislature "for a general and uniform system of public schools," free of charge to the children of the State, "between the ages of 6 and 21," etc.; and such act is therefore constitutional and valid.

2. Same—Uniform System.

The requirements of section 2, Article IX of our Constitution, that our public-school system shall be uniform by legislative authority, relates to the uniformity of the "system," and not to the uniformity of the class or kind of the "schools"; and thus qualifying the word "system," it is sufficiently complied with where, by statute or authorized regulation of the public-school authorities, provision is made for establishment of schools of like kind throughout all sections of the State and available to all of the school population of the territories contributing to their support.

3. Same—County High Schools.

County high schools, which are parts of our public-school system, within the meaning of our Constitution, are entitled to have a special allowance made to them in the yearly estimate of the county board of education for a four-months term (Constitution, Art. IX, sec. 3); but it is otherwise as to a school which is in strictness one of a town or city, governed by local authority and accessible only to the school population of the specified district, for such is not a part of our public-school system; and this class of high schools may only receive their *per capita* or *pro rata* share of the estimate according to average and actual attendance and according to the provision of the statute or authoritative regulations applicable.

4. Same—City or Town High Schools.

The provisions of chapter 820, Laws 1907, that for towns or cities of more than 1,200 inhabitants a public high school may be approved by the county board of education, under contract, to be again approved by the State Board of Education, stipulating, among other things, that the school shall be available to students resident outside the district, etc., must be

shown to exist, for such schools receive the benefit of the special tax in conducting a four-months term of the school.

5. Appeal and Error—Public Schools—Statute—Taxation—Questions of Law—Trials.

Where the county commissioners refuse to accept the estimate of the amount of special tax required to maintain a four-months term of its public school, under the statutory requirement that action be instituted to have the necessary amount fixed by the judge presiding in the district, etc., the conclusiveness of his finding refers to facts, strictly as such, and was not intended to uphold a finding based on erroneous legal principles, presented by exceptions duly noted.

6. Public Schools — Taxation — Statutes — Judicial Questions—Courts—Constitutional Law.

Where the amount required by special tax levy for the maintenance of a four-months term of public school is in dispute between the county board of education and the county commissioners, which, by proper action, is left to the determination of the judge holding the courts of the district, etc., the powers conferred on the judge is of a judicial nature to determine a disputed fact relevant to a pending issue between the two boards, to be levied and collected by the usual and ordinary administrative and executive officers of the county government, and such power does not render the statute unconstitutional.

7. Public Schools—Taxation—Special Tax—Constitutional Law.

The requirement of Article IX, sec. 3, of the Constitution, for a four-months term of public schools are imperative, and not restricted by section 5 as to the amount of tax levies for ordinary State and county purposes.

CIVIL action, heard in GRANVILLE County on 3 August,
(470) 1917, before *Connor, J.*, holding the courts of the Tenth Judicial District.

The action was one in the nature of *mandamus* to compel defendants to lay a special tax of 10 cents on the $100 valuation as necessary to maintain the public schools of said county for a period of four months, defendants contending that a tax of 5 cents levied by them was sufficient for the purpose.

There was judgment for defendants, and plaintiffs excepted and appealed.

(471) *B. S. Royster, Parham & Lassiter, and the Attorney-General for plaintiff.*

Hicks & Stem and D. G. Brummitt for defendant.

HOKE, J. The Board of Education of Granville County, having made their estimate of the amount of special tax required to maintain the public schools of Granville County for a period of four months at 10 cents on the $100 valuation of property, presented

same to the board of commissioners, pursuant to chapter 33, section 8, Laws 1913, and the latter board, being of opinion that 5 cents on the $100 valuation was sufficient, proposed to levy this amount, whereupon the plaintiff board, as required by the said act, instituted the present action to have the amount necessary fixed and determined by the Superior Court judge presiding in the district. The cause coming on to be heard, as stated, before Judge G. W. Connor, holding the courts of the district, his Honor made a full and careful finding of the facts appertaining to the question, and approved the act of defendant board fixing the tax levy at 5 cents. In arriving at this conclusion his Honor eliminated an item of $1,250 demanded for the maintenance of four high schools in said county, located at Creedmore, Stem, Knap of Reeds, and Stovall, being of opinion that these schools were no part of the public-school system, and also the sum of $1,250 estimated and claimed as an amount appertaining especially to the high school in the town of Oxford, the county-seat; the findings of his Honor in reference to the four high schools first mentioned, and his conclusions thereon, being stated in the judgment, as follows: "This estimate further includes the sum of $1,250 for appropriations for high schools at Creedmore, Stem, Knap of Reeds, and Stovall. These high schools are not part of the general and uniform system of public schools required by the Constitution to be maintained in each school district in the State for a period of four months in each year, but have been established and are maintained under the provisions of the school law as State high schools, supported by funds raised by appropriations by the State and county, and funds raised by special taxes levied in the districts in which they are located, and the said sum of $1,250 should not be included in the amount required to maintain the public schools for four months, as required by the Constitution."

From this order the plaintiff board has appealed, assigning for error, chiefly, that his Honor, in determining the sum required, disallowed the amount claimed for the four schools established pursuant to the high-school law (chapter 820, Public Laws 1907) and the subsequent statutes amendatory thereof.

Considering the record in reference to the exceptions noted, Article IX, of our Constitution, after declaring in section 1 that religion, morality, and knowledge are necessary to good government and the happiness of mankind, and that schools and (472) the means of education should be forever encouraged, in section 2 directs that the General Assembly shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State, between the ages of 6 and 21 years; in section 3, that each

county shall be divided into a convenient number of school districts, in which one or more public schools shall be maintained at least four months in every year, and if the commissioners of any county shall fail to comply with the aforesaid requirements of said section they shall be liable to indictment.

After making appropriation of certain specified funds to educational purposes, provision is made for the maintenance and management of the State University, and a State Board of Education is then created, composed of the Governor and chief executive officers of the State, of which the Governor shall be chairman and the Superintendent of Education shall be secretary, and has conferred upon it extensive powers to "legislate and make all needful rules and regulations in relation to the free schools and the educational funds of the State, subject to the supervision and control of the General Assembly, by act or resolutions duly passed."

In *Collie v. Commissioners,* 145 N.C. 170, we have held that these requirements of the Constitution as to our public-school system are imperative, and that the restrictions established by Article V as to the amount of tax levies for ordinary State and county purposes do not apply to taxation required to maintain these four-months public schools. We find nothing in this article of our Constitution, or elsewhere, which in terms restricts the public schools of the State to the elementary grades, or which establishes any fixed and universal standard as to form, equipment, or curriculum. On the contrary, in view of the prominent placing of the subject in our organic law, the large powers of regulation and control conferred upon our State board, extending at times even to legislation on the subject, the inclusive nature of the terms employed, "to all the children of the State, between the ages of 6 and 21 years of age," together with the steadfast adherence to this patriotic, beneficent purpose, throughout our entire history, it is manifest that these constitutional provisions were intended to establish a system of public education adequate to the needs of a great and progressive people, affording school facilities of recognized and ever-increasing merit to all the children of the State, and to the full extent that our means could afford and intelligent direction accomplish. Under such interpretation, the legislation of 1907 and subsequent amendatory acts, by which these four high schools and others of like kind are established and made a part of our public-school system, is fully justified, placed as
(473) they are under the regulation and control of the public-school authorities and extending to all portions of the State which may come under its provisions.

The general principle is fully recognized with us in *Greensboro v. Hodgin,* 106 N.C. 182, and is well supported by authoritative

cases in other jurisdictions. *Evers v. Hudson,* 36 Mont. 135; *Russel v. High School Board,* 97 Ill. 327; *Cook v. Board of Directors,* 266 Ill. 164; *Dickinson v. Dickinson* (Ark.), 178 S.W. 930; *Roach v. School Board of St. Louis,* 77 Mo. 484; *Koester v. Board of Commissioners,* 44 Kan. 141.

Nor is the position weakened or in any way affected by reason of the descriptive words of our Constitution, providing that our system of public schools shall be general and uniform. The term "uniform" here clearly does not relate to "schools," requiring that each and every school in the same or other districts throughout the State shall be of the same fixed grade, regardless of the age or attainments of the pupils, but the term has reference to and qualifies the word "system" and is sufficiently complied with where, by statute or authorized regulation of the public-school authorities, provision is made for establishment of schools of like kind throughout all sections of the State and available to all of the school population of the territories contributing to their support. *Ex parte Sohucke,* 148 Cal. 262; *Robinson, Treas., v. Schenck,* 102 Ind. 307; *Anderson v. Ritterbusch,* 22 Okl. 761; *S. v. Thompson,* 142 Ala. 98; *Koester v. Commissioners,* 44 Kan., *supra;* 4 Words and Phrases (2d Series), 1070.

In *Ex parte Sohucke, supra,* Van Dyke, J., delivering the opinion, said: "A law which applies alike to all the subjects upon which it acts, or, in other words, a law which applies equally to all persons or things within a legitimate class, to which alone it is addressed, does not violate the provision requiring laws of a general nature to have a uniform operation, and is neither local nor 'special.'"

Under the legislation we are considering, these high schools, as stated, may be established in any and all portions of the State, and when established, are under the governance and control of the public-school authorities, are available to any and all members of the school population qualified to enter, in any and every county where they may be placed, and are properly a component part of the uniform system of public schools contemplated and provided for by the Constitution.

In reference to the high school in the town of Oxford, on the record as now presented, this item or claim was properly disallowed. That, being in strictness a town or city high school, governed by local authority and accessible only to the school population of the specified district, is not a part of our public-school system, within the meaning of our Constitution, and is not entitled to have a special allowance made for it in the yearly estimate of the (474) county board of education.

True, the high-school law referred to provides that for towns or

cities of more than 1,200 inhabitants one such school may be approved by the county board of education, under contracts, to be again approved by the State Board of Education, and stipulating, among other things, that the school shall be available to students resident outside of the district, but no such contract is shown to exist, and no special item for its maintenance as a high school should be recognized.

Doubtless, in districts where these localized town and city high schools are placed, and when not a part of the public-school system, within the meaning of the law as we have interpreted it, the county board of education may apportion to the school authorities of such a district their *per capita* or *pro rata* share of the public-school fund according to the provision of the statute or authoritative regulation applicable, and these authorities may not improperly allow to the high school their proper portion on such estimate according to average and actual attendance, but no additional or special item can be claimed for them as a high school, because, as stated, they are not subject to public-school authority, and are only accessible to the school population within the district. The terms of the statute under which this case was constituted in making as it does the finding of the judge conclusive as to how much is required to maintain a four-months school, refers to his finding of fact strictly as such, and does not and was not intended to uphold a finding when based on erroneous legal principles and presented by exceptions duly noted. We are not inadvertent to the position earnestly urged for defendant that the act providing for a determination of the amount required for a four-months school by the Superior Court judge is unconstitutional, in that it attempts to confer legislative powers on the courts, but we do not think the statute is open to such objection. It only empowers the courts to ascertain and determine a disputed fact relevant to a pending issue between the two boards, and thereupon command that the tax be levied accordingly, both the finding of the fact and the judgment thereon being, in our opinion, judicial in their nature. *In re Applicants for License,* 143 N.C. 1 and 6. The tax, however, is authorized, as it should be, by legislative enactment, and is to be levied and collected by the usual and ordinary administrative and executive officers of the county government.

For the error indicated, there must be a new trial on the issue, and it is so ordered.

Error.

CLARK, C.J., concurring: When the Legislature autho-
(475) rized the establishment of four high schools in each county, it enacted a uniform system. At first, probably, but few coun-

ties could comply to the full extent. The enactment has been in force many years, and now all but four counties out of 100 have, each, prescribed four high schools. Certainly, the system cannot be overthrown and destroyed because one or more counties have not complied with the statute. That is not a defect or invalidity in the statute, but the fault of the counties which have not complied with the law.

As the counsel for the plaintiff well said, "The public high schools are the poor man's university." They afford an opportunity for education to those who have passed through the lower grades of the public schools, but who are without means to attend the State University or other institutions of higher learning. To strike them out would be to deny the benefit of a common-school education to most of the children after the age of 15 or 16 years, when they have ordinarily completed the common-school course, and would destroy a most important part of our common-school system.

It it were possible to hold the high schools of this State invalid because four counties have not yet complied with the requirement in regard to them, it would strike a paralyzing blow at the prosperity of the State, which depends upon nothing that the State can do so much as upon our public school system.

We know by the reports of the Superintendent of Public Schools, of which this Court takes judicial notice, that the State has already invested nearly $2,000,000 in high-school buildings and property, and that more than 10,000 students, among them numbers of the brightest youths of the State, of both sexes, to whom our people look forward with hope and pride, are annually attending these institutions. What would become of this great investment, and of the opportunities now afforded more than 10,000 intelligent, ambitious, hopeful youths, if the high schools should now be struck down? The suggestion that it be done should receive but one answer — the injunction given by the Senate at Rome on more than one memorable occasion, *"Ut respublica ne quid detrimenti caperet"* — "See to it that the republic shall receive no harm."

BROWN, J., concurring: While I concur in the opinion of the Court that the so-called high schools mentioned in the opinion are a part of the common-school system, and as such come within the purview of the *Collie* case, I by no means concede that the Legislature or the board of education can establish, in their discretion, any kind of expensive educational institution in a county, and, by calling it a part of the general educational system of the State, cause it to be supported by general taxation as the recognized com-

(476) mon schools of the State are maintained, nor do I understand the Court to so hold.

There is nothing in this record that leads me to the conclusion that these four schools are of such an unusual and expensive character that they may not be with propriety classified as among the common schools of the county of Granville.

As I understand this case, when it is heard again in the Superior Court the presiding judge will pass on the controversy between the plaintiffs and defendants.

In my opinion, the presumption should be in favor of the correctness of the estimates of the county commissioners, and that they took into consideration the maintenance for four months of all the common schools of the county, including the four schools mentioned. When those estimates are attacked, the burden of proof is necessarily on the plaintiffs who attack them.

Much weight should be attached to the judgment of the county commissioners, as they are the direct and immediate representatives elected by the people. They bear the approval of the people and are selected, presumably, because of their character and discretion. There are usually five of these representatives of the people, and they are generally selected from different sections of the county, and are, therefore, peculiarly well informed as to the county needs and interests. The commissioners constitute the local legislature, and it must be assumed that they will faithfully care for the interests of their constituents and will not needlessly cripple any county institutions. The County Board of Education is usually composed of only three persons and are generally not directly responsible to the people.

One of the reasons urged in recent Legislatures for requiring members of the Board of Education to be elected by the people is to make them more directly responsible to those who pay the taxes as well as cast the votes. The experience of a century has shown that those who expend the public money are rendered much more careful and economical when they are elected directly by the voters than when appointed to office.

In this case it appears that the increased valuation of property in Granville County has yielded over $1,500 additional school taxes, and for this reason it is urged the estimates of the commissioners are sufficiently high. Whether they took into consideration the expense of the four so-called high schools, the judge below will of course ascertain. It is presumed that they did.

We have had two controversies like this before this Court, and both were referred back to find the facts upon evidence. In both cases it was ascertained that the county commissioners had supplied

ample funds to support the schools of the county, and that the complaint of the boards of education were without real (477) foundation.

For these reasons, I think the courts should be extremely careful and guarded in interfering with the estimates and budgets which the representatives of the people have deemed sufficient for the support of schools or any other county expense.

Cited: *Bd. of Ed. v. Comrs.*, 182 N.C. 572; *Lacy v. Bank*, 183 N.C. 378; *Provision Co. v. Daves*, 190 N.C. 10; *Tate v. Bd. of Ed.*, 192 N.C. 521; *Owens v. Wake County*, 195 N.C. 137; *Elliott v. Bd. of Equilization*, 203 N.C. 755; *Fletcher v. Comrs. of Buncombe*, 218 N.C. 11; *Administrative Unit v. Comrs. of Columbus*, 251 N.C. 830.

FIRST NATIONAL BANK OF GRAHAM, VA., v. R. J. HALL.

(Filed 7 November, 1917.)

1. Partnership—Evidence of Partnership—Admissions of Partner.

Where, in an action upon a note given by a partnership, one of the defendants denies he was a member of the firm, his declarations to the contrary made to the witness are competent, as also the testimony of a partner to prove the personnel of the firm, that defendant was a member thereof.

2. Partnership—Evidence—Statement of Solvency.

Where a defendant denies he was a member of a partnership sued on a note, his letter given to the plaintiff bank making statement showing the solvency of the partnership is competent evidence.

3. Partnership—Evidence—Bills and Notes—Renewal—Payment—Intent.

Where defendant denies he was a member of a partnership at the time the firm's note was given, the subject of the action, it is competent, when relevant, to show that the note in controversy was a renewal note, for a renewal note is not a payment of the old note unless so intended by the parties at the time.

4. Partnership—Dissolution—Withdrawal of Partner—Evidence—Contradiction.

Where a partnership note is sued on, and one of the defendants denies that he was ever a partner of the firm, it is competent, in contradiction, to show that he had advertised the dissolution by his withdrawal from the partnership.

5. Same—Notice of Creditors—U. S. Mail—Presumptions.

Where defendant denies liability on a partnership note, the subject of

the action, by its having previously been dissolved, and that he had mailed personal notice of its dissolution to the plaintiff, with return card on the envelope, and the letter had not been returned, an instruction is correct, upon the evidence, that if the defendant properly addressed and mailed the notice, it established only a *prima facie* case of that fact.

CIVIL action, tried before *Kerr, J.*, at January Term, 1917, of ALAMANCE, upon these issues:

1. Was the defendant R. J. Hall a member of the partnership of Hart, Hall & Co. on 21 March, 1912, 7 May, 1912, and 6 June, 1912? Answer: Yes.

2. Was there a dissolution of the firm of Hart, Hall &
(478) Co. by the withdrawal of R. J. Hall therefrom previous to 20 February, 1913? Answer: No.

3. If so, did the plaintiff have notice of such dissolution previous to 20 February, 1913? Answer: No.

4. In what amount, if any, is the defendant indebted to the plaintiff? Answer: $1,860.07 and interest on $1,800 from 12 January, 1917.

From the judgment rendered, defendant appealed.

John H. Vernon, Manning & Kitchin for plaintiff.

E. S. W. Dameron, W. H. Carroll, Long & Long, and Parker & Long for defendant.

BROWN, J. The issues explain the controversy. Plaintiff sues to recover balance due on certain notes signed Hart, Hall & Co., by A. F. Hart, alleging that defendant Hall was a member of the partnership, and as such liable for the debt. The answer denied the partnership and consequent liability.

The defendant assigns fifteen errors, but we deem it necessary to notice only a few of them, as the matter in controversy is largely a question of fact and appears to have been settled by the jury in plaintiff's favor upon evidence fully justifying their verdict. Several exceptions are taken to the rulings of the court permitting the declarations of defendant tending to prove the partnership.

The plaintiff did not offer the *declarations* of one member of a partnership made to a witness for the purpose of proving that another person was also a partner in the same firm. Such testimony would have been incompetent. *Henry v. Willard*, 73 N.C. 35.

The testimony of Thompson was to the effect that the defendant told him that he and Hart were members of the firm of Hart, Hall & Co. and had the contract together. The testimony of Hart was that he was a member of the firm, and that the defendant was the other partner.

It is undoubtedly competent to prove the declarations on an alleged member of a partnership to prove that he is in fact one of the partners. It is also competent to prove by one of the partners the personality of the partnership and who composed it. *Swygert v. Bank,* 79 S.E. 759.

The defendant excepts to the evidence of Hart as follows: "I had a letter handed me by Mr. R. J. Hall, written by Mr. A. L. Davis, cashier of the First National Bank of Burlington, N. C., stating that the firm of Hart, Hall & Co. was safe to the amount of $75,000 to $80,000. I have not this letter in my possession and cannot find it. I showed it to J. E. Morton, cashier of the First National Bank of Graham, Va., but I do not know now where it is. I have searched for it in my papers and cannot find it."

It was competent to prove the act of defendant in procuring the letter of credit in the name of the partnership. It was (479) done to further the business of the firm and to enable Hart to borrow money in the prosecution of the partnership work. *Collins v. Smith,* 115 Mass. 388.

Several exceptions were taken to the testimony of the witness Hart that the original notes evidencing the money borrowed were not paid, but renewed, except that $280 was paid on the note of $1,000 and renewed for $720, and that the two notes of $1,500 and $300 were consolidated into one note of $1,800. This evidence was competent, for it is well settled that a renewal note is not payment of the original indebtedness unless so intended. 7 Cyc. 877; *Kidder v. McIlhenny,* 81 N.C. 123; *Hyman v. Deverux,* 63 N.C. 624; *Wilkes v. Miller,* 156 N.C. 428.

In *Terry v. Robbins,* 128 N.C. 142, the Court said: "A prior existing debt can be extinguished by the acceptance of a promissory note or bond, if it is so intended by the parties, the only question being as to proof of such intention. Generally, unless it is otherwise specially agreed, if the holder of a promissory note takes a new note for the original debt, that is *prima facie* a conditional payment only — that is, the original debt will be extinguished upon the payment of substituted note."

There is nothing in this record to take the case out of that general rule. There was evidence tending to prove that defendant caused to be inserted in a newspaper in Graham, Va., a notice signed by him and dated 8 November, 1913, to the effect that the "firm once known as Hart, Hall & Co. was dissolved 16 August, 1912, and that I have had no connection whatever with said copartnership since. This firm has had no authority or power to use my name since said date."

In his answer, the defendant denies that he was ever a member

of such firm, and avers that no such partnership ever existed. The publication of such notice is competent and very strong evidence tending to contradict the averments of the answer. It is a plain admission signed by defendant that such partnership existed at one time, and that he was a member of it.

The defendant testified that in August, 1912, he wrote to plaintiff, notifying it that he was not liable for the debts of Hart, Hall & Co.; that he mailed the letter in an envelope, with a return card on outside; that the letter was never returned to him. The cashier of plaintiff testified that no such letter was ever received by the plaintiff bank. Upon this evidence the court charges: "If you shall find from the evidence in the case that the defendant wrote a letter to the plaintiff, notifying it that he had severed all connection which he had heretofore had with the firm of Hart, Hall & Co., and addressed the same to the plaintiff and mailed it in Burlington,
(480) N. C., that this establishes *prima facie* the fact that said plaintiff received said letter in due course of the mails."

This charge states the law as settled by numerous decisions of this Court. *Trust Co. v. Bank,* 166 N.C. 112; *Mill Co. v. Webb,* 164 N.C. 87.

A careful review of the record discloses no error that justifies another trial.

No error.

Cited: Grace v. Strickland, 188 N.C. 372; *Bank v. Howard,* 188 N.C. 547; *Taylor v. Bank,* 190 N.C. 176; *Lancaster v. Stanfield,* 191 N.C. 346; *S. v. Caudle,* 208 N.C. 249.

JOSEPH W. MARSHALL v. R. L. HASTINGS ET AL.

(Filed 7 November, 1917.)

Roads and Highways—Road Commissioners—Condemnation—Damages—Individual Liability—Statute.

The action of the road commissioners in meeting as a board and adopting a route through plaintiff's land and appropriating it for a public road is a legal condemnation and appropriation of the land for a public use; and where the board has not exceeded the authority conferred by statute, no liability can attach either to the county or to its individual members, for the plaintiff's remedy is in accordance with the procedure provided by the statute, which affords adequate compensation for the damages sustained by him. Chapter 20, Public Laws of 1917.

MARSHALL *v.* HASTINGS.

CIVIL action, heard by *Stacy, J.*, upon report of referee and exceptions thereto by plaintiff, at May Term, 1917, of FORSYTH.

His Honor overruled the exceptions and sustained the judgment of the referee dismissing the action.

William T. Wilson and J. E. Alexander for plaintiff.

Benbow, Hall & Benbow and Hastings, Stephenson & Whicker for defendant.

BROWN, J. This action is brought to recover damages against the defendants individually and personally for injuries suffered by plaintiff by reason of the construction of a public road through his lands.

It appears from the report of the referee that the defendants were the legally elected and qualified Board of Road Commissioners for the county of Forsyth under chapter 20 of the Public Laws of North Carolina of 1907, and as such board were authorized and empowered by law to take the plaintiff's land and to construct the road through his farm. It further appears that the route through plaintiff's farm was adopted and the land appropriated for the public road at a regular meeting of the Board of Road Commissioners. That constituted a legal condemnation and appropriation of the land for a public purpose. *S. v. Jones*, 39 N.C. 614.

There is no finding or evidence whatever that defendants acted in excess of the authority conferred by the statute. The (481) statute creating the board and conferring upon it powers of eminent domain provides an adequate remedy for compensation for all injuries sustained by landowners whose property is taken and provides a method of procedure. It is plaintiff's fault that he has not pursued the remedy provided by the statute.

It is manifest that under well-settled principles of law defendants are not personally liable, and that this action was properly dismissed. *Fore v. Feimster*, 171 N.C. 551; *Hipp v. Farrell*, 173 N.C. 91, S.E. 831; *Templeton v. Beard*, 159 N.C. 63.

Affirmed.

CRUTCHFIELD HARDWARE COMPANY v. REID FOUNDRY AND MACHINE COMPANY.

(Filed 7 November, 1917.)

Vendor and Purchaser—Contract—Breach—Trials—Nonsuit—Evidence.

Where a contract for the sale of certain machines for the life of the contract provides that the vendor will ship such as he is able to supply, and will not be liable in damages for failure to fill any order, the purchaser must abide by the terms of the agreement; and where the vendor has shipped second-hand machines painted over, which the purchaser has refused, and has paid freight charges, which he has been repaid by the vendor, in the former's action to recover damages for the alleged breach of contract, the rejection of the second-hand machines by the purchaser was substantially the same as if the defendant had not filled the order, and the court's order of nonsuit was properly entered.

CIVIL action, tried before *W. F. Harding, J.*, and a jury, at July Term, 1917, of DAVIDSON.

Defendant contracted with plaintiff to sell and deliver to it all goods ordered, during the continuance of the contract, that they may be able to supply, but was not to be liable in damages for failure to fill any order. Plaintiff ordered forty-five Pivot-axle Cultivators, and they were shipped to it by defendant, but proved to be second-hand and repainted cultivators, and plaintiff refused to receive them, and notified defendant they would not have them unless the latter would deduct $10 from the price of each one of the cultivators, which defendant declined to do. This suit was then brought to recover $450 for loss of profits which plaintiff alleged it would have made on a resale of the cultivators during the season if defendant had complied with its part of the contract by properly filling
(482) the order. Plaintiff paid certain charges of the carrier, for freight, storage and drayage, for which he was paid by defendant. When this was done, defendant alleges in its answer that plaintiff threatened to attach the goods in order to secure payment of its damages for the breach of its contract. Defendant, before the expiration of the time limited in the contract, to-wit, 10 June, 1916, offered to ship new cultivators in place of the others, but this offer was refused by the plaintiff.

At the close of the testimony, the court ordered a judgment of nonsuit to be entered, and plaintiff appealed.

Walser & Walser for plaintiff.
L. A. Martin for defendant.

WALKER, J. We do not see upon what ground the plaintiff is entitled to recover damages after having expressly waived them by

a stipulation in the contract. It was undoubtedly lawful to do so, and the parties were at arm's length when they made their agreement, and, therefore, are bound by its terms. They must perform as they have contracted. 7 Am. & Eng. Enc. 118; *Dwight v. Ins. Co.*, 103 N.Y. 347.

What is said in *L. H. Engine Co. v. Paschall,* 151 N.C. 27, is so pertinent to the facts of this case that we content ourselves simply with this quotation therefrom: "There is a sweeping limitation of liability in these words, 'We assume no liability for damages on account of delay.' Again, 'It is agreed that no liability shall attach to us on account of damages or delays caused by such defective material.' And the instrument closes with a provision by which the performance of the contract by the engine company may be avoided entirely, for 'this contract is contingent upon strikes, accidents or other delays unavoidable or beyond our reasonable control.' Thus we have before us a contract which exempts the seller from any liability on account of any delay in executing it, also for defective material, and then provides that he may avoid the contract entirely on account of strikes, fires, etc. The instrument would appear to be one made almost entirely for the seller's protection, with but little regard for the buyer's interests. Yet we are constrained to hold that it is a valid contract, and that the only question is one of construction. We have not been cited to any precedent or other authority, and our own investigations have failed to discover a case in point; so we have to go upon the 'reason of the thing' and the plain letter of written instrument. It is common learning that any contract entered into voluntarily between competent parties is valid and generally will be enforced unless it contravenes some settled principle of public policy or is based upon an immoral consideration or entered into to accomplish an unlawful or immoral purpose.
The contract under consideration is tainted with nothing of (483) that sort, and the parties are undoubtedly competent to make it. The plaintiff seller is a private corporation, and so is the defendant purchaser. Neither is affected with a public use and thereby prohibited from entering into a contract which exempts it from liability arising from the negligence of its servants. As the contract is lawful and expressed with definiteness and certainty, the Court is not at liberty to alter it by construction or make a new agreement for the parties. Chitty on Cont. (11 Am. Ed.) 92."

The clause in that contract which was attacked is fully as sweeping in its terms as the one now being considered. The case of *Heagney v. Machine Co.,* 96 N.W. Rep., is to the same effect. When the defendant failed to ship the goods called for in the contract, and plaintiff rejected those which were shipped, it was substantially the

same as if the defendant had not filled the order at all. Plaintiff had the right to reject the goods as not in compliance with the contract, and the parties, by their conduct, evidently agreed that the transaction should be canceled and treated as if there had been "no filling of the order." Plaintiff was entitled to recover the amount it had advanced for the payment of freight and other charges specified, but this has been paid. *Machine Co. v. Tobacco Co.*, 144 N.C. 421.

We have not considered the question as to whether the only damages claimed by plaintiff are speculative or too remote. Defendant alleges that they are, and in support of this position cites *Machine Co. v. Tobacco Co.*, 141 N.C. 284; *Hardware Co. v. Buggy Co.*, 167 N.C. 423; *Griffin v. Culver*, 16 N.Y. 489; *Ashe v. DeRosset*, 50 N.C. 299.

In any reasonable view of the case, the judgment was correct. Affirmed.

ROBAH McKINNEY, BY HIS NEXT FRIEND, J. A. McKINNEY, v. F. F. PATTERSON AND JOHN L. PATTERSON.

(Filed 7 November, 1917.)

1. Judgments—Torts—Execution Against Person—Verdict.

Before execution against a tort feasor can issue it is necessary that the jury find affirmatively upon an issue as to whether the tortious act was done willfully — that is, voluntarily and of set purpose, or of free will, without yielding to reason.

2. Issues—Willful Torts—Waiver.

In an action upon tort where one of the defendant's counsel asks that an issue be submitted as to the defendant's willfulness in committing it, and another of his counsel states that they do not desire the issue, this being acquiesced in, and nothing further being said, such issue is not submitted, the right to have had it submitted is waived, and an objection may not be taken after argument and verdict.

3. Appeal and Error—Judgments—Nonsuit—Court's Discretion—Intimation.

In an action alleged and tried against a principal and agent in tort, the court submitted issues to the jury directed to the liability of each defendant, and gave instructions upon the evidence relating to each; but when the jury had retired to consider their verdict, he said he would not permit a verdict to stand against the alleged principal, whereupon the plaintiff, as stated in the case on appeal, took a voluntary nonsuit as to this defendant and appealed: *Held*, the intimation of the judge was that he would set aside the verdict within his discretion, as against the weight of the evidence, and not upon a question of law, which is not appealable;

and the nonsuit taken was premature, as the jury may have decided for appellant. The right of appeal upon intimation of the judge, followed by voluntary nonsuit, discussed by WALKER, J.

CIVIL action, tried before *Stacy, J.*, and a jury, at May Term, 1917, of FORSYTH. (484)

The plaintiff alleges that he was run over and seriously injured by an automobile driven by the defendant Francis F. Patterson and owned by his uncle and codefendant, John L. Patterson, and that his injuries were caused by the negligence of the defendant Francis F. Patterson in driving the automobile on Cherry Street, in the city of Winston, at an excessive and dangerous speed and in a reckless manner.

The court charged, in part, as follows: "The plaintiff has offered evidence, as I said a moment ago, tending to show that the defendant John L. Patterson knew that F. F. Patterson was using the car, or that he had reason to know that he had driven it on previous occasions, and that he had driven it on previous occasions for the defendant John L. Patterson, that is, in carrying out the business for which John L. Patterson had the car in Winston, then he did it with John L. Patterson's approval, and then he would be a *quasi* agent or a *quasi* servant for that purpose; and so plaintiff contends and argues to you that at the time in question the defendant Francis F. Patterson was the agent or servant of John L. Patterson and was driving the car of John L. Patterson, and that he was also driving it in furtherance of the purposes for which the car was left in Winston — that is, the plaintiff says it was left here for the use of the defendant John L. Patterson's wife and his mother, and for their family use, and that the defendant Francis F. Patterson was at that time practically a member of the family, and that he was using it for his pleasure and for the pleasure of the family. . . . The defendant John L. Patterson takes issue with the plaintiff on the question as to whether he is liable in this case, and has offered evidence tending to show that, notwithstanding the fact he was the owner of the car, he left it here for the use of his wife and his mother, and not for the use of Francis F. Patterson; that he does (485) know that Francis F. Patterson used the car probably on one or more occasions, but that the defendant F. F. Patterson had no permission or authority from him to use the car, and that at the time the injury occurred he was not using the car in the employment of the defendant John L. Patterson, nor was he about John L. Patterson's business or in the scope of any employment which John L. Patterson may have intended or given the defendant Francis F. Patterson. . . . If you find, gentlemen, as a fact from this

evidence that F. F. Patterson was at the time engaged in running the car to Mrs. Patterson's home, after he had been out driving some of his friends, and that his errand on that day was simply for his own pleasure, and not for the purpose or in the employment of which the defendant left his car in Winston-Salem, then the defendant John L. Patterson is not liable in this case, and it would be your duty to answer the second issue 'No.' . . . The plaintiff says, gentlemen, that you ought to be satisfied and find that F. F. Patterson was virtually a member of Mrs. M. F. Patterson's family; that the defendant John L. Patterson knew the fact, that he left the car here for their use, and that included the use of F. F. Patterson. . . . It is a question of fact, gentlemen, under this evidence for you. If you find as a fact, from this evidence, that F. F. Patterson was an agent or servant of John L. Patterson, and at the time of the injury was in the furtherance of John L. Patterson's business or in the scope of his employment, it would be your duty to answer the second issue 'Yes.' If you do not so find, gentlemen, it would be your duty to answer it 'No.' "

The jury returned the following verdict:

1. Was the plaintiff injured by the negligence of the defendant Francis F. Patterson, as alleged in the complaint? Answer: Yes.

2. Was the plaintiff injured by the negligence of the defendant John L. Patterson, as alleged in the complaint? Answer: No.

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

4. What damages, if any, is the plaintiff entitled to recover? Answer: $3,500.

Plaintiff moved, upon the verdict, for a personal execution against the defendant Francis F. Patterson if the execution against his property is returned unsatisfied. This the court refused, and plaintiff excepted. In this connection the following statement appears in the record:

"While the court was determining the issues, one of the counsel for the plaintiff asked the court to submit a specific issue as to whether the injury to the plaintiff was done willfully or not by the defendant F. F. Patterson. Whereupon the other counsel for (486) the plaintiff told the court that the plaintiff did not desire to have such an issue in which both counsel acquiesced; and thereupon the issues as suggested by the court and as appear in the record were submitted."

Judgment upon the verdict against Francis F. Patterson, and plaintiff appealed.

W. J. Swaim, Benbow, Hall & Benbow, and Fred M. Parrish for plaintiff.

Lindsay Patterson for defendant.

WALKER, J., after stating the case: The court properly denied the plaintiff's motion for an execution against the body of the defendant Francis F. Patterson. In order that such an execution may be issued, after the plaintiff has exhausted his remedy against the property of the defendant, a distinct and separate issue as to the essential fact upon which the right to the execution is based must be submitted to the jury, so as to have an affirmative finding as to the existence of the fact. We so held in *Ledford v. Emerson,* 143 N.C. 527. In that case, which involved the charge of fraud, not at all dissimilar in principle from our case, we said: "We adopt the view taken by the Court in *Davis v. Robinson,* 10 Calif. 411, where Judge Field (since a Justice of the United States Supreme Court) said: 'There is no doubt as to the correctness of the position that the execution must be warranted by the judgment. It rests upon and must follow the judgment; if it exceeds the judgment, it has no validity. To authorize, therefore, an arrest on execution, the fraud must be stated in the judgment, for the writ issues, in the language of the statute, in the 'enforcement' of the 'judgment.' Nor de we entertain any doubt that the question of fraud must be submitted to the jury, except so far as may be necessary to authorize the arrest pending the action. To justify execution against the person, which may be followed by imprisonment, an issue must be framed and be determined like issues of fact raised upon the pleadings. Fraud is an offense involving moral turpitude, and is followed by imprisonment not merely as a means of enforcing payment, but also as a punishment, and it would indeed be strange if on a mere question of indebtedness the right to a trial by jury should be sacred and inviolate, and yet such trial be denied upon a question involving a possible loss of character and liberty. We should hesitate long before we held that this latter question could be tried upon affidavits where the accuser is also a witness, where the affiants are not present and no cross-examination of witnesses is allowed. We are aware of decisions in other States holding a different view, but we do not find sufficient reasons advanced in them to induce us to deny what we cannot but regard as the clear right of the party (487) accused. . . . The arrest upon affidavit is only intended to secure the presence of the defendant until final judgment; and in order to detain and imprison his person afterwards, the fraud must be alleged in the complaint, be passed upon by the jury, and be stated in the judgment. . . . By requiring the charges to be

stated in the complaint the rights of the defendant will be fully guarded. He can then meet the charges and have a fair opportunity of defending himself by a trial before a jury."

Commenting upon that case, in which the opinion of the Court was written by a very able and learned judge, it was said by this Court: "There was no appropriate issue submitted in this case upon the alleged fraudulent conduct of the defendant, and we cannot hold that the general issue submitted embraced the matters relating to it. As soon as the money was paid by the purchaser of the options to the defendant, he immediately became indebted to the plaintiff for the amount of his share, and his subsequent conduct did not add one penny to that indebtedness, nor did it in law increase, in the slightest degree, the obligation to pay it. The debt has continued the same to this time, notwithstanding any of the alleged dishonest acts and practices of the defendant. So that when the jury found that he was indebted to the plaintiff 'by reason of the matters alleged in the complaint,' they referred, or at least must be presumed to have referred, of course, to those matters only which were necessary to constitute a cause of action for the recovery of the debt, and they were the transactions between the parties prior to the payment of the money to and the receipt of the money by the defendant for the plaintiff's use. This was fully sufficient to raise the implied promise to pay to the plaintiff his part of the proceeds, if there was not already an express one to do so. The allegations of fraud were therefore extrinsic to the cause of action, and it should not be supposed that the jury, under an issue so framed, passed upon the alleged fraud; and they not having made any special finding of fraud, a personal execution should not have issued upon the judgment," citing *Claflin v. Underwood,* 75 N.C. 485; *Preiss v. Cohen,* 117 N.C. 54; *Stewart v. Bryan,* 121 N.C. at p. 50.

It is true that this is not an action *ex contractu,* nor is there any allegation of fraud, and there could not well be; but the *Ledford* case furnishes a clear analogy to this one, and requires us to hold that where the gravamen of the charge is a willful wrong, which implies that the act done was voluntary and of set purpose, or where the mere will had free play, without yielding to reason, the matter thus alleged should be passed upon by the jury, as much so as if the tort complained of had been one of negligence or any other omission of duty not necessarily involving an intention to
(488) commit it. But the facts in this case are stronger for the defendant than were those in *Ledford v. Emerson, supra,* for the defendant there. It appears that the plaintiff not only failed to ask for an issue as to the willful wrong, but expressly waived it by agreeing, through his counsel, as stated in the record, that he did

not desire an issue "as to whether the injury to the plaintiff was done willfully" to be submitted to the jury; "and thereupon the issues, as suggested by the court, and as they appear in the record, were submitted." This was a clear waiver of the issue by the plaintiff, and it also throws light upon the first issue and its meaning, in connection with the words used therein, "as alleged in the complaint." A similar question arose in *Ledford v. Emerson, supra,* as will appear by reference to the passages quoted above from the opinion in that case. There we restricted the issue, which was actually submitted, to the debt, excluding the fraud; and here we confine it, as the judge confined it, by reason of the agreement of counsel, to the mere act of negligence stated in the complaint, which is sufficient to constitute a cause of action, excluding any willfulness on the part of the defendant, Francis F. Patterson. If we pursued that course in *Ledford v. Emerson,* there is every reason for doing so here, as plaintiff agreed that it should be done. The general rule is, that a party cannot object after the time for submitting issues has passed, and certainly not after verdict, that an issue, for which he made no request, was not submitted by the court. *Smith v. Newberry,* 140 N.C. 385; *Rich v. Morisey,* 149 N.C. 37. Our case is well within that principle, as there was not only no application for such an issue, but, on the contrary, a direct request that it be not submitted. There was no error, therefore, in refusing to issue the execution for which the plaintiff asked, upon a finding of negligence only. *Oakley v. Lasater,* 172 N.C. 96.

As to the liability of John L. Patterson, we doubt if the plaintiff is entitled to have the judgment reviewed upon any question affecting this defendant, for the court finds as a fact, and so states in the judgment, that plaintiff took a voluntary nonsuit as to him. However, we will inquire how the case stands in respect to the nonsuit. The judge, after the jury had returned from the court-room, stated that if there was a verdict against John L. Patterson he would set it aside; and the plaintiff thereupon took a nonsuit. The judge's remark, made when the jurors were not in the court-room, evidently meant that such a verdict would not violate any principle of law or instruction of the court, but would be against the weight of the evidence. The judge could not have intended anything else, because he had charged fully as to the law, and submitted the case to the jury. If he had thought that there was no evidence of any negligence on the part of this defendant, he could not have given the instructions contained in his charge, and, besides, he would have recalled the jury and directed a verdict, or himself ordered a (489) nonsuit as to John L. Patterson. It would be vain to leave a case to the jury if, as matter of law, the plaintiff was not entitled to

a verdict. This being so, the plaintiff could not take a nonsuit and review his decision, as the setting aside of a verdict for such a reason is not reviewable in this Court, whether a verdict should be set aside as being against the weight of the evidence being a matter which is controlled by the sound discretion of the trial judge.

The judge, as will be seen by reference to the facts stated above, charged fully upon the law, and especially did he instruct the jury that the issue as to the liability of John L. Patterson should be answered against the plaintiff, unless the jury found that Francis F. Patterson was the agent or authorized chauffeur of John L. Patterson at the time of the injury, and, as such, was acting within the scope of his employment, or was about his master's business. When the jury asked for further instructions, and the court repeated that Francis F. Patterson must at the time of the injury have been "about his master's business," the instruction was not decisive of the case against the plaintiff, so that he could take a nonsuit and review the ruling here, for the jury might have returned a verdict in his favor. His case would not have been hopeless under such a charge, for the judge did not cut all the ground from under him. We said, in *Hayes v. R. R.*, 140 N.C. 131: "In order to avoid appeals based upon trivial interlocutory decisions, the right thus to proceed (viz., to take a nonsuit and appeal) has been said to apply ordinarily only to cases where the ruling of the court strikes at the root of the case and precludes a recovery by the plaintiff. The plaintiff's right to take the course he did was challenged in this Court because the ruling did not cover the whole case, but left him ground upon which a recovery could be had." And in *Davis v. Ely*, 100 N.C. 286, Chief Justice Smith said, referring to the practice of thus taking a nonsuit in deference to an adverse ruling: "It has been repeatedly held that appeals, fragmentary in their character, could not be allowed when the subject-matter could be afterwards considered and any erroneous ruling corrected as well, without detriment to the appellant." And again, by the same judge, in *Tiddy v. Harris*, 101 N.C. 591: "The practice has long prevailed that when the proofs are all in and the judge intimates an opinion that under the old practice the plaintiff cannot recover, or, under the new, fails to establish the issues necessary to his having judgment, he may suffer a nonsuit, and by appeal have the correctness of the ruling reviewed," citing *Crawley v. Woodfin*, 78 N.C. 4, and *Gregory v. Forbes*, 94 N.C. 221. The same rule was applied in *Midgett v. Mfg. Co.*, 140 N.C. 361;

Merrick v. Bedford, 141 N.C. 504; *Hoss v. Palmer*, 150 N.C.
(490) 17, and more recently in *Teeter v. Mfg. Co.*, 151 N.C. 602;

Blount v. Blount, 158 N.C. 312; *Gilbert v. Shingle Co.*, 167 N.C. 286. We see that the rule is well established, and it is perhaps

a useful one in practice, but the adverse intimation should be of such a kind that it is fatal to the case of the party against whom it is made. It must be directed against the right to recover at all, leaving no chance, in law, for him to succeed before the jury. *Robinson v. Daughtry,* 171 N.C. 195, is in this respect similar to this case, as plaintiff's right to recover was not destroyed by the intimation of the judge, and Justice Allen suggested that an appeal did not lie. It is well to review the question, as we have done, so as to restrict the practice to its proper limits, and to clear up any doubt in regard to it. Here the plaintiff could have excepted to the instructions and reserved the point, after taking his chance with the jury upon the facts. His Honor thought he had such a chance to win, as he submitted the question to the jury.

The nonsuit was taken prematurely, and it is unnecessary for us to decide whether, if the plaintiff had gone on with the trial to a verdict, he could, in law, have recovered against John L. Patterson, under *Linville v. Nissen,* 162 N.C. 95, and the authorities cited therein.

We have carefully examined the record, and find no error in the rulings of the court in the respects indicated in this opinion.

No error.

Cited: Paul v. Auction Co., 181 N.C. 6; *Coble v. Medley,* 186 N.C. 481; *Bailey v. Barnes,* 188 N.C. 379; *Foster v. Hyman,* 197 N.C. 191; *Crowder v. Stiers,* 215 N.C. 125; *Blevins v. France,* 244 N.C. 341; *Fryar v. Gauldin,* 259 N.C. 394.

MAGGIE L. BROWN, ADMX. OF DENIE T. BROWN, AND INDIVIDUALLY, v. J. E. S. ADAMS.

(Filed 7 November, 1917.)

1. Evidence—Deceased Person—Transactions, etc.—Statute.

Evidence of an interested party that deceased had agreed to devise and bequeath all of his property upon consideration of being taken care of during his life, and that the other party to the agreement, in rendering these services, was thereunder obligated to do so, is prohibited by Revisal, sec. 1631, relating to transactions and communications with deceased persons. There were also transactions and communications between the witness and the deceased, which were prohibited by the same section.

2. Same—Interest—Conversations with Third Persons.

Where the plaintiff, in her own right and as administratrix of her

mother, seeks to recover upon an alleged contract made by her mother and another person, now deceased, under which her mother performed services to such other person under his agreement that he would devise and bequeath to her all of his property, it is incompetent for the plaintiff to testify to communications or transactions between her mother and such other person tending to establish her demand, for she is a party interested, within the contemplation of the statute (Revisal, 1631).

CLARK, C.J., dissenting.

CIVIL action, tried before *Harding, J.*, and a jury, at May (491) Term, 1917, of PITT.

Albion Dunn and M. K. Blount for plaintiff.
W. F. Evans and Harding & Pierce for defendant.

WALKER, J. This action was brought for the purpose of recovering the value of services performed in taking care of the defendant, J. E. S. Adams, in his old age and while he was feeble and infirm, upon the promise made by him at the time that he would leave to plaintiff's intestate, Denie T. Brown, and her children, plaintiff herself being one of them, all of his property, both real and personal, worth about $20,000.

Plaintiff sued as administratrix of her mother and in her own behalf, to recover whatever amount is due on account of the services rendered by them under the contract, and in order to establish her case she was permitted to testify, as a witness in her own behalf, to divers transactions and communications between her intestate and the defendant, since deceased.

When this case was argued before us we received the impression that the defendant had "first opened the door" in regard to the testimony of transactions and communications between the plaintiff's mother, Mrs. Denie T. Brown, and the original defendant, J. E. S. Adams. We find, upon further investigation, that such was not the case, but, on the contrary, that the plaintiff offered this testimony at the outset of the trial before the jury.

It will suffice to state, generally, that the testimony of the plaintiff herself related mostly to transactions and communications between her mother and intestate, Denie T. Brown, and the original defendant, J. E. S. Adams, who has since died. The defendant, Mary Adams, his sister, is his executor, and, as such, has been made a party to this action, in his place, as defendant. The plaintiff, a witness for herself individually and as administratrix, was permitted, under the examination of her counsel, to state very fully conversations and dealings between her mother and the defendants' testator

which, she alleged, occurred in her presence. That she is a deeply interested party and has a large interest in the result of this action, not the slightest doubt can be entertained. There was also testimony of the plaintiff, which was admitted over objection by defendant, and which related directly to a transaction or communication between the plaintiff herself and Mr. Adams. After giving a summary of the "actings and doings" of her mother and herself, on the one side, and Mr. Adams and his sister, Mary, in 1912, when the latter moved to Greenville for the purpose of taking up their residence, with them, where they were to receive the care and attention described by her, certain questions were propounded to her, which, with the answers thereto, are as follows: (492)

1. Question: "State whether you or your mother were under obligations to care for or attend to the wants and necessities of Mr. Adams." Answer: "Yes, sir; we were under obligations to take care and attend to him and help them, in sickness and in health."

2. Question: "State if you heard any conversation between Mr. Stanley Adams and your mother with reference to any consideration which he agreed to pay her in consequence of her waiting on and taking care of him." Answer: "Yes, he did say that he would make to her all his property."

3. Question: "Just state any conversation you may have heard between Mr. Adams and your mother relating to any compensation your mother was to receive." Answer: "He said he would give her the house and lot they now live in, and give her a deed of gift for it, to take place at his death; that pending the suit with Colin Tucker, he said it would not be any good to make anything then until that was settled, and then he would make a will to her, including that and everything else; that the conversation took place in our home." Witness further stated that they moved there then, and that his physical condition was bad, not being able to sit up; that Miss Mary's health was also bad.

4. Question: "Describe what attention and care, if any, your mother devoted to the comfort of Mr. Adams and Miss Mary." Answer: "She cooked for them, nursed them and sat up with them, read for them, and did everything that she could think of that would comfort him."

5. Question: "In consequence of that conversation, tell us what your mother did from 1912, when you say Mr. Adams and Miss Mary moved to Greenville." Answer: "In February, 1912, they moved in our home, on Church Street. Mama had attended to that. And they moved to our home and stayed there with us until some time in April, and during that time my mother cooked for

them, carried meals to them, and made extra nourishment for them; and it was necessary to rub him with liniment, and that was done. In April they moved from mama's house to an adjoining house, and we moved with them. After we moved with them mama cooked for them and did as I have said. Mr. Adams' condition was such as to require a physician several times."

6. Question: "From your knowledge of what your mother did, the attentions paid to the old people that you have testified about, what, in your opinion, would be a reasonable compensation for her services?" Answer: "Three thousand dollars. I did not know about Mr. Adams leaving a will when he died. My mother was not paid anything for the services rendered."

7. Question: "How long did the care and attention your (493) mother gave Mr. Adams and Miss Adams last?" Answer: "Up until the day she was taken sick, eight days before she died."

Other interested witnesses were allowed to be asked and to answer similar questions. These questions and answers were each duly objected to by the defendant, and the several objections were overruled. Defendant excepted, and from the verdict and judgment in favor of the plaintiff she appealed to this Court, and here insists that the evidence was incompetent, under Revisal, sec. 1631, and we agree with her that there was evidence which should have been excluded. Her counsel asked the witness and she was permitted to answer the first of the questions, which, for convenience, we have numbered. This answer clearly involved a personal transaction or communication between the plaintiff and Mr. Adams, who at the time of the trial was dead, the interests of those to whom his estate belongs under his will being defended by his executrix. This testimony should have been excluded, as its admission is expressly forbidden by the Revisal, sec. 1631, and this error, and the erroneous admission of other like testimony entitles the defendant to a new trial.

But if the other testimony of the plaintiff in regard to the transactions between her mother and Mr. Adams is to be considered, we are of opinion that it was likewise incompetent under the same section. The plaintiff relies upon *Ballard v. Ballard,* 75 N.C. 191; *Loftin v. Loftin,* 96 N.C. 99; *McCall v. Wilson,* 101 N.C. 600; *Bunn v. Todd,* 107 N.C. 266; *Johnson v. Cameron,* 136 N.C. 244. We will now consider these cases, and show that not one of them applies, but that each and all of them dealt with questions which are radically different. *Ballard v. Ballard, supra,* was one of the "proof of handwriting" cases, like *Peoples v. Maxwell,* 64 N.C. 313, which, as Justice Bynum stated, do not involve any personal transaction

or communication, but may be based on knowledge acquired in quite a different way. Referring to *Peoples v. Maxwell, supra,* in *Ballard v. Ballard, supra,* he said: "In *Peoples v. Maxwell, supra,* it was held that, although it was competent for the plaintiff to prove the handwriting of the intestate of the defendant, it was incompetent for him to prove that he saw the intestate actually sign a particular paper. The distinction is, that handwriting is proved by a general knowledge of it, and the proof is abstract and is applicable to one case as it is to another. But proof by him that he saw the deceased sign a particular paper is proof of a transaction between him and the deceased. In our case, Wooten, the assignee, it is true, was not called to prove directly the assignment to him by the intestate, but he was called to prove, and did prove, that he saw J. Gooding 'sign his name as a witness to the endorsement of the intestate, Council Gooding.' The signature of the intestate was a cross-mark, incapable of identification and proof without an attesting witness; whereupon the defendant Gooding was called in by (494) the parties as this witness to the ceremony of transferring the bond from the intestate of Wooten. And now, Wooten, a party to that 'transaction,' is called to prove, and, under objection, does prove, all the facts necessary to make effectual this transaction between him and the intestate, to-wit, that he saw the defendant sign his name as a witness. He thus indirectly but conclusively testifies to a transaction between himself and a person since deceased. The case falls directly within the principle established in *Peoples v. Maxwell,* above cited, and *Whiteside v. Green,* 64 N.C. 307; *Murphy v. Ray,* 73 N.C. 588; *McCandless v. Reynolds,* 74 N.C. 301. The witness, Wooten, having endorsed the bond to the plaintiff with a guaranty, the result of this action, of course, can affect his interest or the interest previously owned by him. C.C.P., sec. 343. We are not disposed to relax the common-law rules of evidence beyond the innovations clearly established by the recent Legislature." We have quoted Justice Bynum's language somewhat at length because it is very significant in this connection, and surely indicates with striking emphasis that an interested witness will not be allowed to testify *indirectly* to a transaction or communication with a deceased party which will affect his interest favorably in the event of the action, no more than he will be permitted to do so *directly,* provided his interest is adverse to that of such deceased party. Equally unfortunate to the plaintiff are the other citations. *Loftin v. Loftin, supra,* had nothing to do with a transaction or communication between the plaintiff, Mrs. Loftin, and the deceased party, to-wit, her father, but it was between her and a third party. Justice Davis said: "It was a substantive transaction, with no one now deceased, under

whom she, or any of the parties to this action, derived any interest. It was a transaction with William Gooding alone. Loftin was not present; and the case of *Hallyburton v. Harshaw,* 65 N.C. 88, and *Ballard v. Ballard,* 75 N.C. 190, relied on by counsel for the defendant, are distinguishable from this, in that in *Hallyburton v. Harshaw* the communication, though not between the witness and Harshaw, the deceased testator, yet it was between Harshaw and Pearson (both of whom were dead) about the matter in dispute, and the witness and Harshaw had, by agreement, gone to Pearson to advise with him about it; so, in fact, the witness was the party really interested in the conversation between Harshaw and Pearson; and though the conversation was carried on by Harshaw and Pearson, the witness was present and, in fact, a party to it, as it related to advice given by Pearson, upon which they were to act." That case also favors the defendant's position, for there it is virtually said that the presence of the witness when the transaction or communication is had between the deceased and another party is sufficient to disqualify him, especially when he has an interest in the
(495) event. It should be noted here that the plaintiff in this case, who testified, had a direct and important interest, besides being a party to the action, and that her mother was also interest, so that the heirs and distributees of Mr. Adams, who are represented by the defendant, his executor, have no one to testify in rebuttal of plaintiff's testimony. Said Chief Justice Pearson, in *McCanless v. Reynolds,* 74 N.C. 314: "Allowing a party to an action to give testimony in his own behalf is a wide departure from the rules of evidence at common law, and the proviso in section 343, which fixes a limit to this departure, should be construed liberally. The effect of it is to exclude one of the parties to a transaction who is afterwards a party to an action concerning the right or property involved in the transaction from the enabling clause of the statute, in the event of the death of the other party to the transaction. The proviso rests on the ground not merely that the dead man cannot have a fair showing, but upon the broader and more practical ground that the other party to the action has no chance, even by the oath of a relevant witness, to reply to the oath of the party to the action, if he be allowed to testify. The principle is, unless both parties to a transaction can be heard, on oath, a party to an action is not a competent witness in regard to the transaction." Could words be devised which more strongly condemn testimony of the kind here offered by the plaintiff, both upon principle and a sound construction of the statute? It shocks our ideas of fair play thus to place one of the parties at the mercy of the other by allowing one to speak in his own behalf, when he is under the power and influence of self-

interest, by silencing the other, so that he cannot reply. This is an unjust advantage, not contemplated by the statute.

But continuing our examination of plaintiff's authorities. *McCall v. Wilson, supra,* only held that the evidence did not relate to a transaction or communication between the witness and a deceased person, under which the defendant claimed, but only to what she saw in her husband's hands. He was the only party concerned, and had no transaction or communication with any one. The case did not come within the terms of the statute, nor within its letter or spirit. There were no dealings between a party deceased and another person which was witnessed by a third and interested person who was the witness, as in our case. We may add that we do not see how the testimony in the *McCall* case was material or harmful to defendants. Their contention was that the deed from John E. Moore to Joseph McCall was void as against the deed from Moore's administrator to assignors of defendants for want of registration. Justice Davis says that was the only ground relied upon in the case. *Bunn v. Todd, supra,* involves no such question as we have here. The plaintiff and her mother, the witness, were each entitled to half of the crop of plaintiff's father, the witness' husband, by separate and distinct rights. The witness claimed as his (496) widow, and the plaintiff under a trust created by her grandfather, and it was proposed to prove by the writing the admissions of the deceased as to the trust. This was clearly competent, for there was no transaction or communication in which the witness could be interested, and the witness therefore had no interest in the event of the action, and she was not a party thereto. That case is valuable for its fine analysis of the statute into proper subdivisions by the present Chief Justice, which relieves it of much obscurity. But its facts do not bear any resemblance to our case. The Chief Justice makes this appear when he pointedly says: "She is not (1) a party to the suit, nor (2) is she shown to be interested in the event of the action, nor (3) does any person belonging to the above two classes claim title under or through her. That she had a claim to the part of the crop of her husband, other than that, the proceeds of which the plaintiff claims the deceased held in trust for her, does not disqualify," citing *Mull v. Martin,* 85 N.C. 406. We do not see what application *Lane v. Rogers, supra,* can possibly have to this case. The Court held there that the testimony was incompetent, but did say that the witness could have testified that she saw the intestate have the book on the day of her marriage, as this was no transaction or communication. The point was not in the case, and we merely repeat what was said therein to show that there was nothing in the statute that applied to those facts. It was like knowing a man's

handwriting because the witness had often seen it. Besides, the witness had no interest in the result of the action, so far as appeared, and if she had, her evidence was against that interest, as she was testifying against the defendants, to whom she had conveyed her dower. So that case is not applicable. Here the witness testified to a transaction and communication between her mother and Mr. Adams, defendant's testator, while in that case the witness testified "abstractly" concerning a single individual fact which came within her vision.

The Court said in the *Ballard* case, *supra,* if the witness had said "I saw him sign the paper," or, in the *Lane* case, "I saw him pay for the deed and get it," it would be different and come within the statute as a transaction or communication. It will be found that all the cases cited by the plaintiff have this special feature of single action, and not joint action by the testator and another, and of a thing accomplished, and not one going on to completion. But more of this hereafter. Judge Reade, in *Hallyburton v. Dobson,* 65 N.C. 88, stated this question as a grave one, likely to arise in the future, and strongly intimated against the competency of the evidence under our statute.

The case of *Carroll v. Smith,* 163 N.C. 204, and *Zollicoffer v. Zollicoffer,* 168 N.C. 326, do not in the least conflict with our views.

In the first of these cases Justice Allen said: "The evidence (497) of the widow was objected to, under section 1631 of the Revisal, but she did not testify to a communication or transaction with the deceased *(Johnson v. Cameron,* 136 N.C. 243), nor was her evidence against the personal representative of the deceased or against any one claiming under the deceased. *Bunn v. Todd,* 107 N.C. 267. She simply told what she saw, and against one claiming under Henry Carroll, and not under Albert Carroll." In the second of the cases the alleged transaction or communication was substantially admitted in the pleadings, and the witness, as in several of the cases already cited by us, "told only what he saw," viz., an endorsement on the paper signed by Mrs. Thomas, which was placed by her in the Bible. When the cases upon this subject are properly classified, they are easily reconciled.

There are several decisions by this Court, of comparatively recent date, which decide this very question against the competency of such evidence as was admitted in this case. It was held in *Wilson v. Featherstone,* 122 N.C. 749, and the Court squarely decided this point as indicated by us. The question there was: "Defendant Clara was asked by her counsel, 'State whether or not you heard a conversation between your father and J. E. Rankin, at the Battery Park Bank, in July, 1893, in regard to his bank deposit, and what

disposition he had made of it.'" The question was excluded, and this Court affirmed the ruling unanimously, the Chief Justice saying: "One purpose of section 590 was to disqualify an interested party to testify to a conversation or transaction between the deceased and the witness, because there is no one to contradict the witness, and we think a true construction of that much-construed section excludes the evidence of a third party to such conversation, if the third party is interested in the result of the action, and there is no one to contradict the statement of the witness. Here Wilson is dead, Rankin is a party and incompetent, and the witness Clara is a defendant and claims the property through a gift of her deceased father. So she is interested, and there is no one else who can speak of the transaction or contradict the witness. In *Hallyburton v. Dobson,* 65 N.C. 88, this Court recognized the gravity of the question, but left it for 'future consideration.' In a later case the plaintiff's testator was a trustee of the slave in question for one Lloyd. In the course of the trial Lloyd was offered to prove a conversation between the plaintiff's testator (trustee for the witness) and the defendant's intestate. The court excluded Lloyd's evidence, as he was practically the plaintiff in the action. *Barlow v. Norfleet,* 72 N.C. 535." The same was the decision in *Witty v. Barham,* 147 N.C. 479, upon similar facts, and the identical question is precisely stated and tersely but unquestionably decided, the present Chief Justice writing the opinion: "The court also properly excluded the testimony of one of the defendants offered to prove that she heard the (498) aforesaid conversation between her mother and said Charles G. Daniel, as that would be the 'indirect testimony of an interested witness as to a transaction or communication with the deceased.' *Stocks v. Cannon,* 139 N.C. 60. Such witness would have been competent to testify to 'any substantive and independent fact' that is not 'a communication or personal transaction' with the deceased, as, in *Gray v. Cooper,* 65 N.C. 183, that the deceased had possession and use of the slaves, or *(March v. Verble,* 79 N.C. 19) that the deceased had owned but one bull since the war, and his value, and the numerous cases which hold that an interested witness can prove the handwriting of the deceased, but not that she saw him sign the paper sued on," citing *Davidson v. Bardin,* 139 N.C. at p. 2.

We could not state the point more clearly, or by language set at rest more definitely, securely and permanently any controversy as to the incompetency of this testimony. It has the great merit of being the final word, strongly and unanswerably expressed upon a matter where there had been almost, but not entire, uniformity of decision, and must be so considered. But it has since been approved and adopted, without any question, by a unanimous Court, as de-

cisive of the question, as closing the controversy, and as forever shutting the door against further discussion. To reopen it now would be regrettable and positively unwise, in view of the direct, consistent and final opinions of this Court so frequently expressed. We will show later that it is the just and correct decision and the proper and intended construction of the statute. We refer to *Harrell v. Hagan,* 150 N.C. 242, and *Grissom v. Grissom,* 170 N.C. 97 (opinion by Justice Brown), where *Witty v. Barkam, supra,* was expressly approved, without any further discussion, as the settled law upon this subject. In *Grissom v. Grissom, supra,* at p. 99, Justice Brown says, quoting from *Harrell v. Hagan, supra:* "Whether the construction by the Court of Revisal, sec. 1631, is the correct one, it is useless for us now to discuss. The true meaning of the statute and of the intent of the Legislature have been settled by this Court in well-considered opinions, which we are not disposed to disturb." He also cites *Wilson v. Featherstone, supra,* and *Witty v. Barham, supra,* as finally settling the law. All of these cases were decided with the concurrence of all the members of the Court. If there has been any contrary expression of opinion by us in the less recent past, it has been superseded in our later decisions with unanimous approval. *Johnson v. Cameron,* 136 N.C. 243, was correctly decided on other grounds, as I thought then, and therefore concurred in the result. My opinion is the same now.

(499) The decisions in other jurisdictions are equally emphatic in the rejection of such evidence, the statutes being the same as ours, relating to *personal* transactions or communications. Justice Brewer, afterwards a member of the highest Federal Court for many years, and an eminent jurist, as shown by his long judicial career and his valuable services, said, in *Wills v. Wood,* 28 Kan. at p. 408, discussing a question similar to ours: "Mrs. Forbes, as well as Mrs. Maples, was plaintiff, each claiming as heir of Willis Wills, and each seeking to recover from the administratrix and heirs of David E. James. Neither could testify under the statute as to any transaction or communication had personally with David E. James. Can it be possible that when the two are present with James and a conversation is carried on, that while neither could testify as to what James said to herself personally, she could testify as to what he said to the other? We think not. Such a ruling would be forbidden by the spirit, at least, of the statute. That statute plainly contemplates preventing one party from introducing in evidence conversations had with the ancestor of the adverse party, and this because the lips of such ancestor, closed by death, cannot be heard to give his version of the conversation; and where there are two persons on the one side, having like interests, they should, for the purpose of

giving force to the statute, be considered as one, and neither be permitted to give her version of the conversations and statements of the deceased to the other in her presence. Counsel for defendants, in their brief, well expose the injustice of the ruling asked by plaintiff when they said: 'For instance, James might have conversed with the mother for five minutes about the bond, in the presence and hearing of the daughter, and then turned around and conversed with the daughter upon the same subject, in the presence and hearing of the mother; and while neither would be allowed to testify as to the conversation had with herself, either could testify as to the conversation heard by her between James and the other.' The ruling of the District Court was correct." And so, in *Dawson v. Waggaman,* 23 Dist. of Col. Appeal Cases 428, it was said, at p. 434: "With reference to the second question — that is, whether the testimony of one of the defendants, Julia Dawson, was admissible to prove conversations between the deceased and the defendant, Charles E. Dawson — it is sufficient to say that chapter 1064 of the Code is too plain and explicit to allow of any controversy in this regard. The provision is a just one, and the testimony was properly excluded."

It was held in *Parks v. Caudle,* 58 Texas 216, that "A party to a suit against heirs claiming the property through their deceased ancestor is precluded under Article 2248, R.C., not only from testifying to statements made to him by the deceased, and to transactions between the deceased and himself, but also as to any such statements to or transactions between deceased and third per- (500) sons; and this although occurring at a time when the witness had no interest in such statements or transactions."

In *Comstock v. Comstock,* 76 Minn. 396, it was held: "A party to an action, or interested in the result thereof, cannot give evidence as to conversations with a deceased person, even though the witness took no part in the conversation."

In *Tison v. Goss,* 102 S.W. Rep. 751, at p. 752, it was proposed by the plaintiff, heir of the deceased wife, to give evidence of a conversation between the wife and her husband tending to show that the husband bought property in dispute with money received from a sale of his wife's separate property, and the evidence was excluded as incompetent under their statute as to transactions, etc., of a deceased. But *Matthews v. Hoagland,* 48 N.J. Eq. 455, is like our case exactly in its facts. There it was held: "A party to a suit is not a competent witness, under the act of 1880, to testify adversely to another party suing in a representative capacity as to a transaction of the deceased with a person other than the witness, in which the witness and such person are interested, although such interests are divisible." Other cases to the same effect are *Holland v. Holland,*

98 Appellate Div. (N.Y.) 366; *Pederson v. Christofferson,* 97 Minn. 491.

In *Erwin v. Erwin,* 54 Hun. (N.Y.) 166, it appeared that a father told his son, in the presence and hearing of the latter's wife, that he gave him a certain tract of land, and the son assented to the gift. The wife said nothing. In an action against the deceased father's grantee to enforce performance of the contract it was held the wife was an incompetent witness to prove the contract, being virtually a party to the transaction.

The testimony of an interested witness, especially one who will be as greatly benefitted by a recovery as the plaintiff in this case, concerning a transaction between the deceased and another interested party, would be practically the same as the latter's testimony as to the same transaction, with no opportunity to contradict it; and even if the person who had the transaction or communication were living, the representative of the deceased would be handicapped by the fact of her interest in the event of the action making her a hostile witness. The mere presence of the witness made her practically a party to the transaction or communication, and though passively so, yet with the same effect as if she had really and personally taken an active part in it. *Roberts v. Remy,* 56 Ohio St., at p. 255. A recovery in this case will inure almost directly to the plaintiff as next of kin to her mother.

We might cite many other cases to the same effect as
(501) those above named, but it is unnecessary to do so, as those already cited are quite sufficient to show the strong leaning of judicial opinion against the admissibility of this kind of testimony. All of the statutes on the subject in the States upon which we have drawn for authorities in support of this view of the law are substantially like ours, and some literally so.

We do not think that there is any force at all in the objection of plaintiff to the form of the exceptions, and assignments of error based upon them. They squarely raise the question we have discussed. It was not necessary to except to the answers separately, as they were directly responsive to the questions, to which the exceptions were properly taken.

There was error, we think, in the rulings of the court upon the objections to evidence, which entitle the defendant to a new trial of the issues.

New trial.

CLARK, C.J., dissenting: This action is brought by the plaintiff as executrix of her mother, Denie T. Brown, and by herself, individually, for services rendered decedent, J. E. S. Adams, who has

died since this action was begun, and his executrix, Mary Adams, is substituted as party defendant.

The evidence of the plaintiff was that J. E. S. Adams was an old man and in poor health, living with his sister (now his executrix), who was also old and in bad health; that said Adams made a bargain with the plaintiff's mother that if they would live with them and take care of him and his sister he would leave to Denie Brown his property at his death. There was evidence that he made such will, but that after the death of Denie Brown he tore up said will, and this action is brought to recover value of the services rendered under said contract by plaintiff and her mother.

The first seven exceptions are to the admission of the testimony of the plaintiff, Maggie Brown, who testified as to the conversation between her mother and J. E. S. Adams in making the contract. The defendant contends that this evidence is incompetent, under section 1631 of the Revisal, because the plaintiff is interested as a party to the action and is testifying against the estate of one now deceased. The conversation, however, was not between the plaintiff witness and the decedent (the testator of the defendant), and the evidence was therefore competent.

In *Ballard v. Ballard*, 75 N.C. 191, Bynum, J., says, in substance, that it is not by being a party to the action, or interested in the event, that one becomes disqualified; for, notwithstanding that fact, he is competent, except as to a transaction or communication *between such witness and the person deceased.* This section is analyzed in *Bunn v. Todd*, 107 N.C. 266, where it is held that (502) a person who is interested, or a party, is competent to testify against the estate of a person deceased, when the conversation or transaction is not between the witness and the deceased, but between the deceased and another party. The principle of the Code system is the general competency of testimony, though the witness is a party or interested in the event of the action, leaving its credibility to the jury, the only exception being where the witness is not only a party to the action or interested in its event, and is testifying in his own interest and against the interest of the person deceased, but, further, the testimony must be in regard to a transaction or communication between the witness and the person since deceased; otherwise, the testimony is competent. The provision being statutory, the court must observe it, and cannot exclude evidence except when authorized by its terms.

In *Johnson v. Cameron*, 136 N.C. 244, the exact point was discussed and decided, the Court saying: "The Code, sec. 590 (now Revisal 1631), disqualifies a party to an action, or one interested in

the event thereof, from testifying in his own interest against the person claiming adversely as to 'a personal transaction or communication *between the witness and the deceased person or lunatic,*' except when the executor of such opposing party or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction or communication. But here the witness testified as to no transaction or communication between herself and W. M. Cameron. It was a transaction between W. M. Cameron and her husband, and as to that she was a competent witness, notwithstanding her interest. *Dobbins v. Osborne,* 67 N.C. 259; *McCall v. Wilson,* 101 N.C. 600; *Loftin v. Loftin,* 96 N.C. 99, are in point, as, also, *Ballard v. Ballard,* 75 N.C. 191 (quoting Bynum, J., *ut supra),*" and citing, further, *Peoples v. Maxwell,* 64 N.C. 313, where such witness was held competent to prove the handwriting of the deceased, and *Bright v. Marcom,* 121 N.C. 86, where an interested witness was allowed to prove the delivery of a deed between the deceased and another. *Lane v. Rogers,* 113 N.C. 171.

In *Hallyburton v. Dobson,* 65 N.C. 88, relied upon by the defendant, the point was not decided. *Johnson v. Cameron, supra,* has been cited since with approval by Allen, J., in *Carroll v. Smith,* 163 N.C. 205, and by Walker, J., in *Zollicoffer v. Zollicoffer,* 168 N.C. 329, who cited, also, the other cases above quoted. In *Wilson v. Featherstone,* 122 N.C. 749 (prior to *Johnson v. Cameron),* Faircloth, C.J., seems to take a different view. But the statute is so plain that we cannot disregard it, and should hold that case an inadvertence, which we cannot approve.

(503) While there has been some conflict in the past in our decisions on this point, it has been settled in accordance with the decision in *Johnson v. Cameron,* 136 N.C. 243, by the last two opinions in this Court, which have cited it with approval.

In *Carroll v. Smith,* 163 N.C. 205, Allen, J., says: "The evidence of the widow was objected to, under section 1631 of the Revisal, but she did not testify to a communication of the transaction with the deceased. *Johnson v. Cameron,* 136 N.C. 243."

In *Zollicoffer v. Zollicoffer,* 168 N.C. 329, Walker, J., says: "As to the question of evidence, we think the court confined the testimony of plaintiff, D. B. Zollicoffer, to what occurred between Mrs. Thomas and the defendant, E. T. Zollicoffer, and in this view there could be no valid objection to it, as the witness was not speaking of any communication or transaction between him and Mrs. Thomas, *but of one between her and a third party. Johnson v. Cameron,* 136 N.C. 243; *Bunn v. Todd,* 107 N.C. 266; *Dobbins v. Osborne,* 67 N.C.

259; *McCall v. Wilson,* 101 N.C. 600; *Loftin v. Loftin,* 96 N.C. 99; *Ballard v. Ballard,* 75 N.C. 191."

Besides, *Johnson v. Cameron,* thus approved to date, is in conformity with the exact language of Revisal 1631 *(Bunn v. Todd,* 107 N.C. 266), and the statute should have precedence over any conflicting decisions.

Cited: Bissett v. Bailey, 176 N.C. 47; *In re Will of Saunders,* 177 N.C. 157; *Bank v. Wysong & Miles Co.,* 177 N.C. 293; *Harris v. Harris,* 178 N.C. 9; *Abernathy v. Skidmore,* 190 N.C. 70; *Dill-Cramer-Truitt v. Downs,* 201 N.C. 482; *Price v. Pyatt,* 203 N.C. 800; *Boyd v. Williams,* 207 N.C. 33; *Burton v. Styers,* 210 N.C. 233; *Wilder v. Medlin,* 215 N.C. 546; *Cartwright v. Coopersmith,* 222 N.C. 575; *Peek v. Shook,* 233 N.C. 262; *Harrison v. Winstead,* 251 N.C. 117.

C. R. LOVELACE v. J. A. GRAYBEAL.

(Filed 7 November, 1917.)

Slander — Embezzlement — Trials — Instructions — Appeal and Error — Harmless Error.

In an action for slander, alleging defendant had charged plaintiff with the crime of embezzlement, etc., defended upon the plea of justification, a charge to the jury that there must be a wrongful taking is erroneous, but the error is not prejudicial when it appears that the court further charged there was no evidence to support the charge of a wrongful taking, and correctly as to the only question in controversy, whether the plaintiff actually appropriated the money to his own use.

APPEAL by defendant from *Harding, J.,* at April Term, 1917, of ASHE.

This is an action to recover damages for slander, the plaintiff alleging that the defendant had charged him with the crime of perjury and with the crime of embezzlement.

The defendant pleaded justification.

The evidence tended to prove that the plaintiff was a rural mail carrier, and that the defendant was a surety on his (504) bond; that Mrs. Eller, who lived on the mail route, deposited 25 cents and four unstamped letters in the mail box; that the plaintiff took the letters and the money on one Tuesday; that he stamped

the letters, and on the following Sunday returned the difference of 17 cents to the husband of Mrs. Eller.

The only dispute as to the facts on the plea of justification is that the evidence of the defendant tended to prove that after the letters were stamped the plaintiff appropriated to his own use the 17 cents, and that he paid the amount to Mr. Eller after repeated demands upon him, while the evidence of the plaintiff tended to prove that after paying for the four stamps he left the 17 cents on a shelf in the postoffice and continued on his mail route, and that within a day or two he got the money and returned it at once.

His Honor, among other things, charged the jury as follows:

"Now, the defendant further contends that plaintiff has sworn that he did actually take the money; that he came along one morning and found four letters in the box, and 25 cents placed in there by Mrs. Eller, and that he took that money and the letters, with some other money and letters, and carried it along to Rugby and laid it on a shelf at the postoffice, and went on to Grant, Va., with his mail, and as he came back he bought stamps and placed them on the letters and put the rest of the change in his pocket, and never did account for it until he was called upon several times, and threats had been made that he had better bring the money back before he brought suit against Arthur Graybeal, and that he took it for his own use, and it was Tuesday when he took the money, and that he kept it until the following Sunday before he returned the money; then, after a message had been sent him by Mr. Eller, he took it and delivered it to Mr. Eller. Defendant contends that the evidence ought to satisfy you that he had taken the money and was guilty of embezzlement. Gentlemen, embezzlement is felonious taking and appropriating to one's own use money belonging to another, but there is no evidence that he did this; that after lawfully receiving it into his possession he unlawfully appropriated it to his own use — that is, deprived the owner of the use of it."

The defendant excepted.

The jury returned the following verdict:

1. Did the defendant speak of and concerning the plaintiff the words in substance alleged in the complaint? Answer: Yes.

2. Did he intend thereby to charge the plaintiff with perjury, or embezzlement? Answer: No, as to charge of perjury; Yes, as to the charge of embezzlement.

3. Were the allegations of the defendant concerning the (505) plaintiff true? Answer: No.

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

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

T. C. Bowie for plaintiff.
R. A. Doughton and Charles B. Spencer for defendant.

ALLEN, J. The charge of his Honor excepted to by the defendant is not an accurate statement of the law as he at first applied the definition of larceny, in which there must be a wrongful taking, to the crime of embezzlement, but this was not prejudicial to the defendant, because he immediately follows it with the instruction that there was no evidence to support the charge, and he then instructed the jury correctly as to the only question in controversy, and that is as to whether the plaintiff did actually appropriate the money to his own use.

It also appears from other parts of the charge that his Honor stated fully the contentions of the plaintiff and the defendant, and directed the minds of the jury to the fact really in controversy, as to whether the plaintiff had appropriated the money to his own use or not.

Upon a review of the whole record, we find no reversible error.

No error.

M. LANGHORNE HARDY v. PAUL V. HARDY AND WIFE.

(Filed 7 November, 1917.)

Wills—Devise—Precatory Words.

A devise of land under metes and bounds to a son, with balance of testator's lands to his four daughters, by name, to be equally divided among them, with provision that no one of the daughters shall sell her interest until she becomes 21 years of age, "then should she desire to sell, she shall give my son the preference," etc., with further item, that it was testator's last wish that the old home shall remain intact, and his son shall eventually own it by buying his sisters' interest: *Held, precatory* words are not construed as imperative unless the contrary intent appears in construing the will, and the intent of the testator was that the son and each of the daughters should own their land in fee, giving each of the daughters the right to sell her interest, independently of the other, upon becoming 21 years of age.

THIS is a controversy submitted without action, to try the title to two tracts of land, and to recover the purchase money therefor.

L. M. Hardy, who was the owner of the land, died, leav-
(506) ing a will, the material parts of which are as follows:

"2. I give, devise and bequeath unto M. Langhorne Hardy, my son, of lot No. 1 of the original P. M. Hardy land, a portion described as follows: (Description omitted.)

"3. I give, devise and bequeath unto Addie N., Rebecca M., Sallie G., and Mary L. Hardy, my four daughters, the remainder of my real estate, same to be equally divided among them, each one, share and share alike, in its division, with the following provision, namely: That no one of these four heirs shall make sale of her interest until the age of 21 years shall have been reached, and then, should she desire to sell, she shall give my son, M. Langhorne, the first chance, and in the event of his purchase he shall have the period of one year in which to make settlement for same, if he so desires.

"8. It is my last wish and desire that my old home shall remain intact as it now stands, and that my son, M. Langhorne Hardy, shall eventually own it by buying his sisters' interests, as set out above, by all of them coming to a mutual agreement."

Addie N., mentioned in item 3, intermarried with D. A. Freeman, and after the death of said L. M. Hardy the land devised in said item was duly divided between the four children, Addie N., Rebecca M., Sallie G., and Mary L. Hardy.

Thereafter, and after the said Addie N. became 21 years of age, she and her husband conveyed the land allotted to her to the plaintiff, M. Langhorne Hardy, the devisee in item 2, and the said M. Langhorne Hardy, the plaintiff, has contracted to sell the land devised in item 2, and the land conveyed to him by his sister, Addie N., being the old home, to the defendant, who has refused to accept a deed and pay the purchase money, upon the ground that the title of the plaintiff is defective.

Two of the daughters, devisees in item 3, are not 21 years of age.

His Honor held that the title of the plaintiff was good, and rendered judgment requiring the defendant to accept the deed of the plaintiff and pay the purchase money, and the defendant excepted and appealed.

Loftin, Dawson & Manning for plaintiff.
Y. T. Ormond for defendant.

ALLEN, J. Under the early English and American authorities, language is a will expressive of the wish or desire of the testator as to the disposition of his property was generally held to raise a trust, or to limit the estate devised, unless a contrary intent was manifest

from a consideration of the whole will; but the tendency of modern authority is to reverse this rule, and to hold that precatory words "are not to be regarded as imperative unless it is (507) plain from the context that the testator so intended them."

The question is fully discussed and the authorities cited by Connor, J., in *St. James Church v. Bagley,* 138 N.C. 34; Clark, C.J., in *Fellowes v. Durfey,* 163 N.C. 305, and by Hoke, J., in *Carter v. Strickland,* 165 N.C. 70.

Applying this principle, we are of opinion that item 8 of the will of L. M. Hardy does not establish a trust or limit the estates devised in items 2 and 3 of the will.

It does not purport to command, but merely to express a wish, and the testator points out the way in which he hopes his desired object may be attained, which is that M. Langhorne may buy the interest of his sisters by mutual agreement. This recognizes the right of the sisters to sell at their own price, and that the son cannot acquire title except by purchase, thus showing that the desire of the testator that his son should eventually own the home place could only be carried into effect by contract between the parties, with no limitation on the right to contract, and not under any condition imposed by the testator.

He leaves them free to contract on their own terms, but hopes that they may reach an agreement and that his son may buy the home place.

Eliminating, therefore, the eighth item, there is nothing to prevent the plaintiff from conveying a good title to the land in item 2, which is devised to him absolutely; nor do we think the provision in item 3 restricts the right to sell until all the daughters reach the age of 21 years.

There is force in the contention of the defendant that the restriction upon the right to sell is meaningless, unless it was intended that no part of the land should be sold until all the daughters became 21, as no one of them could make a sale until she reached that age, in the absence of the provision, but this cannot prevail against the plain language of the will.

In the first part of the item the land is devised to the four daughters absolutely, to be equally divided among them, and there is no condition annexed to the devise, and nothing in the whole item, requiring the division to be postponed until all became 21 years old. They then had the right to partition at once, and acting upon this construction the parties have had their shares set apart to them in severalty. If so, why should the testator say that a daughter who had reached 21 years, and whose share had been allotted to her,

could not sell her lot until another daughter, who owned another share and had no interest in the first, became 21?

Again, the language is, "no one of these," "her interest," (508) "then should *she* desire to sell," "she shall give," referring to each one as she reaches 21, and not to all the daughters.

Affirmed.

Cited: Laws v. Christmas, 178 N.C. 361; *Springs v. Springs,* 182 N.C. 487; *Greene v. Lyles,* 187 N.C. 424; *Brown v. Lewis,* 197 N.C. 707; *Dixon v. Hooker,* 199 N.C. 678; *Humphrey v. Faison,* 247 N.C. 134.

R. H. MONEY, ADMR. OF W. H. SALMON, DECEASED, v. TRAVELERS HOTEL COMPANY AND FORSYTH HOTEL COMPANY.

(Filed 7 November, 1917.)

1. Negligence—Breach of Duty—Evidence.

In order to recover damages arising from the alleged negligent act of another, the party injured must show a breach of duty owed to him by the other party.

2. Hotels—Licensees.

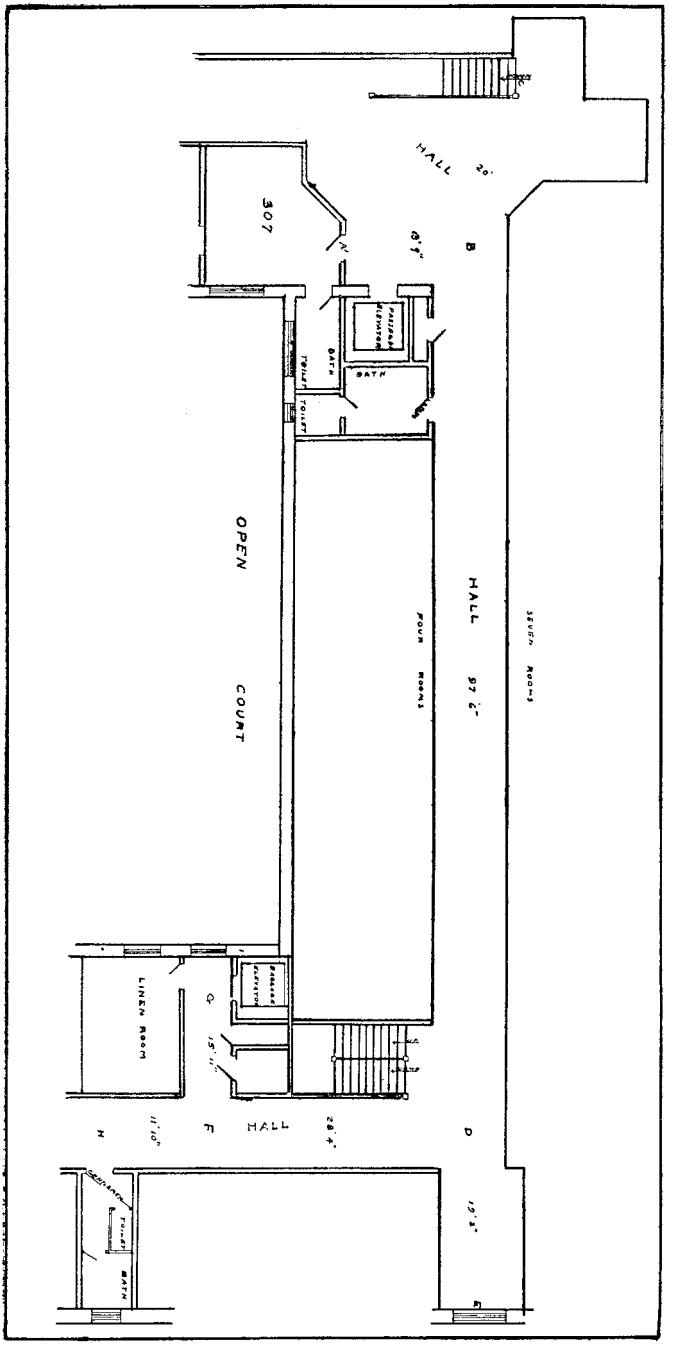
One who is in a hotel for social purposes, at the invitation of one of its guests, is a licensee, at the will of its management, and may be forbidden the premises for improper conduct.

3. Same—Guests—Negligence—Evidence—Personal Injury—Safe Premises—Trials—Nonsuit.

A hotel company is not liable to one, whether a licensee or a guest, for an injury received by him on the premises which was not caused by a hidden or concealed danger along or near the usual and customary route provided for entering and leaving the hotel, and without invitation, express or implied, to go where the injury occurred; and where such person has been in the room of a guest, indulging in conviviality of an intoxicating kind, and in leaving the hotel, passes the passenger elevator and stairway provided for the purpose, wanders around the hall and attempts to go down a baggage elevator at the back, on the part of the floor used exclusively for servants, where he could not reasonably have been anticipated to go, the fact that the door to this elevator was insecurely fastened and he fell through to his injury, does not afford evidence of actionable negligence of the hotel company.

APPEAL by plaintiff from *Harding, J.,* at the March Term, 1917, of FORSYTH.

(509)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D
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E
SERVANTS
TOILET
BATH

This is an action to recover damages for the wrongful death of the intestate of the plaintiff caused, as the plaintiff alleges, by the negligence of the defendant, a hotel company, in failing to have the door of its elevator securely fastened. The following is a diagram of the premises:

(510) S. B. Patterson was a guest of the hotel and occupied Room 307. On the day the intestate of the plaintiff was killed he met Patterson on the street about 10 or 11 o'clock in the morning, and upon his invitation went with him to his room in the hotel in company with one or two others, and there remained until lunch time, when the party took lunch with Patterson at the hotel. All of the members of the party were drinking while in the room. After lunch all of them went together to a circus, where they remained for some time, and they then returned to the room in the hotel for the purpose of getting another drink. After taking the drink they started back to the circus, but finding that the performance was concluded, Patterson and the intestate, Salmons, returned to Room 307, where they remained until the intestate left the room between 6 and 7 o'clock, and in the meantime they were drinking in the room.

At about 7 o'clock Salmons, the intestate, left the room and walked about ten feet to the main passageway. He then turned to the right and walked ninety-five feet. He again turned to the right and walked along another passage twenty-seven feet, and then again turned to the right and walked along the hall in which the freight elevator was located, and he then opened the door of the freight elevator, which was insecurely fastened, and fell down the shaft and was killed. The passenger elevator was within ten feet of the door of Room 307, on the right, going from the room, and the stairway for the use of guests and leading to the lobby was within twenty feet of the room and on the left. The hall on which the freight elevator was located and where the intestate of the plaintiff was killed was narrower than the other halls; there were no rooms for guests on this hall, and it was used solely for a linen room and a dressing room for employees and for the freight elevator.

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

A. E. Holton and Eller & Stockton for plaintiff.
David H. Blair and Manly, Hendren & Womble for defendants.

ALLEN, J. Actionable negligence consists in a breach of duty to the plaintiff. *McGee v. R. R.*, 147 N.C. 145. "In order to sustain an action, the plaintiff must state and prove facts sufficient to show

what the duty is, and that the defendant owes it to him." Shepherd, J., in *Emry v. Nav. Co.*, 111 N.C. 94. "It has been often pointed out that a person cannot be held liable for negligence unless he owed some duty to the plaintiff, and that duty was neglected." *Lane v. Cox*, 1 Q. B. D., L. R. (1897).

The plaintiff has offered evidence tending to prove negligent conduct on the part of the defendant, in that it permitted the (511) fastening of the freight elevator door to become and remain insecure, but he has failed to show that the defendant owed the deceased any duty at the time of his injury and death, except to abstain from willful injury, of which there is no evidence. The deceased, according to the evidence of the plaintiff, was on the premises of the defendant by the invitation of Patterson, a guest of the hotel, for social purposes, and as such he was under an implied license, revocable at the will of the proprietor of the hotel.

The question was fully considered in *S. v. Steele*, 106 N.C. 782, where the Court states as one of its conclusions from a review of the authorities that "When persons, unobjectionable on account of character or race, enter a hotel, not as guests, but intent on pleasure or profit to be derived from intercourse with its inmates, they are there not of right, but under an implied license that the landlord may revoke at any time."

"One who engages in the keeping of a public inn, by that fact surrenders certain rights which as the owner or occupier of a mere private dwelling he would have, and with qualifications which will be noticed hereafter, it may be said that an innkeeper gives a general license to all persons to enter his house. Consequently, it is not a trespass to enter an inn without a previous actual invitation. The innkeeper may, however, exclude those who by reason of their character, conduct or physical condition are obnoxious, and he may also remove, with force if necessary, those who are disorderly or for any reason objectionable to the patrons of his place. When persons enter a hotel or inn, not as guests, but intent on pleasure or profit to be derived from intercourse with its inmates, they are there, not of right, but under an implied license that the landlord may revoke at any time." 14 R.C.L. 537.

If this was the status of the deceased, a licensee, there is no liability on the defendant, as his death was not caused by a hidden or concealed danger along or near the usual and customary route provided for entering and leaving the hotel, and there is no evidence of an invitation, express or implied, to go where he was injured.

In *Sweeny v. R. R.*, 10 Allen 368, which is a leading authority, Bigelow, C.J., states the doctrine as follows: "A licensee who enters on premises by permission only, without any enticement, allure-

ment or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure."

This case is approved in *Quantz v. R. R.*, 137 N.C. 136, (512) and the above excerpt from the opinion is quoted in *Muse v. R. R.*, 149 N.C. 448, and in *Monroe v. R. R.*, 151 N.C. 376, Justice Manning adding in the last case immediately after the quotation, "This doctrine has been approved by this Court in the following cases: *Quantz v. R. R.*, 137 N.C. 136; *Peterson v. R. R.*, 143 N.C. 260; *McGhee v. R. R.*, 147 N.C 142; *Briscoe v. Lighting Co.*, 148 N.C. 396; *Bailey v. R. R.*, 149 N.C. 169; *Muse v. R. R.*, 149 N.C. 443. It has also been approved in the following decisions of other courts, and by the text-book writers; *Gillis v. R. R.*, 59 Pa. 129; 98 Am. Dec. 317; *Zoebish v. Tarbell*, 10 Allen 385; *R. R. v. DeBoard*, 91 Va. 700; *R. R. v. Bingham*, 29 Ohio State 364; *R. R. v. Griffin*, 100 Ind. 221; *Reardon v. Thompson*, 149 Mass. 267; *Redigan v. R. R.*, 14 L.R.A. (Mass.) 276; *Burbank v. R. R.*, 4 L.R.A. (La.) 720; *Benson v. Traction Co.*, 20 L.R.A. (Md.) 714; *Manning v. R. R.*, 21 L.R.A. (W. Va.) 271; 3 Elliott on Railroads, secs. 1250, 1251; Wharton on Neg., sec. 351; 7 Thompson on Neg., secs. 945, 946, 947, 949; Whitaker's Smith on Neg., pp. 60, 61, 62, 63, and note."

The principle is unquestionably sound as applied in the authorities cited, and is controlling in this case, but it requires some qualification as to persons on premises by permission, or under license, express or implied, whose presence could be reasonably anticipated at or near the point of danger, and this modification is recognized in the *Sweeney* case and those following it.

If, however, the deceased was entitled to the protection of a guest, there could be no recovery on this record, because he was injured in a part of the hotel reserved for employees, and to which there was no express or implied invitation.

The deceased was invited to room No. 307, which was within 10 feet of the passenger elevator and within 20 feet of a stairway leading to the lobby, which were the two ways provided for guests in entering and leaving the hotel. He left the room and walked about 10 feet to a main passageway, going by the passenger elevator on his right and the stairway on his left.

He then turned to the right and walked along the passage 95 feet, when he again turned to the right and walked along another passage 27 feet, and then again to the right 15 feet to the freight

elevator shaft, where he was injured. The passage on which the freight elevator was located was narrower than the others, and on it was a linen-room, a dressing-room for employees, and the elevator, which was not used for passengers.

There is no evidence that deceased was ever in the hotel before the day of his death, or that he knew there was a freight elevator, or a toilet on his left as he entered the passage where he was injured, and the uncontradicted evidence is that there was a (513) toilet in room 307, which was used frequently during the day by Patterson and his visitors, and that the deceased knew the location of the passenger elevator.

It is the duty of hotel proprietors to provide reasonably safe ways of ingress and egress for guests, and a slight departure from these ways will not prevent a recovery of damages, but they owe no duty to the guest to keep in safe condition parts of the premises reserved for employees and where the presence of the guest could not be reasonably anticipated.

In *Pierce v. Whitcomb,* 48 Vt. 131, the Court says: "No one has a right to provide a path for access to his house, shop, or store, and *invite* guests and patrons thereto, and provide or permit pitfalls in the way, to their injury. For in all such cases there is an implied guaranty that they may comply with such invitations with safety. But if one departs substantially from the provided way of access, or, becoming the guest or patron in a place of business, and, of his own motion, goes in the dark into places of danger, and is injured, he voluntarily takes the peril and risk upon himself."

In *Armstrong v. Medbury,* 67 Mich. 353, the Court approves the following instruction: "The plaintiff was bound to leave defendant's premises by the usual, ordinary and customary way in which the premises are and have been departed from, provided the same be safe and in good condition; and if, for his own convenience or other reason (than defect in the usual place of departure), he leaves such way, he becomes, at best, a licensee, and cannot recover for injuries from a defect outside of said way, unless it was substantially adjacent to such way, and in this case the defect was not so adjacent."

In *Etheridge v. Central Railway Co.,* 122 Ga. 855: "There was sufficient evidence to authorize the jury to find that the path had been so long used by the public as a passageway over the land that the owner must have known that it was so used and have impliedly consented to its use. Consequently, one using the path would not be a trespasser. But there was nothing in evidence to authorize a finding that there was any express or implied invitation to the plaintiff to use any other part of the premises than the path. Hence, when the plaintiff got out of the path he was a trespasser, and the

defendants owed him no duty except not to injure him wantonly or willfully."

In *Smith v. Trimble,* 111 Ky. 864: "We are of opinion, and so hold, that appellant, while engaged in that work, in using such parts of appellant's premises as were reasonably necessary to enable him to do his work, was on the premises under the assurance in law by appellee that such parts so necessarily used were reasonably safe for the purposes of such use; but beyond that, appellee owed appellant no duty greater than to a stranger or trespasser. And (514) when appellant, without invitation or knowledge of the owner, went into or upon other parts of the premises, not necessary for the performance of his labor, he assumed all the risks of doing so. He was neither required, expected, nor allured to be at the place where he was injured, and consequently appellee was under no duty to him to provide there a place of safety. In entering or leaving premises the visitor is bound to use the ordinary and customary place of egress and ingress, and if he adopts some other way he becomes a mere licensee, and cannot recover for defects outside or not substantially adjacent to the regular way."

In Shearman & Redfield on Law of Negligence, Vol. 3, sec. 704: "In entering or leaving premises, the visitor is bound to use the ordinary and customary place of ingress and egress, and if he adopts some other way he becomes a mere licensee, and cannot recover for defects outside or not substantially adjacent to the regular way."

We are also not without authority on the question in our own Court, this being the principle on which *Quantz v. R. R.,* 137 N.C. 138, was decided, in which a recovery was denied for injuries sustained in falling through an unprotected doorway because the plaintiff had left a passway, which he had the right to use, and had gone 12 feet to reach the door.

We are therefore of opinion there is no evidence of actionable negligence, and this makes it unnecessary to consider the question of contributory negligence.

Affirmed.

Cited: Jones v. Bland, 182 N.C. 73; *Brigman v. Construction Co.,* 192 N.C. 794; *Corp. Comm. v. Interracial Com.,* 198 N.C. 321; *Jones v. R. R.,* 199 N.C. 3; *Adams v. Enka Corp.,* 202 N.C. 770; *Williams v. Mfg. Co.,* 202 N.C. 859; *Clark v. Drug Co.,* 204 N.C. 630; *Ellis v. Refining Co.,* 214 N.C. 391; *Wilson v. Dowtin,* 215 N.C. 551; *Pafford v. Const. Co.,* 217 N.C. 736; *Mills v. Waters,* 235 N.C. 426; *Cupita v. Country Club,* 252 N.C. 350.

HUMPHREY BROTHERS ET AL. v. BUELL-CROCKER LUMBER COMPANY.

(Filed 7 November, 1917.)

1. Corporations—Mortgages—Receivers—Equity of Redemption—Liens—Priorities—Statutes.

Under a deed to lands to a corporation, with immediate mortgage to secure the purchase price, the title passing is only for the purpose of the mortgage, and the corporation acquires only the equity of redemption; and the result is the same when it acquires land already subject to mortgage; and where such mortgages have been promptly registered and the corporation became defunct, with claims against it for torts, for labor performed within the 60 days prior to the appointment of receiver (Revisal, secs. 1131, 1206), and also cost of receivership, etc. (Revisal, sec. 1226), and the lands have since been sold, with the proceeds in court subject to distribution in accordance with the priorities, the mortgagees are entitled to be paid in full; then the cost of receivership and then the statutory priorities for torts and labor will be distributed *pro rata*, etc.

2. Corporations—Mortgages—Liens—Statutes.

A mortgagee of the legal title of property of a corporation, to secure a debt, takes subject to laborers' liens, judgments for torts, and expenses of receivership, and other court proceedings to wind it up, in case of insolvency. Revisal, secs. 1131, 1206, 1207, 1226.

WALKER, J., concurring. BROWN, J., not sitting.

APPEAL by receivers of lumber company, Humphrey Brothers, and Sizer & Co., mortgagee, *et als.*, from *Bond, J.*, (515) at February Term, 1917, of NEW HANOVER.

This is an appeal from an order of Judge Bond distributing the funds in hand and adjudicating property mortgaged for purchase money to be not liable primarily for payment of tort claims and labor claims against the Buell-Crocker Lumber Company, nor liable for costs and expenses of receivership, nor for labor and tort claims incurred by receivers while operating the plant under an order of the Superior Court, until payment of purchase money.

The receivers and certain claimants appealed. The order was made upon exceptions to the report of the referee.

J. O. Carr for receivers.

Kenan & Wright for receivers' creditors.

Stevens & Beasley for Cape Fear Lumber Company.

Winston & Matthews for C. W. Mitchell and executors of W. P. Taylor et als.

E. K. Bryan for Murchison National Bank.

A. D. Ward, William F. Ward, and Robert T. Bryan for D. L. Farrior.

CLARK, C.J. On 6 January, 1910, Frank Buell purchased of the Cape Fear Lumber Company certain property, and to secure the purchase money executed simultaneously with the conveyance a mortgage on the same for $54,582, which was immediately registered.

Some time thereafter, Frank Buell conveyed his equity of redemption in said property to the Buell-Crocker Lumber Company, which went into possession of the property and remained in possession until the receivers were appointed, who sold the same, under order of the court, for $7,850, which sale was duly confirmed, and the receivers executed a deed to the purchaser. The said sum of money is now in the hands of the receiver. The court ordered the property sold, free from lien, and transferred the lien of the Cape Fear Lumber Company from the property to the fund now in court.

The Cape Fear Lumber Company was made a party, after the property had been sold by the receivers, upon a petition asking the court to turn over to it the fund derived from such sale, to be
(516) applied to the payment of its mortgage for the purchase price, on which there was due at the time of the sale $12,706.21, all of which was due, with no means of satisfaction, except the proceeds of the sale. Said Cape Fear Lumber Company was not made a party to this proceeding until after the receivers had ceased operating the mill and plant and had sold most of the corporate property, and after all the costs and expenses had been incurred, except the cost of a reference, which reference was had for the purpose of taking evidence and reporting to the court the facts found, to enable the court to adjust the equities of the various parties in interest.

The Buell-Crocker Lumber Company, when it purchased the equity of redemption from Frank Buell, agreed with him to pay the mortgage debt due by him to the Cape Fear Lumber Company, but said agreement was between him and the Buell-Crocker Lumber Company, and the Cape Fear Lumber Company was not a party thereto. There was no agreement whereby the Cape Fear Lumber Company agreed to accept the Buell-Crocker Lumber Company as the debtor in said mortgage, nor did it agree to release Frank Buell as the debtor. Said Buell-Crocker Lumber Company, however, paid the Cape Fear Lumber Company certain sums on account of said indebtedness, but paid it in partial exoneration of property in which it had bought the equity of redemption.

On 23 April, 1912, the Buell-Crocker Lumber Company bought from D. L. Farrior certain lands, and executed a mortgage thereon for the purchase money, $25,000 of which has never been paid and is more than the property will bring. In the same year the Buell-Crocker Lumber Company bought from the New Hanover Shingle Mills certain timber, and executed thereon a mortgage for the pur-

chase money, on which $26,150 is still due, and it is found by the judge, upon admissions, that it will not bring the balance due on said mortgage.

The Buell-Crocker Lumber Company also executed to the Murchison National Bank, for money used in its operations, a mortgage on lumber on its yard, and a second mortgage for $14,000 on part of the property set out in the mortgage for the purchase money executed by Frank Buell to the Cape Fear Lumber Company, this mortgage covering other property also. The property in the first-named mortgage brought $1,850. About the same time the Buell-Crocker Lumber Company executed a mortgage on two mill plants to Sizer & Co., for $10,000, for money borrowed.

The Buell-Crocker Lumber Company afterwards became insolvent, and in 1914 Humphrey Brothers brought suit, and it was placed in the hands of a receiver. At this time the company was indebted to various parties, including claimants, for $6,787.31, for labor done within 60 days prior to appointment of receivers, and also for some claimants in tort for $800, whose lands had been burned over by its negligence. The receivers proceeded to operate the (517) plant, and incurred a larger indebtedness, to the payment of which said 60-day labor claimants and the tort claimants and all the other appellants tried to subject the amounts received by the receivers from the sale of the property.

The court below adjudged that the receivers pay over to the Cape Fear Lumber Company, or their representatives, the $7,850, proceeds of the property on which it had a mortgage for the purchase price. To this judgment the receivers, the 60-day laborers, and their creditors, Sizer & Co., mortgagee, Humphrey Brothers, the Murchison National Bank, and the tort claimants each excepted and appealed.

After the institution of receivership the following indebtedness accrued: Claim in tort of Gibson James for burning over land, $53.75; receiver's pay-roll for labor, $3,446.32; receiver's other indebtedness, in the amount of $12,775.34.

The receivers, upon their appointment, gave bond, took charge of the property, published the notice required by chapter 173, Laws 1911, and operated the plant for about a year, without objection from any source, until the hearing of this cause before the referee, after all operations had ceased and all the indebtedness of the receivership had been incurred.

The questions presented are not as to the amount of these claims, but solely as to their order of priority. The claims fall into four classes:

1. Claims for labor performed within 60 days prior to the appointment of the receivers, who claim priority under Revisal 1131.

2. Claims in tort for damages by fire occurring prior to receivership, but the amount thereof determined by the referee, under Revisal 1206.

3. Debts incurred by the receivers in operating the plant, including claims for labor and torts and the costs of the action, including fees of receivers and their counsel (Revisal 1226).

4. Mortgages executed to secure money borrowed for the operation of the business, executed to Sizer & Co. and the Murchison National Bank.

The judge below held that none of these claims took priority over the mortgage indebtedness to the Cape Fear Lumber Company, or for the purchase money given to D. L. Farrior, the New Hanover Shingle Mills, and others, and ordered the proceeds from the sale of the property described in said mortgage to be applied to the respective mortgage debts.

The court adjudged that the receivers pay over to the Cape Fear Lumber Company the said $7,850, the proceeds of the property embraced in its mortgage, and that the New Hanover Shingle Company, Mitchell, Taylor, and Brown, and D. L. Farrior, vendors of property on which a mortgage for the purchase money was retained are entitled to the property covered by the respective mortgages, which amount to more than the property therein will
(518) bring, and that the same is not liable to be assessed for any sum whatever, either for costs and expenses in this case nor for labor or tort claims against the Buell-Crocker Lumber Company, or for any claims of any character against the receivers of the Buell-Crocker Lumber Company.

The court finds as a fact that the property in the hands of the receivers, and the fund in court after the application to the mortgages of the property (or its proceeds) embraced in said mortgages, is not sufficient to pay in full the court costs of this proceeding, eliminating the receiver's indebtedness, allowance to receivers or their counsel, and the tort and labor claims filed and allowed against the Buell-Crocker Lumber Company, and directed that the fund in court shall be held and nothing paid out until this Court on appeal shall pass upon the question presented.

The court found as a fact that neither of the three purchase-money mortgagees has anything to do with the disputes between the other parties, and that there is no reason to believe that any further assets of said corporation can be discovered, and that there is no dispute as to the amounts due the tort and labor creditors or creditors of the receivers, as found by the referee. The court re-

served the allowance of the receivers and attorneys to be fixed by the court hereafter. The judgment provided that, after complying with the above provisions thereof, the residue of the funds, if any, should be distributed as follows:

1. To the court costs proper, including the expenses of reference and costs incurred in carrying on said business under order of the court in this cause, *pro rata,* until paid in full, if the fund be sufficient.

2. After all the above provisions are complied with, if any fund remains, it shall be paid to labor claims for work done within 60 days prior to the appointment of receivers, and claims in tort existing when the receiver was appointed, *pro rata,* until paid in full, if funds be sufficient.

It is admitted that, after above requirements have been complied with, all funds will have been exhausted. The respective appellants contend:

1. The labor claimants and tort claimants assert that their claims accrued in 60 days before the receivership and are liens upon all the assets of the corporation prior to any of the mortgagees.

2. Sizer & Co. and the Murchison National Bank, whose mortgages were given to secure credit to operate the business prior to the receivership, properly concede that their mortgages are subject to the claims for labor, tort, and receivership indebtedness in classes 1 and 3, above set out, but they assert priority to the mortgages for the purchase money.

3. The receivers contend that, being authorized by the court to operate the mill and wind up the business, the indebtedness and expenses incurred by them should be paid in preference to all other indebtedness.

4. The receivers further contend that the tort and labor claims are prior liens upon the property described in the pur- (519) chase-money mortgages, as well as the property covered by the mortgages to Sizer & Co. and the Murchison National Bank, and that they are interested in the enforcement of such liens, because, if the purchase-money mortgages have priority there are not sufficient proceeds from the other property to defray the expenses and costs of the receivership.

The appellants have waived the assignments of error based on the lack of sufficient evidence to support the findings of fact, and the appeal therefore rests entirely upon the questions of law touching the priority of the several claims.

The judgment below must be affirmed in every respect.

In *Roberts v. Mfg. Co.,* 169 N.C. 27, it was held: "Property acquired by a private corporation subject to a valid registered mort-

gage does not become assets of the corporation except subject to the prior lien; and the lien given to laborers on the assets of an insolvent corporation for work done under the conditions stated in Revisal 1206, cannot affect the vested rights of the prior lienholders."

In *Walker v. Lumber Co.*, 170 N.C. 460, it is said: "Revisal 1131, which gives to judgments against corporations for labor performed and torts committed priority over prior mortgages executed by the corporation has no application," where the corporation acquired the property subject to such prior mortgage.

One who takes a mortgage upon corporation property for money loaned to operate it or to secure other debts, past or prospective, does so with the knowledge that, under Revisal 1131, 1206, 1207, and 1226, the lien of his mortgage is subject to be displaced in favor of laborers' liens or judgments for tort and the expenses of receivership or of other court proceedings to wind up the corporation in cases of insolvency.

But when the corporation has acquired the property subject to a valid registered mortgage, or at the time of the purchase thereof has executed a mortgage to secure the purchase money, which was immediately registered, the property is an asset of the corporation only to the extent of its equity of redemption. The corporation itself could not divest the lien of the mortgage subject to which it acquired the property, and its creditors, whether laborers or judgment creditors in tort, cannot subject the property of the mortgagees and divest their interests, to be applied to their own claims against the corporation. This would seem too plain for discussion.

The appellants rely upon *Coal Co. v. Electric Co.*, 118 N.C. 232. In that case there was a mortgage on part of the property to secure the purchase money, and another mortgage to secure money borrowed to operate the concern. We understand the decision as holding only that this latter mortgage is subject to the claims for (520) "material furnished." If it can be construed to divest the lien of the mortgage for the purchase money executed simultaneously with the purchase of the property, we cannot give it our approval. In the very next volume *(Baker v. Robbins,* 119 N.C. 289) the Court held: "Unless the statute otherwise provides, a mortgage lien is superior to a subsequent lien created by statute." This must apply only, as we have already said, to property owned by the corporation, *i. e.*, in this case, the equity of redemption, for no statute could divest the interest of the mortgagee in land which the mortgagor corporation has bought subject to such mortgage. This view is clear in all decisions since, down to *McAdams v. Trust Co.*, 167 N.C. 498, where the Court approved the following ruling in *U. S. v. R. R.*, 79 U.S. 362: "(1) A mortgage by railroad companies covering

all future-acquired property attaches only to such interest therein as the company acquires, subject to any liens under which it comes into the company's possession. (2) If the company purchase property subject to a lien for the purchase money, such lien is not displaced by the general mortgage. (3) If the company give a mortgage for the purchase money at the time of the purchase, such mortgage, whether registered or not, has precedence of the general mortgage." (We would not be understood as approving this last paragraph, under the registration laws in this State, when the mortgage is not registered.) "(4) This rule fails, however, when the property purchased is annexed to a subject already covered by the general mortgage and becomes a part thereof, as when iron rails are laid down and become a part of the railroad."

When the vendors convey property and simultaneously take back a mortgage to secure the balance of the purchase money, and such mortgage is at once recorded, there is not an instant of time in which the vendee has the legal title; and, therefore, in such case the wife of the vendee acquires no right to dower in priority to the mortgagee, nor does any right of homestead nor of a prior judgment attach. *Bunting v. Jones,* 78 N.C. 242; *Moring v. Dickerson,* 85 N.C. 466; *Hinton v. Hicks,* 156 N.C. 24.

Revisal 1226, provides: "Before distribution of the assets of an insolvent corporation," the court shall allow reasonable compensation to receiver and the costs and expenses of administration of his trust, and the cost of proceedings in said court *"to be first paid out of said assets."*

The first rule to be observed is, that the property to be subjected must be the property of the corporation, and when there is a mortgage given for the purchase money simultaneously with the purchase, and immediately recorded, the corporation owns only the equity of redemption, and the vested rights of such mortgagee cannot be divested to the payment of any liability, for any purpose, of the insolvent.

Under Revisal 1226, the first assets that are the property of the corporation must be applied to the costs of the pro- (521) ceedings in court, including the fees of the receiver and referee, and (except as to private corporations, *Roberts v. Mfg. Co.,* 169 N.C. 33; *Trust Co. v. Coal Co.,* 27 Col. 246) receivers' certificates issued in operation of the plant, under the orders of the court, and liabilities incurred for labor, and torts. *Lumber Co. v. Lumber Co.,* 150 N.C. 282.

Doubtless, if it were shown that the conveyance and the taking of a purchase mortgage back were a device to exempt the property

from liability for labor and torts, such mortgage would be held no bar to collection of such claims.

The next liability is to claimants for labor performed within 60 days prior to the appointment of the receiver, and for claimants in tort for which liability had accrued when the receiver was appointed. Revisal 1131 and 1203.

It being found as a fact by the judge, and not contested, that there were no assets that could accrue beyond this point, the court refrained from passing upon the priority among other creditors.

Affirmed.

BROWN, J., not sitting.

WALKER, J., concurring: It is well settled that an unregistered mortgage is of no avail as against creditors or purchasers for value, and the quotation in *McAdams v. Trust Co.*, 167 U.S. 498, from *U. S. v. R. R.*, 79 U.S. 362, so far as the third proposition therein decided is concerned, was not intended to ignore this well-settled rule or statutory requirement in this State. The proposition itself was not presented in the *McAdams* case, and it was not quoted with any intention whatever of approving it, but merely because it happened to be a part of the general matter decided by the other Court, passing then upon the terms of the statute of another jurisdiction, not, of course, applicable here, and to show how far some courts had gone, contrary to our statutes and decisions in regard to mortgages, in preserving vested rights. The opinion in the *McAdams* case throughout adverts prominently to the necessity of registration of a mortgage in this State in order to save rights thereunder as against creditors and purchasers. The *McAdams* case is in entire harmony with this case, when rightly considered, and, I believe, has been cited as direct authority to sustain what is herein decided. The point decided in the *McAdams* case assumed that the mortgage must be registered, of course, in order to vest any preferential right, as this language will show very clearly: "The work and labor was performed and the material furnished by the plaintiff, with full knowledge, in law at least, and also in fact, of the prior mortgage. He must be presumed to have been able to take care of his own in-
(522) terests and to have contracted for a lien with reference merely to the equity of redemption and in subordination to the older encumbrance, of which he had full notice, and his case must now be judged by these considerations. The mortgagor could not give him a better right or title than he himself possessed at the time. As the work was commenced after the defendant's mortgage *was registered,*

the lien of the plaintiff is subject to the prior lien of the mortgagee, and the court should have so declared."

Cited: Kelly v. McLamb, 182 N.C. 165; *Stevens v. Turlington,* 186 N.C. 196; *Chemical Co. v. Walston,* 187 N.C. 825; *S. v. Williams,* 231 N.C. 214.

FANNIE L. TURNER v. NORTH CAROLINA PUBLIC SERVICE CORPORATION.

(Filed 7 November, 1917.)

Municipal Corporations—Cities and Towns—Streets—Electric Railway—Freight—Additional Servitude—Damages.

The use of the streets of a city, under legislative authority and charter right given by the municipality, for the transportation of freight in electrically driven cars on street railroad tracks, from a steam-railroad depot to factories, etc., within the city limits, does not impose an additional burden upon the streets for which compensation may be allowed to the owners of lots abutting thereon.

APPEAL by defendants from *Long, J.,* at April Term, 1917, of GUILFORD.

W. P. Ragan, W. P. Bynum, and King & Kimball for plaintiff.
Robertson, Barnhardt & Smith, Peacock & Dalton, and Brooks, Sapp & Kelly for defendants.

CLARK, C.J. This case was before the Court, 170 N.C. 172. The plaintiff sought to enjoin the defendants from building a street railway, but the restraining order having been dissolved and the work having been completed prior to the hearing of the appeal, the court declined to pass upon the questions involved, further than to hold that the city authorities were authorized to grant, upon reasonable terms, franchises for public utilities; and as to the contention that the "construction of this track, or the running of freight cars upon it, is additional servitude, for which the plaintiff, the abutting owner, claims additional compensation," remitted the case, to have that question and the damages, if any, determined at the final hearing.

Upon the undisputed evidence in the case, the station of the defendant, Carolina & Yadkin Railroad Company, and its freight

yards, were located within the city limits of High Point, and
(523) the lines of the North Carolina Public Service Company, including the one complained of, are situated exclusively within the city limits; and the freight cars hauled along the streets were never more than two at a time, and they were carried exclusively between said freight yard and various factories within the limits of the city, said freight exclusively originating in or consigned to these factories within the city of High Point.

The plaintiff contends that this is an additional servitude, for which she, as an abutting owner, is entitled to compensation. If so, every other abutting owner along the lines of these tracks are entitled also to compensation.

The streets of a city are laid out for the accommodation of passengers and traffic between any two points in said city. It is well settled, therefore, that the laying out of a street car line is not an additional servitude, but comes within the very object for which the streets exist. Indeed, they very much lighten the servitude by carrying passengers and freight from point to point within the city by electric or horse power on their rails, which is much less an encumbrance and interference with the use of the streets by others than would be the former method of lines of busses for passengers and horses, wagons and drays for freight. It has therefore, always been held by us that a street car line is not an additional servitude, but a relief. This method of transportation of passengers and goods from point to point in the city is not only a lesser interference with the use of the streets than the former method, but it is more sanitary, and there is much less danger of those crossing the street being run down than by horses attached to drays and other vehicles, which otherwise would be required in great and increasing numbers.

A steam railway passing through a city is an additional burden, not only by reason of the additional danger of fire set out from sparks from the engine, but because it carries through passengers and freight, and is not limited, like this defendant, to moving from a point in the city where the freight and passengers have already arrived, the passengers and freight to another point in the city.

High Point is one of the most progressive and rapidly growing towns in the State. It is said that it is the second city in the Union in the quantity of furniture manufactured. To require the defendant public service company to pay for additional servitude to every abutting owner on the streets along which its lines are operated would make the continued existence and operation of the company impossible. In this case alone the jury has allowed $2,500 damages. If the company was required, in the face of such burdens, to cease business, it would be a great detriment to all dwellers in the city by

increasing vastly the number of drays, wagons, and other vehicles drawn by horses, and by the cost of breaking bulk, in unloading the cars at the railway station and placing the contents (524) in such drays and wagons. The cost of this alone would be a very heavy handicap against the manufacturers of the city, and a heavy ban upon the progress and prosperity of the city.

Before the invention of the electric motor system, in many cities, to save the great expense of breaking bulk at the railway station, horses were attached and the freight cars were drawn over wooden and, later, over iron rails, to and from the factories where they were loaded and unloaded. The use of electric motors for that purpose is speedier and more sanitary, and tends far less to block the streets.

In *Percy v. R. R.*, 113 Me. 106, the Court said: "The doctrine that the grant of power to construct and operate a street railroad along a highway imposes no additional servitude for which the abutting owner is entitled to additional compensation, is not denied by the plaintiff, but it is suggested in argument that the rule is, or ought to be, different when a street railroad company is authorized to transport freight in freight cars, especially in the freight cars of a steam railroad company. We do not think so. The reason given in the *Briggs* and *Taylor* cases why the changed methods of transportation of passengers do not result in an additional servitude apply with equal force to changed methods in transporting property. The right of public travel includes the right to transport property in drays and wagons. To transport it in cars is but another and more modern way of transporting it; so we think the right to haul freight in cars, if the right exists, imposes no additional servitude upon the land in a street over which the railroad runs, and affords no reason for saying that the legislative grant of the right is unconstitutional as impinging upon the constitutional provision which forbids the taking of private property for public use without just compensation."

To same purport, *White v. Granite Co.*, 178 Mass. 363, which says that "A highway is created for the use of the public, not only in view of its necessities and requirements as they then exist, but also in view of the constantly changing modes and conditions of travel and transportation, brought about by improved methods, and required by increase of population and the expansion in the volume of traffic due to the ever-increasing needs of society. . . . For these changing public uses the owner must be presumed to have received compensation when the highway was created." Here the case is more strongly against the plaintiff, for streets are laid out, when the town is built, for the easy movement of persons and goods from one part of the town to the other. An abutting owner is not entitled

to any compensation for laying out the street, which is an absolute necessity for his use of his own lot. It is a benefit, and not a burden.

In *Montgomery v. R. R.* (Cal.), 25 L.R.A. 655, the Court (525) held that "A railroad for transportation of passengers and freight on a street does not impose a new burden of servitude upon the owner of the soil," and adds that it cannot see "why the transportation of freight by modern and improved methods is not equally entitled to encouragement as the transportation of passengers." The Court further observed: "The Appian Way, commenced 312 B. C., which has provoked the admiration of the world, was entitled to commendation for its roadway, 16 feet, while the paths of 8 feet on each side of it for foot passengers, and upon which the Roman legions marched, were unpaved." The Court denied that the transportation of freight from one point to another within the city added an additional burden on the abutting owner. It cannot be, says the Court, that "An interminable string of heavy drays may thunder through the streets from early morning until set of sun, a menace to all who frequent the thoroughfare, and an inconvenience to all dwellers thereon, but that the cars of a railway, which move usually but a few times in a day, and with infinitely less annoyance to the public, upon tracks so adjusted to the service as to occasion little or no inconvenience, cannot be tolerated," adding that all methods for the transportation of passengers and freight made necessary by modern developments must have been contemplated when the street was opened, and even methods not yet discovered, and hence such user imposes no new burden upon the owner of the abutting land.

Lewis Em. Dom. (3d Ed.), sec. 166, says that the operation of express cars on the street railway tracks is a legitimate use of the streets, and adds: "When we direct our attention to a moving freight car taking the place of 20 drays, 20 pairs of horses and 20 drivers, the advantage of such use of a street seems obvious. It is presumably more economical. It saves wear and tear of the street, diminishes the accumulation of dirt and filth, relieves the congestion, and diminishes the noise and confusion. The movement of the freight car would no more interfere with abutting property than the movement of a passenger car. To the extent that the freight car is a substitute for traffic teams on the street, it tends to make the street quieter, cleaner, freer and more sanitary, and since the street exists as much for the movement of freight as for the movement of persons, there seems to be no reason why the street freight car should not be put upon the same basis as the street passenger car, in so far as it concerns the mere movement of the car on the tracks, and in so far as

it carries freight which would otherwise be carried in vehicles on the street."

In *Kipp v. Copper Co.*, 41 Mont. 509, the Court goes very fully into this matter, and holds: "The rights of the abutting owner bear exactly the same relation to the inconveniences which are incident to the tracks installed for the movement of passenger cars and the movement of cars thereon as they do to the incon- (526) veniences which arise from the conveyance of freight by the same means." And says that the freight cars do not obstruct access to the property of the abutting owner any more than the movement of passenger cars or the hauling of the same freight in drays and wagons. To the same purport, *Modehurst v. Traction Co.* (Ind.), 66 L.R.A. 105.

The city of High Point has obtained from the Legislature express authority to permit the defendant company to haul freight over its lines within the city limits, and by its ordinance has directly conferred this power upon the defendant, which is now exercising it.

In *S. v. Rice*, 158 N.C. 639, the Court says: "Even if this Court was of the opinion that the ordinance is not sound public policy and meant hardship, we could not declare it invalid. An appeal in such case must be to the law-making power."

The enterprising city of High Point has taken every step needful to establish competition and improve service in the handling of freight originating within its limits. The Southern Railway Company runs its double-track railway through the heart of the city and at one time enjoyed a monopoly of all incoming and outgoing freight. The city, acting through the vote of its citizens, has made possible the use of its streets in carrying freight and cars rather than in drays, thus avoiding the expense of breaking bulk and establishing effective competition; and by using in this way the station of a competing railway it has destroyed the freight monopoly heretofore existing. It has been well said: "The law of the public streets of a city is declared to be motion. Any use of the street, though a new one, which does not materially abridge or obstruct the right of passage and repassage, or ingress or egress, and to light and air, of the abutting owner, gives no cause of action."

In *Morris v. R. R.*, 10 N.J. Eq. 352, it is said: "The easement of the highway is in the public, although the fee is technically in the adjacent owner. It is the easement only which is appropriated, and no right or title of the owner is interfered with."

In our own Court, in *Hester v. Traction Co.*, 138 N.C. 291, it is said: "The authorities with singular uniformity concur that it is now well settled that the use of the streets in cities and villages for

a street railway is one of the ordinary purposes for which such streets and highways may be used, and does not impose an additional burden of servitude, so as to entitle the abutting property owner, as a matter of right, to compensation before such use can be made. This rule is generally recognized, irrespective of the question whether in the original laying out of the street a mere easement was taken, leaving the fee simple in the abutting property." Citation to this effect could be indefinitely prolonged.

Kirkpatrick v. Traction Co., 170 N.C. 477, is relied on by
(527) the plaintiff. That case held that a street railway is not an additional burden, but that an ordinary steam railroad in the streets of a town is such, and that where a railway, though operated by electricity, engages in hauling freight over its line in trains of several freight cars, baggage and mail cars, such as is used by a steam railroad, with incidental noises and inconveniences which would attend the operation of the steam railway, it would be an additional servitude. In that case the defendant's line of railroad, though operated by electricity, ran from Gastonia to Charlotte, carrying freight trains and passenger trains, between those two points and intermediate points. Such trains consisted of several cars and were used in the streets of the city, not for the purposes for which such streets were laid out, for moving freight and persons from one part of the city to another, but were used for the transportation of freight and passengers on a through line. This increased vastly the volume of business, and used the streets for a purpose not intended, and, of course, was an additional servitude. That case is no authority against the use of the streets of High Point, under an act of the Legislature and by authority of an ordinance, which facilitates the movement of freight from the railroad station in the town limits to the doors of the factories in the city, or from the factories to the railroad station, saving the expense of breaking bulk and minimizing the pressure upon the streets by eliminating the drays, trucks, wagons, and horses which otherwise would have been necessary. By economizing in the costs of manufacture, this aids the town to compete with other centers in the same line of business. The resulting economy in the pressure of traffic upon the use of the streets cannot be any additional servitude or burden upon the abutting owners along the streets.

When two or more common carriers unite in transporting an article as a through line, they are *quoad hoc* partners, and either can be sued for any loss or damage. *Mills v. R. R.,* 119 N.C. 693. But this does not apply to damages or burdens to right of way under rights of eminent domain, for each company is responsible for its own right of way only.

We need not discuss the other assignments of error, for we think that upon the evidence the court should have sustained the motion to nonsuit the plaintiff.

Reversed.

WALKER, J., not sitting.

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(528)

COMMISSIONERS OF ROBESON COUNTY ET AL. v. R. E. LEWIS, SHERIFF, ET ALS.

(Filed 14 November, 1917.)

1. Drainage Districts — Counties — Designated Depositories — Assessments—Public Funds—Statutes.

Laws 1909, chap. 442, by its provisions for the collection of assessments within an established drainage district by the same officer and by the same method as State and county taxes are collected, the same to be turned into the county treasury, giving right of action by *mandamus* to holders of the bonds issued by the district against the district, or its officers, including the tax collector and treasurer, to compel the levy of special assessments, upon default in payment of the principal and interest on the bonds, with liability on the bonds of the tax collector or treasurer upon default in the duty assigned to them, impress the moneys derived from the assessments, whether the organized district be regarded as a public, *quasi*-public, or private corporation, as public money of the county, to be kept in the depository designated under the statute for such funds, although the funds in question are devoted to a particular or defined use. The amendatory laws of 1911 (chapters 67 and 205) reinforces this construction.

2. Statutes — Repealing Statutes — Counties — Depositories—School Districts.

Chapter 645, Public-Local Laws 1911, and chapters 581 and 674, Public-Local Laws 1915, relating to the deposit of public funds of Robeson County, etc., are repealed by section 24, chapter 46, Public-Local Laws 1917.

3. Drainage Districts—Assessments—Depositories—Statutes—Counties — Treasurer.

Chapter 46, section 1, Public-Local Laws 1917, abolishes the office of County Treasurer of Robeson County and substitutes therefor, as designated by the county commissioners, one or more solvent banks or trust companies located in the county of Robeson as a depository and financial agent for that county, with provision (section 3) that such bank or trust company shall perform the duties of treasurer in disbursement of the county funds; section 4, that the sheriff, as such, or *ex officio* treasurer,

shall turn over all moneys of the county, from whatsoever source derived, whether belonging to the general county fund or otherwise, to the bank or trust company designated: *Held*, under these and the further pertinent provisions of the act, moneys derived from assessments of a drainage district, being county funds, should be deposited, as the statute directs, with the depository lawfully designated.

4. Same—Deposits—Contracts—Loans.

Where, under the provisions of statute, a drainage district may loan its money derived from its assessments until required for use in payment of the principal and interest on its bonds maturing serially for a period of 10 years, and the statute provides for a depository for these funds, the drainage commissioners may not contract with a different bank to deposit the funds there, in consideration of such bank buying at par a certain issue of such bonds that could not otherwise have been sold, except below par; nor could the transaction, contemplating a period of 10 years, be construed as such can to the bank as authorized by the statute, and the transaction is void, regarded either as a deposit of the funds or a loan thereof. Public-Local Laws 1917, chap. 447, sec. 7.

5. Constitutional Law—Statutes—Vested Rights.

A vested right cannot be acquired under a statute when its terms and conditions have not been complied with; and when a contract is void thereunder, a contention that a later statute impairs a vested right, under the void contract, is untenable.

6. Drainage Districts—Constitutional Law—Due Process.

The statute under which a drainage district is formed does not deny the district due process of law by providing for the collection and security of the assessments as other county taxes are collected and kept, etc.

APPEAL by defendant from *Bond, J.*, at September Term, (529) 1916, of ROBESON.

This is an action by the Board of Commissioners of Robeson County and the National Bank of Lumberton against R. E. Lewis, sheriff, the First National Bank of Lumberton, and the Board of Drainage Commissioners of Back Swamp, and Jacob Swamp Drainage District, to compel the defendant bank to turn over the money belonging to said drainage district to the plaintiff bank, the plaintiff claiming to be the legal depository thereof, under chapter 46, Public-Local Laws 1917, and the defendant bank claiming to be entitled to the custody and possession of said money under a contract with said board of drainage commissioners.

The plaintiff bank has been duly appointed the depository and financial agent of the county of Robeson, under said act of 1917, and is entitled to the custody and possession of the money directed by said act to be turned over and held by such depository.

The drainage district, which comprises about 35,000 acres of land, was created and organized under chapter 442, Public Laws

1909, as amended by chapters 67 and 205, Public Laws 1911; and, acting under the authority of said acts, it issued bonds of the district in 1912, of the par value of $150,000, bearing interest at 6 per cent, payable semiannually on the first days of February and August of each year, the principal of said bonds maturing in ten annual installments of $15,000 each, the first installment maturing 1 August, 1915.

In 1915, there being no money on hand to pay the first installment of said bonds, said commissioners, acting under legislative authority, issued $15,000 additional bonds, the proceeds to be used in paying off said first installment.

The commissioners duly advertised for bids for said last bonds, and were not able to obtain a bid higher than 85 cents on the dollar, and the defendant bank thereupon made the following offer to said commissioners:

HONORABLE BOARD OF COMMISSIONERS, BACK SWAMP AND JACOB SWAMP DRAINAGE DISTRICT, ROBESON COUNTY, NORTH CAROLINA. (530)

GENTLEMEN:—For $15,000 6 per cent drainage bonds to be issued by your district, dated 1 August, 1915, maturing 1 August, 1925, in denominations of $500, with principal and semiannual interest, payable at the National Park Bank, New York City, we agree to pay you for said bonds on 1 August, 1915, the sum of $15,000.

Prior to our taking up and paying for said bonds, you are to furnish us with a full certified transcript of all the proceedings had in their issuance, evidencing their legality to the satisfaction of our attorneys. You are to pass all necessary resolutions and orders for the issuance of the bonds that our attorneys may deem necessary.

This bid is made with the understanding that all funds to the credit of the district now in banks in Robeson County will be immediately *deposited* with us, and that all moneys arising from taxes and assessments collected in said district will be *deposited* in this bank from date of their collection until such time as they may be needed to pay outstanding bonds and interest as same shall become due; interest at 2 per cent on balances.

We agree to have printed the necessary lithographed blank bonds and to pay for the opinion of a reputable bond attorney as to the legality of this issue, for which you are to pay us $1 at the time the bonds are delivered. Yours very truly,

FIRST NATIONAL BANK OF LUMBERTON, N. C.

(CORPORATE SEAL) H. M. MCALLISTER, *Cashier.*

The commissioners adopted the following resolutions in acceptance of said bid:

RESOLUTION OF AWARD.

WHEREAS, the First National Bank of Lumberton, N. C., having made a proposition to this board to purchase $15,000 6 per cent refunding bonds of Back Swamp and Jacob Swamp Drainage District of Robeson County, N. C., dated 1 August, 1915, maturing 1 August, 1925, in denominations of $500, with principal and semi-annual interest, payable at the National Park Bank, New York City, and pay therefor par, and to pay 2 per cent interest on daily balances of funds *deposited* in said First National Bank of Lumberton, N. C., by the board of drainage commissioners, and to furnish blank bonds, duly lithographed, free of charge, to said board of drainage commissioners; and

WHEREAS, it is made a part of said proposition that the funds in the treasury of said district, and all other funds that may come into the hands of the treasurer of the Back Swamp and Jacob Swamp Drainage District, from this date up to and including 1 August, 1925, and until such a future time thereafter as all (531) the said bond issue is fully paid and discharged, shall be immediately *deposited* in the First National Bank of Lumberton, N. C.,; and

WHEREAS, this board is authorized by chapter 654 of the Public-Local Laws of the State of North Carolina, passed by the General Assembly, Session of 1915, to issue the amount of bonds above described, to be known as "Bonds of Back Swamp and Jacob Swamp Drainage District, Series 1915," and that this board did duly advertise the said bonds for sale, according to law, on the 5th day of May, 1915, and that no bids were received for all or any part of said bond issue, and it is now necessary for this board to sell the said bonds to protect the credit of this district and meet outstanding obligations falling due on 1 August, 1915: Now, therefore, be it

Resolved by the Board of Drainage Commissioners of Back Swamp and Jacob Swamp Drainage District of Robeson County, North Carolina, That the proposition this day made to this board by the First National Bank of Lumberton, N. C., be and the same is hereby accepted, and that the chairman and secretary of the board be, and they are hereby, authorized and directed to execute the said bonds and deliver the same to the First National Bank of Lumberton, N. C., without unnecessary delay.

And be it further Resolved, That the treasurer of this board is hereby instructed to withdraw all funds now to the credit of this board in any other bank of Robeson County, N. C., and *deposit* same in said First National Bank of Lumberton, said First National Bank of Lumberton to pay 2 per cent interest on daily bal-

ances, and to execute proper certificates of deposit as receipt for said funds.

The treasurer of this board is hereby further instructed to *deposit* all other funds that may come into his hands, as treasurer for this district, derived from taxes and assessments or otherwise, in the First National Bank of Lumberton, N. C., said further sums to bear 2 per cent interest from date of *deposit,* same to be calculated on daily balances.

The deposit of said money with the defendant bank, as set forth in said bid, and its acceptance, was a material inducement to the defendant to pay par value for said bonds.

The defendant bank, shortly after receiving said bonds, sent them by mail to Cleveland, and they were lost in transmission, but, being insured, the defendant bank received from the insurance company the full value of said bonds at par.

Prior to the commencement of this action, the plaintiffs made demand upon the defendant for said money, and at that time there was on deposit in the defendant bank, of the money belonging to said drainage district, $30,575.14, and at the trial there remained on hand, after crediting certain amounts paid out on vouchers, $10,441.81, which is made up of assessments collected and in (532) part of the proceeds of the sale of land in the drainage district for the nonpayment of assessments.

His Honor rendered judgment in favor of the plaintiffs, and the defendants excepted and appealed.

E. J. Britt for plaintiff, Board of Commissioners of Robeson County.

McLean, Varser & McLean for plaintiff, National Bank of Lumberton.

Johnson & Johnson and McIntyre, Lawrence & Proctor for defendants.

ALLEN, J. The right of the plaintiff bank to the possession and custody of the assessments and other money belonging to the defendant, drainage district, depends on the construction of chapter 46, Public-Local Laws 1917, under which the bank was appointed the depository of certain money described in the act, and upon the validity of the contract between the drainage commissioners and the defendant, with whom the money is now deposited, and a correct determination of the questions involved require a review of the pertinent parts of chapter 442, Public Laws 1909, as amended by chapters 67 and 205, Public Laws 1911, under which the drainage district was created and organized.

The act of 1909 first deals with the organization of the district, and then with the collection of the assessments and their security.

In section 32 it is provided: The assessments shall be collected "by the same officer and in the same manner as State and county taxes are collected"; and in the latter part of the same section, that any landowner may "pay the *county treasurer* the full amount of his assessment and have his land released therefrom."

In section 33: Every person who shall neglect to pay the full amount of his assessment "*to the county treasurer* within the time specified shall be deemed as consenting," etc.

In section 34: The assessments "shall be collected in the same manner, by the same officers as the State and county taxes are collected," and if any installment of principal or interest shall not be paid, the holder or holders of the bonds upon which default has been made have the right of action against the drainage district or the board of drainage commissioners, "wherein the court may issue a writ of *mandamus* against said drainage district, its officers, including the tax collector and treasurer, directing the levying of a tax or special assessment." "The official bonds of the tax collector and county treasurer shall be liable for the faithful performance of the duties herein assigned them. Such bonds may be increased by the board of county commissioners."

In the latter part of section 36: "Said costs and expenses shall be paid by the order of the court, out of the drainage fund provided for that purpose, and the board of drainage commissioners (533) shall issue warrants therefor when funds shall be in the hands of the *treasurer.*"

The act of 1911 not only does not interfere with these provisions, but it reinforces the idea, running through the act of 1909, that the assessments are to be collected and held as other public money.

It provides in section 11: "The board of drainage commissioners may issue bonds of the drainage district for an amount equal to the total cost of improvement, less such amount as shall have been paid in, in cash, to the *county treasurer.*"

If any installment shall not be paid, the holder of such bond upon which default has been made shall have a right of action against the drainage district "wherein the court may issue a writ of *mandamus* against the said drainage district, its officers, including the *tax collector and treasurer*"; and the right of action is hereby vested in the holder of such bonds "against any officer on his official bond for failure to perform any duty imposed by the provisions of this act." "The official bonds of the *tax collector* and *county treasurer* shall be liable for the faithful performance of the duties herein assigned

them. Such bonds may be increased by the board of county commissioners."

In section 12, in respect to collecting assessments: These assessments "shall be collected in the same manner and by the same officers as the State and county taxes are collected."

"In all other respects, except as to time of sale of lands, the existing law as to collection of State and county taxes shall have application to the collection of drainage assessments under this act."

"It shall be the duty of the *sheriff* or *tax collector* to pay over to the *county treasurer* promptly the money so collected by him upon said tax assessments, to the end that the said *treasurer* may have funds in hand to meet the payments of principal and interest due upon the outstanding bonds as they mature. It shall be the duty of the *county treasurer,* and without any previous order from the board of drainage commissioners, to provide and pay the installments of interest at the time and place as evidenced by the coupons attached to said bonds, and also to pay the annual installments of the principal due on said bonds at the time and place as evidenced by said bonds; and the said *county treasurer* shall be guilty of a misdemeanor and subject upon conviction to a fine and imprisonment in the discretion of the court if he shall willfully fail to make prompt payments of interest and principal upon said bonds, and shall likewise be liable in a civil action."

In section 13: "That the fee allowed the sheriff or other county tax collector for collecting the drainage tax . . . shall be 2 per cent of the amount collected, and the fee allowed the county treasurer for disbursing the revenue obtained from the sale of the drainage bonds shall be 1 per cent: *Provided,* that no fee shall be allowed the *sheriff* or *county treasurer* for collecting or re- (534) ceiving the revenue obtained from the said bonds, nor for *disbursing* the *revenue* raised for paying off the said bonds: *Provided, further,* that in those counties where the *sheriff* and *treasurer* are on a salary basis no fees shall be allowed for collecting or disbursing the funds of the drainage district."

In section 15: "If the funds in the hands of the *county treasurer* shall be greater than is necessary to pay the annual installments or the annual cost of maintenance of the drainage works, such surplus shall be held by the county treasurer for future disbursement for other purposes."

This summary of the two statutes, which we have largely taken from the brief of counsel, shows clearly that whatever may be the correct designation of the drainage district as a public, *quasi*-public, or private corporation, that the money belonging to the corporation

is treated and stamped by the law of its creation as public money, although devoted to a particular and defined use.

The assessments are to be collected by the sheriff, who collects the taxes; they are to be paid over by the sheriff to the county treasurer; they are protected by the bonds of these public officers, and these are the only means provided in the statutes for their collection, custody, and protection.

It therefore appears that when there was a county treasurer for Robeson County he was entitled to the money belonging to the district as public money.

How has this been changed by the abolition of the office of county treasurer?

We omit a discussion of the effect of chapter 645, Public-Local Laws 1911; chapters 581 and 674, Public-Local Laws 1915, as they are repealed by section 24, chapter 46, Public-Local Laws 1917, and proceed to consider the latter act of 1917.

By the first section it abolishes "the office of county treasurer in the county of Robeson," and by the second it substitutes, by appointment of the county commissioners, "one or more solvent banks or trust companies located in the county of Robeson as a depository and financial agent for said county."

If these two sections stood alone, it would follow by necessary implication that the depository designated by the county commissioners would be entitled, as successor to the treasurer, to the possession and custody of all the funds and money formerly in the hands of the county treasurer, as otherwise there would be no place provided for a part of the funds, and it cannot be supposed that the General Assembly would leave them without a custodian and without protection.

The statute does not, however, stop here. It provides, in
(535) section 3: "That the bank or trust company appointed as herein provided shall perform all the duties heretofore performed or required by law to be performed by the Treasurer of Robeson County and the Sheriff of Robeson County in respect to the disbursement of public funds coming into their hands by virtue of their office, as well as certain other duties specified in this act." And in section 4: "That all moneys coming into the hands of the Sheriff of Robeson County by virtue of his office as such sheriff, or by virtue of his office as *ex officio* Treasurer of Robeson County, whether belonging to the general fund, general road fund, any district or township road fund, general school fund, and special school-tax fund, county sinking fund, or otherwise, and any and all public moneys, from whatever source derived and coming into the hands of the Sheriff of Robeson County by virtue of his office as sheriff,

or by virtue of his office as *ex officio* Treasurer of Robeson County or custodian of any public funds of said county, shall be deposited by the sheriff in such bank as may be designated by the Board of Commissioners of Robeson County in accordance with the provisions of this act."

Note that the last section says, "*all moneys* coming into the hands of the Sheriff of Robeson County by virtue of his office," "whether belonging to the general county fund . . . *or otherwise,*" "and any and all public moneys, from whatever source derived," thus indicating care and caution and a purpose to include every fund possible; and as the money belonging to the drainage district is collected by the sheriff and goes into his hands by virtue of his office, and is dealt with in the statutes as public money, and as the enumeration of funds is followed by the inclusive term, "or otherwise," so that nothing might escape, we are of the opinion that this money comes within the letter and spirit of the act of 1917, and that the plaintiff bank is entitled to the custody and possession thereof, unless the contract between the drainage commissioners and the defendant bank defeats this right.

The drainage commissioners do not claim authority to make the contract with the defendant bank except under section 7 of chapter 447, Public-Local Laws 1915, which is as follows: "That as the *assessments heretofore* levied to provide for the payment of the bonded indebtedness of said drainage district are due and payable on the first Monday in September in each year, beginning with the year 1915; and as under the provisions of this act the proceeds from each assessment will not be needed to pay the next installment of the principal of said bonds until 1 August of the year following the year in which the respective assessments are due and payable, and therefore the proceeds of each assessment would otherwise remain in the treasury of said district until the first day of August of the year following the year in which the respective assessments are to be collected, and it is advisable that the said funds (536) should be on interest, therefore the board of drainage commissioners of said district be, and they are hereby, authorized and empowered to loan all amounts derived from the respective assessments until such time as said funds are needed to pay interest upon the bonded debt of said district or interest thereon, the said loans to be made to such bank or banks, or otherwise, and at such rate or rates of interest, and with such security for the prompt repayment thereof, as the said board of drainage commissioners may in their discretion determine: *Provided, however,* that no funds shall be so loaned out for a period longer that the date of the maturity of the next installment of the bonded debt of said district."

The authority conferred is "to loan," not to name a depository, and the commissioners can only lend "until such time as said funds are needed to pay interest," etc., nor can they make any loan "for a period longer than the date of the maturity of the next installment of the bonded debt of said district," and if the contract is not in accord with these requirements it is invalid, because in excess of the power of the commissioners.

When we turn to the contract it is manifest that at the time it was made neither the drainage commissioners nor the defendant bank had in contemplation a loan, and that, on the contrary, they were arranging for a depository for the funds.

The word "loan," or "lend," does not appear in the offer of the bank or in its acceptance by the drainage commissioners, while "deposited" is used twice in the offer and in the acceptance, and "deposit" three times in the acceptance.

The rate of interest to be paid by the defendant bank on deposits, 2 per cent, contradicts the idea of a loan, and particularly when the drainage commissioners, claimed to be the lender, were paying 6 per cent on their bonds.

The life of the contract, extending over a period of 10 years, is also fatal to the contract, whether considered as a loan or a deposit, as the power to lend is restricted by the statute and cannot extend beyond "the date of the maturity of the next installment of the bonded debt of said district."

We therefore conclude that the contract is not within the power conferred by the act, and is invalid, although entered into in good faith and with a desire to subserve the best interests of the district, which fully appears from the record.

If so, the objection of the defendants that the act of 1917 impairs the obligation of the contract is without merit, as there is no obligation to impair if the contract is void.

Nor can it be said to be a taking of the property of the drainage district without due process to provide, in the statutes, under which it exists, for the collection and security of the assessments.

The objection to charging interest at the rate of 6 per
(537) cent against the defendant bank from the date of the demand is not one requiring decision, as the judgment directs the drainage commissioners to repay to the bank "all interest paid under this judgment."

We are therefore of opinion the judgment must be affirmed, but this does not interfere with the right of the drainage commissioners to make loans from time to time under said act of 1915.

Affirmed.

Cited: *Comrs. v. Credle,* 182 N.C. 446; *Wilkinson v. Boomer,* 217 N.C. 220.

M. D. TAYLOR ET AL. v. H. CLAY TAYLOR ET AL.

(Filed 14 November, 1917.)

1. **Wills—Devises—"Children"—Estates for Life—Rules of Construction —Intent.**

   A devise of land to "children" does not include "grandchildren," and the principle ordinarily applicable to the construction of a devise to survivors after a life estate, that it is determined as of the death of the life tenant, and not the death of the testator, is but a rule of interpretation to ascertain the intent of the testator, and will not be permitted to defeat it when the intent otherwise appears by proper construction.

2. **Same — Existing Conditions — Early Vesting of Estates — Words Employed—Interpretation.**

   The condition of the testator and his family, and all the attendant circumstances, may be considered when relevant in the interpretation of his will to ascertain his intent, the law favoring an early vesting of estates; and when words are used with a certain significance in one part of the will they will be construed in other parts thereof to have the same significance, unless a contrary intent appears.

3. **Same—"My Living Children."**

   A testator who died leaving a wife and twelve children surviving devised certain of his lands to his wife for life, and "at the expiration of my wife's interest in land and property, divide it equally among my living children"; and by another item, "the balance of my estate to be divided equally among my living children." He was predeceased by a son, who had married contrary to his wishes, of which marriage there are living children: *Held,* the intent of the testator, by the use of the words, "my living children," was to designate his own children who should survive him.

APPEAL by petitioners from *Long, J.,* at June Term, 1917, of GUILFORD.

This is a proceeding to sell land for division.

John B. Taylor was the owner of said land, and he died, leaving a holographic will, which has been duly admitted to probate, and is as follows:

"I, John B. Taylor, of the county of Guilford and State of North Carolina, being at this time of sound and disposing (538) mind and memory, but always mindful of the uncertainty of life, and being disposed of making a just and equitable disposition

of my property, I have made this my last will and testament, in manner and form following:

"Item 1. I give and devise to my beloved wife, Mary J. Taylor, the tract of land on which I now live, for and during her widowhood, including two tracts bought of J. W. McMerry, together with all cattle and hogs, sheep, farming tools, household and kitchen furniture.

"Item 2. I give to my wife, Mary, the grain on the farm, with the horses and mules and wagons and harness, to have for her benefit.

"Item 3. I will that the balance of my estate be equally divided amongst my living children.

"Item 4. And at the expiration of my wife's interest on land and property, divide it equally among my living children.

"I hereby appoint my wife, Mary J. Taylor, my executrix to execute this my last will and testament.

"Whereof I have hereunto set my hand and seal, this the 17th day of July, 1885. JOHN B. TAYLOR."

The said John B. Taylor had thirteen children, one of whom died before said will was made, leaving children, and two of the surviving twelve died after the death of the said John B. Taylor and prior to the death of his wife, Mary J. Taylor, leaving children, and ten of them survived the said Mary J. Taylor.

The child who died prior to the making of the will married against the will of his father.

The ten surviving children are the petitioners, and the children of the two who died after the death of the testator are the defendants, they claiming as the heirs at law of the deceased children.

The said John B. Taylor left property other than that devised to his wife for life.

The petitioners contend that the words, "my living children," in the will mean children living at the death of the said Mary J. Taylor, and the defendants contend that these words mean children living at the death of the testator.

His Honor held with the defendants, and rendered judgment accordingly, and the plaintiffs excepted and appealed.

Clifford Frazier for plaintiffs.
Charles A. Hines and C. R. Wharton for defendants.

ALLEN, J. It is true, as contended by the petitioners, that a devise to children does not include grandchildren *(Lee v. Baird,* 132 N.C. 755), and that when the devise is to survivors after a (539) life estate, the time usually adopted for determining who

comes within the class is the death of the life tenant, and not the death of the testator *(Bradshaw v. Stansberry,* 164 N.C. 356), but these are not principles of substantive law, but rules of interpretation, which should be resorted to to ascertain the intention of the testator, and not to defeat it. *Crossley v. Leslie,* 14 Anno Cases 706.

It is also competent, in construing a will, "to consider the condition of the testator and his family and all the attendant circumstances" *(Ripley v. Armstrong,* 159 N.C. 158), and the law favors a construction which gives to the devisee a vested interest as early as possible, and not a contingent interest, "to the end that property may be kept in the channels of commerce." *Dunn v. Hines,* 164 N.C. 120.

The law, also, if possible, adopts the just, natural, and reasonable rule of an equal distribution among children (40 Cyc. 1411), and if words are used in one part of the will in a certain sense, the same meaning is to be given to them when repeated in other parts of the will, unless a contrary intent appears. "It is a well-settled rule of testamentary construction that if it is apparent that in one use of a word or phrase a particular significance is attached thereto by the testator, the same meaning will be presumed to be intended in all other instances of the use by him of the same word or phrase." *Raskrow v. Jewell,* Ann. Cases, 1914b, 64; *Gibson v. Gibson,* 49 N.C. 425; *Lockhart v. Lockhart,* 56 N.C. 205.

Applying these principles, we are of opinion that the term, "living children," includes all the children living at the death of the testator.

The testator had thirteen children, one of whom predeceased him, leaving children, and twelve of whom survived him.

There was some reason for excluding the one child and his descendants from participation in the estate, because he had married against the wishes of the testator, but the other twelve stood upon equal terms, and the testator declares his purpose to make "a just and equitable disposition" of his property. But he did intend, if all died before the death of the life tenant, that he should be intestate as to his whole estate, except as to the devise for life or widowhood, or, if all died except one, leaving children, that the sole survivor should take the whole estate.

To so hold would not only be inequitable in opposition to the declared purpose to make an equitable disposition of his property, but it would also run counter to the presumption against intestacy, and still this is a necessary conclusion if the position of the petitioner can be maintained.

The testator has, however, put the matter at rest by giving to

"living children" a definite meaning, and has, as some of the authorities express it, become a dictionary for himself. He devised *a part* of his property to his wife for life, and the balance to his living children.

Suppose there had been no life estate, and the devise had
(540) been of the whole estate to my "living children," clearly the children living at the death of the testator would take, and if so, the part of the estate not devised to the wife for life would pass to the same person.

We have, then, in item 3 a devise of that part of the estate not given to his wife for life to his twelve children who survived him as "my living children," and the same meaning must be given to the same language in item 4, as no contrary intent appears, because the testator has said what he means by "my living children."

The reference to the expiration of the wife's interest in the last item is simply intended to fix the time for the division of the land devised to her for life.

Affirmed.

Cited: Grantham v. Jinnette, 177 N.C. 240; *Carroll v. Herring,* 180 N.C. 372; *Edmondson v. Leigh,* 189 N.C. 202; *Massengill v. Abell,* 192 N.C. 241; *Jessup v. Nixon,* 193 N.C. 643; *Mountain Park Institute v. Lovill,* 198 N.C. 648; *Bell v. Thurston,* 214 N.C. 234; *Priddy & Co. v. Sanderford,* 221 N.C. 425; *Oldham v. Oldham,* 225 N.C. 478; *Trust Co. v. Green,* 239 N.C. 619; *Anders v. Anderson,* 246 N.C. 57.

H. S. RICHARDSON v. CITY OF GREENSBORO ET ALS.

(Filed 14 November, 1917.)

Municipal Corporations—Cities and Towns—Water-works—Flat and Meter Rates—Ordinances—Discrimination.

An ordinance of a municipality furnishing water to its residents upon a flat rate, according to the faucets in the house, payable quarterly in advance, and also upon the meter plan, whereby the consumer pays only for the water used, which provides that "water meters will be used whenever in the judgment of the board they should be attached," is reasonable and valid; and where the city, at its own expense, has changed a consumer, at his request, from a flat to a meter rate, its refusal to change him back to the flat rate is reasonable and not necessarily discriminative, because there are small consumers upon the flat-rate basis.

RICHARDSON *v.* GREENSBORO.

CONTROVERSY without action, submitted at August Term, 1917, Superior Court of GUILFORD, *Harding, J.*, presiding.

From a judgment in favor of plaintiff, defendants appealed.

A. S. Wyllie for plaintiff.
Charles A. Hines for defendants.

BROWN, J. The purpose of this proceeding is to compel the defendants to furnish plaintiff water and sewerage service on what is known as the flat rate. From the facts agreed, it appears that the defendant city is the owner of, and operates, a municipal water and sewerage system. No separate charge is made for sewerage, as that is a part of the water service system. The rates for water service are computed according to one or the other of two methods — one called the flat and the other the meter rate.

By the flat rate a consumer's water rent is computed solely according to the number, nature and character of the faucets or openings in or about his premises, and is a fixed sum, payable quarterly in advance. On the meter rate, a consumers' water (541) rent is based solely on the actual amount of water used, at so much per thousand gallons, and is payable at the end of each and every month. Upon the failure of a consumer to pay his water rent when due, or within ten days thereafter, his water supply is cut off and his service discontinued. The greater number of residences in the city of Greensboro are now being furnished water at the flat rate, while about 500 of such residences are being supplied at the meter rate, without respect, however, to any classification.

In December, 1916, plaintiff, a citizen of Greensboro, requested defendant to install a meter on his premises, as he preferred to pay for only water actually consumed. This was done, at expense of defendants. In May, 1917, plaintiff requested defendants to take out the meter and put him on the flat rate. The defendants refused, informing plaintiff that when a consumer gave up the flat rate and required a meter to be put in, it was the policy of the city authorities to continue such consumer on the meter rate. Plaintiff contends that such refusal is an unlawful discrimination against him.

An ordinance of the city provides that "Water meters will be used wherever and whenever in the judgment of the board they should be attached."

We see no force in the contention that this ordinance is unreasonable and void. On the contrary, it appears to be a very wholesome check upon the flat-rate consumer to prevent the wasteful and extravagant use of water. We think there is nothing unreasonable in requiring a citizen who has voluntarily given up the flat rate and

compelled the defendants to put in a meter to adhere to the water rate. If he were permitted to change his mind every month the city could be put to much inconvenience and expense.

There is no claim that the charge for water as measured by a meter is unreasonable, and that method is certainly as fair as can be devised, for under it a customer pays only for what he consumes. If he is wasteful and extravagant in the use of water, the loss falls on him, whereas under the flat rate it falls on the city.

Unless the city authorities are permitted to exercise some reasonable control over those who use the flat rate, that system may be grossly abused. These matters are purely administrative, and must of necessity be left to the sound discretion of the municipal authorities.

It is well settled that there is not necessarily any discrimination because meter rates are charged against certain consumers and flat rates against other consumers of the same class, nor because small consumers are charged by the room and large consumers according to the quantity of water used. 4 McQuillan on Mun. Corp., p. 3591.

This subject is fully discussed in *Powell v. Duluth,* 91 (542) Minn. 53; *Steward v. Water Co.,* 90 Col. 635; *Bldg. Co. v. Water Co.,* 90 Va. 83, and by this Court in *Horner v. Electric Co.,* 153 N.C. 535.

The last case is on all-fours with the case at bar, and we can add nothing to what is said in the opinion.

Reversed.

J. D. PHILLIPS, ADMR. OF M. M. MORGAN, v. INTERSTATE LAND COMPANY.

(Filed 14 November, 1917.)

1. Corporations — Officers—Principal and Agent—President—Restricted Authority—By-Laws—Bills and Notes—Notes.

It may be shown, as between the original parties, that the payee of a note of a corporation took it with knowledge that the president's authority was restricted by the by-laws, requiring the counter-signature of the secretary, and that it was invalid, without consideration, and given only as accommodation paper.

2. Same—Deceased Persons—Statutes.

A corporation, sued upon its note, executed by its president, defended upon the ground that it was for accommodation, therefore without consideration, and under its by-laws its validity depended upon the counter-signature of its secretary, of which the plaintiff had had previous notice.

At the plaintiff's instance, the testimony of himself and of defendant's president and secretary was taken before the clerk. Revisal, secs. 865 and 866. The plaintiff died, and his administrator was made a party in his stead, and upon the trial it is held reversible error to exclude the testimony as taken before the clerk, offered by the defendant, as being a transaction or communication with a deceased person, contrary to Revisal, sec. 1631, and which tended to sustain the defense.

3. Evidence—Statutes—Bill of Discovery.

The examination of an adverse party to an action, under Revisal, sec. 865, is a substitute for the former bill of discovery, and may be introduced in evidence by either party. Revisal, sec. 867.

4. Same—Corporations—Principal and Agent—Interest—Dead Persons.

In an action on a corporation's note, made by the president, which was not countersigned by the secretary according to the requirement of the by-laws, the secretary is only an agent of the company, and his testimony as to notice of the by-laws does not come within the provision of Revisal, sec. 1631, as to a transaction or communication with a deceased person.

5. Appeal and Error—Objections and Exceptions—Evidence Competent in Part.

A general objection and exception to the introduction of evidence competent in part will not be considered.

HOKE, J., concurring.

APPEAL by defendant from *Webb, J.*, at April Term, 1917, of SCOTLAND. (543)

This is an action upon a note, begun by the plaintiff's testator. Before his death, and at his instance, A. A. James, the president, and W. L. Fields, secretary of defendant company, were examined before the clerk, under Revisal, 865 and 866. Their testimony was taken down in writing by the clerk, said Morgan being present, and filed in the case. The plaintiff's testator filed his complaint, declaring upon the note. The answer alleged that the note was invalid as against the defendant, for the reason that it was an accommodation paper and without consideration, and for the further reason that its president, A. A. James, at the time of the execution of the note, advised said M. M. Morgan that the note was invalid as to the defendant company, because its rules and by-laws required all its notes to be countersigned by its secretary, which was not done in this case.

On the first trial the plaintiff's testator testified fully in regard to the whole transaction between him and A. A. James touching the execution of the note. There was a mistrial, and on the second trial M. M. Morgan having died, his administrator, J. D. Phillips, was made a party to the action. He put the note in evidence, proving the handwriting of James and the defendant's admission that James

was president when he executed the note. The defendant then offered in evidence the examination of James and Fields, taken before the clerk at the instance of Morgan, and upon objection by the plaintiff the examination was excluded.

The presiding judge found the following facts: "This case was tried before Judge W. J. Adams and a jury during the life of M. M. Morgan, which resulted in a mistrial, and in that trial M. M. Morgan testified as to the personal transaction and communication between himself and the said A. A. James, president of the defendant, touching the execution of the note sued upon. The evidence of the said Morgan was reduced to writing and is now in court as a part of the court file."

The defendant then called A. A. James as a witness to show the facts touching the execution of the note, but upon objection by plaintiffs he was excluded. The defendant then offered to show by its secretary that the note was not properly executed and that the defendant did not receive any consideration for the note. This was also excluded. The defendant then offered in evidence the entire testimony taken at the former trial, and it was excluded. The defendant then offered in evidence the examination of A. A. James and W. L. Fields, taken before the clerk, and the evidence of M. M. Morgan, subsequently given on the trial, which controverted the examination of James and Fields before the clerk. All of this was excluded, and the defendant excepted to the ruling in each instance.

(544) The defendant also offered to show that while it had no written rules and by-laws, it had verbal rules and by-laws, which forbade the execution of notes in its name, except when attested by the secretary, and asked the witness, A. A. James, to state whether or not the Interstate Land Company at any of its meetings adopted rules prior to the execution of this note, governing the execution of notes. This was excluded, and also evidence was offered by the defendant to show that the witness, A. A. James, advised Morgan that he did not have authority to execute the note, and that there was no consideration for it, and that it was executed as accommodation paper. All this was excluded, and defendant excepted.

The court charged the jury that if they believed from the evidence in the case that James signed the note sued on, it would be their duty to answer the issue "Yes, $2,000, with interest thereon from 10 January, 1912." From the verdict and judgment the defendant appealed.

E. H. Gibson and Walter H. Neal for plaintiff.

Cox & Dunn and Russell & Weatherspoon for defendant.

CLARK, C.J. It is true that the president of the corporation is *ex vi termini* its general agent. *Bank v. Oil Co.*, 157 N.C. 307; *Davis v. Ins. Co.*, 134 N.C. 60. But his authority may be restricted by the by-laws of the corporation or its charter, and when the authority of the president to bind the corporation is challenged, his authority can be shown by proof, and it should be left to the jury to determine from the evidence whether the power exercised by the president was restricted in this case by its by-laws *(Bank v. Bank,* 10 Wallace 644), and it was error to exclude evidence of such by-laws, and that M. M. Morgan had notice of such restriction. It was also competent as between the parties to show that there was no consideration for the note, and that it was merely accommodation paper. Revisal 865, under which James and Fields, the president and secretary, were examined as adversary parties, at the instance of Morgan, it is true, did not make them witnesses for the plaintiff *(Coates v. Wilkes,* 92 N.C. 386; *Shober v. Wheeler,* 113 N.C. 377), nor did it compel the plaintiff to use such testimony on the trial *(Shober v. Wheeler,* 113 N.C. 370), but Revisal 867, provides: "The party to be examined under the preceding sections may be compelled to attend in the same manner as a witness who is to be examined conditionally, and the examination shall be taken and filed by the judge, clerk, or commissioner, in like manner, and *may be read by either party on the trial.*"

If, therefore, M. M. Morgan had been living at the second trial, from which this appeal is taken, the above evidence of James and Fields, taken under Revisal 865, could have been read in evidence for the defendant. We know of no reason why it was rendered incompetent under Revisal 1631. The object of that section (545) is to close the mouth of a witness who is a party to the cause, or interested in its event, as to the transaction or a communication with a deceased adverse party, because the other party has no opportunity to be heard. But in this case the examination was taken by the instance of Morgan, who was present thereat, with opportunity to cross-examine the adversary witnesses, and he testified himself, and all the evidence duly taken down at such examination, both that of Morgan and of James and Fields, was offered in evidence in this case, and should have been admitted.

Furthermore, Morgan himself testified at the former trial, and it was error to exclude evidence of his testimony at that trial, coupled with the evidence of James and Fields.

The examination of W. L. Fields and his testimony as to the by-laws of the company was competent, even though that of James was excluded, for he was not a party to the transaction, but an agent, and, besides, was offered to testify as to matters which were

not a transaction or communication between Morgan and the defendant. When objection is general, if any part of the evidence is competent and the incompetent part is not singled out, it is error to exclude. *S. v. Ledford,* 133 N.C. 722, citing *Barnhardt v. Smith,* 86 N.C. 479; *Smiley v. Pearce,* 98 N.C. 187; *Hammond v. Schiff,* 100 N.C. 175; 4 Jones Evidence, sec. 691; *Smith v. McGregor,* 96 N.C. 111.

This case differs from *Bank v. Oil Co.,* 157 N.C. 302, in several material respects. In that case the note had been assigned to plaintiff, before maturity, for value, and there was no notice that it was without consideration or that the president had no authority to sign without the signature of the secretary, and the transaction was in the ordinary course of business. There was evidence in this case that Morgan knew of this defect when he took the note from James; that there was no consideration; the transaction was not in the ordinary course of business, and the action is between the original parties.

In *Matson v. Melchor,* 42 Mich. 477, the deposition of the plaintiff, taken before the death of the defendant and relating to a personal transaction between them, was held competent. In *Coughlin v. Haeussler,* 50 Mo. 126, it is held: "Where the testimony of both parties, given at the first trial, is preserved in a bill of exceptions, the minutes of the testimony of either party so recorded may be given in evidence at the second trial, in case of his death in the meantime; consequently, the surviving party may then testify, although the counsel for the deceased party refused to put in the evidence the minutes of his former testimony."

When the testimony of the deceased party has been given and is available, then the reason for the application of statutes like
(546) our Revisal 1631, does not exist. *Marlatt v. Warwick,* 19 N.J. Eq. 439; *Galbraith v. Zimmerman,* 100 Pa. St. 374. "The evidence of the deceased plaintiff on a former trial being admissible, the reason of the statute excluding one party to the action from testifying ceasing, the living party is competent." *O'Neal v. Brown,* 61 Texas 34.

New York Code, 821 is substantially the same as our Revisal 1631. In *Rice v. Mortey,* 24 Hun. 143, the Court said: "Upon the trial the plaintiff was entitled to introduce in evidence his own examination, taken at the instance of the defendant, and the same was not rendered inadmissible by section 829 of the Code of Civil Procedure. The reason for the rule excluding such testimony is wanting. In the next place, Mortey himself called Rice as a witness in his own behalf, and the Code, sec. 881, provides that the deposition *may*

be read in evidence by either party at the trial." McDonald v. Woodbury, 30 Hun. 35.

New York has no statute just like our section 865, but it provides for the taking of the *deposition* of the adverse party, and says *either party may introduce it at the trial;* and in *Berdell v. Berdell,* 86 N.Y. 519, the Court says: "A party whose deposition has been taken before trial, at the instance of an adverse party, had the right, if he desire it, to read such deposition in evidence on the trial on his own behalf. Code 881."

In *Rowland v. Pinckney,* 8 Miss. 458, it is said: "The deposition of a witness, taken before the death of one of the parties, is not inadmissible on the trial, under section 829 of the Code."

In *Neis v. Farquharsan,* 9 Wash. 508, it is said: "Death of a party to an action, and substitution of his legal representative, subsequent to the commencement of a suit against him, will not render inadmissible in evidence the deposition of an adverse party in interest, when at the time such deposition was taken the testimony of the witness was competent."

It was held in *Lear v. Smith,* 6 Ky. L. 657 that "The deposition of a surviving party may be read in evidence upon the trial of an action, notwithstanding the death of the adverse party, where the deposition of both had been taken and the personal representative of the deceased upon the trial refused to introduce the deposition of the deceased."

The examination of the adverse party, under Revisal 865, is a substitute for the former bill of discovery, and as Revisal 867, provides that it may be read by either party on the trial, it is, like a deposition, *de bene esse,* in that it becomes "the evidence of the law." So to speak, it is "canned evidence," kept in cold storage, for it cannot be altered. In both, the testimony is subject to all valid objections taken at the time, and there is stronger reason for its competency at the trial, for, besides the express authority without any exception, in Revisal 867, that such testimony can be read "by either party at the trial," in the case of evidence (547) *de bene esse* the deposition is taken in favor of the party offering it, while in a bill of discovery it is taken at the instance of the adversary party.

Error.

HOKE, J., concurring.

Cited: Caldwell Co. v. George, 176 N.C. 609; *Nance v. Telegraph Co.,* 177 N.C. 315; *Beck v. Wilkins-Ricks Co.,* 186 N.C. 212; *Dellinger v. Bldg. Co.,* 187 N.C. 848; *Martin v. Hanes Co.,* 189 N.C.

645; *Lane v. R. R.*, 192 N.C. 293; *Andrews v. Smith*, 198 N.C. 37; *McGraw v. R. R.*, 209 N.C. 439; *Enloe v. Bottling Co.*, 210 N.C. 263; *Tuttle v. Bldg. Corp.*, 228 N.C. 511; *Hayes v. Richard*, 244 N.C. 323.

BANK OF UNION v. W. E. BROCK.

(Filed 14 November, 1917.)

Appeal and Error—Judgment Set Aside—Excusable Neglect—Meritorious Defense—Findings of Fact.

On appeal from an order setting aside a judgment for excusable neglect, it is not sufficient that the lower court has found that there was a meritorious defense, for the facts upon which this finding was based must appear of record, so that the Supreme Court may pass upon the correctness of the ruling, or the case will be remanded to that end, with leave to file additional affidavits, if the parties are so advised.

CIVIL action, tried before *Long, J.*, at May Term, 1917, of UNION. Plaintiff appealed.

Stack & Parker for plaintiff.
Redwine & Sikes for defendant.

WALKER, J. Plaintiff alleged in its complaint that H. S. and Rosa E. Pinkston, on 1 January, 1911, made and delivered to it their promissory note for $2,173.91, due and payable 1 January, 1912, which was duly endorsed by the defendant, on which $761.49 had been paid, leaving a balance of $1,828.87, including interest, due thereon. The complaint was verified and filed 7 May, 1917, it being the first day of the August Term of the court. On 9 August, 1917, judgment was entered for the amount due on the note, and costs; and afterwards, but during the same day, the court adjourned, the judge leaving for his home in Cleveland County. He did not return. Defendant did not attend the court. He intended to do so, and file an answer for himself, he being an attorney and solicitor of the judicial district, but he was prevented from doing so by the illness of his wife, who required medical treatment. He accompanied her to a Northern city for the purpose of placing her under the care of a medical expert. As soon as he returned and found that judgment had been taken against him he moved to set it aside, upon proper notice. The presiding judge found that defendant's neglect to file an

answer during the time fixed by law was excusable, and we concur with him in that finding, for we think the defendant has presented a very strong case in that respect. Judge Webb, who (548) signed the judgment, when informed by the defendant of the facts, wrote to Judge Long as follows: "At the last term of Union Court, and on Wednesday evening of the first week, I signed quite a number of judgments handed up by the attorneys, and understood that they were all signed without objections by the defendants. It seems that I signed a judgment against Solicitor Brock. He says the summons was returnable to that term of the court, and that the plaintiff, of course, had three days in which to file a complaint. Mr. Brock informs me that the complaint was filed on Monday, the first day of the term, and that the judgment was taken on Wednesday evening. He was out of the State, I understand, on a matter of business, and did not reach home till Wednesday or Thursday of the term. He says that he has a good defense to the action. On receiving this information from him I wired the clerk not to copy the judgment, but later on notified him to put it on record. Mr. Brock asks that the judgment be set aside and that he be allowed to answer. I think he is entitled to it, and I wish I had known that the complaint had been filed on Monday of the term and that Mr. Brock had a defense to the action. I certainly would not have signed the judgment on Wednesday against him. If Mr. Brock can show you he has a good defense, I hope you can see your way clear to set the judgment aside and let him file an answer."

Defendant filed an affidavit, setting forth the facts and showing why he could not be present at the court when the judgment was rendered, and alleging that he had a good and meritorious defense to the action. The judge decided with him, and set aside the judgment, but did not state the facts upon which he based his ruling as to the defense. This he should have done, as we cannot decide whether such a defense exists unless we know what it is. The judge should find the facts constituting the alleged defense, and then decide whether, in law, it is meritorious. This question was discussed in *Gaylord v. Berry,* 169 N.C. 733, and we pursue the course taken in that case, which is similar to this one, and remand the case, so that the facts may be found. The question as to what is a meritorious defense is discussed in *Sircey v. Rees' Sons,* 155 N.C. 296; *Schiele v. Ins. Co.,* 171 N.C. 426; *Gallins v. Ins. Co.,* at this term. The judge evidently has found that there is a meritorious defense, or he would not have set aside the judgment, but he has not stated the facts, so that we may examine his ruling and determine whether it is correct. It may be that there is such a defense, but we cannot know how this is in the present state of the record. The judgment should not be dis-

turbed unless there is at least *prima facie* a good defense, for we would be doing a vain thing to set aside a judgment if this same judgment must be rendered again. *Estes v. Rash,* 170 N.C. 341; *Minton v. Hughes,* 158 N.C. 587.

It is therefore adjudged that the order setting aside the (549) judgment be itself vacated, and the judge will proceed to find the facts, and upon them make his ruling as to whether there is excusable neglect, and also whether there is a meritorious defense, with leave to file additional affidavits, if the parties are so advised.

This result can work no harm to the plaintiff, as the judgment is a lien, and will continue to be a lien if not set aside, provided it is properly docketed. If it appears that defendant has a meritorious defense, it is but just that he should be heard.

The defendant will pay the costs of this Court.

Remanded.

J. D. CARTER v. D. F. KING.

(Filed 14 November, 1917.)

1. Appeal and Error—Jurors—Challenges—Objections and Exceptions.

Where the court has refused to stand aside a juror challenged for cause, and the party has then peremptorily challenged him, in order to get the benefit of his exception he must exhaust his remaining peremptory challenges, and then challenge another juror peremptorily to show his dissatisfaction with the jury, and except to the refusal of the court to allow it.

2. Same—Court's Discretion.

Where a juror is challenged for relationship to the adverse party to the action, and erroneously and in good faith says he is not within the prohibited relationship, and is accepted without further challenge, and thereafter only the peremptory challenges are exhausted, it is within the sound discretion of the trial judge to set the verdict aside, before judgment, on the ground of relationship, which is not reviewable on appeal.

3. Libel—Slander—Jurors.

Words, oral or written, which tend to impeach the honesty and integrity of a jury in determining their verdict are actionable; and where a party at interest in a controversy wherein the jury disagreed, one to eleven, publicly stated that there was one man on the jury who was not bribed, and in a letter to the attorney of the adverse party stated, "I note what you say about the jury standing eleven to one, this was due entirely to whiskey, and the appeal made to their prejudice": *Held,* the spoken and written words were actionable, *per se,* and the evidence thereof carried the case to the jury.

4. Same—Damages—Mitigation—Evidence.

Where libelous words are published of the plaintiff as one of eleven jurors in a former action, it is incompetent to show, in mitigation of damages, that the plaintiff knew that the answer contained a disavowal of any personal reference to him.

CIVIL action, tried before *Harding, J.*, at February Term, 1917, of ROCKINGHAM, upon these issues: (550)

1. Did the defendant publish of and concerning the plaintiff in a letter to A. L. Brooks, Esq., the words set out in the plaintiff's second cause of action? Answer: Yes.

2. If so, did the defendant thereby charge the plaintiff with corruption or bribery in the discharge of his duties as a juror? Answer: Yes.

3. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,500.

From the judgment rendered, defendant appealed.

W. R. Dalton, P. W. Glidewell, and W. M. Hendren for plaintiff.
A. W. Dunn, J. R. Joyce, and Manning & Kitchin for defendant.

BROWN, J. 1. During the selection of the jury the defendant challenged Juror R. C. Comer on the ground of kinship to the plaintiff, the juror stating that he was fifth cousin to the plaintiff. The court held that a fifth cousin is not within the ninth degree, and held that his kinship was not cause for challenge. The defendant then challenged said juror peremptorily, and he thereafter exhausted his other three challenges before accepting the jury.

There is nothing in the record to indicate that there was any person on the jury against defendant's will. He had gotten rid of Comer and had exhausted his three remaining challenges before accepting the jury. He attempted to make no further challenge before accepting the jury, and that must be taken to indicate his satisfaction with the panel. The defendant should have challenged a fifth juror before accepting the jury, to indicate his dissatisfaction, and then except to the refusal to allow the peremptory challenge, upon the ground that they were not legally exhausted. The exact point was presented and decided in *Oliphant v. R. R.*, 171 N.C. 304, citing *S. v. Cockman*, 60 N.C. 485.

2. After verdict, and before judgment signed, the defendant moved to set aside the verdict because one of the jurors was related to plaintiff within the ninth degree. Upon perusal of the panel, defendant questioned Juror Roberts and asked about his relationship to plaintiff. The juror stated that he was not related within the ninth

degree. Defendant passed the juror. The juror was third cousin to plaintiff, well within the ninth degree.

The court finds that in stating the relationship the juror made such statement in good faith, without any intention of speaking inaccurately or misleading the court or the defendant. The court finds that the defendant did not challenge the juror or inquire for other cause, and that he had a peremptory challenge unused, but accepted the juror, and that after accepting the juror, Roberts, defend-
(551) ant's counsel then challenged another juror and stood him aside, exhausting his fourth peremptory challenge. There was no effort on the part of the defendant to exercise the rights of peremptory challenge, other than the fourth above set out, three of which had been exhausted before the juror, Roberts, had been questioned, and one was exhausted after.

The refusal of his Honor to set aside the verdict and grant a new trial is a matter within the sound discretion of the court, and is not reviewable. *S. v. Jones,* 80 N.C. 415; *S. v. Lambert,* 93 N.C. 618; *Baxter v. Wilson,* 95 N.C. 143; *S. v. Maultsby,* 130 N.C. 665.

In *S. v. Davis,* 80 N.C. 415, the Court said: "We think the principles deducible from all the authorities above cited are that where the challenge is to the poll, made for good cause, in apt time — that is, before the juror is sworn — it is strictly and technically a ground for a *venire de novo;* if made after the juror is sworn, the court may, in its discretion allow the challenge; but its refusal to do so is no ground for a *venire de novo,* because the prisoner has lost his legal right by not making his objection at the proper time; and the same principle applies if the objection existed at the time the juror was sworn, but not discovered until afterwards; in that case the refusal by the court to grant a *venire de novo,* or new trial, which in effect are the same, would not be error, and the only redress then left the prisoner is an appeal to the sound discretion of the court, before whom the case was tried, for a new trial, and, if refused, he has no right of appeal."

3. The defendant offered no evidence and moved to nonsuit. The evidence tends to prove that an action was tried in the Superior Court of Rockingham County entitled *"Leaksville-Spray Institute v. B. Frank Mebane,"* in which defendant was interested personally as a trustee of the institute. The jury being unable to agree upon a verdict, a mistrial was ordered. The jurors, it appears, stood eleven for defendant Mebane and one for plaintiff institute. This plaintiff was one of the eleven. There is evidence tending to prove that this defendant stated publicly that there was one man on the jury that was not bribed. It is contended that these words naturally imply that the other eleven who were against the institute were bribed. Shortly

after that, defendant had some correspondence by letter with Mr. A. L. Brooks, of Greensboro, who was attorney for Mebane in said action, in which defendant wrote and mailed the following letter, which was duly received and read by Mr. Brooks, viz.:

LEAKESVILLE, N. C., 3 July, 1913.

MR. AUBREY L. BROOKS.

DEAR SIR:—The Lord whom I serve requires me to hold no malice or hatred against any one, but He does not require me to look upon sin as being right. As I see it, a man who can be hired to slander and misrepresent another, and thus try to (552) rob him of his good name is infinitely worse than a man who can be hired to rob a man of his purse. *(I note what you say about the jury standing eleven to one; this was due entirely to whiskey and the appeal made to their prejudice.)* I have been told by people who ought to know, that they did not try the case at all; they simply tried me, and all this slander was premeditated and deliberate. I was told before the trial commenced that this policy had been agreed upon. All the money you get for it will never ease your conscience.

Yours truly, D. F. KING.

The words in parentheses are those set out in the complaint as constituting the libel. The defendant admits writing and mailing the letter, but avers that he did not refer to plaintiff or have him particularly in mind.

It has long been settled that it is actionable to publish words, oral or written, which tend to impeach the honesty and integrity of a public official in the execution of the duties of his office.

As long ago as 1724, in *Aston v. Blagrave,* 2 Lord Raymond 1369; 92 Eng. Ref. 391, it was held actionable, *per se,* to say a justice of the peace is a rascal or liar, when speaking of his executing his office.

So it is held in the United States that words imputing to a justice of the peace *misconduct* touching him in his office are actionable. *Mix v. Woodward,* 12 Conn. 262; *Gove v. Blethen,* 21 Minn. 80.

Likewise it is held that words, oral or written, tending to impeach the integrity and conduct of jurors in the discharge of their duty are actionable, *per se.* 25 Cyc. 352.

In *Byers v. Martin,* 2 Colorado 605, it is held that a newspaper article denouncing a verdict to be "infamous," and saying "We cannot express the contempt which should be felt for these twelve men who have thus not only offended public opinion, but have done injustice to their own oaths," is libelous and actionable, *per se.* In that case it was contended that the words complained of were not

actionable, because they were published of and concerning a body or class of men, and therefore no cause of action lies as to an individual member of such body. The court held that any member of the jury could maintain an action against the publisher, citing several precedents.

Thus we see from the authorities that this action may be maintained by plaintiff, although in the letter there is no specific reference to him, individually.

The defendant excepts because the court declined to let the defendant prove by the plaintiff on cross-examination that the plaintiff knew that the answer disavowed any reference to plaintiff contending that this is in mitigation of damages. We fail to see the force of this. The fact that plaintiff knew what was in the (553) answer and that it contained a disavowal of any personal reference to him in the Brooks letter, does not mitigate the damage. It was as harmful to libel and slander the plaintiff collectively as one of the eleven jurors as it would have been to have libeled him individually.

There are many exceptions to the evidence and charge, which we have examined, but will not discuss, as it is unnecessary. In our view, if the evidence is to be believed, plaintiff has established a cause of action and is entitled to some damage.

The defendant did not offer himself as a witness or introduce any evidence. Such matters in mitigation of damage, as by means of a very dexterous cross-examination his counsel managed to bring out, he received full benefit of in the charge of the court.

No error.

Cited: Paul v. Auction Co., 181 N.C. 5; *S. v. Casey*, 201 N.C. 623; *Flake v. News Co.*, 212 N.C. 787.

JOHN D. GALLINS ET AL. V. GLOBE-RUTGERS FIRE INSURANCE COMPANY.

(Filed 14 November, 1917.)

1. Judgments by Default—Pleadings, Filing—Clerks of Court.

Pleadings should be filed with the clerk of the court of the proper county, and when a proper answer to a complaint has been mailed in time to reach the clerk, and he has failed to get his mail on that day, the last one of the term, and it was in the clerk's office, on his desk, unopened, when the judge signed judgment for plaintiff by default, the neg-

lect, if any, was that of the clerk, for which the defendant is not responsible, and upon a *prima facie* case of a meritorious defense shown, the judgment should be set aside.

2. Attorney and Client—Venue—Presumptions—Duty of Attorney.

An attorney, resident in an adjoining county to that of the venue of an action, 28 miles from the county-seat, with several daily trains passing between the two cities, may fairly be presumed to be a regular practitioner of that county, nothing else appearing.

3. Same—Laches of Attorney.

Where a corporation has employed an attorney to defend an action against it, who has prepared an answer, which has been properly verified, and in his absence the agent of the defendant mails it to an adjoining county, that of the venue, and it is received by the clerk of the court in time, but remains unopened at the last day of the pleadings term until after a judgment by default has been signed, and the judge has left the court-room: *Held*, while it was the duty of the attorney to have filed the answer in time, the defendant, not being in default, will not be held responsible for his neglect therein.

4. Judgments by Default — Meritorious Defense — Prima Facie Case — Issues.

To set aside a judgment for default of an answer, it is necessary that defendant show only *prima facie* that he has a meritorious defense; and where the proposed verified answer has been filed in support of the motion, raising an issue of fact necessarily to be determined before judgment can be rendered, it is sufficient.

MOTION to set aside judgment against defendant, heard before *Harding, J.*, at March Term, 1917, of FORSYTH. (554)

The court denied the motion, and defendant appealed.

Louis M. Swink, Gilmer Korner, Jr., and A. E. Holton for plaintiff.

Manly, Hendren & Womble for defendant.

BROWN, J. It appears from the findings of fact that the summons was returnable to February Term, 1917, of the Superior Court of Forsyth County; that this term expired by limitation of law on Saturday, 24 February; that the judge left the bench about 5:30 p.m., without formally adjourning the court. Judgment by default, for want of an answer, was entered about 5 p.m.

It appears that R. J. Hobbs, of Greensboro, N. C., was attorney for defendant, and prepared the answer that is set out in the record. The answer was verified by Paul W. Schenk, State agent of defendant, on 22 February, and duly forwarded by registered mail on 23 February, to C. M. McKaughan, who is Clerk of the Superior Court of Forsyth County. The package reached Winston-Salem at 9:15

a.m., 24 February. The clerk did not get his mail until 4 p.m., when the package containing the answer reached his office. The clerk did not open his registered mail until after the judgment by default had been rendered, but the answer was in his office and on his desk at that time.

We are of opinion that the court should have set aside the judgment by default.

1. The answer was duly verified by the proper agent and mailed to the clerk in time to have reached his office on the morning of the 24th, and to have been duly filed in the record of the case. Pleadings are not required to be filed with the judge, but with the clerk. The agent of defendant had a right to expect that the clerk would receive his mail on the morning of the 24th and open it. Had the clerk not neglected to send for his mail, the answer would have been duly filed in the records of the case on the morning of that day. As it was, the answer had been received by the clerk an hour before the judgment by default was rendered, and it was the clerk's delay in not opening the registered letter that prevented the answer from being placed in the records of the case. It is a universal custom among attorneys practicing in different counties to mail pleadings to the clerks (555) of court, who place them in the proper files. We think the defendant had a right to suppose that the clerk would receive and open his mail in time to file the answer.

2. It appears that R. J. M. Hobbs, an attorney, of Greensboro, had been retained as counsel for the defendant, and had prepared the answer; that he was detained in the eastern part of the State; that the agent, Schenk, had expected Hobbs to return in time to attend to filing the answer, but, finding that Hobbs was detained, mailed it direct to the clerk. There is no finding that Hobbs did not practice regularly in the Superior Court of Forsyth County. It is a fair presumption, in the absence of such finding, that he did, as he resided within 28 miles of the county-seat, with several daily trains connecting the two cities. Hobbs is a resident practitioner of an adjoining county, licensed to practice in the courts of this State. It was his duty to file the answer. He was detained in the eastern part of the State. Ascertaining this, the State agent of defendant did all he could do when he mailed the answer directly in ample time to the clerk.

Assuming that Hobbs was negligent, the relation of attorney and client existed between Hobbs and defendant. The latter was in no default and will not be held responsible for the negligence of its counsel in failing to perform an act exclusively within the line of his professional duties. The case, we think, falls clearly within the rule laid down in *Seawell v. Lumber Co.*, 172 N.C. 324.

3. The answer is duly verified and is sent up as a part of this record. It is only necessary, upon a motion to set aside a judgment by default, that the defendant show *prima facie* that he has a good defense. *Schiele v. Ins. Co.*, 171 N.C. 426.

The action is brought to collect an insurance policy issued by defendant upon certain property belonging to plaintiff. In the complaint it is alleged that certain bowling alleys were covered by the policy and by mutual mistake omitted. This is denied in the verified answer.

It is manifest that the answer sets up a *bona fide* defense, raising an issue to be determined before judgment can properly be rendered.

Error.

Cited: *Grandy v. Products Co.*, 175 N.C. 513.

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(556)

B. W. TOWNSEND AND J. H. TOWNSEND v. DRAINAGE COMMISSIONERS OF BACK SWAMP AND JACOB SWAMP DRAINAGE DISTRICTS, SHERIFF R. E. LEWIS, AND A. G. CALHOUN.

(Filed 14 November, 1917.)

1. Drainage Districts—Assessments—Sales—Notice—Purchasers — Deeds and Conveyances.

Where the owner of land within a drainage district dies after it is formed, and after notice given to the estate the lands are sold by the sheriff for default in payment of the annual installment of the assessment thereon, one who claims the land under an unrecorded deed executed under the will of the deceased owner may not attack the validity of the sheriff's deed, given to the purchaser of the land, for the lack of notice to himself.

2. Drainage Districts—Assessments—Sales—Notice—Procedure.

The remedy of a landowner in a drainage district, whose land has been sold for default in paying the assessment, without the statutory notice, is by motion in the drainage proceedings, and not otherwise.

3. Drainage Districts — Assessments — Taxes—Sales—Deeds and Conveyances—Rights of Parties.

Sales for default in the payment of assessments on lands in drainage districts, except as to time, must in all respects be under the law for the collection of State and county taxes (Gregory's Sup., sec. 4018), and a purchaser at such sale may, at his election, bring foreclosure suit upon the tax certificates (Revisal, sec. 2912) or proceed to acquire a deed from

the sheriff under the provisions of Revisal, secs. 2899, 2907; the only remedy for the owner being to redeem upon payment of the purchase price, with the statutory interest and all subsequent taxes (Revisal, sec. 2913), and he may not question the purchaser's title without showing title in himself at the time of the sale and payment of all subsequent taxes. Revisal, sec. 2909.

APPEAL by R. C. Townsend from *Connor, J.*, at May Term, 1917, of ROBESON.

This action was begun by J. H. and B. W. Townsend, as owners of 1,512 acres, being tract No. 71, in the Drainage Swamp, which land, in February, 1916, was sold by the sheriff for default in payment of the annual installment of the assessment thereon of $1,392.18. At said sale A. G. Calhoun became the purchaser, at the price of $11,000, which he duly paid to the sheriff. Calhoun agreed with the plaintiffs, prior to his payment of the purchase price for said lands, that if arrangements could be effected with the drainage district and the sheriff whereby Calhoun would be relieved of the payment of the purchase price, and that his agreement with the lumber company (who owned the timber thereon), that this purchase should not affect their rights and that the timber should be protected against future assessments, if any, he would relinquish his claim as purchaser in favor of the plaintiffs. The drainage commissioners and the sheriff refused to concur in this arrangement, owing to the opposition
(557) of the bondholders, and thereupon this action was instituted and a temporary injunction issued, restraining the sheriff from executing to Calhoun his deed or certificate, and from collecting and receiving from him the $11,000. At October Term, 1916, of Robeson, the plaintiffs had an agreement with the drainage commissioners whereby a nonsuit was taken, and the judge signed a judgment directing the sheriff to collect the purchase price from Calhoun. It appearing that this judgment was taken without notice to Calhoun, at February Term, 1917, the judgment was set aside as between the plaintiffs and Calhoun. At that time Calhoun had already paid the $11,000 and the sheriff had issued the deed or certificate to him, and it was adjudged that the plaintiffs, J. H. and B. W. Townsend, had no further right to redeem, since they had been given the opportunity and had refused to do so. It was then suggested that the appellant, R. C. Townsend, claimed an interest in the land, which is lot No. 71 of the drainage district, and notice issued to him to show cause at May Term, 1917, why he should not be foreclosed if he failed to set up any claim in said land. At May Term, 1917, judgment was rendered, Calhoun consenting, that the appellant, R. C. Townsend, should have 90 days from 15 May, 1917 (the date of the hearing, and not the date of service of summons on him, which was prior

thereto), in which he could redeem the land by paying the purchase price of $11,000 and interest allowed in such cases, together with whatever other taxes Calhoun had paid on the land in the meantime, and decreeing that should said R. C. Townsend fail to redeem within said time, he should be foreclosed of any right to redeem and the sheriff should execute a deed to Calhoun for said land. The court found further facts, as follows: "The court finds that said tax sale was in all respects regular, as set out in said tax certificate, and that the defendant, A. G. Calhoun, became the purchaser of the lands therein described, and that throughout the establishment of the said drainage district the land described in said certificate was owned and listed in the name of S. R. Townsend, who died after the establishment of said drainage district, and executed his last will and testament, under which the defendant, R. C. Townsend, claims through the plaintiffs in this action *by virtue of an unrecorded deed.*"

A written agreement between the parties is filed in this Court that the deed from B. W. Townsend and J. H. Townsend, executors of S. R. Townsend, to D. W. Townsend for the lands in controversy was executed 26 April, 1916, and duly registered the next day, and that the deed for the lands by D. W. Townsend to R. C. Townsend is dated 16 August, 1916, and registered 5 November, 1917, since the docketing of the appeal in this Court.

R. C. Townsend claims title to the land under the will of S. R. Townsend, which was executed and probated since the establishment of the drainage district and also under the deed from the executors of S. R. Townsend to D. W. Townsend and the con- (558) veyance by him as above set out.

The court found that the tax sale by the sheriff was in all respects regular, and there is no exception to this finding and no request appears in the record that the Court should find other facts.

From the judgment at May Term, 1917, R. C. Townsend appealed.

T. A. McNeill, Jr., and Sinclair, Dye & Ray for R. C. Townsend.
McLean, Varser & McLean for A. G. Calhoun.

CLARK, C.J. From the above statement of facts found by the judge and the admissions, it is clear that at the time of the tax sale in February, 1916, at which A. G. Calhoun bought, the lands in controversy were still a part of the estate of S. R. Townsend and subject to the assessments against said lands in favor of said drainage district under which it was sold at a sale in all respects regular as set out in the tax certificate and founded by the judge.

At May Term, 1917, Calhoun consented that the paper executed to him by the sheriff when he paid the purchase price should be treated as a tax certificate, and this concession by him eliminates all controversy as to whether it was a deed for the land or not. There is no controversy now before the Court whether R. C. Townsend had notice, because the record shows that he was served with such notice and appeared at May Term, 1917, and was given ninety days after that hearing to pay for and redeem the lands; and it was decreed that upon his failure to do this Calhoun would be entitled to a deed from the sheriff, which would operate as a complete conveyance of R. C. Townsend's interest.

A. G. Calhoun bought at the sale in February, 1916, which the judge finds to have been regular in all respects. By one means or another, the confirmation of that sale has been postponed until now nearly two years have elapsed since the sale. It was by consent of said Calhoun that, at May Term, 1917 — now six months ago — ninety days were allowed R. C. Townsend in which to redeem the land, though he was a claimant under an unregistered deed which he had made no attempt to put on record and which was not recorded till 5 November, 1917, since the case was docketed here.

In *Banks v. Lane,* 170 N.C. 14, it was held that the landowner, at the time of the establishment of the drainage district, was the only necessary party to the proceedings, and that lien holders and mortgage holders need not be made parties, and that the establishment of the drainage district created the presumption that the land would be benefited by the drainage district more than the
(559) burdens assessed against it for such purpose. This was held true against the purchase money mortgages under the facts recited in that case. That case was reheard and reaffirmed 171 N.C. 505. The second opinion pointed out that if the plaintiff was the landowner, and had not been served, the remedy was my motion in the drainage proceeding and not otherwise.

In this case, at the time of the tax sale in February, 1916, the record discloses that R. C. Townsend had no interest in the lands, but on the contrary shows that the title then was still in the estate of S. R. Townsend, who was a party to the proceedings to establish a drainage district and whose estate had full notice of the proceedings to sell for default in payment of the assessment.

As set out in appellant's brief, Laws 1911, chap. 67, sec. 12 (Gregory's Supplement, sec. 4018, and subsections), provide that sales for default in payment of assessments in drainage districts shall in all respects, except as to time, be under the laws for the collection of State and county taxes. The court in this case found that the sale February, 1916, by the sheriff was in all respects regular.

The consent by Calhoun at May Term, 1917, that R. C. Townsend should have ninety days in which to redeem was an act of grace on his part and gives to R. C. Townsend no right to an extension of time after the lapse of said ninety days.

The appellant contends that Revisal 2912, requires the purchaser at a tax sale to bring an action to foreclose upon his tax certificate, and that this is his only remedy. In this he is in error, for section 2912 gives this as an additional remedy and uses the following language: "The holder of a deed for real estate sold for taxes shall be entitled to the remedy provided in this section (2912) if he elect to proceed thereunder," or he may proceed to acquire a deed from the sheriff as otherwise pointed out in sections 2899 to 2907 of the Revisal.

Every individual purchaser has two remedies, one to proceed under the statute to require a deed, and the other to foreclose by action in court under section 2912. Formerly, if the county was purchaser it had only the right to foreclose *(Wilcox v. Leach,* 123 N.C. 74), but this was changed by Laws 1901, chap. 588, sec. 18 (now Pell's Revisal 2905), which provides that the sheriff can execute a deed upon the demand of the county commissioners or the governing board of a municipal corporation in the same manner as in cases where individuals have purchased.

In this case, the purchaser, Calhoun, is following his remedy to demand a tax deed, and since the matter has been in court notices have been issued to all parties who might claim an interest since he obtained a judgment against the plaintiffs, executors of S. R. Townsend, who claimed to be the owners of the land and who are the parties under whom R. C. Townsend now claims. (560)

Revisal, 2193, provides that the only remedy of the landowner or occupant is that he may redeem, and there is no obligation upon the purchaser to foreclose, and it is provided that this redemption is allowed the owner of the land upon payment of the amount of the purchase price with the statutory interest, as provided by Revisal 2913, together with all other taxes subsequently paid. This is held in *Beck v. Meroney,* 135 N.C. 532, to constitute the landowner's sole remedy.

The plaintiff cites *Rexford v. Phillips,* 159 N.C. 213, where the Court discusses this matter fully, and after referring to the fact that taxes had been paid and that a tender had been made and rejected, holds that it is the duty of the land claimant to pay the taxes and the statutory charges, and says: "This is nothing but right, and is no more than the plaintiff should be required to do, in order that his delinquency may not inure to his benefit, and that justice may be done to the defendant who has relieved the land of a charge which

would have rested upon it if the plaintiff had performed his duty by listing his property for taxation."

Revisal 2909, provides that no person shall be permitted to question the title required by the sheriff's deed without *"first showing that he or the person under whom he claims had title to the property at the time of the sale, and that all taxes due upon the property have been paid by such person or* the person under whom he claims." Calhoun's judgment against the plaintiffs, under whom the appellant claims, is set out in the record, and the appellant does not show that he has paid the taxes, but says expressly that he has not, and he has no right now to question the status of Calhoun.

In *Eames v. Armstrong,* 146 N.C. 1, the Court discusses this question and cites the cases up to that time under Revisal 2909. The appellant is in fact a "volunteer." He is not a creditor or purchaser for value within the meaning of the Connor Act, and he cannot come into court under his unregistered deed and successfully question Calhoun's right to a deed when he has not paid or tendered within the ninety days, which were allowed him as an act of grace with Calhoun's consent, by the judgment of May, 1917, the purchase money with the statutory charges and taxes. In fact, he has been treated in the same manner as if he had title to the lands, though he had none, and he was allowed ninety days in which to redeem when he appeared and said he wished to redeem.

The appellant has had all that S. R. Townsend or his executors could claim, though he was not entitled to stand in their shoes. He is not entitled now to have an addition to the more than six months delay which he has obtained by appealing from a judgment which allowed him ninety days as an act of grace. There is no error
(561) in the judgment of the court of which he can complain, and we cannot hold that there was. It is ordered, however, that R. C. Townsend shall be allowed till 1 January, 1918, to comply with the terms of the judgment appealed from, and on default shall then be in all respects foreclosed from all claim or rights as to the property in question.

Affirmed.

Cited: Headman v. Comrs., 177 N.C. 265; *Price v. Slagle,* 189 N.C. 766; *Drainage Comrs. v. Lumber Co.,* 193 N.C. 24.

G. J. CARTER & CO. v. THE TOWN OF LEAKSVILLE.

(Filed 14 November, 1917.)

1. Municipal Corporations—Cities and Towns—Bridges—Negligence—Instructions—Contentions—Evidence—Trials.

The proper authorities of an incorporated town are required to construct and maintain bridges upon its streets of sufficient strength to bear up the weight of any vehicle of transit that could reasonably be expected in the vicinity where it is placed; and where there is evidence that the plaintiff's loaded motor truck, damaged by the giving away of a bridge on the street of defendant town, was greater in weight than that which could reasonably have been anticipated there, it is not error for the trial judge to state the defendant's contention as to this phase of controversy, that plaintiff knew or had reason to know when he drove upon the bridge that it could not stand the strain.

2. Issues—Negligence—Contributory Negligence—Trials—Appeal and Error—Harmless Error.

While it is desirable that issues as to negligence and contributory negligence should be separately submitted to the jury when they properly arise upon the trial of a controversy, the failure of the trial judge to submit the second issue, leaving the case to be determined under the first, is not reversible error when it appears that the objecting party has been properly given the benefit of every position open to him on the evidence and pleadings.

CIVIL action, tried before his Honor, *W. F. Harding, J.*, and a jury, at February Term, 1917, of ROCKINGHAM.

The action was to recover damages for injury to a motor truck of plaintiff caused by the giving away of a bridge on a street in the town of Leaksville, and for maintenance of which the town was responsible.

The cause was submitted to the jury on the two issues: First, as to defendant's negligence; second, damages.

There was verdict on first issue for defendant.

Judgment, and plaintiff excepted and appealed, assigning errors.

C. O. McMichael for plaintiff.

P. W. Glidewell and A. W. Dunn for defendant.

HOKE, J. We have given this case careful consideration, and we are of opinion that no error has been shown that (562) would justify the Court in disturbing the results of the trial.

It was chiefly insisted for plaintiff that the court in its charge, when stating certain contentions of defendant, gave recognition and emphasis to facts well calculated to influence the action of the jury when there had been no evidence of such facts presented, and particularly to the position urged that plaintiff drove on the bridge with

an excessive load, and when he knew or had reason to know that the bridge was not strong enough to stand the strain to which it would be subjected.

We have held, at this term, in *Barham v. Holland,* that, under certain circumstances, this may be so prejudicial as to constitute reversible error, but the position is not open to plaintiff on this record for the reason that, while defendant offered no testimony, there were facts in evidence on the part of the plaintiff which permitted the inference referred to, and the suggestion therefore was well within the range of legitimate argument and was not improperly recognized as such in the charge of the court. Nor do we think that the court in its charge was improperly restrictive as to the duty resting on defendants in reference to the strength of the bridge they were required to build. Construing the charge as a whole, the correct way of interpreting it *(S. v. Exum,* 138 N.C. 599), it imposed upon defendants the duty of constructing and maintaining a bridge of sufficient strength to bear up the weight of any vehicle of transit that could be reasonably expected in the vicinity where it was placed, and this, in our opinion, was the correct measure of defendant's duty concerning it.

Again, it was objected that his Honor, after declining to submit an issue on contributory negligence, as requested by defendant, allowed the jury to consider the testimony tending to establish contributory negligence in determining the first issue.

There was averment of contributory negligence in the answer, with facts in evidence tending to support it. In such case, we have frequently said that it is better to submit a separate issue directly responsive to the pleading and proof. It has been also held, however, that the failure to submit such an issue will not constitute error when it appears that the objecting party has been properly given the benefit of every position open to him on the evidence in the determination of the first issue. *Ruffin v. R. R.,* 142 N.C. 120.

On the present instance, we are unable to see that the plaintiff or his cause has been in any way prejudiced in this respect by the manner in which this evidence was submitted to the jury, and on perusal of the entire record we must hold that no prejudicial error has been made to appear.

No error.

(563)

R. B. McRARY ET AL. v. SOUTHERN RAILWAY COMPANY.

(Filed 14 November, 1917.)

1. Carriers of Goods—Bills of Lading—Parol Agreements—Commerce—Federal Law—Evidence.

The relation of carrier and shipper may be created without written bill of lading, and when the shipment is interstate and the agreement of shipment rests in parol, the requisite stipulations of sale or contract as prescribed by Federal statute or valid regulations of the Interstate Commerce Commission will attach and govern the rights of the parties; but when written bill of lading has been issued it should be introduced in evidence. The effect of the Cummins Act, later enacted, was not considered.

2. Carriers of Goods—Bills of Lading—Evidence—Carrier's Memorandum—Limited Valuation—Released.

A written memorandum made and signed by the carrier's agent stating that it was for its own filing, and that it was neither the original bill of lading nor duplicate nor copy thereof, that the signature was to acknowledge the amount prepaid for the freight charges, can only be considered, at most, as the carrier's receipt for the charges prepaid; and where the writing indicates that the shipment had been released in consideration of a certain limited valuation placed upon the goods, such does not afford substantive and sufficient evidence thereof in an action against the carrier for loss or damage thereto.

3. Same—Appeal and Error—Verdict—Judgments.

The appellant is required to show error in the judgment below; and where the carrier contends that, as a matter of law, there is error in the amount of damages awarded for partial loss of a shipment of antique furniture, in sets, on the ground that the furniture was shipped released in consideration that the value thereof did not exceed a certain amount per hundred pounds, and there is reasonable inference from the evidence that the loss of the part affected the value of the entire shipment, which would equal, at the limited valuation claimed, the amount of the verdict, the judgment will not be disturbed. The effect of the Cummins Act, later enacted, was not considered.

4. Carriers of Goods — Claims — Damages—Amount Stated—Payment—Estoppel.

It is not required that a claimant state the amount of his loss, in his claim for damages against a carrier, and though such amount is stated it does not control his recovery in his action against the carriers, for the claim usually provided for by a clause in the bill of lading is recognized as valid chiefly for the purpose of notifying the carrier that a claim is being made and to direct its attention to the matter at or near the time to enable it to procure evidence disclosing the real facts of the transaction; and unless there has been a payment in satisfaction or an adjustment of the claim accordingly, the amount therein demanded will not operate as an estoppel. The effect of the Cummins Act, later enacted, was not considered.

CIVIL action, tried before his Honor, *W. F. Harding, J.*, (564) and a jury, at July Term, 1917, of DAVIDSON.

The action was to recover damages for breach of contract of shipment of a lot of antique furniture over defendant railroad and others, made by R. S. McRary, at Lexington, N. C., on 2 November, 1914, consigned to Helen Ivey Company, plaintiff, at Germantown, Pa. Part of the furniture was lost and written notice of claim duly filed.

On denial of liability, there was verdict for plaintiff, assessing damages at $140. Judgment on the verdict, and defendant excepted and appealed.

Phillips & Bower and Roper & Roper for plaintiff.
Walser & Walser and Linn & Linn for defendant.

HOKE, J. There seems to have been no written bill of lading introduced in evidence, but there was parol testimony offered by plaintiff to the effect that on 2 November, 1914, plaintiff R. B. McRary shipped over defendant road and others to his coplaintiff, Helen Ivey, at Germantown, Pa., a lot of antique furniture, and that a portion of said furniture was never delivered, in breach of the contract of shipment, and that the pecuniary damage sustained was $140 or more.

Judgment having been entered for plaintiff, pursuant to verdict, for that amount it is objected for defendant that there are facts in evidence which, as a matter of law, should limit plaintiff's recovery to a much less sum, but in our opinion this position cannot be sustained.

It is well established that the relationship of carrier and shipper may be created without any written bill of lading. *Davis v. Norfolk and Southern R. R.*, 172 N.C. 209; *Smith v. R. R.*, 163 N.C. 143. It is also held that, in case of interstate shipments, while a written bill of lading should always be issued in evidence of the contract between the parties, if the same is omitted, the requisite stipulations of sale or contract as prescribed by the Federal statutes or valid regulations of the Interstate Commerce Commission will attach and govern the rights of the parties concerning it. *Bryan v. L. and N. R. R. Co.*, present term; *Tafts & VanDyke v. A. C. L. R. R.*, present term; *Peanut Co. v. R. R.*, 166 N.C. 62; *R. R. v. Mugg*, 202 U.S. 242.

While these positions are fully recognized with us, we find nothing in the record which necessarily, or as a matter of law, should reduce the amount of plaintiff's recovery as established by the verdict. The written memorandum introduced and chiefly relied upon by defendant is entirely too indefinite to be allowed any such effect.

Acknowledging that a bill of lading has been issued, it begins with the statement that "it is not the original bill of lading nor a copy nor a duplicate covering the property named, but is intended solely for filing." The only signature appearing on (565) the paper and purporting to be that of the agent, signed, it seems, by the billing clerk, is prefaced by the statement that "the signature here acknowledges the amount prepaid," and the paper, at most, can only be considered as a receipt for so much money prepaid on the shipment. If it be conceded that this memorandum also contains evidence tending to show that the goods were shipped released and on a valuation limited to $5 per hundred pounds, and with testimony *ultra* to the effect that the weight of the goods actually lost was not more than 285 to 305 pounds, there are also facts in evidence to the effect that the weight of the entire shipment was much greater; that it consisted of a lot of antique furniture, a portion of it in sets, and permitting the inference that a loss of a part might very well cause substantial damages to the remainder and in weight more than sufficient to justify the verdict even at the limited valuation. It is the recognized principle that the appellant is required to show error *(Oil Co. v. Burry,* at the present term; *In re Smith's Will,* 163 N.C. 464), and if the view suggested should be accepted by the jury, there is nothing which necessarily restricts plaintiff's recovery below the sum established by the verdict, and the exceptions of the defendant presenting the position must be overruled.

It is further shown that the consignee, Helen Ivey, in presenting her claim, stated the amount of damages at $110, and it is insisted that she should not be allowed to recover a greater sum, but in this requirement usually provided for by a clause in the bill of lading, the amount demanded is not ordinarily of the substance and is not required to be given in making the claim. The provision is inserted and upheld as a reasonable stipulation more especially for the purpose of notifying the carrier that a claim for damages is made and directing its attention to the matter at or near the time, and with a view of enabling it to procure evidence disclosing the real facts of the transaction, and unless there had been a payment in satisfaction or adjustment of the claim, we see nothing that should estop the plaintiff from a recovery of her actual loss. This seems to be a proper deduction from authoritative cases dealing with the subject, as in *St. Louis, etc., R. R. v. Starboid, Admr.,* decided 30 April, 1917, Advance opinion, U. S. Supreme Court, L.R.A. Pub. Co. p. 462, where it was held, among other things, that the notice in writing stipulated for in a bill of lading need not give the amount of damages claimed.

It may be well to note that the facts of this transaction are of date prior to the Cummins Amendment, enacted 4 March, 1915, chap. 176, 38 U.S. Statutes, p. 1196, and the effect of such amendment on stipulations of this character have been in no way considered. *Bryan v. R. R., supra.*

We find no error, and the judgment for plaintiff must be affirmed.

No error.

Cited: Mann v. Transportation Co., 176 N.C. 108; *Aman v. R. R.,* 179 N.C. 313; *Schroader v. Express Agency,* 237 N.C. 459.

(566)

JOHN F. McNAIR v. W. H. COOPER, ADMINISTRATOR, AND THE HEIRS AT LAW OF NEILL McNAIR, DECEASED.

(Filed 21 November, 1917.)

1. Limitation of Actions — Statutes — Executors and Administrators — Frauds—Heirs at Law.

While the law invests an administrator with a certain discretion as to pleading the statute of limitations, it is required of him that he act in perfectly good faith, free from coercion, undue influence or collusion; and where fraud and collusion are therein shown by and between him and a creditor of the estate, the heirs at law may set aside the judgment accordingly rendered and plead the state in their own behalf.

2. Same—Evidence—Trials.

Fraud may be inferred from the facts and circumstances established, and evidence is sufficient upon the question of failure of an administrator to plead the statute of limitations against a judgment rendered against his intestate in the intestate's lifetime, in fraud and collusion with the judgment creditor, which tends to show that the administrator was the justice of the peace who rendered the judgment, and was then, and has continued to be, directly and indirectly, in the employment of the judgment creditor; that he permitted a judgment to be rendered against the estate on the former judgment which could have been collected at any time, at the suggestion of the plaintiff's attorney, a few hours after the summons had been issued, without investigating as to payment, though suggested by the justice of the peace at the time, and that he had assumed the correctness of the plaintiff's statements in regard to the matter and had not mentioned it to the heirs at law, which he could readily have done, who did not have an administrator appointed because they had been told by the intestate that he had no debts.

CIVIL action, tried before *Webb, J.,* at March Term, 1917, of SCOTLAND, upon these issues:

1. Were the judgments rendered by S. W. Covington, J. P., and referred to in the complaint, rendered through fraud upon the part of the defendant W. H. Cooper, or through collusion between the plaintiff and said W. H. Cooper, administrator? Answer: No.

2. In what amount is the defendant W. H. Cooper, administrator, indebted to plaintiff? Answer: Yes, in the amount set forth in the complaint.

From the judgment rendered, the defendants Walter Leitch and others appealed.

G. B. Patterson and Cox & Dunn for plaintiffs.
McIntyre, Lawrence & Proctor for defendants.

BROWN, J. The only assignment of error is directed to the charge of the court upon the first issue — that there is no evidence of collusion, and directing the jury to answer that issue "No."

This proceeding is brought to subject the lands of Neill McNair, deceased, to the payment of certain judgments ob- (567) tained originally by plaintiff against said Neill McNair, and which were duly docketed in Superior Court on 24 October, 1898. No executions were issued and no homestead set apart. No effort was made to collect the judgments until after death of Neill McNair in 1914. On 25 September, 1915, the defendant W. H. Cooper was duly appointed administrator of Neill McNair. Thereupon on same day plaintiff instituted actions before a justice of the peace on said judgments against said administrator and obtained judgments. No answer was filed and no defense was interposed. On 12 July, 1916, this proceeding was instituted against the administrator and heirs at law of Neill McNair to sell the lands of the deceased to pay the judgments. The defendants, heirs at law, in their answer, aver that said judgments are barred by statute of limitations, and that the administrator failed to plead same, as it was his duty to do, by reason of fraudulent collusion with plaintiff.

We are of opinion that the court erred in directing a verdict for plaintiff as there are facts and circumstances in evidence sufficiently strong in probative force to carry the case to the jury.

It is well settled in this State that the heirs at law may attack any claim allowed by an administrator, even if reduced to judgment, if it can be shown that the judgment was rendered through fraud and collusion between the plaintiff and the administrator.

In *Proctor v. Proctor,* 105 N.C. 224, it was said: "The question thus left open was decided in *Speer v. James,* 94 N.C. 417. . . . It is there held that the heir is bound by the judgment against the

administrator unless he can show that it was obtained by collusion and fraud."

In *Person v. Montgomery,* 120 N.C. 111, it was said: "They (the heirs at law) are also at liberty to dispute and contest the liability of their ancestor's estate to the debts for which his lands are sought to be sold, *and even to plead the statute of limitations* against the debts claimed to be due unless they have been reduced to judgment; and if fraud and collusion can be shown between the administrator and creditor, it may be pleaded where there has been judgment."

In *Best v. Best,* 161 N.C. 516, it was said: "When the claim is evidenced by a subsisting judgment against the administrator, the heir is concluded as to its validity unless the judgment can be successfully assailed on the ground of fraud and collusion or 'collusive fraud,' as expressed in some of the cases. This position, as laid down in *Speer v. James,* 94 N.C. 417, correcting an erroneous impression to the contrary which had been made by *Bevers v. Park,* 86 N.C. 588, has been again and again affirmed by this Court and may be taken as accepted law with us. *Lee v. McKoy,* 118 N.C. 518; *Byrd v. Byrd,* 117 N.C. 523; *Smith v. Brown,* 99 N.C. 377." To the
(568) same effect are: *Tremble v. Jones,* 7 N.C. 579; *Long v. Oxford,* 108 N.C. 280; *Tilley v. Brown,* 112 N.C. 348.

While an administrator is invested with a certain discretion as to whether he will plead the statute of limitations, the law requires that he act in perfectly good faith and free from coercion, undue influence, or collusion. *Pate v. Oliver,* 104 N.C. 458; *Williams v. Maitland,* 36 N.C. 92.

There is evidence that defendant Cooper, as a justice of the peace, rendered the judgments obtained in 1898, and that at that time he was clerk and bookkeeper for plaintiff. He qualified as administrator in 1915 at the request of plaintiff's attorneys. The administration bond was executed by plaintiff's son and bookkeeper. At that time and since Cooper has been cashier of a bank in Laurinburg controlled and practically owned by the plaintiff. The judgments were rendered against Cooper as administrator within a few hours after his qualification and without the knowledge of the heirs at law who resided in Laurinburg and were well known to Cooper as well as plaintiff.

The administrator made no investigation whatever to ascertain whether the old judgments had ever been paid. Summonses were served upon the administrator about 1 o'clock, returnable at 3 o'clock. The administrator appeared before the magistrate, where he met the attorneys for plaintiff. The only investigation made by the administrator was to look at the complaints. He did not even ask the plaintiff if the judgments had ever been paid or were still

due. On the trial below, the administrator testified that he made no investigation because the complaints filed by plaintiff before the magistrate were sworn to by the plaintiff, and that he took his word, but an inspection of the original complaints which were offered in evidence disclosed the fact that the complaints were not only not sworn to, but were not even signed by John F. McNair.

The justice of the peace offered to give Cooper time to look into the matter if he desired, but he did not request it. He knew the judgments were barred by the statute, as he had rendered them himself in 1898 when he was a justice of the peace. Cooper, also, knew the condition of Neill McNair, and that the judgments could have been collected at any time before they were barred. He made no defense to the actions and never mentioned them to the heirs at law, although he saw some of them frequently. Afterwards, when reproached by one of them, he said he did just what the lawyers asked him to do. There is evidence that the heirs at law made no effort to have an administrator appointed because Neill McNair told them not long before he died that he did not owe any debts.

The nature of fraud is such that it can seldom be established by direct positive proof. In order to establish it, it is not necessary that direct affirmative or positive proof be given. In matters that regard the conduct of men the certainty of mathematical (569) demonstration cannot be required. Like much of human knowledge, fraud may be inferred from facts and circumstances established. This means no more than that the proof must create a belief and not merely a suspicion. *Perry v. Ins. Co.*, 137 N.C. 404.

There is ample evidence in this record from which an impartial and prudent administrator would have been justified in concluding that the judgments had long since been paid. In such case it would be his moral duty to protect the estate by interposing the statute of limitations. It is not a nefarious plea, but frequently a just and beneficient one. While lapse of time may destroy the evidence of payment and death may claim those by whom it can be proved, nevertheless, as compensation, the law wisely raises a legal barrier which renders such evidence no longer necessary. That barrier the heirs at law have interposed in this case. If they have been denied the protection of it by reason of collusion or coercive influence, they can still have the benefit of it.

Upon the evidence, the judge should have submitted the issue to the jury under proper instructions.

New trial.

Cited: Twiddy v. Mullen, 176 N.C. 17; *Coleman v. Vann*, 205 N.C. 437.

GEORGE E. GILL ET AL. V. A. W. PORTER AND WIFE.

(Filed 21 November, 1917.)

Partition—Sole Seizin—Defense Bond—Waiver—Motions—Notice—Judgments—Time Extended—Appeal and Error.

Where, upon plea of sole seizin before the clerk, in proceedings to partition lands, the defendant in possession is allowed to file answer without objection, and no demand for the defense bond is made, and the cause has been transferred to the civil issue docket for trial, the defendant is entitled to notice of a motion to strike out the answer and for judgment by default, and when notice has not been given and the motion for judgment allowed, it will be ordered stricken out on appeal and a reasonable time given for the filing of the bond required by law.

PETITION for partition, heard before *Webb, J.*, at March Term, 1917, of RICHMOND, upon a motion to strike out the answers of defendants Porter and wife for failure to file a defense bond, and for judgment for want of an answer. The motion was allowed and the answers were stricken from the records. Attorneys for defendants, in apt time and before the order was made, asked for time within which to file bond, which motion was denied. Defendants excepted. Thereupon judgment by default for want of an answer was rendered. Defendants excepted and appealed.

(570) *J. G. Mills, Manning & Kitchin, and A. R. McPhail for plaintiffs.*

Stack & Parker and W. S. Loudermilk for defendants.

BROWN, J. This is a special proceeding, returnable before the clerk, and the pleadings were made up and filed before him. The defendant Mae H. Porter filed her answer on 14 January, 1917, pleading sole seizin. At the time of filing their answer, defendants failed to file a defense bond as required by law when sole seizin is pleaded in partition proceedings. *Haddock v. Stocks*, 167 N.C. 70.

No motion to strike out the answer for lack of bond and for judgment by default was made before the clerk. The clerk transferred the cause to the trial term docket, and the case was first called at March Term, 1917, when the judgment was rendered. No previous notice of the motion was given defendants.

The answer had been filed some seventy-four days prior to the motion in the Superior Court. No objection was made before the clerk to the filing of the answer and no demand made for a bond. This constituted a waiver of the bond to such an extent at least that defendants were entitled to notice of the motion and to a reasonable time within which to file the bond. The exact point is decided in

McMillan v. Baker, 92 N.C. 110; *Cooper v. Warlick,* 109 N.C. 672; *Beckton v. Dunn,* 137 N.C. 559.

In the last case it is said: "Even when an answer has been filed without any bond, and has remained on file for some time without objection, it is held to be irregular to strike it out and give judgment without notice or rule to show cause, or without giving the defendant opportunity to file a defense bond."

The judge should have granted defendant's motion for time to file bond.

The judgment of the Superior Court is set aside and the cause remanded with instructions to allow defendants to file a justified bond, to be approved by the clerk, within twenty days after this opinion shall be received in the office of the clerk of the Superior Court.

Reversed.

Cited: Rich v. R. R., 244 N.C. 181; *Motley v. Thompson,* 259 N.C. 617.

(571)

C. A. BARBEE v. GEORGE T. PENNY ET ALS.

(Filed 21 November, 1917.)

1. Appeal and Error — Motions—Judgments—Pleadings—Objections and Exceptions.

Exceptions should be noted to the refusal of the trial judge to grant a motion for judgment upon the pleadings and reserved for final judgment and appeal, and an appeal does not presently lie.

2. Wills—Donee of Power—Excess of Power—Contracts—Assent of Cestui Que Trust—Expenditures—Account—Compensation.

A power in a will given the executors to sell off a tract of land, dividing it into smaller lots, etc., does not authorize the executors to enter into contract with real estate dealers to lay off land into streets and lots, nor will authority likewise conferred by the other beneficiaries permit the executors to exceed the power given them in the will; but where the land company has expended money to lay off the land into streets and lots, with expenditures of money enhancing the value of the whole, under the contract with the executors, with the approval of some of the beneficiaries, in an action brought by the latter, in which the others are subsequently joined, all being of full age, the land company is entitled to just compensation upon account taken.

3. Trusts and Trustees — Excess of Powers — Parties — Statutes—Cestui Que Trustents.

Where the question involved in the controversy is whether the trustee of an express trust has exceeded his authority, it is necessary to join the *cestuis que trustent* in the action, and Revisal, sec. 404, has no application.

4. Pleadings—Several Defendants—Admissions as to Some—Trials.

Where some of the *cestuis que trustents* have acquiesced in a contract made by the donees of a power under a will, and thereafter they bring action to set the transaction aside, on the ground that the power had been exceeded, in which the other *cestuis que trustents* are afterwards made parties defendant and admit the allegations of the complaint: *Held*, the admissions made by the defendants, *cestuis que trustents*, do not bind their codefendant, and the latter are entitled to have the jury pass upon the issues raised by them.

APPEAL by plaintiffs from *Long, J.*, at April Term, 1917, of GUILFORD.

Brooks, Sapp & Kelly for plaintiffs.
King & Kimball for defendants.

CLARK, C.J. This case was before the Court, *Barbee v. Penny*, 172 N.C. 653, when the case was remanded to make additional parties. The new parties, who are cobeneficiaries with the original parties under the will of Mrs. Barbee, filed an answer admitting all the allegations in the complaint. A motion was thereupon made for judgment upon the pleadings, which was denied, and the plaintiffs were taxed with the costs, from which this appeal is taken.

The testatrix named three of her sons as executors, with (572) directions to lay off a certain 150-acre tract into lots, of such size as they should deem best, for sale, with provision that any of her children could purchase before the sale, in accordance with a specified method of valuation, the purchase price to be charged against each child so buying in settlement of his distributive share, and with further directions that her children should have a voice in the management of the estate, the majority to decide. It was held on the former appeal that the executors were given the naked power of sale, with the legal title in all the heirs, subject to be divested upon proper execution of the power, and that when the executors have entered into an agreement for the sale of the lands at a price named, with a specified rate of commission, and they brought this suit to set aside such contract, alleging lack of power, on the demand of the other heirs at law for cancellation it was held that the other children of the testatrix, the beneficiaries of the trust,

are necessary parties, and the case was remanded in order that they should be joined, it being held that Revisal 404, providing that a trustee of an express trust may sue without joining the *cestui que trust* does not apply when the question to be determined is, as in this case, whether the trustee has exceeded his authority.

It appears in this case that the new parties defendant were all of full age, and there was vested in them the entire, unqualified and unconditional estate in the land involved in this controversy at the time that they executed the power of attorney to the executors vesting in them full powers in regard to the laying off and sale of the property in question. It is alleged in the answer of the original defendants that said executors, with the knowledge and assent and approval of the other heirs, executed the agreement with the defendants, who are auctioneers, to lay out said 150-acre tract of land, dividing the same into 560 lots, and that through this property have been constructed by them numerous streets and walks, and that they have advertised the same extensively, all of which at a cost of several thousands of dollars; and, besides, they have expended time, as they allege, to the value of $2,500, and by reason of these outlays they allege the sale value of the land has benefited more than the amount of cash and value of time expended. The original defendants further aver that the plaintiffs, the executors, with the consent and approval of the other beneficiaries, fixed minimum prices on said lots, and approved the contract made with the defendants.

The allegation in the complaint that said contract should be set aside because the executors had no authority to execute the same without the assent of the other heirs is denied by the auctioneers, the original defendants. The fact that such other heirs than the executors, since they have been made defendants, have filed an answer admitting the allegations of the complaint, cannot have the effect to deprive the auctioneers, the original parties de- (573) fendant, of the right to have the issues arising upon the pleadings submitted to a jury, and the court therefore properly refused the motion for judgment upon the pleadings.

In *Duffy v. Meadows,* 131 N.C. 33, it was held that "The refusal of judgment upon complaint and answer is not appealable," the Court saying: "The correct practice would have been to note an exception to the refusal, so as to have it considered on appeal from the final judgment. *Walker v. Scott,* 106 N.C. 56; *Cooper v. Wyman,* 122 N.C. 784; *S. c.,* 65 Am. St. 731; *Cameron v. Bennett,* 110 N.C. 277." Counsel, however, ask us to express an opinion upon the point, which we sometimes have done, even when the appeal must be dismissed. *S. v. Wylde,* 110 N.C. 500; *Milling Co. v. Finlay, ib.,* 411, and cases citing these. See Anno. Ed.

We are of the opinion that the authority in the will conferred upon the executors to divide the 150-acre tract into lots, and to sell the same off, did not give the executors power to make the contract with the auctioneers which this action is brought to set aside. Nor does the authority conferred by the other heirs authorize the executors to exceed the powers conferred by the will. The defendants, having relied upon such action of the executors, and upon the confirmation of their conduct by the other heirs, are therefore entitled to a just allowance for the expenditures which they have made, in reliance upon the contract with the executors, approved by the other heirs at law; and as they are all of full age, when the case goes back an account will be taken to ascertain what is a just allowance in this respect. *Cozad v. Johnson,* 171 N.C. 637, 644.

Appeal dismissed.

Cited: Duffy v. Hartsfield, 180 N.C. 152; *Corp. Comm. v. Mfg. Co.,* 185 N.C. 23; *Pender v. Taylor,* 187 N.C. 251; *Gilliam v. Jones,* 191 N.C. 622; *Erickson v. Starling,* 235 N.C. 658.

THE SWAMP LOAN AND TRUST COMPANY v. FLORA E. YOKLEY ET AL.

(Filed 21 November, 1917.)

1. Usury—Statutes.

An express or implied loan, upon the understanding that the money shall be returned, at a greater interest rate than the statute allows, whatever the form of the transaction, and with corrupt intent on the part of the lender, is usury, under our statute, the corrupt intent consisting in "taking, receiving, reserving, or charging" a greater rate than that allowed by law. Revisal, sec. 1951.

2. Same — Commissions — Banks and Banking—Certificate of Deposits—Trials—Evidence.

Under an agreement made with a bank, an insurance company deposited money upon a 6 per cent certificate of deposit, which the bank loaned to its customer upon his note, bearing the legal rate upon its face, which was pledged to the insurance company as additional collateral to its certificate. The bank charged its customer a greater rate of interest than allowed by statute (Revisal, sec. 1951), in which the insurance company did not participate, looking only to the bank for the rate of interest stated on the certificate. In an action on the note the maker pleaded the usury statute, the plaintiff bank claiming the difference as its commission in negotiating the loan: *Held,* the transaction between the bank and its customer was usurious, as a matter of law.

3. Usury—Statutes—Commission—Evidence—Trials—Questions for Jury.

Where, in an action upon a note, the defendant pleads the usury statute (Revisal, sec. 1951), and the evidence is sufficient to sustain a verdict that the excess of interest was a proper charge made for negotiating the loan, the question should be submitted to the jury.

4. Appeal and Error—Instructions—Reference—Findings—Trial by Jury—Waiver.

Where instructions of the court to the jury are excepted to, and the case referred, a new trial will not be granted on appeal, for error, when it appears that the facts found by the referee, upon sufficient evidence, covered this phase of the controversy, the report confirmed by the judge, and the right to a trial by the jury waived by the party in failing to demand it in proper time.

5. Reference—Exceptions—Trial by Jury—Waiver.

A party who has excepted to the report of a referee may not have the judge pass upon his exceptions, without objection, and then demand that proper issuances covering his exceptions be submitted to the jury for determination if the decision is unfavorable, for such is a waiver of his constitutional right thereto.

6. Judgments—Estoppel—Bills and Notes—Separate Transactions.

Where notes are given in different and unconnected transactions between the same parties, a judgment in an action on one of them is not an estoppel to an action on the other; and the same is true when the benefit from the only matter involved in both is disclaimed by the party sought to be estopped, and the former judgment amply protects the party setting up the estoppel.

APPEAL by plaintiff from *Webb, J.*, at May Term, 1917, of UNION. (574)

This is an action on a note executed by the defendants to the plaintiff, Savings, Loan and Trust Company.

The defendant relied on the plea of usury.

The plaintiff filed a reply to the answer of the defendants, in which it, in substance, alleged that the loan to the defendants was made by the Security Life and Annuity Company, and that the plaintiff negotiated the loan and charged 1 per cent as commissions therefor.

The action came on for trial at August Term, 1916, when the following verdict was returned by the jury:

1. Was the loan represented by the note sued on in this action made to the defendants by the Security Life and Annuity Company? Answer: No.

2. Are defendants estopped to maintain the defense asserted in this action by reason of the defense pleaded in an- (575) other action between the same parties? Answer: No.

The verdict was returned under an instruction from his Honor

directing them to answer both issues in the negative if they believed the facts testified to by the witnesses, to which the plaintiff excepted.

His Honor, then, over the objection of the plaintiff, made an order of compulsory reference to state the account between the plaintiff and the defendants.

The referee appointed in the order, after hearing evidence for the plaintiff and the defendants, made his report to a subsequent term of the court, in which he found the facts as contended for by the plaintiff.

The defendant filed exceptions to said report. The exceptions were heard and were sustained, the judge finding the facts as contended for by the defendants.

The plaintiff moved for a confirmation of the report of the referee, but stated that if the report was not confirmed it desired to note exceptions and formulate an issue or issues to be submitted to a jury.

There was no objection made to the court hearing and passing upon the exceptions of the defendant to the report, nor did the plaintiff tender any issues upon the exceptions, nor ask for any issues to be submitted to a jury until after the judge had heard and passed upon the exceptions.

At a subsequent term of the court the defendants moved for judgment upon the record, and the plaintiff requested that certain issues be submitted to the jury. His Honor granted the motion of the defendants and entered judgment in their favor, to which the plaintiff excepted and appealed.

Redwine & Sikes for plaintiff.
Stack & Parker for defendants.

ALLEN, J. "In order to constitute a usurious transaction, four requisites must appear: (1) There must be a loan, express or implied; (2) an understanding between the parties that the money lent shall be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid, as the case may be; and (4) there must exist a corrupt intent to take more than the legal rate for the use of the money loaned. . . . A profit greater than the lawful rate of interest, intentionally exacted as a bonus for the loan of money, imposed upon the necessities of the borrower in a transaction where the treaty is for a loan and the money is to be returned at all events, is a violation of the usury laws, it matters not what form or disguise it may assume." *Doster v. English,* 152 N.C. 341, approved in *Monk v. Goldstein,* 172 N.C. 519.

The corrupt intent consists in knowingly "taking, receiving, reserving, or charging a greater rate of interest than 6 (576) per centum per annum." (Revisal, sec. 1951; *McRackan v. Bank*, 164 N.C. 26); and "Where there is negotiation for a loan of money, and the borrower agrees to return the amount advanced at all events, it is a contract of lending; and however the transaction may be shaped or disguised, if a profit or return beyond the legal rate of interest is intended to be made out of the necessities or improvidence of the borrower, or otherwise, the contract is usurious." *McRackan v. Bank, supra.*

Applying these principles to the evidence, we are of opinion his Honor held correctly, that in any view of the evidence the plaintiff, the Savings, Loan and Trust Company, made the loan to the defendants, and not the Security Life and Annuity Company, and that the transaction is usurious.

The evidence shows that the defendants applied to the annuity company and were refused the loan; that the annuity company then agreed to advance the money to the trust company to be lent to the defendants upon condition that the trust company would issue to the annuity company a certificate of deposit for the amount and attach the note of the defendants as collateral; that, pursuant to this agreement, the money was sent to the trust company, and the certificate of deposit and the note executed and delivered; that the note was payable to the trust company; that an agreement for extension of time was made with the trust company; that renewal notes were excepted to the trust company; that all payments made by the defendants were made to the trust company; that the trust company entered the transaction on its books, and while it at first charged the excess over 6 per cent as commissions, it afterwards charged it as interest; and that the defendants at first paid to the trust company 7 per cent on the loan, and afterwards 8 per cent.

Mr. Brimsley, an officer of the annuity company, who acted for the company in the transaction, testified, among other things: "I told them (defendants) we could not handle the paper they offered us; that we wanted to accommodate them, but I suggested that we could do it if they could get the Savings, Loan and Trust Company to handle it for them; we could take a certificate of deposit from the Savings, Loan and Trust Company at 6 per cent. We afterwards did that, made the deposit, and got the certificate, and we got the note of Payne and Kochtitzky *as further security.*"

On cross-examination, he said: "When Kochtitzky came to see me, he wanted to borrow from us, but could not give proper security. He wanted to give personal security, and we wanted real-estate mortgage. We then proceeded to lend the money or deposit

the money with the Savings, Loan and Trust Company and take a certificate of deposit from the Savings, Loan and Trust Com-
(577) pany. Then they made the loan to Payne and Kochtitzky, taking Payne and Kochtitzky's note as collateral security. In other words, we made the loan to the Savings, Loan and Trust Company and took those certificates of deposit introduced in evidence. When we collected interest from time to time we collected that from the bank and made demand on the bank. Nothing was said to me by the Savings, Loan and Trust Company as to what rate of interest they were making the loan."

And, again, he said: "We never had any arrangements with Payne and Kochtitzky as to what rate of interest they were to pay the Savings, Loan and Trust Company. We never had any arrangements with Payne and Kochtitzky as to the rate of interest we were to receive. We didn't look for interest from anybody but the Savings, Loan and Trust Company. When this certificate of deposit became due we did not make the demand on the Savings, Loan and Trust Company. We carried it on for some years. They got after Payne and wanted to collect from Payne, and he came to us and wanted us to deposit more money with them, and we did that, and they gave us the certificate of deposit."

Mr. Clark, cashier of the trust company, testified: "When the money was sent down here and deposited, it was deposited in our bank by the Security Life and Annuity Company, and we then issued a certificate of deposit to them. Then we got Payne and Kochtitzky, and they gave us a note.

The notes ran for twelve months. At the end of every twelve months we had them give us a new note, and every one of them was made to the Savings, Loan and Trust Company. We allowed the same certificate of deposit to stay on, and did not give a new one. This note sued on is a part of the original transaction."

Later, referring to the amounts collected by plaintiff from Payne and Kochtitzky, he said: "In May, 1914, I quit calling one of them commissions and called them both discounts. On 8 June, 1914, . . . we charged them $83.43, at that time, as discount on the note sued on. It is down here as discount. I think that figures out at the rate of 7½ per cent. . . . 9 June, 1915, is the next entry — T. J. Payne, $141.66 twice. That was on this $2,500 note. That shows interest at the rate of 7½ per cent. We credited the Security Life and Annuity Company on our books with $5,000, and issued a certificate of deposit for it."

One of the defendants testified: "We could not borrow the money from the insurance company. We borrowed it from the plaintiff. Mr.

Grimsley said he would not lend the money without real-estate security."

Under this evidence, the money received by the defendants was the property of the trust company, and as there was an agreement to repay, it is a loan, and a greater rate of interest than 6 per cent being reserved, it is usurious. (578)

If the transaction was of doubtful character, we would agree with the plaintiff that it ought to have been submitted to the jury, and if made to appear that the trust company was doing no more than charging a reasonable commission for negotiating a loan made by the annuity company, would uphold it, but this is not a reasonable inference, from the evidence.

If, however, the instruction of his Honor was erroneous and the verdict should be set aside, the plaintiff would be in no better position, because his Honor found the facts against the plaintiff on exceptions to the report of the referee, and these facts are sufficient to support the judgment. He made the following rulings and findings, which appear in his judgment:

"Defendants' objections and exceptions to finding of fact No. 3 is allowed, and the finding stricken out and the following substituted therefor: 3. On or about 3 March, 1910, the Security Life and Annuity Company deposited $5,000 in the Savings, Loan and Trust Company, for which it received a regular certificate of deposit, bearing interest at 6 per cent per annum. The plaintiff made a loan of $5,000 to O. W. Kochtitzky and T. J. Payne, taking their note for said amount, with W. C. Heath as endorser, said note bearing interest at 6 per cent from date on its face, but 7 per cent interest being in reality charged and collected thereon, per annum, by the plaintiff. The latter deposited this note with the said insurance company as collateral to the said certificate of deposit.

"The findings of fact, as they stand, under these rulings, and amendments, are to the effect that plaintiff made the loan, a part of the time at 7 per cent interest per annum, a part at 8 per cent; that such rate of interest was paid, and giving the respective amounts, in dollars."

These findings of fact are supported by evidence and are conclusive upon us, and the plaintiff waived his right to have a jury trial upon them by failing to demand a jury upon the exceptions.

The plaintiff could not take its chance with the judge for a favorable decision, thereby consenting that he should hear the exceptions, and then ask for a jury trial if the decision was unfavorable.

The question was passed upon and decided in *Robinson v. Johnson,* at this term, in which, upon a similar state of facts, the Court says: "Plaintiffs have clearly waived their constitutional right to the

trial of the issues in the case by a jury, as they failed to except to the referee's report, and did not tender any issues at all, not even on the defendants' exceptions. This was really tantamount to an agreement on their part that the judge should pass upon the defendant's exceptions without a jury."

We are also of opinion that the plea of estoppel cannot (579) avail the plaintiff.

The parties in the former action were the same as in this, but the note sued on was a different one, and the transaction, so far as the records show, not connected with the loan in the present case.

The issues, therefore, were not the same, and the only reference in the former action to any item or fact in this is as to an item of $812.12, and the defendants in the present action stated at the trial of the issues that they did not ask any recovery on account of this item, and the possibility of any benefit therefrom is provided against in the judgment.

We find no error.

Affirmed.

Cited: Baker v. Edwards, 176 N.C. 231; *Ins. Co. v. Smathers,* 212 N.C. 41; *Bank v. Merrimon,* 260 N.C. 338.

CHARLES A. RAGLAND v. LASSITER-RAGLAND, INC., AND R. G. LASSITER.

(Filed 21 November, 1917.)

1. Reference—Account—Statutes—Trial by Jury—Appeal and Error.

Where the controversy involves the taking of a long account, it should be referred under the provisions of Revisal, sec. 519; but where, as in this case, it has otherwise been tried, without error or prejudice to the appellant, the judgment of the lower court will not be disturbed.

2. Insurance—Premiums—Beneficiaries—Payment—Contracts, Expressed or Implied—Accounts.

Where one has taken out a policy of insurance on the life of another for his own benefit, under an agreement, expressed or implied, from the form and nature of the contract, and the purpose for which, and the circumstances under which, it was taken, that the premium should be paid by the beneficiary, and not by the insured, the latter, as between the parties, will not be liable therefor; and where there is evidence that a partnership concern had taken out an insurance policy on the life of one of its members actively engaged in its business, for its own benefit, and, voluntarily and without the request of the insured, a corporation, which

succeeded it, had paid the premium, in the shareholder's action for an account and settlement it is reversible error for the judge to charge the jury that the item for the premium paid was a proper charge against the plaintiff, it being a question for the jury to determine what the agreement was in this respect, under proper instructions from the court.

3. Instructions—Issues—Appeal and Error—Verdict Set Aside—Reference —Statutes.

In an action for an account and settlement, brought by a shareholder against a corporation, the judge erroneously charged the jury upon one issue which affected the whole amount assessed thereunder, to the plaintiff's prejudice: *Held*, the judgment and verdict as to this issue will be set aside, and as its determination requires the ascertainment of a long account between the parties (Revisal, sec. 519), a reference is suggested, unless the parties should themselves render it unnecessary by agreement as to this issue.

4. Same—Verdicts—Courts—Volition of Parties.

In this action for account and settlement, brought by a shareholder against a corporation, the issues as to the value of the shares of the stock and as to a certain credit were involved, the court charging erroneously, to plaintiff's prejudice, on the second one, which involved the correctness of the first, but which, it seems, could be corrected as a matter of calculation: *Held*, the court cannot correct the verdict, which the appellee could do, in this case, on his own volition, or the plaintiff, with his consent.

CIVIL action, tried before *Kerr, J.*, and a jury, at April Term, 1917, of GRANVILLE. (580)

The plaintiff brought this action for the purpose of having an accounting and settlement with Lassiter-Ragsdale, Inc., of which company he was a shareholder. The jury returned the following verdict:

1. How many shares of stock does plaintiff own in the defendant company? Answer: Fifty shares.

2. What is the value of the plaintiff's stock in the defendant company? Answer: $103 per share.

3. Is plaintiff indebted to the defendant company? If so, in what sum? Answer: $4,650.

Judgment in favor of plaintiff for $500 and costs, only, and he appealed.

Hicks & Stem and T. T. Hicks for plaintiff.

B. S. Royster and Parham & Lassiter for defendant.

WALKER, J. The case involved the taking of a long account, and it would perhaps have been better to refer it, under Revisal, sec. 519, which provides: "Where the parties do not consent, the court may, upon the application of either, or of its own motion, direct a

reference, where the trial of an issue of fact shall require the examination of a long account on either side, in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein." If this had been done, many of the questions would have been eliminated, and the trial of the issues before the jury would have been restricted more clearly to the real controversy, and much irrelevant matter would have been excluded. But we do not see that the plaintiff has been prejudiced by the course adopted. The testimony as to his conduct in Fairmont and other places was competent as tending to show neglect of his duties to the company and a too free expenditure of money. It may be that this testimony was prejudicial to the plaintiff, and very likely it was so, but it was nevertheless relevant. The other objections, except one, relate largely, if not altogether, (581) to questions of fact and questions of evidence, and have no substantial merit. There was no reversible error in respect to them.

Plaintiff was charged with $419, the amount of the premium of policy taken on his life for the benefit of the copartnership of Lassiter & Ragland, and payable to them, their successors and assigns. The court charged the jury that when the copartnership was dissolved the policy was payable to C. A. Ragland and his successors, meaning his heirs at law, and not to Lassiter-Ragland, Inc., but that the plaintiff was chargeable with the amount of the premium ($419) paid by the corporation. The firm of Lassiter & Ragland having ceased to exist, if, as the judge instructed the jury, Ragland was entitled to the policy, we do not see how he could be responsible to the company for the premium. If he had asked the company to pay it for him, a different question would be presented, for then he would be liable for money paid at his request. If the company chose to make a voluntary payment to the insurance company, it could not recover the amount from the plaintiff unless in some way he had ratified what had been done for him, or had, with knowledge of the fact, accepted and retained the benefit of the payment, if there was any such benefit. It would seem, from his testimony, there being none to the contrary, that the policy was taken out for the sole benefit of the copartnership as a business concern, with the expectation and understanding that the firm would itself pay the premiums. Ordinarily, the insured is liable for the premiums, and if he is under an obligation to keep the policy in force and fails to do so, he would be liable for the resulting loss to the beneficiary. 25 Cyc. 751; *Ainsworth v. Backers,* 5 Hun. (N.Y.) 414; *Brown v. Price,* 4 C. B. (N.S.) 598; *s. c.,* 93 E.C.L. 598; *National Assu. Association v. Best,* 2 H. & N. 605 (27 L.J. Exch. 19); *In re Archer,* 14

Ch. Div. 603. If it was agreed, either expressly or by implication, from the form and nature of the contract, and the purpose for which, and the circumstances under which, it was taken, that the premiums should be paid by the beneficiaries, and not by the insured, the latter, as between him and them, would not be liable for their payment. It would seem, from the evidence, if true, that there was such an understanding between these parties, and if there was not, we discover no evidence upon which the court could charge, as matter of law, that the plaintiff was liable to Lassiter-Ragland, Inc., for the amount paid by them. The facts must be found before the liability can be determined, and a peremptory instruction was not proper. This error requires that there should be a new trial as to the third issue, as the error affects the whole amount assessed under that issue, and there was one solid sum given for all the damages. It is said in *Rowe v. Lumber Co.*, 133 N.C. at pp. 443 and 444: "The issue submitted at the first trial was, 'Are the plaintiffs the owners of the land in controversy, or any part thereof, and (582) if of any part, what part?' The answer to that issue was 'No.' There were three tracts of land in dispute, and if an error was committed as to any of them this Court must of necessity give a new trial as to all, though there may have been no error committed as to one of them. This results from the form of the issue. If a separate and distinct issue had been submitted as to each tract, and an error had been committed as to one only, the court even in that case could have given a general new trial, but in its discretion could have restricted a new trial to the issue or issues as to which the error was committed. When the issue is general, embracing within its scope several distinct pieces of property or tracts of land, the new trial must be general, because the issue, and consequently the verdict, are in their very nature indivisible. This seems to have been expressly decided. *Beam v. Jennings*, 96 N.C. 82; *Holmes v. Godwin*, 71 N.C. 306." We cannot amend the verdict, but if defendant will consent to deduct from the verdict and judgment the amount of the premium included in them, the recovery will be so reduced and judgment entered accordingly; otherwise, there will be a new trial, as we cannot amend the second issue so as to show the true value of the stock, after giving plaintiff credit for the amount of the premium charged against him. We cannot compel the parties to agree as to a reduction of the value of a share, under the second issue, but it would seem to be a mere matter of calculation to determine how much the value of the stock, per share, will be diminished by the credit of the amount charged for the premium paid by the defendant corporation, and the consequent withdrawal of so much from the assets of the company. The defendant, however, may elect, without plaintiff's

consent, to deduct from the damages assessed under the third issue the amount of the premium paid by it, and if this is done, judgment will be entered accordingly; otherwise, there must be a new trial. Under the last method of adjustment, defendant will lose the difference in the value of the stock, caused by the subtraction of the amount of the premium, if plaintiff refuses his consent to a proportionate change in the value of the stock, but this cannot be helped by us, as we cannot alter the verdict without his consent; and defendant will have to choose between this and a new trial of the issues. When we allow the plaintiff to have a judgment for the balance found to be due to him, after deducting the amount of premium paid by it, we are only doing what we are asked by the plaintiff to do, and, therefore, his consent to this change is not required, but this is not true as to the value of the stock, which has been found by the jury. The verdict as to that cannot be amended without the consent of both parties that it may be done, so as to fix the value of the stock after the amount of the insurance premium has been
(583) taken from the assets.

We have not considered all the points raised by the plaintiff as to his liability for the amount paid by defendant corporation on the premium. He argues that, upon the evidence, he is not liable, in any view, or at all, for this amount, because there was no request to pay, and the defendant company had nothing to do with the policy or the premium, and it is also suggested that the policy may be void, or that it has expired. However this may be, the charge of the court, as it now stands, cannot be sustained, and this error is sufficient to dispose of the appeal. There will, therefore, be a new trial, unless the defendant consents to a reduction of the verdict and judgment, as above indicated.

If there is a new trial, it will be advisable to refer the case, as it involves the taking of a long account, and the ultimate issues can best be determined in that way, if the right to a jury trial is reserved; and, besides, a jury cannot consider such an account with the facility and accuracy of a referee. No real harm to the appellant seems to have resulted, so far, but it does not follow that he may not be prejudiced in the further progress of the case by a failure to refer.

Error.

Cited: *Sentelle v. Bd. of Ed.*, 198 N.C. 392.

PRESTON L. TAYLOR v. TALLAHASSEE POWER COMPANY.

(Filed 28 November, 1917.)

1. Master and Servant—Employer and Employee—Negligence—Safe Place to Work.

The duty of the master to furnish his servant a reasonably safe place to work cannot be delegated by him to another, so as to escape liability for not performing it; and a failure to exercise due care in performing this duty is negligence, and actionable, if the proximate cause of an injury to the servant.

2. Same—Appeal and Error—Evidence—Harmless Error—Negligence.

Where the evidence, in an action by the servant to recover damages of the master for a personal injury, is that the servant, in the performance of his work, went upon an elevator frame to nail braces thereon, with insufficient standing-room for the purpose; that the elevator was not usually run on such occasions, but, while he was in the proper position necessary to do the work, it was operated, without warning, by an inexperienced employee, struck him on the head and caused the injury complained of, it was sufficient to be submitted to the jury upon the issue of defendant's actionable negligence.

3. Same—Changed Conditions.

Where the evidence tends to show that the plaintiff received the personal injury complained of by the negligent running of defendant's elevator, on the occasion, contrary to custom in such instances, testimony that another employee thereafter, on that day, had done the same kind of work, when the elevator was not running, at his request, is not objectionable, on the principle applying to alterations of machinery, or appliances, made by the master after an injury has been inflicted.

4. Evidence—Damages—Expert Evidence.

Where there is evidence that an employee's injury was proximately caused by the employer's negligence, it may be properly shown, by the opinion of a medical expert, based upon relevant facts, if found by the jury, that the injury was of a permanent character, upon the issue of damages.

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

Exceptions to a part of the charge, though erroneous when considered as detached from other relative parts thereof, will not be held for reversible error, when the charge, considered as a whole, correctly states the principles of law applicable to the issue.

CIVIL action, tried before *Webb, J.*, and a jury, at July Term, 1917, of CLEVELAND. (584)

The action was brought to recover damages for injuries alleged to have been received by the negligence of the defendant. The plaintiff was employed as a carpenter by the defendant. The evidence was somewhat conflicting, and it will better disclose the questions at issue to state what it tended to prove as contended by the respective parties.

This is plaintiff's version of it, or that which he contended should be accepted by the jury:

"The plaintiff, under the direction of defendant's foreman, went upon the elevator frame belonging to the defendant, and in which the defendant operated an elevator for the purpose of carrying brick and mortar for use in the construction of the power-house it was building, to nail certain braces thereon which had become loosened or broken, and in performing said work in the manner he had theretofore been instructed to do, and while engaged in knocking off one of the broken pieces preparatory to nailing on a new piece, and while standing on a narrow piece of scantling only 2 inches wide, a distance of 20 to 30 feet from the ground, was stricken on the back of the head by a rapidly descending elevator, knocked unconscious, fell upon a wheelbarrow on the ground loaded with brick, and sustained injuries which were serious and permanent.

"The evidence further shows that the plaintiff had been sent upon this elevator frame previous to this occasion to make similar repairs, and that the defendant stopped the elevator while the plaintiff was engaged in the work and in this dangerous position, and the plaintiff performed the work in safety. Instead of providing a platform for plaintiff to stand upon, which the defendant's foreman admitted could have been done, the defendant required plain-
(585) tiff to stand upon a scantling 2 x 6, which was turned up edgeways, and make the repairs, and upon this occasion failed to stop the elevator, but permitted it to descend upon the plaintiff without any warning of its approach. The elevator weighed about 1,500 pounds. The defendant operated its elevator by means of a wire cable and a hoister engine, and at this time had an inexperienced and incompetent negro for flagman, who had just gone on duty that day, and there was also evidence tending to prove that the man who was in charge of the engine was a new man and without experience. There was a space of only 5 inches between the scantling on which the plaintiff was standing and the outside edge of the elevator, and plaintiff testified that at the time he was injured he had his arm around one of the 4 x 4 inch posts of the elevator frame and was standing on a piece of plank 2 inches thick by 6 inches in width, and was straightening the nails with his left hand. His head was on the inside, and this was necessary for he had to have 'somewhere to hold and some way to see the nails,' hence it was impossible for any one to stand on this piece of timber and make the repairs while the elevator was passing without being stricken by it, and previously, as plaintiff testified, the defendant had had the elevator stopped and plaintiff notified of its approach, and he would hold to

one of the posts and swing his body out of the way and let the elevator pass."

The defendant takes issue with the plaintiff, and contends that no such inferences of fact as those above detailed should be drawn by the jury, but that the evidence shows rather that the following facts should be deduced by them:

"The plaintiff had a safe place in which to work; he was sent up on the outside of the elevator shaft, and there was no use or occasion whatever for him to put his body, or any part of it, on the inside of the shaft, as all the work being done was on the outside; that he had a good, sound piece of strong bracing to stand upon, and there was at least 9 inches between the bracing and the edge of the elevator as it came down. The plaintiff had done similar work on the same elevator on former occasions, and had even assisted in building the elevator shaft, and hence knew all about the structure, and knew that the elevator was running at the time he was sent up to make the repairs; that if the plaintiff put his head on the inside of the elevator, he did so of his own volition, and he, by doing so, contributed to his own injury. The defendant did not know, and had no reason to believe, that the plaintiff was going to put his head or any other part of his body on the inside of the elevator shaft while doing the work. If the plaintiff had done the work carefully and had taken due precaution for his safety, he would not have been hurt; and, in truth and in fact, the plaintiff was not hit by the elevator, which made it practically impossible for him to have been in the position as he alleges. The plaintiff carelessly (586) and negligently took hold of one of the broken braces — one of the very pieces he had been sent up to repair — and swung his weight on same, which caused his fall and injury."

The jury returned the following verdict:

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

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

3. What damages, if any, is plaintiff entitled to recover? Answer: $5,000.

Judgment was entered thereon, and defendant appealed.

Ryburn & Hoey for plaintiff.
O. Max Gardner and R. L. Smith for defendant.

WALKER, J., after stating the case: We have stated the contentions of the two parties as to the nature of the evidence and what it tends to prove almost in their own language. The jury have passed

upon the different views, and have adopted that of the plaintiff in all its essential features and under a carefully considered charge of the court which covered the case completely in every aspect of it. The exceptions are few and, we think, untenable.

The question asked the witness, Mr. Warren, as to whether he had been ordered to fix the elevator during the afternoon of the day on which the plaintiff was injured, and whether the elevator had been stopped while he was working there, if incompetent, was entirely harmless. The witness stated that he had received such an order, and that the defendant had promised him to stop the elevator while he was at work, and that he did the work without being hurt.

It required no proof to show that if the elevator was not moving it could not injure him, so that in the end his testimony merely tended to prove a self-evident fact. It does not fall within that class of cases where some alteration of machinery or appliance is made to prevent the infliction of an injury. The evidence has some tendency to show that the elevator caused the injury to the plaintiff, and that he had the right to believe that it would not be lowered while he was at work, and also that it was moved by a new and inexperienced operator. There was no change in the elevator and no allegation that it was inherently defective. The only question was whether or not it was the elevator that struck the plaintiff and caused his injuries. The duty to furnish a reasonably safe place for the employee to do his work is a primary one and cannot be delegated, and a (587) failure to exercise due care in performing this duty is negligence, which becomes actionable if it is the proximate cause of an injury. *Marks v. Cotton Mill,* 135 N.C. 287. If the defendant allowed it to descend while plaintiff was underneath, and after he had been induced to believe by previous conduct that it would not be moved, and he was thereby injured, the negligence is clear, and it can make no difference therefore whether they stopped it that afternoon or not, as it would not affect the question of negligence which is apparent from the lowering of the elevator on the plaintiff's head while he was at work, contrary to the custom. *Steel v. Grant,* 166 N.C. 635, directly supports this view.

It was held in *Keating v. Hewatt,* 99 N.E. (Mass.) 479, that an employer is responsible for injury to an employee resulting from the foreman's negligent failure to protect the employee against injury at a machine after an assurance, express or implied, that it would not be moved while he was working at it, and that it could be found by the jury that the injury was due solely to the negligent failure of the foreman to secure this promised protection after he had exposed the plaintiff to danger. For such negligence of the fore-

man the employer is responsible. There would seem to be no doubt as to the principle that if an employer orders his employee to proceed with his work, assuring him of its safety and promising to protect him against a danger which by due care can be avoided, and the employer fails to keep the promise, so that his employee, who relied upon it, is injured without contributory negligence on his part, the latter may recover if injury proximately results.

We have not considered the proposition whether, regardless of any custom or promise to protect the plaintiff from injury while mending the elevator frame, it was of itself negligence to move the elevator while he was there engaged in performing the duty assigned to him, as we do not deem it necessary to do so in view of what has already been said.

The hypothetical questions put to the experts were based upon sufficient evidence of the facts they recited and were competent and relevant to show that the injury was of a permanent nature. *Summerlin v. R. R. Co.*, 133 N.C. 550; *S. v. Bowman*, 78 N.C. 509; *Perkins v. R. R. Co.*, 44 N.H. 223.

The case of *Parrish v. R. R. Co.*, 146 N.C. 125, is directly in point. We there said: "It was necessarily assumed by the very form of the question that the jury might find that whatever injury the plaintiff had suffered was *directly* caused by the fall, and the witness was called upon to state what the physical conditions produced by the fall indicated to his trained and experienced mind as a medical practitioner. We think the evidence comes strictly within the rule admitting expert testimony, or that which is given by a witness having special or peculiar knowledge and skill in (588) the particular calling to which the injury relates, and the competency of the question, as predicated on the hypothetical facts stated, is sustained by the best considered authorities," citing *Logan v. Weltmer*, 180 Mo. 322; *Stouter v. R. R. Co.*, 127 N.Y. 66.

There was no dispute as to the witness, who was a physician, being an expert, and his opinion as to the permanence of the injury could be taken. Besides, the injury was so severe in character that it hardly required expert testimony to show that it would permanently disable the plaintiff.

The exceptions to the charge are without any merit. It is not permissible to select a detached portion of the charge and assign it as error, unless it contains a distinct and independent proposition in itself which is not explained or qualified by the other parts, but the charge must be construed as an entirety; and so construed, we find no error in it, even if the parts selected by the defendant for his exceptions were erroneous, without reference to what preceded or followed them. It is thoroughly well settled that we must look

at the whole charge when construing it for the purpose of ascertaining its meaning. *S. v. Exum,* 138 N.C. 600; *Kornegay v. R. R. Co.,* 154 N.C. 389.

The case has been tried according to correct legal principles applicable to it, and the verdict cannot be disturbed.

No error.

Cited: Beck v. Tanning Co., 179 N.C. 125; *Hill v. R. R.,* 180 N.C. 492; *Beal v. Coal Co.,* 186 N.C. 756; *Perkins v. Wood & Coal Co.,* 189 N.C. 607; *Milling Co. v. Hwy. Comm.,* 190 N.C. 697; *Spivey v. Newman,* 232 N.C. 284; *Mintz v. R. R.,* 236 N.C. 114.

LOW M. RILEY v. W. H. STONE.

(Filed 28 November, 1917.)

1. Appeal and Error—Court's Discretion—Verdict Set Aside—Evidence.

The question as to whether a verdict of the jury should be set aside as contrary to the weight of the evidence is one in the discretion of the trial judge; and if upon sufficient evidence to support the verdict he refuses to do so, his action is not reviewable on appeal.

2. Slander—Justification—Privilege.

Words charging another with a theft are actionable *per se* unless they are true or privileged, and if false and not privileged, the one having spoken them is liable in an action for slander.

3. Same—Burden of Proof—Trials.

Slanderous words falsely uttered are actionable *per se* and imply malice, and where the jury have found under the evidence and proper instructions that they were false, upon the plea of justification, the law holds them to be false, and the plaintiff in the action is entitled to recover his damages unless spoken under a qualified privilege, and then the plaintiff is required to further show that the defendant did not act in good faith, but with malice, or took advantage of the occasion to injure the plaintiff in his character or standing.

4. Same — Qualified Privilege—Master and Servant—Employer and Employee.

Where an employer charges his employee with theft, and calls in a policeman, his communications to the policeman, upon his investigation made in good faith, are of a qualified privilege; but where, from the character of the statements, the manner in which they were uttered and the circumstances, as in this case, malice may be properly inferred, it is sufficient to be submitted to the jury, with the burden on the plaintiff to show malice, or whether the defendant had exceeded his privilege.

5. Slander—Master and Servant—Employer and Employee—Ratification.

Where, in an action for slander, an employer is sought to be made responsible for the acts of his employee, his approval of the acts of the employee is equivalent to prior authority to do them.

6. Appeal and Error—Instructions—Presumptions.

Where, on appeal, the charge of the court has not been sent up, the appellate court will assume that proper instructions upon the evidence had been given the jury.

7. False Imprisonment—Master and Servant—Employer and Employee—Evidence—Questions for Jury—Trials.

Evidence is sufficient in an action for false imprisonment which tends to show that a saleslady in a store was accused of theft by a coemployee and detained in the store after closing hours by the employee telling her she could not go until the arrival of her employer, though she expressed a desire to go for her supper and because of a pain in her back; that upon her employer's arrival he roughly accused her of many thefts, insisted upon a confession, called in a policeman and searched her room with her forced acquiescence by threats of arrest and imprisonment, and as a result of the policeman's remarks in the presence of the employer remained in her room for several days as her choice between that and being apprehended and otherwise restrained her liberty of action.

CIVIL action, tried before *Cox, J.*, and a jury, at March Term, 1917, of CHATHAM. (589)

This action was brought to recover damages for slander, assault, and false arrest, or imprisonment, and was here at a former term of this Court (169 N.C. 421), but was not finally decided. It comes before us now to be decided as to its merits, and the defendant has reserved but one exception, by his motion to nonsuit, which requires us to decide only whether there is any evidence of the slander or false imprisonment, the jury having returned the following verdict:

1. Did John Stone wrongfully imprison the plaintiff, as alleged in the complaint? Answer: Yes.

2. If so, was such wrongful imprisonment authorized or ratified by the defendant? Answer: Yes.

3. If so, what damages, if any, is the plaintiff entitled to recover? Answer: $1,000. (590)

4. Did the defendant Stone speak of and concerning the plaintiff language as alleged in the first cause of action? Answer: Yes.

5. If so, was said language true? Answer: No.

6. Was the language spoken of the plaintiff spoken maliciously? Answer: Yes.

7. What damages, if any, is the plaintiff entitled to recover therefor? Answer: $500.

As the motion to nonsuit is equivalent to a denial that there is any evidence to support the verdict, it will be necessary to state so much of it as bears upon the essential features of the case. It may be said here that there was strong testimony to the effect that plaintiff had been taking different articles from the store from time to time without having them charged to her, as was required by the rules and regulations of the store. The other lady clerks freely and positively testified to having seen her do so, and goods were found in her possession for which she had not accounted. When a clerk desired to purchase anything, it was her duty to charge it on a ticket and send the package and ticket to the cashier by the overhead trolley. There was ample evidence to show that she had frequently violated this rule, and had taken goods away for herself without having any record of the transaction with the cashier. Clerks were allowed a discount on their purchases. The clerks had reported the alleged pilfering of the plaintiff to the defendant, who was manager of the store, and he had requested that a close watch be kept on her. The slander and false arrest is fully described by the plaintiff in her testimony, as follows:

"I live in Greensboro, but formerly lived in Sanford, where my mother and father now live. I was raised there. I was about 22 years old when I went to Greensboro in April, 1911. I first went to work with C. H. Dorsett as saleslady, who was engaged in the mercantile business. I remained with him until 15 September, 1913. I then went to work with Ellis, Stone & Co. as saleslady. They conducted a department store. I had charge of the hose stock at the time I went there. I remained with them until 4 December, 1914. The day on which the matters complained of occurred was a rainy and cold day. We didn't have many customers in the store. Some time between 5 and 6 o'clock Miss Bessie Hampton came in. She said she wanted to purchase a drop skirt. Miss Slack, who had charge of that department, had left the store a short while before. I said, 'I will go with you and show it to you.' We went on the second floor and looked at the skirts and also at some coat suits. We fooled around up there until about twenty minutes past 6 o'clock. I realized that the store
(591) was being closed. We came downstairs and the lights were practically all off. She apologized for keeping me until twenty minutes past six. I did not see any one else in the store, but there was one or two lights left burning. I was in the habit of leaving the store about 6 o'clock, or soon thereafter. I hurried back to the cloakroom and got my umbrella and raincoat and hat and came on out, and came by the counter where I usually kept my pocketbook and got it and was going out of the door. I had my hand on the door. Mr. Hicks was standing up at the front of the store. He

said, 'Little girl, it is raining bad outside and you will get wet.' I said, 'No, I have my umbrella and I don't think I will.' He said, 'I have got something I want to show you. Wouldn't you like to see it?' I said, 'I am a little late, but I will be glad to see it.' For the last two or three weeks he had talked very freely of Christmas presents. He was going with a young lady in the store, and two or three times he had asked me what I thought would be nice to give this young lady for a Christmas gift, and naturally, when he said he had something to show me, I thought that was what it was. We started back in the store. I thought when we walked back in the store that he was going to where there was better light. There was a light burning over the balcony. We went on upstairs, and when we got to where this light was burning I thought we were going into Mr. Hick's office — he was the bookkeeper — but instead of going into the office we turned the other way and went over another short flight of steps and got to the third floor, and then we walked, I guess, the distance of the courtroom back towards the front of the store, and right in the center of the stockroom is what they called the 'Boss's room' — a little room Mr. Stone had built there privately to keep away from the traveling men. We walked in and sat down.

"John Stone (the defendant's son) was floor manager at that time. John came up and walked in and said, 'Hello, Miss Riley; what is this — a little party?' I said, 'No, it is not a little party.' I said, 'It is a thief you have got up here. You sit down, John, and tell me what you have seen me take.' He says, 'I have never seen you take anything, but others have.' I said, 'What others? That is just what I want to know.' He said, 'Well, lot of others; all of the ladies in the store. One lady has been to us three times and told us unless we got rid of you that she would quit her job.' I tried to get John to tell me who had been telling him I had been stealing and what they had been telling him I had been taking, and he said that just all the ladies had; that this one lady had been to them three times and told them that unless they got rid of me she would quit her job; that she would not work in the store with a person of that sort. I said, 'I am sick, my back is hurting me so bad I don't know what to do. Well, it is 7 o'clock, suppose I go to supper.'

"John had already told me that his father would be in on the 7:10 train, and that he would see me, so I asked him (592) to let me go to supper. 'No, you cannot go to supper; you will have to stay here until the boss comes.' So I stayed a little while, I don't know just how long, and Mr. Stone came in. He (Hicks) did not stay in the room until Mr. Stone came. John Stone did, but Mr. Hicks got up and went downstairs. I suppose in about twenty minutes Mr. Stone came up. I do not remember about Mr.

Hicks. Mr. Stone came in and told me that he understood there was some trouble in the office; that he was sorry, and that he knew that I was up there, and that he had been knowing for a long time that I had been stealing, and all he wanted me to do was to confess it to him and tell him all about it. I said, 'Mr. Stone, I have tried my best to explain to the bookkeeper, Mr. Hicks, and John Stone, but they will not listen. I think if you will listen to me a little while I can explain to you just how this trouble occurred.' He said, 'Miss Riley, there is no use explaining, we have facts.' I said, 'What facts?' He said, 'Just plenty of them. I have an itemized statement in my safe of the list of things that you have been taking out of the store.' I said, 'Suppose you get it and show it to me.' He said, 'No, it is too late tonight and we will not trouble about that.' I said, 'Mr. Stone, who has been telling you that I have been taking these things?' He said, 'The ladies in the store.' Said nearly all of them had orders to watch me. 'Your pocketbook has been gone into daily and your pockets have been gone into daily. Your tickets have all been watched daily. I have had the bookkeeper to watch you and had the cashier to watch you, and we just have plenty of facts in the case.' He said, 'Now, I will tell you what I want you to do for me,' but first I asked him what he had seen me take, and he said he had seen me take several things; that one time I had a pile of goods under the counter and took them out piece by piece, and I didn't make any tickets for them. He said that was way back in the early spring; that he could date it back six months before he went North in the spring. I said, 'I can tell you exactly what was under the counter and how came it there.' I told him that when those new voile patterns came in I did cut off three dress patterns for myself. I sent one of them to my mother at Sanford, and sent one to my sister at Sanford. I simply cut them off and put them under there. I sent two of them up to the cashier's stand, and the cashier wrapped them and parcel posted them, and they were sent to my mother and sister at Sanford, and the other one I took and paid for it and took it home and used it. He said that there was no use trying to explain, that I had taken nice silk dress patterns and wool dress patterns, and there was no use for me to deny that I had taken these things, because he had absolute proof of the fact. He said, 'I don't hope for you to remember all of them. I just want you to square yourself around at this desk and write down for me on paper a few of
(593) the things you have taken. I don't hope for you to remember all of these things.' I said, 'Mr. Stone, if you think now that you are going to get me to square myself and write down on paper for you things that I have not got, I am not going to do it. You, nor a regiment like you, couldn't make me do that.' Then he got mad.

He said, 'Well, I didn't know you were going to be biggety and uppish about the thing. I thought you would be willing to confess the matter. Don't you know what it means to you if you don't do it? Don't you know I will have to call an officer and have your room searched, and that will be embarrassing to you and to the people with whom you are living, and you will have to go up and stay in jail all night, and in the morning it will come out in big headlines in the paper, and your people in Sanford will hear of it, and you will be branded as a thief the rest of your life.' I said, 'Mr. Stone, I have done all I can to explain.' He got up and called John and said, 'John, call an officer. Miss Riley don't think we are giving her a square deal.' I stayed there a few minutes and an officer came in. I later learned it was Mr. McCuiston. Mr. Stone said, 'We have a girl here who has been stealing goods away from the store and I want to have her room searched.' Mr. McCuiston turned around to me, or to both of us, and said he would have to explain to me that he would have to have a search warrant before he could search my room against my will. He said, 'You will have to have a search warrant before you can have her room searched. We can detain her and get a search warrant and search it against her will.' I said, 'I don't want my room searched if there is any other way, but if there is no other way of satisfying Mr. Stone, if he thinks there are goods down there belonging to him, I want you to go search my room. I want him to be satisfied.'

"I thought we were getting up to start, but he said he would have to get an officer to bring a search warrant. I do not know how the officer got the message, whether he was phoned for or not, but in a few minutes Mr. O'Brien came in with, I suppose, a search warrant. I never did see it, and it was never read to me. We got up, Mr. Stone, Mr. O'Brien, and Mr. McCuiston. John Stone and I went downstairs, and when we all got to the front door of the store there was another policeman standing there in front of the store. I do not know who that was. I afterwards learned that it was Mr. Skeens. I think it was the worst night we had that winter. It was rainy, windy, and cold. It was about twenty minutes to nine. I said, 'It is just too bad for me to walk home, I would like to have some way to ride,' and John Stone stepped up and said he would go out and get an automobile. He did so, and we all got in and went down to Gorrell Street, where I was rooming at a Mrs. Richard Stone's house. Mr. Stone, Mr. O'Brien, and Mr. McCuiston and myself went in the automobile. There was no one at home but old Mrs. Stone, and she had been in bed a week with grippe, (594) and young Mrs. Stone was upstairs with the babies. Mr. McCuiston said he would get out and go in and tell the lady what we

had come for. We went inside where these empty boxes were that I had sent up that afternoon. I had these little boxes that I had gathered up a week or two before, from time to time. None of them were any size, except the one that had the cretonne bag in it. I had made that that day at dinner. I took these boxes up to the cashier that afternoon — late in the afternoon before the last delivery — and asked him if he would send them out for me; that they were empty boxes that I had collected — nice little white boxes that I thought would be nice to put Christmas presents in. He said that he would send them out. I lifted the lid of one of the boxes and showed it to Mr. Hicks. I had made this cretonne bag for a young lady, and I just told him that was a Christmas gift I had made that day. I took these boxes up to my room that night myself and opened them up, one by one, and I came down to this box; I open it; that purple tie was in it. Mr. Stone lifted the tie out of the box and said, 'This is the tie we are looking for.' I knew nothing of the tie being in the box until that time. So they searched my room; went through everything in there."

Q. "What was it all worth?" A. "Twenty-five dollars."

"They searched in the dresser drawers; searched my trunk out in the hall, and searched in the closet and in the bed and under the bed, and raised the lid of the heater and looked in there. On a little table I had a few things. I had a little work basket on this table, and in this work basket I had a few little articles I had bought from time to time, and Mr. Stone took all of those things out of the work basket and laid them over on the bed, and when they went through my trunk he made slurring remarks about whatever things were in my trunk, and took up a gown and said, 'Ah, ha! don't you think this is too fine for you to wear — the clothes that you have in this trunk — on the salary you are making?' He took up a little voile dress that had some little lace bands in it — real cluny lace — that a traveling man whom Mr. Dorsett bought lace from had given me a year or two before that, and made a remark about that lace being too fine. I had a little pearl garniture in my trunk that I bought before I left Sanford, before I went to Greensboro, and he said that I 'could not afford such fine things as that on the salary I made.' Mr. McCuiston remarked about my having too many pairs of shoes. There was a gentleman's collar in my trunk. A young man had been coming to see me for a while before that from Sanford, and in the summer before this he left hurriedly one afternoon and left his collar. He bought the collar or got the collar and stuck it in his pocket. It was an awfully hot day, and after a while he said, 'If you don't mind, I will change my collar,' and so he changed his
(595) collar and laid the other one on the piano, and that night

when he left he forgot his collar, and when I went upstairs and dumped it in the trunk and it stayed there. Mr. Stone when he came across this man's collar, picked it up and showed it to Mr. McCuiston, and in a sneering way remarked about 'Miss Riley having a man's collar in her trunk.'

"They stayed in my room until about a quarter till eleven, I think, when they left. Mr. McCuiston turned to me and says, 'Get yourself ready; you will have to go up to the police headquarters with me tonight.' He says, 'I will promise not to put you in jail; that is what I ought to do, but I will promise not to do that. It is a mighty bad night and you can stay in the police office.' He says, 'There is a chair there and a couch, and you can be fairly comfortable.' I said, 'Is it as bad as that? Isn't there any way in the world I could arrange to stay in my room?' He says, 'You can give bond and stay in your room.' Of course I knew nothing about such things. I says, 'I think if you will give me time to get some of my friends I could do that.' Mr. Stone called him out in the hall and they stayed a few minutes, and he came back and said, 'Now if you will promise me that you will be in the police court Monday morning I will let you stay in your room until then; and so he left; and Mr. Stone said he would like to have a conversation with Mrs. Stone, the landlady, in the next room; so he went out and had a conversation with her. I stayed in my room all the next day. I was sick. Mr. O'Brien and other policeman and Mr. Stone were all in my room. No one else was there. Mr. Stone did not come back after his conversation with Mrs. Stone. I stayed until Sunday night, and I went home. It was awfully cold, and I got there at 10 o'clock. Went home alone. My mother met me at the door and said, 'What is the matter?' I told her all about it. I told her just what had happened to me: that Mr. Stone had accused me of stealing and how terrible it all was, and I had just felt like I wanted to die. I stayed in bed for almost the first week I was there, and then I was up and down continuously, and then we sent for my brother in Rocky Mount, and he came and we decided to come to Greensboro, and he came to your office. It was the first of January. I don't remember what day of the month. It was on Friday.

"I received $40 a month when I first went with Ellis-Stone. My salary was raised 15 September, 1914, to $45 a month; that was after Mr. Stone had told me he had seen me taking things from the store. I was not required to give any bond to appear Monday morning. I never stole anything from Ellis, Stone & Co."

The witness was sharply cross-examined, and circumstances of the strongest suspicion as to her guilt elicited by counsel, and some things indicating guilt were not very satisfactorily explained by her.

There can be no doubt, if we go no further, that there were
(596) repeated and clear violations of the company's rules in regard to clerks taking articles from the store without entering their purchases on tickets provided for the purpose. There was evidence that defendant had caused a warrant to be issued for the plaintiff after this suit was brought.

The testimony in the case was very voluminous, covering many printed pages, and it would be difficult, if not impossible, to go into the numerous details without extending the opinion beyond its proper length. We therefore content ourselves with this statement and such comments upon other matters in the opinion as may be relevant to the questions presented in the record and discussed by counsel.

Judgment was entered upon the verdict, and defendant appealed.

J. A. Barringer and R. C. Strudwick for plaintiff.
R. H. Hayes and Brooks, Sapp & Kelly for defendant.

WALKER, J., after stating the case: Those facts, which are apparently undisputed in this case, do not impress us very favorably for the plaintiff, but we must remember that she is entitled to have a jury pass upon them, and we are bound by the verdict, if no error in law has been committed at the trial. The verdicts of jurors may not always be right, but no better system has ever been devised for the purpose of deciding the facts than that which we have adopted for so many years. If the jury err, the remedy is with the trial judge, who can set aside the verdict if against the weight of the testimony. Unless this is done, we must accept it, at least, as a correct finding of the facts. The judge refused, in this case, to disturb the verdict, but, on motion of the defendant, he entered a judgment of nonsuit as to the third cause of action relating to the alleged assault, leaving two causes of action — one for slander and the other for false imprisonment. We are not called upon to inquire, and decide, as to the strength of the proof, or the weight of the evidence, for they are matters for the consideration of the jury alone, under the corrective supervision of the judge to avoid a miscarriage of justice. We are aware of the difficulty often presented in marking clearly the exact line of division between *some* and *no* evidence, but we have no such trouble in this case. The jury having adopted the plaintiff's version of the facts, as against the one advanced by the defendant, the only question is whether we can find in the record *any* evidence which, if construed most favorably for the plaintiff, will support the finding of the jury.

What was said by the defendant, and imputed to him as slander, was privileged, not absolute, but qualified *(Billings v. Fairbanks,*

139 Mass., 66), and the defendant is protected by this privilege, provided he used it without malice. *Bacon v. M. C. Railroad Co.*, 66 Mich. 166. The words uttered were slanderous, and (597) actionable *per se*, unless they were true or privileged, and if false, and not privileged, the liability of defendant attaches for having spoken them. *Hamilton v. Nance*, 159 N.C. 56.

The doctrine of privilege has been often considered by the courts, and has been defined with reasonable clearness. It is a duty which every one owes to society and to the State in which he lives to assist in the investigation of any alleged misconduct and to promote the detection of crime. All information given in good faith in response to any inquiries made with this object is clearly privileged. But this duty does not arise merely when confidential inquiries are made. If facts come under any person's knowledge which lead him reasonably to conclude that a crime has been or is about to be committed, it is his duty at once to give information to the public authorities or to the persons interested, and, therefore, upon grounds of public policy communications which would otherwise be slanderous are protected as privileged if they are made in good faith in the prosecution of an inquiry regarding a crime which has been committed and for the purpose of detecting and bringing to punishment the criminal. All material statements made by the persons interested in the detection of the crime during their investigations and relevant thereto, are privileged. For the sake of public justice, charges and communications which would otherwise be slanderous are protected if made in good faith in the prosecution of an inquiry into a suspected crime. Newell on Slander (3d Ed.), secs. 595 and 597. In those cases where one person has an interest in the subject-matter of the communications, and the person to whom the communication is made has a corresponding interest, every communication honestly made in order to protect such common interest is privileged by reason of the occasion. Newell on Slander, sec. 623. This Court stated the rule in *Harrison v. Garrett*, 132 N.C. 176: "Any communication between employer and employee is protected by this privilege, provided it is made *bona fide* about something in which (1) the speaker or writer has an interest or duty, (2) the hearer, or persons addressed, has a corresponding interest or duty, and provided (3) the statement is made in protection of that interest, or in the performance of that duty. There must also be an honest belief in the truth of the statement. When these facts are found to exist, the communication is protected by the law, unless the plaintiff can show malice on the defendant's part, the burden in this respect being on the plaintiff." The utterance of words actionable *per se* implies malice, and in the absence of a plea of justification, or when the

plea is set up and the issue is answered against the defendant, the law says that the words are false, and the plaintiff is entitled to recover his damages. *Hamilton v. Nance, supra; Ramsey v.* (598) *Cheek,* 109 N.C. 274. But where there is qualified privilege, the plaintiff must go further and show that the defendant was governed by a bad motive, and that he did not act in good faith, but took advantage of the occasion to injure the plaintiff in her character or standing. This privilege applies where the publisher of the alleged slander acted in good faith in the discharge of a public duty, legal or moral, or in the prosecution of his own rights or interests; to anything said or written by a master concerning the character of a servant who has been in his employment; to words used in the course of legal or judicial proceedings; and to publications duly made in the ordinary mode of parliamentary proceedings *White v. Nichols,* 3 How. (U.S.) 266. Ours is a case of qualified privilege which has the effect of rebutting the implied malice, upon the presumption that the words were honestly spoken in protection of the speaker's interests, and places the burden upon the plaintiff to show express malice, as we have shown, and whether he has exceeded his privilege, or abused it, by acting with a bad motive, are ordinarily questions for the jury. *Gattis v. Kilgo,* 140 N.C. 106. Whether the defendant used the words maliciously or with a bad motive must be determined by the jury from all the facts and circumstances, if there is any evidence of the same. While the evidence to support the accusations of dishonesty made against the plaintiff is apparently very strong, we are of the opinion that there is some evidence that the defendant did not act with the best motive, but from a bad motive of spite or malice against the plaintiff. We are not required to say how we would have found as to the fact of plaintiff's guilt or the defendant's motive, but are confined to the simple question, whether there was any evidence as to the latter, however weak it may be, so that it is enough to be considered by the jury. The manner in which the defendant addressed the plaintiff in his office was rude, unnecessary, and uncalled for. Whether she was guilty of shoplifting, or not, she had the right to fair and considerate treatment from one who professed to be acting under a privilege of the law in the honest protection of his interests. There were two men in the room with this woman, who had no one to befriend her or to see that she received fair treatment. Defendant accused her roughly of taking goods without number, and told her there was no use in trying to explain, and asked her "to square herself around here at this desk, and write down for me on paper a few of the things that you have taken. I don't hope for you to remember all of them. It would be impossible." She said, in reply:

"Mr. Stone, if you think now that you are going to get me to square myself and write down on paper for you things that I have not got, I am not going to do it. You nor a regiment like you could not make me do that." Then he got mad and said: "Well, I did not know you would get bigoty and uppish about it, but thought you would be willing to confess the matter. Don't you know what this means to you if you don't do it? Don't you know I will (599) have to call an officer and have your room searched, and that will be embarrassing to you and to the people with whom you are living, and you will have to go up and stay in jail all night, and in the morning it will come out in big headlines in the paper, and your people in Sanford will hear of it, and you will be branded as a thief the rest of your life?" And plaintiff said: "Mr. Stone, I have done all I can to explain." He got up and called John Stone, and said: "John, call an officer. Miss Riley don't think we are giving her a square deal." Plaintiff testified: "I stayed there a few minutes, and an officer came in. I later learned it was Mr. McCuiston. Mr. Stone said: 'We have a girl here who has been stealing goods away from the store, and I want to have her room searched.'" The treatment of the plaintiff in her room, when search for the goods alleged to have been stolen was being made, exceeded any privilege of the law under which defendant claims protection, and was evidence of an ulterior motive in charging her with the larceny. His slurring remarks about her extravagance, and the much more serious imputation or insinuation against her chastity — for the jury might infer that this was his meaning — were not, to say the least, germane to the object of the search. His general conduct and demeanor throughout the transaction in the store and in her room were indicative of a feeling of resentment against her.

There are other circumstances of equal importance in deciding whether there was *any* evidence of malice or a wrong motive, but we will refer to only one part of the testimony in this connection. Elmer Shields testified: "I saw Mr. Stone Monday morning. He called me up to his office and said he understood I didn't think he had treated Miss Riley right. I told him no, I didn't think he had given her a square deal. He said he didn't think he had — he ought to have turned her over to the officer and had her locked up." This is not the language of a man who is acting within the bounds of his privilege. Finally, the plaintiff brought this suit, and almost immediately following this act on her part the defendant caused a warrant for larceny to be issued against her. It is strange that he did not prosecute her upon the evidence he had collected before he detained her in the store. If he had done so, and she had sued him for malicious prosecution, the alleged evidence upon which he based

his accusations against her when in the store, if true, would have exonerated him, as it would have constituted probable cause. The jury had the right to consider the issuing of the warrant as a retaliatory measure, and it is evidence of the state of his feelings toward the plaintiff. The charge against the plaintiff that she had pilfered the store was justified only so far as it was made in good faith and was required for the protection of the defendant and the public,

(600) and for the purpose of bringing the plaintiff before the bar of justice to answer for the crime, and the questions whether the defendant has acted in good faith, or has not exceeded his privilege, are for the jury. *Gassett v. Gilbert,* 72 Mass. (6 Gray) 94. The privilege imports that the words are uttered in a legal proceeding, or on some other occasion of apparent duty which *prima facie* imports that the party was actuated by a sense of duty, and not by the malice which is generally to be implied from speaking words imputing a crime to another. There can be no doubt that the accusation had a direct tendency to hold the plaintiff up to public reproach and disgrace, and was therefore actionable, unless it falls within the class of communications or statements usually termed privileged — that is, authorized by law — notwithstanding they may injuriously affect private character. The law regards the publication of all defamatory matter which is false in fact as malicious, and affords to the party injured a remedy in damages therefor. This is the general rule. But there are cases which constitute an exception to it. These are, when the cause or occasion of the publication is such as to render it proper and necessary for common convenience and the general welfare of society that the party making it should be protected from liability. In such cases the occasion rebuts the inference of malice, which the law would otherwise draw from an unauthorized publication, and renders it necessary for the party injured to show malice, or, as it is sometimes called, malice in fact, as an essential element in support of his action. "A publication 'fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned,' comes within the class of privileged or authorized communications. A party cannot be held responsible for a statement or publication tending to disparage private character, if it is called for by the ordinary exigencies of social duty, or is necessary and proper to enable him to protect his own interest or that of another, provided it is made in good faith and without a willful design to defame. This general statement of the doctrine on this point seems to be consonant with sound principle, and is supported by numerous authorities." *Gassett v. Gilbert, supra,* and cases therein cited. We have not considered the fact that the

charges were found by the jury to be false, as evidence sufficient to show express or actual malice, but have followed in that respect the rule laid down by this Court in *Ramsey v. Cheek*, 109 N.C. 274. Nor have we laid much stress on what John Stone did as floor manager of the store, because not urged in argument, and as we are convinced that there is evidence of ratification of his acts, and approval of his acts is equivalent to prior authority to do them. *Horton v. Hensley*, 23 N.C. 163; *Daniel v. R. R.*, 136 N.C. 517; Cooley on Torts, pp. 127, 214. As this is a motion to nonsuit, and the charge of the court is not before us, we must assume, in the absence of it, that the court gave proper instructions upon the evidence, as error (601) is not to be presumed. *In re Smith's Will*, 163 N.C. 464. The liability of the master for the tort of his servant is discussed in *Daniel v. R. R., supra; Jackson v. Telegraph Co.*, 139 N.C. 347; *Flemming v. Cotton Mills*, 161 N.C. 436; *Garretson v. Duenkel*, 50 Mo. 104; Wood on Master and Servant, secs. 288, 294.

The contention that there was no evidence of a false imprisonment cannot be sustained. This term has been variously defined, as will appear by the following references to it, taken from the text-books: "False imprisonment is the unlawful and total restraint of the liberty of the person. The imprisonment is false in the sense of being unlawful. . . . The right violated by this tort is 'freedom of locomotion.' It belongs, historically, to the class of rights known as simple or primary rights (inaccurately called absolute rights), as distinguished from secondary rights, or rights not to be harmed. It is a right *in rem;* it is available against the community at large. The theory of the law is, that one interferes with the freedom of locomotion of another at his peril. . . . Unlawful detention by actual physical force is unquestionably sufficient to make out a cause of action. Unnecessary violence in an otherwise justifiable arrest may give rise to it. Actual physical contact with the person of plaintiff is not, however, essential. Battery often accompanies arrest, but this is incidental only. Force is essential only in the sense of imposing restraint. . . . The essence of personal coercion is the effect of the alleged wrongful conduct on the will of plaintiff. There is no legal wrong unless the detention was involuntary. False imprisonment may be committed by words alone, or by acts alone, or by both; it is not necessary that the individual be actually confined or assaulted, or even that he should be touched." 19 Cyc., pp. 319 and 323. "Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty, compelled to remain where he does not wish to remain, or to go where he does not wish to go, is an imprisonment. . . . The essential thing is the restraint of the person. This may be caused by

threats, as well as by actual force, and the threats may be by conduct or by words. If the words or conduct are such as to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars. . . . The true test seems to be, not the extent of the restraint (where the interference amounts to a restraint), but the lawfulness thereof." 11 Ruling Case Law, pp. 793 and 794. "It is not necessary to constitute false imprisonment that the person restrained of his liberty should be touched or actually arrested. If he is ordered to do, or not to do, the thing; to move, or not to move, against his own free will, if it is not left to his option to go or stay where he pleases, and force is offered, or there (602) is reasonable ground to apprehend that coercive measures will be used if he does not yield, the offense is complete upon his submission. A false imprisonment may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, or by personal violence, or both. It is not necessary that the individual be confined within a prison or within walls, or that he be assaulted. It may be committed by threats." *Martin v. Houck*, 141 N.C. 317; Voorhees on Arrest, secs. 274, 275, 276. The language here was: "I said, 'I am sick; my back is hurting me so bad I don't know what to do. Well, it is 7 o'clock most; suppose I go to supper? John had already told me that his father would be in on the 7:10 train, and that he would see me; so I asked him to let me go to supper.' 'No, you cannot go to supper; you will have to stay here until the "boss" comes.' " This language would indicate that when plaintiff was told that she could not go to supper, but must stay there, after she had stated that her back was hurting her, that there was actual restraint upon her "freedom of locomotion." She wanted to leave for two reasons — because she was suffering with her back, and because it was her hour for supper. Notwithstanding these two good reasons for leaving the room, she did not quit the place after being told that she could not go, but must stay where she was at the time. When ordered to remain where she was, she submitted to the command, though she had two good reasons for leaving and wanted to go, and no doubt she would have gone had she thought herself free and untrammeled to do so. It is quite certain that she would have done so. Her language is: "I was told that I could not go, but that I would have to stay; so I stayed." This language means that her reason for staying was the order from John Stone. The word "so" is defined as "the case being such," "therefore," or "for this reason," and was used by her in that sense, as if she had said "He told me I could not go, but must stay, and for this reason I stayed." She gives as her reason for not going, that

he virtually ordered her not to leave, which implies clearly that she was coerced by what had been said to her, and thought that her freedom to act as she desired had been restrained or taken away. But the conduct of the defendant, after he entered the room, with his threats and intimations, and circumstances attending his inquiries as to the thefts, the order for a policeman with a warrant to search her room, after she had said, "I don't want my room searched if there is any other way," what he said to her in her room, and what the policeman said in his presence and hearing, all tended to show intentional and actual restraint of her person. "Get yourself ready," said McCuiston to her; "you will have to go up to the police headquarters with me tonight. I will promise not to put you in jail; that is what I ought to do, but I will promise not to do that. It is a mighty bad night, and you can stay in the police office. There is a chair there, and a couch, and you can be fairly comfortable." In reply to which, the plaintiff testified: "I (603) said, 'Is it as bad as that? Isn't there any way in the world I could arrange to stay in my room?' He said, 'You can give bond and stay in your room.' Of course, I knew nothing about such things. I said, 'I think, if you will give me time to get some of my friends, I could do that.' " The action of the parties seems to have impressed her with the belief that she was under compulsion to stay where she was until it suited their pleasure to release her. The proper thing to have done was to have secured a warrant of arrest in the beginning, if the defendant thought that his evidence, already accumulated, was sufficient to show guilt on her part. The case would then have been tried on its own merits, and involved simply the question of her guilt, or rather of probable cause for the accusation, unmixed with malice or other elements calculated to prejudice the defendant in any controversy with her. They ordered her to appear at the police court Monday morning, which she did not do, but they took no further steps to prosecute her — why, does not appear, unless defendant's confidence in his case had abated.

Our conclusion is, that there was evidence of malice, or wrong motive, under the count for slander, and of false imprisonment, under the other count. The plaintiff may be guilty, notwithstanding the verdict, but we must accept the latter as conclusive on the truth of the matter.

No error.

Cited: *S. v. Publishing Co.*, 179 N.C. 723; *Elmore v. R. R.*, 189 N.C. 668; *Rhodes v. Collins*, 198 N.C. 25; *Stevenson v. Northington*, 204 N.C. 694; *Parrish v. Mfg. Co.*, 211 N.C. 10; *Hoffman v. Hospital*, 213 N.C. 670; *Parker v. Edwards*, 222 N.C. 77; *Chambers*

v. Chambers, 235 N.C. 751; *Jones v. Hester,* 260 N.C. 269; *Hales v. McCrory-McLellan Corp.,* 260 N.C. 570.

M. C. KIRKMAN AND GUY C. KIRKMAN v. THEODORE SMITH.

(Filed 28 November, 1917.)

1. **Wills—Devises—Shifting Use—Defeasible Fee.**

A devise of lands to K. "his lifetime, then to go to" G. and M., "and if they should die without leaving bodily heirs, then to go to the Flow heirs": *Held,* after the falling in of the life estate, G. and M. take the fee in the remainder (Revisal, sec. 3138), defeasible upon their dying without leaving "bodily heirs," in which event it would go to the ultimate devisees, upon the principle of a shifting use operating by way of an executory devise.

2. **Wills—Devises—Defeasible Fee—Estates—Limitations—Statutes.**

When G. and M. take, by devise, the fee simple in lands, defeasible upon their dying without leaving bodily heirs, the event determining the estate they shall take is whether they have children living at the time of their death or born within ten lunar months thereafter, "unless the intention of such limitation be otherwise, and expressly and plainly declared in the face" of the will.

3. **Deeds and Conveyances—Defeasible Title—Wills—Devises.**

A devise of lands to G. and M. in fee, defeasible upon their dying without leaving bodily heirs, and then to the heirs of the testator: *Held,* neither G. nor M., nor one of them after the death of the other, could convey an indefeasible fee simple title to the lands.

4. **Wills—Estates—Remaindermen—Testator's Heirs—Devise—Purchase—Descents—Statutes.**

Where a testator devises a fee simple title to his lands to his two sons, defeasible upon their dying without leaving bodily heirs, naming the Flow heirs as his ulterior devisees (Revisal, sec. 1556; Rule 4 of Descents), providing that on failure of lineal descendants, etc., the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who are of the blood of the ancestor, has no application, and cannot confine the heirs who will take under the will to those who are also the heirs of his two sons to whom the devise was made; for the Flow heirs would take directly under the will as purchasers, upon the happening of the contingency.

CIVIL action, heard by *Cline, J.,* on demurrer, at June (604) Term, 1917, of MECKLENBURG.

The plaintiffs alleged in their complaint:

1. That the defendant made and executed a written agreement, by which he contracted to purchase a certain trace of land in Clear

Creek Township, containing 132 acres, from the plaintiffs, for $4,000 provided the plaintiffs can convey a good title in fee to the same.

2. In pursuance of said written agreement, the plaintiffs have tendered a deed sufficient in form to convey to the defendant the lands described in the written agreement hereinbefore set out, and have demanded the purchase price therefor, in accordance with the terms of the agreement.

3. The defendant has refused to accept said deed, and still refuses to accept it, giving as his reason and excuse, not any objection to the form or substance of the deed itself, but that the plaintiffs were not vested with an absolute title in fee simple to said land by the will of D. W. Flow, under which they claim the same, and cannot pass such a title to him.

4. The part of the will of D. W. Flow devising the lands reads as follows: "Second. To Margaret G. Kirkman, one tract of land, known as the Harkey Place, supposed to be about 132 acres, adjoining the lands of Mrs. Helena Morrison, J. A. Houston, and adjoining my home tract, to be hers her lifetime, and then to go to Guy Kirkman and Marvin Kirkman, and if they should die without any bodily heirs, then said land to go back to the Flow heirs."

5. Margaret G. Kirkman is the daughter of D. W. Flow, and was a widow at the time D. W. Flow made his will, and Guy and Marvin Kirkman were her two sons and her only children, and as such the grandsons of the said testator, D. W. Flow.

6. The will is dated 27 October, 1893, and was duly and properly probated and recorded in the office of the Clerk of (605) the Superior Court of Mecklenburg County.

7. That Marvin Kirkman died intestate, in the year 1903, he then being unmarried and a young man, only 18 years of age, leaving no issue or lineal descendants, and that Guy Kirkman, mentioned in that part of the will above quoted, is the same person as G. C. Kirkman, one of the plaintiffs herein, and that he is now 30 years of age and has a wife and two living children, who are 9 and 7 years of age, respectively.

8. That solely on account of the facts before stated, the defendant refuses to accept the title to the lands in question and pay for the same, in accordance with his contract, insisting that on account of said facts he would not and could not obtain from plaintiffs an absolute fee simple title to said lands.

The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

The court sustained the demurrer, and as plaintiffs admitted that they could not improve their case by amendment, and desired to have the same finally decided upon the present complaint, the

court dismissed the action and taxed plaintiffs with the costs, and they thereupon appealed.

Thaddeus A. Adams for plaintiffs.
Cansler & Cansler for defendant.

WALKER, J., after stating the case: It is clear that by the deed, which has been tendered, an absolute fee simple title would not pass to the purchaser of the land, if the deed should be accepted. The clause of the will in question is the same as if it had read, "To Margaret Kirkman for life, and then to Guy Kirkman and Marvin Kirkman and their heirs, and if they should die without any bodily heirs, then the land to go over to the Flow heirs." This follows from the provision of our statute (Revisal, sec. 3138), that every devise of real estate shall be held and construed to be a devise in fee simple unless otherwise plainly expressed or intended by the will, or some part thereof, that the testator's purpose was to pass an estate of less dignity. The limitation in remainder to the two sons was of an estate in fee, but subject to be terminated or defeated by the happening of the event, viz., the death of the sons without bodily heirs, upon which the estate was limited. The estate, therefore, was not absolute, but defeasible. If the event takes place, it will go over to the ulterior devisees. *Whitfield v. Garris,* 134 N.C. 27. It is a shifting use, operating by way of an executory devise, as it would be a conditional limitation if the clause were in a deed. Chief Justice Shepherd pointed out with great clearness and discrimination, in *Starnes v. Hill,* 112 N.C. 1, and afterwards in *Whiteside v. Cooper,* 115 N.C. 570, the difference between vested and contingent remainders.

Quoting from Gray on Perpetuities, he said: "The true test
(606) in limitations of this character is, that if the conditional element is incorporated into the description of the gift to the remainderman (as it is in the case under consideration), then the remainder is contingent; but if after the words giving a vested interest a clause is added divesting it, the remainder is vested. Thus, on a devise to A. for life, remainder to his children, but if any child die in the lifetime of A., his share to go to those who survive, the share of each child is said to be vested, subject to be divested by its death. But on a devise (as in the present case) to A. for life, remainder to such of his children as survive him, the remainder is contingent." But Guy C. Kirkman cannot convey an indefeasible title, as he may yet die without bodily heirs. It is provided by Revisal, sec. 1581: "Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issue of the body, or without children, or

offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person shall die, not having such heir, or issue, or child, or offspring, or descendant, or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise and expressly and plainly declared in the face of the deed or will creating it." This will was made since 1828. If the contingency of Guy's dying without bodily heirs should take place, the estate would go over to the other devisees named in the will, namely, the Flow heirs, and the estate of the purchaser, if he accepted the deed, or was compelled to do so, would be defeated. It therefore results that the deed would not pass to him the estate for which he contracted, and which the plaintiffs agreed to convey. We do not think that Rule 4 of the Canons of Descent has any application. That rule (Revisal, sec. 1556) provides: "On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise, or settlement from an ancestor, to whom the person thus advanced would be in the event of such ancestor's death have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who were of the blood of such ancestor, subject to the two preceding rules." It is evident that the rule is confined to cases where there is no other disposition of the land by the will which would interfere with the prescribed course of descent. In this case the "Flow heirs" take, not by descent from the testator, or Guy C. Flow, but under the will as purchasers, because it is declared therein that in default of the sons having bodily heirs at their death the estate shall go to them. He who thus takes under the will, and not by descent under the law, is what the civil law denominates *hæres factus,* or an heir made by will. We could not construe Rule 4 as confining the limitation over at the death of the sons without "bodily heirs" to those of the Flow heirs, who also will be heirs of (607) Guy Kirkman at his death, as the testator has willed otherwise by appointing other devisees to take when the event, now contingent, shall happen. If there had been no such limitation to other persons in remainder, the question ably argued by learned counsel might have arisen.

His Honor, Judge Cline, was therefore correct in holding that the plaintiffs could not convey "an absolute fee simple estate" which they sold to the defendant and contracted that they would transfer to him.

Affirmed.

Cited: *Bell v. Keesler,* 175 N.C. 528; *Leggett v. Simpson,* 176 N.C. 5; *Cherry v. Cherry,* 179 N.C. 6; *Love v. Love,* 179 N.C. 117; *Reid v. Neal,* 182 N.C. 199; *Zieglar v. Love,* 185 N.C. 42; *Yelverton v. Yelverton,* 192 N.C. 620; *Clark v. Clark,* 194 N.C. 289; *Trust Co. v. Miller,* 223 N.C. 5; *Elmore v. Austin,* 232 N.C. 19; *Scott v. Jackson,* 257 N.C. 660.

S. A. MULLINAX v. J. J. HORD.

(Filed 28 November, 1917.)

1. Pleadings—Definiteness—Motions.

Where the complaint sufficiently alleges the negligent acts of the defendant, concerning which damages are claimed in an action to recover for a personal injury, the defendant should ask that the pleadings be made more definite or certain, if such information is required for his defense.

2. Evidence—Conjecture—Facts in Issue.

The mere conjecture of a witness as to what one would do under given circumstances should not be received in evidence, especially when it invades the province of the jury in their determination of a fact arising from the evidence.

3. Negligence—Physicians—Surgeons—Skill Required—Rule of Prudent Man.

The law requires a physician or surgeon, in the practice of his profession, to have and apply that degree of care and skill ordinarily possessed by members of his profession; and he is liable in damages to his patient for any injury proximately caused by his lack of the requisite knowledge and skill, or the omission to exercise reasonable care, or failure to use his best judgment in his treatment which a practitioner of ordinary prudence would have exercised under the same circumstances.

4. Same—Evidence—Questions for Jury—Trials.

In an action against a surgeon for damages alleged to have been caused by his failure to properly treat a patient who had been shot in the foot, evidence tending to show that after he had treated the foot he said no further visit was necessary; that he failed to probe the wound for foreign substances; that a few days thereafter pieces of shoe leather and several shot worked their way out of the wound, causing inflammation, and suppuration ensued, attended with great pain; that, contrary to his diagnosis, the toes of the foot did not properly grow in their natural position, but caused a deformity, and that he did not attend the patient after the first visit, is sufficient to be submitted to the jury upon the question of the defendant's actionable negligence.

5. Negligence — Contributory Negligence—Parent and Child—Infants — Minors.

Where a minor sues a physician and surgeon to recover for injuries caused by his alleged want of attention and unskillfulness in treating a wound he had received, contributory negligence on the part of the father, who had called in the surgeon and was acting as father in behalf of his son, cannot be attributed to the latter; and an issue as to contributory negligence resting solely on this ground is not a proper one to be submitted to the jury.

CIVIL action, tried before *Cline, J.*, and a jury, at April Term, 1917, of GASTON. (608)

Plaintiff sued to recover damages for injuries to his foot, alleged by him to have been caused by the defendant's want of attention and his unskillfulness as a surgeon in treating and caring for it, after it had been injured by a gunshot wound. The plaintiff complained as follows:

1. That the defendant was, and is, a physician and surgeon, engaged in the practice of his profession in the town of King's Mountain, N. C.

2. On or about 24 December, 1907, plaintiff was accidentally shot, receiving a serious and painful wound in the right foot, which broke the bones and lacerated his foot. He immediately called in and employed the defendant as a surgeon to dress, heal, and cure his foot, whereupon defendant undertook to attend and care for plaintiff's injury.

3. That defendant negligently, carelessly, and unskillfully conducted himself in treating, caring for, and attending plaintiff's injuries, as aforesaid, and by reason of said negligent and careless conduct two of the toes on plaintiff's foot were drawn to one side and crooked, and thereby his foot is greatly deformed, which renders plaintiff a cripple for life.

4. That at the time of plaintiff's injury he asked the defendant to amputate the injured toes and to remove the broken bones from his foot, and plaintiff, being a small child at such time, his father, W. L. Mullinax, who had the care and custody of plaintiff at the time, insisted that defendant as surgeon remove or amputate the injured toes from plaintiff's foot, and defendant neglected and refused to do so.

5. That by reason of defendant's negligent and unskillful treatment of plaintiff's injuries, plaintiff's foot is in a drawn and crooked condition, rendering plaintiff unable to wear an ordinary shoe and compelling him to have shoes made to special order, which has caused him great inconvenience and great mental and physical suffering, and, as plaintiff is informed and believes, his injuries are

permanent and he will continue to suffer much inconvenience, bodily suffering, and mental anguish.

6. That, as plaintiff is informed and believes, the carelessness and negligence of the defendant, as aforesaid, is the sole and proximate cause of his injuries, and he has been disabled from
(609) doing profitable work and has been damaged in the sum of $2,000.

Defendant, in his answer, admits "that on or about 24 December, 1907, plaintiff was accidentally shot, receiving a wound in his right foot, fracturing some bones and lacerating the flesh, and admits further that he was called in to attend said wounds, and did treat them," and then he denies all the other allegations of the complaint.

The evidence was, that the defendant did not probe the wound for any foreign substances in it. Plaintiff's father testified, in part: "In answer to your question, was I suggesting to him that I thought the toes ought to be taken off? will say that was my idea. He said he didn't think it was necessary to take them off. As to whether there was any suggestion about probing the place for shot, will say no, I don't think there was, at all. In one sense of the word, that would have been his job. As to whether he made any examination of what might have been in the foot, no, he just clipped off some of those leaders and washed it off. He washed it himself the first time, and bound it up. As to how he came into the house, he generally goes in a hurry, as far as that is concerned; he don't propose to fool away time. I don't remember exactly every word that was said: he called for the bandage and needle and thread. He said he had another call, but he didn't mean to say that he was going before he finished his job there." There was also evidence that defendant stated, after he examined, treated, and dressed the wound, that "it would not be necessary for him to come back." Defendant stated to one of the witnesses, W. L. Mullinax, upon his being asked if he was not going to amputate the toes, one of which was hanging by a piece of skin, that he did not think it necessary, for "it would grow back all right." Plaintiff testified: "He had showed us that the toes would grow back, and said it was not necessary for him to come back, and this was why we did not have him back. Dr. Hord said it was not necessary to come back." There was much other testimony to the same effect. The defendant denied that he had promised to return and see the patient, but he did say that he would do so if any change in the condition of the wound required it; and he further testified: "In answer to your question as to whether or not I mean to say that if I have a patient in a dangerous condition and I consider it my duty to go to see him, that because no one tells me

to come back I don't stay away, will say, no, sir. In answer to your question as to whether I neglect my patients, will say, no, sir; I try not to do so." The wound became inflamed a few days after the defendant left, and pieces of the sock and shoe and seven shots worked out. The plaintiff further testified: "It left the little toe sticking right straight up, like that (indicating), and the other one stuck up to the first joint and grew over that way; that small toe was hanging down by a little bit of skin. There (indicating) is where shot worked out — blue place; here is the scar (in- (610) dicating) where they came out — seven shots and a piece of the shoe and sock worked out right there (indicating). My father asked him if he didn't think there were some shot up there that he ought to take out, and he clipped some little white leaders, or something. He said he didn't guess there were, and he didn't try to get anything out; didn't probe there or anywhere. My foot was dead; it was hurting a bit. He pulled up the leaders and clipped them off; I reckon they were leaders — some white strings. I called Dr. Hord's attention to my foot afterwards. I was on the street one day, barefooted, and I saw Dr. Hord and showed him my foot, and I said: 'You told me those toes would grow back all right, and you see how they are.' He replied: 'Yes, sticking up a little bit," and kept right on down the street; he didn't offer to do anything for me; that is all he said — 'They are sticking up a little bit.' "

Dr. J. M. Caldwell, defendant's witness, testified: Question — "What would be the proper course for a physician to do under the conditions above stated, with reference to future treatment or returning?" Answer — "I think the physician ought to tell them that he must see the patient again — see the condition of the wound and redress it if necessary. Sometimes a wound heals. When it is thoroughly cleaned out, a wound will heal; sometimes it will not heal at all — will slough off; in that case it needs treatment."

There was other evidence not necessary to be stated. The jury returned the following verdict:

1. Was the plaintiff, S. A. Mullinax, injured by the negligence or want of skill of the defendant, as alleged in the complaint? Answer: Yes.

2. What damages, if any, is the plaintiff entitled to recover? Answer: Five hundred dollars.

Judgment for the plaintiff, and appeal by the defendant.

Carpenter & Carpenter and N. F. McMillan for plaintiff.
Mangum & Woltz for defendant.

WALKER, J., after stating the case: We think that the complaint is sufficient to cover the several acts of negligence alleged against defendant. If it was too general in form, and he wished to be apprised more particularly as to the negligent acts or omissions on his part, he should have asked that the pleading be made more definite or certain, in order that he would not be misled in answering it. But this he failed to do. The requested instruction was, therefore, properly refused. The question excluded by the court had been substantially answered, but it was incompetent, as it called for the expression of an opinion upon matters strictly within the
(611) province of the jury, and which they could easily decide without the aid of his opinion. It was not the subject of expert testimony, but at best the answer of the witness, if given satisfactorily to the defendant, would have been no more than pure conjecture as to what the conduct of a person would be under given circumstances. It would not even be proper opinion evidence. There are but two questions in the case — one as to whether there was any evidence of negligence, and the other as to whether there was any evidence as to contributory negligence.

It is true, as contended by the defendant, that the law does not require of a physician or surgeon absolute accuracy, either in his practice or in his judgment. It does not hold physicians and surgeons to the standard of infallibility, nor does it require of them the utmost degree of care and skill of which the human mind is capable, but that, while in the practice of their vocation, they shall exercise that degree of knowledge and skill ordinarily possesses by members of their profession. *Long v. Austin,* 153 N.C. 508, 510; *Van Skike v. Potter,* 53 Neb. 28. But when a physician consents to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge. The law holds him liable for any injury to his patient resulting from want of the requisite knowledge and skill, or the omission to exercise reasonable care, or the failure to use his best judgment. *Long v. Austin, supra; Pike v. Honsinger,* 155 N.Y. 201. While it is true that physicians are not responsible for the errors of an enlightened judgment where good judgments may differ, they will be charged with errors, or should be, only where such errors could not have arisen except from want of reasonable skill and diligence. *Jackson v. Burnham,* 30 Pac. Rep. 579; *West v. Martin,* 80 Am. Dec. 107.

Discussing this question in *Staloch v. Holm,* 111 N.W. 264 (cited with approval in *Long v. Austin, supra),* the Court said: "To the

ordinary rule that the exercise of defendant's best judgment is no defense in an action for damages caused by his negligence, a general exception is recognized with respect to cases involving matters of opinion and judgment only. A physician entitled to practice his profession, possessing the requisite qualifications, and applying his skill and judgment with due care, is not ordinarily liable for damages consequent upon an honest mistake or an error of judgment in making a diagnosis, in prescribing treatment or in determining upon an operation, where there is reasonable doubt as to the nature of the physical conditions involved, or as to what should have been done in accordance with recognized authority and current practice." The law does not excuse an error of judgment if it occurs by reason of the surgeon's lack of that knowledge which he should possess in order to qualify him for the practice of his profession, or (612) the negligent failure to exercise the requisite skill and diligence. *Long v. Austin, supra,* where the principles governing such cases are fully discussed.

It is seen, therefore, that a surgeon's duty in treating a wound of his patient is to be measured by both his skill and diligence. If by the lack of that skill which the law requires that he should have he fails to treat his patient properly, so that he is injured thereby or his condition is rendered worse than it would otherwise have been, or if having the requisite skill he negligently fails to use it, or if he is not careful and diligent in the treatment to the extent that he should be so, and as a surgeon of ordinary prudence would have been under the same circumstances, he will be liable for any proximate injury.

The evidence in this case is somewhat conflicting, and it was proper that the jury should have passed upon it and found the facts. If the defendant should have discovered by a sufficiently careful examination that there were foreign particles in the wound, consisting of shots, or cloth and leather from the plaintiff's sock and shoe, and he failed to discover this because he did not exercise the proper care, the plaintiff can recover for any damage to him resulting proximately therefrom. Or if the defendant did know, or should have known by the exercise of reasonable care, skill and forethought, that the wound was in such a condition as to require further attention from him, and he failed to give it, whereby the plaintiff was made to suffer, and his members became deformed and distorted, a condition which would not have arisen if proper care had been exercised, it would entitle plaintiff to damages for the wrong. It is really the application of the ordinary principles in the law of negligence to a case requiring professional knowledge and skill in the performance

of the duty which one person owes to another. There is evidence in the record that the proper skill was not employed, and that due care and diligence were not exercised. A surgeon may possess a high order of learning and skill and yet not use them at the proper time or in the proper way. The charge here is that defendant failed to use proper skill, in that a few days after he left inflammation set in and suppuration ensued to such an extent as to cause the plaintiff great pain, and that shots, cloth and leather were expelled from the wound by the effort of nature to relieve itself of those foreign substances, and finally, that the toes of the plaintiff's foot were greatly twisted out of their natural shape and regular position, with resulting pain and inconvenience to him. It is hardly necessary to refer to the evidence in greater detail, or more than to say that there was some from which the jury might find that there was negligence. "The unwarranted abandonment of a case at a critical period, resulting in increased pain and suffering on the part (613) of the patient, will render the physician liable in damages." 30 Cyc. 1576; *Lawson v. Conway,* 38 Am. St. Rep. 17. He told them it would not be necessary for him to come back, as "the toes would grow back all right," when it appears that this turned out to be wrong advice, or a faulty diagnosis, and misled the plaintiff, to his injury.

As to contributory negligence. We find no evidence of it in the record, and the submission of such an issue would have been futile. There are cases decided by courts, whose opinions are entitled to the highest respect, which hold that the negligence of a father is imputable to the child, upon the ground that he is a keeper, or agent, to whom discretion in the care of his minor child is confided, and for this reason, and in respect to third persons, his act must be deemed to be that of the infant — his neglect, the latter's neglect. *Hartfield v. Roper,* 21 Wendell (N.Y.) 615, 619 (34 Am. Dec. 273); *McGarry v. Loomis,* 63 N.Y. 104 (20 Am. Rep. 510).

This doctrine is still recognized in a number of other States. 29 Cyc. 552, and note 75. But it has not been approved in a majority of the States. It is said in 29 Cyc. at p. 553, 554: "According to the great weight of authority, in an action brought for the benefit of a child who has sustained injuries through the negligence of another, negligence on the part of the parents or those standing *in loco parentis* will not be imputed to the child nor bar a recovery by him. The rule announced in *Hartfield v. Roper* has received severe condemnation in many of the courts repudiating it as authority, and is very generally regarded as unsound by text-writers."

In his book on Negligence, Judge Thompson says of this doctrine: "An adult person, when he commits his person to the custody

of another, does so at least voluntarily; an infant does not select his custodian, it is selected for him by the laws of nature, or by circumstances beyond his control. Certainly, there is no reason why the ordinary principle that where one is injured by the concurring negligence of two persons, he has an action against either or both, should not apply in the case of an injury to a child, unless the imputation is to be put upon the law of denying the feeble and helpless infant the same measure of protection which it accords to adults."

It is further said in 29 Cyc. at p. 555, 556: "While in most jurisdictions negligence of parents, or others *in loco parentis,* cannot be imputed to a child to support the plea of contributory negligence, when the action is for his benefit, yet when the action is by the parent, in his own right, or for his benefit, as when he sues as administrator, but is also the beneficial plaintiff or *cestui que trust* of the action as distributee of the child's estate, the contributory negligence of the parent may be shown in evidence in bar of the action." But this Court repudiated the New York doctrine, (614) and has adopted and adhered to the rule which is stated above to be that which is supported by the great weight of authority. *Bottoms v. R. R. Co.,* 114 N.C. 699.

Justice Shepherd carefully reviews the authorities in that case, and logically reaches the conclusion that the New York doctrine is not sound and has been rejected by a large majority of the courts. Quoting from Beach on Contributory Negligence, 42, he says: "It is a principle of law laid down before the spacious days of great Elizabeth, that the abuse of an authority derived from the law shall not work harm to or prejudice the rights of the person subjected to it. The parent's authority is given for the protection of the child, but the principle of *Hartfield v. Roper* turns the shield into a sword and uses it to deprive the child of the very protection arising from the parental relation." He then quotes from other authorities as follows: "The doctrine announced in this case *(Hartfield v. Roper)* has been followed in some jurisdictions, but the modern tendency is to reject it, and to hold the negligent injurer liable for the consequences of his own wrongful act regardless of the contributory negligence of the child's parent or guardian." Wood on Railroads, sec. 322. And Bishop on Noncontract Law, 582, says: "It is as flatly in conflict with the established system of the common law as anything possible to be suggested. An examination of the leading text-books which treat of negligence will disclose that it is also disapproved as being contrary to principle and reason as well as the rapidly accumulating weight of authority," citing Wharton on Negligence, 312-314; Pollock on Torts, 299; Cooley on Torts, 981; 2 Thompson on Negligence, 1184; 1 Sh. & Redf. on Negligence, sec. 66-75.

The doctrine of *Hartfield v. Roper* has been characterized as being opposed to every principle of reason and justice *(Whirly v. Whiteman,* 1 Head. 610), and repulsive to our natural instincts, and unfair to that class of persons whose unfortunate circumstances and the condition of poverty require them to support life by their daily toil. *Kay v. R. R. Co.,* 65 Pa. 269.

Chief Justice Beasley of the New Jersey Court, after exposing the fallacy of basing such a doctrine on the ground of agency, proves that it is utterly untenable by a convincing argument, and which, he says, conducts us to the rather absurd conclusion of making an infant in its nurse's arms answerable for all her negligence while she is employed in its service, and closes with this language: "Every person so damaged by the careless custodian would be entitled to his action against the infant. If the neglect of the guardian is to be regarded as the neglect of the infant, as was asserted in the New York decision, it would from logical necessity follow that the
(615) infant must indemnify those who should be harmed by such neglect."

It is also said by Justice Shepherd: "Although a child of tender years may be in the highway through the fault or negligence of his parents, and so improperly there, yet if he be injured through the negligence of the defendant he is not precluded from redress. 'All,' says Judge Redfield, in *Robinson v. Cone,* 22 Vt. 213, 'that is required of an infant plaintiff in such a case being that he exercise care and prudence equal to his capacity.' This rule is also laid down in *R. R. Co. v. Gladman,* 15 Wall. 401," which is cited with approval in *Murray v. R. R. Co.,* 93 N.C. 92.

The doctrine approved generally by the text-writers and the Courts is thus commented on in 1 Sh. & Redf. on Negligence, secs. 66-78: "The Vermont rule, as it is called, commends itself to our judgment and is abundantly justified by the reasoning of the Courts which have adopted it. . . . It should be fully applied to such cases, giving to defendants who suffer from its hardships the same consolation which courts administer to plaintiffs when nonsuiting them — that their case is very hard and deserves sympathy, but that the law must not be relaxed to meet hard cases." "If, where one of two innocent persons must suffer, the law puts the loss, as it justly does, upon the one who has by some negligence enabled the wrong to be done, surely when there are two guilty persons in the transaction the law should not leave the only innocent one to suffer, as it practically does, by referring him to his parent or guardian for an injury of which a stranger has been the principal cause." (Sections 77, 78.) "No injustice can be done to the defendant by this limitation of the defense of contributory negligence since the rule itself is

not established primarily for his benefit, and he can never be made liable if he has not been himself in fault." (Section 73.)

The Vermont rule has been adopted, or at least favorably considered, as to one or more of its features, in the following cases: *Greer v. Lumber Co.*, 161 N.C. 144; *Alexander v. Statesville*, 165 N.C. 527; *Raines v. R. R. Co.*, 169 N.C. 189, and *Foard v. Power Co.*, 170 N.C. 48. It also may be said that the Courts which have adopted the New York rule have subjected it to so much criticism and qualification, in order to escape its harshness and injustice, that but little of it remains in its original similitude. Its former vigor has been greatly impaired, if not virtually destroyed, because its excessive rigor was too apparent. *Bottoms v. R. R. Co., supra.*

In our case, the father had assumed control of his child after his injury, and was taking care of him, having himself employed the physician to treat and cure his wound. The child was in no position, and in no condition, to act for himself, and had the right to rely upon his parent, who was supposed to be more experienced and more likely to do what was best for him. In all that we (616) have said, we do not mean to imply that even the father was at all negligent, but for the sake of argument and of testing the correctness of the plaintiff's position, we have assumed that he had not taken proper care of his son.

Reviewing the entire case, we find no error in the record.

No error.

Cited: Muse v. Motor Co., 175 N.C. 470; *Brewer v. Ring & Valk*, 177 N.C. 489; *Thornburg v. Long*, 178 N.C. 591; *Hill v. R. R.*, 186 N.C. 477; *Nash v. Royster*, 189 N.C. 414; *Pangle v. Appalachian Hall*, 190 N.C. 835; *Childers v. Frye*, 201 N.C. 45; *Love v. Zimmerman*, 226 N.C. 391; *Gray v. Weinstein*, 227 N.C. 465.

JUNIUS M. SMITH v. W. M. WITTER.

(Filed 28 November, 1917.)

1. Deeds and Conveyances — Estate — Vested Interests — Contingent Interests.

Where successive survivors in a deed to land take a defeasible fee therein, with ulterior contingent limitation over in fee simple, the interests of each therein being vested will pass by deed to the extent thereof and subject to the limitations expressed in the deed.

2. Trusts and Trustees—Deed and Conveyances—Restraint on Alienation —Husband and Wife.

Where a defeasible fee is conveyed by deed to a trustee for a married woman and her heirs for her sole and separate use, free from the debts of her husband, upon the death of her husband, it is unnecessary for the trustee to join in her conveyance of the land; and a provision in the deed under which she claims, that she shall not have the power to sell the lands or profits arising therefrom by anticipation or otherwise, is void as an attempted restraint on alienation.

3. Lunatics — Estates—Contingent Interests—Sales—Equity—Clerks of Court—Jurisdiction—Statutes.

Revisal, secs. 1896, 1897, does not confer jurisdiction on the clerks of courts to order the sale of contingent interests of lunatics, etc., in lands, nor has section 1798 of the Revisal, relating to estates of infants, this effect; and suits to sell such interests, when the circumstances of the ward require it, should be determined in the Superior Court, in its equitable jurisdiction, which is required to order an investment of the funds in proper instances in accordance with the terms and conditions imposed by the conveyance, in order that the lawful intent of the donor may not be defeated. Revisal, sec. 1590.

4. Lunatics—Estates—Contingent Interests—Guardian and Ward—Courts —Jurisdiction—Deeds and Conveyances.

The order of sale by the clerk of the court of contingent interests of a lunatic in lands approved by the judge, in proceedings brought for the purpose, is void for the lack of jurisdiction, and the deed thereto of the guardian conveys nothing to his grantee.

APPEAL by defendant from *Cline, J.*, at the June Term, (617) 1917, of MECKLENBURG.

This is an action to compel the defendant W. M. Witter to perform his contract to buy the property herein below described, for the sum of $5,000, upon the tender of a deed by the plaintiff. The defendant refused to accept the deed on the ground that it did not convey an indefeasible fee-simple title. The court held that the plantiff was and is able to make to the defendant a fee-simple title according to the tenor of the said contract, and upon the execution of the said deed to the defendant to the foregoing three lots of land that the plaintiff have and recover of the defendant the sum of $5,000 and interest thereon from 25 May, 1917, at 6 per cent until paid, the same being the contract price and the date for the conveyance, and the defendant appealed.

It is admitted that the contract is in due form, and a binding obligation according to its terms upon both parties, and that plaintiff has fully performed same if he is seized of the indefeasible fee-simple title to the property, the question of his title being the sole point in controversy.

The original source of plaintiff's title is a certain deed from

Nancy S. Smith to Carrie E. Smith and others, dated 6 April, 1880, which deed was before this Court and construed in the case of *Springs v. Hopkins,* 171 N.C. 486, and the relevant facts affecting the limitations thereof are stated in the report of said case. The lands conveyed by said original deed were sold in proceedings duly brought, and the funds arising from the sale thereof reinvested in the three lots, the title to which is in issue, they being conveyed subject to the limitations of said original deed. It is admitted that the title to said lots is good, subject only to the limitations of said original deed above referred to.

W. Mc. Smith, Carrie E. Smith, and the husband of Elizabeth Jane Lee are dead.

W. Bernard Smith died in infancy during the lifetime of his parents, and at their death the children surviving them were Lillian Smith, Junius Smith, and Julia E. Smith, the last named being insane.

Anna B. Lee died unmarried and without issue, leaving surviving her mother, Elizabeth Jane Lee, and her brother, B. Rush Lee. The husband of Elizabeth Jane Lee was dead at the time she executed the deed to the plaintiff.

B. Rush Lee and Elizabeth Jane Lee, the ultimate remaindermen mentioned in the original deed, conveyed all their right, title and interest, present and future, vested and contingent, etc., in the lands in question to Lillian S. Springs.

Lillian S. Springs (her husband joining) then conveyed to plaintiff Junius M. Smith all her title, interest and estate, present, future, vested, contingent, etc., including both her defeasible one-third and the interests of the ultimate remaindermen, leaving only one-third defeasible interest of Julia E. Smith, outstanding. (618)

Julia E. Smith is *non compos mentis,* suffering from what is said to be an incurable mental malady. Her one-third defeasible interest in said property constitutes her whole estate, and as the property is in bad repair and will produce no income in excess of carrying charges, she is wholly dependent on the bounty of her family and the State and in debt for necessaries furnished for her proper care and maintenance. Her duly appointed guardian, acting under orders of the court, conveyed to plaintiff Junius M. Smith all of the right, title, interest and estate, present, future, contingent, vested, etc., of said Julia E. Smith in and to the property in question.

Charles S. Glasgow and Clarkson, Taliaferro & Clarkson for plaintiff.

Hunter Marshall, Jr., for defendant.

ALLEN, J. The deed under which the plaintiff claims was considered in *Springs v. Hopkins,* 171 N.C. 488, and it was there held that the children of W. Mc. Smith and wife, who survived their parents, to-wit, Lillian Smith, Junius Smith, and Julia E. Smith, took an estate in fee with the right of successive survivorships, defeasible upon the death of said children without issue, and in that event over to Anna B. Lee and B. Rush Lee and to the survivor of them in fee, defeasible upon the death of both without issue, in which last event the title would pass to W. H. Bailey in trust for the sole and separate use of Elizabeth Jane Lee in fee.

The attempt to prevent Elizabeth Jane Lee from conveying her interest in the property described is void as a restraint on alienation (*Trust Co. v. Nicholson,* 162 N.C. 263), and as her deed to the plaintiff was executed after the death of her husband, it was not necessary for the trustee to join in the conveyance. *Cameron v. Hicks,* 141 N.C. 21. It is also established that contingent interests, such as those before us, will pass by deed. *Kornegay v. Miller,* 137 N.C. 659; *Beacom v. Amos,* 161 N.C. 357; *Hobgood v. Hobgood,* 169 N.C. 490; *Scott v. Henderson,* 169 N.C. 661.

It follows, therefore, as the plaintiff holds deeds from all who have any interest or title, contingent or otherwise, that he has an indefeasible title, if the deed from the guardian, purporting to convey the interest of his ward, a lunatic, is valid.

This deed was executed under the authority of an *ex parte* proceeding commenced before the clerk of the Suprior Court. The orders and judgments were approved by a judge of the Superior Court, but there was no appeal, taking the proceeding to the Superior Court, nor does it appear that any order or judgment was made or
(619) approved in term. It also appears from the proceeding that it was not brought for the purpose of selling the land, but only the interest of the lunatic therein, and there is neither prayer in the petition nor provision in the decree for a reinvestment of the proceeds of sale. The proceeding was not instituted under the act of 1903 and 1905 (now Revisal, sec. 1590) providing for the sale of certain contingent interests.

"By the common law, as well as by statute, 17 Edward II, chap. 10, which was only declaratory of the common law, the King, as *parens patriæ,* took charge of the effects of a lunatic and held them, *first,* for the maintenance of him and his family, and, *second,* for the benefit of his own creditors, as the Court of Chancery might order from time to time. Shelford on Lunatics, pp. 12, 356, 498; Bac. Abr., title, *Lunatics,* c.

"Thus in England, by the grant of the King. the Court of Chancery acquired exclusive, original and final jurisdiction over the per-

son and property of lunatics. Our courts of equity in this State succeed to these chancery powers, and still retain them, except in so far as and to the extent only as they have been given to other courts by statute." *Blake v. Respass,* 77 N.C. 195.

The statutes relied on by the plaintiffs to confer jurisdiction on the clerk (Revisal, secs. 1896, 1897) bear substantially the same relation to the estates of lunatics that section 1798 does to the estates of infants, and neither purports to deal with other than vested interests. Indeed, if the statutes referred to go to the extent claimed by the plaintiff, the acts of 1903 and 1905, which were adopted after long discussion, were unnecessary, and the debate as to the power of courts of equity to sell contingent interests, which has prevailed since the case of *Watson v. Watson,* 56 N.C. 400, vain and useless.

The whole question of the jurisdiction to sell contingent interests was elaborately discussed and the authorities reviewed in *Springs v. Scott,* 132 N.C. 551, and the Court says in conclusion: "Upon careful examination of the cases in our own Reports and those of other States, we are of opinion:

"1. That without regard to the act of 1903, the Court has the power to order the sale of real estate limited to a tenant for life, with remainder to children or issue, upon failure thereof, over to persons, all or some of whom are *in esse,* when one of the class being first in remainder after the expiration of the life estate is *in esse* and a party to the proceeding to represent the class, and that upon decree passed, and sale and title made pursuant thereto, the purchaser acquires a perfect title as against all persons *in esse* or *in posse.*

"2. That when the estate is vested in a trustee to preserve contingent remainders and limitations, the Court may, upon petition of the life tenant and the trustee, with such of the remaindermen as may be *in esse,* proceed to order the sale and bind all (620) persons either *in esse* or *in posse.*

"3. That since the act of 1903, chap. 99, the court has the power, when there is a vested interest in real estate and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, to order the sale by conforming to the procedure prescribed by the act.

"4. That the act is constitutional and applies to estates created prior to its enactment."

The Court also says in the first part of the opinion, on page 551, "To the suggestion that this proceeding invoking the equitable powers of the Court, should have been instituted in the Superior Court in term, in which we concur," and adds, after the enumeration of its

conclusions, "Of course, in each of the classes named, the decree must provide for the investment of the fund in such way as the Court may deem best for the protection of all persons who have or may have remote or contingent interests."

The case has been approved in *Hodges v. Lipscomb,* 133 N.C. 202; *Smith v. Gudger,* 133 N.C. 627; *McAfee v. Green,* 143 N.C. 415; *Trust Co. v. Nicholson,* 162 N.C. 263; *O'Hagan v. Johnson,* 163 N.C. 197; *Bullock v. Oil Co.,* 165 N.C. 67. And in the *Smith* case the Court says: "We think, however, that the plaintiff erroneously brought this proceeding before the clerk. It is not a special proceeding for partition, but an equitable proceeding for the sale of property and reinvestment of the proceeds formerly cognizable in a court of equity, as set out in *Watson v. Watson,* 56 N.C. 400. We do not think that this equitable power is conferred upon the clerk."

Provision is also made in the several cases for a reinvestment of the funds, which could not be done if the courts permitted a sale of a contingent interest in land, which has been attempted in the proceeding under which the guardian has acted, and not the land itself.

It is desirable that estates shall be unfettered and in the channels of commerce, but as long as the owner is within the law, the courts have no power to thwart his purpose, and divert his property contrary to his intention, which would be the result if a contingent interest, which might become vested as to the entire property, under the scheme worked out by the owner, could be sold without provision being made for a reinvestment.

Under the deed before us, the owner intended that the lunatic should own the whole of the land in a certain contingency, and it is proposed under the special proceeding to make this impossible.

We are, therefore, of opinion that the clerk was without jurisdiction; that if the proceeding had been in the Superior Court the decree ought to have provided for a reinvestment of the pro-
(621) ceeds of sale; that the deed of the guardian passed nothing to the plaintiff, and that his title is not an indefeasible title in fee.

Reversed.

Cited: Pendleton v. Williams, 175 N.C. 252; *Dawson v. Wood,* 177 N.C. 163; *Hollowell v. Manly,* 179 N.C. 264; *Crawford v. Allen,* 180 N.C. 246; *Stepp v. Stepp,* 200 N.C. 239; *Bem v. Gilkey,* 225 N.C. 525.

C. O. BOYLES v. CHARLOTTE ELECTRIC RAILWAY COMPANY.

(Filed 28 November, 1917.)

Railroads—Street Railways—Concurring Negligence—Pedestrians—Last Clear Chance—Contributory Negligence.

A pedestrian should be observant for his own safety before crossing a street car track; and where he is familiar with the car schedules and the location of the track, and walks along the track and turns into contact with a rapidly running car, with a headlight and lights within the car, his negligence, if the car was running at an excessive speed, concurs with that of the company's negligence, if any, continuing to the time of the injury, and will bar his recovery; and the doctrine of the last clear chance has no application. *Ingle v. Power Co.*, 172 N.C. 751, cited and distinguished.

APPEAL by plaintiff from *Justice, J.*, at the November Term, 1916, of MECKLENBURG.

This is a petition to rehear.

J. W. Keerans for plaintiff, petitioner.
Osborne, Cocke & Robinson for defendant.

ALLEN, J. This appeal was disposed of on the former hearing without an opinion, and we would now follow the same course but for the insistence of counsel that our decision is in conflict with *Ingle v. Power Co.*, 172 N.C. 751. The distinction between the two cases is clear, and indeed there is but one point of similarity, and that is in both cases the cars were running at an excessive rate of speed.

In the *Ingle* case a car had passed along a parallel track a few minutes before the injury complained of; the car which struck the deceased was not running on any schedule, and was an extra; it was not equipped with a practical fender which is required by law; the injured party was standing in the middle of the track in a stooping position; he could have been seen by the motorman to be on the track when the car was 300 yards distant; if the car had been running at a regular rate of speed it could have been stopped within 8 or 10 steps; the brakes were not applied until after the collision, and it was held there was evidence that notwithstanding the negligence of the plaintiff, which was found by the jury, the de- (622) fendant could have avoided the injury by the exercise of ordinary care.

In the present case the car was not an extra and was running on regular time; there is no evidence the car did not have a practical fender; the plaintiff was not on the track in front of the car; he walked into the front right-hand corner of the car, and as the car

was approaching he was on a path away from the track, walking slowly.

The uncontradicted evidence shows:

(1) That the plaintiff was in the habit of going this same route; that he knew the location of the car track, and that he knew the car passed about the time of the day at which he was injured.

(2) That the view was unobstructed.

(3) That he took absolutely no precautions for his safety, but walked heedlessly and recklessly into the car.

(4) That there was a headlight on the car, and it was making enough noise to be heard by the witness Henley 30 feet further up the track than the plaintiff.

The plaintiff testified that he did not know anything as to how he was injured, and the only eye-witness introduced by the plaintiff testified, among other things: "Before the car struck him, I saw the bulk of a man there; it looked like a man coming; it looked like — in fact, I didn't know anything about the stops of the street car there; I just thought the man was coming to get on the car, and the car was running pretty fast. . . . Boyles was on the south side, and the right-hand corner of the street car — the front right-hand corner — struck him. When I first saw Boyles he looked like he was going to cross the track — looked like he was coming toward us. We were in a triangular shape from the south, the street car running in this direction; he was on the south side, we on the other side, the Norfolk-Southern engine straight back from us at the water tank. When I first saw him I could not tell anything about his appearance or what he was doing; it was a quick thing to look at, because by the time I saw him the car was close — coming in, too, and the thought struck me, a man was going to get on the street car, and I looked to see why he wasn't stopping. . . . Looked like he was coming towards the track — apparently, going slowly, and looked like he was going to catch the car. When I saw him he was about 20 feet from me. There was a headlight on the car. I suppose the car was lit up; I judge it was. I heard the car before I saw the man; I heard it when it started away — when it stopped up above at the crossing. I don't know whether he walked into the car or not; it struck him, somehow or other. I guess he must have walked into it — he got into it some way or other; he was not on the track. . . . It was my understanding that when Mr. Boyles walked up towards the street car he was going to his work; it looked like
(623) he was coming right towards me. *He slowed up as he got near the car line.* When a man is going to catch a car, he goes to the line — I do; I don't go beyond the line; I don't know whether he went beyond the line. *It looked like he slowed up as he got to the*

car; it looked like he was walking slow; he didn't have time to walk far. It all happened so quick, I couldn't tell whether he slowed up or not. *I thought he was going to catch the car.*"

Upon this evidence it may well be said, as was said in *Crenshaw v. Street R. R.,* 144 N.C. 325, that if the defendant was negligent, the plaintiff was guilty of such concurrent negligence, continuing up to the time of the injury, as will bar a recovery.

There is no evidence raising the doctrine of the last clear chance, because up to the last moment the plaintiff was in a safe place, and the motorman could not anticipate that he would walk into the car.

"It must be conceded that if one be walking along or crossing a track it is not only his duty to turn off when signaled, but to keep a lookout — look and listen for the approach of a car. The track itself is notice that a car may at any moment approach. We are speaking only of street railways in this connection." *Davis v. Traction Co.,* 141 N.C. 134.

In *Crenshaw's* case the Court says: "Speaking of the rights of foot passengers on streets, and the duty to use their powers of observation when approaching vehicles or street railways, the Court, in *Railway Co. v. Block,* 55 N.J.L. 612, said: 'The degree of care required in approaching and crossing street railways exceeds that required in approaching and passing foot passengers, not because the right of the foot passenger and the right of the driver of a vehicle differ, but because of the circumstances. The vehicle usually travels at a greater speed — it cannot be so quickly stopped or diverted from its course; a street car cannot turn aside or even retrace its steps.' On this part of the case the decision in *Parker v. R. R.,* 86 N.C. 222, and *Bessent v. R. R.,* 132 N.C. 934, are very much in point. A rational being should not needlessly venture into places of peril, and if he does he should use proper precaution to guard against injury. If he fails to do either, and suffers damage in consequence thereof, it must be referred to his rash act and gross inattention to his own security as the true and efficient cause. *Express Co. v. Nichols,* 3 N.J.L. 439. But numerous courts have stated this principle with substantial uniformity, and we find that it has been applied to facts not unlike those now presented to us, and to the extent of denying the plaintiff's right of recovery."

We see no reason for disturbing the judgment.

Petition dismissed.

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BANK OF UNION v. NAN CARLILE.

(Filed 28 November, 1917.)

Justice's Courts — Nonresidents—Process—Statutes—Time to Answer — Jurisdiction—Motions.

The provision of Revisal, sec. 1451, that a justice of the peace shall not enter a judgment against a nonresident defendant unless it shall appear that process was duly served at least ten days before the return day, is not jurisdictional; and where, upon special appearance of defendant for the purpose of dismissing the action, he was given more than ten days thereafter to answer or defend, which he refused to do, the justice's judgment will not be disturbed.

APPEAL from justice of the peace, tried before *Webb, J.*, at February Term, 1917, of UNION.

There was a verdict and judgment for plaintiff. The defendants, H. A. DeCover and wife, appealed.

Stack & Parker for plaintiff.

J. A. McNorton and Frank Armfield for defendants.

BROWN, J. This action was instituted before a justice of the peace of Union County for the recovery of $200 on promissory notes against Mrs. Nan Carlile, a resident of Union County, and H. A. DeCover and Mrs. H. A. DeCover, residents of New Hanover County. The summons was issued on 24 November, 1916, and was served on H. A. DeCover and Mrs. H. A. DeCover on 2 December, 1916, and was returnable on 8 December, 1916. On return day those defendants, by attorney, entered a special appearance before the justice and moved to dismiss the action for the reason that the summons was not served upon them for more than ten days before return day. The court found that the summons was served on said defendants less than ten days before return day of same. The court then took an *advisari* on the motion to dismiss until 12 December, 1916, when the court overruled the motion. Defendants excepted.

Upon motion of the plaintiff, the cause was continued until 22 December, 1916, in order, as stated by the court, that the defendants have time to file answer to the plaintiff's complaint. On 22 December, 1916, judgment was rendered against the defendant Carlile upon admissions, and against defendants DeCover, after hearing evidence of the plaintiff, for the sum of $200, interest and costs.

In the Superior Court the defendants in apt time made a special appearance, through their attorney, and moved to dismiss the action and vacate the judgment rendered by the justice of the peace,

for irregularity, in that in the said action defendants being nonresidents of Union County the service of summons therein was had within less than ten days of the return day named therein. (625) The motion was overruled, and the defendants excepted.

Defendants assign error:

1. Failure of the justice of the peace to dismiss the action as to appellants.

2. Failure of the judge to dismiss the action and vacate the judgment as to appellants.

The defendants rely on Revisal, sec. 1451: "No justice of the peace shall enter a judgment under the two preceding sections against any defendant who may be a nonresident of his county unless it shall appear that the process was duly served upon him at least ten days before the return day of same."

We are of opinion that the motion of defendants was properly overruled.

The provision of the statute is not jurisdictional. The justice had jurisdiction over the parties and the subject-matter. Had he rendered judgment within the ten days, in the absence of the defendants, it would not have been void, but only voidable. Upon motion, it would have been the duty of the justice to set the judgment aside and give the defendants the proper time within which to answer.

It appears from the record that the defendants had from the 2d day of December, when the summons was served, to the 22d of December, when the judgment was rendered, within which to make their defense. On the return day of the summons the justice took an *advisari,* and then very properly gave defendants ample time within which to answer the complaint. We see nothing in the conduct of the justice of which defendants can justly complain.

We do not regard *Fertilizer Co. v. Marshburn,* 122 N.C. 411, cited by defendants, as in point. In that case a justice in Duplin County issued a summons for defendant in Sampson, addressing the summons "to any constable or other lawful officer of Duplin County." The summons was served on the defendant by an officer of Sampson. The court decided that for this reason the summons was improperly issued and improperly served, and did not bring the defendant into court.

A case more in point is *Laney v. Hutton,* 149 N.C. 264. In that case summons was issued by a justice of the peace on 16 January, returnable on 1 February. It was served on defendants, resident in another county, on 28 January. Judgment was entered against said defendants, in their absence, on 1 February, and they afterwards appealed to the Superior Court. In the Supreme Court they moved

to dismiss the action because the summons was served within ten days of the return date.

The Court held that the action should not be dismissed, (626) saying: "The judgment (of the justice) was not void, but irregular, or, at most, voidable." Of course, if the defect had been jurisdictional, the judgment would have been void. In this case the court gives us the purpose of the statute saying: "Section 1451 of the Revisal was evidently intended to afford the defendants a reasonable opportunity to appear and plead."

No error.

FRANK WALDO ET AL., V. W. L. WILSON.

(Filed 28 November, 1917.)

1. Appeal and Error—Instructions—Adverse Possession—"Color."

The adverse possession to ripen title to land under "color" by known and visible lines and boundaries is not required to be for "more than seven years next preceding the commencement of the action"; and where the court several times has repeated this error in his charge, with correct instructions in other parts thereof, so that it may not be seen which exposition of the law the jury has accepted, it will be held for prejudicial and reversible error.

2. Same — Limitation of Actions—Evidence—Disseizin—Entry—Burden of Proof—Trials.

A dispossession and continued adverse possession of lands for seven years under color amounts to a disseizin, and an instruction that the burden of proof is upon the party thus claiming to show "a tortious entry and actual expulsion" is reversible error.

3. Limitation of Actions — Adverse Possession—Deeds and Conveyances —Outer Boundaries—Constructive Possession.

Where, in an action to recover lands, the defendant introduces evidence tending to show actual occupancy and possession of a small part of the lands claimed under color of a sufficient instrument, giving metes and bounds, with evidence that the possession extended to the outer boundaries given, the question is one for the jury, under a correct charge from the trial judge.

PETITION to rehear the above entitled case, reported 173 N.C., p. 689.

James H. Merrimon and Merrimon, Adams & Johnson for plaintiff.

Martin, Rollins & Wright for defendant.

BROWN, J. When this appeal was first before this Court we said that the plaintiffs make two contentions:

1. That the grant under which defendant claims is void.

2. That plaintiffs have been in adverse possession under color for seven years prior to the commencement of the action.

We adhere to our former opinion upon the first contention, for the reasons and upon the authorities therein given. (627)

We are, however, of opinion, upon a careful reëxamination of the record, that our conclusion reached upon the review of the second contention is erroneous. We were advertent to errors in the charge upon this branch of the case; but taking the charge as a whole, we thought the jury were probably not misled and the plaintiffs not seriously prejudiced.

After a more critical examination of the charge, and further reflection, we are now of opinion that the errors in it were serious and very likely to mislead the jury, to plaintiff's detriment.

The court charged the jury that plaintiffs must show by the greater weight of the evidence that they have been in adverse possession under known and visible lines and boundaries "for *more* than seven years *next* preceding the commencement of the action." This charge is erroneous. The possession need not be *next* preceding the commencement of the action, and it need not continue for *more* than seven years continuously. This error was repealed during the charge, although in reference to this the court also charged correctly.

Amid these conflicting instructions upon a vital matter, we think it likely the jury were confused. We are unable to tell by which rule they were governed *(Raines v. R. R.,* 169 N.C. 193), and we cannot with certainty know that they were not influenced by the error. *Horton v. R. R.,* 162 N.C. 424.

Another assignment of error is to the charge: "That an adverse possession sufficient to divest title is where one enters on land intending to usurp possession and to oust another of his freehold; and to constitute an actual disseizin, or one in fact, there must be a tortious entry *and actual expulsion.* A disseizin and adverse possession is an actual, visible, and exclusive appropriation of land, commenced and continued under a claim of right; the claim must be adverse and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action. It is the occupation with an intent to claim against the true owners which renders the entry and possession adverse. And if the plaintiffs have failed to satisfy you by the preponderance or greater weight of the evidence that they have had seven years' continuous adverse possession of 6317, or a part thereof, of the kind and character described, it would be your duty to answer the first issue 'No.' "

As observed by the learned counsel for plaintiff in his brief, "This charge contains abstract questions that have no application."

A freeholder can be disseized of his seizin by dispossession, aided by the law which takes away his right of entry. *Tyson v. Harrington,* 41 N.C. 334; *London v. Bear,* 84 N.C. 271.

In this State, under the statute, a dispossession and con-
(628) tinued adverse possession for seven years amounts to a disseizin. The charge that the burden was imposed upon the plaintiffs to show at the outset that they had disseized the defendant by a *"tortious entry and actual expulsion"* was erroneous and misleading. We find that there was no attempt to correct this error. The jury might well have concluded that there must have been an actual expulsion of defendant from the land before plaintiff could acquire an adverse possession. It is now insisted by defendant that there is no sufficient evidence of adverse possession, and that therefore these errors are harmless. As the point was not before us, we did not pass on it.

There is a brief statement of most of the evidence in the former opinion. There is evidence of an actual occupancy, *possessio pedis,* of a very small part of 6317 which defendant undertakes to explain, but that is a question for the jury. The adverse and unexplained possession of so small part may not give title to the whole tract, but, coupled with all the other evidence in the record, we think, under our decisions, that, taken as a whole, the evidence is sufficient to go to the jury that they may, under a correct charge, draw their own conclusions from it. *Locklear v. Savage,* 149 N.C. 236; *McLean v. Smith,* 106 N.C. 172; *Hamilton v. Icard,* 114 N.C. 538; *Bryan v. Spivey,* 109 N.C. 67; *Osborne v. Johnson,* 65 N.C. 26; *Lenoir v. South,* 32 N.C. 241; *Christman v. Hilliard,* 167 N.C. 7.

The petition to rehear is allowed and a new trial ordered.

Petition allowed.

Cited: Alexander v. Cedar Works, 177 N.C. 146.

WILLIAM MARSHALL WILSON v. SUPREME CONCLAVE, IMPROVED ORDER OF HEPTASOPHS.

(Filed 28 November, 1917.)

1. Insurance—Policies—Contracts—Vested Rights—Constitutional Law.

A general consent of a policy-holder in an assessment fraternal benefit society that the company may thereafter alter or amend its constitution or by-laws does not authorize the society to make such changes therein as will impair the vested right of its members and policy-holders arising under their contract of insurance with the company.

2. Same—Fraternal Orders—Assessments.

Where a member of a fraternal benefit society has taken out a life insurance policy therein under a contract that its members shall be assessed according to age, the society may not thereafter so change its plan of insurance as to divide the members prior to a certain date into a class by themselves, leaving them to take care of their losses among themselves by ever-increasing assessments in the progress of time, or at their option come in as new members to be assessed according to their increased age, and thus lose their vested rights under their policy contracts.

3. Fraternal Orders — Amendments — Charter — By-Laws — Suspending Member.

Where fraternal benefit insurance societies are required to file certified copy of changes made in their constitution and by-laws with the Insurance Commission within 90 days, and fail to do so, they may not, while thus in default, suspend a member for noncompliance therewith.

4. Insurance—Fraternal Orders—Policies—Lex Loci.

Where a member of a fraternal benefit society, incorporated in another State, takes a life insurance policy therein through a subordinate lodge in this State, the policy contract is a North Carolina contract, subject to the laws of this State, which will not permit such change in the plan of insurance as will impair rights theretofore vested under the policy, whether such may be lawful in such other State or otherwise.

5. Insurance—Commerce—Policies—Contracts—Lex Loci— Presumptions —Statutes.

Insurance is not the subject of interstate commerce, and the presumption is that the law of the place at which a contract of insurance is made shall govern the rights of the parties, and the statute law at the time thereof applies, and not that which is later enacted.

6. Insurance — Fraternal Orders—Contracts—Policies—Vested Rights— Cancellation—Damages.

Where a fraternal benefit society has issued a policy of life insurance to a member, and has changed its plan of business so as to impair the vested rights of the insured under his contract, and refuses to accept the proper premium, and declares the policy void, the insured may maintain his action to recover of the insurer the principal sum of money he has paid on his policy, and simple interest thereon.

APPEAL by defendant from *Cline, J.*, at February Term,
(629) 1917, of MECKLENBURG.

The defendant, a fraternal benefit society, incorporated in Baltimore, Md., organized in Charlotte, N. C., a subordinate lodge, in which the plaintiff became a member 3 September, 1896, and took out an insurance policy in the sum of $5,000. He paid the fixed monthly dues of $8.10 each month, and his lodge dues from time to time, until 1 July, 1901, when the defendant raised the rate of the monthly assessments on the entire membership alike, as of the age when each member joined, which caused the monthly dues of the plaintiff to be increased to $13.10, which he paid from time to time, till 1 January, 1910; then the defendant again raised its due for the entire membership, and upon all members alike, as of the age when they joined, and this increased the plaintiff's monthly dues to $18.47, which he paid from that date to and including January, 1916.

The defendant, on 28 October, 1915, held a special ses-
(630) sion of its Supreme Conclave at Harrisburg, Pa., and divided its members into two classes — "A" and "B." Class B was to be composed of members who joined prior to 1 January, 1914, and all joining after that date were to constitute Class A. It was provided that the members of Class A should pay for their insurance on a fixed basis, based upon their then attained age, upon the National Fraternal Congress rate; but the members of Class B were to pay for their insurance, or protection, also at their then attained age and on what was known as the "current cost plan." The laws then in force in this State and in Maryland as to fraternal benefit societies required such society making a change in its constitution or by-laws to furnish a certified copy of said changes to the Insurance Commissioner of Maryland and also to the Insurance Commissioner of North Carolina, within 90 days after the adoption of said change. Laws 1913, chap. 89, sec. 19, of this State. The defendant filed an uncertified copy with the Insurance Commissioner of Maryland on 3 March, 1916, and did not file a certified copy with the Insurance Commissioner of this State till 8 March, 1916, both of which acts were beyond the 90-days period prescribed; and while the defendant was thus in default, it suspended the plaintiff from membership.

The plaintiff did not consent to the classification by the defendant into Classes A and B, as above set out, but on the contrary tendered his dues for January, 1916, under the rules and regulations in force prior to 28 October, 1915, and disputed the validity of the proposed classification.

The defendant accepted the January dues, 1916, on the conditions contained in the written instrument accompanying said pay-

ment. The defendant notified the plaintiff in February, 1916, that the defendant had placed the plaintiff in Class B, and that as a member of said class he was required to pay for February an extra assessment equal to the regular assessment for said month, and that if said regular and assessment were not paid before the last day of February that all plaintiff's rights under his contract would be *ipso facto* forfeited.

After receiving said notice, plaintiff paid no further dues, and began this suit 21 March, 1916, alleging in his complaint that the attempted classification by the defendant of its members into Class A and Class B had not been properly made, and if properly made, it was unlawful, in that it was a discrimination against the old members of the order, because it attempted to rate them at their then attained age, and also attempted to put them in a class by themselves, to which new members could not be admitted, thus withdrawing all new blood from that class and forcing them to carry their own insurance at their then attained age, which rate would grow heavier with the passage of time, and would finally force the survivor of said old members to pay his own death claim.

The answer admits the allegations above set forth, except that it denies the unlawfulness of the classification, and (631) alleges that they were authorized by a change in the constitution and laws of the defendant, adopted at Harrisburg, Pa., 28-30 October, 1915, and pleaded that full faith and credit must be given to the statutes of Maryland under which said changes were made.

The court charged the jury that said classification of members by the defendant corporation was unlawful because in violation of the contract rights of the plaintiff, and that the statute of Maryland, permitting the defendant to amend its charter, could not, and did not, authorize it to violate the contract rights of the plaintiff.

Verdict and judgment for plaintiff. Appeal by defendant.

T. A. Adams for plaintiff.

A. C. Davis, Olin Bryan, and C. W. Tillett, Jr., for defendant.

CLARK, C.J. The defendant's counsel, in his argument, admitted that this same question had been decided against it in *Williams v. Heptasophs* (this defendant), 172 N.C. 787, and he asked this Court to review and reverse what was held in that case. Indeed, this case is even stronger in some respects for the plaintiff than in the *Williams* case, and we think that case was rightly decided. In that case it was said that by virtue of the resolutions adopted 29 October, 1915, which put all the members who joined prior to 1 January,

1914, in a separate class and required them to pay all death losses occurring in their class, the result would be that the assessments upon the plaintiff would become, of course, much higher than if the entire membership had continued to share in the burden of all the deaths; and consequently, if the plaintiff should be "the longest liver in that class, he would have to pay his own death loss, and in the meantime would, as a member of a constantly dwindling class, be required to pay higher and higher assessments on the death of each of his fellow-members."

In that case we further considered the options set before the plaintiff, and pointed out that if he elected to accept any one of them he would be in the same condition of a new member coming into the order who had never held the policy of insurance, for the value of his policy would be completely destroyed. The plaintiff, it appears, had already paid in nearly $3,200, which, with the compound interest thereon, and deducting the cost of operating the company, should already be more than enough to pay the $5,000 policy. To require the plaintiff to throw all this away and start anew, relying upon assessments at his present attained age for payment of his policy out of a class receiving no new accessions, is simply to put him into a *cul de sac,* from which there is no exit but with loss."

The earnest counsel for the defendant insisted that the
(632) company was in straits; that it owed $90,000,000 of liabilities and had only $25,000 cash in its treasury. This is a bad result, and whether due to a faulty plan of operation inherent in the method adopted, or to mismanagement, or to unforeseen losses, we do not know. But it does not affect the fact that the new plan proposed is in entire derogation of the contract rights of plaintiff. No regulation or amendment to the charter was valid which would have this result, and no statute of Maryland or of any other State could empower the defendant to violate its obligation to the plaintiff.

Though a member of a beneficial society may be bound by after-adopted by-laws or changes in its constitution, this is subject to the proviso that the society cannot thereby impair the contract rights of the member as the owner of the policy, which is a certificate of indebtedness issued by the company to the member.

In this case, as in *Bragaw v. Supreme Lodge,* 128 N.C. 357, it is not shown that the plaintiff had any notice of or assented to this amendment; on the contrary, he avowed his dissent when informed of its passage. In *Bragaw's* case we said: "A provision that one should become a member, subject to the power of the corporation to change its by-laws, cannot be construed into liberty to change at its will the contract of insurance it has made with each insurer.

The company and the insured occupy two entirely different relations. In one it is a company, and the other party one of its members. In that relation the by-laws or constitution can be amended at will of the majority, if done in the legal and prescribed mode. The other relation is that of insurer and insured, and this contract relation cannot be altered save by the consent of both parties, and the party alleging that the consent was given must show it."

"A mere general consent that the constitution and by-laws may be amended applies only to such reasonable regulation as may be within the scope of its original design." *Strauss v. Life Assn.*, 126 N.C. 971.

We are of opinion that the statute of Maryland did not authorize the classification adopted, and that if it had, it would be invalid because in violation of the contract rights of the plaintiff.

We further think that this was a North Carolina contract and is governed by the statutes of this State *(Knights of Pythias v. Meyer,* 198 U.S. 507; *Equitable Soc. v. Pettus,* 140 U.S. 226; *Ins. Co. v. McCue,* 223 U.S. 234), and there is no statute of this State which authorized this radical change of the status of the plaintiff.

It has been often held that insurance is not interstate commerce *(Ins. Co. v. Craven,* 178 U.S. 389), and the presumption is that the law of the place at which a contract is made shall govern the rights of the parties. *Ins. Co. v. Cohen,* 179 U.S. 262. The plaintiff's contract of insurance was written in 1896, and the passage of chapter 54, Laws 1899, could not change the tenor of the contract made with the plaintiff prior to its passage; nor could it au- (633) thorize the application to it of a Maryland statute. His contract is to be construed entirely in the light of the statutes in force in this State in 1896. The condition that the society is to be governed by the by-laws enacted by the Supreme Conclave from time to time has reference to the future regulations of the order which are reasonable in their terms and which do not impair vested rights. *Strauss v. Life Assn.*, 126 N.C. 971; *S. c.*, 128 N.C. 465.

This Court has already held that this particular classification by this defendant is unlawful and invalid. *Williams v. Heptasophs,* 172 N.C. 987. This case is stronger for the plaintiff than that, because:

(1) In the *Williams* case the record did not show, as in this, that the defendant was in default in filing certified copies of its proposed amendments to its constitution and by-laws with the Insurance Commissioner of Maryland and of North Carolina.

(2) The plaintiff in this case was suspended by the defendant during the time that the defendant was in default in complying with the statutory regulations in regard to filing such amendments.

(3) The plaintiff in the *Williams* case tendered no payment

under protest, or otherwise, after the proposed classification, while the plaintiff in this action tendered his January, 1916, dues under the terms and conditions specified in the written tender that it should be accepted "in accordance with the rate fixed by the by-laws prior to 28 October, 1915," and the payment was accepted, which was an acknowledgment that the classification was null and void as against this plaintiff, or at least a waiver of said classification as to him.

The defendant in raising the rate in 1901, in which the plaintiff acquiesced, furnished the plaintiff in July, 1901, a written statement as follows: "It makes no difference how long you have been a member, you need pay only the rate for the age you were when joining the order. You now have an order second to none, based upon sound business principles, appealing to all seeking good, safe protection at a minimum cost. You can now tell your friends what it will cost them each month, and thus benefit them and aid the order."

The defendant had the right to increase its rates, if necessary, laying them, as they did, at the increase in 1901 and again in 1910, upon all the members upon the basis of the age at which they became members; but it had no right to practically divide the membership into two, putting the plaintiff in Class B, into which no new members would be admitted from time to time. It is true there is an opportunity for the members of Class B to pass into Class A, but upon the condition that they shall be assessed at the attained age (which of plaintiff is now 75 years), for this is in direct violation of the terms upon which he entered the association.

(634) An insurance company is like a river. The loss in volume by the outflow is constantly made good by accessions along the route, *i. e.*, by the interest accruing, and by the waters coming from above, *i. e.*, the payments by new members. While time depletes the current by death, it is adding to it from new sources; but when, as in this case, the company seeks to divide its members into classes, the older of which will receive no accessions, the current will soon run dry. It is true that this figure is more applicable to the standard companies than to a benefit association where the losses are paid by assessments upon death, but it is none the less true that when there is a class in which there are no new members to assess, that class must become smaller and smaller and the assessments larger and larger till they become unbearable. Certainly such division into classes is not within the contract made by this plaintiff, and upon breach of that contract he is entitled to recover back the principal money which he has paid in, with simple interest thereon. *Braswell v. Ins. Co.*, 75 N.C. 8, and citations in Anno. Ed.

It appears that the plaintiff has paid in principal money in the twenty years from 1896 to 1916 $3,149.31. He is now over 75 years of age and unable to obtain other insurance. The classification attempted to be enforced upon him is unlawful, arbitrary and discriminatory, as we have already held in Williams against this defendant, 172 N.C. 787. We hold that the contract under which the plaintiff claims is founded upon and governed solely by the laws of North Carolina, and that even if it were governed by the laws of Maryland, the classification complained of is not warranted by the laws of that State; and if it were they could not impair the obligation of the contract which the defendant entered into with this plaintiff, and the judgment is in all respects affirmed.

No error.

ALLEN, J., not sitting.

Cited: *Spearman v. Burial Assoc.*, 225 N.C. 187.

CALDWELL LAND AND LUMBER COMPANY v. COMMISSIONERS OF CALDWELL COUNTY ET ALS.

(Filed 28 November, 1917.)

Taxation — Government Reservation—Contracts to Convey Land—Deeds and Conveyances.

A contract to convey lands to the United States Government reservation, under the Federal statute, does not vest the title in the Government until survey made, acreage determined, purchase price paid, or conveyance made and title approved by the Attorney-General, and until then the land is subject to State, etc., taxes under the State statutes.

APPEAL by both parties from *Carter, J.*, at chambers, as of May Term, 1917; from CALDWELL. (635)

The plaintiff lumber company, being the owner of certain timber lands in Caldwell County, entered into an agreement on 15 September, 1915, to sell the same to the United States "at the rate of $1.90 per acre, the acreage to be determined by Government survey." The defendant County Commissioners of Caldwell caused the lands to be assessed for taxation for State and county purposes for the years 1916 and 1917, and the defendant sheriff was authorized to collect such taxes.

The case is submitted upon "a controversy without action," in

which it is agreed "No conveyance of the title has been made under the terms of the contract referred to and no condemnation proceedings thereunder have been instituted." It was also agreed that the U. S. Department of Agriculture, by its agents, has exercised certain acts of possession over the lands referred to in said contract by building roads, and the like.

The court held that the lumber company was liable for the taxes for 1916, from which it appealed, and that it was not liable for the taxes on the lands in question for the year 1917, from which the defendants appealed.

W. C. Newland for plaintiff.
Squires & Whisnant for defendants.

CLARK, C.J. The sole question presented is, "Who was the owner of the lands in question on the first day of May, 1916 and 1917?"

The statute provides: "Every person owning property is required to list and deliver to the list taker a statement, verified by his oath, of all the real and personal property, moneys, credits . . . in his possession or under his control on the first day of May, either as owner or holder thereof, or as parent, guardian, trustee, executor, executrix, administrator, administratrix, receiver, accounting officer, partner, agent, factor, or otherwise."

In this case, the plaintiff has given a contract to sell to the Government, at the price of $1.90 per acre, the acreage to be determined by Government survey, but there has been no survey. The acreage has not been determined; the purchase money has not been paid, and no deed has been executed. The same rules apply when the Government holds such a contract as if it were an individual. No title has passed, for no conveyance has been made. The laying out of roads by a department of the Government does not pass the title, and the Government, like an individual, has only a right of action for specific performance or for damages unless it chooses to resort to condemnation proceedings. At any rate, at the time this case was presented to the court the defendant lumber company
(636) was the "owner" of the land in question, and was such on 1 May, 1916, and 1 May, 1917, and is liable for the taxes for both years. Black on Tax Titles (2 Ed.), sec. 106, says that "by the 'owner' is meant the person who has the legal title or estate to or in the land, and not the one who by contract or otherwise has a mere equity therein or a right to compel a conveyance of such legal title or estate to himself," citing *Tracy v. Reed*, 38 Fed. 69.

The act of Congress ratified 1 March, 1911, ch. 186, sec. 8, which is referred to in the contract given by the lumber company, the

plaintiff in this case, provides that in acquiring lands for his reservation, "No payment shall be made for any such land until the title shall be satisfactory to the Attorney-General and shall be vested in the United States." No deed has been executed to the Government nor has been approved by the Attorney-General, and the title has never vested in the United States. The title may never vest in the Government, for the act may be repealed or the title may not be approved.

The plaintiff has not a solvent credit to show nor money received which could be taxed in lieu of the land. He still has the land and nothing more.

In the plaintiff's appeal the judgment is affirmed. In the defendant's appeal the judgment that the lumber company is not liable for the taxes of 1917 is

Reversed.

Cited: *Lumber Co. v. Graham County,* 214 N.C. 172.

EMMIE LEMLIE BROWN v. GEORGE E. WILSON.

(Filed 28 November, 1917.)

1. **Guardian and Ward—Funds in Hand—Personalty—Action—Parties.**
When personal property or money in hand is the subject of the action, an heir at law of a deceased ward may not maintain an action against the guardian for a settlement in his own right, for such may only be done by the personal representative of the deceased ward.

2. **Guardian and Ward—Settlement—Action—Pleadings—Demurrer.**
Where the complaint fails to allege that the proceeds of sale of certain of the ward's land came into the hands of the guardian, a demurrer thereto in an action against the guardian for a settlement thereof is good.

3. **Equity — Conversion—Reconversion—Guardian and Ward—Pleadings —Demurrer.**
Where the ward's land are sold by order of court under the doctrine of equitable conversion, the proceeds are to be regarded as personalty, and the doctrine of reconversion only can apply to infants and (formerly) to married women; and where an heir at law of the deceased ward brings action against the guardian for settlement, the allegation that the qualified guardian in 1856 affords no evidence that the ward was a minor in 1861, when the lands were sold, and without further averment, a demurrer is good.

APPEAL by plaintiff from *Cline, J.,* at February Term, 1917, of MECKLENBURG. (637)

This action was brought by the plaintiff in her own right against the executor of Joseph H. Wilson for a settlement of the guardianship of her mother, Ella R. Carson, and her mother's sister, Richardine Carson, both long since dead.

The complaint alleges that Joseph H. Wilson qualified as guardian of Ella R. Carson and sister, Richardine, at October Term, 1856, and that he failed to file any final account as to Ella R., and filed only a partial final account as guardian of her sister. It is also alleged that at November Term, 1856, in an action in which the said wards were plaintiffs and John A. Young and others were defendants, it was ordered by the court that a one-third interest of said wards in certain real property derived from their father R. C. Carson be sold to one Young for $8,000, and that the said Joseph H. Wilson was appointed commissioner to make said sale, and that the record shows that his deed conveying said interest was dated in 1863 and registered in 1867, the consideration named therein being $8,000. It is also alleged that said Wilson, as guardian of Richardine, partially settled with her in 1877 by paying to her $3,000, the proceeds of certain insurance money collected on policies on her father's life, and further that said J. H. Wilson never filed any inventory or final account of his guardianship of herself or her sister. It is alleged upon information and belief that the said Joseph H. Wilson, as guardian, was indebted to said Ella R. Carson in the sum of $3,000, a part of the distributive share of her father's estate.

Section 14 of the complaint alleges that the plaintiff, as the sole heir of Ella R. Carson and Richardine, is entitled to the sum of $8,000, with interest from 1 January, 1861, "being the proceeds derived from the sale of said interest in real estate as hereinbefore set forth and still in the hands of the said guardian at the time of his death."

The prayer for judgment is first for the sum of $3,000 as Ella R.'s part of the distributive share of her father's estate, and second for $8,000, with interest from January, 1861, as the proceeds of the sale of the wards' interest in the property conveyed to John A. Young. The complaint does not allege that the proceeds of said sale ever came into the hands of the guardian.

The defendant demurred:

(1) That there was a defect of parties plaintiff, in that the personal representative of Ella R. Carson and the personal representative of Richardine Carson, who are the only parties who can maintain this action for an account and payment of any distributive share of R. C. Carson, deceased, which may have been in the hands of the defendant's testator at the time of his death are not parties.

(2) That the plaintiff in her own right cannot maintain this action. (638)

(3) For that there is a misjoinder of causes of action, in that the plaintiff has attempted to unite in her complaint a cause of action which could be instituted only by the personal representative of Ella R. Carson and the cause of action which should be brought only by the personal representative of Richardine Carson. The Court stated to plaintiff's counsel that if he would so amend his complaint as to specifically allege that the $8,000 proceeds of the sale of real estate to John A. Young ever came into the hands of the said J. H. Wilson, as guardian, he would overrule the demurrer. Plaintiff's counsel stated in open court, as appears from the judgment, that she was unable to amend her complaint. The court thereupon sustained the demurrer and dismissed the action. The plaintiff excepted and appealed.

T. W. Alexander and Hugh W. Harris for plaintiff.

Osborne, Cocke & Robinson and Cansler & Cansler for defendant.

CLARK, C.J. An action for any funds in the hands of the guardian of Ella R. Carson and of her sister Richardine which said guardian is alleged to have received as a distributive share from the estate of the father of said wards can be maintained only by the personal representatives of said wards. *Goodman v. Goodman,* 72 N.C. 508; *Merrill v. Merrill,* 92 N.C. 665.

The complaint does not allege that the proceeds of the sale of the real estate belonging to said ward came into the hands of said guardian, and the plaintiff having expressed her inability to amend the complaint to so aver, the demurrer was properly sustained.

As to the second ground of demurrer, the allegation in the complaint is that the realty was sold by J. H. Wilson, commissioner. The complaint does not aver and the plaintiff refused the leave given by the court to amend the complaint to aver that the proceeds of the realty came into the hands of Wilson as guardian. The plaintiff cannot maintain this action, for it is not averred in the complaint that at the time of the sale of the realty in 1861 the mother and aunt of the plaintiff were then minors. If they were of full age when the sale was made in 1861, such sale worked a complete conversion of the proceeds of the sale from realty into personalty, and consequently such proceeds could be recovered only by the personal representatives of the plaintiff's mother and heir.

In *Benbow v. Moore,* 114 N.C. 270, Shepherd, C.J., says: "It was at an early period laid down by Sir Thomas Sewell, M. R., in the

leading case of *Fletcher v. Ashburner,* 1 Bro. C. C. 497, 'that money directed to be employed in the purchase of land and land directed to be sold and turned into money are to be considered as that (639) species of property into which they are directed to be converted, and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land.' This principle is so universally accepted that it is needless to cite additional authority in its support, and it is equally well settled 'that every person claiming property under an instrument directing its conversion must take it in the character which that instrument has impressed upon it, and its subsequent devolution and disposition will be governed by the rules applicable to that species of property.' " 1 Williams Exrs. 551; *Proctor v. Ferebee,* 36 N.C. 143; *Smith v. McCrary,* 38 N.C. 204; *Brothers v. Cartwright,* 55 N.C. 113; *Conly v. Kincaid,* 60 N.C. 594; Adams Eq. 136.

The doctrine of equitable reconversion applies only to the proceeds of the sale of real estate belonging to infants and married women which, under the statute then and now in force, retained the character of realty, and not to the proceeds of the sale of real estate belonging to persons of full age. The fact that J.H. Wilson qualified as guardian in 1856 is no allegation that they were minors still in 1861.

In fact, the land was turned into money, and was, therefore, the subject of an action by the personal representative. The doctrine of "equitable reconversion" which 2 Mordecai Law Lectures (2 Ed.), 1370, styles the "child of the Lord Chancellor's imagination" has no room for application, for "reconversion is the result of the election expressly made or inferred by a court of equity, and is the notional or imaginary process by which a prior constructive conversion is annulled and the constructively converted property is restored, in contemplation of a court of equity to its original actual quality." *Ib.* Here there was nothing to change the money received from the sale of the land, even imaginatively, back into land.

The judgments sustaining the demurrer is

Affirmed.

Cited: Hollingsworth v. Supreme Order, 175 N.C. 633; *Roomy v. Ins. Co.,* 256 N.C. 323.

(640)

CAROLINA STALEY v. BRUCE STALEY ET AL.

(*Filed 28 November, 1917.*)

Costs—Admissions—Processioning—Title—Issue.

Where, in proceedings to procession lands, plaintiff's title is denied, upon allegation of insufficient knowledge [Revisal, sec. 479(1)], and without objection the cause is transferred to the civil issue docket for trial, and a survey being necessary, the judge has ordered it to be made, to which defendant excepts without giving any ground; and upon trial, after survey made, it is admitted by the parties that the title to a part of the land was in plaintiff, he is entitled to recover his costs, except that of witnesses present at the trial who were neither tendered nor sworn. Revisal, sec. 1264(1).

APPEAL by defendants from *Cline, J.,* at July Term, 1917, of RANDOLPH.

This was a proceeding under the Processioning Act (Revisal, 326), begun before the Clerk of the Superior Court of Randolph. The petition alleges that the plaintiff is the owner of a tract of land containing 69 acres, fully describing the same by metes and bounds. On a survey, ordered by the court, it appears to contain 73 acres. The defendants denied that the petitioner was the owner of said land, and the clerk transferred said case to the trial docket of the Superior Court at term, because the title was put in issue. The defendants did not except to the order. At no time before the trial, nor in the pleadings, did the defendants admit that the petitioner was the owner of the land. The case came on for trial at July Term, 1917, as an action to quiet the title, the plaintiff being in possession.

After the jury was impaneled and pleadings read, when the plaintiff was proceeding to introduce her record title, and the witnesses necessary to show possession in order to prove title out of the State and against all other persons, the defendants admitted in open court that the plaintiff was the owner of the land embraced within the boundaries, R. S. V. P., as shown by the plat, consisting of 73 acres, and that it was the true location of the boundaries of her land, it being all the land claimed in the first paragraph of the complaint and according to the metes and bounds therein given. Thereupon, the plaintiff moved for judgment, for that particular land and the costs, which was granted, except that the court did not allow the plaintiff's witnesses to prove against the defendant, since they were neither sworn, tendered, or examined.

Judgment was signed, upon the admission of the defendants in open court that the plaintiff is the owner and in possession of the tract of land shown in the map submitted by the surveyor, containing nearly 74 acres embraced within the lines R. S. V. P., and the

defendants admitted that these lines are the true boundaries of the lands described in paragraph 1 of the complaint, and for
(641) costs against the defendants, except that the plaintiff was not allowed the attendance of his witnesses who were not sworn and tendered. The defendants appealed from the judgment for costs.

G. S. Bradshaw and J. A. Spence for plaintiff.

Brittain & Brittain, W. C. Hammer, R. C. Kelly, and H. M. Robins for defendants.

CLARK, C.J. The only question presented is the judgment against the defendants for costs. Paragraph 1 of the complaint alleged that the plaintiff was the owner of a tract of land set out by metes and bounds. To this the answer averred that the defendants "have not sufficient knowledge or information to form a belief, and therefore deny the same." Revisal, 479(1). There were other allegations in the complaint as to boundaries, which were also denied. Upon the issues thus raised, the case was transferred to the term of the Superior Court for trial without exception. The judge made an order, "It appearing to the court, from the pleadings, that a survey of the lines and boundaries mentioned in the pleadings is necessary to enable the court and jury to intelligently pass upon the contentions of the parties," and appointed two surveyors, with directions "to survey all the lines in dispute according to the contention of all the parties, and make a report of the same, with a map showing the various lines and corners in dispute, to the next term of court." The defendants excepted without giving any ground.

At the trial term, after the jury was impaneled and pleadings were read, the court called attention to the denial in the answer of the plaintiff's allegation of ownership in paragraph 1 of the complaint, which in effect converted the action into one of ejectment, and inquired of counsel for defendants if they denied plaintiff's title to all the land claimed, or only such portion along the side-lines as were covered by a conflict of claims as to location. No answer was made, and plaintiff was proceeding to offer proof of title, when defendants' counsel stated that they admitted the plaintiff was the owner of and entitled to the land shown on the court map as lying within the boundaries, R. S. V. P., and said that was the true and correct location of the lines and boundaries of her land. The counsel for the plaintiff stated they could not recover any more than that, and asked for judgment in favor of the plaintiff according to said admission, which motion was allowed by the court with costs.

The defendants objected that they were not liable for costs, as their admission was only in accord with their contention as run by

the surveyor. The court held that as the defendants had denied plaintiff's allegation of ownership in its entirety, and had caused the clerk, upon the issues thus raised, to transfer the cause to the civil issue docket at term for trial, and had made no ad- (642) mission until the trial was in progress, the plaintiff was entitled to recover costs, under the statute; but inasmuch as the plaintiff saw fit to accept defendants' admission and move for judgment thereon, without swearing, tendering, or examining any witnesses, the plaintiff was not allowed to prove the attendance of any witnesses against defendants at this term. In this we find no error.

Revisal 1264(1), provides: "Costs shall be allowed, of course, to the plaintiff upon a recovery (1) in an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial." The answer of the defendants put the title in question, and though the plaintiff may not have recovered to the full extent of the contentions in her complaint, she recovered judgment and was entitled to costs. And upon examination of the pleadings, the order for a survey was not improvidently made.

If the defendants had entertained the same view at the time of filing the answer as at the trial, they should have admitted the allegations of paragraph 1, and then if the plaintiff had recovered nothing more, costs would have been adjudged against the plaintiff. It may well be that by reason of the information obtained in making the survey the plaintiff ascertained that she could not recover anything more than what was alleged in paragraph 1, and that the defendants also learned that they could not resist her claim as to that. However that may be, the judgment was in accordance with the statute.

The plaintiff excepted to the refusal to tax her witnesses at the trial term against the defendants, but such order was properly made. *Moore v. Guano Co.*, 136 N.C. 248; *Cureton v. Garrison*, 111 N.C. 271.

No error.

Cited: In re Hurley, 185 N.C. 423.

MRS. ALLIE CLYDE CLAY, ADMX., v. STATE INSURANCE COMPANY OF INDIANAPOLIS.

(Filed 28 November, 1917.)

1. Insurance, Accident—Death by Violence—Third Persons.

Where a policy of life insurance provides for a double indemnity in case of death by accident, "exclusively and independent of all other cases," the word "accident" is construed as an unusual and unexpected occurrence, taking place without foresight or expectation of the insured, determined by reference to the facts as they may affect him; and the intentional killing of the insured by a third person does not alone withdraw the claim from the protection of the policy.

2. Same—Insured the Aggressor—Murderous Assault.

Where a policy of life insurance gives double indemnity if the death of the insured has been caused by "external, violent, and accidental means," no recovery can be had of the extra indemnity when such death is caused by the killing of the insured by a third person, and the insured was in the wrong in commencing the fight, and the aggressor, under such circumstances as would render a homicide likely as a result of his own misconduct.

3. Same—Evidence.

Where the insured, having announced that he would kill his adversary, attacked him with a deadly weapon—a pole 3 or 4 feet long—pursued him with a pistol, which he first fired, and in the ensuing fight was killed by his adversary's pistol, fired at close range or contact, it is held that the insurer is not liable under a policy covering death by "external, violent, and accidental means."

CIVIL action, tried before *Allen, J.*, and a jury, at Febru-
(643) ary Term, 1917, of BERTIE.

The action was to recover a double indemnity of $1,000 claimed on a policy of insurance on one George E. Clay, deceased, who was killed in a fight with one Sullivan on 2 April, 1915.

The policy, bearing date in 1909, and on which the premiums had been regularly paid, insured the life of said George E. Clay in the sum of $1,000 and contained a stipulation for double indemnity of $1,000, in terms as follows: "During the premium-paying period of this policy, and excluding any time while the same may be in force, as extended insurance, all premiums having been duly paid, and this policy being then in force, in the event of the death of the insured, resulting from bodily injury, sustained and effected directly through external, violent, and accidental means (suicide, sane or insane, not included), exclusively and independently of all other causes, provided such death shall occur within 90 days from the date of the accident, the company will pay to the beneficiary or beneficiaries hereunder, in addition to the amount otherwise due, the sum of $1,000."

The policy also contained a clause withdrawing certain cases from the risks covered by the policy, among them the following: "If the insured shall, whether sane or insane, die of his own hand or act, or die in consequence of the violation of law, within one year from the date hereof, this policy shall be null and void, and all payment therefor shall be forfeited."

On proof of death, duly made, the $1,000 principal insurance was paid, and received "without prejudice," and in this suit for double indemnity of $1,000 recovery was resisted by defendant company, on the ground "that the death of the insured was brought on by his own unlawful conduct in attacking one Sullivan with a deadly weapon, and that said death was not the result of external, violent, and accidental means; suicide, sane or insane, not (644) included, exclusively and independently of all other causes."

The testimony of an eye-witness bearing directly on the occurrence was as follows: "I knew the late George E. Clay. I don't know the exact date that he was killed. I was in about 20 steps of him when he was killed. I was in my lot and he was in the public road. He was shot by Mr. Lester Sullivan. That killed him. I could not tell you how long he lived after he was shot, but not, in my opinion, to exceed 5 minutes." Cross-examination: "I lived in that community and on the land I owned, in Bertie County. I am sometimes called Robert, or Bob. This occurrence between George E. Clay and Lester Sullivan took place in 20 steps of my lot. A man named Robert Peele was moving off of my place. He was moving himself and was going to another place he had rented. He had several teams, and among them Mrs. Felton's team and his father's team. Mr. Lester Sullivan was driving one of the carts — Mrs. Felton's cart. I was in my barn at first, shelling corn. I heard them talking in the road. Clay was using oaths and cursing Sullivan. 'I will kill you,' he said. I went out of the barn and into the lot, and when I stepped into the lot, out of the barn, I heard Clay say, 'I will kill you.' Sullivan was then standing with his arms folded across his breast, and Clay slapped him in the face with his hand. Clay then went and got a pole — a pea pole — about 3 or 4 feet long. Clay then struck at Sullivan with the pole, and Sullivan warded off the lick and grabbed Clay around the neck and was holding him. The next thing I heard was the report of the pistol, and I saw smoke from a pistol behind Sullivan. The two men were then right together. Then I saw Sullivan run his hand into his shirt bosom, pull out a pistol and put it against Clay's breast, and fire. The two shots came almost together. I could not say who shot the first pistol. I could not tell, from all the facts, who fired the first shot. I know there was smoke around Sullivan when the first shot went off. Sulli-

van then ran his hand into his shirt bosom and got out his pistol. I did not see Sullivan have a pistol until then. Clay did have a pistol in his hand. I was in 20 steps from where it occurred. I heard Sullivan tell Clay that he was friendly with him and to go off and let him alone; that he did not want to have any trouble. I did not see Sullivan take anything from Clay. I saw two pistols, and Clay had one and Sullivan one. The pea pole that Clay had was dropped in the road. I do not know what became of the pistol that Clay had. I saw Mr. Peele take it out of his hand. Four shots were fired — Sullivan shot three and somebody else shot the other one. I could not say exactly that I heard Clay say to Sullivan he could not move the household effects of Mr. Peele. I heard Clay say, 'I will kill you.'"

On issue submitted as to liability and amount, the court
(645) charged the jury, if they believed the evidence, to answer the issue "Yes, $1,000, with interest." Judgment for plaintiff, and defendant excepted and appealed.

Pruden & Pruden, Gilliam & Davenport, and S. Brown Shepherd for plaintiff.

Winston & Matthews and H. S. McMichael for defendant.

HOKE, J., after stating the case: We regard it as established by the numerous decisions on the subject that in case of accident insurance, as expressed in the general terms of this policy, the word "accident" should receive its ordinary and popular definition as an unusual and unexpected occurrence — one that takes place without the foresight or expectation of the person affected — and that in a given case the question is to be determined by reference to the facts as they may affect the holder of the policy, or rather the person insured. "An event which, under the circumstances, is unusual and unexpected by the person to whom it happens." Bomvier, 1883, as cited in *Lovelace v. Travelers' Protective Association,* 126 Mo. 104, and the cases, hold further that the intentional killing of the insured by a third person does not of itself, and without more, withdraw the claim from the protection of the policy. *Lovelace v. Travelers' Association, supra; Richards v. Travelers' Ins.,* 89 Cal. 170; *Warner v. Mutual Accident Ins. Co.,* 8 Utah 431; *Supreme Council v. Garrigus,* 104 Ind. 133; *Ins. Co. v. Barrett,* 90 Tenn. 256; *Gresham v. Equitable Acc. Ins. Co.,* 87 Ga. 497; *Travelers' Ins. Co. v. McConkey,* 127 U.S. 661; Kerr on Ins., 381; Vance on Ins., 566.

When the death has occurred as the result of an affray or other breach of the peace, several of the decisions contain expressions to the effect that the right to recover depends on whether the insured

was the aggressor or in the wrong, but, so far as examined, a careful perusal of these cases will disclose that this of itself is not the ultimate test of liability. In some of them, as in *Supreme Council v. Garrigus, supra,* recovery was allowed, the intimations suggested are in the nature of *obiter dicta.* In others, where recovery was denied, it was by reason of exceptions of more inclusive meaning than any which appear in this policy. Thus, in *Gresham v. Equitable, supra,* the insured having been killed in an affray, the policy exempted the company from liability for death or injury caused *by fighting.* In *Travelers' Insurance Co. v. McConkey,* 127 U.S. 661, the company was exempt if the death of the insured was caused by intentional injuries inflicted by the insured or *any other person.* But in policies without these or like specific and definite exceptions, and on facts calling for construction of insurance in case of death by "external, violent, and accidental means," without more, we hold that the true test of liability in cases of this character is whether the insured, being in the wrong, was the aggressor, (646) under circumstances that would render a homicide likely as the result of his own misconduct.

The position finds full and direct support in *Talifeiro v. Travelers' Protective Association,* 80 Fed. 368, where it was held "That a benefit certificate insured against death by accident does not cover a case where the assured was shot in a quarrel in which he was the aggressor and violently attacked his adversary with a pistol, accompanying the act with the exclamation that he must have revenge, and warning his adversary to put himself in shape." On such facts, Thayer, J., delivering the opinion, said: "This can be regarded as in no other than an invitation to a deadly encounter, in which the deceased voluntarily put his life at stake and deliberately took the chances of getting killed. Where a person thus invites another to a deadly encounter, and does so voluntarily, his death, if he sustains a mortal wound, cannot be regarded as accidental by any definition of that term which has been heretofore adopted. It might as well be claimed that death is accidental when a man intentionally throws himself across a railroad track, or leaps from a high precipice, or swallows a deadly poison. It is possible that death may not follow from either of these acts, but death is the result that would naturally be expected, and if such is the result it is not accidental."

The facts being essentially similar, we regard this well-reasoned case as decisive of the present appeal, it appearing here that the insured announcing that he would kill his adversary, first wrongfully assaulted him with a pea pole 3 or 4 feet long, a deadly weapon, and pursued the fight with a pistol, which he first fired, and was

then himself shot and killed. Such a homicide could in no sense be called accidental, but on the facts as they are now presented the death of one or both of the parties was not unlikely, and that of the insured was fully justified under the law.

On the argument plaintiff cited and very much relied on the case of *Lovelace v. Travelers' Protective Association,* 126 Mo. 104, *supra.* In that case the insured, entering a hotel about 11 o'clock at night with a view of becoming a guest, found a disorderly person in the office. He was a friend of the landlord, who was sick at the time, and he undertook to put the offender out of the office, and was shot and killed as a result. There had been no threat or display of deadly weapons, and there was nothing in the facts or attendant circumstances to indicate that a homicide would likely follow, and on such facts recovery was allowed.

The case, to our minds, is not inconsistent with our present decision, and the two seem very well to define and illustrate the dividing line by which the question of liability may be properly determined. In the Missouri case, though the deceased may have been the aggressor, the attendant circumstances, as stated, did not
(647) show that a homicide was to be naturally expected, and permitting the inference that the same was accidental, a recovery was sustained. In our case the affray from the beginning took on the aspect of a deadly encounter, and, the deceased being the aggressor and in the wrong, the homicide could not be considered an accident.

For the error indicated, there will be a new trial of the issue, and if the facts in evidence are as now presented, the defendant is entitled to the instruction that if these facts are accepted by the jury, their verdict should be for defendant.

New trial.

Cited: Poole v. Ins. Co., 188 N.C. 470; *King v. Ins. Co.,* 197 N.C. 568; *Whitaker v. Ins. Co.,* 213 N.C. 378; *Scarborough v. Ins. Co.,* 244 N.C. 505; *Gray v. Ins. Co.,* 254 N.C. 291; *Mills v. Ins. Co.,* 261 N.C. 549.

BEAUFORT COUNTY LUMBER COMPANY v. DRAINAGE COMMISSIONERS OF BACK SWAMP DISTRICT ET AL.

(Filed 28 November, 1917.)

1. Drainage Districts—Proceedings—Judgments—Estoppel.

Where a drainage district has been established in accordance with the provisions of chapter 442, Laws of 1909, chapter 67, Laws of 1911, and the owner of lands has been given the statutory notice required at the hearings, filed exceptions as to the amount of the assessment against his land, obtained a partial reduction of the amount he claimed, and appealed from the final judgment, but failed to prosecute it: *Held*, the drainage acts are constitutional and valid, affording full and fair opportunity to appear before a court with power to ascertain and determine any and all matters affecting the property interest of the owner, and the judgment entered operated as an estoppel of record.

2. Drainage Districts—Timber—Entire Damages—Judgments.

While under the drainage acts no assessments for benefits can be made against the owner of timber interests, only the land itself being liable, the owner of the land and of timber within the district, by the provision of the statute, when made a party to the proceedings and duly notified, is required to present his claim for the entire injury, inclusive of that to his timber, and the damages to the timber should thus be included and allowed in the final judgment in the proceedings.

3. Same—Evidence—Jury of View—Constitutional Law.

The drainage act provides that before final award is entered, a careful survey of the proposed canal and lateral branches and map thereof be made, showing plans of the entire district, the route, width of canal and branches, the differing levels, the bottom and grade of proposed improvements, the yards of excavation, with estimated cost, and plans and specifications, thus affording the owner ample data by which a jury of view could make a fair and full estimate of his damages; and objection to the constitutionality of the act, that the claimant is required to make his claim for damages before injury is inflicted, and without means to enable the jury of view to fairly assess them, is untenable.

4. Drainage Districts — Entire Damage — Timber—Constitutional Law—Compensation.

The drainage acts contemplate that all damage to the owner of lands shall be assessed, including the taking of his timber necessary to carry out its plans, section 24 being designed to give the owner of the timber the privilege of taking such timber if he so elects; and objection that this section is an unconstitutional taking of the owner's timber and giving it to the contractor, without compensation, cannot be maintained.

5. Drainage District—Negligence—Damages—Independent Action.

While in proper instances the owner of land and timber within a drainage district may maintain his independent action to recover substantial damages for the defendant's negligent construction of its canal, it is *Held* in this case, that evidence to the effect that, in the opinion of a witness, it was possible for defendant to have cut some of the trees so as to make them fall entirely on the right of way is too indefinite for him to do so.

6. Evidence—Drainage Districts—Lost Records—Secondary Evidence.

In this case it is *Held* that secondary evidence of drainage proceedings was properly admitted under the evidence as to the loss of the original, the regularity of the proceedings not being questioned.

CIVIL action, tried before *Connor, J.*, and a jury, at Feb-
(648) ruary Civil Term, 1917, of ROBESON.

On motion by defendants, made in apt time, there was judgment as of nonsuit, and plaintiff excepted and appealed.

McLean, Varser & McLean for plaintiff.
Johnson & Johnson for defendant.

HOKE, J. A perusal of the record will disclose that the drainage district in question has been duly and regularly established, pursuant to the provisions of the statute applicable (chapter 442, Laws, 1909; chapter 67, Laws 1911); that the plaintiffs and all others owning lands or timber interests within the defined area have been duly notified, both of the hearing on the intermediate and final reports; that plaintiff company not only had actual notice, but attended the hearings, certainly the final one, and filed exceptions to the report, insisting on a reduction of the amount assessed against it, and also on the invalidity of the statutes as being violations of the constitutional provisions, both State and Federal, established in protection of the rights of private property; that the exception as to amount was in part sustained, a reduction being ordered, and those as to unconstitutionality of the statute having been overruled and final judgment entered, plaintiff appealed and failed to prosecute the same, thus acquiescing in the final judgment as properly determinative of the rights of the parties in the premises. On this record, the Court is of opinion that such judgment is conclusive of the questions presented, and that the judgment of nonsuit should be sustained.

We have held in numerous cases that these drainage acts
(649) are constitutional; and plaintiff having been duly made a party and afforded full and fair opportunity to appear before a court with power to ascertain and determine any and all matters affecting its proprietary interests, the judgment referred to is an estoppel of record against it, and it is no longer open to plaintiff to further litigate the questions presented. *Drainage Commissioners v. Mitchell,* 170 N.C. 324; *Griffin v. Commissioners,* 169 N.C. 642; *Shelton v. White,* 163 N.C. 90; *Newby v. Drainage District,* 163 N.C. 24; *Sanderlin v. Luken,* 152 N.C. 738; *City of Kinston v. Loftin,* 149 N.C. 255; *Davidson v. New Orleans,* 96 U.S. 104.

It is urged for the plaintiff that, while the judgment may conclude as to any and all damages caused to plaintiff's land situate within the drainage district, no such effect should be allowed as to its timber interests; such interests, under the recent decision of *Dover Lumber Co. v. Drainage District* not being involved in the proceedings.

It is the recognized principle that, in order to a full estoppel, the court should have jurisdiction of the subject-matter *(Hobgood v. Hobgood,* 169 N.C. 485), but we do not think the position is open to plaintiff on this record, or that any such effect follows from the decision referred to. In that case it was held that, under the drainage acts, no assessments for benefits could be properly made against the owners of timber interests alone; the statute in terms clearly contemplating that only the land was liable; but it was not at all held that when one owning both land and timber interests within the prescribed area had been made a party and duly notified, he was not required to present a claim for the entire injury suffered. The language of the statute on this subject is — "It shall be the duty of the engineer and viewers to assess the damages claimed by any one that is justly right and due them for land taken, or for inconvenience imposed because of the construction of the improvement, or for any other legal damages sustained. Such damages shall be considered separate and apart from any benefit the land would receive because of the proposed work" — language that is broad enough and clearly intended to include the claim for any and all damages sustained by any party by reason of the proposed canal, certainly to the extent that it was properly constructed and in accord with the plan that had been surveyed and described in the map, etc.

In support of plaintiff's position that the statute is in violation of the company's constitutional rights, it is suggested that plaintiff is required to make its claim for damages before injury is inflicted, and when there is no sufficient means of enabling a jury of view to make any correct estimate of the amount, but, to our minds, the objection is not well taken. Before any final award is made against the claimant or his property, the act provides that a careful survey of the proposed principal canal and all lateral branches (650) shall be made, and that a full and accurate map of the same shall be prepared and in evidence, showing the plans of the entire district, the route and width of the canal and all its branches, the differing levels of the various points, the bottom and grade of the proposed improvements, the total yards of excavation, with the estimated cost, and the plans and specifications, and the costs of any other work required to be done. These requirements were complied with in the present instance. An accurate map was present at the

different hearings, accessible to plaintiff or its agents, and it seems that the managers of plaintiff had a special copy made for the company. It appears, therefore, that ample data are afforded by which any intelligent jury of view could make a fair and full estimate of plaintiff's damage. And the further objection that section 24 of the statute is invalid because it gives the claimant's timber to the contractor without compensation must also be disallowed. Any and all damages done to an owner's land must be awarded him, including the amount of timber destroyed or that is to be considered in estimating the damages; and this section (24) is designed to extend to the owner the privilege of taking the timber if he so elects. It is conserving to the owner, to that extent, the right to take the timber which would otherwise be taken from him in the legitimate exercise of the powers of eminent domain, recognized and conferred by the statute. It is further contended that the judgment of nonsuit is erroneous because plaintiff company in any event is entitled to recover for the damages caused by defendant's negligence in constructing the canal. It may be, and the authorities seem to hold, that for appreciable damages caused by such negligence, and which the owner could not avoid by reasonable effort on his own part, a recovery might be had, the damages being awarded in the first instance on the theory that the work will be carefully done and in accordance with the plans and specifications. *Duvall v. R. R.,* 161 N.C. 448; *Wood v. Land Co.,* 165 N.C. 367; *Quantz v. Concord,* 150 N.C. 539; *Meares v. Wilmington,* 31 N.C. 73. But there are no facts presented which would uphold any such position. All the actual damages caused by the work, either in appropriation of right of way, the destruction of timber thereon, etc., are or should have been included in the damages awarded pursuant to the statute, and there are no facts in evidence to justify any recovery beyond this. The evidence on behalf of plaintiff to the effect that in the opinion of the witness it was possible to have cut the trees so that same should have fallen on the right of way and so caused no injury whatever to the adjacent property, is entirely too indefinite and uncertain to be made the basis of a recovery, or to justify a reversal of the order of nonsuit. It is of manifest and supreme importance that our extensive lowlands should be reclaimed and added to the productive resources of
(651) the State, and in accord with an enlightened public policy that those who engage in the effort pursuant to the provisions of laws enacted for the purpose should be encouraged. The act itself says, in section 37, that it shall be liberally construed in promotion of their efforts, and it would be contrary to the terms and spirit of the laws and in violation of just principles to hold that a right of action should arise to a claimant because a few trees which

might possibly have been felled on the right of way happened to fall on the adjacent lands, and assuredly on this record no actionable negligence has been shown.

The exceptions to the rulings of the court on questions of evidence are without merit. There was no serious question but that the drainage proceedings were complete and in all respects regular, and we think the evidence as to loss of original was sufficient to permit secondary evidence of their contents. Apart from this, the case on appeal seems to show that the portion of the original more directly relevant was later put in evidence by defendants. There is no error, and the judgment of nonsuit must be affirmed.

Affirmed.

Cited: *Spencer v. Wills,* 179 N.C. 178; *Ingram v. Hickory,* 191 N.C. 53; *O'Neal v. Mann,* 193 N.C. 157; *Drainage Comrs. v. Jarvis,* 211 N.C. 692; *Newton v. Chason,* 225 N.C. 207.

NEWTON HOWARD v. BUCKEYE COTTON OIL COMPANY.

(Filed 28 November, 1917.)

1. Principal and Agent — Vice-Principal—Negligence—Orders—Employer and Employee.

A negligent order of a vice-principal which proximately causes an injury to an employee in its execution, without contributing cause on his part, may be actionable against the employer, though the machinery and place of work may be all that is required; and the negligent omission of the vice-principal to warn the employee of a danger apparent to him and not to the employer, having opportunity to do so, may also become actionable against the employer.

2. Same — Evidence — Questions for Jury — Trials—Contributory Negligence.

An inexperienced employee at a cotton-oil mill was injured while at work at a linter machine for preparing the cotton seed for manufacture into oil, by passing them through rapidly revolving power-driven circular saws on a cylinder, protected by an outer covering, operated by levers when the cylinder is removed for the purpose of sharpening the saws. In the employee's action against the company there was evidence tending to show that he and his vice-principal were preparing to remove the cylinders, the plaintiff not being in position to see that the saws were revolving; that the vice-principal's position was such that he could see them when he said, "Let's get them out," and in consequence the plaintiff put his hand into the machine and received the injury complained of: *Held,* sufficient of defendant's actionable negligence to take the case to the

jury, and, if the facts are found in accordance with the evidence, to free the plaintiff of the charge of contributory negligence.

CIVIL action, tried before *Cline, J.*, and a jury, at Febru-
(652) ary Term, 1917, of MECKLENBURG.

The action was to recover damages for physical injuries, caused by the alleged negligence of defendant company, and by reason of which, on October 3 or 4, 1916, plaintiff, an employee of the defendant, assisting in the operation of linter machines in defendant's mill, had his hand badly lacerated and permanently injured, from which he still suffers.

On denial of liability and plea of contributory negligence, the jury rendered the following verdict:

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

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

3. What damages, if any, is plaintiff entitled to recover? Answer: $1,200.

Judgment on the verdict, and defendant excepted and appealed.

F. M. Redd and John M. Robinson for plaintiff.
Clarkson & Taliaferro and F. O. Clarkson for defendant.

HOKE, J. It was chiefly urged for error that the court overruled defendant's motion to nonsuit, but, on the record, such a motion could not be sustained. There was evidence on the part of plaintiff tending to show that on 3 October, 1916, plaintiff, an inexperienced hand, as employee of defendant company, was engaged with others in operating the linters in defendant's mill, these linters being machines whereby the lint cotton is removed from the seed, preparatory to their being manufactured into oil; that the linter, speaking generally, consisted of a saw cylinder, containing around its face large numbers of sharp, fine saws, and having a covering, called the under-breast, so constructed that by the revolutions of the saw cylinder, amounting, when in operation, to from 400 to 700 and 800 a minute, the lint cotton, as stated, was stripped from the seed; that when these saws became dull the method is to remove the cylinder and insert another, this being done by raising the covering by means of a lever on the left of the machine, then lifting out the saw cylinder by hand, and the only safe way to do this is to stop the machine. The movement of the machine is controlled by a lever on the right side, and one standing on that side is in a position to observe and note whether the machine is in motion; but on the left,

termed by the witness "the blind side," this could not be seen; that on this occasion, while plaintiff was on the left or blind side of the machine, and had raised the covering, preparatory to (653) lifting out the saw cylinder, one Lew Jones, who had taken part in clearing the machine for the purpose, and who stood towards plaintiff, in the position of vice-principal, standing on the right of the machine, where he could see and note whether the same was in motion, called to plaintiff, "Let's get them in," whereupon plaintiff extended his hand under the breast to remove the saw cylinder, and, same being in motion, plaintiff's hand was lacerated, etc., from which he still suffers. Speaking directly to the occurrence, plaintiff, a witness in his own behalf, testified in part as follows: "Just before I was hurt, I was sitting back there and had finished my supper. It was about 4 o'clock in the morning. Lew had called me and was ready to put in the saw cylinder, and I come down there and says, 'Which one,' and he says, 'This one over here,' and he come behind me and helped me to shake down the seeds, and then I moved back the chute, and he helped me take off the top piece of the breast and laid that aside, and he went on by, and I raised my lever from the saw cylinder, throwed the belt, and began to clear up the seed down there, and Lew said, 'Let's get them in,' and I went to raise my breast with the hook, and in just a minute my hand was stuck, and Lew came up. Lew was standing on the right-hand side of the other gin when he said, 'Let's get them in' — I reckon, about 4 or 5 feet away from me. He could see the pulleys on the right-hand side. I was on the left-hand side, and he was on the right, and that is where this main pulley pulls them saw cylinders. I was working on the blind side of the pulley. After Lew and I took off the top breast, I raised the lever on the right-hand side. That raised the under breast a little off the saw cylinder. After that under breast is raised, you can't tell whether the cylinder is running or not; can't see it at all. After the lever is raised up off of the saw cylinders it would be underneath, and you can't tell they are running."

Accepting this testimony as true, the rule uniformly prevailing on motions of this character, it permits the inference that defendant was negligent and that plaintiff himself was free from fault, and his Honor made correct decision in denying the motion to nonsuit.

It is well recognized that, although the machinery and place of work may be all that is required, liability may, and frequently does, attach by reason of the negligent orders of a foreman, or boss, who stands towards the aggrieved party in the place of vice-principal. *Ridge v. R. R.*, 167 N.C. 510; *Myers v. R. R.*, 166 N.C. 233; *Holton v. Lumber Co.*, 152 N.C. 68; *Noble v. Lumber Co.*, 151 N.C. 76; *Wade v. Contracting Co.*, 149 N.C. 177.

On this testimony, it was a clear breach of duty in such a person to give an order naturally importing a direction to proceed when the machine was in motion and when he was in a position affording full opportunity to see and note the fact; and if, as defendant contends, the speech of the foreman did not amount to a positive direction to remove the cylinder, standing as he was, where he could see that the machinery was in motion, having just assisted in shaking down the seed, preparatory to removing the cylinder, it was a negligent breach of duty not to have warned plaintiff to desist till the machine had stopped. In any aspect of the matter, therefore, the facts in evidence on the part of plaintiff required that the issues be submitted to the jury. In *Holton v. Lumber Co., supra,* and on matters directly relevant to the question presented, it was held: "When an employee has been instructed by his superior to direct another, an inexperienced employee, in working at a dangerous machine, the instruction of the former is the instruction of the master; and where there is evidence that a negligent order was given by him, which a reasonably prudent man would not have given, which proximately caused the injury complained of, the case should be submitted to the jury."

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And in *Noble v. Lumber Co.,* 151 N.C. 76, *supra:* "The defendant is liable to the plaintiff, its employee, for an injury received while removing a shiver from a sawmill, in the course of his employment, when it appears that it was necessary for him to remove it, and that he was required by his foreman to do so when the saw was running, the only safe method being to stop the saw before doing so; and such negligent act of the foreman was the proximate cause of the injury."

In our opinion, these cases are in full support of his Honor's ruling, denying the nonsuit, and his judgment to that effect must be affirmed. The case of *Mathis v. Manufacturing Co.,* 140 N.C. 530, cited and much relied upon by defendant, does not sustain his position. There, an employee, clearing away the sawdust around a circular saw, ran his hand on the saw when it was in motion and was injured. The movement of the saw could have been readily observed by the claimant, and there were no negligent directions from a vice-principal to mislead him to his hurt. The case is not apposite to the facts presented by this record, and judgment for plaintiff must be affirmed.

No error.

Cited: Thompson v. Oil Co., 177 N.C. 282; *Davis v. Shipbuilding Co.,* 180 N.C. 76; *Tatham v. Mfg. Co.,* 180 N.C. 629; *Parker v. Mfg. Co.,* 189 N.C. 277; *Robinson v. Ivey,* 193 N.C. 812; *Jackson*

v. Mfg. Co., 195 N.C. 19; *Smith v. Ritch*, 196 N.C. 75; *Smith v. Granite Co.*, 202 N.C. 309; *Reaves v. Power Co.*, 206 N.C. 527.

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COMMERCIAL SECURITY COMPANY v. MAIN STREET PHARMACY.

(Filed 28 November, 1917.)

1. **Bills and Notes—Negotiable Instruments—Endorser—Denial—Burden of Proof.**

In order to constitute one a holder in due course, under the provisions of our negotiable-instrument law (Revisal, chap. 54), there must be an endorsement to that effect, excepting instruments payable to bearer; and proof of the endorsement is required when it is denied in an action on the paper.

2. **Same—Detached Paper—"Allonge."**

Where proof of endorsement is required in an action on a negotiable instrument, it must be shown to have been made on the instrument itself, or on some paper thereto physically attached, sometimes termed an "allonge."

3. **Same—Defenses—Equities—Fraud.**

Where one claiming to be a holder of a negotiable instrument in due course by endorsement, brings action against the maker thereof, and shows such endorsement on a detached paper, without evidence of its having been attached, or as to the intermediate endorsements, the defendant may set up any equities he may have against the original payee; and where fraud or misrepresentations in its procurement is established, no recovery thereon can be had.

CIVIL action, tried before *Kerr, J.*, and a jury, at March Term, 1917, of DURHAM.

The action was to recover on seven promissory notes, of $125 each, all due at time of action commenced, executed by defendants to the American Manufacturing Company, and of which plaintiff claimed to be the endorsee and holder in due course.

Defendant denied that plaintiff was endorsee or holder in due course; alleged that the notes were procured by fraud and misrepresentation on the part of the payee, and plead further that the notes sued on were part and parcel of one and the same transaction in which another note of $125 had been given, making eight notes in all, and that in an action brought by plaintiff on the first of the services, before a justice of the peace, on plea of fraud and misrepresentation, duly made, the issue was determined in defendant's

favor, and defendant pleads the finding and judgment in that action as an estoppel and bar to recovery in this.

On issues submitted, the jury rendered the following verdict:

1. Did the defendant, or its agent, execute the promissory notes which are the subject of this action? Yes.

2. Were the said notes secured from defendant by means of fraud and false representations on the part of American Manufacturing Company? Yes.

3. Did plaintiff purchase said notes and hold same in due (656) course, as alleged in the complaint? No.

4. In what amount, if any, is defendant indebted to plaintiff? Nothing.

5. Is the plaintiff in this action estopped by the issues and judgment thereon in the former action between the same parties, same being entitled "Commercial Security Company v. Main Street Pharmacy Company," and being No. 1437 of the civil issue docket of the Superior Court of Durham County? Yes.

Sykes & Tilley and Fuller, Reade & Fuller for plaintiff.
Bryant & Brogden for defendant.

HOKE, J. Our decisions construing the statute on negotiable instruments (chapter 54 of the Revisal) are to the effect that, except in case of instruments payable to bearer, in order to constitute one a holder in due course, there should be an endorsement, and when such fact is denied, as it is in this instance, the same must be established by proper proof. *Bank v. Clark,* 172 N.C. 268; *Park v. Exum,* 156 N.C. 228-230; *Myers v. Petty,* 153 N.C. 462; *Mayers v. McRimmon,* 140 N.C. 640; *Tyson v. Joyner,* 139 N.C. 69. On this subject, the statute in question (section 2179) requires that an endorsement must be written on the instrument itself, or on some paper attached thereto. This attached paper, sometimes termed an "allonge," was resorted to when, from the great number of signatures or the style of the chirography, there was no longer room on the instrument for writing the endorsement; and while in the better-considered decisions this lack of room is not considered of the substance, it is an essential of the requirement that the paper be physically attached or that it should have been when the endorsement was made, and that an assignment or transfer on a separate paper will not suffice. *Midgette v. Basnight,* 173 N.C. 18; *Crosby v. Roub et al.,* 16 Wis. 645; Huffcut on Negotiable Instruments, 21, 348, 350; Norton on Bills and Notes, 105; Daniels on Negotiable Instruments (6th Ed., per Calvert), secs. 689a-690.

Considering the record in view of these principles, we find no

facts in evidence tending to show that there has ever been a valid endorsement of these notes. There is no proof of the endorsements which appear on the back of the notes, nor of the dates when the same may have been made, and the written certificate put in evidence by the plaintiff, purporting to be transfer of the notes from the payee to plaintiff, was not and does not appear to have been attached to the notes or any of them. And even if testimony to the effect suggested has been overlooked by us, the credibility of the evidence would be for the jury, and his Honor committed no error, to plaintiff's prejudice certainly, in submitting the ques- (657) tion to them for decision, and they have found that plaintiff company is not a holder in due course. *Bank v. Fountain,* 148 N.C. 590. This being true, the notes were open to any equitable defenses existent between the payee and makers; and the verdict having established further that the notes were procured by fraud and misrepresentation, no recovery thereon can be had. *Mayers v. McRimmon, supra,* and other cases cited.

The verdict on the first four issues being fully determinative of the controversy in defendant's favor, we do not pass on the question of estoppel presented in the fifth issue. The position, in proper instances, is fully recognized, and on the facts in evidence the authorities cited by defendant appear to support defendant's view of the matter. It is a doctrine, however, that requires careful restriction, and we deem it advisable to withhold decision upon it till facts in evidence may require it.

On the record, the judgment for defendant is affirmed.

No error.

Cited: Whitman v. York, 192 N.C. 93; *Waddell v. Hood, Comr.,* 207 N.C. 253.

P. W. GARLAND, TRUSTEE, v. LUTHER C. ARROWOOD ET AL.

(Filed 5 December, 1917.)

Evidence—Fraud—Bankruptcy—Appeal and Error—Reversible Error.

Where a trustee in bankruptcy brings suit against the bankrupt for fraudulently investing his funds for improving his father's land in 1905 and 1906, evidence tending to show that he eventually received a large tract of land by devise from his father, and that in 1917 he was worth lands to a considerable valuation, is irrelevant, and constitutes reversible error.

GARLAND *v.* ARROWOOD.

CIVIL action, tried before *Cline, J.*, at April Term, 1917, of GASTON.

There was a verdict for the plaintiff upon the issues. From the judgment rendered, defendants appealed.

S. J. Durham and Mangum & Woltz for plaintiff.
J. W. Keerans and A. C. Jones for defendants.

BROWN, J. It appears that the defendant Luther C. Arrowood was adjudged a bankrupt, June 1910. The trustee brings this action to subject certain lands to the payment of funds that the bankrupt is alleged to have invested in improvements of his father's lands by erecting buildings thereon in 1905 and 1906, for the purpose of defrauding then existing creditors.

Upon the trial of these issues the defendants excepted be-
(658) cause the court permitted plaintiff to show by defendant that he now owned 275 acres of land, embracing 244 acres which he eventually received under his father's will, and 31 acres which had been allotted to him as a homestead in the bankrupt proceedings, and to show that the valuation thereof was $10,000 to $12,000.

This evidence is irrelevant to the matters in controversy and should have been excluded. It was not harmless error, but well calculated to prejudice the minds of the jury against defendant. The fact that defendant Luther is now the owner of $12,000 worth of land is no evidence that he invested his funds some eleven years ago in improvements on the land during his father's life for the purpose of cheating and defrauding his creditors.

We can well understand how the forceful counsel for plaintiff could make a very strong plea, based upon such facts, to induce the jury to render a verdict for the plaintiff, trustee of the creditors.

We think the defendant's financial condition in 1917, and the value of his possessions then, furnish no evidence of his condition and throws no light upon his conduct in 1906. The transactions sought to be impeached by such evidence are too remote. *Gross v. McBrayer*, 159 N.C. 372.

New trial.

W. W. HOKE v. D. A. WHISNANT AND F. R. TILLEY.

(Filed 5 December, 1917.)

1. Verdict—Weight of Evidence—Motions—Court's Discretion.

A motion to set aside a verdict as not in conformity with the evidence is addressed to the discretion of the trial judge, when the evidence is conflicting, and will not be considered on appeal.

2. Verdict—Evidence—Judgments.

Where there is evidence that a business was worth the price the vendor received for it, and that the loss was sustained by the purchaser's mismanagement, the verdict of the jury awarding a less amount than claimed by the purchaser in his action for tort cannot be set aside as a matter of law, and the amount he claims substituted therefor — *i. e.*, the amount of the purchase price.

3. Judgments—Torts—Interest.

Where action in tort is brought for fraudulently inducing the plaintiff to buy a stock of merchandise, and a recovery against the vendor is had, interest is chargeable on the judgment from the term at which the action was tried.

APPEAL by both parties from *Carter, J.*, at March Term, 1917, of CALDWELL. (659)

This is an action to recover damages, the plaintiff alleging that he was induced to pay $1,200 for an interest in a mercantile business by the fraud of the defendants.

The defendants denied the allegations of fraud.

The plaintiff introduced evidence tending to establish his contentions, and that he had been damaged at least in the sum of $1,200, the amount paid by him to the defendants.

The defendants introduced evidence tending to prove there was no fraud; that the interest purchased by the plaintiff was worth $1,200 at the time of the sale, and that the loss to the plaintiff was due to mismanagement occurring after the sale.

The negotiations with the plaintiff began in November, 1910, and resulted in the purchase by him of the interest in the business in February, 1911.

This action was commenced in 1914.

Under instructions, to which there is no exception, the jury returned the following verdict:

1. Was the plaintiff induced to purchase a one-third undivided interest in the stock of goods and business of the Whisnant-Tilley Company by the false and fraudulent representations of the defendants, as alleged in the complaint? Answer: Yes.

2. What damages, if any, is the plaintiff entitled to recover? Answer: $400.

Upon the coming in of the verdict, the plaintiff moved the court:

1. To set aside the verdict as to the second issue, and for a new trial as to the said issue, because the damages assessed are inadequate and not in conformity to the pleadings and proofs.

Motion denied, and plaintiff excepted.

2. To set aside the verdict as to the second issue and render judgment for the sum of $1,200 and interest from 4 February, 1911, based upon the pleadings, proofs, and the findings of the jury upon the first issue, and tender judgment accordingly.

This motion was denied, and plaintiff excepted.

Judgment was then rendered in favor of the plaintiff for $400, with interest thereon from 4 February, 1911, the date of the contract of sale.

The defendant excepted to the judgment, upon the ground that the plaintiff was not entitled to recover interest, except from the date of the judgment. Both parties appealed.

Council & Yount for plaintiff.

Mark Squires and M. N. Harshaw for defendants.

(660) ALLEN, J. The motion by the plaintiff to set aside the verdict and for a new trial was one addressed to the discretion of the court, and is not reviewable. *Billings v. Observer,* 150 N.C. 543; *Harvey v. R. R.,* 153 N.C. 574.

Nor can the motion for judgment for $1,200 be allowed, because there is neither finding by the jury nor admission in the pleadings or on the trial that the plaintiff has been damaged $1,200.

On the contrary, while the defendants did not deny that the plaintiff paid $1,200, they contended, and introduced evidence in support of their contention, that the interest in the business bought by the plaintiff was worth $1,200 at the time of the sale, and that the loss sustained by the plaintiff was due to subsequent mismanagement.

The measure of damages in actions of this character, where the property is retained by the vendee, as here, is the difference between the real value of the property and its value as represented to be, and not the amount paid by the vendee. *Lunn v. Shermer,* 93 N.C. 165; *Robertson v. Halton,* 156 N.C. 218.

The plaintiff was not entitled to judgment for $1,200, and it would have been error to instruct the jury to answer the second issue in that amount, if requested to do so.

The exception of the defendant to the judgment must be sustained, as the action is in tort to recover damages, and not in contract.

The principle is stated in *Harper v. R. R.*, 161 N.C. 451, as follows: "Damages recovered for a tort do not, as a matter of law, bear interest until after judgment; but when the tort consists solely in the destruction of property, and not in personal injuries, this Court has held that the jury may in their discretion give interest on the value of the property destroyed from the date of its destruction, in addition to the actual value of the property. *Rippey v. Miller*, 46 N.C. 480; *Guano Co. v. Magee*, 86 N.C. 351; *Williams v. Lumber Co.*, 118 N.C. 928; *Lance v. Butler*, 135 N.C. 419; *Stephenson v. Koonce*, 103 N.C. 266; *Wilson v. Troy*, 18 L.R.A. 449, and notes."

The distinction between the recovery of interest as damages in actions of tort and in actions *ex contractu* is pointed out and discussed in *Bond v. Cotton Mills*, 166 N.C. 20.

It was not necessary for the defendant to assign error, as his appeal is from the judgment.

Clark, C.J., says, in *Ullery v. Guthrie*, 148 N.C. 418: "It has always been held that an appeal is itself a sufficient exception and assignment of error to the judgment, for that is a matter appearing upon the face of the record proper, and as to errors on the face of the record no exception is required. Revisal, sec. 1542. This is fully discussed in *Thornton v. Brady*, 100 N.C. 38, which has been repeatedly cited since. But if an exception and assignment of error to the judgment were necessary, the appeal itself is a sharp assignment that the facts found or admitted do not justify the (661) judgment. *Appomattox Company v. Buffalo*, 121 N.C. 37; *Murray v. Southerland*, 125 N.C. 176; *Delozier v. Bird*, 123 N.C. 692; *Cummings v. Hoffman*, 113 N.C. 269. Of course, if the appeal is an exception to the judgment, it is on the ground that the facts found or admitted do not justify the judgment. And when there are no other exceptions in the case, this one exception cannot be grouped."

The judgment must be reformed by striking out the interest, except from the term at which the action was tried.

Plaintiff's appeal affirmed.

Defendant's appeal reversed.

HOKE, J., not sitting.

Cited: Sears, Roebuck & Co. v. Banking, 191 N.C. 506; *Ins. Co. v. R. R.*, 198 N.C. 519; *S. v. Harvell*, 199 N.C. 600; *Goodman v. Goodman*, 201 N.C. 810; *Acceptance Corp. v. Jones*, 203 N.C. 526; *Campo v. Kress & Co.*, 208 N.C. 817; *Jones v. Ins. Co.*, 210 N.C. 561; *Kennedy v. Trust Co.*, 213 N.C. 623; *Coach Co. v. Motor Lines*, 229 N.C. 653; *Hinton v. Cline*, 238 N.C. 137; *Upchurch v. Buckner*, 241 N.C. 411.

W. C. GOODMAN v. TALLAHASSEE POWER COMPANY.

(Filed 5 December, 1917.)

1. Railroads—Evidence—Fellow-servant Act—Negligence.

A standard-gauge railroad track, over which defendant's contractor hauls material to be used in building a large manufacturing plant for defendant by means of a "dinkey," and over which the defendant uses a "speeder," the size of a hand-car and operated by gasoline, to carry its employees to and from their work, is a railroad, in contemplation of the Fellow-servant Act; and where an employee has been injured by the negligence of the one operating the speeder, the defense that the injury was caused by the alleged negligence of a fellow-servant and no recovery can be had, is not available. *Twiddy v. L. Co.*, 154 N.C. 237, cited and distinguished.

2. Instructions—Fellow-servant Act—Appeal and Error—Harmless Error.

Where the defendant is a railroad operated within the meaning of the Fellow-servant Act, an erroneous instruction on the issue as to whether the plaintiff and the one whose negligence caused the alleged injury were fellow-servants is harmless, if erroneous.

3. Evidence — Re-examination—Cross-examination—Appeal and Error — Objections and Exceptions.

Defendant's exception to the evidence on reëxamination, which is substantially the same as that given by him on cross-examination, cannot be sustained on appeal.

APPEAL by defendant from *Cline, J.*, at August Term, 1917, of CABARRUS.

This is an action to recover damages for personal injury.

The plaintiff, W. C. Goodman, was working for the defendant Tallahassee Power Company as an electrical helper at Badin, N. C., on or about 22 March, 1916, and had been so working for some time prior thereto. On that day, he, with two other electricians, (662) went out to do some work. They went to their work on what is known as a "speeder," which was operated on the railroad track built by the defendant. Said track was used by the defendant for the purpose of hauling material and supplies of all kinds from the railroad at Whitney to Badin, where the defendant was erecting its factories and other plants for the manufacture of aluminum. Said track was not used as a public carrier for either freight or passengers at the time of the injury, but was so used in June thereafter. The Hardaway Contracting Company, contractor for the defendant, was using its dinkeys to haul in the material used in the construction of these plants. The speeder was a small four-wheeled car, about the size of an ordinary hand-car, was propelled by gasoline, and was used on said track by the employees of the company in going from place to place in discharge of their duties. The speeder was operated

by one of the employees of the company, and he took the plaintiff and others out to their place of work on the day of the accident, and in the afternoon was bringing them in. When the speeder was crossing the road-crossing, north of the defendant's plant, it was run into by an automobile, which knocked the speeder a distance of some 10 feet and off the track. The plaintiff, who was one of the occupants of the speeder at the time, was injured in his foot, and has suffered continuously since that time. He alleges that the accident was due to the carelessness of the operator of the speeder in not sounding the gong, or slowing up, or stopping the speeder before entering on said crossing, and he introduced evidence tending to sustain his contention.

The defendant denied that it was negligent, and alleged that if there was negligence it was the negligence of a fellow-servant, for which it was not responsible.

The track on which the speeder was running was standard-gauge, had heavy rails, and trains pulled by steam locomotives ran over it, carrying material. It was constructed so that it could be used as a carrier of freight and passengers, and began to be operated as such in June, 1916.

Seaford, a witness for defendant, gives the following account of the employment of the plaintiff and of himself: "At the time of the accident I was machinist and operator of the speeder. I repaired and kept speeder in operation. I worked in the shop when the speeder was not running, and when the speeder was running I ran it. Mr. Hagadon was the master mechanic in the shop. Goodman worked in the electrical department, in the same building. Mr. Bears was the head of that department. Hagadon did not have immediate control over Goodman. I had instructions from Mr. Hagadon that whenever I was on the speeder I was subject to the electrical department's orders. When Goodman told me to stop, I had to stop, absolutely, and when he told me to start, I started. When the electrical department is out together, they generally all wanted to go (663) to the same place and stop at the same place. They were all three at Whitney, and wanted to go to Badin, and I carried them to Badin, or part of the way. They all worked in the electrical department, except me. When they all quit work and wanted to go back, I had to take them. If he said he wanted to go back at 3:30, I would be there at 3:30. I was obeying the orders of my boss, and pleasing the electrical department also."

The jury returned the following verdict:

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

2. Was the injury to the plaintiff caused by the negligence of a fellow-servant, as alleged in the answer? Answer: No.

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

His Honor instructed the jury to answer the second issue "No," if they believed the evidence, and the defendant excepted.

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

F. I. Osborne, R. L. Brown, and W. G. Means for plaintiff.

L. T. Hartsell and R. L. Smith for defendant.

ALLEN, J. Conceding that the plaintiff and Seaford, the driver of the speeder, were fellow-servants, as the defendant contends, the defense that the defendant is not responsible for an injury caused by the negligence of a fellow-servant cannot avail the defendant if it was operating a railroad at the time of the injury to the plaintiff, within the meaning of section 2646 of the Revisal, which abolishes the doctrine of fellow-servants as to railroads, and provides that "Any servant or employee of any railroad company operating in this State who shall suffer injury to his person . . . by the negligence . . . of any other servant, employee, or agent of the company . . . shall be entitled to maintain an action against the company."

The statute was considered in *Hemphill v. Lumber Co.*, 141 N.C. 489, and it was then held that it included logging roads, and the definition given to the term "railroads," in *Schus v. Power Co.*, 85 Minn. 447, was adopted, as follows:

"In *Schus v. Powers-Simpson Co.*, 69 L.R.A. 887; 85 Minn. 447, this point was raised under the Minnesota 'Fellow-servant Act,' which is very similar to that in this State, and the Court held that the words, 'every railroad corporation owning or operating a railroad in this State,' embraced a 'logging road'; that though it is not a common carrier of freight and passengers, its employees engaged (664) in the operation of its trains are exposed to the same dangers and risks as are employees of railroads operating as common carriers, and come within the spirit and intent of the act, and that the wider signification of the word 'railroad,' meaning any road operated by steam or electricity, on rails, was intended by the Legislature.

"Both street railways and logging roads are railroads — *i. e.*, roads whose operations are conducted by the use of rails — and come within the general term, 'railroads' — certainly within the meaning of the Fellow-servant Act, which sought to protect all em-

ployees engaged in this dangerous avocation, by requiring safe ways, machinery, and appliances, and taking away from such companies the defense that an employee had been injured or killed by the negligence of a fellow-servant."

In the subsequent case of *Carter v. R. R.*, 160 N.C. 10, the principle was affirmed, and the Court then said: "In construing that act (Revisal, sec. 2646) and its similar phraseology, we held that logging roads are railroads, within the meaning of the act, and that the term 'railroad' embraced any road operated by steam or electricity, on rails."

The *Hemphill* case has been approved sixteen times, the latest reference to it being in *Buckner v. R. R.*, 164 N.C. 204; *McDonald v. R. R.*, 165 N.C. 625; *Bloxham v. Timber Co.*, 172 N.C. 46, and we are not inclined to disturb it, as roads "operated by steam or electricity, on rails," come within the language of the statute, and they are within its spirit, which is to protect employees engaged in a dangerous service. Indeed, the employees of railroads which are not public-service corporations are frequently subjected to greater danger because of defective appliances and the absence of supervision by officers of the State.

The evidence clearly brings the defendant within the principle, as it shows that the road operated by the defendant was standard-gauge, had heavy rails, and that a locomotive hauled trains over it, carrying all kinds of heavy material.

It follows, therefore, if the plaintiff and Seaford were fellow-servants, there was no prejudicial error in the instruction to the jury, as the defendant, being a railroad, operating in this State, could not have the benefit of the defense that the plaintiff was injured by the negligence of a fellow-servant.

The case of *Twiddy v. L. Co.*, 154 N.C. 237, has no application to the case before us. In that case the plaintiff was in a separate department and had no connection with the operation of the road, while in the present case the plaintiff and Seaford were together, operating the speeder, the plaintiff giving directions and Seaford driving it.

We therefore conclude, there is no reversible error in the charge.

There is also an exception to evidence, which we have considered, and find without merit. (665)

There is no substantial difference between the answer of the witness to the questions objected to on reëxamination and his testimony on cross-examination.

No error.

Cited: Wallace v. Power Co., 176 N.C. 561; *Corp. Comm. v. R. R.*, 187 N.C. 430.

W. C. MOORE, JR., ET AL., v. H. B. PACKER AND L. HARRISON.

(Filed 5 December, 1917.)

Judgments — Injunctions—Bonds—Court's Jurisdiction—Parties—Estoppel.

Where a restraining order has been issued against W. C. M. from cutting timber on certain lands, and an order is entered entitled as against W. C. M., Jr., permitting him to continue cutting upon his giving a certain bond with surety, which is given by W. C. M., Jr., as principal and another as surety, who afterwards is permitted to withdraw his answer, and judgment for damages entered against W. C. M.: *Held*, W. C. M., Jr., by filing answer, entered a general appearance in the former action, and the court also having jurisdiction of the subject-matter, and thus acquiring jurisdiction of the parties, properly entered judgment against the principal, W. C. M., Jr., and the surety on the bond, and execution under the judgment may not be restrained by the obligors of the bond. Void and voidable judgments and proceedings to set them aside, etc., discussed by ALLEN, J., citing *Doyle v. Brown*, 72 N.C. 396; *Carter v. Rountree*, 109 N.C. 32, and other cases.

APPEAL by plaintiffs from order of *Carter, J.*, 21 March, 1917; from CALDWELL.

This is an action to restrain the collection of a judgment under execution.

On 12 March, 1913, Packer and Harrison, the defendants herein, instituted their civil action against W. C. Moore in the Superior Court of Burke County, and the sheriff made return upon the summons as follows: "Received 13 March, 1913. Served 13 March, 1913, by reading the within to W. C. Moore. J. P. Icard, Sheriff, Caldwell County."

A restraining order was issued in that action and it was returned as served on W. C. Moore. At the hearing on 26 March, 1913, before Judge Webb, an order was entered entitled as against W. C. Moore, Jr., as defendant, in which it was provided that "Upon the defendant filing bond in the sum of $200, to be approved by the Clerk of Burke Superior Court, the defendant is permitted to continue his timber-cutting operations until the further order of the court."

A bond was made entitled as of W. C. Moore, Jr., defendant, in which W. C. Moore, Jr., was the principal and V. W. Hoke the

surety, the condition of which is therein stated as follows: "The condition of the foregoing obligation is such that the (666) above bounden W. C. Moore, Jr., has been permitted to continue his timber-cutting operations, as will appear by reference to the order of his Honor, James L. Webb, of this date. Now, if said defendant shall pay all such damages as shall be sustained by the plaintiffs by reason of the order as aforesaid, in event that the plaintiffs be declared the owners of the lands in controversy, then this obligation to be void; otherwise to be in full force and effect."

Plaintiff filed his complaint against W. C. Moore, and an answer was filed and verified by W. C. Moore, Jr. The case came on for trial at October Term, 1915, at Burke Superior Court, and at that time the plaintiff stated in open court that W. C. Moore, Sr., was the defendant they were suing, and not W. C. Moore, Jr., and defendant W. C. Moore, Jr., upon motion, was permitted to withdraw his answer. An issue of damages was submitted against W. C. Moore, Sr., and judgment was rendered setting forth that W. C. Moore had failed to make any defense and rendering judgment against the defendant and W. C. Moore, Jr., and V. W. Hoke, surety on the injunction bond, in the sum of $200. W. C. Moore, Jr., and V. W. Hoke excepted and gave notice of appeal, which was never prosecuted. Execution was issued upon the judgment rendered and attempted to be levied on the property of V. W. Hoke. Thereupon, plaintiffs obtained a restraining order against the enforcement of the judgment, which the court on the hearing dissolved, and plaintiffs appealed.

Squires & Whisnant for plaintiff.
Avery & Ervin for defendants.

ALLEN, J. The plaintiff W. C. Moore, Jr., filed an answer and entered a general appearance in the former action, and he and his co-plaintiff filed the bond conditioned to pay the damages recovered, and both of them excepted to and gave notice of appeal from the judgment rendered.

This conduct on the part of the plaintiffs amounted to a general appearance and gave the court jurisdiction of the parties *(Chadbourn v. Johnson,* 119 N.C. 282), and as it also had jurisdiction of the subject-matter, the judgment rendered is not void.

"Where a defendant has never been served with process, nor appeared in person or by attorney, a judgment against him is not simply voidable, but void: and it may be so treated whenever and wherever offered without any direct proceedings to vacate it. And the reason is, that the want of service of process and the want of appearance

is shown by the record itself whenever it is offered. It would be otherwise if the record showed service of process or appear-
(667) ance when in fact there had been none. In such case the judgment would be apparently regular and would be conclusive until, by a direct proceeding for the purpose, it would be vacated." *Doyle v. Brown,* 72 N.C. 396.

If an erroneous judgment, it is an estoppel between the parties until corrected by appeal *(Weeks v. McPhail,* 128 N.C. 131), and if "they (the plaintiffs) wish to attack it for irregularity, it must be done by motion in the original cause" *(Harris v. Bennett,* 160 N.C. 344), and not by a new action.

The distinctions between the different kinds of judgments and the remedies afforded for correcting errors in them are accurately and clearly stated in *Carter v. Rountree,* 109 N.C. 32, as follows:

"Judgments may be void, irregular or erroneous. A void judgment is one that has merely semblance, without some essential element or elements, as where the court purporting to render it has not jurisdiction. An irregular judgment is one entered contrary to the course of the court, contrary to the method of procedure and practice under it allowed by law in some material respect, as if the court gave judgment without the intervention of a jury in a case where the party complaining was entitled to a jury and did not waive his right to the same. *Vass v. Building Assn.,* 91 N.C. 55; *McKee v. Angel,* 90 N.C. 60. An erroneous judgment is one rendered contrary to law. The latter cannot be attacked collaterally at all, but it must remain and have effect until by appeal to a court of errors it shall be reversed or modified. An irregular judgment may ordinarily and generally be set aside by a motion for the purpose in the action. This is so because in such case a judgment was entered contrary to the course of the court by inadvertence, mistake, or the like. A void judgment is without life or force, and the Court will quash it on motion, or *ex mero motu.* Indeed, when it appears to be void, it may and will be ignored everywhere and treated as a mere nullity."

As, therefore, the judgment is not void, the court having jurisdiction, the plaintiffs are not entitled to the relief prayed for, and there was no error in dissolving the restraining order.

Affirmed.

HOKE, J., not sitting.

Cited: Hatch v. R. R., 183 N.C. 628; *King v. R. R.,* 184 N.C. 446; *Duffer v. Brunson,* 188 N.C. 791; *Clark v. Homes,* 189 N.C. 707; *Caldwell v. Caldwell,* 189 N.C. 810; *Ellis v. Ellis,* 190 N.C.

422; *Truelove v. Parker,* 191 N.C. 438; *Ellis v. Ellis,* 193 N.C. 219; *S. v. Hollingsworth,* 206 N.C. 740; *Harrell v. Welstead,* 206 N.C. 819; *Dail v. Hawkins,* 211 N.C. 283; *Calhoun v. Stiers,* 215 N.C. 126; *Cameron v. McDonald,* 216 N.C. 716; *In re Will of Smith,* 218 N.C. 163; *In re Canal Co.,* 234 N.C. 378; *Collins v. Hwy. Comm.,* 237 N.C. 284; *Washington v. McLawhorn,* 237 N.C. 453; *Mills v. Richardson,* 240 N.C. 191; *Deans v. Deans,* 241 N.C. 10; *Moore v. Humphrey,* 247 N.C. 428; *Shaver v. Shaver,* 248 N.C. 119.

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MRS. EMMIE LEMLEY BROWN, ADMINISTRATRIX *d. b. n.*, v. GEORGE E. WILSON, EXECUTOR, ETC.

(Filed 5 December, 1917.)

1. Executors and Administrators—Surplus Fund—Guardian and Ward.

Semble, where the same person has qualified as administrator of the deceased and also as guardian of his children, and as executor has paid the debts of his testator, the law will transfer the surplus, after paying the debts, from the administrator to the guardian. *Ruffin v. Harrison,* 81 N.C. 208; *S. c.,* 86 N.C. 190.

2. Limitation of Actions—Executors and Administrators—Repealing Statutes.

Where one has qualified as administrator of the intestate in 1856, and there is evidence that funds came into his hands as such; that in 1884 he died without making final settlement, leaving a will, and his executor duly qualified, advertised for creditors, etc., and made final settlement; that in 1916 the plaintiff qualified as administratrix *d. b. n.,* and brings action for an accounting: *Held,* the limitations of actions in force prior to 1868, under the Code of 1863, secs. 136, 137, do not apply by reason of the repealing act of chap. 113, Laws of 1891, and the statute has run as a complete bar to the plaintiff's cause of action. *Edwards v. Lemmond,* 136 N.C. 330, cited as controlling.

APPEAL by plaintiff from *Cline, J.,* at the February Term, 1917, of MECKLENBURG.

This is an action by Emmie Lemley Brown, administratrix *d. b. n.* of the estate of R. C. Carson against George E. Wilson, executor of the estate of J. H. Wilson for an accounting.

R. C. Carson died intestate in 1856, leaving surviving him two children, Ella R. Carson and Richardina Carson, and Joseph H. Wilson in the same year qualified as his administrator.

Ella R. Carson became 21 years of age in 1864, married Dr.

Lemley in 1868, and died in 1875, leaving the plaintiff, Emmie Lemley Brown, her child surviving her.

Richardina Carson became 21 years of age in 1867, made a settlement with the said Wilson, administrator, in 1877, and died intestate in 1887.

The said Joseph Wilson also qualified as guardian of the said Ella and Richardina Carson in 1856. Joseph H. Wilson died in 1884, leaving a will and appointing the defendant George E. Wilson as his executor. It does not appear that he filed any final account as administrator.

The said George E. Wilson duly qualified as executor, advertised for creditors to present their claims, and has made a final settlement of the estate and has filed his final account.

The plaintiff was appointed administratrix *d. b. n.* in 1916 and immediately thereafter commenced this action.

There was evidence upon the trial tending to show that (669) assets went into the hands of said J. H. Wilson, administrator, and also of the payment of debts by him.

The defendant pleaded in bar of the action the statute of limitations of three, seven, and ten years, lapse of time, and abandonment, and the action was tried upon these pleas.

The court charged the jury as follows:

"The first issue submitted to you in this case is this: Is the plaintiff's cause of action set out in the complaint barred by the statute of limitations? The court is of the opinion, and so instructs you, if you believe all the evidence in this case, your duty is to answer the first issue 'Yes.'

"Second: Is the plaintiff's cause of action set out in the complaint barred by the lapse of time? The court is of the opinion, and so instructs you, that if you believe all the evidence in this case, your duty is to answer the second issue 'Yes.'

"Third: Has the plaintiff and those under whom she claims, by their conduct, abandoned the cause of action set out in the complaint? The court being of the opinion, so instructs you, if you believe all the evidence in this case, it is your duty to answer the third issue 'Yes.'"

To the foregoing charge of the court the plaintiff duly excepted.

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

T. W. Alexander and Hugh W. Harris for plaintiff.

Osborne, Cocke & Robinson and Cansler & Cansler for defendant.

ALLEN, J. The evidence strongly supports the contention of the defendant that the estate of R. C. Carson has been fully administered, and that all of the assets coming to the hands of the former administrator were exhausted in the payment of debts.

It may also be maintained on the record, that if there was a surplus after the payment of debts, as J. H. Wilson was both administrator of the estate and guardian of the infant children, the law would transfer the surplus from the administrator to the guardian under the authority of *Ruffin v. Harrison,* 81 N.C. 208, affirmed on petition to rehear, 86 N.C. 190, in which event the right of action would not be in the plaintiff, but in the administrator of the ward, who would be barred under *Dunn v. Beaman,* 126 N.C. 766.

We will not, however, rest our decision on either of these grounds as the case was tried in the Superior Court on the pleas of the statute of limitations, lapse of time and abandonment, and the appeal presents for review the correctness of the rulings on these questions, waiving the objection that the rules of Court have not been complied with, in that the exception is to the whole charge, and not to a part of it specifically pointed out. (670)

The plaintiff does not contend that her cause of action is not barred if the limitations in force since 1868 apply, but she insists that the limitations prior to that time control, and that under the statutes then in force no right of action accrued to the distributee until the tender of a refunding bond, which has not been done.

This position, as to the statutes applicable, is sound under sections 136 and 137 of the Code of 1883, the first of these providing that as to causes of action accruing before 24 August, 1868, "the statutes in force previous to that date shall be applicable," and the second that the time between 20 May, 1861, and 1 January, 1870, "shall not be counted so as to bar actions or suits," but both of these statutes were repealed by chapter 113, Laws 1891, and are, as far as this action is concerned, as if they never existed.

It has also been directly held in *Edwards v. Lemmond,* 136 N.C. 330, that the statutes of limitation in force since 1868 are not applicable to causes of action arising before that time by reason of the repealing act of 1891.

In the *Edwards* case the original administration was taken out in 1866, and the executrix, who qualified, lived until 1901. There was then administration on the estate of the testator and on the estate of the executrix, and the first administrator brought suit against the second. The executrix did not file a final account.

The plea of the statute of limitations was sustained, and the ground of the decision is stated as follows: "At the end of two years, the law makes the demand and puts an end to the express trust,

though no express demand is made by any party interested upon the executor or administrator. He is in default, and an action will lie at the end of the two years at the instance of any one entitled to have an account in settlement of the estate. Walker, J., in *Self v. Shugard,* 135 N.C., at bot. of p. 194. It is familiar learning that the statute begins to run whenever the party becomes liable to an action if the plaintiff is under no disability. *Eller v. Church,* 121 N.C. 269. There having been no action begun within ten years, during which actions could have been brought, this action is barred by the Code, sec. 158. *Hunt v. Wheeler,* 116 N.C. 424. In *Wyrick v. Wyrick,* 106 N.C. 84, this was intimated and was reaffirmed in *Kennedy v. Cromwell,* 108 N.C. 1. *Grant v. Hughes,* 94 N.C. 231, and *Bushee v. Surles,* 77 N.C. 62, relied on by the plaintiff, were both cases where the original administration began under the law prior to the Code, as is stated by Davis, J., in *Woody v. Brooks,* 102 N.C. 344. The same is true of *Phifer v. Berry,* 110 N.C. 463. At that time such actions were governed by the former law. The Code, sec. 136; *Brit-*
(671) *tain v. Dickson,* 104 N.C. 547. But section 136 has been repealed by chapter 113, Acts 1891, and the statute of limitations prescribed by the Code is applicable to this case, though original administration was taken out in 1866."

The statute began to run against the mother of the plaintiff, who, as distributee of R. C. Carson, had the right to maintain an action, and the cause of action was barred before the appointment of the plaintiff.

No error.

Cited: Pierce v. Faison, 183 N.C. 179; *McIver v. McKinney,* 184 N.C. 397; *Washington v. Bonner,* 203 N.C. 252; *Peal v. Martin,* 207 N.C. 110; *Seagle v. Harris,* 214 N.C. 342; *Brown v. Cowper,* 247 N.C. 11; *Spivey v. Godfrey,* 258 N.C. 677.

PAUL CHATHAM ET AL., V. MECKLENBURG REALTY COMPANY.

(Filed 5 December, 1917.)

1. Corporations — Contracts — Subscriptions—Corporate Acts—Board of Directors — Evidence—Ratification—Officers—Principal and Agent—Scope of Authority.

Where a realty company proposes to lay off its land into lots for sale, and its president and two of its directors, in writing, subscribe to a street railroad company to be built through the lands, the nearest one being 1½

miles distant, and upon the operation of the railway the lots are sold off at a great profit upon the original investment, amounting to much more than the sum subscribed, and upon objection to the service the railway company improved its operations accordingly, and the officers of this company saw the work in progress without at any time objecting: *Held*, sufficient evidence to be submitted to the jury on the question whether the president and directors acted within the scope of their authority in making the subscription or of the subsequent ratification of their acts by the corporation. *Duke v. Markham*, 105 N.C. 131, cited and distinguished.

2. Corporations—Subscriptions—Contracts.

Where the name of a corporation is stricken out of a subscription to an enterprise with the consent of the parties, and the subscription is thus delivered and accepted, it is binding between the acceptor and the other subscribers, and is a valid obligation between them.

3. Judgments—Contracts—Interest—Statutes.

Where the controversy is made to depend upon whether a written agreement of a certain date to subscribe to plaintiff's enterprise in a sum certain was binding upon the defendant corporation, the affirmative answer of the jury to the issue carries with it interest on the subscription from the date it was due, as a matter of law, and judgment should be rendered accordingly, and not from the date of its rendition, as in tort. Revisal, sec. 1954.

APPEAL by defendant from *Cline, J.*, at the February Term, 1917, of MECKLENBURG.

In May, 1910, the defendant owned 156 8-10 acres of land about 3½ miles east of Charlotte, which it had bought for $16,131, and proposed to dispose of the same for suburban home lots. W. S. Lee was president of defendant Realty Company and A. (672) J. Draper and W. H. Hood were directors, and these, with other associates, organized the Mecklenburg Country Club adjoining the defendant's land.

In June, 1910, Paul Chatham had an application before the aldermen of Charlotte for a street railroad franchise, the nearest street car line at that time being 1½ miles from this property. Defendant was desirous that Chatham should construct the line he proposed through defendant's property, and the president of the defendant proposed that it and the Country Club would subscribe $10,000 to aid in the construction of the line to be run through a part of the defendant's property. This paper was dictated by Lee to a stenographer and was signed by him in the name of the company and delivered to Chatham to get Draper and Wood, the two directors above mentioned, to sign, which was done by them with Lee's concurrence after striking out the Mecklenburg Country Club as one of the parties.

In December, 1910, Stephens, selling agent of the defendant, had a plat made of the property, which has been sold off for $87,185, be-

ing an advance of $71,053 profit. Work was begun on the street railway in the spring of 1911 and completed in November of that year. The defendant sold practically all this land between 20 March and 30 May, 1911.

It was in evidence that the plaintiffs' and defendant's officers were in consultation many times during the construction of the line, and that no objection was made by defendant to the location of the line after the completion of the first line, when the plaintiff presented a bill to the defendant for its subscription of $10,000; that objection was made that the storage battery cars with which the line was equipped were unsatisfactory, and that thereupon the plaintiff proposed that he would take the line up and build a first-class trolley system down Mecklenburg Avenue to the Country Club as soon as he could get a contract with the Southern Public Utilities Company to furnish the power to operate it, and it was replied by the defendant's officers that in such case the defendant would have to pay the $10,000. There was also evidence that the plaintiffs began the construction of a trolley line which was laid out by Laxton, one of defendant's directors, and that while this line was under construction defendant's officers frequently saw the work in progress and none of them protested that the line was unsatisfactory, and, further, that this second line was located and completed with the knowledge and consent and approval of defendant's officers at a cost of $35,000, and has since been in continuous operation at a cost of about $30 per day, and that defendant's president stated that when he signed the paper he was satisfied that if the road was built in a condition satisfactory to defendant's board of di-
(673) rectors it would be worth $10,000 to the defendant to have the road run through his property. In May, 1913, when the plaintiffs again demanded payment of its subscription, the defendant's officers replied, in effect, that they had then disposed of practically all their property and had no interest in the car line, and again refused payment. Upon the issues submitted, the jury found a verdict for plaintiff in the sum of $10,000, but the court signed judgment, with interest on $10,000 only from first day of the trial term. Both parties appealed.

Cansler & Cansler and H. L. Taylor for plaintiff.
Osborne, Cocke & Robinson for defendant.

DEFENDANT'S APPEAL.

CLARK, C.J. The court properly instructed the jury that if the words "Mecklenburg Country Club" were stricken out by one of the signers of the paper with the knowledge and consent of the other

parties before the delivery to the plaintiff that the paper delivered, signed by the president and two directors of the defendant company, was the sole and exclusive obligation of the defendant; that it was a complete contract in itself, and not a preliminary agreement, and was a valid obligation between the parties. There was evidence that upon the failure of the storage-battery cars, the defendant extended and afforded an opportunity to the plaintiffs to perform the contract without an abandonment of the subscription, and that the construction of the second line was under and in reliance upon the subscription; that the terms of the contract were complied with and was ratified by the defendant, and that the defendant never dissented from or protested against the construction of the second line.

The defendant earnestly insists that it is not bound by the contract signed by its president and two directors, and insists upon the decision in *Duke v. Markham*, 105 N.C. 131, which held that a mortgage was not valid, as to third parties, which was not authorized by the majority of the stockholders in meeting assembled, the assent of each stockholder having been given separately and at different times to a person who went around to them privately, holding that this was not the act of the corporation, and that though money was raised upon such mortgage, this would not validate it as to other creditors, since it was invalid when registered.

That has no application in this case. This contract, as submitted to the jury, is between the original parties thereto and was executed by the president and two directors. There was evidence that they were acting in behalf of the corporation as their general agents, with the knowledge of the company, and that subsequently when there was objection made there were changes made in the (674) work to the knowledge of the defendant company; that its officers saw the work in progress and under the amended agreement and made no objection. There was ample evidence, if believed by the jury, that the president and the two directors, in making the contract, were acting within the scope of their authority, and that the subsequent change in the contract was ratified by the defendant, who had been benefited many times the value of the subscription by reason of the work done by virtue of this contract, and the jury, under very full and correct instructions by the court, have found their verdict in favor of the plaintiffs.

The exceptions are numerous and were ably and fully presented in this Court. We have carefully considered them and do not find error therein.

PLAINTIFFS' APPEAL.

On the coming in of the verdict, the plaintiffs tendered the court judgment for $10,000, with interest from 19 May, 1913, the date of

the contract. The court refused to sign the judgment tendered by plaintiffs and signed judgment for $10,000, with interest from the first day of the trial term, 5 February, 1917.

The plaintiffs excepted and appealed.

Revisal 1954, is as follows: "All sums of money due by contract of any kind whatsoever, excepting money due on penal bonds, shall bear interest; and when a jury shall render a verdict therefor, they shall distinguish the principal from the sum allowed as interest, and the principal sum due on all such contracts shall bear interest from the time of rendering judgment thereon until it be paid and satisfied."

In *Barlow v. Norfleet,* 72 N.C. 535, it is said: "The judge left it to the jury to give the plaintiff interest or not, as they should think proper. We think he should have instructed them that if they found that defendant owed the principal sum demanded, the plaintiff was entitled to interest from the time it became due."

The jury having found for the plaintiff in the principal sum, the court should have entered judgment bearing interest thereon from the date of the contract. *Jolly v. Bryan,* 86 N.C. 458 (463), which says: "As this (interest on verdict), however, can be corrected by a simple calculation, it is not necessary to disturb the verdict, but only to modify the judgment in this particular." This rule is approved in *Lumber Co. v. R. R.,* 141 N.C. 171.

In an action on contract, when the jury finds the principal sum due thereon, which in this case was $10,000 (or nothing), said sum bears interest as a matter of law, and the court should give interest from the date of the contract, or from the time at which it (675) was due under the contract. *Bond v. Cotton Mills,* 166 N.C. 20. But when the action is in tort, the jury can allow interest or not, as it sees fit, and, therefore, when the jury does not assess interest the verdict and judgment bear interest only from the first day of the term at which the judgment is rendered. *Harper v. R. R.,* 161 N.C. 451; *Hoke v. Whisnant,* at this term.

The judgment will be modified so as to bear interest from 19 May, 1913.

In plaintiffs' appeal, Modified.

In defendant's appeal, No error.

Cited: Cook v. Mfg. Co., 182 N.C. 223; *Perry v. Norton,* 182 N.C. 589; *Bell v. Danzer,* 187 N.C. 232; *Sears Roebuck Co. v. Banking Co.,* 191 N.C. 506; *Bryant v. Lumber Co.,* 192 N.C. 611; *Thomas v. Watkins,* 193 N.C. 632; *Thomas v. Realty Co.,* 195 N.C. 595; *Ins. Co. v. R. R.,* 198 N.C. 519; *Trust Co. v. Transit Lines,* 198 N.C. 679; *Yancey v. Hwy. Comm.,* 221 N.C. 189.

W. H. OLLIS & SON v. M. E. PROFFITT ET ALS.

(Filed 5 December, 1917.)

1. **Attorney and Client — Defense — Bankruptcy — Excusable Neglect — Judgment.**

A client does not entirely relieve himself of all responsibility in his action by employing an attorney; and when he has sat through the trial consulting with his attorney, introduces no evidence, and judgment is rendered against him, he may not set the judgment aside upon the plea of excusable neglect in failing to plead or show a discharge in bankruptcy as a defense.

2. **Appeal and Error — Abandonment of Appeal — Presumptions — Judgments.**

Where the defense of a discharge in bankruptcy is relied on as a defense to the action of debt, which the defendant fails to allege, relies upon the plaintiff's evidence, and judgment is rendered against him, from which he appeals without perfecting the appeal, his abandonment of the appeal is regarded as his acquiescence in the judgment.

APPEAL from *Carter, J.*, at August Special Term, 1917, of AVERY.

No counsel for plaintiffs.
Lowe & Love for defendants.

CLARK, C.J. This is an appeal from the refusal of a motion to set aside the judgment on the ground of excusable neglect.

The judge finds the facts as follows: "The complaint and answer were duly filed, and immediately before the trial term the defendant M. E. Proffitt gave to his attorneys his discharge in bankruptcy and requested them to use it in the trial; and when the case was called for trial and pleadings read, the defendant M. E. Proffitt was not in the courtroom, but came in immediately after the pleadings were read and remained in the courtroom with his (676) attorneys, consulting and advising with them, until the close of plaintiffs' evidence. At the close of plaintiffs' evidence the defendants moved for a nonsuit, and excepted to its refusal. The defendants then rested their case on the plaintiffs' evidence, the jury answering the issue in favor of the plaintiffs, and the defendants excepted to the judgment and gave notice of appeal in open court, prepared the statement of case on appeal, and served it on plaintiffs, and plaintiffs served counter-case. Nothing further was done with the case on appeal by the defendants. At the April Term, 1917, defendants made their motion to set aside the judgment, and the same not having been disposed of at the said term it was renewed at the July, 1917, Term; thence continued to the present term. Upon these facts the court overrules the motion, and defendant excepts."

This is not a case of excusable neglect, but of inexcusable negligence. The action was on certain notes against the defendant, his wife and another. The defendant was present at the trial, and if he was relying upon his discharge in bankruptcy, it was his duty to plead it and stop the trial as to himself. But he went on with the trial and took exceptions to certain matters in the trial, appealed, and afterwards abandoned the appeal. He well knew that his discharge in bankruptcy was not relied on; and if it was, and he excepted on that ground, he acquiesced by abandoning his appeal.

In *Roberts v. Allman,* 106 N.C. 391, it is held: "It is not enough that parties to a suit should engage counsel and leave it entirely in his charge. They should, in addition to this, give to it that amount of attention which a man of ordinary prudence usually gives to his important business," citing from *Sluder v. Rollins,* 76 N.C. 271, as follows: "The defendant does not abandon all care of his case when he has engaged counsel to look after it." See cases cited in *Roberts v. Allman, supra,* and citations to that case in the Anno. Ed.

Affirmed.

Cited: Murray v. Bass, 184 N.C. 322.

J. G. PARDUE ET ALS., v. H. O. ABSHER ET AL.

(Filed 5 December, 1917.)

1. Foreign Corporations — Process — Service—Statutes—Insurance Commissioner.

Service of summons on a foreign insurance company doing business in this State is not restricted to the method prescribed by Revisal, sec. 4750, but may be made in the manner stated in Revisal, sec. 1243.

2. Same—Bonding Companies.

Service of summons upon the Commissioner of Insurance under Revisal 4750, does not apply to bonding companies authorized under section 4805, and the same may be made under section 440(1).

3. Foreign Corporations — Bonding Companies — Process—Principal and Agent—Statutes.

A local agent receiving premiums or commissions for a bonding company doing business in this State is within the contemplation of the section 440(1) one upon whom a valid service of summons can be made on a foreign corporation, including a bonding company.

4. Judgments—Payment—Actions—Clerks of Court—Injunctions.

Where a foreign bonding corporation has voluntarily paid off a judg-

ment rendered against it without protest and with full knowledge of the facts, and the judgment has been canceled accordingly, it may not recover back the money it has so paid in the absence of fraud or deceit, or restrain the clerk from paying it to him.

APPEAL by defendant Guaranty Company from *Ferguson, J.*, at March Term, 1917, of WILKES. (677)

This is a motion by the U. S. Fidelity and Guaranty Company, one of the defendants, at January Term, 1917, of Wilkes, to set aside a judgment of that court rendered at March Term, 1910, on the ground that summons in said cause had not been properly served, and that at the time of the rendition of said judgment in 1910 the statute of limitations had barred said action by reason of an alleged final settlement by the other defendants in said action.

The court found as facts: That the summons in the original cause was returnable to January Term, 1910, of Wilkes; complaint was filed on the first day of said term, the summons being returned served on F. D. Hackett, local agent of the U. S. Fidelity and Guaranty Company, and also on the other defendants. Entry was made at that term "Twenty-five days allowed defendants to answer and continued." At March Term, 1910, judgment was entered for $880 and interest from different dates on certain amounts; $519.25 was collected (besides costs and commissions) and was credited on the judgment. In 1916, the judgment having become dormant, upon notice to defendants, it was revived and execution issued. Then after correspondence with defendant U. S. Fidelity and Guaranty Company and the State Insurance Commissioner the court finds as a fact that said company "caused their attorneys, Jones & Jones, Raleigh, N. C., to send their check to the clerk of the Superior Court of Wilkes to pay said judgment on 20 January, 1917, and the clerk received the said check and marked the judgment 'Satisfied.' But before he paid the same to plaintiff, a restraining order was issued and served on the clerk, restraining him from paying out the money until further order of the court."

The letter from Jones & Jones, enclosing the check in payment of the judgment, is as follows: (678)

"At the request of the United States Fidelity and Guaranty Company of Baltimore, Md., we are handing you herewith checks made by the Commercial National Bank of this city upon the Hanover National Bank of New York for the sum of $968.95, the amount of the judgment in your court in favor of Pardue against the United States Fidelity and Guaranty Company *et al.*

"Will you please do us the kindness to send us a receipt for the amount, and greatly oblige, Yours truly,

"ARMISTEAD JONES & SON."

The judge also finds as a fact that while the Fidelity and Guaranty Company had a process agent, then and now, G. A. Follin, at Winston, the subject-matter of this action "was not an insurance transaction, and that the said company was not strictly an insurance company in the meaning of the statute, but was transacting the business of a bonding company, and that said F. D. Hackett (upon whom the summons was served in 1910) not only solicited business for the company as a bonding company, but received money for said company in the way of premiums or commissions on said bonds, and also was such an agent as would reasonably be expected to give his principal notice of the suit."

The court denied the motion to set aside the judgment, and said company appealed.

Hackett & Gilreath for plaintiffs.
J. C. Wallace and E. C. Willis for defendants.

CLARK, C.J. The defendant contends that the judgment was void as to the Fidelity and Guaranty Company because the summons was not served upon the Insurance Commissioner. In *Fisher v. Ins. Co.*, 136 N.C. 224, it was held that service of process on an insurance company is not restricted to that method as prescribed by Revisal 4750, but that it may be made also in the manner prescribed by Revisal 1243. It is unnecessary to consider whether it may not be made also in the manner prescribed by Revisal 440, for this is not an insurance company, but a bonding company authorized under Revisal 4805, and that section does not require service of process upon the Insurance Commissioner, though they must be licensed by that officer. Service, therefore, under Revisal 440(1), is valid when made upon a local agent of such corporation, and it is therein provided that "Any person receiving or collecting moneys within this State for or on behalf of any corporation of this or any other State or government shall be deemed a local agent for the purpose of this section." Indeed, the term "local agent" is not (679) limited to those receiving money for the company. *Copeland v. Tel. Co.*, 136 N.C. 11. Nor is it necessary to consider whether upon the facts of this case the company has waived a failure of service upon a proper officer, if such had been the case, by appearance in the action or by acquiescence in the judgment, for the defendant company has paid off the judgment, with notice of all the facts, and without protest.

It is an "elementary rule that unless otherwise provided by statute, a party cannot, either by direct action or by way of set-off or counterclaim, recover money voluntarily paid with the full knowl-

edge of all the facts, and without any fraud, duress or extortion, although no obligation to make such payment existed." 30 Cyc. 1298. This applies to voluntary payments by corporations *(ib.,* 1300), and "Money voluntarily paid to satisfy a judgment which has not been reversed cannot be recovered back, and it is immaterial that the recovery was fraudulent. Payment of a judgment is voluntary unless made to procure the release of the goods of the party making the payment after seizure, or to prevent their seizure by an officer armed with the authority or apparent authority to seize them." *Ib.,* 1302. It can make no difference that afterwards the appellant alleged that it made payment to prevent a revocation of its license to do business in this State. It made no protest at the time, and the fact that it thought it was to its advantage to pay this judgment cannot vitiate the effect of the unrestricted payment in full of the judgment, without protest.

Moreover, the judgment having been paid and cancellation entered on the docket by the clerk before service of the restraining order, there is no judgment to be set aside and no ground to restrain the payment of the money over to the plaintiff, as whose agent the clerk held the same, for there is no allegation of fraud or deceit in procuring the payment to be made. There was full discussion and correspondence, and the company ordered the payment to be made with full knowledge of all the facts.

Affirmed.

Cited: Townsend v. Coach Co., 229 N.C. 526; *Moore v. Deal,* 239 N.C. 230.

STATE EX REL. CORPORATION COMMISSION ET AL., V. R. A. DUNN AND J. B. BROWN, EXRS., ETC., ET AL.

(Filed 5 December, 1917.)

1. Taxation—Statutes—Interpretation—Inheritance Tax.

Laws imposing an inheritance tax are liberally construed to effectuate the intention of the Legislature, and the exemptions to be allowed rest in its power and discretion.

2. Same—Dower.

The right to dower in the husband's lands rests upon statute, and does not grow out of the contractual relations of the marriage, and, being in the nature of property which passes "by the intestate laws of this State," is subject to taxation, under chapter 201, section 6, Laws 1913, providing

an exemption of $10,000; and the inheritance-tax law of 1911 (chapter 46, section 6) completely exempting such tax, is repealed by this later statute. The origin, history, and nature of the widow's right of dower discussed by CLARK, C.J.

3. Same—Widow's Dissent.

Where a widow dissents from her husband's will and claims her dower right in his lands, she takes such interest "as if he had died intestate" (Revisal, sec. 2081), and it is subject to the inheritance tax. Chapter 201, sec. 6, Laws 1913.

ALLEN, J., concurring; WALKER, J., dissenting; HOKE, J., concurring in dissenting opinion of WALKER, J.

APPEAL by plaintiffs from *Cline, J.*, at June Term, 1917, (680) of MECKLENBURG.

Peter Marshall Brown died in May, 1913. His widow, Daisybel P. Brown, dissented from her husband's will and was allotted for her dower lands valued at $65,850, besides $2,000 cash as her year's allowance. She was married to Peter Marshall Brown in 1905 and was 34 years old at the time of his death. The present value of her dower, based on the tables of expectancy, is $56,222.78. The inheritance tax on all the other property of the said P. M. Brown, deceased, including the remainder after the dower, has been paid by the executors, but no tax has been paid on said $56,222.78, nor on the $2,000 year's allowance, and this action is to recover the 1 per cent inheritance tax on said sums, less $10,000 exemption allowed to the widow by the statute.

By consent, the court found the facts as above stated, and directed a nonsuit. From this judgment the State appealed.

Attorney General, Assistant Attorney General, R. H. Sykes, and George W. Wilson for plaintiffs.

Pharr & Bell for defendants.

CLARK, C.J. The case presents the single question, whether the dower and year's allowance which, under our statute, accrue to a widow upon her husband's death intestate, or upon dissent to his will, are subject to the inheritance tax, under section 6, chapter 201, Laws 1913. That section reads as follows: "From and after the passage of this act, all real and personal property, of whatever kind and nature, *which shall pass by will or by the intestate laws of this State* from any person who may die seized or possessed of the same while a resident of this state . . . shall be, and hereby is, (681) made subject to a tax for the benefit of the State, as follows" (here follows the details).

Whether an inheritance tax shall be laid or not, and the rate thereof, and the exemptions allowed, are matters which rest in the power and discretion of the law-making department. "Laws imposing the inheritance tax must be liberally construed to effectuate the intention of the Legislature." *Norris v. Durfey,* 168 N.C. 321. This statute allows an exemption from the inheritance tax in favor of adult children of $2,000; in favor of minor children, $5,000; and in favor of the widow, $10,000. Prior to this act, it would seem that the widow's dower was exempt from taxation. The insertion in this statute of the following: *"Provided,* a widow shall be entitled to an exemption of $10,000, and each child under 21 years of age to an exemption of $5,000," is a clearly expressed intention that all above $10,000 of the property which passes to the widow, whether by will or on intestacy, shall be subject to the inheritance tax. The intent of the Legislature is as clear as its power. No property of which the husband was seized and possessed can pass to the widow except by will or under the intestate laws of the State.

The suggestion that dower is vested in the widow by virtue of the contract of marriage, and passes by such contract, and not by law, cannot be sustained. The authorities may be said to be uniform against this position. In 9 R.C.L., p. 563, it is said, under the head of "Dower," sec. 5: *"Positive Law, Not Contract, as Basis.* — In our law, the right to dower is not regarded as springing from contract, although the contract of marriage is a prerequisite to its existence, but from the positive terms of the common law or statute law. Its existence and incidents are therefore determined by the law of the State in which the real estate lies — not by that of the place of the marriage or the domicile of the parties, and likewise by the law *existing when the estate becomes consummate by the husband's death, instead of by that in force at the time of the marriage or at the time of the acquisition of the real estate by the husband.* The constitutional questions raised by changes of law made while rights of dower are inchoate are discussed elsewhere." The reference, "elsewhere," is to section 8, which states that "It is also the rule that the wife's expectation of dower — that is, her inchoate right of dower — even after the husband has become seized of particular real estate, is not a vested right, within the protection of the constitutional provision," citing numerous authorities.

In 14 Cyc. 882, it is said: "Dower is inchoate after seizin of the husband and during coverture, and consummate after the death of the husband." On page 885 it is said: "Although there is early authority to the contrary, it must now be regarded as settled that dower is not the result of any contract between husband and wife, either express or implied. But it is an institution of the State,

(682) founded upon public policy and made by positive law an incident of the marriage relation." On page 925 it is said: "An inchoate right of dower is not an estate, nor is it an interest in real estate."

In *Norwood v. Morrow,* 20 N.C. 578, Ruffin, C.J., says: "There is no contract between husband and wife for curtesy or dower. The interest one gets in the property of the other, the law gives for the encouragement of matrimony. It is certain that such as her estate (dower) is, the law makes it without any act of her husband and against his will." To same purport, *Rose v. Rose,* 63 N.C. 391. That dower is not a part of the contract of marriage, but is an estate arising and passing by operation of law, is well settled, both in this country and in England. In 2 Scribner on Dower, 2, the result of the English authorities is thus given: "It will be observed that this estate arises solely by operation of law, and not by force of any contract, express or implied, between the parties; it is the silent effect of the relation entered into by them, not as in itself incidental to the relation or as implied by the marriage contract, but merely as that contract calls into operation the positive institutions of the municipal law."

Blackstone and Littleton speak of five species of dower, which had been gradually evolved from the variant customs as to dower prevailing in different parts of England, but these from time to time have been dropped or abolished, except what is known as "dower by the common law," which is defined as "one-third part of all the lands and tenements of which the husband was seized in fee simple or fee tail at any time during the coverture, and of which any issue which she might have had might by possibility have been heir, to be held by the wife for the term of her natural life." This was abolished in this State in 1784 and was not restored till 1868. It is not so generally known that it was abolished, and more completely in England, in 1834, and has remained so. The only dower there existent for the last eighty-three years has been dower in one-third of the real estate of which the husband died seized and possessed, subject, however, to the right of the husband by will to bar even this.

In fact, dower at common law has not only been thus abolished in England, but it exists unchanged by statute hardly anywhere. 14 Cyc. 883, says: "In many of the United States, dower, exactly or substantially as it existed at common law, has been recognized as in force or adopted by judicial declaration or by express constitution or statutory provisions, while in others it has been very materially changed by statute. In other States, dower has been abolished altogether and a different right or interest substituted, as, for ex-

ample, a certain portion of the husband's real property in fee simple, or a certain portion of community property, or both."

Common-law dower was not only abolished in this State in 1784, and remained so till 1868, but there are many cases (683) in which it can be defeated, which would not be the case if it was based upon an implied contract between husband and wife. It may be defeated by divorce or by felonious slaying of the husband by the wife (Revisal 2109); by elopement or abandonment (Revisal 2110); by dissent of widow (Revisal 3081). The dower of an insane wife may be conveyed by the husband alone (Revisal 959); and dower may be defeated by mortgage of the husband alone, when for part of purchase money. Revisal 958 and 3085. It must be seen that while dower is a provision for the widow, by virtue of the statute, out of the property left at her husband's death, it is not a vested right, nor an estate in land, nor is it in any sense based upon an implied contract arising out of the marriage. It is purely statutory, like the laws of devolution of all property upon death, such property being disposed of by the law as to dower, or descent, or by will, according to the statute in force at the time of death of the owner. As has been repeatedly said by this and other courts, when a man dies he has no natural or inherent right to dispose of the property that he leaves behind him. The law-making body as to wills and as to descent, whether to children or widow by way of dower, controls. In *Sutton v. Askew*, 66 N.C. 172, it was held that the Legislature could increase the inchoate right of dower by restoring the common-law right of dower, which gave her dower in all the lands of which the husband was seized and possessed during coverture, but that the Legislature could not thus restrict his power of alienation of lands which he had acquired prior to the passage of the act. There were two dissenting opinions, and the authorities elsewhere are in accord with that view. The majority opinion rested not upon the vested right of the wife, but an assumed vested right of the husband in the *jus disponendi*, which an extension of the dower right would impair, and because it might deprive creditors of their rights. The majority of the Court evidently did not approve the legislative policy of restoring common-law dower. They criticise it as a violation of the husband's rights of property, and say that theretofore there had been but few questions as to dower rights, and none as to inchoate dower rights, but that the act of 1868-'69 "involves the subject in much uncertainty and will breed much litigation." Judges Dick and Rodman, in their dissenting opinion, say, correctly: "The history of the common law shows that dower was always regarded as a municipal institution and was not the result of a contract."

Dower, as known to the common law, was purely an English regulation, which has been abolished there since 1834, and was abolished here for nearly a hundred years. Dower is now hardly the same in any two jurisdictions. In Biblical times, "dowry," as when Shechem solicited Jacob for his daughter, Dinah, in marriage, "Ask
(684) me never so much dowry and I will give it" (Gen. 24:12), bore no resemblance to the "dower" of the common law, but was a gift, made by the suitor to the father or other near relatives of the intended bride. A similar custom prevailed among the Greeks, but Aristotle states that it had come to be looked upon as a relic of barbarism in their ancestors, as it was virtually a purchase of their wives. Neither is it like the dower, called *"dos,"* of the Roman law (or the *"dot,"* still in France), which was the marriage portion which the wife brought to her husband, in land or money. 1 Scribner on Dower, 2, 3. It may be noted that the French *"dot"* (pronounced *"doe"),* with its attraction to foreign suitors of American heiresses, is the origin of the slang word, "dough," for property.

The Chief Justiciar, Glanville, in the first English law book, about 1175, said that if no dower was announced at the church door, the wife took one-third; subject, however, to the disposal of the husband, by deed or will, later; for, said he, "Since the wife herself is in a legal sense under the absolute power of her husband, it is not singular if the dower as well as the woman herself should be considered fully at the disposal of the husband, who may give away or alienate the dower in his lifetime." He adds that, if the promise at the church door is of more than a third, though the husband does not alienate it, the wife cannot take more, but if he promises less, she gets only that. The second English law book, by Bracton, about a century later, repeats this, and gives as the reason because the woman has no vested interest in the dower before it is assigned, and "because she cannot gainsay her husband."

Law books in those days came about a century apart and were in manuscript, for it was some centuries yet before printing was invented. Indeed, Littleton, in his work on "Tenures," doubts if the first work named was written by Chief Justiciar Glanville, because he was not "in orders," and attributes it to Glanville's nephew, Hubert Walter (who was a bishop and later Archbishop of Canterbury and Chief Justiciar), for in those days very few could read or write, except those who were in orders, and there were no lawyers till more than a hundred years after Glanville's time. Consequently, most of the judges were bishops or priests, with a few laymen.

Dower, in fact and in law, is neither a vested right in the wife, nor is the husband or wife beyond the power of the Legislature to change it at will. It is simply the provision which the law makes

for the support of the widow out of the husband's estate after his death, and is controlled, like all the other laws of descent and distribution, by the statute in force at the time of his death.

Dower, therefore, being a provision out of the husband's estate which is allotted to her for her support in case of intestacy, or when she dissents from the provision made for her in her husband's will, is necessarily "property which passes by will or by the (685) intestate laws of this State." Revisal 3081.

In this case, if the widow had been content with the provision made for her in her husband's will, it would have been subject to the inheritance tax. It is none the less so because dissatisfied with the amount thereof she dissented, and under proceedings provided by law she has received a larger sum in lieu thereof. Whether she took it by will or under dissent, which gave her the same share "as if he had died intestate," it is property which passed to her from her husband "by will or by the intestate laws of the State." The Legislature has seen fit to tax it in either event, subject to an exemption of $10,000. It cannot be that if she took by will it was taxable, but if dissenting she took an allotment of the same amount which she would have received if he "had died intestate" that the property is exempt from taxation.

Revisal 3081, provides that upon a dissent, "The widow shall have the same rights and estate in the real and personal property of the husband *as if he had died intestate.*" There are numerous decisions that the words, "dying intestate," is not limited to the ordinary meaning of one dying without making a will, but includes death of a person without effectually disposing of the property. *In re Cameron,* 62 N.Y. Supp. 187, and many other cases.

The identical question here presented was passed upon in a very able opinion *(Billings v. People,* 189 Ill. 472; *S. c.,* 59 L.R.A. 807), which holds: "The words, 'intestate laws,' in a statute imposing a transfer tax upon property passing by the intestate laws of the State, refer to the laws which govern the devolution of estates of persons dying intestate, including applicable rules of the common law which are in force, so that the tax will be applicable to a widow's dower interest and her award under the administration laws." It was again presented in the same State in a recent case (1910) in the settlement of the estate of Marshal Field [*People v. Field,* 248 Ill. 147; 33 L.R.A. (N.S.) 230], where it was held: "A sum provided by antenuptial agreement to be paid the wife in case of her surviving the husband, in lieu of all claims and rights which she might otherwise have upon her husband's estate as his widow, is subject to succession tax." The *Billings* case, *supra,* was taken on writ of error to the United States Supreme Court (188 U.S. 97) and was affirmed,

the Court holding: "Inheritance-tax laws are based upon the power of a State over testate and intestate dispositions of property to limit and create estates and to impose conditions upon their transfer or devolution. This Court has already decided in regard to this law that such power could be exercised by distinguishing between the lineal and collateral relatives of a testator. Whether the amount of tax depends upon him who immediately receives, or upon him (686) who ultimately receives, makes no difference with the power of the State." In short, the Court sustained the legislative power to tax inheritances, whether testate or intestate, and at different rates, on the passage of the inheritance to different classes of devisees or distributees, including in that case the widow. To same purport, *In re Morris,* 138 N.C. 260, a very interesting and learned opinion by Mr. Justice Brown. In *S. v. Scales,* 172 N.C. 915, Allen, J., says: "Our inheritance-tax laws show an advancing tendency to include all property and to decrease exemptions, and should be liberally construed, to the end that all property coming within their provisions may fairly and reasonably be taxed." Walker, J., says, *In re Inheritance Tax,* 172 N.C. 170, that "The obvious intent of the State is to tax every interest passing by will to persons not exempt"; and though that case held that an annuity bequeathed to a widow was exempt from taxation, it was because of the language of the act of 1909, which did not extend to the taxation of widows. This has now been changed, as we have seen by the act of 1913, which, after taxing all property of every kind of a decedent passing by will or by law to another, exempts as to the widow $10,000 only.

The inheritance-tax law of 1911 (chapter 46, section 6) contains this exemption: *"Provided,* that all legacies and property passing by will *or* by laws of this State to a husband or wife of the person died possessed as aforesaid . . . shall be exempt from tax or tax duty." In 1913 the Legislature changed this by substituting for it a tax on all property of a decedent of every kind, whether passing by will or intestacy, *"Provided,* the widow shall be entitled to the exemption of $10,000." The whole subject of inheritance taxation has been discussed in the admirable opinion by Brown, J., *In re Morris,* 138 N.C. 259, where he says: "The statute must be given a liberal construction to effectuate the intention of the Legislature"; and to the same effect, *Norris v. Durfey,* 168 N.C. 321, and *S. v. Scales,* 172 N.C. 915, in which Allen, J., gives a valuable synopsis and history of the inheritance-tax law in this State.

The Legislature necessarily intended to tax the widow's share of the estate of the deceased, because, after taxing all property of every kind, it gives among the exemptions one of $10,000 to widows. It would be manifestly unjust to tax them if they take under the will,

but to exempt them entirely if they take contrary to the will by dissenting.

The taxing power is the life of the State. The existence of all governments depends upon its exercise, and all property and all rights of devolution or transfer of property are liable to be taxed at the will of the lawmaking body, and subject to change by it, except where there is a prohibition in that respect in the State Constitution, and there is nothing in the Constitution of North Carolina which forbids the Legislature to tax the transfer of the property of the decedent, whether it goes by will or in case of intestacy, or upon dissent of the widow she receives her share under proceedings at law for its allotment in such cases, "as in cases of intestacy." Revisal 3081. (687)

Reversed.

ALLEN, J., concurring: The Laws of 1917 provide that all real and personal property "which should pass by will or by the intestate laws of this State" shall be subject to the inheritance tax.

The dower of the widow does not pass by will, and is not therefore taxable under the statute, unless it comes within the meaning of the phrase, "intestate laws of this State."

The authorities from other States hold almost unanimously that dower does not pass by the intestate laws, but the decisions are based on the language and history of the statutes in the several States, and in each the Court was endeavoring to perform the duty, now imposed on us, of determining the intent and purpose of the General Assembly when it laid the tax on property passing by the intestate laws. The history of inheritance taxes is outlined in *S. v. Scales*, 172 N.C. 916, and we then adopted a liberal construction of the statutes, "to the end of taxing all property fairly and reasonably coming within their provisions," and we also said, after giving a statement of legislation on the subject:

"This statement of legislation upon the subject in this State shows an advancing tendency to include all property, to decrease exemptions, and to maintain a distinct classification of persons, the lineal descendant, lineal ancestor, husband and wife being in the most favored class, and the stranger and the corporation in the class subject to the highest tax."

Having in view these principles, what did the General Assembly of this State mean when it said, "which shall pass by will or by the intestate laws of this State"?

When a man dies he leaves a will or dies intestate, and, as ordinarily understood, stripped of technicality, all of his property must

pass either by will or by the intestate laws, the latter expression being used as the equivalent of "or as in case of intestacy."

The history of legislation on the subject, and the changes made by the act of 1913, which have since been retained in the statutes, sustain this construction.

In the act of 1911, after saying that all real and personal property passing by will or by the intestate laws of the State shall be subject to the inheritance tax, there is provision that all legacies or property "passing by will or laws of this State to husband or wife" shall be exempt, which clearly exempted dower, because it passes by the "laws of this State."

This provision was omitted from the act of 1913, and in (688) lieu thereof the widow is given an exemption of $10,000.

Why did the General Assembly of 1911 insert a proviso having the effect to exempt dower if the Legislature thought dower was already exempt because not passing by the intestate laws of the State?

Why make the change in the act of 1913 and strike down a section in the act of 1911 which exempted dower, if the Legislature still intended dower to be exempt? Why give the widow an exemption of $10,000, and no more, if in addition she was to have her dower free from taxation?

It is not dower that is the favorite of the law, but the widow, and under the construction we give the statute she has an exemption of $10,000, when a child's exemption, if under 21, is $5,000, and if over, $2,000, and the husband's nothing, showing that she retains her favored position.

I concur in the opinion of the Chief Justice.

WALKER, J., dissenting: I am unable to agree with my brethren of the majority in this case. I think that much of what has been said by the Court is irrelevant to the question presented in the record. It is unquestionably true that the State has the power to tax all kinds of property and estates therein, because one kind receives as much protection from it as another; and it is just, therefore, that this power should exist, to be exercised when it is expedient to do so, or the interests of the State may require that it should be done. But this is not the question here, but quite another, which is, has the State exercised its sovereign power to tax with respect to dower? I contend that it has not, and did not intend to do so, for if it did, the language we find in the statute would not have been employed, but something very different. If dower does not pass "by the husband's will or under the intestate laws," it is not taxable, because these are the very words of the statute.

The estate of dower is one of great antiquity, and so much so that it has been difficult to trace its origin; and even Coke and Blackstone and writers of even an earlier period have been baffled in their efforts to find its original source. Coke said that it was certainly the law of England before the Norman conquest that a widow should continue forty days in her husband's mansion after his death, within which time (called her quarantine) her dower was to be assigned her. 2 Blackstone, p. 135; Coke Litt., 32b. And one among our greatest commentators, if not entitled to the first place, has said that it is possible that it might be with us the relic of a Danish custom; since according to the historians of that country dower was introduced into Denmark by Swein, "the father of our Canute the Great," out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals. 2 Blackstone Comm. 129. It has been described as a legal, equitable, and moral right, favored by the law in a high degree, and with life and liberty, held to be sacred. Coke Litt. 124b. "Dower was, indeed, pro- (689) verbially the foster-child of the law, and so highly was it rated in the catalogue of social rights as to be placed in the same scale of importance with liberty and life. *Favorabilia in lege sunt, vita, fiscus, dos, libertas,* was the maxim in the courts, and is frequently cited by the old text-writers and reporters." Park on Dower, 2; Coke Litt. 124b. It is an institution of the State, existing by reason of public policy (14 Cyc. 885), and is not dependent upon the husband's will for its efficacy, but becomes the property of the wife, as his widow, in spite of anything he may say or do. He has no hand in its making. It grows out of the marriage, it is true, and is one of its incidents, but it is not derived from the husband by descent or devolution of any kind, nor does it come to the widow by his intestacy — that is the occasion, but not the cause, of it. It derives its existence from a law of its own, and not from any laws of intestacy. The latter apply when there is devolution or succession from him who dies — the decedent — but dower vests in the widow not in either way, as it is the creation of the law and does not emanate from the husband, nor is it dependent upon his intestacy, except in the sense that it vests in possession and enjoyment at his death, as a vested remainder does when, under a will, it takes effect at the expiration of the particular estate. It may well be doubted upon high authority whether any intestate laws existed at the time when dower originated in the very ancient past. But whatever may be said, it is no part of the husband's succession, for she comes into this estate neither as his heir by inheritance nor as his distributee by succession or devolution, and does not in any sense take from him, but against his will. He may devise her a part of his property

in lieu of dower, but this is not dower, and she does not take as his widow, but as his devisee. If she does not dissent, she takes under the will, not dower, but something else which is a part of his estate and which is taxable, because she then comes within the letter of the law, as she takes by the will. But she may have dower when he dies testate instead of intestate, as when he makes a will and ignores her entirely. If this was the case here, could she be taxable? She takes not under the will, because she was left out in the disposition of her husband's property, and she takes not her dower under any intestate law, because there is no intestacy. Where the husband wills her property expressly in lieu of dower, if she does not dissent from the will she is deprived of dower by her election to take under the will, for neither justice nor the law will permit her to take both under and against the will — in consistent benefits. Again, a person always takes, under intestate laws, something that the intestate, if so minded, could have devised or bequeathed, but he could not have devised her dower, and it follows, both logically and conclusively, that she does not acquire her dower under any such law. Counsel were (690) asked, in the argument: "If the husband had conveyed all of his real property, and every interest he had therein, would the dower pass?" The answer, of course, was in the negative, as it had to be. If he cannot pass her dower by his deed (even if he specially and by express words included it), how can it pass from him to her if he died intestate? He had no estate or interest in it to pass. It is as separate and distinct from his estate as if he had never owned the land itself from which it is allotted.

We do not agree with the proposition that all property passes either by will or under the intestate laws, for there are cases where this cannot be said correctly. The interest of the wife in an estate by entirety does not so pass at the death of the husband, for she does not take her interest from him by will or otherwise, and there are other instances. There is a wide difference between an interest vesting in another at the death of a person, which merely fixes the time, and the taking of that interest under or through him. It may be derived altogether independently of him, and, whether technically considered or not, it is not passed by will, nor by the laws of intestacy. The law is a technical science, and its principles should be applied to all cases where applicable, and the Legislature is presumed to have acted in view of the established law and the accepted meaning of words when it passes a statute.

A statute should be interpreted according to its language. We cannot go beyond its four corners for aid in its construction. The intent must be found in its words. Nor can we substitute our opinion of what is right or just for the declared or expressed intention of the

Legislature, but must presume, absolutely and conclusively, that what was meant is what was said. This is the cardinal rule, and is never departed from. It may be that a widow's dower should be taxed, but she has a perfect right to shield herself from a burden which has not been imposed, by insisting upon the application of the simple and familiar rule we have stated. She says to us: "The power to tax is conceded, but has not been exercised, from some motive of benevolence or consideration for her; but whatever the motive, the Legislature has not declared its will that the widow's dower should be taxed, and you have no right to do what the Legislature has not done."

If we need any authority to back our conclusion, we have it, most abundantly. The courts of this country are quite unanimous in holding that, under similar statutes, the dower is not taxable as an inheritance or "under laws of intestacy." The Illinois cases are the solitary exceptions, and have been severely criticised as giving the wrong rule in such cases, and, while paying due deference to the Court, they are said to be illogical, being wrong in their premises, reasoning, and conclusion. Some of the cases which sustain our view are the following, among the many: "This is a special tax, and the rule is, that laws imposing such tax are to be con- (691) strued strictly against the government and favorably to the taxpayer." *Crenshaw v. Moore,* 124 Tenn. 528. "It has been uniformly held that an inheritance tax is not a tax on the property or the real estate of a deceased person, but is a tax laid upon the privilege or right of succession to that property." *McDaniel v. Byrkett,* 120 Ark. 295. "This right (right of dower) originates with the marriage. It is an incumbrance upon the title of the heir at law and is superior to the claims of the husband's creditors. Its origin is so ancient that neither Coke nor Blackstone can trace it, and it is as 'widespread as the Christian religion, and enters into the contract of marriage among all Christians.' . . . Whether it be considered that the widow holds her dower in the nature of a purchaser from her husband by virtue of the marriage contract, or whether it be merely a provision of the law made for her benefit, it cannot be considered that her right is in succession to that of her husband upon his death, or that the husband bestows it upon her in contemplation of death. While it is true that her right to dower is not consummated until the death of the husband, and that it is carved out of only such realty as he owned at his death, it does not follow from this premise that the widow succeeds to his title by the intestate laws. She derives it by virtue of the marriage, and in her right as wife, to be consummated in severalty to her upon the death of her husband." *Crenshaw v. Moore, supra.* "It is true that dower has its origin and

continuance by force of the law, and depends upon the husband's death for its consummation. But it is quite another thing to suppose that the estate is dependent upon the law of succession, or owes its existence to any such transfer as the inheritance-tax statutes contemplate. Dower comes to a wife by virtue of the marriage; and the death of the husband serves only to consummate, not to transmit, it. The law that confers dower on the widow is not the law that appoints the inheritance property of a decedent to designated heirs." Ross on Inheritance Taxation, sec. 56. The courts of Pennsylvania have held that a widow's dower is not liable for inheritance tax. *Re Avery's Estate,* 34 Pa. St. 204. The courts of Louisiana have held the same. *In re Marsal's Estate,* 118 La. 212. "We conclude, therefore, that the widow of a deceased person does not take dower as the heir of her husband or by virtue of the intestate laws, but that this estate is inimical to the claim of the heir, and carved out of the estate of the deceased, in spite of and in derogation to the rights of heirs under the intestate laws." *McDaniel v. Byrkett,* 120 Ark. 295. "What the wife receives . . . she receives, not as an heir of her husband, but in her own right — something which belongs to her absolutely, and of which she could not have been deprived by will or by any other voluntary act of her husband without her consent. Under that section, she is not an heir, within the meaning of (692) our intestate or succession statutes." *In re Bullen's Estate,* 47 Utah 96. "Strictly speaking, the widow's share should be considered immune, rather than exempt, from an inheritance tax. It is free, rather than freed, from such tax. It is not excepted from the taxable class, because it was never in such class. Like all debts, taxes, costs, expenses, and similar items, it is deducted before any inheritance tax is assessed. The share of the realty and personalty which, under our law, go to the widow, independently of any will or act of the husband, is not, so to speak, a part of his estate, and is no more liable to a succession tax at his death than is her individual property." *Re Strahan's Estate,* 93 Neb. 828. "A widow's dower estate in the lands of her deceased husband, which became vested on her marriage, and consummated on the death of her husband, independent of the husband's will, and not by virtue thereof, was not subject to transfer tax." *In re Weiler's Estate,* 122 N.Y. Supplement 608. The Supreme Court of Idaho, where the doctrine of community property exists, held that such property was not liable for inheritance tax. *Kohny v. Dunbar,* 21 Idaho 258. The Supreme Court of Arkansas, in discussing the case of *Billings v. People,* 109 Ill. 472, said: "The opinion in the *Billings* case sets out the statute of that State upon the subject of dower, from which it appears that the

estate of courtesy has been given alike to the husband and the wife, and each being given a certain fixed interest in the lands upon the death of either spouse, then the estate is called dower, but it is not the dower of the common law, as the term, 'dower,' at common law, related exclusively to the interest the widow had in the real estate of inheritance." *McDaniel v. Byrkett, supra.* While the report shows that the *Billings* case was carried to the Supreme Court of the United States, a reading of the report of the case there will show that the widow did not appeal from the decision of the lower court, and the question of the liability of the widow's dower for taxation was not discussed in that Court. *Billings v. Illinois,* 188 U.S. 97.

The question of the liability of a widow's dower to an inheritance tax has been passed upon by the courts (upon statutes practically the same as that of North Carolina) of Arkansas, Illinois, Louisiana, Nebraska, New York, Utah, and Tennessee; and the courts of all those States, except that of Illinois, have held that a widow's dower was not subject to taxation. While the Supreme Court of Illinois has held to the contrary, it will be noticed that this court cited no decisions on this subject except its own. The decision in the *Billings* case has been discussed by nearly all the courts in which this matter has arisen since its rendition, and they have all refused to follow the decision of that court. The question of the liability for inheritance tax of community property held by the wife as survivor has been passed upon by the courts of Idaho and Nevada, and they hold that the community property is not liable to inheritance (693) taxes, because it is not derived by one of the spouses from the other, and there is therefore no succession of it.

It may be added that the Illinois decision was to a great extent influenced by the peculiar wording of the statute of that State in regard to dower. It is not, as we have said, the common-law dower, but an estate with its name, without its legal characteristics.

It is a maxim that three things be favored in law — life, liberty, and dower. Thomas' Coke 14; 4 Bacon's Works 345.

We learn in 2 Blackstone, pp. 131 *et seq.*, that there were five species of dower: (1) *De la plus belle,* where the widow was endowed of the fairest of the lands held by her in socage, which discharged that held by the lord in chivalry. This disappeared when military tenures were abolished. (2) Dower by particular custom, where she received the whole, the half, or one-quarter of her husband's lands. (3) Dower *ad ostium ecclesiæ,* or dower at the door or porch of the church, when tenant in fee simple endows the wife of the whole or any part of his lands as he shall please to give her, which, in certain circumstances, she might reject and resort to her dower at common law. (4) Dower *ex assensu patris* was a species of

that last kind of dower mentioned, and derived its name from the fact that the dower was taken from the lands of the husband's father with the latter's consent. (5) Dower by the *common law,* which gave her one-third part of all the lands and tenants in which her husband had an estate of inheritance, and of which he was seized at any time during the coverture, to hold for the time of her natural life.

None of these forms of dower, except that of the common law, or dower allotted from the lands of which the husband died seized, ever were known to our law in regard to estates. Formerly, when the widow was endowed of lands only which her husband died seized, it was like dower in copyhold lands, which was governed by custom as to her title and the quantity and proportion she would take, also called free bench, and contradistinguished from dower, which is the estate of the widow in all lands of which the husband was seized at any time during the coverture. Blackstone says that dower *ad ostium ecclesiæ* has long since fallen into total disuse because of its uncertainty, and for the reason, too, that she might receive from the law, independently of the husband's volition, a fixed part of his estate in lands of which he was seized at any time during the marriage. This brief review of the subject, based upon the authority of Coke and Blackstone, shows very clearly that we can derive no aid in the construction of our law from old and obsolete rules and customs which have been ignored and finally repealed long ago; and no writer, ancient or modern, even intimates that the husband could, of his will, alien or impair the wife's common-law estate of dower, or that she acquires her right or title from
(694) him, by his intestacy or otherwise; and this is true, whether the dower is allotted by the law of this State from lands of which the husband was seized at any time during the coverture or only of those of which he died seized. In neither case was there any descent or devolution from him which would bring it within the meaning of an inheritance or succession for the purpose of taxation. It is for this reason that the courts have held with practical unanimity, as we have shown, that the wife's dower does not come within the reach of inheritance or succession taxes.

The fact that the widow is allowed an exemption of $10,000 under the last act, whereas no such exemption was allowed before, does not affect the question, so as to show that her dower is taxable, as she may derive property, both real and personal, from her husband by will, and the latter kind of property under the intestacy law, as one of his distributees, and from these exemptions would be taken, as they come within the meaning of the provision taxing property acquired from her husband by will or the intestacy laws, and are therefore taxable, and to them the exemption of $10,000 would apply,

and not to property already not taxable by the language of the Statute. You cannot take an exemption from something not taxable, or an exemption from an exemption.

Justice HOKE concurs in the dissenting opinion.

Cited: *Trust Co. v. Doughton,* 187 N.C. 267; *Chemical Co. v. Walston,* 187 N.C. 823; *McGehee v. McGehee,* 189 N.C. 564; *In re Davis,* 190 N.C. 361; *Waddell v. Doughton,* 194 N.C. 539; *Blower Co. v. MacKenzie,* 197 N.C. 155; *Watkins v. Shaw, Comr.,* 234 N.C. 98; *Bennett v. Cain,* 248 N.C. 431; *Yount v. Yount,* 258 N.C. 241.

MARY J. BROWN v. LINVILLE RAILWAY COMPANY.

(Filed 5 December, 1917.)

1. Railroads — Flag Stations—Failure to Stop Train—Actual Damages—Punitive Damages.

The failure of a freight train to stop upon signal at a flag station for passenger trains only will not render the railroad company liable in damages; and where such are allowable, punitive damages cannot be recovered unless the engineer willfully refused to stop upon being signaled, or failed to do so under circumstances showing gross negligence.

2. Railroads — Flag Stations — Failure to Stop Train—Damages—Proximate Cause—Negligence.

The actual damages recoverable upon the negligent failure of a train to stop upon being signaled at a flag station must be those proximately caused by the defendant's negligence; and where the plaintiff has knowingly, on a dark night, returned along the railroad track and was injured by falling into a cattle-guard, which is often necessary to be maintained (Revisal 2601), instead of taking a public road conveniently located, her falling into the cattle-guard will be attributable to her own negligence, and the defendant will not be held responsible for the resulting injury.

APPEAL by defendant from *Carter, J.,* at August Special Term, 1917, of AVERY. (695)

The defendant maintained a flag station 200 or 300 yards from the town of Minneapolis, which was at the terminus of a switchback running from the main line at the flag station down to the town of Minneapolis, where defendant had a station and agent. The flag station was used only for the purpose of allowing passengers to get off and on passenger trains.

The testimony of the plaintiff was that she had been on a visit

to her sister at Minneapolis for two or three days prior to 24 November, 1916, on which date she proposed to return to her home at Cranberry, about 3 miles distant; that her husband walked from Cranberry to Minneapolis to assist her and her five children from the home of her sister to the flag station, arriving there about dusk. Soon after reaching the flag station her husband heard the train blow, placed himself on the track, and signaled the engineer by waving his handkerchief to stop. He does not know whether the engineer could see him or not, owing to the curvature of the track. The train not stopping, the plaintiff and her husband decided, instead of going back to her sister's or to the house of others who resided near the flag station, to walk the railroad track to Cranberry, though, according to the testimony of her husband, the public road from Minneapolis to Cranberry was only 60 yards distant from the flag station, and he knew the road. There was evidence tending to show that this train was not a passenger train, but a rock train, and did not carry passengers.

Verdict and judgment for plaintiff. Appeal by defendant.

J. W. Ragland, W. C. Newland, and S. J. Ervin for plaintiff.
Lowe & Love and Epps & Linney for defendant.

CLARK, C.J. The court correctly instructed the jury that the plaintiff would not be entitled to recover, though her husband signaled the train, if it was not a passenger train; that if it was a passenger train, she could not recover, for its failure to stop, anything except actual damages, unless the engineer actually saw the signal or with reasonable care he ought to have seen it. *Williams v. R. R.*, 144 N.C. 498.

The court erred, however, in refusing to give the following prayer for instruction asked by the defendant: "If the jury shall find from the evidence that plaintiff was left at the flag station, as alleged, and she failed to exercise due care in returning to the home of her sister, or the house of another near the flag station for the night, or failed to exercise proper care in making her election to travel over a safer route, such as is used by those on foot, but negligently chose to walk between the rails and along defendant's railroad tracks in the dark,

(696) and fell into the cattle-guard, and this was the proximate and intervening cause of the injury complained of, plaintiff would not be entitled to recover for any injury sustained on the railroad after she left the flag station, if they find from the evidence that she could have traveled over a safer route."

The court also erred in refusing the following prayer for instruction: "That there is no evidence that the railroad from the flag

station in the direction of Cranberry was used as a passway, or that defendant had any notice that it was so used as a walkway, and if plaintiff attempted to use it as such, she was a trespasser, and defendant owed her no duty with respect to it, other than to refrain from willfully injuring her."

We have several decisions that where a passenger train fails to stop to take on passengers at a regular station, or at a flag station when duly signaled, the company is liable to actual damages when there is simple negligence, but to punitive damages if such conduct was willful or committed with such circumstances as to show gross negligence. *Purcell v. R. R.*, 108 N.C. 414. This case was overruled in *Hansley v. R. R.*, 115 N.C. 602, but the latter case was reversed and *Purcell v. R. R.* was reinstated on a rehearing in *Hansley v. R. R.*, 117 N.C. 565, and *Purcell v. R. R.* has been repeatedly cited since as authority. See annotations to that case, 108 N.C. at p. 424.

The subject is fully discussed in *Williams v. R. R.*, 144 N.C. 498, where it is held: "Compensatory damages may be recovered for failure of the engineer to stop a train at a passenger station when he should have stopped upon being signaled, he having failed to see signals by reason of negligence in not keeping a proper lookout"; and, further, that the plaintiffs "may recover punitive damages also if the engineer willfully refused to stop the train at such flag station." See, also, citations to that case in the Anno. Ed.

But it was not negligence as to the plaintiff that the defendant had cattle-guards across its track. Indeed, they are often necessary (Revisal 2601; *Shepard v. R. R.*, 140 N.C. 391); nor was the defendant liable because the plaintiff, instead of traveling the country road, essayed to use the roadbed of the defendant for her own convenience to go home in the night-time and fell into the cattle-guard. These were not the natural or proximate consequences of the failure of defendant to stop its train at the flag station, but were the proximate consequences of the defendant's own conduct. She walked the defendant's roadbed in the night-time, with her children, when she should have taken the public road and have relied upon the damages due her by the defendant, if anything, by reason of its failure to stop. In *Le Beau v. R. R.*, 164 Wis. 30, it was held that where a railway company carried a woman passenger beyond her destination, and she voluntarily and needlessly walked back, instead of waiting for a returning train, the road was not liable for injuries sustained by her from exposure on her walk back, the damages not being the proximate result of the road's breach of (697) duty.

In *Garland v. R. R.*, 172 N.C. 638, the Court held: "Where a railroad company has negligently carried a female passenger a mile

or two beyond her station, causing her to walk that distance to her home with a suitcase, because thereby her husband failed to meet her, damages sustained by her by reason of a storm coming up did not arise proximately from the carrier's tort and cannot be included as an element of damages."

In that case it is said: "If the cause is remote in efficiency and does not naturally result from the tort, it will not be considered as proximate. To be such, it must be 'a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed.' *Ramsbottom v. R. R.*, 138 N.C. 38; *Brewster v. Elizabeth City*, 137 N.C. 392."

In permitting the jury to consider the damages sustained by the plaintiff in falling into the cattle guard and in refusing to give the prayers of instruction above set out, there was

Error.

Cited: Johnson v. Telegraph, 177 N.C. 33; *Blaylock v. R. R.*, 178 N.C. 358.

ANNA E. WOOD v. NORTH CAROLINA PUBLIC-SERVICE CORPORATION.

(Filed 5 December, 1917.)

1. Evidence—Nonsuit—Trials—Motion.

Upon a motion to nonsuit, the evidence is considered in the light most favorable to the plaintiff, and an inference in defendant's favor may not be drawn from his own evidence.

2. Negligence — Separate Parties — Concurrent Cause—Entire Damage—Actions.

Where the negligence of two parties proximately and concurrently cause a personal injury to a third person, free from blame, he may maintain an action against either of the others for the entire damage.

3. Street Railways — Alighting Passengers—Negligence—Evidence—Contributory Negligence—Trials—Questions for Jury.

A street car company owes the duty to its passengers to use a high degree of care to see that they safely alight from its cars when they stop at the regular stopping points; and where there is evidence tending to show that automobiles usually passed the place where plaintiff was injured at the rate of one or two a minute, and by the exercise of care, a street car conductor could have seen the approach, at high speed of one of them, and failed to warn a passenger of her danger, for which she had looked

and failed to see, and that she was struck and sustained the injury complained of while she was alighting or immediately thereafter, it is sufficient upon the issue of defendant's actionable negligence, and the plaintiff will not be held, as a matter of law, to be barred of her right to recover upon the issue of contributory negligence.

CLARK, C.J., concurring; WALKER, J., dissenting; BROWN, J., concurring in the dissenting opinion of WALKER, J.

APPEAL by defendant from *Long, J.*, at the May Term, 1917, of GUILFORD. (698)

This is an action to recover damages for personal injury caused, as the plaintiff alleges, by the negligence of the defendant street railway company.

On 5 July, 1916, the plaintiff became a passenger on one of the defendant's street cars for the purpose of going to her home west of the city of Greensboro, and when the car reached a point nearly opposite Fields' Store, about one-half mile west of the corporate limits of Greensboro, it stopped at a regular stopping place and at the destination of the plaintiff for the purpose of allowing passengers to alight.

The plaintiff while in the act of alighting from the car, or immediately after she had reached the ground, was stricken by an automobile running at from 25 to 30 miles an hour, and was seriously injured. The automobile was running in an opposite direction from the car. The evidence of the defendant tended to show that the plaintiff was injured 10 or 12 feet from the street car while she was attempting to pass to the sidewalk. There was also evidence on the part of the plaintiff that if she had been permitted to get out on the other side of the street car she could have stepped from the car in safety to a cinder path.

At the conclusion of the evidence there was a motion for a judgment of nonsuit, which was denied, and the defendant excepted.

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

G. S. Bradshaw and John A. Barringer for plaintiff.
Jerome, Scales & Jerome for defendant.

ALLEN, J. The only question presented by the appeal from the refusal to nonsuit the plaintiff is whether there is any evidence fit to be submitted to the jury of negligence on the part of the defendant; and in the consideration of this question we must accept the evidence of the plaintiff and construe it in the light most favorable to her. We are not permitted to base our judgment on the evidence of

the defendant, nor can we draw the inference, favorable to the defendant, that the automobile was running on the extreme right side of the road and turned suddenly and struck the plaintiff, as no witness testified that the automobile changed its course, and one (699) witness (Boyles) testified "The automobile was coming along by the side of the car." We cannot act upon the statement in the defendant's brief that the evidence shows that the automobile turned suddenly and struck the plaintiff, in the absence of evidence of the fact, and it can only be inferred upon the presumption that the driver of the automobile was obeying the law by being on the right-hand side of the road, when all the evidence shows she was violating the law by exceeding the speed limit.

The evidence is irreconcilable, the plaintiff testifying that "as soon as I struck the ground the automobile got me"; "I had just cleared the car when it got me"; "I just barely cleared the car to get down to the street"; "I hadn't made any steps"; "I just stepped off the car and hadn't taken a single step"; and the witnesses for the defendant that she was 10, 12 or 15 feet from the car when she was stricken.

Giving, therefore, to the evidence a construction favorable to the plaintiff, and accepting it as true, as it is our duty to do, it shows that the defendant permitted the plaintiff, a passenger, to alight on a roadway, along which one or two automobiles were passing each minute, immediately in front of an automobile moving rapidly, without warning, and when the conductor of the defendant, who knew of the dangers of the road, did not look to see if any danger was approaching.

Is this evidence of negligence? The negligence of the driver of the automobile is established by the evidence, but this does not relieve the defendant from liability, if it was also negligent, as there may be two proximate causes of an injury; and where this condition exists, and the party injured is not negligent, those responsible for the causes must answer in damages, each being liable for the whole damage, instead of permitting the negligence of one to exonerate the other.

It is in the application of this principle it is held, except where the doctrine of comparative negligence prevails, that the plaintiff cannot recover if his own contributory negligence concurs with the negligence of the defendant in causing the injury, because as his negligence is one of the proximate causes, he as well as the defendant is liable for the whole damage, and as there is no contribution among tort feasors he cannot recover anything from the defendant.

"There may be more than one proximate cause of an injury, and it is well established that when a claimant is himself free from

blame, and a defendant sued is responsible for one such cause of injury to plaintiff, the action will be sustained though there may be other proximate causes concurring and contributing to the injury. In 21 Am. & Eng. Enc. (2 Ed.) 495, it is said: 'To show that other causes concurred in producing or contributing to the result complained of is no defense to an action of negligence. There is indeed no rule better settled in this present connection than that the defendant's negligence, in order to render him liable, need (700) not be the sole cause of plaintiff's injuries.' Again, on page 496, it is said: 'When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable.' " *Harton v. Tel. Co.*, 141 N.C. 461, approved in *Harvell v. Lumber Co.*, 154 N.C. 262, where it was pointed out that the difference of opinion in the *Harton* case was only as to the application of the principle to the facts in that record.

We must then inquire as to the negligence of the defendant, and here the decision depends on whether the defendant owed a duty to the plaintiff, who was a passenger on its car, and who was injured while alighting, or immediately thereafter, according to her evidence, and whether it failed in the performance of this duty.

There is a conflict of authority as to the obligation of the street railway after a passenger has left the car, the Courts of Alabama and Kentucky holding that it must provide a reasonably safe place and way (*Montgomery v. Street Ry.*, 133 Ala. 529; *R. R. v. Mitchell*, 138 Ky. 190), and others that, as the company has no stations and no control over the streets, its obligation should be coextensive with its control, and that the relation of carrier and passenger ceases when the passenger has safely alighted. Clark's Accident Law 13; *Creamer v. R. R.*, 156 Mass. 321; *Street R. R. v. Body*, 105 Tenn. 669; *Schley v. R. R.*, 19 Anno. Cases 1020 and note; *Stuart v. R. R.*, Anno. Cases, 1912 B 863, and note.

The weight of authority seems to be with the latter view, and also that in any event the railway must exercise the highest degree of care, and must afford the passenger an opportunity to alight in safety.

The Court says in *Anderson v. Street R. R. Co.*, 12 Ind. 197: "There is a marked difference between the duties the law imposes upon those who operate street railways and those who operate ordinary steam railways. The latter usually run upon scheduled time and have fixed places for receiving and discharging passengers. There is a higher degree of care imposed upon street railways than upon ordinary steam railways. When their cars stop for passengers to alight it is the duty of their servants to stop long enough for the

passengers to alight, and to see that the car does not start again while any one is attempting to alight or exposed to danger."

In *Smith v. R. R.*, 32 Minn. 3, "The defendant was a carrier of passengers for hire, owning and controlling the tracks and cars operated thereon. It is therefore subject to the rule applicable to passenger carriers. . . . As respects hazards and dangers incident to the business or employment, the law enjoins upon such carrier the highest degree of care consistent with its undertaking, and it (701) is responsible for the slightest negligence. . . . This rule extends to the management of the cars and track and to all the subsidiary arrangements necessary for the safety of passengers."

In *R. R. v. Scott,* 86 Va. 907, "Passenger carriers bind themselves, says a learned author, to carry safely those whom they take into their coaches, as far as human care and foresight will go — that is, to the utmost care and diligence of very cautious persons. . . . And in *R. R. v. Prindle,* 82 Va. 122, this Court said, 'The implied contract to carry safely includes the duty of giving the passengers reasonable opportunity to alight in safety from the train, and a violation of this part of the company's duty is culpable negligence, for which an action will lie.' In Wharton on Negligence, sec. 649, it is laid down that 'When a danger approaches, it is the duty of the officers of the road to notify passengers, so that they can take steps to avoid it; and failure to give such notice is negligence. So, also, if there is a dangerous place at the landing, it is the duty of the conductor to warn those about stepping out,' and 'he must give notice to all if any danger in alighting is probable.' "

In *Cartwright v. R. R.*, 42 Mich. 606, Cooley, C.J., says: "If a car in which there were passengers was not standing where it would be safe for them to alight without assistance, it was the duty of the company to provide assistance, or give warning, or move the car to a more suitable place. . . . These authorities show the extent to which the liability of carriers of passengers goes in cases like the present, and by this liability street or horse railways, as well as other classes of carriers, are bound."

In *Street R. R. v. Twiname,* 111 Ind. 591: "A railway company is a common carrier of passengers as well as freight. A street railway company is also a common carrier of passengers, with duties and responsibilities entirely analogous to, and substantially the same as, those of a railway company in the carriage of passengers. Both are railway companies within the usual meaning of that term, and the same general rules and degree of care in the transportation of passengers must be observed by each. . . . Carriers of passengers are required to exercise the utmost care and foresight in the performance of their duty as such carriers. . . . This is the equiv-

alent of requiring that the highest degree of care and skill shall be used in the transportation of passengers as the rule is stated by many of the decided cases."

In *R. R. v. Higgs,* 38 Kan. 383: "All possible skill and care implies that every reasonable precaution in the management and operation of street cars be used to prevent injuries to passengers; it means good tracks, safe cars, experienced drivers, careful management, and judicious operation in every respect. All possible foresight means more than this; it means anticipation, if not knowledge, that the operation of street cars will result in (702) danger to passengers, and that there must be some action with reference to the future, a provident care to guard against such occurrences, a wise forethought and prudent provision that will avert the threatened evil if human thought or action can do so."

In *R. R. v. Tobriner,* 147 U.S. 571, after speaking of the duty of a street railway to deliver its passengers in safety, "It was not a duty to a person solely because he was in danger of being hurt, but a duty owed to a person whom the defendant had undertaken to deliver, and who was entitled to be delivered safely by being allowed to alight without danger."

And the author, in 4 R.C.L., "The general rule just considered that in the case of a carrier having exclusive control or occupation of its tracks and stations, one traveling may still retain the status of a passenger after alighting from the carrier's vehicle, is from the nature of things not applicable to carriers not so situated, as for instance, in the case of persons traveling on street railway cars. While a person attempting to alight from a street car remains a passenger until he has accomplished the act of alighting in safety, and the carrier owes to the passenger alighting that very high degree of care and attention which the law puts upon it generally to the end of promoting the safety of its passengers, and will be liable for negligent injury to the passenger while so alighting, it is the generally accepted view that one who has alighted from a street car and is in safety upon the highway is no longer a passenger."

If, therefore, the defendant owed to the plaintiff a high degree of care, and if it was its duty to protect her from and warn her of danger and to see that she alighted in safety, has there been a breach of that duty?

The question presented to us by the motion for judgment of nonsuit is within even narrower limits, as the law commits to the jury the duty of saying how the fact is, and leaves to this Court no power or jurisdiction except to decide whether there is any evidence of a breach of duty fit to be considered by the jury, and enjoins upon us that we give to the evidence the construction most favorable to

the plaintiff, and that she is entitled to the benefit of every reasonable inference arising upon the evidence.

The evidence is conflicting, and that of the plaintiff, standing alone, would raise serious doubts in our minds if we were sitting as jurors as to her right to recover, but we cannot give her the benefit of the legal principles we have declared, which apply as of right to all litigants, and say there is no evidence that the defendant failed to protect and warn her, and to give her the opportunity to alight from its car in safety.

(703) One witness testified that 60, and another 120, automobiles passed the place of injury in an hour, and all the evidence shows that the plaintiff alighted on a much traveled roadway.

The plaintiff testified she was struck by the automobile as soon as her feet were on the ground. Her language is, "As soon as I struck the ground the automobile got me"; "I just had cleared the car when it got me"; "I just barely cleared the car to get down to the street."

A witness for the defendant, who was a passenger, testified: "The first I saw of the automobile was when the car stopped. I was looking out the window. It had not quite got to the street car." The conductor in charge of the car was on the platform with the plaintiff, according to her evidence, and he testified, "I did not look specially to see whether an automobile was coming when Mrs. Wood got off the car."

Is it not a reasonable inference from this evidence that the plaintiff was permitted to alight on a roadway along which automobiles were passing at the rate of one or two a minute, immediately in front of a rapidly moving automobile, and that if the conductor had looked, and had taken the slightest precaution, he could have seen the approaching automobile and the danger to the plaintiff, and could have averted the injury?

The plaintiff must have been in the act of getting off the car, if her evidence is true, at the time the passenger saw the automobile not quite to the street car, and if the conductor had looked would he not have seen the same thing, and that the automobile was not on the side of the roadway away from the car, but was rushing down on the plaintiff, and can it be said, if these facts are true, that the defendant afforded the plaintiff the opportunity to alight in safety? If so, there was evidence of a breach of duty on the part of the defendant which was the cause of the plaintiff's injury, and the case was properly submitted to the jury.

There is evidence of contributory negligence upon the part of the plaintiff, and we must assume that this was submitted as the charge is not sent up as a part of the record. It cannot be declared as matter

of law that she was guilty of such negligence that her right of action would be barred, because she testified that she was paying attention when she got off, and that immediately before attempting to alight she looked for an automobile and did not see one.

If the inquiry is made as to why the conductor should be held to the duty of seeing the automobile when the plaintiff testifies that she looked and did not see one, the answer is that the automobile was running about 800 yards a minute, and that she might well have looked and not see it as she was preparing to alight, and the conductor could have seen it while she was alighting, as enough time must have elapsed for the automobile to have run two or three hundred yards from the time she prepared to get off the car until she actually reached the ground.

There is other evidence in the record which we have not referred to because we have not thought it necessary that the (704) motorman in front of the car could have seen the approaching automobile one-half mile distance.

We have carefully considered the record and are of opinion that the judgment must be affirmed.

No error.

CLARK, C.J., concurs in all that is so well said in the opinion of the Court, and upon the additional ground that the defendant did not give the plaintiff opportunity to alight upon the sidewalk on the opposite side of the car, where she would have been perfectly safe. The evidence is that the track on the right-hand side of the street going west, in which direction the car was moving, ran close to the sidewalk, and that the plaintiff could have stepped off the step of the car upon this sidewalk. This would have been entirely safe. On the contrary, the conductor put her off on the left-hand side of the car, in the middle of the street, which she thus had to cross where two cars per minute, on an average, were running at a high rate of speed, and put her down immediately in front of a car which was approaching at the rate of 30 to 35 miles an hour, according to defendant's conductor.

The defendant contends that it was unsafe to put her off on the right-hand side of the street, where the track was close along the sidewalk, because the telegraph poles were on that side, as if telegraph poles 60 yards apart, and standing still, would be more of a menace to a passenger getting off from a standing car than putting her off on the left-hand side in the maelstrom of moving cars, shooting by two to the minute, or "at least 100 per hour," going at a rapid rate on an asphalt roadbed — the smoothest and best road in the State (from Greensboro to High Point) — and immediately in

front of the car which struck the plaintiff and which, according to the defendant's evidence, was moving 35 miles per hour, which was nearly 800 yards a minute.

WALKER, J., dissenting: It will be necessary to a proper understanding of the case, as we view it, that we should make a brief rehearsal of the facts:

The action was brought by plaintiff to recover damages on account of personal injuries received by her, after she had alighted from one of the defendant's street cars, by being run over and dragged by an automobile driven by Mrs. H. F. Coleman, of Baltimore, Md. The plaintiff, on 5 July, 1916, became a passenger on one of the defendant's street cars for the purpose of going to her home west of the city of Greensboro, and when the said street car had reached a point upon its run nearly opposite Fields' store, and being
(705) about one-half mile west of the corporate limits of the city of Greensboro, it stopped for the purpose of allowing passengers to alight therefrom, at a regular stopping place for defendant's cars, it being the destination of plaintiff upon this occasion. The plaintiff alighted from the street car, when she was immediately stricken by an automobile driven by Mrs. H. F. Coleman at a very high rate of speed, receiving the injuries for which this action was brought. The automobile, at the time it ran over the plaintiff, was going east and in an opposite direction to that of defendant's car, and was running at the rate of 25 to 35 miles an hour. Mrs. Coleman, who was driving the automobile, not only was violating the law as to the excessive speed at which she was running, but was driving the same upon the left-hand side of the road in violation of the law. If the plaintiff did not see the automobile when she looked straight ahead, the line of vision being free from any obstruction for a long distance, it must necessarily have been on the other side of the road, and it could not have appeared six feet from the side of the car when first seen by plaintiff's witnesses without having been suddenly veered from its course. The evidence shows that the defendant's track beyond the corporate limits of the city of Greensboro is located on the right-hand side of the public highway going west, and to the left of the street car track going west is a well-constructed way, about 30 feet wide, paved with asphalt, for the use of pedestrians and various kinds of vehicles, including automobiles. It had been the custom and rule of defendant for twelve years to discharge its passengers from its car going west at this point, on the left-hand side of said car, and this custom or rule was known to plaintiff prior to the time of her injury upon this occasion. The place where plaintiff alighted was paved with asphalt and

was smooth, while upon the right-hand side of the track there was a ditch and poles, except at one point directly in front of Fields' store, where there was a sidewalk running a short distance, paved with cinders, and in wet weather a passenger getting off on that side would have to step in the mud. The accident happened about 4 o'clock p.m., and at this point a person could see both east and west along the highway a distance of one-half mile. Plaintiff was familiar with the conditions there existing at the time of her injury, having on numerous occasions prior to her injury gotten off defendant's cars at that stopping place.

At the close of plaintiff's evidence, defendant moved to dismiss the action and for judgment as in case of nonsuit, under the statute, and this motion was renewed at the close of all the testimony. The motion being refused, defendant appealed to this Court.

It is a familiar principle that a defendant in an action of this kind can only be made liable in damages for a breach of duty to the plaintiff — that is, of a duty which was owing to her at the time she was injured by the automobile. If there was no (706) duty owing to the plaintiff, or no breach of a duty, it follows that there is no liability.

A street car company has no right of way save that upon which its tracks are laid, and for this reason the Courts have generally held that where a car stops in public streets or otherwise highways, for the purpose of discharging a passenger, the relation of carrier and passenger is terminated as soon as the latter alights from the car, for he is then not upon the premises of the company, but upon the street over which the company has no control. It may be true, as argued, that the carrier is not allowed to discharge passengers at a place where the street is out of repair and in such a dangerous condition that to alight from the car upon the highway would be perilous; but however this may be, it is not the case when the street is in good condition at the place of alighting, for then the passenger, as soon as he leaves the car, occupies the position of a traveler on the highway, with the same relative rights and responsibilities. It has been so decided in several cases by Courts of the highest authority.

Speaking of a passenger who had just alighted from a car on a public highway, the Court, in *Creamer v. West End St. Ry. Co.*, 156 Mass. 320, said: "He was not a passenger when the accident occurred, and he ceased to be a passenger when he alighted upon the street from his car. The street is in no sense a passenger station, for the safety of which a street railway company is responsible. When a passenger steps from the car upon the street, he becomes a traveler upon the highway, and terminates his relationship and rights as a

passenger, and the railway company is not responsible to him as a carrier for the condition of the street or for his safe passage from the car to the sidewalk. When a common carrier has the exclusive occupation of its tracks and stations, and can arrange and manage them as it sees fit, it may be properly held that persons intending to take passage upon or to leave a train have the relation and rights of passengers in leaving or approaching the cars at a station *(Warren v. Fitchburg R. R. Co.,* 8 Allen 227; 85 Am. Dec. 700; *McKimble v. Boston, etc., R. R. Co.,* 139 Mass. 542; *Dodge v. Boston, etc., Steamship Co.,* 148 Mass. 207, 214; 12 Am. St. Rep. 541); but one who steps from a street railway car to the street is not upon the premises of the street railway company, but upon a public place where he has the same rights with every other occupier, and over which the company has no control. His rights are those of a traveler upon the highway, and not of a passenger."

In that case, the passenger was killed immediately after leaving the car by another car of the same line, running in an opposite direction upon a parallel track, so that this case is stronger for this defendant than was the case cited for the one there sued. Other cases to the same effect are: *Bigelow v. W. E. Street Ry. Co.,*
(707) 161 Mass. 393; *Oddy v. W. Street Ry. Co.,* 178 Mass. 341; *Cit. Elec. Ry. Co. v. Boddin,* 105 Tenn. 666.

It appeared in *Oddy v. W. E. Street Ry. Co., supra,* that the plaintiff upon leaving the car was stricken by a hose cart immediately upon reaching the ground and before he had an opportunity to take a step after doing so. The Court said: "Street car companies carrying passengers in ordinary public streets or highways are not negligent in not providing means for warning passengers about to leave a car of the danger of colliding with or of being run over by other vehicles in the street. The risk of being hurt by such vehicles is the risk of the passenger, and not that of the carrier. It is not a danger against which the carrier is bound to protect the passenger or to give him warning." And in the Tennessee case, the Court said: "If the passenger relation did not terminate when the defendant safely alighted from the car, when would it end? Would it continue only while he was crossing the parallel track, or until he had reached a point of comparative safety on the far side of the street? Or if, after reaching the ground, he had directed his steps to the other side of the street, would it have continued until he reached the pavement? We think that the Massachusetts Supreme Court was wise in adopting the rule that this relation terminates the moment passengers descend to the street. This is the fixed point free from all speculation or uncertainty."

The same doctrine is stated in a note to *Duchemin v. Boston*

Elev. Ry. Co., 104 Am. St. Rep. at p. 589, where it is said: "The instant a passenger steps or frees himself from the car on which he has been riding, he, for most purposes, ceases to be a passenger. The street is in no sense a passenger station, for the safety of which a street railway company is responsible. When a passenger steps from a car upon the street, he becomes a traveler upon the highway, and terminates his relation and rights as passenger, and the railway company is not responsible to him as a carrier for the condition of the street or his safe passage from the car to the sidewalk. One who steps from a street railway car to the street is not upon premises of the railroad company, but upon a public street, where he has the same rights of any other occupier, and over which the company has no control."

In this case there is no evidence of any inherent defect in the street, or anything over which defendant had any control. If we do not adopt the principle of the cases which have been cited, it would be next to impossible for a street railway to operate its cars for the convenience and accommodation of the public. The decision in this case will result in a peculiar hardship to the defendant. The proximate cause of the accident was not attributable to the defendant, but to the recklessness of another which could not well have been foreseen. If it was not the sole cause, it was at least an (708) intervening one and still the proximate cause. There are physical circumstances which tended to show, and from them the inference is clearly deducible, as we have stated, that the automobile was not on the side of the road where the street car was just before it struck the plaintiff, and, therefore, that it must have been suddenly turned from its course and driven in the direction of the street car. The view to the west along the road was clear and unobstructed, and if it had been on the side where the street car was the plaintiff was bound to see it when she looked, for plaintiff's witnesses showed that it would be in the line of vision, and she stated that it was not in sight. It was impracticable for the defendant to have prevented the collision with the plaintiff. It was not bound to anticipate that Mrs. Coleman would so suddenly, and in such a reckless manner, drive her automobile so near the street car and imperil the lives of passengers while they were alighting therefrom.

It is also to be said that the law of this State provides: "In approaching or passing a car of a street railway which has been stopped to allow passengers to alight or embark, the operator of every motor vehicle shall slow down, and if it be necessary for the safety of the public, he shall bring said vehicle to a full stop. Upon approaching a pedestrian who is upon the traveled part of any highway, and not upon a sidewalk, and upon approaching any inter-

secting highway or a curve, or a corner in a highway where the operator's view is obstructed, every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn or other device for signaling." Gregory's Supplement, p. 446.

The defendant's servant in charge of the street car was not bound to anticipate a violation of the positive law by Mrs. Coleman, or any one else. The laws of the road are well known, and if they had been obeyed, there would have been no injury to the plaintiff. There was a clear and wide space between the proper position of the automobile, under the law, and the place where the plaintiff alighted from the street car. If the automobile had stopped, or even had the speed been reduced, there would have been no accident. It was not a natural and probable consequence that the automobile would be driven so near the street car as to injure a passenger then in the act of alighting, and the conductor was not, in law, required to look out for such an unexpected event. 29 Cyc. 528.

The law of the State regulating the speed and use of automobiles on highways was enacted for the very purpose of protecting persons when leaving street cars without the necessity of their conductors to look in every direction before discharging passengers. The plaintiff had already looked in the direction of the approaching automobile, when she had a clear and unobstructed view, and did
(709) not see it. She had a better chance to see it, if within the range of vision, than the conductor, because she was occupying the steps in the act of getting off the car, while he was behind her on the platform. It would seem that if the law required the conductor to look, which we deny, he was not required to do so in this instance, because he would not have seen as well as she could, and certainly not any better than she did. If she was where the automobile could have been seen, and did not see it, how could he have seen it if he had looked in the same direction? There is no reason why the conductor should have helped the plaintiff off the car, for she was fully able to help herself. She said, "I just had cleared the car when the automobile got me."

If the rule we have laid down, and supported by well-considered precedents, is the correct one, we do not see how the street railway company can be liable when she admits that she had cleared the car, and therefore was in the highway when she was struck by the automobile. But there is testimony from two disinterested witnesses, introduced by the plaintiff (and not by the defendant), who were in the car at the time and looking out of the windows, that she was well in the street, one stating the distance from the car to be six feet, and the other that the street car was moving when the automobile first was seen, before it reached her, and that when she was

struck by the automobile, she fell "very near the middle of the street" and was lying there when the automobile passed her. One of these witnesses, for the plaintiff, testified that "passengers always get off on the left-hand side at this place," and the other that "it was the usual custom to do so."

There was a width in the street of 25 feet. It will make the case appear more clearly for the defendant if we conclude by quoting the testimony of L. A. Jackson, a witness for the plaintiff: "The automobile was passing the window where I was sitting when I first saw it. It was running very fast. Mrs. Coleman was driving it, so I heard. I did not see the automobile strike Mrs. Wood. I think the automobile was five or six feet from the street car when it struck her. The street car track is off from the paved part of the road. When the automobile passed the street car it was going straight ahead. After the automobile passed the window where I was seated, it would have to go about 25 feet before it struck Mrs. Wood. I heard Mrs. Wood scream and looked out the window. She was about in the center of the paved part of the road and was about the center when the automobile finally left her — about 30 feet from the car. I think the street car had just started when the automobile went by the window."

This proves that she was not by the side of the street car when she was stricken by the automobile, but from 20 to 30 feet, at the very nearest, at least 6 feet away from it. She was necessarily excited, and perhaps rendered unconscious and oblivious of (710) the events by the sudden impact, whereas her witnesses were not under such disadvantages. If they give the true account of the matter, there was no negligence on the part of the defendant. But her own testimony places her on the ground when she was stricken, and that is sufficient to have severed the relation of carrier and passenger at the time of her injury.

The two persons who were on the car, and who testified most strongly against her, were her own witnesses (Mr. M. E. Boyles and Mr. L. A. Jackson), and they placed her near the middle of the street when the automobile left her. But in any view of the testimony, when construed most favorably for her, she was on the ground, and not on the premises of the company, when she was hurt; and one of her witnesses, Mr. L. A. Jackson, stated that the street car had started before she was stricken and as the automobile passed the window where she was sitting. In this case, if the conductor had looked ahead, he would have seen no more than the plaintiff herself saw, and besides, after a conductor looks and fails to see, an automobile driven at a high rate of speed could reach the steps where passengers are being discharged before he could reach

the platform again and assure them of safety, and then let them off. And that was the reason for passing the law and restraining the chauffeurs, as the Legislature knew of the difficulty and danger in the other method.

Cited: Loggins v. Utilities Co., 181 N.C. 224; *White v. Realty Co.,* 182 N.C. 537; *Nowell v. Basnight,* 185 N.C. 148; *Mangum v. R. R.,* 188 N.C. 696; *Earwood v. R. R.,* 192 N.C. 30; *Clinard v. Electric Co.,* 192 N.C. 743; *Evans v. Construction Co.,* 194 N.C. 34; *Ballinger v. Thomas,* 195 N.C. 520; *Smith v. R. R.,* 200 N.C. 179; *Campbell v. R. R.,* 201 N.C. 109; *Godfrey v. Coach Co.,* 201 N.C. 267; *Sanders v. R. R.,* 201 N.C. 679; *Brown v. R. R.,* 208 N.C. 59; *Trust Co. v. R. R.,* 209 N.C. 308; *Harper v R. R.,* 211 N.C. 402; *Lewis v. Hunter,* 212 N.C. 508; *York v. York,* 212 N.C. 703; *Harvell v. Wilmington,* 214 N.C. 613; *Daniel v. Packing Co.,* 215 N.C. 765; *Bechtler v. Bracken,* 218 N.C. 522; *White v. Chappell,* 219 N.C. 659; *Sample v. Spencer,* 222 N.C. 584; *Rattley v. Powell,* 223 N.C. 136; *Harris v. Greyhound Corp.,* 243 N.C. 350.

R. A. POE & CO., INC., v. THE TOWN OF BREVARD.

(Filed 5 December, 1917.)

1. Contract — Improvements — Breach — Damages — Benefits—Equity —Quantum Meruit.

Ordinarily a party cannot recover any damages for breach of contract stipulations without averring and proving a performance of his own antecedent obligations arising on the contract or some legal excuse for nonperformance thereof, or, if the stipulations are concurrent, his readiness or ability to perform them; but this doctrine is so far modified as to permit the contractor to recover upon a *quantum meruit* upon his breach in case of building or improvement contracts when it is made to appear that the owner or other contracting party has received and continues to enjoy the contractor's work under circumstances that in equity and good conscience call for compensation.

2. Same—Contracts—Specific Method.

This right to recover on a *quantum meruit* under the circumstances indicated does not prevail where it appears from the stipulations of the contract that the parties have undertaken to provide, and the written agreement between them does provide for a special method of adjustment; and in that event, on breach, the specified method must be recognized and pursued.

3. Same—Contracts—Municipal Corporations—Cities and Towns.

Where a city or town, under the express terms of its street-paving contract, and on default of its contractor, takes over the material and machinery furnished and being used by him, and completes the work, employing others for the purpose, furnishing them additional material, with stipulations that the contractor and his bond shall be liable for any additional expense caused the city by the contractor's default, and that the contractor shall receive no further payment under the contract until the work shall have thus been completed: *Held*, by the provisions of the contract, the idea that the contractor may only recover upon a *quantum meruit* is excluded; and in his action against the city, he is entitled to an accounting for, and may recover the profits the latter may have made in taking over and completing the work, as measured by the contract, together with compensation for the machinery and material which the city had retained or consumed in the completion of the contract.

4. Contracts—Breach—Damages—Terms of Settlement—Better Materials.

Where, upon default of a contractor for paving the streets of a city, he is, under the terms of his contract, permitted to recover the amount the latter has made by completing the contract, the extra price it has paid for material of better grade than that specified is not chargeable against the contractor in the settlement.

CIVIL action, heard on report of referee and the findings of a jury on issues raised by exception to said report, before (711) *Lane, J.*, at April Term, 1917, of TRANSYLVANIA.

It appeared that plaintiff company had contracted with defendant town to pave certain streets therein according to the specifications of a written contract and the work to be completed by 1 July, 1913; that said plaintiff having failed to proceed satisfactorily with the work or to complete same within the time stipulated, the defendant, pursuant to a provision of the contract to that effect, formally notified plaintiff, took over the work and completed the same, and this action was instituted to adjust and determine the rights of the parties growing out of conditions presented. It appeared, also, that prior to said notice and action of defendant, plaintiff had expended from eight to ten thousand dollars on the undertaking, and that defendant, in taking over the job, had also taken certain machinery and material belonging to plaintiff, which it still holds.

Defendant denied any liability, and averred, among other things, that no proper demand had been made of plaintiff's claims; that plaintiff had voluntarily abandoned the contract, and that the town had suffered great damage by failing to complete the work within the specified time.

In the progress of the cause, it was referred to Mr. Michael Schenck, who heard the same, made a full and careful report of the case, finding that the defendant was indebted to plaintiff in the sum of $3,576.90. Both sides filed exceptions, and on is- (712)

sues submitted at demand of defendant, the following verdict was rendered:

1. Was the claim of the plaintiff presented to the defendant in the manner required by law? Answer: Yes.

2. Did the plaintiff surrender the contract on or about the first day of July, 1913, as alleged in the defendant's answer? Answer: No.

3. What damage did the town of Brevard sustain by reason of the failure of the plaintiffs to complete the contract on or by the first day of July, 1913? Answer: Nothing.

The verdict having failed in any way to affect the findings and report of referee, his Honor further considered the case, sustained an exception of plaintiff, by which the amount due was increased by $2,912.74, and otherwise affirmed the report. The amount so ascertained in plaintiff's favor being, as stated, found by referee $3,576.90
Increased by the judge ruling on plaintiff's exceptions..... 2,912.74
$6,489.64

Judgment was entered for that sum and interest from the time the work was completed, and defendant excepted and appealed.

R. L. Gash and Chase Brenizer for plaintiff.
Wilch Galloway and Martin, Rollins & Wright for defendant.

HOKE, J., after stating the case: There is no error in the proceedings below by which the issues submitted have been determined, and recurring to the case as presented by the report of the referee, and the judgment of his Honor modifying same, this judgment of $6,489.64 is composed of items as follows:

Amount saved by defendant in completing work, as found by referee	$1,105.96
Amount of machinery belonging to plaintiff which was taken over and held by defendant	1,563.95
Amount material, stone and cement belonging to plaintiff and now held by defendant	906.99
Increased by his Honor's ruling on plaintiff's exceptions	2,912.74
Making a total of	$6,489.64

This last item was allowed to defendants by the referee as a part of the cost of completing the work under the contract, whereas, the proof showed that the same arose by reason of defendant's having used a higher priced material than the contract stipulated
(713) and, to the extent of such increase, the same was not a legitimate charge in defendant's favor in an adjustment controlled

by the contract provisions. And if the contract furnishes the proper rule for our guidance in the matter, none of the items of charge are erroneous.

This was not seriously controverted by defendant's counsel; we understood that it was admitted on the argument, and very properly so, but it contends that nothing should be allowed plaintiff and no accounting is due it because, while the jury have found that there was no abandonment by plaintiff of its rights under the contract, all the proof showed there was a failure of performance on its part, and if any recovery at all can be had, it must be on a *quantum meruit* for work done and material furnished in the beginning of the work.

It is very generally held that "a party cannot recover damages for breach of contract stipulations without averring and proving a performance of his own antecedent obligations arising on the contract or some legal excuse for nonperformance thereof, or, if the stipulations are concurrent, his readiness and ability to perform them." This statement of the principle, appearing in *Ducker v. Cochrane,* 92 N.C. 597, has been recognized and approved in *Tussey v. Owen,* 139 N.C. 457; *Corinthian Lodge v. Smith,* 147 N.C. 244; *McCurry v. Purgason,* 170 N.C. 468, and many other cases.

The doctrine, in its strictness, is usually so far modified as to permit a recovery on a *quantum meruit,* in case of building or improvement contracts, when it is made to appear that the owner or other contracting party has received and continues to enjoy the benefits of a contractor's work and under circumstances that in equity and good conscience call for compensation, a distinction referred to in *Corinthian Lodge v. Smith,* as follows: "The doctrine which we hold to be controlling on the facts of this appeal is modified to some extent by a line of cases which establishes the principle that when 'one party has performed the contract in a substantial part and the other party has accepted and had the benefit of the part performance, the latter may, under certain circumstances, be precluded from relying on the performance of the residue as a condition precedent to his liability.' 1 Beach Contracts, sec. 107; 9 Cyc. 645."

This principle more usually obtains in the case of building contracts, when the owner or proprietor of a house that has been built or substantially completed by another has entered into the possession and use of his building. In such case, owing to the great hardship and injustice that would frequently arise by a strict application of the general rule, the courts are disposed to lay hold of slight circumstance as justifying the modification suggested and apply the principle as stated in Beach Modern Law of Contracts, as follows

(section 108): "Where a building is erected upon and becomes
(714) a part of the realty of the owner, and, although defective in some respects, is of real and substantial value to the owner, the contractor can recover the value of his work, less the damages to the other party, for a failure to comply with the terms of the agreement." Neither the principle nor its modification, however, is allowed to affect the question when the contract itself provides for a specific method of adjustment in case of breach.

The portion of this contract more directly relevant to the question thus presented is as follows: "In case of the refusal or failure of the contractors, after reasonable notice, to prosecute the work with proper diligence or to supply a sufficiency of skilled workmen, or of proper materials, or to execute the work in a satisfactory or expeditious manner, or in case of any other violation of this contract, then, if the said engineer shall certify that such refusal, failure or violation is sufficient ground for such action, the town shall be at liberty, after three days notice, in writing, to the said contractors of their intention to do so, to provide such labor or materials as the engineer may advise, deducting the cost thereof from any money then due or thereafter to become due, under this contract; or they may terminate the employment of said contractor on all of the said work, and may enter upon the premises and assume the completion of the aforesaid work, and take possession of all the materials thereon, and employ any such person or persons to finish the work and provide the proper materials therefor, as required under this contract. And in case of such debarment of said contractor and assumption of the work by the town, then the contractor shall not be entitled to receive any further payments under this contract until the said work shall be wholly finished, but the said contractor shall be indebted to the said town for all the expense incurred thereby, or for any damage sustained through such default, and the amount of such expense and damage may be retained by the said town out of the unpaid balance of the amount stipulated herein to be paid the said contractor. The expense and damage thus incurred in finishing the said work shall be audited and certified by the said engineer, the same as if done by contractor, and if the amount shall exceed the balance due and unpaid said contractor, then the latter shall pay back this excess to the said town and be held therefor."

A perusal of this stipulation will clearly disclose that it was the purpose of the parties "in case of any violation of the contract," if the town took over the work and completed it, that an accounting should be had between the parties, particularly that portion which provides: "That in case of such debarment, the contractor shall not

receive any further payments till the work be wholly finished." . . . And, further: "The amount of such expense and damage (incident to contractor's breach) may be retained by said town out of the unpaid balance of the amount stipulated herein to (715) be paid the contractor." Not only is this apparent from the terms of the contract, but such an interpretation is clearly within its meaning and purpose. In these municipal contracts for public improvements, it is chiefly desired that the work shall be properly done and within the stipulated price, and that the municipality be protected from the uncertainties and delay of a settlement on the basis of a *quantum meruit.* This is the principal reason that the officers and agents of the municipality undertake to secure a specific method of adjustment by the contract itself. To this end, in this and usually in contracts of like character, it is provided that if the work is not being done satisfactorily, the municipal agents may take it over, receive the benefit of work already done, and apply any and all amounts due to a completion of the work according to the contract specifications. In addition, here and in other like cases, a solvent bond is required to make good any default on the part of the contractor, and, further, defendant is allowed to retain for any and all sums expended and all damages incident to delay. This being true, if the work is completed at an amount less than the contract specifies, it is right and just that there should be an accounting to the contractor for it. This is particularly true in the present instance, where it appears that the plaintiff had entered on the work in good faith, prosecuted the same as far as it was able, and expended thereon from eight to ten thousand dollars, of which the defendant has received the benefit. They cannot recover the full amount of this expenditure, because they are, as stated, barred from a recovery on a *quantum meruit* by the provisions of the contract, but they should justly recover on it the contract price that was in excess of the cost of the completed work.

There is well-considered authority elsewhere in direct support of the position. *Robinson v. Chinese, etc., Benevolent Assn.,* 54 N.Y. & Suppl. 858; *White v. Livingston,* 69 Appell. Div. 361, approved 174 N.Y. 539; *Murphy v. Buckman,* 66 N.Y. 297; *Wilkinson v. Becker,* 185 Pa. St. 225; 30 A. & E. Enc. (2 Ed.) 1264. And decisions in our own Court are in full recognition of the general principle. *Piano Co. v. Kennedy,* 152 N.C. 196; *Main v. Griffin,* 141 N.C. 43.

There is no error in the proceedings below, and judgment for plaintiff is

Affirmed.

Cited: Moss v. Knitting Mills, 190 N.C. 648; *Lumber Co. v. Construction Co.,* 249 N.C. 684.

(716)

KING BROS. SHOE STORE COMPANY v. SEP S. WISEMAN.

(Filed 5 December, 1917.)

1. **Courts — Justice of the Peace — Jurisdiction—Contracts—Amount Demanded—Statutes.**

The justice of the peace has jurisdiction of an action upon contract where the summons used as a complaint demands, in good faith, a recovery of $200 or less, though a greater sum could have been demanded. Revisal, sec. 1419.

2. **Limitations of Actions—Written Promise to Pay—Definiteness.**

A written reply of an endorsee of a note to a letter describing the note and demanding payment, directing the payee to file the claim in the bankrupt court against the maker, "get your share, what is left I will pay," is a sufficient and definite promise to pay a sum certain under the principle "that is certain which can be rendered certain"; and the statute of limitations will not commence to run until the ascertainment of the sum promised has been made in accordance with the method prescribed by the promissor.

CIVIL action, tried before *Carter, J.,* and a jury, at August Special Term, 1917, of AVERY.

Plaintiff sued for $182.50, balance due on note, the excess of the debt having been remitted. After the evidence was closed, the court ordered a nonsuit, and the action was dismissed, because the claim of the plaintiff, as the court ruled, was barred by the statute of limitations. The defendant, waiving the question whether a nonsuit can be granted upon the ground stated by the court, proved that the defendant had, on 4 February, 1913, sent the following letter to plaintiff: "File your claim against the bankrupt court and get your share; what is left I will pay." There was evidence tending to show that this letter was written in answer to one from the plaintiff to the defendant in which demand was made on the latter for the payment of two notes he had endorsed for M. A. Thompson, and which were payable to and owned by the plaintiff. The amount due on the notes from the estate of M. A. Thompson, the bankrupt, was not paid by the trustee in bankruptcy until 1915, the first installment of $50 on 15 May, and the second of $17.50 on 15 December of that

year. So far as appeared, there were only two notes owing by Thompson to the plaintiff.

Judgment was entered on the nonsuit, and plaintiff appealed.

F. A. Linney, V. B. Bowen, and Harrison Baird for plaintiff.
J. W. Ragland, W. C. Newland, and S. J. Ervin for defendant.

WALKER, J., after stating the case: The justice's court had jurisdiction as the plaintiff duly remitted the excess over the amount demanded in the summons treated as a complaint (Revisal, sec. 1445), which was $182.50. We have often held that the (717) jurisdiction is determined by the amount demanded in good faith, even if plaintiff could have sued for more than $200. Revisal, sec. 1419; *Teal v. Templeton,* 149 N.C. 32, citing *McPhail v. Johnson,* 115 N.C. 302; *Cromer v. Marsha,* 122 N.C. 563; *Brantley v. Finch,* 97 N.C. 91. It is there said that "had it been doubtful as to the sum demanded, the remittitur made is clear, even if it had been retroactive."

The letter of the defendant, dated 4 February, 1913, was sufficient to prevent the bar of the statute of limitations. It contains an absolute promise to pay the balance of the debt, after deducting therefrom the amount paid by the trustee in bankruptcy. When take in connection with the letter, to which it was an answer, it describes the notes with sufficient certainty, for plaintiff demands payment of the notes, and defendant, replying to this demand, agrees to pay what is left after plaintiff gets the share of the bankrupt's estate applicable to the debt. This is a distinct and definite promise to pay a certain debt, and the rule is given by which the amount is to be ascertained, namely, by deducting the amount paid by the trustee. The maxim of the law is, "That is certain which can be rendered certain" *(Id certum est quod certum reddi potest).* The rule in such cases is well stated in *Taylor v. Miller,* 113 N.C. 340, by Justice McRae, when quoting from the opinion of Justice Rodman in *Faison v. Bowden,* 72 N.C. 405: "The new promise must be definite and show the nature and amount of the debt, or must distinctly refer to some writing, or to some other means by which the nature and amount of it can be ascertained; or there must be an acknowledgement of a present subsisting debt, equally definite and certain, from which a promise to pay such debt may be implied."

The rule as thus approved was deduced and formulated by Justice Rodman from previous decisions, especially *McBride v. Gray,* 44 N.C. 420, and *Shaw v. Allen's Exrs.,* 44 N.C. 58, where Judge Battle said that to repel the statute of limitations, there must be a promise to pay the debt sued on, either express or implied, and the

terms used must have sufficient certainty, or be capable of being reduced to a certainty, under the maxim *id certum est quod certum reddi potest,* and the claim should be identified as that in regard to which the promise was made, citing *Smith v. Leeper,* 32 N.C. 86, and *Moore v. Hyman,* 35 N.C. 272. It will be found that these cases strongly support the position of the plaintiff here.

In the *Moore* case, Judge Pearson said: "When so sued, a promise to settle implies a promise to pay the balance; for why settle unless you intend to pay? And this implied promise to pay is sufficient to repel the statute, for although the amount is indefinite at the time of the promise, yet a mode is agreed on by which it
(718) can certainly be ascertained; and the maxim above cited applies." And again: "The amount is indefinite, but a mode is pointed out by which it may, or may not, be made certain; if it be made certain in that mode, the promise becomes absolute. . . . The maxim above cited applies only when the amount can be made certain by reference to some paper, or by figures, or in some other infallible mode, in which case it is considered the same as if the amount was ascertained at the time of the promise."

In the *McBride* case, *supra,* Judge Battle said that the promise would be sufficiently certain if the amount can be made certain by computation, or, we may add, some fixed rule or standard, as here, and when, besides, the debt to be paid is certainly identified. In the latter respect, the case of *Smith v. Leeper, supra,* is much like ours, where the plaintiff demanded payment of an account and defendant promised to pay it, the reference to the account in the demand and the promise, coupled together, made a sufficient identification.

Justice McRae, in *Taylor v. Miller, supra,* puts a case very much like this one when he says: "Here is the original contract, liable to be defeated by the plea of the statute, but still *continuing.* Here is the correspondence between the agent of the payee and the maker himself; it is perfectly definite and certain as to what note is meant. And here is the letter of the defendant in which he refers to the letter which describes it and demands payment; he proposes to settle both claims the first of next month. The defendant was probably no philologist. He used words in their ordinary acceptation, and which could not be misunderstood. We think they fill the letter and spirit of the statute." He also says that since our statute requiring the promise to be in writing (Revisal, sec. 371), the same rule prevails. "The promise must be unconditional." *Greenleaf v. R. R. Co.,* 91 N.C. 33. It must be certain in its terms. *Long v. Oxford,* 104 N.C. 408; 113 N.C. at p. 342.

The language of the statute is this: "No acknowledgment or promise shall be received as evidence of a new or continuing con-

tract, from which the statute of limitations shall run, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest."

It will be seen by a bare perusal that this provision, intended merely to protect the promisor and to settle definitely and exactly the terms of the promise, and requiring only that it be in writing, does not change the rule in regard to its nature, that is, certainty and identity of the debt or subject to which the promise applies. The terms or phraseology being the same, it can make no difference, so far as its construction for the purpose of determining its binding effect is concerned, whether it is written or oral. The statute, of course, did not begin to run until the balance was ascertained, and, as said in one of the cases we have cited, the promise (719) became absolute. No suit could have been brought before the balance was certainly ascertained by payment of the dividend by the trustee in bankruptcy. *Helsabeck v. Doub,* 167 N.C. 205; *Moore v. Harkins,* 171 N.C. 696, and cases cited. The promise was, in effect, that defendant would pay "what is left," when it is ascertained, and the running of the statute must be counted from that time. It follows that the learned judge erred when he ruled otherwise.

New trial.

Cited: Phillips v. Giles, 175 N.C. 412; *Sewing Machine Co. v. Burger,* 181 N.C. 244; *Irvin v. Harris,* 182 N.C. 655; *Williams v. Williams,* 188 N.C. 730; *Fertilizer Co. v. Eason,* 194 N.C. 249; *Trust Co. v. Lumber Co.,* 221 N.C. 94.

R. A. CONRAD v. R. L. SHUFORD AND JULIUS SHUFORD.

(Filed 5 December, 1917.)

1. Pleadings—Special Damage—Allegations—Automobiles.

While special damages are required to be pleaded, the rule is not so restrictive as to necessitate special averment of all of the particulars of a general damage from an injury alleged to have been negligently inflicted; and where the plaintiff alleges that the negligent or reckless driving of the defendant's automobile frightened his horse and caused him to be thrown from his buggy, severely injuring his back., etc., it is sufficient for the introduction of his evidence that a wen on his back was bruised by the fall and became inflamed and very painful and troublesome, and should the defendant desire a more definite statement, he should ask for a bill of particulars.

2. Evidence—Expert Testimony—Damages—Personal Injury.

Held, in this action to recover damages for a personal injury alleged to have been negligently inflicted by the defendant, that the expert testimony of physicians that the injury could have caused inflammation of a wen of plaintiff's back, etc., was competent. *Mule Co. v. R. R.*, 160 N.C. 252, cited and distinguished.

3. Evidence—Nonsuit—Trials.

Upon a motion to nonsuit, the evidence is considered most favorably for the plaintiff, giving him the benefit of all just and reasonable inferences to be drawn therefrom, and under the evidence in this case it was properly denied.

4. Negligence—Evidence—Other Occurrences—Automobiles.

Where there is evidence tending to show that the negligent and reckless driving of defendant's automobile caused the plaintiff's horse to throw him from his buggy and injure him, it is competent to show that at the same time and place another horse, being driven ahead of the plaintiff's horse, also became frightened from the same cause, as corroborative evidence that the defendant's automobile was then being negligently and recklessly driven, and as a circumstance tending to show that it was in a manner that would frighten animals.

5. Automobiles—Negligence—Evidence—Trials—Questions for Jury.

Where there is evidence tending to show that the plaintiff's horse was frightened by the sudden, unnecessary and reckless sounding of the defendant's automobile horn, which caused the injury complained of, and also evidence that the horn was sounded only as required by the statute, the determination of the jury, under proper instructions, that it was done in the manner contended for by plaintiff, is conclusive.

CIVIL action, tried before *Ferguson, J.*, and a jury, at (720) February Term, 1917, of CATAWBA, upon the following issues:

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

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

3. What damage has plaintiff sustained? Answer: $200.

Judgment thereon, and defendant appealed.

Plaintiff alleged that while he was driving his team on a public road, the defendant, who was in an automobile, approached and passed him in such a negligent and reckless manner, and at such a high rate of speed, that his horses were frightened and ran away, throwing him violently to the ground and severely injuring his back, head, and breaking his nose and several ribs, whereby he was caused great bodily pain and mental suffering, and was subjected to much loss of time and to the payment of medical expenses for his care, etc., to his damage of $2,000. It is also alleged that the driver of the automobile, Julius Shuford, one of the defendants, had the reputa-

tion of being a careless and even reckless chauffeur. Plaintiff had a wen on his back, which was bruised by the fall, and became so inflamed as to be very painful and troublesome.

McCorkle & Moose and Wilson Warlick for plaintiff.
W. A. Self and Walter C. Feimster for defendant.

WALKER, J., after stating the case: First. The evidence as to the wen on plaintiff's back had already been admitted, without objection, when the defendant objected to a question of plaintiff's counsel in regard to it. If defendant can now raise the question as to its competency, we do not think it should have been excluded. It was sufficiently covered by the allegation as to the injuries in the complaint. Special damages must be pleaded, it is true. *Sloan v. Hart,* 150 N.C. 269. The rule is thus stated in 13 Cyc., pp. 175, 176: "Where, by reason of a certain wrong, or from the breach of a contract, the law would impute certain damages as the natural, necessary, and logical consequence of the acts of the defendant, such damages need not be specifically set forth in the complaint, but are, upon a proper averment of such breach or wrong, recoverable under a claim for damages generally. Hence, where a willful (721) wrong is committed, evidence of matters tending to aggravate the damages, when necessarily or legally arising from the act complained of, is admissible, without special averment. If the damages sought to be recovered are those known as special damages — that is, those of an unusual and extraordinary nature, and not the common consequence of the wrong complained of or implied by law, it is necessary, in order to prevent surprise to the defendant, that the declaration state specifically and in detail the damages sought to be recovered." But the rule in pleading is not so stringent as to require a special averment of every immediate cause of the injury suffered. The primary and efficient cause of all the injury, however directly produced, and all the consequences resulting therefrom, are within the compass of the demand for compensatory damages. *Davis v. Wall,* 142 N.C. 450, 452, citing *Hammond v. Schiff,* 100 N.C. 161. "It is well established that, in a 'pure tort,' the case presented here, the wrong-doer is responsible for all damages directly caused by his misconduct, and for all indirect or consequential damages which are the natural and probable effect of the wrong, under the facts as they exist at the time the same is committed and which can be ascertained with a reasonable degree of certainty. A wrong-doer is liable for all damages which are the proximate effect of his wrong, and not for those which are remote: 'that direct losses are necessarily proximate, and compensation, therefore, is always re-

coverable; that consequential losses are proximate when the natural and probable effect of the wrong.'" *Bowen v. King,* 146 N.C. 385, 390, citing *Johnson v. R. R.,* 140 N.C. 574; *Sharpe v. Powell,* 7 L.R. (1892), p. 253; 8 Am. & Eng. Enc. 598; Hale on Damages, 34, 35, *et seq.* It was held in *B. & O. R. R. Co. v. Slanker,* 180 Ill. 357, that an angry tumor which resulted from an injury and required an amputation of a serious nature was within the scope of a demand for damages very similar to the one made in this complaint, the court stating: "The mere fact that she did not enumerate all of the particulars of her general damages did not deprive her of the right to prove them," citing *Hutchinson v. Granger,* 13 Vt. 386; *L. S. & Mich. So. R. R. Co. v. Ward,* 135 Ill. 511; *City of Chicago v. McLean,* 133 *id.,* 148. All the injuries which the plaintiff suffered as a result of the collision are quite plainly charged to have been caused directly and immediately by the negligent and reckless act of the defendants in running by his vehicle and scaring his team. The description of the injuries was not as exact as it might have been made, but sufficiently definite. The pleader is not required by the rule to go into an account of minute details and to specify every muscle that ached and every nerve that throbbed, every contusion or fracture, and every racking pain. *Hanson v. Anderson,* 90 Wis. 195; 13 Cyc. 185. A case directly in point is *Ch. City R. R. Co. v. Cooney,* 196 Ill. 466. If a more definite statement of the in-
(722) juries was desired, the defendant could have asked for a bill of particulars.

Second. The testimony of the doctors as to the wen, and their opinion that the injury could have caused it to inflame and become malignant, is not considered in the brief, and therefore is abandoned, but we do not think there is any merit in these assignments of error. The testimony of the experts was not like that in *J. M. Pace Mule Co. v. R. R.,* 160 N.C. 252. There the doctor testified to a fact, and did not give expression merely to his opinion as an expert.

Third. The court would have erred had it nonsuited the plaintiff. There was ample evidence to warrant the verdict, and the court was required to consider it most favorably for the plaintiff, upon such a motion, giving him the benefit of all just and reasonable inferences to be drawn therefrom. *Milhiser v. Leatherwood,* 140 N.C. 231.

Fourth. The testimony as to other horses being frightened by the defendant's automobile, under like circumstances, at the same time, or immediately afterwards, and on the same road, was some corroborative evidence of negligent, reckless, and unlawful driving. It is said in 17 Cyc., under the title of "Similarity in essential conditions," at p. 283: "That a fact existed or event occurred at a particular time cannot be shown by evidence that another fact ex-

isted or even occurred at another time, unless the two facts or occurrences are connected in some special way, indicating a relevancy beyond mere similarity in certain particulars. Such relevancy is found where similarity in all essential particulars is shown to exist. Evidence of other facts or occurrences is then admitted, provided the court deems this course a wise exercise of its administrative discretion. The probable fact or occurrence may be (1) found in actual life by observation, or (2) reproduced voluntarily in an experiment. A sufficient ground of admissibility is furnished where physical conditions are shown to have been identical on the two occasions. The observed uniformity of nature raises, under such circumstances, an inference that like causes will produce like results. It is, legally as well as logically, immaterial if dissimilarity in conditions is shown to exist in the presence of some particular which cannot reasonably be expected to have affected the result. Another fact or occurrence, the conditions of which are the same in all essential respects, will be deemed relevant, the burden being upon the party offering the evidence to satisfy the court that such similarity exists. In admitting evidence of such facts or occurrences the court makes no finding, except that sufficient has been shown to him as to the relevancy of the evidence to warrant its submission to the jury. Other occurrences have been deemed relevant where the essential conditions are similar, although the law of uniformity in action underlying the relevancy is not natural, but legal." But we base the relevancy of this testimony upon the ground that the conditions and circumstances were substantially the same (723) and the two occurrences were separated only by a very brief interval of time, the Wilson team being driven just ahead of the plaintiff's on the same road. We hold it to be competent, not because the frightening of Wilson's team is proof of the alleged fact that defendant also frightened the plaintiff's, but merely as a circumstance tending to show that defendant was driving recklessly and in a manner that would frighten animals. *Aurora v. Brown,* 12 Ill. App. 122.

Fifth. The instruction of the court as to defendants suddenly, unnecessarily and recklessly sounding the horn of the automobile as he passed the plaintiff's team on the road was unobjectionable. Defendants contend that they were required by the statute to signal Wilson, who was ahead, of their approach. But that question was fairly and fully submitted to the jury, whether they were doing it for the one purpose or the other — that is, to signal Wilson, or suddenly, unnecessarily and recklessly, and in a manner calculated to frighten plaintiff's team. The presiding judge presented this branch of the case in both aspects, giving the plaintiff's contention and the

defendants' with equal fullness. The defendant stated that he sounded the gong for the purpose of signaling Wilson, and the judge told the jury that he was justified in so doing, and then gave plaintiff's contention and the instruction we have mentioned. The jury evidently found, under the instructions and the evidence, that the gong was sounded so as to frighten the teams, or suddenly, unnecessarily and recklessly.

The other exceptions are without any merit, or are merely formal.

No error.

Cited: *McCord v. Harrison-Wright Co.*, 198 N.C. 746; *Pickett v. R. R.*, 200 N.C. 754; *Sams v. Hotel Raleigh*, 205 N.C. 761; *Etheridge v. R. R.*, 206 N.C. 660; *Caldwell v. R. R.*, 218 N.C. 68; *Binder v. Acceptance Corp.*, 222 N.C. 515; *Oberholtzer v. Huffman*, 234 N.C. 400; *Karpf v. Adams*, 237 N.C. 113.

MRS. C. E. WHITE AND HUSBAND, ANDREW WHITE, v. MRS. M. L. GOODWIN.

(Filed 5 December, 1917.)

Wills — Devise — Husband and Wife — Tenants in Common — "Heirs of Body"—Statutes—Rule in Shelley's Case.

A devise of land to testator's son-in-law, J., and to his daughter, R.; his wife, "after the death of R., the lands to be equally divided between J. and the heirs of R.'s body": *Held*, the intent of the testator, as gathered from the will, was to give to each of the beneficiaries, J. and R., an undivided equal interest in the lands to be held in common, excluding the construction they were to take the estate in entireties; the survivor, as between husband and wife, taking the whole; and should the proper construction be to give a life estate in the land to R., the same result would follow, the words, "heirs of her body," being manifestly used to separate and mark the estate of the remaindermen from that of J., the other tenant in common, the words employed being considered as "heirs general," under the statute (Revisal, sec. 1578), converting R.'s estate into a fee simple. *Ford v. McBrayer*, 171 N.C. 421, cited and distinguished.

SPECIAL proceedings for partition of land, transferred to (724) civil issue docket of Superior Court of IREDELL County, and tried on a plea of sole seizin by defendant, before *Justice, J.*, and a jury, at May Term, 1917, of said court.

Verdict and judgment for defendant, and plaintiff excepted and appealed.

C. Monroe Adams for plaintiff.
R. T. Weatherman, J. H. Burke, and W. D. Turner for defendant.

HOKE, J. The relevant and controlling facts were admitted by the parties to be as follows:

That Tilghman Holland and Sarah Holland, his wife, are dead, leaving a last will and testament, duly admitted to probate, and in which the land in controversy, and the true title thereto, is disposed of as follows:

"We give and bequeath unto our beloved son-in-law, Jeremiah J. Rhyne, and our beloved daughter, Ruth A. Rhyne, all our real estate, it being 87 acres of land in one farm, to be the same, more or less, and all our personal property whatever may be on hand at our death, after our funeral expenses and just debts is paid. We want, after Ruth A. Rhyne's death, the land to be divided equally between Jeremiah J. Rhyne and the heirs of Ruth A. Rhyne's body. The said J. J. Rhyne is to pay William Holland, our oldest son, $50, and Nathaniel Holland's two children, James W. Holland and Sarah M. Holland, $25 apiece, and Sarah R. Frazier $50 at our decease, then the rest to be his, as above written. We also appoint Jeremiah J. Rhyne sole executor of this our last will and testament."

That Jeremiah J. Rhyne and Ruth A. Rhyne, the parties mentioned in said will, are both dead, and that the plaintiff, Carolina Eliza White, is the only heir at law of Ruth A. Rhyne, a daughter by a former husband, there being no children born to Jeremiah J. Rhyne and Ruth A. Rhyne during their marriage. That Jeremiah J. Rhyne predeceased Ruth A. Rhyne by four months. That the defendant, Mary Leonora Goodwin, is in the possession of the land in controversy, having entered by virtue of deed, executed by J. J. Rhyne and his wife, Ruth A. Rhyne, dated 15 February, 1915, and recorded 8 March, 1915, in Book 51, page 294, which deed was offered in evidence. It is admitted that said deed is in usual form for a fee simple title to said land, and that it conveyed whatever interest Jeremiah J. Rhyne and Ruth A. Rhyne had in the land at the time of its execution, and waives the necessity of sending the deed up in full as part of the record. That the conditions (725) mentioned in said will were performed by J. J. Rhyne by the payments provided therein.

And upon these facts we are of opinion that the cause has been correctly decided. In *Highsmith v. Page,* 158 N.C. 226, approved on this point in *Eason v. Eason,* 159 N.C. 540, it was held, among other things, that "While in a conveyance of lands to husband and wife jointly they will take and hold the estate by entireties, the survivor taking the whole, this character of an estate is not created when it

appears by construction from the conveyance that it was not so intended, but that the parties were to take and hold their interests as tenants in common." The position should prevail also in the interpretation of wills, and, applying the principle, the present instrument, in the first clause, would convey to the devisees an estate by entireties, but in the second clause, "We want, after Ruth A. Rhyne's death, the land to be divided between Jeremiah J. Rhyne and the heirs of Ruth A. Rhyne's body," it is clearly the intent of the devisors that the right of survivorship should not attach. This is the evident purpose and purport of the second clause; and, construing the will as a whole, its effect is to pass to the devisees an estate in equal interests, as tenants in common. *McCallum v. McCallum,* 167 N.C. 310; *Taylor v. Brown,* 165 N.C. 161; *Fellows v. Durfey,* 163 N.C. 305.

And if this will, by correct construction, shall be held in its terms to convey to Ruth a life estate in her share, the result is the same, for the remainder, being to the heirs of her body, made equivalent by our statute to "heirs general" (Revisal, sec. 1578), the rule in *Shelley's* case would apply, and she would take and hold the absolute ownership of her share. *Cohoon v. Upton,* at the present term. True, in the disposition of our courts to restrict the application of the rule in *Shelley's* case, referred to by Justice Allen in the recent decision of *Ford v. McBrayer,* 171 N.C. 421, it has been held that when an estate has been limited to one for life, remainder to his heirs or the heirs of his body, to be equally divided between them, these words, "to be equally divided," will prevent the operation of the rule, the reason therefor being fully stated by Pearson, J., in *Ward v. Jones,* 40 N.C. 400, but the position applies only when these words referred to are used to affect and qualify estate of the remaindermen, and not, as in this instance, when they are manifestly used to separate and mark the estate of such remaindermen in equal interest from that of the other tenant in common.

In many decisions of our Court the rule in *Shelley's* case is fully recognized as a principle in our law of real property, and the words of the present devise, "to be equally divided," being used to designate a division between the one-half interest of the husband and that of the other takers, there is nothing in this instance to pre-
(726) vent the operation of the rule, and, the devisees, J. J. Rhyne and his wife, Ruth, evidently the primary objects of the testator's bounty, holding under the devise in absolute ownership, their conveyance to defendant passed the entire estate.

The opinion of his Honor to that effect finds support in *Cohoon v. Upton, supra; McSwain v. Washburn,* 170 N.C. 363; *Robeson v.*

Moore, 168 N.C. 388; *Jones v. Wichard,* 163 N.C. 241; *Price v. Griffin,* 150 N.C. 523; *Perry v. Hackney,* 142 N.C. 368; *Tyson v. Sinclair,* 138 N.C. 24, and many other cases on the subject to like effect.

It may be well to note that, from the facts agreed upon, it appears that the amounts charged on the share of J. J. Rhyne in favor of the other children of the devisors have all been paid.

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

No error.

BROWN, J., dissenting: I agree to the opinion of the Court as far as it holds that the will of Tilghman Holland and wife, Sarah, does not create an estate by entireties in Jeremiah Rhyne and his wife, Ruth. The context of the will plainly shows that it was intended that they should hold their several interests — whatever that interest may be — separate and distinct. But I cannot agree to the proposition that under the terms of the will Ruth Rhyne took an estate in fee under the operation of the rule in *Shelley's* case.

The language of the will is: "We give and bequeath unto our beloved son-in-law, Jeremiah J. Rhyne, and our beloved daughter, Ruth A. Rhyne, all our real estate (describing it). We want, after Ruth Rhyne's death, the land to be divided equally between Jeremiah J. Rhyne and the heirs of Ruth A. Rhyne's body."

It is to my mind perfectly plain, by the use of the words, "heirs of Ruth A. Rhyne's body," the testator meant the issue or children of Ruth A. Rhyne, and that he intended that his daughter should have her portion of the land during her lifetime, and after her death that it was to be divided between her children and her husband — that is to say, the children taking one-half and the husband taking one-half. It is a cardinal principle in the construction of wills to so construe them as to effectuate the plainly expressed intention of the testator. Where this intention is manifest, technical rules of law must give way. *Triplett v. Williams,* 149 N.C. 394. *McCallum v. McCallum,* 167 N.C. 310.

I think, under our decisions, the rule in *Shelley's* case is prevented from applying by the provision that the land is to be divided equally between Jeremiah Rhyne and the heirs of Ruth A. Rhyne's body after her death.

In the recent case of *Haar v. Schloss,* 169 N.C. 228, in referring to the effect of such a provision in a will, Mr. (727) Justice Allen says:

"In *Mills v. Thorne,* 95 N.C. 364, which is affirmed in *Gilmore v. Sellars,* 145 N.C. 283, it was said that 'In England, ever since the leading case of *Jepson v. Wright,* 2 Bligh 1, it has been held that

the words, "equally to be divided," or "share and share alike," superadded to limitations to the heirs of the body, etc., do not prevent the application of the rule. But in this State it would seem that the superaddition of like words to the limitations to the heirs, or heirs of the body, or issue, do prevent the application of the rule'; and this has been the consistent ruling of this Court since the case of *Ward v. Jones,* 40 N.C. 400." See, also, *Midgett v. Midgett,* 117 N.C. 8; *Jenkins v. Jenkins,* 96 N.C. 254; *Howell v. Knight,* 100 N.C. 254; *Freeman v. Freeman,* 141 N.C. 97.

In *Jenkins v. Jenkins, supra,* article 5 of the will in question read: "I desire my daughter, Eliza Jane Jenkins, to have the use of all the balance of my estate, including lands, negroes, stock of all kinds, household, etc., during her natural life, and at death to be equally divided among the heirs of her body"; and in this case the words, *"to be equally divided,"* was held to prevent the application of the rule, and cited *Mills v. Thorne* and *Ward v. Jones.*

The Chief Justice concurs in this dissent.

Cited: Parrish v. Hodge, 178 N.C. 135; *Davis v. Bass,* 188 N.C. 207.

E. E. GORHAM AND E. E. GORHAM, ADMR. OF JOHN C. GORHAM, v. ILA H. COTTON, ADMX. OF F. H. COTTON.

(Filed 5 December, 1917.)

1. Partnership—Requisites.

It is required, to make a partnership, that two or more persons should combine "their property, effects, labor, or skill," in a common business or venture, under an agreement to share the profits and losses in equal or specified proportions, constituting each member an agent for the others in matters appertaining to the partnership and within the scope of its business.

2. Same — Deeds and Conveyances — Lands — Tenants in Common—Executors and Administrators—Distribution—Creditors—Statutes.

Where two or more persons purchase lands and take a conveyance to the undivided lands to themselves, and have procured the purchase money from a bank on their joint note, with joint and several liability under our statutes (Revisal, secs. 412, 413), in the absence of other evidence, a partnership in the land has not been established, and they take it as tenants in common; and where one of the parties has died insolvent, and his administrator has sold the land to make assets, the other party, having paid his *pro rata* part of the note, may not maintain that the

proceeds of the sale was a partnership asset, to be first applied to the partnership debt, for such proceeds are for *pro rata* distribution among the creditors of the intestate, including the plaintiff, under the statutes applicable.

CONTROVERSY without action, heard before *Connor, J.*, at April Term, 1917, of CUMBERLAND. (728)

There was judgment for plaintiffs, and defendant administratrix excepted and appealed.

Q. K. Nimocks for plaintiff.
Sinclair, Dye & Ray for defendant.

HOKE, J. From the "case agreed" it appears that at some time prior to this proceeding, apparently about 13 May, 1913, plaintiff E. E. Gorham, and John C. Gorham, intestate, and F. H. Cotton, intestate of defendant, having executed their joint note to the First National Bank of Fayetteville to procure money for the purpose, bought and took title to the three in equal interests of seven unimproved lots in and near Fayetteville, N. C.; that the individual plaintiff, E. E. Gorham, has paid his *pro rata* share of said note, and the balance due thereon is $466.66, principal and interest, and which is demanded by said bank, and no part of same has been paid by John C. Gorham or F. H. Cotton or their estates; that since said note was made and discounted, J. C. Gorham and F. H. Cotton have died, and each of said lots having been sold by court proceedings to make assets, and at a price in excess of the amount paid for same, and the estates of the said intestates being each entitled to one-third of said purchase price, less costs and charges of sale; that the estate of F. H. Cotton, deceased, is insolvent and will not suffice to pay his debts in full.

Upon these facts, plaintiffs contend that they are entitled to have one-third of said note paid in full out of the proceeds of said sale of said lots, and defendant denying that the estate of Cotton is liable on said note, except as to a general creditor, to be paid its *pro rata* from the assets of his intestate's estate. The plaintiffs base their claim on the position that the purchase of these lots was a partnership venture, and that the proceeds of sale constitute partnership assets, which should be properly applied to the payment of the partnership debts and in exoneration of the other partners to the extent of the intestates' proportionate liability.

The principle, as a general rule, is fully recognized with us *(Scott v. Kenan,* 94 N.C. 296; *Strauss v. Frederick,* 91 N.C. 121; *Ross v. Henderson,* 77 N.C. 170), but it may not avail the plaintiffs, on this

record, for the reason that the fact of partnership is not established.

The definition of a partnership by Chancellor Kent is given (729) in 30 Cyc. 349, as follows: "A contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions," with the comment by the author that "the same is both comprehensive and accurate." Various other definitions are given in a note to this article, pp. 349 and 350, one from *Karrick v. Hanniman,* 168 U.S. 328, as follows: "A contract of partnership is one by which two or more persons agree to carry on a business for their common benefit, each contributing property or services and having a community of interests in the profits. It is in effect a contract of mutual agency, each partner acting as a principal in his own behalf and as agent for his copartner." And that from *Meehan v. Valentine,* 145 U.S. 611, to the effect "That those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions." And, again, from *O'Donohue v. Bunce,* 92 Fed. 858; "The accepted definition of partnership is the voluntary association of two or more persons in sharing the profits and bearing the losses of a general trade or specific adventure."

The substantive features of these definitions have been approved and applied in numerous cases in this jurisdiction, as in *Reaves v. Fertilizer Co.,* 105 N.C. 283-296; *Mauney v. Coit,* 86 N.C. 464, and all embody the proposition that, to make a partnership, two or more persons should combine their "property, effects, labor, or skill in a common business or venture, and under an agreement to share the profits and losses in equal or specified proportions, and constituting each member an agent for the others in matters appertaining to the partnership and within the scope of its business."

Under these or equivalent definitions, there are no facts nor findings in the case agreed showing that a partnership was ever entered into by these parties. It is not shown that there was ever any agreement between them to buy or hold this property as copartners, or that one was or intended to be the agent of the other in its acquisition or sale, or even that it was bought for the purposes of resale at all. No sale took place in their lifetime; and, so far as appears, it may have been bought for the purpose of partition between them, and, on the facts as they are now presented, the parties procuring the money on their joint note, joint and several, under the provisions of our statute (Revisal, secs. 412-413; *Rufty v. Claywell, Powell & Co.,* 93 N.C. 306), bought and took a deed for the prop-

erty in ordinary form, and held the same, as tenants in common, at the time that two of the owners died.

The authorities cited by defendant seem to be decisive in his favor, some of them being to the effect that, even if the (730) lots had been purchased by the parties with a view of resale, this of itself, and without more, would not constitute a partnership. *Clark v. Sidway,* 142 U.S. 682; *Gottschalk v. Smith,* 156 Ill. 377; *La Cotts v. Pike,* 91 Ark. 26.

In *Clark's* case it was held: "That persons who jointly purchased land to hold for a rise in value are not partners, but are tenants in common," etc. In *La Cotts v. Pike, supra,* it was held, among other things, "That in order to constitute a partnership it is necessary that there should be something more than the joint ownership of property; that mere community of interest by ownership is sufficient to create a tenant in common; that, before there can be a partnership, there must be an agreement for community of profits and loss. . . ."

From this it follows that, defendant's intestate having died insolvent and owning a one-third interest in the lots as tenant in common only, the proceeds from the sale of such interests must be distributed *pro rata* in the due and orderly administration of the estate.

There is error, and, on the facts appearing in the case agreed, there must be judgment for defendant.

Reversed.

Cited: Royal v. Dodd, 177 N.C. 209; *Bank v. Odom,* 188 N.C. 678; *Leftwich v. Franks,* 198 N.C. 292; *Wilkinson v. Coppersmith,* 218 N.C. 174; *Rothrock v. Naylor,* 223 N.C. 786; *Johnson v. Gill,* 235 N.C. 45.

JAMES NIXON v. THE BUCKEYE COTTON OIL MILL.

(Filed 5 December, 1917.)

1. Negligence—Evidence—Res Ipsa Loquitur—Trials—Questions for Jury.

The plaintiff was employed by the defendant oil company, among other things, to relieve its power-driven elevator, consisting of a chain with small cups thereon, enclosed in a box, from becoming chocked by overfeed, the method being to remove the excess by hand through a small opening in the box. There was evidence tending to show that whenever the elevator chocked it would throw the belt operating it from the shaft

pulley and stop the elevator, but at the time of the injury it failed to do so, owing to defective condition in the fastening of the pulley to the shaft, and caused the injury, the subject of the action, while the plaintiff was removing the seed in the manner indicated. There was conflicting evidence as to whether the plaintiff was in charge of the shafting and pulley, or only required to replace the belt to start the elevator in motion: *Held*, under the evidence and the doctrine of *res ipsa loquitur* applying thereto, the issue of defendant's actionable negligence was for the determination of the jury, and, having been answered by them in plaintiff's favor, under a proper charge, a cause of action is established.

2. Evidence—Res Ipsa Loquitur—Defendant's Control.

The position that the doctrine of *res ipsa loquitur* cannot apply when the servant, who has received a personal injury, is in charge of the defective machinery which caused it, is inapplicable, when, upon conflicting evidence and proper instructions, the jury has found as a fact that the principal, and not the injured servant, had its supervision and management under its charge.

3. Negligence—Master and Servant—Evidence—Employer and Employee —Inspection—Trials.

Where there is evidence tending to show that the plaintiff, an employee, was injured by the unexpected running of a piece of machinery connected by belt to a pulley on defendant's power-driven shaft, which was caused by the pulley not revolving with the shaft because the fastening had become ineffective from service; that plaintiff's foreman inspected the machinery daily, which was so placed that he could have seen the defect: *Held*, sufficient to fix the defendant with notice of the imperfection, and hold him responsible for his negligent failure to have known it.

4. Instructions—Improper Remarks—Statutes.

Where the jury has returned for further instructions from the court, which he fairly and impartially gives, his statement to them that they should reconcile the evidence if they could; that they were entitled to their own opinion, which he would not do anything to coerce; that if they could not, the court would "have to do something else," is not an intimation on the merits or whether "any fact has been fully and sufficiently proved," and unobjectionable under the provisions of the Revisal, sec. 536.

CIVIL action to recover damages for physical injuries
(731) caused by alleged negligence of defendant company, tried before *Webb, J.*, and a jury, at September Term, 1917, of MECKLENBURG.

On denial of liability, and plea of contributory negligence, the following verdict was rendered:

1. Was the 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 damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,000.

Judgment on the verdict, and defendant excepted and appealed.

F. M. Redd and John M. Robinson for plaintiff.
Clarkson, Taliaferro & Clarkson for defendant.

HOKE, J. The evidence on the part of plaintiff tended to show that, in April, 1915, plaintiff was an employee of defendant company, working in the cake and meal room, his duties being "to see after the cake-meal and to keep up the repairs of the belts"; that an elevator, consisting of a continuous chain with little cups attached, enclosed in a box, conveyed the cut cake to this room from a lower floor, the same being driven by band and pulley connected with the main shaft of the operating machinery; that this elevator was liable to become choked, caused chiefly by being at times (732) overfed by a conveyor which delivered these little cakes on the lower floor, and when it did, it was the custom of plaintiff and other employees to release the elevator by removing this excess by hand and from a small opening in the box; that the pulley driving the elevator band, when in proper shape and fix, was fastened securely to the main shaft, and when the elevator became choked it threw the belt from the elevator pulley, making it always necessary, before the elevator would start again, to replace the belt on the pulley. On the occasion in question, plaintiff being at the time on the stairway, a coemployee called to plaintiff that the elevator was choked, and he hurried down to release it by removing the excess feed, and while so engaged the elevator started and caught plaintiff's hand, inflicting substantial and painful injuries. The plaintiff, a witness in his own behalf, testified, among other things, that he had many years' experience in this work on this and similar machines; that he had released this elevator in the same way 25 or 30 times, and that it had never started of itself in this way before, and that it would not do so when the machinery was in proper condition; that, in such case, the pulley always cast the belt, as stated, making it necessary to replace the same before it could be affected by the motor power. That was the reason for its being choked; it had thrown the belt. In the present instance it had not done so, for the reason that the pulley, being loosened from the main shaft, the set-screw requiring attention, when the elevator became overloaded, the main shaft revolving within the elevator pulley, the latter remained stationary and failed to throw the belt as it had always done; that, some time after, witness had examined this main shaft and discovered indications that had revolved within a loosened pulley, as claimed.

There was conflicting evidence on the part of defendant, but, under a full and fair charge by the court, the jury have accepted plaintiff's version of the occurrence, and, this being true, a cause of

action is clearly established. On the facts in evidence, and under the principle of *res ipsa loquitur,* as recognized and applied in numerous decisions of this Court, it was required that the issues be submitted to the jury. *Deaton v. Lumber Co.,* 165 N.C. 560; *Turner v. Power Co.,* 154 N.C. 131; *Morriset v. Cotton Mill,* 151 N.C. 31; *Fitzgerald v. R. R.,* 141 N.C. 530; *Ross v. Cotton Mills,* 140 N.C. 115; *Stewart v. Carpet Co.,* 138 N.C. 60. And, in addition to this, the plaintiff himself gave direct testimony to the effect that the cause of the unusual and unexpected movement of the elevator was that the set-screws, designed to hold the elevator pulley fixed and stationary, had become loosened, permitting the main shaft to revolve within the pulley, thus failing to throw the belt, as it had always done before. It is earnestly insisted for defendant that the doctrine of *res ipsa loquitur* does not apply, for the reason (733) that the principle is only recognized when all of the agencies which may bring about the unusual and harmful result are under defendant's control, and that here the plaintiff himself was in charge and he should be held responsible.

The position, as a general legal proposition, may be correct, as a rule, but it cannot avail the defendant, on this record, for the reason that it is based on the theory that defendant's evidence is true, whereas the jury, under the charge of the court, rejecting the defendant's version, have, as stated, accepted plaintiff's testimony to the effect that "his business in the room was to see after the cake-meal and keep up the repairs of the belts; that he had nothing at all to do with the pulleys or shafting."

Again, it is insisted, on defendant's motion to nonsuit, that there is no evidence whatever that defendant knew or could have known that the machine was out of order, but we do not so interpret the record. This was no sudden break in the machinery, which might reasonably have been overlooked, but it was a condition requiring time, and which the jury have found the defendant should have discovered. The superintendent himself, testifying for defendant, said that the place was not 10 feet above the floor, and its condition was readily observable; that he was in there 10 or 12 times every day to see that the machinery was running all right. He claimed, and stated, however, "that the whole thing in that room was in charge of plaintiff—machinery and all—and if anything was wrong in pulleys or shaft, he was to fix it, and if it broke down he was to report it"; the plaintiff testifying, as stated, that his duties did not in any way extend to looking after the machinery. In this aspect of the case, the court, among other things, instructed the jury as follows: "Or, if you find from this testimony that the pulley was defective, worn, and in the condition as alleged in the complaint, if you find that the

defendant company did not know of that defect and could not have known of that defect by the exercise of ordinary care and prudence, notwithstanding there was a defect about the pulley or about the machinery, as alleged in the complaint, the court charges you, if the company did not know it, and could not have known it by the exercise of ordinary care and prudence, then the company would not be guilty of negligence, and it would be your duty to answer the first issue 'No.' The court charges you, however, gentlemen, that it is the duty the law imposes upon any man who runs machinery to have that machinery inspected at reasonable times to see whether there are any defects about the machinery that would make it dangerous to the employees in charge; and it is the duty of a company working, handling this machinery to have it inspected at reasonable times to see that it is in good condition. . . . If you find from this testimony that this plaintiff, as was contended in the argument, if you find that this plaintiff had control of that machine room; that he was there, in absolute control of all that machinery, and find that being so, that it was his duty to report any defect (734) to the superintendent, then the court charges you, if there was a defect, that it was his duty to do so, and if he did not, he could not recover."

A breach of legal duty in failing to properly overlook and inspect the machinery is a permissible inference from the facts in evidence. The charge of his Honor here gives to defendant the benefit of every position to which it was justly entitled, and this exception of defendant also must be overruled.

Defendant objects further that there was unwarranted interference with the action of the jury, presented in the record as follows: After deliberating on the case for several hours, the jury returned and the spokesman said they were having difficulty in coming to an agreement, two of them, himself and another, being inclined to hold with defendant by reason of plaintiff's negligence, and being told by the court that it was a matter for them, they would have to decide it among themselves. And after some colloquy, the court said further: "All I can say to you is: if I can give you any additional instructions as to the law, I will be glad to do so, but I tried to instruct you fully about it. I cannot decide anything for you, though. Do not understand me to say anything that would have any tendency to drive you away from any position which you may think correct in the matter. (But if you can reconcile all this testimony and come to a conclusion and answer these issues, it is well you should do so. I do not want to say anything to coerce your decision. A man has a right to have his views about anything. But if you can reconcile the testimony and come to a verdict, I would be

glad that if you would do so. Of course, if you cannot, we have to do something else.)"

It is the duty of the judge to counsel a perplexed jury towards an agreement, keeping always within the statutory restriction that he shall give no intimation on the merits or whether "any fact has been fully and sufficiently proved." Revisal, sec. 535. The admonition of his Honor was not so pronounced as that which was upheld in *Warlick v. Plonk,* 103 N.C. 81, and we are unable to see that he has exceeded his privilege or in any way transgressed or failed in the full performance of his duties as an impartial, considerate and capable judge.

There is no error, and the judgment on the verdict must be affirmed.

No error.

Cited: Highfill v. Mills Co., 206 N.C. 585; *In re Will of Hall,* 252 N.C. 86.

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(735)

G. W. McMANUS, ADMINISTRATOR OF GUS McMANUS, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 5 December, 1917.)

1. Railroads—Evidence—Nonsuit—Issues—Last Clear Chance.

Where there is evidence tending to show that the plaintiff's intestate had been employed by the contractor of defendant railroad company for the building of a temporary bridge over a river for the passage of its trains; that owing to a break in the coffer dam the plaintiff was required to work until 4:25 in the morning, when he laid some boards from a chute to the main track, and was lying down thereon, either asleep or dulled by fatigue, when he was run over and killed by defendant's train, approaching at the speed of 4 miles an hour upon a straight track for 300 or 400 feet, with a dim headlight, upon the lighted bridge: *Held,* a motion to nonsuit was properly denied, and the case was correctly submitted to the jury upon the issues of negligence, contributory negligence, and the last clear chance.

2. Railroads—Negligence—Last Clear Chance.

In the application of the doctrine of the last clear chance to railroads when the injury complained of has been received by a person down upon the track in front of an approaching train, it does not require that the person so injured should have been unconscious at the time, for it may be presented, in proper instances, when the claimant is in a position of such peril that ordinary efforts on his part will not avail to extricate him.

3. Evidence—Medical Experts—Railroads—Down on Track.

When relevant to the inquiry in an action against a railroad company for negligently running over and killing plaintiff's intestate while upon the defendant's track, it is competent for a medical expert, who had made a professional examination, to testify, in answer to a question, that from the nature, condition and position of the wounds, the intestate was lying down at the time the injury causing death was inflicted.

CIVIL action, tried before *Webb, J.*, and a jury, at May Term, 1917, of UNION.

The action was to recover damages for death of plaintiff's intestate, caused by the alleged negligence of defendant company, and on denial of liability, plea of contributory negligence, etc., the following verdict was rendered by the jury.

1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. If so, did plaintiff's intestate by his own negligence contribute to the injury which caused his death? Answer: Yes.

3. If so, notwithstanding the negligence of plaintiff's intestate, could the defendant have avoided the injury which resulted in the death of plaintiff's intestate? Answer: Yes.

4. What damage, if any, is plaintiff entitled to recover? Answer: $800.

Judgment on the verdict for plaintiff, and defendant excepted and appealed, assigning for error chiefly the denial of (736) its motion to nonsuit.

Stack & Parker for plaintiff.
Cansler & Cansler and Frank Armfield for defendant.

HOKE, J. There was evidence tending to show that, in January, 1917, the defendant company and the Piedmont and Northern were using a temporary bridge or trestle over the Catawba River, near Mount Holly, N. C., and their trains running over a main track on said trestle, which was straight and approached in a straight line from the west for a distance of 300 to 400 feet; that the Piedmont and Northern were having this trestle made a permanent structure, or were building a bridge just above, and for that purpose had placed a dummy line over the trestle from the western bank to a chute in the middle of the stream, about 4 feet from the main track and parallel thereto, as far as it extended; that cars carrying dirt and other material were run out on the dummy track to the chute where the load was dumped in same, carrying it to the workmen below; that this work was being done by the Shiplett Concrete Company, and plaintiff's intestate was an employee of the latter company,

whose duties were to dump the loads into the chute and clear the dirt and gravel from the tracks while the cars went back for another load; that owing to the conditions prevailing, the speed of regular railroad trains passing over the trestle was restricted to 4 miles per hour, and there were lights kept on the bridge at night, and there was also a headlight on the engine of defendant's train, though this was somewhat dim; that on the occasion in question there had been a break in a coffer dam in the river and the concrete company's entire force had been kept to the work till 2 o'clock, and plaintiff's intestate, engaged on his work at 4:25 a.m., was run over by a freight train of the Seaboard Company, approaching from the west; had both legs cut off, the right one close to the body, and the left just below the knee; was thrown to the river below, and died shortly thereafter. There were also facts in evidence permitting the inference that the intestate had laid some boards from the chute to the main track and was lying down thereon and very likely asleep or dulled by fatigue at the time he was run over and killed.

On this evidence, as it appears in the case on appeal, the judgment overruling the motion to nonsuit was clearly correct, and the case was properly submitted to the jury on an issue presenting the question whether defendant company or its employees had negligently failed to avail itself of the last clear chance of avoiding the injury, a position approved and illustrated in many decisions of our Court dealing with the subject. *Johnston v. R. R.*, 163 N.C. 431;

Henderson v. R. R., 159 N.C. 582; *Edge v. R. R.*, 153 N.C.
(737) 212; *Snipes v. Mfg. Co.*, 152 N.C. 42; *Farris v. R. R.*, 151 N.C. 483.

While the facts of this record do not necessarily call for the discrimination in view of some of the positions taken on the argument, we consider it not amiss to note that it is not always required for the application of this doctrine that the person injured or killed should have been unconscious, but the same may at times be presented when a claimant was in a position of such peril that it is evident that ordinary effort on his part will not avail to extricate him.

Speaking to this question in *Snipes'* case, the Court said: "Ordinarily, cases calling for application of the doctrine indicated arise when the injured person was down on the track, apparently unconscious or helpless, as in *Sawyer's* case, just referred to, or in *Pickett's* case, 117 N.C. 616, or in *Dean's* case, 107 N.C. 637; but such extreme conditions are not at all essential, and the ruling should prevail whenever an engineer operating a railroad train does or, in proper performance of his duty, should observe that a collision is not improbable, and that a person is in such a position of peril

that ordinary effort on his part will not likely avail to save him from injury; and the authorities are also to the effect that an engineer in such circumstance should resolve doubts in favor of the safer course," citing *Clark's* case, 109 N.C. 430-443-44, and *Bullock's* case, 105 N.C. 180.

It was also urged for error that Dr. McCoy, a witness for plaintiff, who had made a professional examination of the intestate at the time, was allowed, over defendant's objection, to testify that, "from the nature, condition and position of the wounds, he was of opinion that the intestate was lying down at the time the same was inflicted." It will be noted that this witness, admitted to be an expert, spoke from a professional and personal examination of the intestate, and the answer, to our minds, was clearly within the domain of expert opinion. Both question and answer are approved and upheld, we think, in *Ferrebee v. R. R.*, 157 N.C. 290; *Parrish v. R. R.*, 146 N.C. 125; *S. v. Jones*, 68 N.C. 443. The case of *Pace Mule Co. v. R. R.* in no way conflicts with this position. There the expert was allowed to testify that certain mules had died from being jammed in a railroad car. This was not an opinion on facts which the witness had obtained and noted himself or as they might be accepted by the jury, but was merely a deduction of the witness as to a much controverted fact and one which had no natural, certainly no necessary, connection with facts coming within his knowledge and observation as an expert.

There is no error, and the judgment for plaintiff must be affirmed.

No error.

Cited: *S. v. Fox*, 197 N.C. 486; *S. v. Smoak*, 213 N.C. 93; *George v. R. R.*, 215 N.C. 774; *George v. R. R.*, 217 N.C. 685; *Justice v. R. R.*, 219 N.C. 276; *Hester v. Motor Lines*, 219 N.C. 746; *Wade v. Sausage Co.*, 239 N.C. 526; *S. v. Atwood*, 250 N.C. 148.

(738)

CABARRUS COUNTY DRAINAGE DISTRICT No. 2, v. THE BOARD OF COMMISSIONERS OF CABARRUS COUNTY.

(Filed 12 December, 1917.)

1. Actions—Misnomer—Abatement—Appearance.

A misnomer of defendant is not a ground for dismissal of the action, the remedy being by plea in abatement, giving the correct name, allowing amendment to the summons and pleadings; and where defendant has entered a general appearance, he is concluded thereby.

2. Drainage District—Findings—Evidence—Record.

Findings made by the trial court from the record of drainage proceedings, as to certain facts as therein stated, require no further evidence than the record itself contains; and where the record sets forth that exceptions were filed and not appealed from, the burden is on the party claiming to the contrary to show it.

3. Counties — Drainage District—Assessments—Judgments—Contempt—Courts—Constitutional Laws.

A judgment in proceedings for *mandamus* against the county commissioners to compel them to pay an assessment of a drainage district for benefit to the public roads therein, that the defendants pay the same, with interest and cost, out of the first moneys coming into their hands, and not otherwise appropriated, is valid and not in violation of the Constitution or statute relating to taxation; and should a rule for contempt be issued, they may show their inability, acting in good faith, to legally comply with the judgment.

PROCEEDING in *mandamus*, heard by *Cline, J.*, in Concord, CABARRUS County, 13 August, 1917.

The court found the facts and rendered judgment as follows:

1. That plaintiff, Cabarrus County Drainage District, No. 2, was duly and legally established under chapter 442, Public Laws 1909, and amendments thereto, under proper petition and bond, as required by said act.

2. That said act was in all respects complied with, said district having been drained under said act and proceedings for said purpose, and bonds of said district have been sold for payment of the cost and expenses of said improvement, except for the amount due said defendant county, and the amounts which the landowners did pay in cash on or before 8 October, 1914.

3. That said board of viewers of said district assessed against the defendant county the sum of $1,500 for the benefit which will be derived by the nine public roads of Cabarrus County which cross said drainage district.

4. That notice was given the defendant, County Commissioners for Cabarrus County, of said assessments, by serving notice on J. F. Harris, register of deeds for said county, as required by said drainage act and amendments.

5. That said county appeared before the Clerk of the (739) Superior Court for Cabarrus County, in person of L. A. Weddington, chairman of the board of commissioners; J. F. Harris, clerk to board of commissioners, and H. S. Williams, its attorney, and filed objections to said assessment, which will appear in the record proper of this case, and said exceptions were overruled by the court; and said assessment and report of board of viewers

was affirmed by the court, and that said appeal was not prosecuted and said appeal was abandoned.

6. That no part of said assessment has been paid, though often demanded by the plaintiff, which assessment was due 8 October, 1914, and is still due and unpaid.

7. That said defendant county has no property subject to execution.

It is therefore ordered that the defendant county and its officers and assessors be, and they are hereby, commanded to pay said assessment of $1,500 to the plaintiff, with interest at 6 per cent from 8 October, 1914, and the cost of action, out of the first moneys coming into their hands not now otherwise appropriated.

From the judgment rendered, defendant appealed.

J. L. Crowell and L. T. Hartsell for plaintiff.
H. S. Williams and W. G. Means for defendants.

BROWN, J. The defendants moved to dismiss for misnomer, as the defendants are sued under a wrong title. At the time of making this motion defendants had filed an answer, pleading to the merits, and entered a general appearance.

It is familiar law that where a defendant pleads in his true name he is concluded thereby, whether the proper method to raise the objection is by plea in abatement or otherwise. It is well settled that a general appearance cures a misnomer of defendant in process or pleadings. 14 Ency. P. & P. 298; 3 Cyc. 524.

A misnomer is never a ground for dismissal, but for plea in abatement, when, the correct name being given, the summons and pleadings may be amended accordingly. *Dunn v. Society,* 151 N.C. 133.

The plea in abatement must not only point out plaintiff's error, but must show how it may be corrected by giving defendant's true name. 1 Chitty Pldg. 446.

The defendants contend that there is no evidence to support the second, third, and fifth findings of fact. No evidence was necessary, except such as is afforded by the record of the drainage proceedings and judgment rendered therein. The court states that the facts are found from an inspection of the record in the drainage proceedings, and these records show that the exceptions were filed and appeal taken. That it was never prosecuted is manifest from the lapse of time. If it has been prosecuted, and is pending undecided, (740) the burden is on defendant to show it.

The defendants except to the judgment. We see no objection to the form of the order of the court requiring defendants to pay the

judgment out of the first money coming into their hands not otherwise appropriated. This does not require defendants to violate any law.

If the entire fund raised by taxation and known as the general fund is required to meet the necessary expenses of the county government, economically administered, no part of it can be legally diverted to the payment of this judgment. Certainly the special funds raised by special taxation and appropriated to specific purposes cannot be so applied.

Neither can the commissioners increase the tax levy beyond the constitutional limit in order to pay it, without legislative sanction. *Bennett v. Commissioners,* 173 N.C. 625.

It is the duty of defendants to obey the order, if they can; but if, acting in good faith, they cannot, they will have full opportunity to make such answer, in case a rule for contempt is issued, returnable in the cause. *Cromartie v. Commissioners,* 87 N.C. 135.

This question is fully discussed in that case, and the duties and powers of county commissioners declared.

Affirmed.

Cited: Hatch v. R. R., 183 N.C. 628; *Comrs. v. Comrs.,* 184 N.C. 467; *Raleigh v. Public School System,* 223 N.C. 320; *Elec. Membership Corp. v. Grannis Bros.,* 231 N.C. 719; *McLean v. Matheny,* 240 N.C. 787.

A. CANNON v. HENRY BRIGGS.

(Filed 12 December, 1917.)

Courts—Clerks of Court—Taxing Costs—Surveyor—Statutes—Appeal and Error.

Where a court survey of lands has been ordered and made, and the trial judge has failed to make an order allowing compensation to the surveyor, the clerk of the court has no power to make the allowance (Revisal, sec. 1504); but, on appeal from the clerk's refusal, the judge of the Superior Court should make it, upon motion made to that effect; and in this case permission to renew the motion at the next term of the Superior Court of the county is granted.

MOTION to retax costs in above case, heard by *Lane, J.,* at May Term, 1917, of HENDERSON.

The motion was denied, and defendant appealed.

No counsel for plaintiff.
O. V. F. Flythe for defendant.

BROWN, J. The defendant obtained a verdict and judgment in this action, brought for the recovery of land and to (741) remove a cloud from title. In taxing the costs, the clerk failed to tax the fees and charges of the court surveyor, who had been ordered to make the necessary survey. In apt time defendant moved before the clerk to retax the costs and include surveyor's bill. The clerk ruled that he had no authority to tax the surveyor's fees in the bill of costs, as the judge who tried the case made no order fixing the allowance to the surveyor under the statute. Defendant excepted and appealed.

The appeal was heard by *Lane, J.*, at the regular term of the Superior Court for Henderson County, who made this order:

"This cause coming on to be heard on appeal from the clerk, on motion of the defendant to allow the charges of T. C. Anderson and Henry Briggs for surveying, and being considered, the claim is not allowed, the court being of opinion that it has not the right to allow the same."

We are of opinion that the ruling of the clerk was correct. The clerk has no power to make an allowance to the surveyor. That power is given to the judges of the Superior Court by Revisal, sec. 1504.

The statute provides for making surveys under order of court, and for the compensation of the surveyor, and declares: "And for such surveys the *court* shall make a proper allowance, to be taxed as among the costs of the suit."

The word "court," as used in this statute, refers to the judge, and not to the clerk. The allowance to experts used in civil or criminal actions is generally fixed by the judge who tries the case, and doubtless would have been fixed in this instance if brought to the attention of the trial judge before the adjournment of the trial term.

The law, however, will not allow an inadvertence or oversight to work an injustice. It is a recognized practice to retax costs and include witness tickets and other items that have been omitted.

The judge had the power to fix the allowance, although he did not try the case. It was his duty, on the hearing of this appeal, having full jurisdiction over the entire matter, to grant the motion made then before him, and fix the allowance and order it to be taxed in the bill of costs, to be paid as the other costs, under the final judgment rendered by the judge who tried the case.

The cause is remanded, with permission to renew the motion at the next term of said court.

Error.

Cited: *Ipock v. Miller,* 245 N.C. 586.

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(742)

LEONORA MUMPOWER v. BLACK MOUNTAIN RAILWAY COMPANY.

(Filed 12 December, 1917.)

1. Railroads—Negligence—Evidence—Questions for Jury—Trials.

Where there is evidence tending to show that the plaintiff's intestate, an engineer on defendant's locomotive, was killed by a runaway car from defendant's siding, on a steep mountain grade, coming into collision with his train on the main line; that the car got away from a shipper on the siding when moving it according to an established custom; that the brake-shoes on this car were insufficient, and the defendant had provided a defective derailer, which failed to work, and that the intestate's train was running backward for the failure of defendant to provide a "wye" or turn-table, and without proper lookout to warn him of the danger, which he could probably have averted by jumping, had the train been properly run with the locomotive ahead, or upon warning given: *Held,* sufficient, upon the issue of defendant's actionable negligence.

2. Railroads—Negligence—Collisions—Presumptions—Burden of Proof.

The death of plaintiff's intestate, an engineer on defendant's locomotive, caused by a collision with another car running wild into his train from a siding, raises a presumption of defendant's negligence, with the burden on defendant to disprove it, and carries the case to the jury.

3. Negligence—Concurring Causes—Damages.

Where a negligent act, committed by a shipper within a custom permitted by the railroad company, together with the negligent acts of the railroad, concurrently and proximately cause an injury to the latter's employee, engaged at the time within the scope of his employment, an action may be maintained against the railroad for the entire damage suffered.

APPEAL by defendant from *Lane, J.,* at March Term, 1917, of YANCEY.

The plaintiff's intestate was a fireman upon defendant's railroad. At Summit Cut, near Burnsville, the defendant had built a side-track about 300 yards long, on a very steep grade. If a car upon said side-track got loose it would run down said side-track and onto the main line for more than a mile. The railroad runs from Kona, in

Mitchell County, to Escota, in Yancey, about 22 miles. The roadbed is very steep and crooked. The defendant failed to put in a turntable or "Y," by reason of which at that time the engine had to be run backward, with the tender in front, from Escota to Kona.

The side-track at Summit Cut was much used by English, a lumber dealer, as a loading and shipping point. He had built a dock along this side-track to store lumber on. The custom had prevailed, ever since this road was built, for shippers to move cars on the side-tracks, which were numerous on this road, for storing and shipping lumber.

The defendant had a defective derailer on the side-track at Summit Cut, and about a week before the death of plaintiff's intestate a car in bad order and with defective brakes had been placed on this side-track. The defendant, in repairing this car, left it with seven brake-shoes instead of eight. (743)

On the day the plaintiff's intestate was killed, the engine was being operated backward up the hill, towards the side-track. English attempted to move a car that was on his side-track, but, owing to its defective brakes, he was unable to control it, and, the derailer also being defective, the car ran out on the main line and down it, at an ungovernable speed. The engine being operated backwards, the engineer, who was on the other side, could not see the car coming. If his engine had been at the head of the train he could have seen the wild car coming, and could have jumped. The defendant had no lookout on the engine, nor on the leading car, as the train was backing up the hill. The runaway car collided with the train, killed the plaintiff's intestate and seriously injured the engineer.

Verdict and judgment for the plaintiff. Defendant appealed.

Merrimon, Adams & Johnston and Charles Hutchins for plaintiff.

H. G. Morrison, J. J. McLauchlin, J. Bis. Ray, and Pless & Winborne for defendant.

CLARK, C.J. There was evidence of negligence, in that the defendant had no lookout on the rear end of the train, which was moving backward. *Lloyd v. R. R.*, 118 N.C. 1010; *Purnell v. R. R.*, 122 N.C. 845, and numerous cases cited to these cases in the Anno. Ed. In any view of the case, there was not a sufficient lookout, as required by *Arrowood v. R. R.*, 126 N.C. 630.

The evidence of the defective derailer was also evidence of negligence sufficient to go to the jury. Evidence was competent as to the custom prevailing on the railroad for shippers, like Mack English, to shift the cars on the side-track, both before and after they were loaded, to meet their convenience, and to show that this was done

with the implied knowledge and consent of the company. *Bradley v. R. R.*, 126 N.C. 735; *Kesterson v. R. R.*, 146 N.C. 276; *Whitehurst v. R. R.*, 160 N.C. 1; *Greer v. Lumber Co.*, 161 N.C. 144, and many others.

The death of plaintiff's intestate was caused by a collision, and this raised the presumption of negligence on the part of the carrier, and the burden was on the defendant to rebut this presumption, which carried the case to the jury. *Stewart v. R. R.*, 137 N.C. 687; *Wright v. R. R.*, 127 N.C. 225.

Though the track was very steep and crooked, the defendant had failed to build any turntable or "Y," by which the engine would have been turned around and operated head first. There was evidence that if the engine had been operated head first, the engineer could have seen the wild car in time to have avoided injury, or at least to jump and save himself. There was also evidence that
(744) the derailer, which should have thrown a runaway car off the track, was visibly defective, and that the loose car did not even hesitate as it went over it.

If there was negligence of English in shifting the cars on the track, it was in accordance, according to the evidence, with the custom of this defendant at the side-tracks, and therefore his shifting it was with the knowledge and consent of the company. If the negligence of English started the runaway car, it concurred with and contributed to the negligence of the company, which permitted him to do this, and which, by reason of running the train backward without a lookout at that end, and without a sufficient derailer, which should have thrown the car before it reached the main line, caused the death of plaintiff's intestate, as the jury found.

In *Ridge v. R. R.*, 167 N.C. 525, Walker, J., said: "Where there are two causes coöperating to produce an injury, one of which is attributable to the defendant's negligence, the latter becomes liable, if together they are the proximate cause of the injury, or if defendant's negligence is such proximate cause. Where the master's negligence contributes to the result, although there may be a coöperating cause not due to the servant's act, the law will not undertake to apportion the liability, but will hold him responsible to the servant in the same degree and with the same consequences as if his negligence had been the sole cause of the injury."

After English had released the car, the injury to the plaintiff would not have occurred except for the negligence of the defendant in the several particulars above stated. The case is very much like *Bloxam v. Timber Co.*, 172 N.C. 46, where Walker, J., said: "The shifting of the winds is not the proximate cause of the injury. Although the act of God, for which they are not responsible, as con-

tended by the defendants, is considered to be the remote cause, if, after the winds changed in direction and the tree started in its course toward the car, the engineer had a fair opportunity to stop the engine after becoming aware of the danger, if these are the facts, the injury to the plaintiff was not the result of an accident, but of direct causation."

In *Hudson v. R. R.*, 142 N.C. 204, it is said: "In order, however, that a party may be liable for negligence, it is not necessary that he should have contemplated or even been able to anticipate the particular consequences which ensued or the precise injuries sustained by the plaintiff. It is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his act of omission, or that consequences of a generally injurious nature might have been expected."

The defendant, for divers reasons, should have anticipated that some injury would occur from its custom in permitting shippers to move cars on side-tracks, because of the fact that it had left this car on a steep side-track, in a defective condition, with (745) only seven brake-shoes instead of eight, and it knew that if the car broke loose, the derailer, which, if in good condition, would have thrown the runaway car from the track before it reached the main line, was in a defective condition, so that it did not operate. As to exception 28, while the court did not use the exact words as to the burden of proof, as requested, he did charge as follows: "Was the plaintiff's intestate injured and killed by the negligence of the defendant, as alleged? The burden of this issue is upon the plaintiff to satisfy you, by the greater weight or the preponderance of the evidence, that the plaintiff's intestate was killed by the negligence of the defendant."

The refusal of the court of an amendment to plead the Federal Employer's Liability Act was a matter within its discretion. Revisal, 507; *Johnson v. Telephone Co.*, 171 N.C. 130. Besides, as assumption of risk is not shown or pleaded, we cannot see that it would have had any bearing. The plaintiff had alleged, and the answer had admitted, that it was an intrastate railway. *Flemming v. R. R.*, 160 N.C. 196. The defendant, moreover, had repeatedly announced its readiness for trial upon the pleadings, which admitted that it was engaged in intrastate business. *R. R. v. Mimms*, 242 U.S. 532.

The defendant claims that its railroad was built principally as a logging road. It is alleged in the pleading, and admitted, that it is a common carrier; and the fact, if such, that it is a logging railroad, built through a rough country, will not avoid its liability for negligence as shown in this case. Even if a logging road, it is liable to its employees in the same standard of duty as any railroad system.

Buchanan v. Lumber Co., 168 N.C. 40; *Hemphill v. Lumber Co.*, 141 N.C. 487; *Simpson v. Lumber Co.*, 130 N.C. 96; *Craft v. Timber Co.*, 132 N.C. 156.

After carefully considering the whole case, and each exception in detail, we find

No error.

Cited: Gaddy v. R. R., 175 N.C. 521; *Wallace v. Power Co.*, 176 N.C. 562; *Battle v. Cleave*, 179 N.C. 114; *White v. Hines*, 182 N.C. 285; *McDowell v. R. R.*, 186 N.C. 574; *Michaux v. Rubber Co.*, 190 N.C. 619; *Bryant v. Construction Co.*, 197 N.C. 643; *Brady v. R. R.*, 222 N.C. 374.

C. E. GROVE ET AL., V. JOHN A. BAKER ET AL.

(Filed 12 December, 1917.)

1. Appeal and Error—Verdict Set Aside—Refusal of Judgment.

Where judgment upon the verdict has been asked and the judge sets aside an answer to one of the issues as a matter of law, and not within his discretion, the right demanded is a substantial one, and an appeal from its refusal will presently lie, and is not fragmentary.

2. Verdicts—Answer to Issues—Definiteness—Courts—Findings of Fact.

Where on a trial in ejectment a court map has been introduced and used by the parties and referred to in the court's instruction to the jury, and the true divisional line between the lands is in dispute, an answer to the issue that the line is between "4 to 3" is sufficiently definite upon which to render judgment, it being found as a fact by the trial judge that the response referred to these figures upon the official map.

3. Same—Waiver—Presumptions—Evidence.

Where a verdict is rendered in open court, a party should then object to the indefiniteness of an answer to an issue, so the judge could submit it to the jury again, or he will be deemed to waive his objection; and when this course has not been taken and the judge has found sufficient facts upon which its definiteness is made to appear on appeal, his finding will be presumed to have been upon sufficient evidence, nothing else appearing.

4. Appeal and Error—Refusal of Judgment—Verdict—Objections and Exceptions—Case.

Where the trial judge erroneously sets aside an answer to an issue as a matter of law and refuses judgment upon the verdict the appellate court will reverse such action; but appellant's other exceptions, if properly taken, will be preserved to him.

GROVE *v.* BAKER.

APPEAL by plaintiffs from *Shaw, J.*, at March Term, 1917, of BUNCOMBE. (746)

Ejectment. The jury responded to the issues as follows:

1. Are the plaintiffs the owners and entitled to the possession of the tract of land described in the complaint? Answer: Yes.

2. Are the defendants in the wrongful possession of said land, or any part thereof? Answer: Yes.

3. Where is the true dividing line between the lot claimed by the plaintiff and that claimed by the defendant? Answer: 4 to 3.

4. What damages, if any, are the plaintiffs entitled to recover? Answer: One dollar.

The plaintiffs moved for judgment upon the verdict. The defendants moved to strike out the response to the third issue as too indefinite and to grant a new trial on that issue. The court being of that opinion so ordered, "simply as a matter of law, and not in the exercise of any discretion."

The court found the facts as follows: "O. L. Israel, the county surveyor who had been appointed by order of the court to make a survey showing the lines in controversy and the contentions of the parties, was introduced as a witness on behalf of the plaintiffs. The said Israel, under the order appointing him surveyor, was ordered by the court to make maps and blue-prints, and they were used by him in explaining his testimony to the jury and were also used by the court and referred to by the court in its charge to the jury. The court also used said blue-prints or maps in stating the contentions of the parties. The court finds as a fact that the answer of the jury to the third issue 'from 4 to 3' referred to the fig- (747) ures 4 to 3 as laid down on the plat of the official surveyor made by O. L. Israel, court surveyor, a copy of said map being hereto attached and made a part of this judgment."

The plaintiffs appealed.

Martin, Rollins & Wright for plaintiffs.

M. W. Brown, James H. Merrimon, and J. M. Gudger, Jr., for defendants.

CLARK, C.J. The defendants contend that the appeal from the order setting aside the finding on the third issue and awarding a new trial as to that is fragmentary and premature. This would be so if the partial new trial had been granted as a matter of discretion (*Billings v. Observer*, 150 N.C. 542), but the plaintiff's appealed from the refusal of their motion for judgment upon the verdict. The finding upon the third issue was set aside as a matter of law and not of

discretion. The right to a judgment is a substantial right, and from its erroneous refusal an appeal lies.

As the court found upon adequate evidence that the finding upon the third issue "from 4 to 3 referred to those figures upon the map made by the county surveyor under order of the court, which was referred to by the court in its charge, blue-prints of which were given to the jury under such instructions," it was error to hold as a matter of law that the response to the third issue was too indefinite to justify judgment thereon.

The verdict of the jury, taken in connection with the evidence in the case and the findings of fact by the judge, is entirely definite and entitled the plaintiffs to judgment in accordance therewith.

In *Reynolds v. Express Co.*, 172 N.C. 491, it is said: "It is a recognized principle in our system of procedure that a verdict may be interpreted and allowed significance by proper reference to the pleadings, the evidence, and the charge of the court."

"A verdict should be liberally and favorably construed with a view to sustaining it if possible, and in order to a proper apprehension of its significance resort may be had to the pleadings, the evidence, and the charge of the court." *Donnell v. Greensboro*, 164 N.C. 337. "The meaning of a verdict may be found by reference to the charge of the court." *S. v. Murphy*, 157 N.C. 616.

In this case the blue-prints which the jury had before them in deliberating upon their verdict and in returning the same was the official plat. A case almost exactly in point is *Smith v. Fite*, 98 N.C. 517, an action of ejectment, where the jury found that the plaintiff was the owner of the land in dispute "up to the red line upon our plat." The defendant moved for a new trial and to set aside
(748) the verdict for uncertainty. The court rendered judgment in favor of the plaintiff up to the red line in accordance with the finding of the jury, and on appeal this Court affirmed the judgment, saying: "The verdict refers to the plat which, it is manifest was before the jury and the court, and which had, as the record shows, been prepared under an order of survey previously made in the cause, and we must assume that the reference to the plat rendered the verdict intelligible and certain, upon which the court could render judgment. This is made plain by the reference to the verdict contained in the judgment."

In this case the judge finds as a fact that the answer of the jury to the third issue "from 4 to 3" referred to the figures 4 to 3 as laid down on the plat of the official court surveyor.

If the verdict was rendered in open court, the counsel for the defendants should then and there have made the objection for the alleged indefiniteness of the words "4 to 3" in the response to the third

issue, and the court, of course, would at once have referred the matter to the jury. *S. v. Whitson,* 111 N.C. 695. Not having done so, the objection was waived. Indeed the jury could be reassembled. *Luttrell v. Martin,* 112 N.C. 607; *Petty v. Rousseau,* 94 N.C. 362.

It may be, though it does not appear here, that the jury could not be reassembled, but the judge, if such was the case, must be presumed to have acted upon testimony in making his finding above set out. There is no allegation that there was no evidence to sustain such finding, and we must presume it to be correct.

The appeal from the judgment is a sufficient assignment of error and no case on appeal is necessary.

The judgment setting aside the third issue as a matter of law for indefiniteness is therefore set aside, and the case is remanded that judgment may be entered in accordance with the verdict and the facts as found by the judge. When the judgment is so entered, the defendants will be entitled to appeal upon any exceptions taken by them at the trial if they have preserved such exceptions by filing them in the record. *Bazemore v. Bridgers,* 105 N.C. 192.

Reversed.

Cited: Balcum v. Johnson, 177 N.C. 218; *S. v. Snipes,* 185 N.C. 747.

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(749)

MARY H. HOWLAND v. CITY OF ASHEVILLE.

(Filed 12 December, 1917.)

Municipal Corporations—Water-works—Fires—Negligence.

Where, under its charter, a municipality furnishes water to its inhabitants for private use upon compensation, and also water with connections and appliances for extinguishing fires from its public funds, without charging its inhabitants therefor, in the latter instance there is no contractual relations between the municipality and its inhabitants but the exercise of a governmental function, and the municipality cannot, in the absence of statutory provision, express or implied, be held liable to one whose house has been destroyed by fire through its negligence in failing to maintain adequate water mains or to supply a sufficient water pressure. As to whether liability would attach if compensation were charged, *Quœre? Harrington v. Greenville,* 159 N.C. 632, cited as controlling.

CIVIL action, tried before *Shaw, J.,* and a jury, at February Term, 1917, of BUNCOMBE.

The action was brought by the plaintiff to recover damages for the destruction of her residence in the city of Asheville. She alleged that the defendant had full power and authority under its charter to provide a system of water-works with all necessary accessories for the purpose of supplying water to its citizens for domestic purposes and for sanitary and other public purposes, and among the latter for fire protection to the city and its inhabitants. That it was authorized further to build and construct the standpipes or reservoirs for the storage of a water supply, and for the building and maintenance of all necessary structures and appliances for forcing the water through its mains and pipes laid in its streets to carry the same to the places where it was needed, and generally that its powers were not only sufficient but ample for the purpose of affording an adequate supply of water with sufficient pressure for fire protection to the city and its citizens and for furnishing to the latter a sufficient quantity of pure and wholesome water for their domestic uses. Plaintiff further alleged that the defendant had failed to perform its duty to the public, and especially to her, in that the pipe laid near her house was too small to carry a sufficient stream of water with the requisite pressure to protect her property, and that this fact had been called to the attention of the city authorities, who were requested to remedy the defect, but that they failed to heed her request, and consequently when her house caught fire, the supply of water and the pressure were insufficient to quench the flames or to check the fire, except to a very small extent, and that she lost her home by reason of the defendant's neglect in the particulars mentioned.

There was a 6-inch pipe laid by the plaintiff in the street near her home, which she asked the defendant before the fire to enlarge so as to afford a greater volume of water for her protection
(750) against fire, but this was not done until after the fire, when a 10-inch pipe was substituted.

The principal complaint of the plaintiff was the lack of water pressure. There was competent evidence that no charge was made by the city for water used to extinguish fires, but the expense of all water consumed for that purpose was paid out of the general fund. This statement is sufficient to show the general nature of the cause of action without setting out more fully the allegations of the complaint and the evidence.

At the close of the evidence and on motion of the defendant the court dismissed the action as of nonsuit, and plaintiff appealed.

Thomas Settle, Curtis Bynum, and Merrimon, Adams & Johnston for plaintiff.

Marcus Erwin and Harkins & Van Winkle for defendant.

WALKER, J., after stating the case: We are unable to distinguish this case from *Harrington v. Greenville,* 159 N.C. 632, for, on the contrary, we think that the two cases are in every material respect exactly alike, and certainly they are sufficiently so to require that they should be governed by one and the same principle. We may go even further and say that if there is any difference between the two cases, it is favorable to the defendant in this case, and clearly shows that it is not liable for the plaintiff's unfortunate loss of her property.

In providing for water at hydrants distributed throughout the city, there is no exercise of a private or corporate duty arising out of contract, as where the city is engaged in business of its own for the purpose of gain or profit, but it is exercising a governmental function, and it is not liable for any damage to a citizen if there is a failure to perform it, or to perform it properly or even negligently.

The language of Justice Hoke in the Harrington opinion states a case so clearly analogous to this one that we will do well to quote it: "As we interpret the complaint, plaintiff states and intends to state his grievance in two aspects: (1) That his property was destroyed by reason of negligent failure of the city of Greenville to abate a nuisance which threatened the result; (2) that the injury arose in whole or in part from negligent default in equipment and operation of a fire department maintained by the city for the public benefit; and under our decisions both questions must be resolved against him. It is well recognized with us that unless a right of action is given by statute, municipal corporations may not be held civilly liable to individuals for 'neglect to perform or negligence in performing duties which are governmental in their nature,' and including generally all duties existent or imposed upon them by law solely for the public benefit," citing *McIlhenny v. Wilmington,* 127 N.C. 146; *Moffitt v. Asheville,* 103 N.C. 237; *Hill v.* (751) *Charlotte,* 72 N.C. 55.

This Court has held that a municipal corporation is not civilly liable for the failure to pass ordinances to preserve the public health or otherwise promote the public good nor for any omission to enforce the ordinances enacted under the legislative powers granted in its charter, or to see that they are properly observed by its citizens, or those who may be resident within the corporate limits. *Hull v. Roxboro,* 142 N.C. 453. And in another case, that an employee of a fire department of a city cannot recover for injuries caused by a

hose reel of the city fire department being *knowingly* allowed to be and remain in unsafe and dangerous condition. *Peterson v. Wilmington,* 130 N.C. 76.

It was said in the *Harrington* case, at p. 635: "The ruling in the last case *(Peterson v. Wilmington, supra)* was made to rest on the principle that in maintaining and operating a fire department for the benefit of the public, the city was engaged in the exercise of governmental duties, and therefore not liable to individuals, unless made so by statute, a position in accord with the general current of authority," citing *Wild v. Patterson,* 47 N.J.L. 406; *Fisher v. Boston,* 104 Mass. 87; *Jewett v. New Haven,* 38 Conn. 368; *Torbush v. Norwich,* 38 Conn. 225; *Long v. Birmingham,* 161 Ala. 427; *Mayor of New York v. Workman,* 67 Fed. 346.

The defendant is not liable in such cases, because it is performing the functions of government, where the whole community is affected in the same way, though not all perhaps in the same degree, and is not performing an act of a business nature for its own benefit. *Edgerby v. Concord,* 6 N.H. 8.

It was said in *Howison v. New Haven* (Conn.), 9 Am. Rep. 342: "The acceptance of a special charter by a municipal corporation, authorizing it to perform a strictly governmental duty, does not create a contract between the corporation and the State that it shall be performed, nor make a corporation liable for any omissions to perform or a negligent performance of it." And in *Kirch v. Louisville,* 101 S.W. 373, it was held that a city is exercising a purely *governmental* function when it is supplying water for its public uses, such as watering its streets and parks and extinguishing fires. It was upon the same general principle that the cases of *Hipp v. Ferrall,* 173 N.C. 167; *Hudson v. McArthur,* 152 N.C. 445, and *Templeton v. Beard,* 159 N.C. 63, were decided. See, also, *McConnell v. Dewey,* 5 Neb. 385; *Bates v. Horner,* 65 Vt. 471 (22 L.R.A. 824, and note); *S. v. Harris,* 89 N.C. 169, and there are numerous other cases in our Reports of the same kind.

In the case of *Moffitt v. Asheville,* 103 N.C. 237, Justice Avery states the rule clearly and succinctly. He says: "Where a city or town is exercising the judicial, discretionary or legislative au-
(752) thority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute (expressly or by necessary implication) subjects the corporation to pecuniary responsibility for such negligence," citing *Hill v. Charlotte,* 72 N.C. 55, and many other cases, among them *Donohue v. City of Brooklyn,* 51 Hun. 563, and *Hill v. City of Boston,* 122 Mass. 344, in which the authorities are collected.

In this case there was no statutory liability imposed on the defendant, and no special contract with the plaintiff, as she was being served just as were other citizens of the same community, there being no extra charge made to any of them for the use of water at fires, if such a payment would make any difference, which we do not decide, as it is not necessary to do so. The fire department was intended for the common benefit and protection and was maintained at the public expense. There is no view of the facts disclosed by this record which would justify a recovery by the plaintiff. There are numerous cases cited in the defendant's brief which show a very strong trend of judicial opinion against the liability of a municipal corporation in a case like this one. We will add a few authorities, which are taken from those relied on by defendant, to those already cited, as they illustrate the principle that for negligence in the management of its fire department or its apparatus which results in the loss of his property by one of its citizens, the municipality is not responsible. *S. F. & M. Ins. Co. v. Keeseville,* 148 N.Y. 46; *Tainter v. Worcester,* 123 Mass. 311; *Van Horn v. Des Moines,* 63 Iowa 447; *Wright v. Augusta,* 78 Ga. 241.

In the last cited case the Court said: "Our attention has been directed to no case where a municipal corporation has been held liable for damages done to the property of a citizen in consequence of its failure to provide suitable engines and apparatus, or on account of defective cisterns, or an insufficient supply of water to extinguish the flames, or to the inefficiency, carelessness, and neglect of its firemen or the officers in charge of them, and whose duty it is to direct their operations; while we have been furnished with a number of cases that hold they are not so liable, even when they have authority to levy and collect taxes for that purpose."

The cases cited by the learned counsel of the plaintiff are not applicable, but are clearly distinguishable. Some of them were actions upon contracts with water companies, and others where the city was furnishing light to private consumers for a consideration accruing to itself alone. Such were *Gorrell v. Water Supply Co.,* 124 N.C. 328; *Jones v. Water Co.,* 135 N.C. 553; *Morton v. Water Co.,* 168 N.C. 582; *Powell v. Water Co.,* 171 N.C. 290; *Fisher v. Water Co.,* 128 N.C. 375; *Fisher v. New Bern,* 140 N.C. (753) 506; *Harrington v. Wadesboro,* 153 N.C. 437, and *Terrell v. Washington,* 158 N.C. 281. We need not refer to them more specially, except to say that they rest upon a different principle and upon their own peculiar facts, which are not to be found in this record. We have reached the limit of municipal liability in deciding

them and should keep strictly within it, for there would be great danger of serious injury to the public if it should be transcended.

No error.

CLARK, C.J., concurs in this opinion. I understand this opinion and *Harrington v. Greenville,* 159 N.C. 632, to affirm the nonliability of a municipality in exercising the governmental function of maintaining a fire department, but that these cases do not apply where a city or town is maintaining a system of municipal waterworks. In such case, the liability of the municipality to employees, to the public, to patrons and to any others is the same as a privately owned water company, for the reason that the municipality is then operating a business enterprise, and not governmentally.

Cited: Mack v. Charlotte, 181 N.C. 385; *James v. Charlotte,* 183 N.C. 632; *Scales v. Winston-Salem,* 189 N.C. 471; *Mabe v. Winston-Salem,* 190 N.C. 487; *Holmes v. Upton,* 192 N.C. 179; *McKinney v. High Point,* 237 N.C. 74; *Candler v. Asheville,* 247 N.C. 406; *Rhyne v. Mt. Holly,* 251 N.C. 526; *Ins. Co. v. Johnson, Comr.,* 257 N.C. 370.

JAMES J. BAILEY v. CLAUDE D. JUSTICE ET AL.

(Filed 12 December, 1917.)

1. Appeal and Error—Presumptions—Instructions—Record—Trials.

The appellant must show error in the trial of the case in the Superior Court, and where, in an action involving the title to land claimed by him under a tax deed, the judge has instructed the jury to answer the issue against him, for insufficiency of evidence to locate the land, the judgment will be affirmed if the record does not show the evidence upon which the instruction was based.

2. Appeal and Error—Assignments of Error—Objections and Exceptions.

An assignment of error, to be considered on appeal, must be based upon an exception previously taken and appearing in the record.

CIVIL action, tried before *Shaw, J.,* and a jury, at March Term, 1917, of BUNCOMBE.

The action was brought to recover the possession of land, and the following verdict was returned by the jury:

1. Is the plaintiff James J. Bailey the owner of lot B and C on the court map, as alleged in the complaint, or any part thereof, and

if so, what part? Answer: Yes, one-fourth undivided interest in lots B and C.

2. Is the plaintiff James J. Bailey the owner of lot D on the court map, as alleged in the complaint, or any part (754) thereof, and if so, what part? Answer: Yes, one-fourth undivided interest in lot D.

3. What damage, if any, is the plaintiff James J. Bailey entitled to recover of the defendants W. T. and C. D. Justice? Answer: None.

4. Is the defendant W. T. Justice the owner of the land sued for, to-wit, B, C, and D, or any interest therein, and if so, what interest? Answer: Yes, one-fourth undivided interest in said lots.

5. What damage, if any, is the defendant W. T. Justice entitled to recover of the plaintiff? Answer: None.

6. What interest, if any, has Ailsey McKesson, *alias* Ailsey O'Neil, in lots B, C, and D above referred to? Answer: One-fourth undivided interest.

7. What interest, if any, have the children of Charlotte Scales in lots B, C, and D above referred to? Answer: One-fourth undivided interest.

8. What interest, if any, has Jones Bailey or his children in lots B, C, and D above referred to? Answer: None.

Judgment was entered thereon, and W. T. Justice appealed, the other appellant, Claude D. Justice, having abandoned his appeal.

J. Scroop Styles and Mark W. Brown for plaintiff.
George A. Shuford and Ernest G. Mick for defendants.

WALKER, J., after stating the case: It appears in the record that the appellant claimed a one-fourth interest in each of the lots B, C, and D as a tenant in common, but he also claimed that he had purchased the entire interest in lot D at a tax foreclosure sale. He recovered the one-fourth interest claimed by him, as the verdict and judgment will show, but the presiding judge was of the opinion, and so held, that he had not offered evidence sufficient to locate the land bought by him at the tax foreclosure sale. It does appear by a record of the suit of J. Mooney v. Rebecca Bailey and others, who are the heirs of James Bailey, Sr., that he bought certain land which the commissioner appointed by the court in that case had sold to foreclose a tax purchase by the plaintiff Mooney, the land bought by him being described in the complaint in that action, but, as stated, the court ruled, and so instructed the jury, that there was no proof to show where the land is situated, or whether it was lot D or a part of that described in the complaint,

the language of the court being, "There was no sufficient evidence to locate said tract"; that is, the land described in the record of the Mooney suit or in the commissioner's deed, and as the evidence has not been sent to this Court, we are, of course, unable to say whether or not this ruling was correct, or, in other words, whether there was such evidence. We must see the evidence before we can say whether it tended to locate the land or identify it as lot
(755) D and a part of the land described by the plaintiff in his complaint.

This Court does not presume error in the proceedings below, but he who alleges it must show it affirmatively on the record. The presumption always is that the ruling of the judge is correct, and it will be sustained unless prejudicial error appears. *Todd v. Mackie,* 160 N.C. 357; *In re Smith's Will,* 163 N.C. 466, and *Univ. Oil & F. Co. v. Burney,* at this term (93 S.E. 912).

Applying this rule of appellate courts in *S. v. Smith,* 164 N.C. 479, and *Warren v. Susman,* 168 N.C. 464, we sustained rulings of the Superior Courts because we did not know, in the one case, the nature of the evidence, and, in the other, the allegations of a pleading in regard to which the exceptions were taken and which were necessary to be known in order to determine whether or not there was error. We merely presumed the correctness of the proceedings below because we could not see any error in them as it was not made to appear. So here we cannot say whether there was proof as to the location of the land because the evidence is not in the record.

We need not consider the other question, as to the purchase of the land at the tax sale, for it becomes immaterial if the land was not located, and the jury were instructed that it had not been and found accordingly.

We have considered only what is in the case, and not what is in the assignments of error, unless based upon exceptions taken at the trial. An assignment of error is of no avail unless it rests upon an exception previously taken and appearing in the record. *Todd v. Mackie,* 160 N.C. 352; *Worley v. Logging Co.,* 157 N.C. 490; *Allred v. Kirkman,* 160 N.C. 392.

Our decision on the other question renders immaterial the other exceptions.

No error.

Cited: Bailey v. Mitchell, 179 N.C. 100; *Call v. Stroud,* 232 N.C. 480.

I. H. WILSON v. JEFF WILSON.

(Filed 12 December, 1917.)

1. Costs—Ejectment—Possession—Admissions.

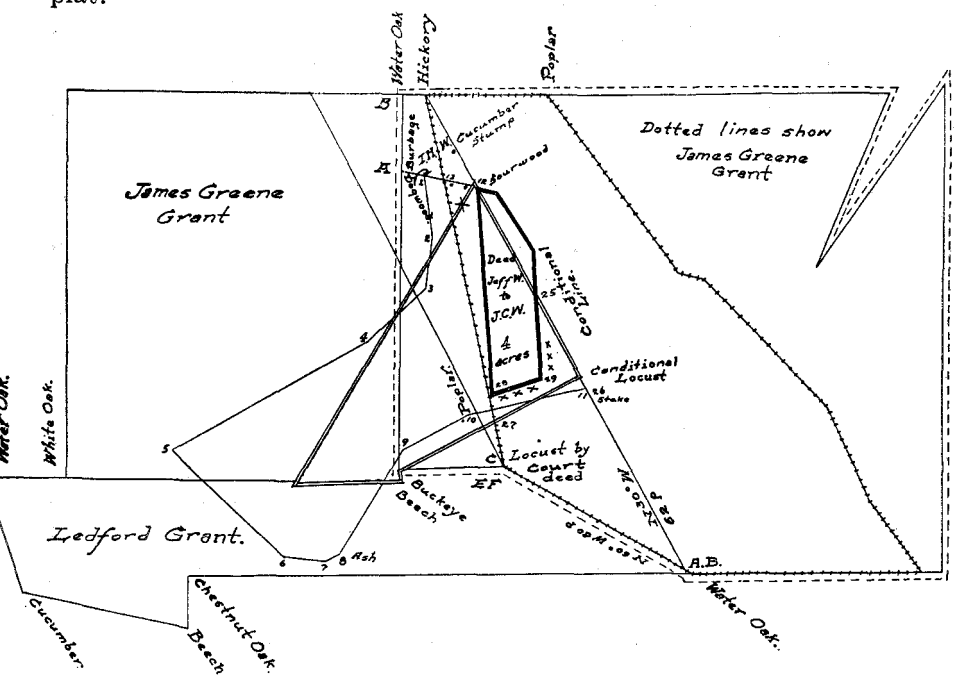
In a possessory action to recover lands, the defendant is not entitled to recover costs when the verdict awards the lands to the defendant that are claimed by him and in his possession; nor is the plaintiff in better position with regard to the costs where the defendant admits that the plaintiff is the owner of the land contained in his larger boundaries, except the *locus in quo*.

2. Appeal and Error—Judgments—Admissions—Ejectment.

Where the judgment does not accord with the admission of the parties in an action for the possession of land, the judgment may be corrected on appeal to avoid further litigation, and thus corrected, affirmed.

APPEAL by plaintiff from *Lane, J.*, at the November Term, 1916, of MITCHELL. (756)

This is an action to recover land covered by the following plat:



Narrow black lines with short lines across—Court deed.
Heavy black lines—Deed to J. C. Wilson by Jeff Wilson.
Deed from J. C. Wilson to I. H. Wilson—Figures 1 to 13.
Dotted lines—James Greene Grant which covers disputed land.
Double lines—Deed from James Greene to Wm. F. Wilson, as located by plaintiff.
I. H. Wilson 2 acre deed—Letters A. to E.

The plaintiff alleges in his complaint that he is the owner (757) of the land within the boundaries 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 1, and that the defendant is in the unlawful possession of a part thereof beginning near the poplar in line 9, containing about one acre.

The defendant denies that the plaintiff is the owner of the land in the complaint, and alleges that he is the owner of the part of the land he is in possession of. He also alleges in what is called the rejoinder to the reply that heretofore there was an arbitration between the father of the plaintiff and the defendant, in which it was found in the award that the defendant was the owner of one acre of land, and that this is the acre of land in dispute in this action, being within the lines 25, 26, 27, 28, 29 and back to 25.

At the close of the evidence and as the argument was about to begin, the defendant made the following admissions in the case: "The defendant admits that the plaintiff is the owner of all the land described in the complaint, except that part shown on the map S. and S. E. of the 4-acre tract marked with XXX; and the defendant admits that if the line is established running from the water oak, passing 11 to the sourwood and west to the hickory, that the plaintiff is the owner of all the land described in the complaint."

The jury returned the following verdict:

1. Is the line dividing the lands between plaintiff and defendant a line running from A. B. to a hickory, or a line running from C to the hickory? Answer: From C to hickory.

2. Did the heirs at law of Isabella Wilson, to-wit, J. C. Sam and W. McWilson, by a prior contemporaneous survey preparatory to executing deeds between themselves and with the view thereto run the line from the ash at 1, to 9, 10, 11 and on to the sourwood corner? Answer: No.

3. Is the plaintiff the owner of the land laid out on the map, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and back to 1? Answer: No.

Judgment was rendered declaring that defendant was not in possession of any part of the land described in the complaint except the one acre above described; that the plaintiff is not the owner of said one acre, and that he take nothing by his action, and that the defendant recover of the plaintiff and his surety his costs.

The plaintiff excepted to the judgment for costs, and appealed.

S. J. Ervin, Charles E. Green, and Hudgins & Watson for plaintiff.

Black & Wilson and Pless & Winborne for defendant.

ALLEN, J. The plaintiff cannot invoke the principle that when there is no disclaimer, and the plaintiff recovers a part of the land in controversy, he is entitled to recover costs, because he has recovered nothing.

Under the first issue, which establishes the line between the plaintiff and defendant "from C to hickory" the defend- (758) ant would be entitled to more land than he is claiming, and under the third issue it is found that the plaintiff is not the owner of the land described in the complaint. The plaintiff cannot, therefore, claim anything under the issues, and in the judgment "it is adjudged that the plaintiff takes nothing by this action."

Nor is the plaintiff in any better position as to costs on account of the admission made by the defendant at the trial that the plaintiff is the owner of all the land described in the complaint, except the one acre, for the reason that the defendant has not been in possession of any other land, and when the action is possessory, and not to remove a cloud from title, it is only when the plaintiff recovers a part of the land *in possession* of the defendant that he can recover costs.

The action cannot be maintained except against one in possession *(Doggett v. Hardin,* 132 N.C. 690), and it was said in *Hipp v. Forester,* 52 N.C. 599: "It has been suggested that, as the declaration included the whole tract granted to Franks, and as the defendant did not disclaim for the part of which he was not in possession, the lessor was entitled, at least, to a verdict for that part. That proposition cannot be sustained, because, as to such part, he was already in possession, and could not, therefore, maintain ejectment against another person for it."

This was under the old system, it is true, but it is affirmed and recognized as still existing under the Code in *Cowles v. Ferguson,* 90 N.C. 313.

In *Atwell v. McLure,* 49 N.C. 371, Pearson, J., in the opinion, for the purpose of illustration, puts this case: "Suppose the declaration is for a tract of land, setting out the metes and boundaries; the party upon whom the declaration is served makes himself defendant; on the trial it turns out that the defendant has title to so much of this tract as he is in possession of; the plaintiff has title to the remainder, but the defendant never was in possession of that part. The defendant is entitled to judgment because the plaintiff has failed to prove that he (the defendant) was in possession of any land to which the plaintiff had title."

The admission, therefore, while sufficient as a basis for an adjudication of title does not entitle the plaintiff to recover anything of the defendant because the defendant was not in possession of any

part of the land, the title to which was admitted to be in the plaintiff, and if so, he cannot recover costs.

The pleadings as well as the admissions of the parties show clearly that the only matter in dispute is as to the ownership of the one acre, and that the defendant has no possession outside of the acre, and as the plaintiff has lost upon the controverted ques-
(759) tion, he ought to pay the costs.

It appears, however, on the face of the record, that the judgment is not in accordance with the admissions of the parties, and to the end that further litigation may be averted it is ordered that it be modified by adjudging that the plaintiff is the owner of the land within the boundaries, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and back to 1, except that part within the boundaries 25, 26, 27, 28, 29 and back to 25 and that defendant is the owner of the exception and as thus modified that it be affirmed.

Modified and affirmed.

Cited: *S. v. Jones,* 182 N.C. 784.

ANNIE HENSLEY ET AL., V. MRS. KATE BLANKINSHIP.

(Filed 12 December, 1917.)

Deeds and Conveyances—Delivery—Husband and Wife—Acknowledgment —Death of Wife.

A deed to lands is only complete upon delivery, and a married woman's deed to her lands requires the written consent of her husband under the form provided for by the statute (Revisal, sec. 952), requiring that such conveyance be signed by both the husband and wife; and a deed made and signed in due form by the wife, and thereafter the husband writes in his name as a grantor, and, after her death, acknowledges its execution before the clerk, is invalid to pass title.

APPEAL by defendant from *Ferguson, J.,* at August Term, 1917, of YANCEY.

This is an action to recover land and to remove a cloud from title.

The plaintiffs are the heirs of Mrs. E. J. Angell, who formerly owned the land.

She was the first wife of D. A. Angell, who, upon her death, married the *feme* defendant, who, upon his death, married the male defendant, and is now Mrs. Blankinship.

The defendant, Mrs. Blankinship, claims under a deed from D. A. Angell, and the whole controversy depends on the validity of a deed purporting to be executed by Mrs. E. J. Angell to one W. W. Burton, who afterwards executed a deed purporting to convey the land to D. A. Angell.

If the deed to Burton is invalid, the plaintiffs are owners of the land as the heirs of E. J. Angell; and if valid, the defendant is the owner as the grantee of D. A. Angell.

Six days before the death of Mrs. E. J. Angell, she signed and delivered a paper-writing sufficient in form to convey (760) said land. Said paper was acknowledged by the said E. J. Angell, and her private examination taken thereto, but at the time of its delivery the said D. A. Angell had not signed the paper, nor acknowledged the execution thereof.

The said paper-writing was written by the said D. A. Angell, and thereafter, whether before or after the death of his wife is in dispute, he signed the paper, and inserted his name as a grantor in the probate, and after the death of his wife he acknowledged the execution thereof before the clerk.

There was a verdict and judgment for the plaintiffs, and the defendants appealed.

Spainhour & Mull for plaintiff.
Hudgins, Watson & Watson and J. Bis. Ray for defendant.

ALLEN, J. There are several exceptions in the record, but there are two principles that are decisive of the appeal upon the facts that are not in dispute.

The first is that a deed must be complete when delivered *(Butler v. Butler,* 169 N.C. 589); and the second, that the deed of a married woman purporting to convey her land is not valid unless signed and *acknowledged* by her husband. *Graves v. Johnson,* 172 N.C. 177.

The statute and the authorities applicable to the last question are reviewed in the case cited, and it is needless to extend the discussion further, except to say that the decision proceeds upon the idea that while the Constitution says a married woman may convey her land with the written assent of her husband, as if unmarried, it is still within the power of the General Assembly to prescribe the form which will furnish evidence of such assent, and that the statute (Revisal, sec. 952) requires that the deed shall be signed by the husband and acknowledged by both husband and wife.

It follows, therefore, as the paper-writing signed by the wife was neither signed nor acknowledged by the husband at the time of its delivery, it did not operate as a conveyance, and that his

Honor might have instructed the jury to answer the issues in favor of the plaintiffs in any aspect of the evidence.

No error.

Cited: Stallings v. Walker, 176 N.C. 324.

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(761)

J. F. WILKINSON v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 12 December, 1917.)

Negligence — Railroads — Customs—Flying Switch—Contributory Negligence—Trials—Questions for Jury.

Where a railroad company uses its spur track to manufacturing plants frequently during the day for switching purposes, and upon which for ten years it has permitted employees of its users there to go in between detached cars standing thereon, or to move the same, as required by their shipping; and there is evidence that, in conformity with this custom, and in the course of his duties, one of these employees, after assuring himself of his safety, is injured while moving one of these cars, by defendant's locomotive making a "flying switch" and shunting cars upon that on which he was so engaged, without signal or warning of any kind, and without a man on the car: *Held,* in the employee's action against the railroad, the question of plaintiff's contributory negligence is properly submitted to the jury, under a proper charge, approved in this case, upon the principle that the plaintiff had the right to assume that the defendant's employees on the locomotive would not violate the duty they owed him, or be guilty of negligent acts in this respect that would cause him injury. *Wyatt v. R. R.,* 156 N.C. 313; *Hudson v. R. R.,* 142 N.C. 198, cited and applied.

APPEAL by defendants from *Ferguson, J.,* at September Term, 1917, of MCDOWELL.

This is an action to recover damages, for personal injury, by the plaintiff, an employee of the Marion Novelty Company.

The defendant relied on the plea of contributory negligence.

The plaintiff was injured on 6 April, 1917, on one of the switch tracks of the defendant, the Southern Railway, at Marion, N. C. The switch is located on the north side of the defendant's main line and west of the freight depot. It is connected with the main line or passing track at a point just west of a street or highway crossing just west of the depot, and runs west for some distance parallel with the main line, and then curves sharply towards the north and away

from the main line, on a curve of about 30 degrees, and is about one-fourth of a mile in length.

Marion is a junction point for three railroads, and a town of industrial activity, having a number of furniture factories, cotton mills, and, in consequence, a switching engine and its crew is stationed at Marion for the purpose of transferring cars from one road to another, making up trains and serving factories in placing and removing cars for loading and unloading. This switch track on which the plaintiff was injured is constantly used by the defendant in its switching operations about its depot, loaded and unloaded cars being constantly placed and removed therefrom by said switching engine. The said switch track also serves the Marion Novelty Company and the Blue Ridge Furniture Company, whose factories and plants are located along said track. The first named (762) being located nearest the depot, but some distance away from the eastern end of the track, where it connects with the main line. At times this track was filled with cars placed thereon by the defendant in its switching operations, and sometimes it contains a very few cars and at other times it contained no cars. The defendant's switch engine frequently entered upon this track each day in the course of its switching operations about the depot, placing cars on the track and taking other cars off the track, and the plaintiff had knowledge of the fact that engines and cars frequently entered thereon on an average of five or six times a day. On 6 April, 1917, there was a number of cars on this track, which blocked the way between the buildings of the Novelty Company, which said buildings were on the opposite side of the track, and the superintendent of the Novelty Company, the plaintiff, desired to place some veneering in the building on the south side of the track, called some others and entered upon the track, undertook to move the cars so as to effect a crossing over the track between the buildings in order to get across. There were several cars on the track, some four or five of these cars being on the track between the building and the east end of the track where it connects with the main line, when plaintiff, in order to remove said cars, entered between them, and after uncoupling one of said cars, undertook to remove the same with a car-mover and by pushing against the same some four or five cars then being on the track between the plaintiff and the eastern end of the track the plaintiff being on the south side of the track. After working some time in the effort to remove this car further west, some cars rolled in on the track, which came in collision with the cars further east, causing them to roll down on and against the plaintiff, inflicting the injuries complained of.

There was evidence tending to prove that the conductor and en-

gineer of the defendant made a flying switch and shunted cars from the main line to the spur track, where they collided with the car, which injured the plaintiff; that no notice or signal was given; that the cars made very little noise; that no one was on the car; and that a man on the cars could see there were men at work at the car, which was struck, in time to avoid the collision.

There was also evidence that for ten years the employees of the Novelty Company and its predecessor had continuously passed over the spur track, and that when cars were present they passed under the cars, or between the bumpers, and that sometimes the employees of the company moved the cars to make a passageway to their work.

There was also evidence that a few minutes before the plaintiff was injured, Hild, secretary of the Novelty Company, went to look for an engine; that he took a position from which he could see to the upper end of the yard and down past the depot, and could
(763) see no engine; that he asked an employee of the defendant at the crossing where the engine was and was told he thought it had gone to C., C. & O. depot; that he went back and told the plaintiff and the others to look out for the engine, and that he could not see one and for them to go ahead with their work.

There was a verdict finding the defendant negligent; that there was no contributory negligence on the part of the plaintiff, and assessing the damages at $9,000.

There are no exceptions bearing on the first and third issues, and the only question raised by the appeal is whether his Honor ought to have instructed the jury to answer the second issue as to contributory negligence against the plaintiff.

His Honor charged the jury on the issue of contributory negligence as follows:

"I charge you that if you find from the evidence that the plaintiff and the employees of the Furniture Company, the predecessor of the Novelty Company, and the Novelty Company, for whom the plaintiff was at work at the time he was injured, had been accustomed to cross the railroad track and, whenever it was necessary, to move the cars in order to make an opening, and that this was known to the defendants, or could have been known to them by reasonable observation, and that they were permitted to do so from time to time, that permission amounted to a license, and the plaintiff was not a trespasser in attempting to move the car, if you shall so find by the greater weight of the evidence. But being a licensee or having a license to go on the track and move the cars wouldn't relieve him from the responsibility of exercising the care of a reasonably prudent man; that is, a person who is reasonably prudent, to avoid injury to himself.

"The defendants insist that on this evidence he has shown that he was not a reasonably prudent man, and that he was guilty of negligence in failing to take the necessary precaution.

"I charge you that if you find from the evidence, by the greater weight of the evidence, that the plaintiff entered upon one of the defendant's spur tracks and undertook to remove certain cars on and along said spur track, and while so engaged in removing said cars entered between certain cars on said side track and there remained for a space of several minutes in a position where he could not be seen by the defendant's servants, agents or employees in charge of an engine and cars being operated and moved about the depot nearby, knowing at the time that said spur track upon which he had entered and along which he had undertaken to move said cars was frequently used by engines and cars entering thereon for the purpose either of placing cars on said spur track or removing cars therefrom, and under such circumstances that there was danger of the plaintiff being injured by a collision between engines (764) and cars entering on said spur track and those already stationary thereon, and that the plaintiff did this without notice or warning to the defendant or to its servants, agents or employees operating a shifting engine about said depot and side track, and without keeping a lookout for his own protection, and under such circumstances that there was imminent danger of his being injured, and you further find from the evidence that was a contributing cause of the injury, then the jury will answer the second issue 'Yes.'

"If the jury find from the evidence and by its greater weight that the plaintiff entered upon the defendant's side track in the town of Marion, upon which engines and cars were being constantly moved, and where there was danger of collision between the cars already on said side track and cars placed thereon by the defendant's shifting crew engaged about said depot, and that after entering upon said side track and between the cars standing thereon that the plaintiff remained thereon, undertaking to move cars on and along said spur track, the plaintiff being in a position where he could not be seen by the members of said train crew by the exercise of ordinary care and caution, and without notice or warning given the defendant or any of its train crew in charge of said shifting engine, and without keeping a lookout for his own protection, and that plaintiff did this with knowledge of the fact that said engine was constantly placing cars on said side track and removing cars therefrom, and that there was danger of collision between the cars placed on said side track and those already thereon, and danger of the plaintiff being injured by reason of such collision, he would be guilty of negli-

gence, and if you find from the evidence, by the greater weight of the evidence, that was the contributing cause of the injury, then the jury will answer the second issue 'Yes.'

"If the jury find from the evidence that the exercise of ordinary care would have required the plaintiff before he entered between said cars on the spur track and attempted to remove the same to have given some notice or warning of his presence in a place of danger, or would have required the plaintiff to maintain some lookout in order to notify him of approaching danger while in a position where he could not be seen, and the jury further find that the failure of the plaintiff to give such notice or warning or to maintain such lookout contributed to cause and bring about his injury, then the jury will answer the second issue 'Yes.'

"If the jury find that the plaintiff did not exercise the care and prudence that an ordinarily prudent man would have exercised under the circumstances and the situation, and that his failure to do so contributed to his injury, it would be the duty of the jury to answer the second issue 'Yes.'

The plaintiff contends that you cannot find him guilty of
(765) contributory negligence. He contends that before he entered upon the work, went between the cars, he had inquiry made by the secretary and treasurer of the company and had him to look out to see whether or not there was any danger of approaching cars or engines, and he contends that from the observation which he made, or caused to be made, he had reason to believe that there was no danger, and he insists that a reasonably prudent man would have gone to the work as he did, thinking that was the condition and feeling that there was no danger in doing so; that a reasonable man would not have expected or anticipated any danger. That is his contention. If you find from the evidence that the precaution which he took and the circumstances under which he acted were that which a reasonably prudent man would do under the circumstances, being at the same time mindful to go about the work in a way in which he would not receive injury, and he exercised the care of a reasonably prudent man, that he was careful to avoid injury under the circumstances, then he would not be guilty of contributory negligence, and it would be your duty to answer the second issue 'No.'

"Now, upon these issues you are the sole judges of the credibility of the witnesses, and you will take into consideration the condition and circumstances as they have been established by the proof, and if you find from the evidence that the plaintiff was guilty of negligence under the rules which I have laid down to you upon the evidence, and that his negligence contributed to or was a contributing

cause of his injury, then it would be your duty to answer the second issue 'Yes.'"

The defendant did not except to the charge.

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

Pless & Winborne for plaintiff.
S. J. Ervin for defendant.

ALLEN, J., after stating the case: We have stated the evidence and the charge on the second issue in full because they are a conclusive answer to the contention of the defendant that the plaintiff can be declared guilty of contributory negligence as matter of law.

The car which the plaintiff and others were moving was stationary, with no engine attached, and it had been customary for ten years for the employees of the Novelty Company and its predecessors to pass continuously under and between the cars, and at times to move the cars.

The defendant knew of this custom, or it had continued long enough to furnish evidence of knowledge, and the plaintiff had the right to assume that the defendant, knowing of these conditions, would not run cars on the track with no engine attached, no man in control, and without notice or signal. The plaintiff (766) also knew that a few minutes before he was injured the secretary of the Novelty Company had gone down the track to look for an engine, and although he could see over the yard and beyond the depot, he could not find one. He was safe and free from danger, but for the negligence of the defendant, and he had no reason to apprehend that the defendant would, with knowledge that employees of the Novelty Company were continuously on the track, cause a car to go on the spur track without signal and with no one in control, and the information he received from the secretary, who looked for an engine, reasonably led him to believe there was no engine near, and that there was no reason to fear a movement of the car.

"The general rule is that every person has the right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which can come to him only from violation of law or duty to such other person. Hence, failure to anticipate defendant's negligence does not amount to contributory negligence, even though he places his property in an exposed or hazardous position." Cyc., vol. 29, p. 516; *Wyatt v. R. R.*, 156 N.C. 313.

The case is in all its essentials like *Hudson v. R. R.*, 142 N.C. 198. In that case an employee of an oil mill plant whose warehouse was by the side track of the railroad was standing on the track behind a car, which was stationary and detached from an engine and within eighteen inches of a bumper post, when a car operated as a flying switch struck the car he was behind and caused it to move and to force the plaintiff against the bumper post and injure him. The defendant relied on the plea of contributory negligence, which was not sustained, the court saying in conclusion what is very pertinent here: "The circumstances did not require the intestate to anticipate that the defendant company, in disregard of its duty, would recklessly turn a car loose on a down grade, which would run into the yard, drive the stationary cars from their position, and crush out his life."

The question of contributory negligence was submitted to the jury under a full and accurate charge, which gave the defendant the benefit of every contention it was entitled to, and so fair was it that the defendant does not complain of the misstatement of a fact, a contention of the parties, or of a legal principle.

No error.

Cited: Chaffin v. Brame, 233 N.C. 381; *Weavil v. Myers*, 243 N.C. 391; *Keener v. Beal*, 246 N.C. 255.

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(767)

FRANK WALDO ET AL., v. W. L. WILSON.

(Filed 12 December, 1917.)

Appeal and Error — Rehearing — New Trials — Costs—Printed Record—Rules of Court.

Where, upon a rehearing, the court grants a new trial, which was refused on the former hearing, all the costs of the appeal, including those of the rehearing, are properly taxed against the appellee. In this case, the general rule confining the costs to 60 pages of printed record, is enforced.

MOTION to retax costs in above case.

PER CURIAM. This appeal was heard at last term, and the judgment affirmed. A petition to rehear was filed by plaintiff in apt time

and considered by us at present term, and was allowed. The judgment of affirmance of the last term was set aside and a new trial ordered. The plaintiff now moves that the costs be taxed against defendant.

This follows as a matter of course. The former judgment of this Court having been reversed and a new trial ordered, the defendant appellee is required to pay all the costs of this Court, including the costs incurred by the rehearing. The plaintiff also asks that the costs of printing the entire transcript of the record on appeal be taxed against defendant "as the said printed transcript was agreed to by counsel for defendant."

Rule No. 31 of this Court provides, as now amended, that the actual cost of printing the transcript on appeal shall be allowed to the successful party not to exceed 85 cents per page of one copy of the printed transcript and not exceeding 60 pages of the above specified size and type unless otherwise especially ordered by the Court. We see no reason for departing from the general rule in this case.

There were two main questions presented for the consideration of the Court. One was the validity of the defendant's grant, based on entry 6317. The other matter presented to the Court related to color of title and adverse possession. A large part of the transcript is taken up with entries, grants and records bearing upon the first proposition, and which would have been unnecessary in presenting only the last contention. Inasmuch as the Court affirmed its former opinion in regard to the validity of the defendant's grant based upon entry 6317, and ordered a new trial only as to the claim of color and adverse possession, we see no reason for departing from the general rule. This rule confines the transcript to 60 pages and is intended to prevent filling the transcript with a great deal of unnecessary matter.

If the appellant permits it to go in, he runs the risk of having to pay for the unnecessary printing. In this case there (768) is much unnecessary printing in the record. We deny the motion upon the ground that a large part of it relates to a matter upon which the appellant failed to establish his contentions, although he secured a new trial.

Cited: *Waldo v. Wilson,* 177 N.C. 462.

R. A. BARRINGER ET AL., v. JOHN FOGGART.

(Filed 12 December, 1917.)

1. Appeal and Error—Issues—Objections and Exceptions.

Where the issues present every contested matter arising from the pleadings, an exception to the issues will not be sustained.

2. Appeal and Error—Trials—Pleadings—Amendments—Cause Retained—Counter-claim.

Where the defendant fails to plead a counter-claim to plaintiff's action, and after adverse verdict, an amendment is permitted for that purpose and the cause retained and tried at a subsequent term before another judge, with adverse verdict and judgment against the defendant, he cannot complain that the cause had been retained and subsequently tried, since it cures the error, if any, of the refusal to submit an issue as to the counter-claim on the first trial.

CIVIL action, tried before *Carter, J.*, at August Term, 1916, of CABARRUS, upon these issues:

1. Are the plaintiffs the owners and entitled to the possession of the property, wheat and oats, as alleged in the complaint? Answer: Yes.

2. What is the value of the property seized? Answer: $92.50.

The court rendered judgment against defendant for the possession of the property and its value, $92.50. The court then allowed defendant to file an amended answer, setting up a counter-claim against plaintiff for damages arising out of a breach of the contract by plaintiff and retained the cause for the trial of the issues thus raised. These issues were tried before Justice, Judge, at April Term, 1917, and are as follows:

1. Did the plaintiffs fail to perform their part of the contract? Answer: No.

2. What damage, if any, is defendant Foggart entitled to recover of plaintiffs for failure to perform their part of contract? Answer: $.....

Whereupon the court rendered judgment that defendant recover nothing, and that defendant pay the costs. From these judgments the defendant appealed.

(769) *L. T. Hartsell and M. H. Caldwell for plaintiff.*
H. S. Williams and J. L. Crowell for defendant.

PER CURIAM. After a careful examination of the record, we fail to find any reversible error in the trial of the issues by either of the judges who tried them. The exception to the issues cannot be sustained. They present every contested matter presented by the

pleadings. That Judge Carter did not render a final judgment, but permitted defendant to amend his answer and set up a counter-claim, is a matter of which the defendant cannot complain, since it cures any previous error in refusing to submit such issue. This counter-claim was fairly submitted to the jury at a subsequent term by Judge Justice and found against defendant. None of the assignments of error are directed to trial of the counter-claim.

Upon the whole record, we find

No error.

CHARLES A. WILLIS v. R. B. WILLIAMS.

(Filed 12 December, 1917.)

1. Appeal and Error—Harmless Error.

The admission of irrelevant and incompetent evidence which does not prejudice the appellant is not reversible error.

2. Appeal and Error—Court's Discretion—Verdict—Weight of Evidence.

The refusal of the trial court to set a verdict aside as against the weight of the evidence is within his sound discretion, and will not be considered, on appeal, unless it has been abused.

CIVIL action, tried before *Ferguson, J.*, at January Term, 1917, of WILKES, upon these issues:

1. Did Charles A. Willis represent to defendant that there were about 2,000 bearing trees on said land? Answer: Yes.

2. Was said representation false and fraudulent? Answer: Yes.

3. Was defendant induced to purchase said land by said false and fraudulent representation? Answer: Yes.

4. What damage, if any, did defendant sustain of plaintiff by reason of said fraud? Answer: $2,000.

5. Did C. A. Willis and wife, Jennie C. Willis, transfer the notes and mortgage sued upon to Charles M. Willis at the time set forth in the complaint? Answer: Yes.

6. Did plaintiff purchase said notes before maturity, for value and without notice? Answer: No.

From the judgment rendered the plaintiff appealed.

(770)

Henry Reynolds and Hackett & Gilreath for plaintiff.

Finley & Hendren for defendant.

PER CURIAM. This action is brought to recover the sum of $2,533.34, with interest upon certain purchase-money notes, secured by mortgage upon the property, and for a foreclosure of the mortgage. The defendant admitted the execution of the notes and mortgage, but alleged that he was induced to purchase the land, at the price paid, by the false and fraudulent representations of one Charles A. Willis, the father of the plaintiff, which said Charles A. Willis was then the owner of the property and undertook to sell the same to the defendant.

The issues above set out clearly present the controversy between the parties. The plaintiff's motion for judgment on the pleadings, on the ground that the defendant admits paragraph 1 of the complaint and that the denial of paragraph 4 is not sufficient, was properly overruled.

The record in this case contains sixty-six assignments of error. Twenty-seven of them are to the rulings of the judge upon questions of evidence. Twenty-seven of them are withdrawn by the brief of the counsel for the plaintiff. Two of the assignments of error relate to the arguments and remarks of counsel in addressing the jury. Seven of the assignments of error relate to the charge of the jury. Two of them relate to the refusal of the court to grant a new trial and to set aside the verdict, and the remaining one is to the judgment.

We have examined these assignments of error, whether commented on in the brief or not, with care. Those relating to the evidence are without merit. Some irrelevant and incompetent evidence was admitted, but it was evidently harmless. In our opinion, it is unnecessary to discuss these rulings of the judge admitting or rejecting evidence. The refusal of the court to set aside the verdict as against the weight of the evidence is a matter in the sound discretion of the judge, and is not reviewable, as has been repeatedly held by this Court.

The charge of the court to the jury is, in our opinion, a full, clear, and correct presentation of the contentions of the parties, together with the evidence bearing thereon, and the law applicable thereto. The whole controversy seems to be one very largely of fact, and we find nothing in the record of which the plaintiff can justly complain.

No error.

Cited: Erickson v. Starling, 235 N.C. 657.

(771)

MRS. E. MURPHY, ADMX., ETC., v. THE CITY OF CHARLOTTE, BOARD OF WATER COMMISSIONERS OF CHARLOTTE, SOUTHERN POWER COMPANY, ET AL.

(Filed 28 November, 1917.)

Master and Servant—Employer and Employee—Disobedience of Orders—Contributory Negligence.

Where an employee unnecessarily disobeys the order of his employer, and for that sole reason has met his death in coming into contact with electric wires of another company, his contributory negligence will bar a recovery in an action for damages for his wrongful death.

CIVIL action to recover damages for the alleged negligent killing of plaintiff's intestate.

Motion to nonsuit was sustained. Plaintiff appealed.

G. A. Smith and T. A. Adams for plaintiff.

Cansler & Cansler, John M. Robinson, Osborne, Cocke & Robinson for defendants.

PER CURIAM. The deceased was employed by the Water Commissioners in patching gutters on the pumping station. While so engaged he came in contact with the electric current of the Southern Power Company's wires that supply the motive power of the station and was killed. These wires pass over the roof and enter the main building of the station and are supported by stanchions some 4 feet and 9 inches in height and carry a very heavy current, some 40,000 volts.

(1) There is no evidence of a failure to perform any duty that either defendant owed plaintiff's intestate.

(2) The defendants offered no evidence. Plaintiff's evidence makes out a clear case of contributory negligence. The intestate was instructed to patch only the gutters, warned not to get near the wires, and told to move his ladder around to the west gutter after finishing the middle gutter, and thus avoid the wires. If he had heeded instructions he would not have been injured.

Affirmed.

PRESSLY MITCHELL v. RALEIGH PEPSI-COLA BOTTLING COMPANY ET AL.

(Filed 17 October, 1917.)

Appeal and Error—Harmless Error—Auto Trucks—Statutes.

The evidence in this case presented an issue of fact as to whether the driver of an auto truck failed to stop his truck upon being signaled, as required by chapter 107, Laws 1913, or that such failure caused the injury alleged; and the exceptions to the ruling of the court upon the evidence being without significance and appreciable effect upon the verdict, no reversible error is found on appeal.

CIVIL action, tried before *Devin, J.*, and a jury, at March (772) Term, 1917, of WAKE.

The action was to recover damages for injuries caused by alleged negligence of defendant in failing to stop his auto truck when signalled to do so, as required by chapter 107, Laws 1913.

On three issues submitted, of negligence, contributory negligence, and damages, there was verdict for defendant on the first issue. Judgment on the verdict, and plaintiff excepted and appealed.

W. H. Lyon, Jr., for plaintiff.
R. N. Simms for defendant.

PER CURIAM. There was evidence on the part of plaintiff tending to show that, on 4 November, 1914, he was driving, at the head of a funeral procession, a wagon carrying the casket and dead body of a deceased colored person, when, seeing defendant approach with his truck loaded with crates and bottles and making considerable noise, plaintiff signalled to the driver to stop and he neglected or refused to do so, contrary to provisions of statute, chap. 107, Laws 1913, and by reason of said neglect, plaintiff's horse ran away, throwing plaintiff from the wagon and causing painful bruises and injuries, for which he brings suit.

The evidence on part of defendant tended to show that defendant did stop when signalled to, and waited for the procession to pass, and as plaintiff's wagon started down a hill it ran on the horse, which began to kick, breaking the harness, and that he ran away on that account.

Under a correct charge, the jury, accepting defendant's version of the occurrence, have answered the issue of defendant's negligence "No," and we see no reason for disturbing the results of the trial.

The objections to rulings of the court on questions of evidence are without substantial significance and, in our opinion, could have

had no appreciable effect on the verdict. The judgment for defendant is therefore affirmed.

No error.

Cited: Bank v. Wysong & Miles Co., 177 N.C. 292.

(773)

MARGARET D. McNEILL ET AL., v. D. A. BUIE ET AL.

(Filed 5 December, 1917.)

1. Limitation of Action—Adverse Possession—Reference—Findings—Appeal and Error.

In this action to recover land, the title to the *locus in quo* depending upon the true divisional line between the adjoining lands, the referee's finding in defendant's behalf approved and accepted by the trial judge, with defendant's possession and cultivation of the lands, such as it was capable of for thirty years, is sustained on appeal.

2. Appeal and Error—Objections and Exceptions—Briefs—Rules of Court.

Exceptions that are not taken or discussed in the brief are regarded as abandoned on appeal.

CIVIL action, tried before *Connor, J.*, at April Term, 1917, of ROBESON, upon exceptions to report of Charles G. Rose, referee.

The court adopted the findings of fact of the referee as well as his conclusions of law, and confirmed the report and rendered judgment in favor of defendants. Plaintiffs excepted to the judgment and appealed.

Seawell & Land and Manning & Kitchin for plaintiffs.
McLean, Varser & McLean for defendants.

PER CURIAM. This action is to recover a tract of land containing 24 acres, and represented on map by boundaries marked D, J, H, B, C. The plaintiffs own the land lying north and the defendants the land lying south of the *locus in quo*. It seems that both parties trace their title back to a common source, and that the controversy is as to the proper location of the dividing line between the two tracts. Plaintiffs contend the true dividing line is the red line C B on plat. Defendants contend it is yellow line J H.

The court adjudges that the true dividing line is the yellow line J H, and that plaintiffs own the lands north and defendants the

lands south of it. This finding gives the *locus in quo* to defendants.

The plaintiffs file a number of exceptions to the report of the referee and also assignments of error to the judgment of the court.

In the view we take of the case, it is not necessary in the disposition of this appeal to discuss them.

The referee finds that the "defendants and those under whom they claim have been in the open, notorious, adverse and undisputed possession of the 'middle 200 acres' of the O'Berry grant 'known as the Solomon Johnson old place,' up to the true dividing line between the Patrick Smith land and the Neill Buie land, for more than thirty years prior to the commencement of this cause."

(774) It is the middle 200 acres of the O'Berry grant known as the Solomon Johnson old place, or the Patrick Smith land that defendants own and claim covers the *locus in quo* and runs up to the dividing line J H. It is the upper 200 acres, or Buie land, that plaintiffs own and claim runs down to C B.

The referee further finds "That the defendants and those under whom they claim have exercised such ownership of the uncleared land lying south of the true dividing line between the Smith and Buie land, as the land was capable of, since 1804, the date of the deed to Patrick Smith. That the plaintiffs and those under whom they claim have never exercised any continuous acts of ownership, and have never been in the actual possession of any portion of the land lying south of the true dividing line between the Smith land and the Buie land."

The plaintiffs except to these findings of fact upon the ground that there is no evidence to support them. We think there is evidence sufficient to support the finding, but this assignment of error under the rules of this Court cannot be considered, as it is deemed to have been abandoned, not having been set out and discussed in the brief. We think this disposes of the appeal.

Affirmed.

E. F. SPAUGH v. ED PENN.

(Filed 7 November, 1917.)

Evidence—Memorandum—Examination of Witness.

In an action to recover a balance due for services rendered in cutting wood, a copy from a lost memorandum book made by plaintiff's daughter which he saw her make, and to the accuracy of which he testified, is competent to refresh his memory on the witness-stand; but the exception loses its force when it appears that the plaintiff could not read, and the copy was only used by his counsel for the purpose of examining him.

BRAWLEY *v.* TURNER.

APPEAL by defendant from *Harding, J.*, at the February Term, 1917, of FORSYTH.

This is an action to recover $25, balance due on the purchase price of a gasoline engine, and $136.21 for services rendered by the plaintiff to the defendant in sawing wood.

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

J. B. Craver for plaintiff.
J. E. Alexander and W. T. Wilson for defendant.

PER CURIAM. We have examined all of the exceptions taken by the defendant and find no error. (775)

The principal exception relied on is to the action of the court in permitting the plaintiff to use a memorandum which was copied by his daughter from a book which was lost, which the plaintiff testified he saw his daughter copy, and that it was an accurate copy, for the purpose of refreshing his memory.

If, as we understand the record, the plaintiff saw the entries made, and they were made for him by his daughter and in his presence, we see no reason in refusing to let him use it for the purpose indicated by his Honor; but if this was not so, the exception loses its force when it appears, as it does from the record, that the plaintiff could not read the memorandum, and that it was not used except by his counsel as a guide in the examination of the plaintiff.

No error.

Cited: *S. v. Smith*, 223 N.C. 459.

BRAWLEY & GANTT v. THEODORE TURNER.

(Filed 7 November, 1917.)

Contracts—Quantum Meruit.

No error is found in this action to recover upon a *quantum meruit* for the value of services rendered in procuring a pardon.

APPEAL by defendant from *Kerr, J.*, at the March Term, 1917, of DURHAM.

This is an action to recover the value of services rendered in procuring a pardon for the defendant.

There was a verdict and judgment for the plaintiffs, and the defendant appealed.

Manning, Everett & Kitchin for plaintiff.
W. H. Carroll for defendant.

PER CURIAM. We have carefully examined the record and find no error. The rulings upon evidence, considered in connection with the caution given to the jury, were clearly right, and the whole controversy resolved itself into an issue of fact for the jury.

The plaintiffs first alleged a special contract to pay them $500, but abandoned this cause of action and recovered $350 on a *quantum meruit.*

No error.

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(776)

JAMES H. SPARGER v. NORTH CAROLINA PUBLIC-SERVICE CORPORATION.

(Filed 7 November, 1917.)

Issues — Evidence — Negligence — Contributory Negligence — Last Clear Chance.

An issue as to the last clear chance is properly submitted, in an action against a street car company for damages for a personal injury alleged to have negligently been caused by defendant's street car running into the plaintiff's buggy as he was crossing the defendant's track, when there is evidence tending to show negligence, and contributory negligence, and that defendant's street car was running 20 or 25 miles an hour without sounding its gong or giving other warnings of its approach or slacking its speed, which otherwise may have warned the plaintiff in time to have avoided the injury.

ACTION before *Long, J.*, at April Term, 1917, of GUILFORD.

On the morning of 10 November, 1915, plaintiff was driving in his buggy north on Elm Street, on the right-hand side of North Elm Street, and his horse turned west of his own accord into Gaston Street, which intersects North Elm at a right angle. To do so it was necessary to cross the tracks of defendant. The plaintiff's place of business was on Gaston Street, and for months it had been his custom to make this trip, with his horse, along this route. He did

not look up or down the track before entering upon the track, and was not controlling the horse with the lines at the time, though he had hold of them. He did not see the car before he got on the tracks, and when he first observed it the car was 125 or 140 feet north from him, traveling 20 to 25 miles per hour. He was on one of the principal streets of the town. The motorman did not ring any gong nor sound any warning, and did not slacken his speed. Plaintiff urged his horse forward, but failed to get entirely off the track, after doing all he could to do so. The car struck a spoke on one of the rear wheels of the buggy, overturned it, and threw plaintiff violently to the ground.

The defendant objected to the third issue, "as to the last clear chance," and the instruction in regard to it, and moved to nonsuit the plaintiff. The jury found that defendant was negligent; that plaintiff was guilty of contributory negligence, but that defendant's servants could have prevented the injury by the exercise of ordinary care, notwithstanding plaintiff's negligence, and assessed the damages at $1,000. Defendant appealed from the judgment.

John A. Barringer, G. S. Bradshaw, and R. C. Strudwick for plaintiff.

Jerome, Scales & Jerome for defendant.

PER CURIAM. It is found by the jury that both parties were guilty of negligence — the defendant, in running at an (777) excessive speed and failing to give proper warning of the approach of the street car; and the plaintiff, in attempting to cross the track of the street railway company in a careless manner; and the evidence fully supports the findings. There was no serious controversy as to this part of the case. But defendant contends that there was no reason for submitting the third issue, as to the ability of defendant's servants to stop the car and avoid the collision, after its servants had observed the plaintiff's dangerous predicament. There was relevant evidence for the jury to consider upon such an inquiry, and the jurors might determine for themselves whether the motorman could have stopped the car after seeing the plaintiff's danger and before reaching the buggy. There was no use of the gong or other signal to warn plaintiff of the danger of remaining on the track or of going upon it. Even though he may have seen the car afterwards, it was too late to leave the track entirely before his buggy was stricken by the car and overturned. There was evidence as to this feature of the case, and also evidence that plaintiff acted with promptness after discovering his danger. If the motorman had sounded the gong, seasonably, it would have aroused the plaintiff

to the peril of his situation, and he would have had more time to escape the injury. The case is governed by the principles of *Norman v. R. R.*, 167 N.C. 538, though not like it in all respects. See, also, *Davis v. Traction Co.*, 141 N.C. 134; *Wright v. Mfg. Co.*, 147 N.C. 534; *Smith v. R. R.*, 162 N.C. 30. The Court said, in *Davis v. Traction Co., supra:* "If a car is moving at a lawful speed — that is, not an excessive rate of speed — and a person enters upon the track, the defendant is required to exercise ordinary care — give signals, lower the speed, and, if it appears *reasonably necessary*, stop the car." The same language was quoted and approved in *Wright v. Mfg. Co., supra.* There was evidence of negligence on the part of defendant after its servants either did discover or could have discovered the danger in which plaintiff had been placed by his own inattention and want of care for himself.

No error.

Cited: Lea v. Utilities Co., 178 N.C. 512.

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(778)

VINSON, JONES & FINCH, INC., v. J. H. PUGH AND J. FRANK WOOTEN.

(Filed 10 October, 1917.)

CIVIL action, tried at May Term, 1917, of SAMPSON, before *Lyon, J.*, upon these issues:

1. Did the defendant J. H. Pugh contract and agree to sell and convey to the said plaintiff the timber, rights, and privileges for the sum of $6,000 upon the lands described in the complaint? Answer: Yes.

2. If so, was the purchase price agreed upon to be paid in cash? Answer: No.

3. Did the defendant J. H. Pugh fail and refuse to comply with his said contract and agreement? Answer: Yes.

4. Did the plaintiffs comply with their part of said agreement? Answer: Yes.

5. Was the defendant Wooten the duly authorized agent of his codefendant, Pugh, in the sale of his timber, referred to in the complaint? Answer: Yes.

6. Was it agreed, prior to the execution of the timber deed, or on the date thereof, that the plaintiff should have thirty days in which to pay the same? Answer: Yes.

7. Was it understood and agreed that the plaintiffs were to pay the expenses incurred in the transaction, in addition to the $6,000 for the timber? Answer: Yes.

8. Was the sum of $250 paid to the defendant Wooten by the plaintiff for his services in procuring the execution of said timber deed by his uncle and codefendant? Answer: No.

9. Was the sum of $250 paid to the defendant Wooten without the knowledge or consent of the defendant Pugh? Answer: No.

10. If so, did the defendant Pugh repudiate said contract upon the discovery of said fact? Answer: No.

11. What damages, if any, is the plaintiff entitled to recover of the defendant James H. Pugh? Answer: $1,750.

From the judgment rendered, defendant Pugh appealed.

Butler & Herring for plaintiff.

Grady & Graham, Kerr & Herring, and Fowler & Crumpler for defendant.

PER CURIAM. This case was before the Court at Spring Term, 1916, and is reported in 172 N.C. 843, which is referred to for the facts.

On the last trial the issues were submitted as directed in the opinion of this Court.

We have examined the several assignments of error relating to the evidence and to the charge of the court, and we (779) find them to be without merit. The case seems to have been tried strictly in accordance with the former opinion.

No error.

HETTIE BARHAM ET AL., v. LUCY HOLLAND, MATT HOLLAND ET AL.

(Filed 3 October, 1917.)

Appeal and Error—Adverse Possession—Evidence—Instructions—Trials.

In an action involving title to lands claimed by defendant by adverse possession, testimony of plaintiff of a conversation with others, to show defendant's permissive occupation, but not in her presence, and without in any way showing its connection with defendant's claim, is rendered reversible error by the court emphasizing this testimony in his charge to the jury in relation to the rights of the parties, when otherwise there was no evidence that the defendant's possession was permissive.

BARHAM *v.* HOLLAND.

PROCEEDINGS in sale of land for partition, transferred to civil issue docket and tried on issues submitted before *Stacy, J.*, and a jury, at February Special Term, 1917, of HARNETT.

Defendants having plead sole seizin, the jury rendered a verdict that plaintiffs were owners of an interest in the land set out in the petition and they and defendants were tenants in common in said land.

Judgment on the verdict, and defendants excepted and appealed.

Baggett & Baggett and Clifford & Townsend for plaintiffs.
E. F. Young and F. T. Dupree for defendants.

PER CURIAM. We have carefully considered the record, and are of opinion that reversible error has been committed, to defendants' prejudice.

There was evidence on the part of the plaintiffs tending to show that plaintiffs were tenants in common with defendants other than Lucy Holland. On the part of defendants there was testimony tending to show that Lucy Holland, mother of the codefendants, had been in the open, notorious possession of the land, asserting exclusive ownership for 25 or 30 years, using it in all respects as if she were sole owner. With a view of showing that the occupation of Lucy Holland was permissive and not adverse, plaintiffs, over defendants' objection, were allowed to prove by Hettie Barham, one of plaintiffs, that she at one time had a conversation with Joe and Jim Ochiltree relative to dividing the land. We are unable to discover anywhere in the case on appeal that Joe or Jim Ochiltree had any con-
(780) nection with defendant or her occupation of the property, and this is the only testimony in the record, as it now appears, showing or tending to show that the question of dividing the land was ever discussed by any one, or referred to, and there is no testimony that we can find from plaintiff or defendant tending to show that defendant had ever had such conversation, or that she had personally ever acted in reference to the land, except in the assertion of her ownership.

On this feature of the case his Honor charged the jury as follows: "The parties in this suit differ in their claim as to whether or not Lucy Holland ever claimed this land as against her brothers and sisters. The plaintiffs argue and contend from this evidence that you should find and be satisfied that she at all times acknowledged the right of her brothers and sisters to a portion of the land, and that she had discussed with them on several occasions that there should be a division of the land and the plaintiffs given their part and the defendant her part, and that discussion was evidence tend-

ing to show that she was not claiming it as her own; that she was not claiming more than her interest or share in the land, and that her title to the whole land could not ripen so long as she was not making adverse claim with the intent to hold it against all others."

Defendant duly noted exceptions, both to the admission of the testimony and the charge, and we are of opinion, as stated, that reversible error has been committed.

There being no evidence to connect Joe and Jim Ochiltree in any way with defendant's occupation of the land, or tending to show that defendant was present at the conversation referred to, we were at first inclined to think that the admission of the evidence might be considered harmless error, but, this being the only testimony about dividing the land, the charge of his Honor in reference to it, in our opinion, gave it such significance that it may have unduly and improperly influenced the jury, to defendant's prejudice.

True, we have repeatedly held that a statement of a party's contentions, though mistaken, will not be held for reversible error in itself, if the law is laid down correctly, as applied to the issue, and, so stated we have no desire or intention to modify the position, but the admission of the testimony as to dividing the land between one of plaintiffs and third persons, not in presence of defendant and with a view of showing a permissive occupation by defendant, was in itself erroneous, and it may not be disregarded, because this reference to it by his Honor, as stated, was calculated to give it such significance that, to our minds, makes its reception reversible error. This will be certified, that the issue may be submitted to another jury.

New trial.

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(781)

CHARLES SCHAEFFER & SON v. STONE COMPANY.

(Filed 24 October, 1917.)

1. Appeal and Error—Objections and Exceptions—Evidence—Vendor and Purchaser.

In an action to recover for goods sold and delivered, a question asked a witness, if the custom for delivery and collection between the parties was not a certain arrangement, with objection, and then without objection, witness answered question and stated the custom, is not held erroneous.

2. Appeal and Error—Objections and Exceptions—Evidence—Vendor and Purchaser—Harmless Error.

A statement by purchaser, as a witness, that he did not owe the vendor,

is competent; but if otherwise, it would be harmless if the witness had theretofore made the statement, without objection.

3. Evidence—Contradiction—Trials.

Where the vendor, as a witness, has denied that he had made certain statements to the purchaser, the material to the controversy, it is competent for the purchaser to introduce in evidence certain envelopes, with endorsements thereon, for the purpose of contradiction.

4. Appeal and Error—Objections and Exceptions—Contentions—Instructions—Case.

Objection that the judge's statement of a party's contention was not sufficiently full should be made at the time, with specific request to have them so; and exceptions to the charge upon matters of law may be taken for the first time in appellant's statement of the case for service on the appellee.

APPEAL by defendant from *Connor, J.*, at December Term, 1916, of NEW HANOVER.

This is an action to recover $1,269.35, alleged to be due by account for goods sold and delivered.

The defendant denied that it was indebted to the plaintiff.

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

McClammy & Burgwin for plaintiff.
Robert Ruark for defendant.

PER CURIAM. The first exception is to allowing the following question:

Q. Was the custom of dealing between you and Schaeffer & Son that goods were to be delivered upon your order, and then the same day, or the second day, they would come and collect for those goods?

The question was not answered, but was changed in form, so the witness could state the custom of dealing between the plaintiff and the defendant, which he did, fully, to which no exception was taken.

The second exception is to permitting the witness, Stone, (782) who was president of the defendant company and had active charge and management of its business during the time it was dealing with the plaintiff, to say that the defendant company did not owe the plaintiff anything.

It was competent for the witness to make this statement, as he knew the facts; but if the evidence was incompetent, it would be harmless, because the same witness had stated, without objection, "My company is not indebted to Schaeffer & Son for one cent."

The fourth and fifth exceptions are to allowing the defendant to

introduce certain envelopes, with the endorsements thereon, which were properly admitted for the purposes to which the evidence was restricted, which was, that certain statements had not been mailed out by the plaintiffs.

The seventh exception is to a question asked a witness, to which he answered: "I am not in position to answer that question."

There is also an exception to a statement of the contentions of the parties by his Honor; but upon examination of the charge we find nothing prejudicial to the plaintiff, and it does not appear that he requested a fuller statement or that he made any objection at the time the charge was given.

A party is not required to except to the charge upon matters of law until he serves his statement of case on appeal, but if a contention is improperly stated it is his duty to call the matter to the attention of the judge at the time.

The other exceptions are formal, except those that are not considered in the brief.

The case resolved itself into a question of fact, which has been determined by the jury.

No error.

JOHN MURPHY v. CAROLINA ELECTRIC COMPANY ET ALS.

(Filed 26 September, 1917.)

1. **Appeal and Error — Service of Case — Agreement — Time Extended— Computation.**

   Time extended by consent to serve statement of case on appeal is computed from adjournment of court, or, as in this case, when the judge left the county.

2. **Appeal and Error — Service of Case — Time Extended — Laches—Certiorari.**

   Excusable neglect is not shown in serving statement of case on appeal in this case, it appearing that the appellant had at least four days left him for the purpose after the stenographer's transcribed notes had been filed with the clerk, as directed; and appellant and his attorneys, within ready communication with the clerk's office at the county-seat, did not ascertain the fact or communicate with the stenographer, living in another town, when the copy promised them had not been received, it appearing that their copy had been directed, by mistake, to other attorneys living in the same town; and a motion for a *certiorari* will not be allowed in the Supreme Court.

3. Appeal and Error—Certiorari—Record Proper—Rules of Court—Agreement of Parties.

The parties to an appeal, without the consent of the court, cannot waive the rule of the Supreme Court requiring that a transcript of the record proper, or all thereof that may be had, shall be filed therein as the basis for the motion for a *certiorari;* but they may, by written agreement, consent that the appeal may be docketed at the next ensuing term of the Supreme Court.

APPEAL by defendants from *Webb, J.,* at March Term, (783) 1917, of SCOTLAND.

Cox & Dunn for plaintiff.
G. B. Patterson and McLean & McKinnon for defendants.

PER CURIAM. This appeal was entered by defendants at March Term, 1917, of Scotland, and by consent they were granted 60 days to serve statement of the case on appeal. The court expired by the judge leaving the county on 13 March, and the 60 days therefore expired on 12 May. The stenographer filed the transcript of testimony in the clerk's office on 9 May. The clerk certifies that at no time was he ever requested by the defendants or their counsel to notify them of docketing the transcript of testimony in his office; that on 20 March he issued transcript of the judgment to Robeson, and on 22 March he issued execution on the judgment; that since 9 May the transcript of testimony and a carbon copy thereof have been on file in his office, but neither the defendants nor any one for them have called on him for the same; that his office is connected by the Bell Telephone Company with the offices of defendants' counsel and with the residence of the president of both the defendant companies.

The defendants moved in this Court on 25 May for *certiorari,* which, by consent of plaintiff, was continued, without prejudice to his rights, to this term. The defendants contend that the delay to make up the case on appeal was not due to any fault of theirs, but to the fact that the stenographer, who lives in Greensboro, mailed the copy of the notes to them at Maxton, but misaddressed it to McLean & McRae instead of to McLean & McKinnon. There was agreement between said counsel and the stenographer that transcript of notes need not be made up till April Term of Scotland Court, and they did not write her in regard to the matter till 17 April. The defendants' counsel asked the clerk before that, on 12 April, if the transcript to the evidence had been filed in his office, but they made no further application to the clerk for infor-
(784) mation, nor after the testimony was filed there on 9 May,

though there was a telephone to the clerk's office which they could have used at any moment.

The letter of the defendants' counsel to the stenographer, asking for the transcript of the evidence, was not written until 17 April, and the request therein was not that she should send them a copy, but that she should "file it in the office of the clerk of the Superior Court." Her sending them a copy misaddressed is immaterial. If they expected a copy they should have wired or written her, when there was danger that it would not come in time. It was negligence that they did not have any arrangement with the clerk, nor request him to notify them when the transcript was filed, nor make any inquiry of him thereafter. If this had been done, they could have had such notice by 'phone or mail on 9 May, and by automobile or train they could have had prompt access to such copy, for it is only some 8 miles by rail from their office to the county-seat.

There was laches on the part of the defendants. From 9 May to 12 May they made no inquiry, by 'phone or mail, of the clerk, and did not use the evidence to make up their case on appeal, when they had four days in which to do so. For many years, and until recently, the statute allowed only five days for the appellant to make out his case on appeal. The statute (Revisal 591) now allows the appellant fifteen days. This, by consent of the appellee in this case, was extended sixty days, and the appellee was not called on to extend that liberal allowance.

The motion for *certiorari* cannot be allowed. We take note, however, to "exclude a conclusion" that in this case the appellee, agreeing that the motion for *certiorari* should go over to this term (which was a matter he could consent to), further consented to waive the requirement that on an application for *certiorari* for the case on appeal the transcript of the record proper must be docketed. This is a requirement of the court, and could not be waived by the appellee. This has had no effect here, as the *certiorari* is denied on the ground above stated. But attention is called to the fact that the court will not dispense, by reason of consent of counsel, with the requirement that a transcript of the record proper, or all of it which can be had, must be filed as the basis of an application for *certiorari*. *Burwell v. Hughes*, 120 N.C. 277, and cases there quoted, and cases cited thereto in the Anno. Ed.

Motion denied.

Cited: Baker v. Hare, 192 N.C. 789; *Brack v. Ellis*, 193 N.C. 540.

(785)

W. A. BRILEY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 26 September, 1917.)

Railroads — Negligence — Presumptions — Statutes — Evidence—Trials —Questions for Jury.

The statutory presumption that the killing of plaintiff's cow by a backing railroad train was negligently done, when action has been begun in six months, is not eliminated by evidence tending to show the cow, separated from the herd, ran into the train, and the question is for the determination of the jury, in an action to recover the resulting damages.

APPEAL by defendant from *Harding, J.*, at May Term, 1917, of PITT.

F. G. James & Son for plaintiff.
Skinner & Cooper for defendant.

PER CURIAM. This is an action for killing plaintiff's cow by a train running backwards. The defendant offered evidence tending to show that the train did not run over the cow, but the cow, being separated from its companions, tried to run over the train and "butted in," and asked the court to charge that the presumption of negligence against a railroad company killing cattle, arising under Revisal, 2645, is rebutted by this evidence.

The court properly refused to so charge. *Hardison v. R. R.*, 120 N.C. 492, is identical on the facts. The presumption of negligence is raised by the statute, and if the evidence of the defendant had satisfied the jury that the cow was guilty of contributory negligence, which was the proximate cause of her death, it would have returned a verdict in favor of the defendant; but the court could not charge that the defendant's evidence, as a matter of law, repelled the presumption of negligence raised by the statute, the action having been begun in six months.

The track was straight for a long distance, so the cows could have been seen, but the train ran into a drove of them while running backwards.

A somewhat similar case is *Randall v. R. R.*, 104 N.C. 410, where the plaintiff asked the court to charge that as the oxen killed by the train was hitched to a cart and being driven at the time, the statutory presumption of negligence did not arise. This Court held that the statute was broad enough to include such cases as well as when the stock was running at large. That case has been affirmed several times since. See Anno. Ed. This case is stronger for the plaintiff, for there it was admitted that the oxen were pulling the cart when

killed, and here the allegation that the cow ran into the train is denied.

It is always bad manners, and generally brings on unpleasant results, to "butt in." But in this case the allegation is denied, and the judge could not take the evidence as true, its credi- (786) bility being a matter for the jury.

No error.

Cited: Borden v. R. R., 175 N.C. 179.

L. R. SAWYER ET AL. v. PASQUOTANK COUNTY.

(Filed 12 September, 1917.)

1. Injunction—Dissolution—Damages—Judgment—Contingencies.

Upon dissolution of a restraining order, liability of plaintiff and his sureties on the injunction bond cannot be determined in advance of any loss or damage proven or sustained, and an adjudication thereof in certain contingencies is reversible error.

2. Appeal and Error—Trials—Issues.

On this appeal it is held that the issue submitted covers every phase of the controversy, and that it was answered by the jury under a correct charge of the court upon a trial without error.

ACTION to restrain the levy and collection of a tax in a special school-tax district in PASQUOTANK County, upon the ground that a majority of the votes cast at the election was not in favor of the proposition.

A restraining order was issued, and at the trial a verdict was returned by the jury in favor of the defendants.

Judgment was rendered upon the verdict, dissolving the restraining order and directing the collection of the tax, and also adjudging the liability of the plaintiffs and their surety on the injunction bond in certain contingencies.

The plaintiffs excepted and appealed.

Ehringhaus & Small and Aydlett & Simpson for plaintiffs.
Ward & Thompson for defendants.

PER CURIAM. We have considered the exceptions of the plaintiffs to the refusal to submit certain issues, and to the charge, and

find them without merit. The issue submitted covers every phase of the controversy, and the charge is free from objection.

The exception to the judgment must be sustained, as the liability of the plaintiffs and their surety on the injunction bond cannot be determined in advance of any loss or damage, proven or sustained. The defendant will be taxed with the costs of this Court.

Modified and affirmed.

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(787)

J. L. SIMMONS v. ADAMS GRAIN AND PROVISION COMPANY.

(Filed 19 September, 1917.)

Appeal and Error—Vendor and Purchaser—Substantial Error.

No substantial ground for a new trial is found upon examination of the appellant's assignments of error.

CIVIL action, tried before *Daniels, J.*, at February Term, 1917, of BEAUFORT, upon these issues:

1. Is the defendant indebted to the plaintiff on account of the shipments of corn on 15 February, 1915, and of peas on 2 March, 1915, as alleged in the first cause of action in the complaint? If so, in what amount? Answer: $642.84 and interest from 2 March, 1915.

2. Did the defendant prevent the plaintiff from delivering the 15,000 bushels of corn and 2,372 bushels of peas by wrongfully failing and refusing to honor the draft theretofore drawn by plaintiff, as alleged, for the second cause of action in the complaint? Answer: Yes.

3. If so, what damages, if any, is plaintiff entitled to recover? Answer: $161.28.

4. Did plaintiff contract to sell and consign to defendant 5,000 bushels of corn on 23 December, 1914, as alleged in the answer as the first counterclaim? Answer: Yes.

5. If so, was plaintiff prevented from delivering a part of said 5,000 bushels by the wrongful failure of defendant to pay the drafts drawn by plaintiff, as alleged in the reply? Answer: Yes.

6. What damages, if any, is the defendant entitled to recover of plaintiff on the said counterclaim? Answer: Nothing.

7. Did plaintiff contract to sell and deliver to defendant 15,000 bushels of corn at 65 cents, as alleged in the answer as the second cause of action? Answer: Yes.

8. What damages, if any, is defendant entitled to recover of the plaintiff on its second counterclaim for failure of the plaintiff to ship the 15,000 bushels of corn as of 6 January, 1915, referred to in the second issue? Answer: Nothing.

9. What damages, if any, is defendant entitled to recover of the plaintiff on its third counterclaim for failure of plaintiff to ship the 2,372 bushels of peas as of 6 January, 1915, referred to in the second issue? Answer: Nothing.

10. Did plaintiff contract to sell and ship the 15,000 bushels of corn at 68 cents per bushel, 19 January, as alleged for the fourth counterclaim? Answer: No.

11. If so, what damages, if any, is defendant entitled to recover of plaintiff for and on account of his failure to comply with said contract? Answer: Nothing.

12. In what amount, if any, is plaintiff indebted to defendant for the bags referred to in the fifth counterclaim? (788) Answer: $61.28. Bags, if recovered, belong to Simmons.

From the judgment rendered, defendant appealed.

Ward & Grimes and H. C. Carter for plaintiff.
Small, MacLean, Bragaw & Rodman for defendant.

PER CURIAM. We have examined the thirteen assignments of error directed to the evidence and charge of the court, and think they present no substantial ground for granting a new trial.

No error.

STATE v. ARTHUR HORNER.

(Filed 21 November, 1917.)

1. Intoxicating Liquors—Criminal Law—Manufacture, Aiding—Evidence—Trials—Questions for Jury.

It is not necessary for a conviction under the provisions of Public Laws 1917, chap. 157, making the distilling or manufacturing, etc., of spirituous or malt liquors or intoxicating bitters within the State unlawful, including within its express terms those who aid, assist, or abet therein, that the liquor should have been actually manufactured or the product finished; and where there is evidence tending to show that such manufacture had been in progress, but had been suspended by the arrest of the prisoner, and that he was aiding or assisting therein, it is sufficient to be submitted to the jury and to sustain conviction of the offense charged.

2. Same—Guilty Knowledge.

Upon the evidence in this case, tending to show that the defendant went through an obscured pass with his wagon, at a propitious hour, to a place where a still had been but recently in operation; of the whistling signals he gave of his approach; that he was armed and had certain implements with him used in distilling; that when he was arrested, some one hastily removed the still and most of its accessories, leaving some beer there and some burned hoops and wood, etc., and that he had in his wagon some tow sacks to cover up or conceal the beer, and stated he had been hired to haul it away, etc.: *Held*, sufficient for the jury upon the question of defendant's guilty knowledge that in removing the beer he was participating or aiding in the unlawful manufacture and distillation of spirituous liquors prohibited by the statute. Public Laws 1917, chap. 157.

3. Same—Removal of Liquor—Innocent Intent.

Where there is evidence of defendant's guilty knowledge in aiding in the distilling or manufacturing of intoxicating liquor prohibited by Public Laws 1917, chap. 157, by hauling it away, and also consistent with his innocence in merely hauling away the remnants after the illegal purpose had been accomplished or frustrated, without intention of taking part or aiding in its manufacture, the question of his guilt or innocence is one for the jury, under proper instructions.

4. Intoxicating Liquor — Indictment — Manufacture, Aiding—Degrees of Offense—Conviction.

Upon a charge in an indictment for manufacturing liquor, etc., under Public Laws 1917, chap. 157, the defendant may be convicted of the second degree of the offense — *i. e.*, aiding or abetting its manufacture.

5. Instructions — Requested Instructions — Substantial Compliance—Appeal and Error.

Where the trial judge substantially gives a correct request for special instruction, without weakening its effect, it is sufficient.

6. Criminal Law—Bill of Particulars—Statutes.

The remedy for a defendant in a criminal action, when the indictment does not sufficiently inform him of the particular charge against him to enable him to prepare his defense, is to apply to the court, acting in its discretion, to require the solicitor to furnish him a bill of particulars. Revisal, sec. 3244.

7. Criminal Law — Instructions — Expression of Opinion — Pleas — Not Guilty—Denial as to Evidence.

A plea of not guilty to a criminal charge is a denial of the truth of all of the evidence introduced by the State on the trial tending to show guilt; and where defendant is tried under an indictment for the manufacture of spirituous liquors, etc., or aiding, etc., therein, prohibited by Public Laws 1917, chap. 157, it was error in the trial judge to state in his charge to the jury that the defendant had testified to material and prejudicial facts and made declarations tending to show his guilt, when such was only the evidence of the State's witnesses, whose credibility was for the jury to pass upon, and constitutes reversible error, however inadvertently committed.

STATE *v.* HORNER.

INDICTMENT tried before *Long, J.*, at August Term, 1917, of MOORE. (789)

Defendant was convicted, and appealed from the judgment.

The charge against the defendant was that he had manufactured liquor, contrary to the statute prohibiting the same. There was evidence tending to show that defendant drove his father's wagon to the place of manufacture, over "a dim road," when it was dark. He left the road and drove to a house nearby and whistled two or three times, and then drove to the branch near the still, or where the still had been. He then left his wagon and went to the place where there were five stands of beer. He returned to the wagon to quiet his horses, and then went back to where the beer was, and he was removing a plank from the top of the beer barrels when he was arrested by the officers who had been watching his movements. He stated that he was paid by a man for hauling the beer away. He had a blanket and oil-cloth, which he stated that he intended to use for covering the barrel "to prevent the beer from sloshing out." He also had a rifle and cold-chisel. The rifle was loaded. There was a hammer lying on the furnace, but he denied knowing anything about it, though the officers said it had been placed (790) there within a few minutes. He had a gallon jug in his wagon and some tow sacks. There were indications at the place that a still had been in operation there very recently. There was evidence of stealth and secrecy about defendant's movements when he drove up to the place where the beer was and started to remove it. Defendant was convicted, and appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

H. F. Seawell for defendant.

WALKER, J., after stating the case: This indictment was found under Public Laws 1917, chap. 157, which provides that "It shall be unlawful for any person or persons to distill, manufacture, or in any manner make, or for any persons to aid, assist, or abet any such person or persons in distilling, manufacturing or in any manner making any spirituous or malt liquors or intoxicating bitters within the State of North Carolina. . . . Any person or persons violating the provisions of this act shall be guilty of a felony and be imprisoned in the State Prison for not less than one year and not exceeding five years, in the discretion of the court."

The contention of the defendant is that as there was no proof that any liquor was found at the still, or that any was manufactured

there, no offense had been committed. It is true that no liquor was found by the officers who made the search, but it does not follow from this fact that none was ever manufactured. There was evidence from which the jury could infer that the still had been operated not long before the officers arrived, and that somebody had evidently made a hasty removal of the still and most of its accessories, as the beer was left there, and some barrel hoops and wood. The State contends that defendant's conduct tended to show that he knew what had been done and that it was unlawful; otherwise, he would not have been so cautious and stealthy in his movements; that he selected what he believed was a fit hour for his work to be done, and traveled along an unfrequented road, whistling, when he approached the place, in a low tone, as a signal to some one of his presence; that he was armed for any eventuality, apparently anticipating trouble, and that he had on his person or in his possession a blanket and oil-cloth, for the purpose of concealing the beer in his wagon, and also had a jug, hammer, cold-chisel, and some sacks. While these facts and circumstances may not necessarily prove that the defendant was engaged at the still, in the manufacture of liquor, as argued by the State, the jury might infer from them that he was so engaged.

We do not agree with the learned counsel that the State
(791) was required to show that spirituous liquor was actually produced at the still, and that if the parties who were operating it had been caught in the act of making the liquor, though the process had not reached its final stage, they could not be convicted. They were manufacturing it, even though they had not finished their work and fully produced the intended result, having been unexpectedly foiled in their purpose and forced to retire to a place of safety. They had not finished moving the still and its appurtenances when the officers appeared and arrested the defendant; and while defendant was uncovering the beer, this colloquy took place between the officer (J. W. Brown) and him: The officer said, "What are you doing here?" He replied, "I just came here." When the officer said, "Whose beer is this?" or "Whose still is this?" defendant answered, "I don't know anything about it," and the officer said, "Consider yourself under arrest." The defendant said to the other officer (E. R. Brown) that "it was easy to get into trouble, and stated how much money he was to get," and also said that he had come there to haul the beer away, and brought the jug in which to carry some to his home. There was evidence, we think, from which the jury could make the deduction that liquor had actually been manufactured. We do not mean to imply that it would not be sufficient to convict if the parties were engaged in the manufacture of liquor, or were

making it, and left before it was made. *S. v. Summey,* 60 N.C. 496. In this case the court instructed the jury as follows: "If you find that there was no liquor manufactured as contemplated by the statute, you should acquit the defendant, and you need not go any further. But if this evidence convinces you beyond a reasonable doubt that there was an illicit still and that liquor had been manufactured, and that this beer was there for the purpose of furthering this business of making liquor, then the next question for you to consider is this: Was the defendant engaged in the business of manufacturing liquor, if it was being manufactured?" The defendant surely cannot complain of these instructions.

We have pointed out the evidence which tended, as the State argues, to show a guilty knowledge on the part of the defendant of what had been done, and which is some evidence against him, that the other parties had been engaged in an unlawful act; and, further, it may be said that it could not have been unlawful unless it was the manufacture of liquor, as we can conceive of no other crime that had been committed. But while there is evidence, it must not be supposed that it establishes the defendant's guilt, as it only tends to do so, and the jury may well find from it that the defendant is innocent of any wrong-doing, and that he went there, not as a participant in the crime, if one was committed, but merely to haul away the remnants, after the purpose had been accomplished or had been completely frustrated, and with no intention of tak- (792) ing any part in the manufacture of liquor. If that was his purpose, and his acts were done innocently, or, in other words, if he hauled away beer as an act disconnected with the manufacture of liquor, he would not be guilty under this statute. The jury must pass upon this controverted question and say what is the truth of the matter, giving the defendant the full benefit of the presumption of innocence and the doctrine of reasonable doubt.

It makes no difference whether defendant was a principal in the first degree or in the second degree as an aider and abettor. The latter is but a lower grade of the principal offense, viz., the distilling or manufacturing of the liquor. An aider and abettor is denominated in the books as a principal in the second degree. *S. v. Powell,* 168 N.C. 134; Clark's Cr. Law (2d Ed.), p. 116. This brings the case within the terms of Laws 1891, chap. 205 (Revisal, sec. 3269), which provides: "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 any attempt to commit a less degree of the same crime."

The judge was not bound to adopt the exact language of counsel

in giving a requested instruction, if the latter is substantially given, and not in a way to weaken its force. *S. v. Rowe,* 155 N.C. 436.

If the indictment does not sufficiently inform the defendant of the particular charge made against him, so as to enable him to prepare his defense, he may apply for a bill of particulars, under Revisal, sec. 3244, which provides: "In all indictments when further information not required to be set out therein is desirable for the better defense of the accused, the court, upon motion, may, in its discretion, require the solicitor to furnish a bill of particulars of such matters." *S. v. Brady,* 107 N.C. 822; *S. v. Shade,* 115 N.C. 757; *S. v. Corbin,* 157 N.C. 619.

But we must award a new trial because of substantial error in the charge. After giving proper instructions to the jury, the court, when the jury returned to the courtroom for further instructions, repeated briefly those given before they retired to their room, and then added: "He said himself that he was there for the purpose of hauling it off to assist somebody who had put that beer there. He stated that himself, and he stated that he got into bad luck, or something like that, for undertaking to do that thing."

The defendant did not testify in his own behalf, and his Honor manifestly was referring here to what the State's witnesses had testified that the defendant told them at the still at the time of his arrest; but whether he had made those statements to the officers was a question of fact for the jury to decide, depending upon the credibility of the State's witnesses, and the court was deciding
(793) that he did make the statements when it charged the jury that "he said himself that he was there for the purpose of hauling it off," etc., and this the court could not do, as the jury must pass upon the credibility of the witnesses, and find the facts. *S. v. Davis,* 136 N.C. 568; *S. v. Cook,* 162 N.C. 586. The court, therefore, inadvertently, of course, expressed its opinion upon the weight of the testimony. The credibility of the witnesses always is a question for the jury.

It is said in *S. v. Hill,* 141 N.C. at p. 772: "When a plea of not guilty has been entered and stands on the record undetermined, it puts in issue not only the guilt, but the credibility of the evidence. As is said in *S. v. Riley,* 113 N.C. 648, 'The plea of not guilty disputes the credibility of the evidence, even when uncontradicted, since there is a presumption of innocence which can only be overcome by the verdict of a jury.' " *Harper Mfg. Co. v. R. R. Co.,* 128 N.C. 280; *Cogdell v. R. R. Co.,* 129 N.C. 398; *Smith v. R. R. Co.,* 147 N.C. 603; *Newby v. Edwards,* 153 N.C. 110.

It was assumed in *Gilliland v. Board of Education,* 141 N.C. 482, that a charge that the jury "should consider declarations" of

parties, without former proof that they were made, would be error. If there is such preliminary proof as was shown by the charge in that case, when taken as a whole, the case is different.

The plea of not guilty entered by the defendant necessarily denied the truth of all the evidence tending to show guilt, and, therefore, was a sufficient denial that the declarations were ever made. It cannot be doubted that the instruction was prejudicial.

New trial.

Cited: *S. v. Ogleston,* 177 N.C. 542; *S. v. Baldwin,* 178 N.C. 697; *S. v. Killian,* 178 N.C. 755; *S. v. McMillan,* 180 N.C. 742; *S. v. Crouse,* 182 N.C. 837; *S. v. Grier,* 184 N.C. 727; *S. v. Sparks,* 184 N.C. 746; *S. v. Sullivan,* 193 N.C. 757.

STATE v. JIM LITTLE.

(Filed 21 November, 1917.)

1. Courts — Jurors Set Aside—Exceptions to Jurors—Prejudice—Appeal and Error.

It is proper for the trial judge to stand aside a juror in a criminal action upon his statement that he would not convict upon the testimony of a certain witness of the State, relied on by it for conviction; but if otherwise, it would not be prejudicial, when it appears that defendant did not challenge any juror, and that, therefore, the jury determining the case was satisfactory to him.

2. Criminal Law—Intimidating Witness—Suppression of Evidence.

Evidence in a criminal action that the defendant assaulted the prosecuting witness at the term the action was for trial is competent as an effort to suppress evidence or intimidate the witness, and may properly be referred to in the charge to the jury.

3. Evidence—Corroboration—Conversations.

Testimony by a witness as to his conversation with the prosecuting witness is properly admitted when in corroboration of the latter's testimony, and so confined.

4. Criminal Law—Trials—Witness—Cross-examination.

While the solicitor, in the trial of this criminal action, may have prefaced his questions to defendant with remarks which properly should have been reserved for his address to the jury, such as, "Now, tell the truth about this, if you know how," etc., his method in so doing is *Held* not to exceed the legitimate bounds or to constitute reversible error.

5. Motions—New Trials—Verdict—Court's Discretion.

A motion for a new trial after verdict on the ground that a petit juror in the case had also served on the grand jury is to the discretion of the trial judge, and not reviewable on appeal.

6. Motions—Jurors—Verdict—New Trials—Court's Discretion.

Where it appears that the trial judge had on the preceding day stated to several jurors who stood for an acquittal of a defendant of violating the prohibition law, that "they hindered the machinery of justice in holding out against a verdict of guilty," etc., it affords no legal ground to set aside a verdict convicting the defendant of a like offense in an unrelated case, when none of the evidence in the former case appears of record; and when made after verdict, it is to the unreviewable discretion of the trial judge.

APPEAL by defendant from *Long, J.*, at the July Term, (794) 1917, of RICHMOND.

The defendant was convicted of selling intoxicating liquor to W. E. Reynolds, and appealed from the judgment of imprisonment upon the verdict.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

Fred W. Bynum and Ozmer L. Henry for defendant.

ALLEN, J. 1. A juror was called and stated upon his examination that he would not convict any one on the testimony of W. E. Reynolds, the witness upon whom the State had to rely for a conviction, and the court, in the exercise of its discretion, excused him from service on the jury, and the defendant excepted. This ruling is clearly correct *(S. v. Vann,* 162 N.C. 538), but if erroneous it was not prejudicial, as it does not appear that any juror was challenged or that the jury which served was not one entirely satisfactory to the defendant. *S. v. Cunningham,* 72 N.C. 469.

2. The State was permitted to prove, over the objection (795) of the defendant, that the defendant made a violent assault on the prosecuting witness, Reynolds, during the term of court, and this was referred to in the charge, to which defendant excepted.

This evidence was competent on the question of the guilt of the defendant as a circumstance tending to show an effort to suppress evidence or to intimidate a witness against him.

3. The evidence of Baldwin as to a conversation with the witness, Reynolds, was properly admitted as corroborative, and to this his Honor confined it.

4. The fifth, sixth, and seventh exceptions are taken to the so-

licitor's manner of questioning the defendant on cross-examination, the objectionable remarks being as follows:

"Now, tell me the truth about this, if you know how."

"Now, Mr. Little, I want you to answer this question; you have been dodging me."

"Come on, and tell me what trouble you had."

These remarks preceded the various questions the solicitor asked the witness, and while they may not have been altogether polite and are in the nature of comments, which ought to have been reserved for the argument before the jury, they do not exceed the bounds of legitimate discussion and cannot be held reversible error.

5. After verdict, the defendant moved for a new trial because a member of the petit jury was a member of the grand jury which passed on the bill of indictment against him, which was denied.

This motion was addressed to the discretion of the judge, and his decision thereon is not reviewable.

"It has always been held by us that a motion to set aside the verdict because of a defect as to one of the jurors comes too late after verdict, and addresses itself only to the discretion of the court. Walker, J., in *S. v. Lipscomb,* 134 N.C. 697. In that case it was shown that the juror was under 21 years of age. In *S. v. Mcaultsby,* 130 N.C. 664, the same ruling was made where a relationship was discovered, after verdict, between the prosecuting witness and a juror, and the court there cited many other cases where a disqualification of a juror on divers grounds had been found after verdict, and in all which cases the court held that the matter rested in the discretion of the trial judge, and that the refusal of the motion was not reviewable on appeal." *S. v. Drakeford,* 162 N.C. 671.

6. The defendant also moved to set aside the verdict because, on the day before the trial of the defendant, his Honor said to five jurors who had stood for the acquittal of one Hinson, charged with retailing, that "they hindered the machinery of justice in holding out against the verdict of guilty, but that if the position they took was taken by reason of their conscientious judgment in the matter, that he had respect for them and that they were en- (796) titled to their judgment; and further suggested to the five men who stood for acquittal that if there was any reasons arising out of prejudice or opposition to the law why they should not return a verdict of guilty in a retailing case, that the court would relieve them of further duty from that date, but that if it was a mere question of judgment, that they could return; that the matter was left with them."

No relation is shown between the two cases, none of the evidence in the *Hinson* case is set out, nor are the circumstances shown which

caused the remarks to be made, and we cannot see that they were not entirely justified. In any event, the defendant knew all the facts before the trial began, and he could not wait until after verdict and then bring the matter to the attention of the court for the first time, except by an appeal to its discretion, which is not reviewable.

We have considered all of the exceptions, and find no error.

No error.

STATE v. ELIZABETH BURNETT.

(Filed 26 September, 1917.)

Criminal Law — Pleas — Nolo Contendere—Admissions—Sentence—Subsequent Term.

The plea of "*nolo contendere*" is in effect a plea of guilty so far as to permit the imposition of the sentence prescribed by the law, and where prayer for judgment has been continued upon payment of cost, it may be imposed by the court at a subsequent term, after due notice to the defendant.

MOTION for judgment, heard before *Allen, J.*, at August Term, 1917, of WAYNE.

The case was brought forward on motion of solicitor, and motion for judgment renewed, the defendant being present and also represented by counsel. The court sentenced the defendant to twelve months confinement in the jail of Wayne County. The defendant excepts and appeals.

Attorney-General Manning and Assistant Attorney-General Sykes for plaintiff.

J. L. Barham for defendant.

BROWN, J. At the May, 1917, Term of the Superior Court of Wayne County the defendant was indicted for conducting a bawdy-house. The defendant entered a plea of *nolo contendere*, and the prayer for judgment was continued upon payment of costs. At the August, 1917, Term of the said court, on motion of the solicitor, the case was brought forward and the motion for judgment re-
(797) newed, the defendant being present and represented by counsel, who excepted to the motions. The exception was overruled, and after hearing the evidence, the court found as a fact that, before and after the plea of *nolo contendere*, the defendant had

been guilty of continuously keeping a bawdy-house at the same place and practically in the same manner as before the submission of the plea, and that she bears a bad reputation in that respect, and also for selling whiskey.

It is contended that the effect of the plea of *nolo contendere* when accepted by the court precludes any further sentence, except such as is imposed at the time the plea is accepted, and that the payment of costs was the punishment inflicted in this case.

We are unable to agree with the learned counsel for the defendant. A plea of *nolo contendere,* which is still allowed in some courts, is regarded by some writers as a *quasi*-confession of guilt. Whether that be true or not, it is equivalent to a plea of guilty in so far as it gives the court the power to punish. It seems to be universally held that when the plea is accepted by the court, sentence is imposed as upon a plea of guilty. *Com. v. Ingersoll,* 145 Mass. 381; 12 Cyc. 354.

The only advantage in a plea of *nolo contendere* gained by the defendant is that it gives him the advantage of not being estopped to deny his guilt in civil action based upon the same facts. Upon a plea of guilty entered of record, the defendant would be estopped to deny his guilt if sued in a civil proceeding. *Com. v. Horton,* 9 Pick., Mass. 206; 12 Cyc. 354.

Speaking of this plea, the Supreme Court of Massachusetts says: "The plea of *nolo contendere* is an implied confession of the offense charged, and the judgment of conviction follows that plea as well as the plea of guilty, and it is not necessary that the court should judge that the party was guilty, for that follows by necessary legal inference from the implied confession." *S. v. Herlihy,* 102 Me. 310.

The Pennsylvania Supreme Court says: "The plea of *nolo contendere* is a mild form of pleading guilty. . . . It has the same effect as a plea of guilty so far as concerns the proceedings upon the indictment." *Buck v. Com.,* 107 Pa. 486.

So we see upon the authorities that the court had power notwithstanding the acceptance of the plea to impose the sentence fixed by law. The judgment of the court was not suspended; but even if it had been, there are circumstances under which a court may pronounce judgment in such cases. The judgment in this case was continued upon payment of the costs, which plainly gave to the solicitor the right to pray judgment at any time. Of course, notice should be given and the defendant allowed a hearing, as was done in this case.

Affirmed.

Cited: In re Stiers, 204 N.C. 50; *S. v. Ray,* 212 N.C. 750; *S. v. Calcutt,* 219 N.C. 563; *S. v. Parker,* 220 N.C. 418; *S. v. Pelley,*

221 N.C. 499; *S. v. Ayers,* 226 N.C. 580; *S. v. Stansbury,* 230 N.C. 590; *S. v. Shepherd,* 230 N.C. 607; *S. v. Thomas,* 236 N.C. 200; *S. v. Cooper,* 238 N.C. 243; *Winesett v. Scheidt, Comr.,* 239 N.C. 194; *Fox v. Scheidt, Comr.,* 241 N.C. 35; *Barbour v. Scheidt, Comr.,* 246 N.C. 171.

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STATE v. R. A. MANSHIP.

(Filed 14 November, 1917.)

1. **Jurors — Court's Discretion—Discharge of Jurors—Retaining Juror — Tales Jurors.**

   The trial judge, in his discretion, may discharge any jurors or jury, and is not required to reserve one juror of the original panel to "build to," before directing the sheriff to summons tales jurors as authorized by Revisal, sec. 1967, amended by chapter 15, Laws 1911; chapter 210, Laws 1915.

2. **Same—Bystanders.**

   Where the regular jurors have been discharged by the trial judge for the term, evidently under the impression that the business of the court was over, and on the following day there remains a criminal case regularly coming up for trial on a defect of jurors, the judge, within his discretion, is authorized to direct the sheriff to summons "other jurors, being freeholders within the county," whether within or without the courthouse. Revisal, sec. 1967, amended by chapter 15, Laws 1911; chapter 210, Laws 1915.

3. **Jurors—Motions—Exceptions—Challenge to Array.**

   Where the regular jurors have been discharged for the criminal term, and talesmen have been summoned to try another case regularly for trial at that term, a denial of defendant's motion for continuance, and forcing him into trial with the jury thus constituted, does not constitute a challenge to the array.

4. **Intoxicating Liquors — Criminal Law—Prohibition—Unlawful Sales—Evidence—Statutes.**

   Upon trial for the sale of intoxicating liquors in bottles to the prosecuting witness, in evidence in the case, it is competent for the sheriff to testify that he had found a box and sack of bottles just outside of defendant's store, corresponding in appearance and labels with the bottles the prosecuting witness testified he had purchased from the defendant, when the box and bag of bottles are also in evidence.

APPEAL by defendant from *Webb, J.,* at May Term, 1917, of RICHMOND.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

W. R. Jones for defendant.

CLARK, C.J. The defendant was indicted for retailing spirituous liquors, in six counts, and was convicted on all six.

Exceptions 2 and 3 were to the admission of the testimony of the sheriff, that he found just outside of the defendant's store a box of bottles and also a sack full of bottles, both of which were placed before the jury, which, he testified, corresponded in appearance and labels with the bottles which the prosecuting wit- (799) ness testified he purchased from the defendant, which were also before the jury. We can see no objection to this testimony.

The indictments against the defendant were combined, and the jury rendered a verdict of guilty on each count. The court had discharged the regular jury, but, this case coming up, directed the sheriff to summon tales jurors as authorized by Revisal, sec. 1967, amended by chapter 15, Laws 1911, and chapter 210, Laws 1915, which reads, as amended: "That there may not be a defect of jurors, the sheriff shall, by order of court, summon, from day to day, of bystanders, other jurors, being freeholders, within the county where the court is held, or the judge may in his discretion, at the beginning of the term, direct the tales jurors to be drawn from the jury box used in drawing the petit jury for the term, in the presence of the court; such tales jurors so drawn to be summoned by the sheriff and to serve on the petit jury, and on any day the court may discharge those who have served the preceding day: *Provided,* that the judge may, upon his own motion or upon request of counsel for either plaintiff or defendant, instruct the sheriff to summon such jurors outside the courthouse. It shall be a disqualification and ground of challenge to any tales juror that such juror has acted in the same court as grand, petit, or tales juror within two years next preceding such term of the court."

It has never been controverted that the judge in his discretion has the power to excuse any juror and to discharge any jury that he thinks proper. It seems that in this case the regular jury had been discharged under the impression that the business of the court was over. This case coming up, the defendant asked for a continuance. But, there being no other ground suggested therefor, the court, in the exercise of its discretion, directed tales jurors to be summoned, under the above statute, which was passed for this very purpose, that "there may not be a defect of jurors." There was long a practice, under the former statute, that the judge should reserve one juror of the regular panel to "build to," based upon the technical idea that

the tales jurors should be *other* jurors, as if they would not be "other" jurors even if that one juror had also been discharged. It was no prejudice to this defendant that one regular juror was not retained. Twelve jurors, freeholders, to whom he entered no exception, sat upon his case, and he was duly convicted.

The record states: "On Thursday evening the court had discharged the regular jury summoned for the week, and on convening of court on Friday morning the defendant moved for a continuance of his case. The defendant's motion for continuance was denied, and on being forced into trial with a jury called in and chosen by the sheriff, defendant duly excepted." This is not a challenge to (800) the array, but we have treated it as such, and find no error.

When, for any reason, there is a defect of jurors, the judge is authorized to direct the sheriff to summon "other jurors, being freeholders within the county where the court was held," and "on any day the court may discharge those who have the preceding day." Such matters are properly within the sound discretion of the presiding judge. There is no indication in this record of any abuse of discretion by the judge in the discharge of the regular jury, nor in the manner of summoning the tales jurors. The above statute gave him the discretion "at the beginning of the term to direct tales jurors to be drawn from the jury box, in the presence of the court." Which method he should resort to rested with the judge. This was not "at the beginning of the term," but even treating those words as directory only, and not a restriction on the power of the court, it would have been extremely inconvenient and would have delayed the court to have drawn the jurors from the jury box, for they would have come from all parts of the county, to the interruption of their business. The statute gave the court the alternative of summoning the bystanders, either within or without the courthouse.

There is no exception to the charge of the court, and nothing in the record tending to show partiality by the sheriff in summoning the jurors, or any other prejudice sustained by the defendant, and no exception on that ground.

No error.

Cited: *S. v. Wood,* 175 N.C. 816.

STATE v. HECTOR LITTLE.

(Filed 14 November, 1917.)

1. **Appeal and Error—Instructions—Contentions—Objections and Exceptions.**

Objections to the statement by the judge of the contention of a party must be made to him at the time, so that if it is erroneous he may have an opportunity to correct it.

2. **Courts—Instructions—Contentions—Improper Remarks.**

In this case the State relied upon the evidence of a witness who had been employed as a detective to convict the defendant of a sale of liquor in violation of the prohibition law, with conflicting contentions upon the evidence that this witness had been previously convicted of violating the same law and was not worthy of credence. A statement of the contentions of the parties by the judge to the jury, in his own language, that "Birds of a feather will flock together"; that the witness, "having been convicted of unlawful sales of whiskey before this trial, would be likely to know who sells liquor in violation of the law," is not held objectionable as an improper remark.

3. **Evidence—Credibility—Witnesses—Jurors—Trials.**

It is within the province of the jury to weigh the testimony and to sift the true from the false, and they may believe a witness of bad character in preference to a witness of good character.

4. **Jurors—Selection—Right of Party—Discharge of Jurors—Courts.**

The right of a defendant in a criminal action is to reject jurors and not to select them, and he cannot complain that the court has discharged jurors on the day preceding the trial of his case, unless it is made to appear that he has in some legal way been prejudiced.

INDICTMENT for selling liquor, tried before *Long, J.*, and a jury, at July Term, 1917, of RICHMOND. (801)

Defendant was convicted, and appealed from the judgment.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

Fred. W. Bynum and Ozmer L. Henry for defendant.

WALKER, J. The charge against the defendant was that he had sold one quart of whiskey to W. E. Reynolds, and the principal exceptions were taken to the remarks of the judge, in his charge, in regard to the latter, who was the State's chief witness.

1. We do not see any merit in the exceptions. When the judge referred to the expression that "Birds of a feather will flock together," and "that Reynolds, having been convicted of unlawful sales of whiskey before this trial, would be likely to know who sells

liquor in violation of the law," he was merely stating what the contention of the State was, in its own language, and laid no improper emphasis on the contention. It was the legitimate argument of the State in its effort to bolster the testimony of Reynolds, whom it thought needed some propping on account of his previous bad record. It was contended by the solicitor that the State was compelled, in many cases, to resort to such men as witnesses, in order to detect and convict the guilty, as they were apt to know more about such violations of the law than any one else, and for this reason Reynolds was entitled to credence. Objections to the statement by the judge of the contentions of a party should be made to him at the time, so that he may have an opportunity for correction, if it is erroneous. This is settled by the following cases: *S. v. Foster,* 172 N.C. 960; *S. v. Merrick, ib.,* 870; *S. v. Johnson, ib.,* 920; *S. v. Burton, ib.,* 939; *McMillan v. R. R., ib.,* 853.

2. The objection embodied in the second exception is of the same character as the one just considered. The court was only stating what the State had contended in the solicitor's address to the jury, viz., that the chief of police, who had testified, did not say that the money was handed by Reynolds to the defendant, who delivered the bottle of whiskey to Reynolds, but the contention of the State (802) was that the circumstances, as shown by the chief of police, corroborated the testimony of Reynolds that he bought the liquor from the defendant with the money given to him by the chief of police. That Baldwin corroborated Reynolds was stated by the court as a part of the contention.

3. The same may be said of the next objection, except that it is taken to a statement, by the judge, of the defendant's contention, viz., that Reynolds' own testimony was discredited by the fact of his admission that he was to be paid for his services as a detective, and therefore he was interested in the verdict.

The court charged that a jury may believe a witness of bad character who they think is telling the truth, and disbelieve one of good character if they think that he is not stating the truth. We can find no fault in this instruction. It would seem to be plainly correct. It is the province of the jury to weigh the testimony and to sift the true from the false. *S. v. Spencer,* 63 N.C. 316; *S. v. Gay,* 94 N.C. 814. As to the exception relating to the discharge of certain jurors in another case the day before, we do not perceive how this prejudiced the defendant. No prejudice appears, and what does not appear is supposed not to exist. The right of the accused, with respect to jurors, is one to reject and not to select. *S. v. Gooch,* 94 N.C. 987; *S. v. Hensley,* 94 N.C. 1021; *S. v. Green,* 95 N.C. 613; *S. v. Jones,* 97 N.C. 469; *S. v. McDowell,* 123 N.C. 764; *S. v. Barber,* 113 N.C.

712. The defendant had an unobjectionable jury to try the case, and a fair opportunity to acquit himself, and he cannot justly ask for more.

The other objections are merely formal.

No error.

Cited: *Walker v. Burt,* 182 N.C. 330; *S. v. Jestes,* 185 N.C. 736; *S. v. Graham,* 194 N.C. 468; *S. v. Lea,* 203 N.C. 34; *S. v. Bittings,* 206 N.C. 803; *S. v. Neal,* 222 N.C. 547.

STATE v. J. R. HICKS.

(Filed 31 October, 1917.)

Spirituous Liquors — Cider—Wines Sold on Premises, etc.—Statute—Exceptions.

The sale of domestic wines in quantities of 2½ gallons, in sealed packages and crated, etc., on the premises where manufactured, when made from fruits grown on the lands of the manufacturer within this State, is lawful, under chapter 35, section 3, Laws 1911; and the Search and Seizure Act (chapter 44, Laws 1913, and chapter 97, Laws 1915), passed primarily to regulate shipment of spirituous, vinous, or malt liquors, contains no provision to the contrary.

INDICTMENT, April Term, 1917, of ORANGE, *Kerr, J.*

The jury rendered the following special verdict: (803)

"That the defendant and M. J. Jeffreys, in December, 1916, purchased from one Michael, in Orange County, 2½ gallons of wine each, in sealed jugs, containing 2½ gallons; that said purchase and delivery took place on the premises of the said Michael, in Orange County, and the wine had been manufactured by Michael during the past twelve months, from grapes grown on his own premises in said county; that the defendant was on his way to his home, with the said wine in his possession, when he was seized by the officers."

The court pronounced defendant not guilty. State appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

No counsel for defendant.

BROWN, J. Chapter 35, Public Laws 1911, entitled "An Act to prohibit the sale of near-beer, beerine, and other like drinks," pro-

vides in section 1 that it shall be unlawful to sell or dispose of, for gain, "near-beer, beerine, or other spirituous, vinous, or malt liquors," etc.; and section 3 makes the following exception: *"Provided, further,* that this act shall not apply to the sale of domestic wines when sold in quantity of not less than 2½ gallons, in sealed packages or crated, on the premises where manufactured, or to the sale of cider in any quantity by the manufacturer from fruits grown on his land within the State of North Carolina."

Chapter 44, Public Laws 1913, generally known as the "Search and Seizure Law," excepts from its operation "wines and ciders in any quantity, where such wines and ciders have been manufactured from grapes or fruit grown on the premises of the person in whose possession such wines and ciders may be."

Chapter 97, Public Laws 1915, being entitled "An Act to restrict the receipt and use of intoxicating liquors," was passed primarily to regulate the shipment of spirituous, vinous or malt liquors, and seems to contain no provision applicable to the facts in this record. It thus appears to be the policy and express purpose of our Legislature to except from the operation of the prohibition law the sale of cider in any quantity, and the sale of domestic wines in quantities of not less than 2½ gallons, in sealed packages or crated, on the premises where manufactured, when made from fruits grown on the lands of the manufacturer within the State of North Carolina. *S. v. Williams,* 172 N.C. 973.

The facts found in the special verdict, in our opinion, do not constitute a violation of the laws of the State, either for the (804) manufacture to sell or for the defendant to purchase and have the wine in his possession. The brief filed for the State concurs in this view.

Affirmed.

STATE v. M. J. JEFFREYS.

(Filed 31 November, 1917.)

For digest, see *S. v. Hicks,* at this term.

INDICTMENT, April Term, 1917, of ORANGE, *Kerr, J.*

The jury rendered a special verdict, the facts of which are identical with those found in *S. v. Hicks,* at this term. The court pronounced the defendant not guilty. The State appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

No counsel for defendant.

BROWN, J. This case is covered by the ruling in *S. v. Hicks*, at this term. The judgment is

Affirmed.

STATE v. JOE SMITH.

(Filed 24 October, 1917.)

1. Constitutional Law—Criminal Law—Unusual Punishments—Statutes.

Our Constitution, Art. I, sec. 14, restraining, in general terms, the "infliction of cruel and unusual punishments," has been considered by the Supreme Court as an admonition to the judiciary in imposing sentence left to an extent within its discretion by the statutes; and while it has been decidedly intimated that a statute may be declared void for prescribing such punishment for an offense as is "cruel and unusual," the question does not arise as to punishment for assault with a deadly weapon, under our statutes.

2. Same—Felony.

Our statute (Revisal, sec. 3292) defines as a felony a crime that may be punished by imprisonment in the penitentiary, and under our Constitution, Art. VI, sec. 2, one so convicted or confesses himself guilty, forfeits his rights to vote, and may only be restored to citizenship, etc., as provided by law. Hence, a sentence to the penitentiary should not be imposed except by express provision of statute.

3. Criminal Law—Punishment—Statutes—Assaults—Deadly Weapons.

Our statutes bearing more directly upon the punishment for an assault with a deadly weapon are Revisal, sec. 3293, making offenses punishable as common-law misdemeanors where no specific punishment is prescribed, except in certain instances wherein imprisonment in the county jail may be imposed; and Revisal, sec. 3620, leaving punishment by fine or imprisonment, or both, in the court's discretion, upon a conviction of assault with or without intent to kill or injure; and thereunder no authority is conferred on the trial judge to impose a sentence of imprisonment in the penitentiary upon a conviction of assault with a deadly weapon; and while section 3620 authorizes a punishment for assault with or without intent to kill, by fine or imprisonment, or both, within the court's discretion, the discretion referred to is within the limitation of the sentence by statute and so understood, and to that extent will not be disturbed on appeal, except in case of manifest and gross abuse.

4. Criminal Law—Punishment—Repealing Statutes.

The provisions of chapter 167, Laws 1868, secs. 8 and 7, providing punishment for an assault with a deadly weapon or by means likely to kill, by imprisonment in the penitentiary, are repealed by Revisal, sec. 3620.

CRIMINAL action, tried before *Whedbee, J.*, and a jury, at (805) May Term, 1917, of WAYNE.

Defendant was indicted for secret assault, and at the conclusion of the State's evidence, tendered a plea of guilty of assault with a deadly weapon, which plea was accepted by the State.

The evidence tended to show an aggravated assault with a deadly weapon, firing twice with a pistol at the prosecutor, one John W. Howell, and at close range, inflicting a slight wound in the hand.

The court sentenced defendant to four years confinement in the penitentiary, and defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

Langston, Allen & Taylor for defendant.

HOKE, J. The provision of our Constitution, Art. I, sec. 14, restraining, in general terms, the "infliction of cruel and unusual punishments," has been considered with us more especially as an admonition to the judiciary in the imposition of sentences recognized and established by the law for the punishment of given offenses and to the extent that the same are discretionary with the courts; and while there is decided intimation that in extraordinary and exceptional instances it may be held to affect legislative enactments, there is no such question presented in this record, for the statutes applicable do not come under the condemnation of any such principle, and the question presented must be determined by correct interpretation of the legislation controlling the subject. *S. v. Woodlief,* 172 (806) N.C. 885; *S. v. James Francis,* 157 N.C. 612; *S. v. Manuel,* 20 N.C. 144. And see an interesting case on the general question in *Weems v. United States,* 217 U.S. 349, holding certain provisions of the Philippine Criminal Code void, as contrary to the Philippine Bill of Rights forbidding cruel and unusual punishments.

Considering the case in the aspect suggested, our statute on crimes (Revisal, sec. 3292) defines as a felony a crime that may be punished by imprisonment in the penitentiary. Section 2, Article VI of our Constitution, provides that any one convicted or confessing himself guilty of a crime that can be so punished shall forfeit his right to vote, and shall only be restored to citizenship, etc., as provided by law. A punishment involving consequences of that

character should not be imposed but by express provision of law, and we are of opinion that there is now no law in this State which justifies the imposition of such a sentence for four years, or other term, for the offense of which the defendant stands convicted — an assault with a deadly weapon. The sections in our Revisal which may be considered as bearing more directly on the subject are as follows:

"Sec. 3293. All misdemeanors where a specific punishment is not prescribed shall be punished as misdemeanors at common law; but if the offense be infamous or done in secrecy or malice, or with deceit or intent to defraud, the offender shall be punished by imprisonment in the county jail not less than four months nor more than ten years, or be fined."

"Sec. 3620. In all cases of assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court: *Provided,* that when no deadly weapon is used and no serious damage is done, the punishment for assaults, assaults and batteries, and affrays, shall not exceed a fine of $50 or imprisonment for thirty days; but this proviso shall not apply to assaults with intent to kill or with intent to commit rape."

Under the ruling in *S. v. Rippy,* 127 N.C. 516, this later section, bearing directly on the case of assaults, with or without intent to kill, making provision for punishment of such offenses, is to be regarded as specific, within the meaning of the statute, and entirely withdraws the case of assault from the operation of section 3293. Both of the sections, however, were considered in *S. v. McNeil,* 75 N.C. 15, and it was directly held that neither provision authorized imprisonment in the penitentiary for the offense of assault and battery. The decision in *McNeil's* case is epitomized in the headnotes as follows:

"Misdemeanors made punishable as at common law, or punishable by fine or imprisonment, or both, can be punished by fine or imprisonment in the county jail, or both. Hence, a general verdict of 'guilty' upon an indictment containing three counts, to-wit, one for an assault with a deadly weapon with intent to kill, another for a similar assault with intent to injure, and a third (807) for a common assault and battery, will not, since the act of 1870-'71, chap. 43, justify imprisonment in the penitentiary. Fine and imprisonment at the discretion of the court does not confer the power to imprison in the penitentiary."

While the language of section 3620 authorizes a punishment for assault with or without intent to kill, by fine or imprisonment, or both, in the discretion of the court, it does not at all mean that the

judge may change the character of punishment recognized and established by the law for such an offense, but that, within such limits, the extent of the punishment is referred to the discretion of the trial judge, and his sentence may not be interfered with by the appellate court, except in case of manifest and gross abuse. This position is emphasized by the fact that, under the former law (chapter 167, Laws 1868, secs. 8 and 7), an assault with a deadly weapon, or by any means likely to produce death, with intent to kill, could be punished by imprisonment in the penitentiary not exceeding ten years; and, in section 7, an assault with a deadly or dangerous weapon, without intent to kill, but with intent to injure, was so punishable not exceeding five years; and the statute of 1870-'71, chapter 43, now Revisal, sec. 3620, was substituted for these sections and was enacted for the express purpose of repealing them.

In *S. v. Rippy, supra,* a sentence of ten years in the State's Prison was upheld, but in that case there was a statute which expressly authorized imprisonment in the State Prison.

Recurring to the many decisions imposing sentences for misdemeanors, we find none where a sentence of more than two years has been approved, *S. v. Woodlief, supra,* and authorities cited. But there seems to be nothing in these cases which necessarily restricts the lower court to this period, and, with the limitation that he cannot change the character of punishment recognized by law for a given offense, or alter by his sentence the quality of a crime from a misdemeanor to a felony, there is nothing which would prevent a court from making "the punishment fit the crime," where it is unprescribed by the law and within its sound legal discretion.

This will be certified, that the sentence on the prisoner may be set aside and a legal punishment imposed in accordance with law.

Error.

Cited: S. v. Jackson, 183 N.C. 702; *S. v. Crews,* 214 N.C. 706; *S. v. Tyson,* 223 N.C. 494; *S. v. Bentley,* 223 N.C. 568; *S. v. Perry,* 225 N.C. 177; *S. v. Grimes,* 226 N.C. 525; *S. v. Surles,* 230 N.C. 285; *S. v. Courtney,* 248 N.C. 453.

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STATE v. J. L. NORRIS.

(Filed 24 October, 1917.)

Criminal Law—Roads and Highways—Obstruction—Statutes.

A way over the lands of another as an outlet to and from the lands of the one claiming it, cannot be established by permissive user, but by possession adverse to the true owner; and a way of this character which has not been established by the public authorities or used and kept up by the public for a sufficient length of time, does not fall within the meaning of Revisal, sec. 2686, so as to make its obstruction punishable.

INDICTMENT for obstructing a cartway, tried before *Connor, J.*, at March Term, 1917, of BLADEN.

The jury returned a special verdict. The court pronounced judgment, finding the defendant guilty. From the sentence of the court the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

Bayard Clark for defendant.

BROWN, J. According to the special verdict, the cartway has never been established under the statute. Revisal, sec. 2686. June Dix owns a tract of land, which he cultivates, and to reach the same from any public road he must cross the lands of others. For thirty-seven years he has used a road across the lands now owned by the defendant, over which he has exercised no ownership or possession, except passing back and forth along the same, and occasionally cutting out a tree or other obstruction therefrom. The road was not cut out or established by Dix, and has been used by others only occasionally. In clearing his own land for cultivation, the defendant felled trees and placed brush and other obstruction in this cartway.

It is manifest, from the brief filed by the State, that the learned Attorney-General and his able assistant are of opinion that the court below erred in adjudging the defendant guilty, upon the facts set out in the special verdict, and in that opinion we concur.

The way in question is neither a public highway nor a private cartway established under the act. A public highway is one established by the public authorities and kept in order by them, or else it is such a highway as has been used and kept up by the public for such a period of time that the law will presume a dedication to the public use. There is no finding that the public has any interest in the cartway or has ever used it to any appreciable extent. It con-

nected Dix's land with the main road, and no public pur-
(809) pose was served by it. *S. v. McDaniel,* 53 N.C. 284; *Boykin v. Ackenbach,* 79 N.C. 539.

The only way that the prosecutor, Dix, could acquire an easement over the land of the defendant, other than by grant, is by continuous adverse user. While it is well established in this State that the right to a private way over the land of another may be acquired by continuous adverse use for twenty years, it is equally well settled that the mere use of a highway without being adverse, for the required period, is insufficient to create the right. *Ingrahan v. Hough,* 64 N.C. 43; *Mebane v. Patrick,* 46 N.C. 23.

The mere fact that Dix was using a pathway across the defendant's land for his own convenience will not be given the effect of an adverse user without evidence to support it. The quiet acquiescence of the defendant in such use, as an act of neighborhood courtesy, will not be allowed to prejudice him. *Boykin v. Ackenbach, supra; Mebane v. Patrick, supra.*

It is not contended that the use of the highway upon the part of Dix was in any sense adverse to the rights of the defendant. The judgment of the Superior Court is reversed. Let judgment be entered that the defendant is not guilty.

Reversed.

Cited: Weaver v. Pitts, 191 N.C. 748; *Gruber v. Eubank,* 197 N.C. 285; *Hemphill v. Bd. of Aldermen,* 212 N.C. 188; *Darr v. Aluminum Co.,* 215 N.C. 772; *Speight v. Anderson,* 226 N.C. 496; *Gibson v. Dudley,* 233 N.C. 259; *Williams v. Foreman,* 238 N.C. 303; *Henry v. Farlow,* 238 N.C. 543.

STATE v. J. A. POYTHRESS.

(Filed 24 October, 1917.)

1. Indictment—Criminal Law—Warrant—Complaint—Omissions—Forms—Judgment.

The omission of the name of the party in the complaint, against whom a criminal offense is charged, will not of itself invalidate the indictment, when the warrant of arrest thereto attached and referred to contains his name and clearly indicates him as the person charged, the complaint and warrant being read together, and in this way they are sufficient in form to proceed to judgment upon conviction. Revisal, secs. 1467, 3254.

STATE *v.* POYTHRESS.

2. Indictment—Amendments—Courts—Criminal Law.

The policy of the law is to allow liberal amendments to the warrant of arrest, with the limitation that the amendments allowed must conform to the evidence elicited on the trial; and, in this case, on appeal from a recorder's court, and on trial in the Superior Court, under indictment for violating the State prohibition laws, the court properly allowed amendments alleging two additional counts, there being abundant evidence to sustain them.

3. Verdict — Criminal Law — Indictment—Several Counts—General Answer.

Where there are several counts in a bill of indictment charging a violation of the State prohibition law, with evidence as to each, and the court has instructed the jury, if they acquitted the defendant on any one or more of the counts, to so specify, a general verdict of guilty is not objectionable, though it were better for the jury to answer as to each count, the verdict meaning that the defendant had been found guilty under all of them.

CRIMINAL action, tried before *Kerr, J.*, and a jury, at May Term, 1917, of DURHAM. (810)

The defendant was charged with the following crimes:

1. That he engaged in the business of selling, exchanging, bartering, or giving away spirituous liquors, for the purpose of gain, directly or indirectly.

2. That he had in his possession twenty-seven pints of such liquors for the purpose of sale.

3. That he received at one time and in one package more than one quart of whiskey, to-wit, twenty-seven pints.

There is an averment in the verified complaint that all these acts were unlawfully, willfully, and maliciously done, and were committed against the statute and against the peace and dignity of the State. The name of the defendant was omitted from the complaint, the words in that part of the charge where the name should appear being, "That on or about 24 April, with force and arms, in the county aforesaid and within Durham Township, did willfully," etc. The warrant of arrest, which was issued at the time the complaint was filed, contained the name of the defendant, and is partly in these words: "These are *therefore* to command you forthwith to apprehend the *said* J. A. Poythress, . . . to answer the above charge, set forth in the affidavit, and be dealt with according to law." Defendant pleaded "not guilty," before the recorder, and was tried, and having been convicted and sentenced, he appealed. There was no motion to quash or to arrest the judgment before the recorder, so far as appears. In the Superior Court the solicitor moved to insert two counts in the charge, and was allowed to do so, as follows:

"And did unlawfully and willfully sell to London Whitted, on the first day of February, 1917, twenty pints of whiskey, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

"And, further, that the said J. A. Poythress, on the first day of January, 1917, in Durham County, State aforesaid, did unlawfully and willfully sell to persons, to the court unknown, spirituous liquors, to-wit, one pint, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the court."

The jury returned a verdict of guilty, judgment was entered thereon, and defendant, after moving unsuccessfully to arrest the judgment, again appealed.

Attorney-General Manning and Assistant Attorney-Gen-
(811) *eral Sykes for the State.*

R. S. McCoin and Brawley & Gantt for defendant.

WALKER, J., after stating the case: The complaint did not allege any offense against the defendant, as his name was not mentioned therein, but the warrant refers distinctly to the complaint, and, besides, was physically annexed to it. When this is the case, it may supply any omission or deficiency in the former, and if the two, when considered together as parts of the same proceeding, sufficiently inform the defendant of the accusation made against him, nothing else is necessary to be done. We so held in *S. v. Yellowday,* 152 N.C. 793, where it was said: "The second objection is that the allegations of the complaint or affidavit were not inserted in the warrant; but this is untenable, as the warrant clearly refers to the affidavit and called upon the defendant to answer its allegations. This is all that the law requires in such a case," citing *S. v. Winslow,* 95 N.C. 649; *S. v. Davis,* 111 N.C. 729; *S. v. Sharp,* 125 N.C. 634; *S. v. Yoder,* 132 N.C. 1113; to which we add *S. v. Sykes,* 104 N.C. 694.

In those cases, the affidavit, or original charge, was essentially changed, and yet it was held that the Superior Court had the power to amend it. It has also been held by this Court that if the defendant is before the court, without regard to the manner by which he was brought there, the court will not release or discharge, but proceed against him criminally for any offense, within its jurisdiction, which he may have committed, although not the one for which he was arrested. *S. v. Cale,* 150 N.C. 805.

Bishop's New Criminal Procedure, sec. 235, subsec. 1, says: "From the principles stated, it seems, if a warrant of arrest is in-

sufficient or void, if the accused person is brought before the magistrate under it, he is not therefore to be set at liberty, whatever may be his rights as against the officer and others connected with its proceedings."

The other objections and exceptions by the defendant relate principally to the ruling of the court allowing amendments to the warrant. The policy of the law as evidenced by section 1467 of the Revisal and numerous decisions of this Court is one of liberality in allowing amendments in the Superior Court to warrants issued by justices of the peace, and such amendments are allowed even after verdict *(S. v. Smith,* 103 N.C. 410), and even after a special verdict *(S. v. Telfair,* 130 N.C. 645). The only restriction would seem to be that the amendment must be made to conform to evidence elicited on the trial, as shown by the record *(S. v. Baker,* 106 N.C. 758). The effect of this amendment was to add two additional counts to the charge upon which the defendant was being tried, both amendments conforming to the evidence elicited on the trial, (812) as appeared from the record, and both amendments abundantly supported and sustained by evidence offered at the trial. Much of this evidence, as appears, was not objected to by the defendant, and if believed by the jury, established the guilt of the defendant, and further showed that he had persistently carried on the business of a "blind tiger" and dealt in large quantities, and did not merely conduct a small business of selling liquor by the drink or by the half-pint. The evidence, if believed by the jury, was amply sufficient to convict the defendant upon the first count in the warrant, which is made a criminal offense by section 1, chapter 44 of the Public Laws of 1913; on the second count in the warrant by section 2, chapter 97 of the Public Laws of 1915; on the third count by section 2, chapter 44 of the Public Laws of 1913. These sections have been lately construed by this Court in the case of *S. v. Carpenter,* 173 N.C. 767. If the defendant had in a suitcase at one time 27 pints of whiskey, that would be receiving in one package more than one quart.

If his Honor had the power to permit the amendments upon the motion of the solicitor for the State, then it seems to be conceded in the brief of the defendant's counsel that the exceptions, both to evidence and to his Honor's charge, cannot be supported; but whether admitted or not, that is the true result. These exceptions seem to be predicated upon the idea that his Honor was without power to allow the amendments. The evidence clearly showed not only that the defendant had the quantity of whiskey prohibited by law, from which the jury could infer that he had such quantity for sale, but that, as a matter of law, he did sell, and in large quan-

tities and for large profits, and evidently sold such quantities with the knowledge that his vendee was buying for the purpose of retailing, as he had the kind of package that would suit the retail market.

There was evidence to support each count of the written accusation, as amended. If it was necessary to amend — and we have shown that it was not — as there were already sufficient accusations to warrant the sentence, the court undoubtedly had ample power to do so, and to allow either the affidavit or warrant to be amended in order to secure the proper administration of the law, without much, if any, regard to harmless technicalities. The statute so expressly provides, and as there seems to be either some misapprehension as to its meaning and scope, or failure to note its broad provisions, we may well reproduce it here, so as to direct special attention to it. Under the title "Process not quashed for form," it reads: "No process or other proceeding begun before a justice of the peace, whether in a civil or a criminal action, shall be quashed or set aside for the want of form, if the essential matters are set forth therein; and the court in which any such action shall (813) be pending shall have power to amend any warrant, process, pleading, or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be deemed just, at any time, either before or after judgment." Revisal, sec. 1467.

As the judge clearly had the power to amend the warrant, the question then is presented whether the complaint and warrant, as amended, charged a criminal offense, for if it did we disregard immaterial defects in them. In this respect, the statute further provides: "Every criminal proceeding by warrant, indictment, 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 of proceeding sufficient matter appears to enable the court to proceed to judgment." Revisal, sec. 3254.

The learned counsel of the defendant, who has argued the case with commendable zeal and with ability, took the further position that the jury has rendered a verdict of "guilty" generally, without stating therein on which count he was convicted. But this was not necessary. It may be advisable to do so, but it is not indispensable that it should be done. The verdict plainly meant, and should be so construed, that defendant was guilty on each and all of the counts. The judge instructed that if they acquitted defendant on any one or more of the counts, they should specify it in the verdict. The

offenses charged are of the same grade, and punishable alike, and a general verdict of guilty in such a case, where there is a joinder of several counts, will be sustained, as it extends to all the offenses included in the charge. *S. v. Cross,* 106 N.C. 650; *S. v. Baker,* 63 N.C. 276; *S. v. Carter,* 113 N.C. 639; *S. v. Robbins,* 123 N.C. 730. If one of the counts is bad, the verdict is presumed to have been given on the one that is good. *S. v. Beatty,* 61 N.C. 52. A general verdict of guilty, when there are three counts, and the jury are instructed by the court to disregard two of them, will be applied to the third count. *S. v. Leak,* 80 N.C. 403. When the solicitor elects to try only on one count, or when the verdict is only on one of several counts, it is equivalent to an acquittal as to the others. *S. v. Sorrell,* 98 N.C. 738; *S. v. Taylor,* 84 N.C. 773. Where an indictment contains more than one count, but the evidence, charge of the court, and the argument of counsel were confined to only one of them, it will be presumed that the verdict followed the course of the trial, and that the jury considered only the counts in the same restricted way adopted at the trial, and that the verdict related to such count, and not to the others. *S. v. May,* 132 N.C. 1020.

We have held that a verdict for illegally engaging in the business of a retail liquor dealer, selling liquor by the small (814) measure, to a person unknown, and selling it for gain, will be upheld if there is one good count, the presumption being that the verdict was confined to that count. *S. v. Avery,* 159 N.C. 495; citing *S. v. Tisdale,* 61 N.C. 220; *S. v. Holder,* 133 N.C. 710; *S. v. Dowdy,* 145 N.C. 432.

These are but illustrations of the different ways in which verdicts have been construed, so as to ascertain what was meant by the jury. A verdict of guilty, when there are several counts, is equivalent to a verdict of guilty as to all of them, or, in other words, such a verdict, in the absence of something to restrict it, extends to all the counts. There was evidence in this case sufficient to convict on each of the counts, and it will be presumed that the jury, when nothing appears but this general verdict, intended to embrace all the counts therein.

In the presence of our statutes upon this subject, which are quoted above, and even without them, we would not at all be disposed to reverse the judgment or arrest its execution on a mere technicality, if there is one here, because the defendant was fully apprised, by the complaint and warrant, of the particular charge made against him and had ample opportunity to defend himself against it. So that, in any view of the case, defendant was legally convicted, and the court had the power to impose the punishment.

No error.

Cited: *S. v. Mills,* 181 N.C. 534; *S. v. Snipes,* 185 N.C. 747; *S. v. Holt,* 195 N.C. 241; *S. v. Hunt,* 197 N.C. 708; *S. v. Anderson,* 208 N.C. 786; *S. v. Clegg,* 214 N.C. 677; *S v. Graham,* 224 N.C. 350; *S. v. Brown,* 225 N.C. 24; *Carson v. Doggett,* 231 N.C. 636; *S. v. Sawyer,* 233 N.C. 79; *S. v. Thompson,* 233 N.C. 347; *S. v. Hammonds,* 241 N.C. 228; *S. v. St. Clair,* 246 N.C. 186; *S. v. Howell,* 261 N.C. 658.

STATE v. JOHN COFFEY.

(Filed 5 December, 1917.)

1. Homicide—Murder, First Degree—Evidence—Premeditation.

Where there is evidence of previous ill-will of the defendant towards the deceased, upon trial for homicide; that the former approached the latter as he was preparing to play ball, with his hand on his right-hand hip pocket, addressed the deceased, to which the latter replied, "I will do you right; I do not want to have any trouble with you"; that deceased started into the field upon the call to play ball with nothing but a glove in his hand, the prisoner drew a pistol from his right-hand hip pocket, and used both hands while firing the fatal shot: *Held,* no particular time is required for premeditation and deliberation, and the evidence is sufficient to sustain a conviction of murder in the first degree.

2. Homicide—Intoxication—Evidence—Murder.

Evidence in this case of intoxication as a defense to a charge for murder is held inefficient to disturb the verdict for conviction in the first degree.

3. Appeal and Error—Evidence—Harmless Error.

Upon a trial for murder, testimony of a witness that he was permitted to see the deceased after he had been shot, who told him, "Tell everybody I love them," is held irrelevant and harmless.

INDICTMENT for homicide, tried before *Justice, J.,* at Au-
(815) gust Term, 1917, of CALDWELL.

The defendant was convicted of murder in first degree, and from sentence of death appeals.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

Moses M. Harshaw, W. C. Newland, and J. H. Burke for defendant.

BROWN, J. The defendant excepts to the refusal of the court to instruct the jury that there is no sufficient evidence of murder in

first degree. There is evidence tending to prove that defendant shot and killed Albert Kirby under these circumstances.

The deceased was playing baseball. The defendant came around the left side of the ball field up to the deceased and said something to him, and the deceased replied, "I will do you right; I do not want to have any trouble with you." At that time the umpire called, "Play ball," and as the deceased turned to resume the game, with nothing in his hand but the baseball glove, the defendant deliberately shot him twice — once in the side and almost immediately a second time in the back. The defendant pulled the pistol out of his *right pocket* and used both hands in shooting it.

The defendant then ran, with the sheriff, who happened to be present, pursuing him. After a long chase, the sheriff shot at defendant, who then surrendered. These is evidence that defendant approached deceased with his hand *in the right* side pocket of his coat, and that a half hour before they had been quarreling. There is evidence that at time of the homicide, deceased begged defendant to go off and leave him, stating that he did not desire any trouble. One witness testifies that immediately after the killing and while the body of the deceased was lying on the ground, somebody walked up to the defendant and said, "John, you killed him, and I guess you hate it now." The defendant replied, "I do not know; that is what I aimed to do."

There is also evidence of previous ill-will and quarreling. Moved by the earnest eloquence of defendant's counsel, we commenced the examination of this record, with the hope that some exculpating circumstances would be found, but the simple statement of the evidence discloses abundant proof of a deliberate and willful homicide amply sufficient to support the charge of the judge and the verdict of the jury, and no discussion of it is necessary.

It is true there is evidence that the defendant was drinking, but that does not justify the taking of human life. Besides, there is very strong evidence that he was not drunk. The sheriff says: "John Coffey was not drunk. He outran me, and it takes a speedy man to do that."

No particular time is required for the process of premeditation. When the fixed deliberate purpose to slay is once (816) formed, it is immaterial how soon afterwards such resolve is executed. This subject is so fully discussed in numerous cases that we forbear further discussion. *S. v. Walker*, 173 N.C. 780, and cases cited.

The only other assignment of error is to the evidence of Harris, who was permitted to state that he went to the deceased and spoke to him, and deceased said: "Tell everybody I love them."

We are unable to see, and defendant fails to point out, wherein he was prejudiced by this evidence. In our opinion it was irrelevant and harmless.

No error.

Cited: *S. v. Benson,* 183 N.C. 798; *S. v. Steele,* 190 N.C. 511; *S. v. French,* 225 N.C. 284; *S. v. Wise,* 225 N.C. 749.

NATHANIEL BOYDEN

ADDRESS OF DR. ARCHIBALD HENDERSON, OF THE UNIVERSITY FACULTY, IN PRESENTING, ON BEHALF OF THE FAMILY, TO THE SUPREME COURT, A PORTRAIT OF THE LATE JUDGE NATHANIEL BOYDEN, AT ONE TIME A MEMBER OF THAT BODY.

May it please your Honors:

One bright morning in the autumn of 1822 two adventurous young men from remote New England, the one from Massachusetts, the other from Connecticut, alighted from the stage coach and tarried to take breakfast at the home of Hezekiah Saunders, near King's Cross Roads, in Guilford County. So impressed were these young fellows by the attractions of the locality that, before the stage was ready to depart, they had resolved to end their wanderings and to make a hazard of new fortunes in the Old North State. One of these young men was the agent of a clock company; the other was a fledgling attorney, with less than $50 in his pocket. The former bore the name of Sidney Porter; the latter, the name of Nathaniel Boyden. Is it too fanciful to say that had these two young men gone on, as they intended, to Greenville, S. C., or Monticello, Ga., and not found North Carolina fair to look upon that clear autumn morning, after a bountiful repast, it would not have been my singular destiny to present to the State of North Carolina three years ago a memorial to the grandson of the former, the world-famous "O. Henry," and to present to the Supreme Court today a portrait of the latter, distinguished as lawyer, member of Congress, and Justice of the Supreme Court, Nathaniel Boyden? What a debt the State of North Carolina owes to the gratifying blandishments of Hezekiah Saunders, of Guilford, and his hospitable hostelry of a hundred years ago!

I.

Nathaniel Boyden derived from forbears of worth and distinction, and inherited qualities which in due time elevated him to position and esteem wholly commensurate with ancestral promise. Thomas Boyden, the ancestor of all the earlier members of the family who bore this name in America, embarked for New England in the good ship *Francis,* from Ipswich, Suffolk County, England, in April, 1634, having taken the oath of allegiance before his Majesty's officers, according to the order of the Lords of the Privy Council. The family was long established in England, the surname being frequently found in English records during the past three centuries; and at the village of Boyden, in Suffolk, are located estates enumerated in the will of an English nobleman. The father (818) of Nathaniel Boyden, John by name, the first male child

born (29 January, 1764) of European parents in Conway Township, Massachusetts, died on 2 October, 1857, at the great age of 93 years. As a soldier in the Revolution he stood on guard at one end of the cable stretched across the Hudson River to prevent the passing of the sloop-of-war, *Vulture,* when Benedict Arnold was plotting to betray West Point, and he often reverentially spoke of seeing Washington when he made his unexpected visit to West Point after André's capture and Arnold's flight.

Nathaniel Boyden's mother, Eunice Hayden, was the daughter of Dr. Moses Hayden, a learned and eminent physician, of Conway, Mass., and his uncle was the Hon. Moses Hayden, a member of Congress from New York. The pioneer of the family was William Hayden, who came to this country in the *Mary and John* in 1630; and for many earlier generations the Haydens, whose estates were located in the neighborhood of Norwich, England, were distinguished for bravery as soldiers and for commendable virtues as citizens. It is probable that Nathaniel Boyden derived his brilliant talents as a lawyer from the Haydens, who for long held legal appointments in England from the king. It is noteworthy that the wife of one of his Hayden ancestors was the aunt of the ill-starred Anne Boleyn.

We feel no surprise, then, on learning that the young Nathaniel, who was born in Conway, Mass., on 16 August, 1796, displayed the martial spirit of his ancestors by enlisting in the war of 1812 at the age of 15, and that for his services he received the reward of a land warrant for 160 acres of land. His education was of the best. He was prepared for college at Deerfield Academy, and attended in succession Williams College and Union College, Schenectady, N. Y., where he was graduated in July, 1821. He began the study of the law while still in college. Before coming to North Carolina he served a brief apprenticeship under the New York attorney, Judah Yearby, whose office was just off Wall Street, and under his uncle, the Hon. Moses Hayden, with whom he read law.

At King's Cross Roads, in Guilford County, he taught school, the while acquainting himself with the North Carolina legal code and procedure; and somewhat later he taught school in Madison, Rockingham County, where he met Ruth, great-niece of Governor Alexander Martin, and was married to her on 20 January, 1825. In December, 1823, he received license to practice law in the courts of this State, and settled near Germanton, Stokes County, where he resided until his removal to Surry, in 1832. In 1842 he removed to Salisbury, where he resided until the time of his death, on 20 November, 1873. After the death of his first wife he was married to Mrs. Jane C. Mitchell, widow of Dr. Lueco Mitchell, and niece of Chief Justice Leonard Henderson. I rejoice in the presence

here this morning of a gracious resident of Raleigh, Mrs. T. (819) K. Bruner, granddaughter of Nathaniel Boyden and Ruth Martin, and in the presence of the son of Nathaniel Boyden and Jane, his second wife, the Hon. A. H. Boyden, the most popular and debonair of North Carolina gentlemen.

The conspicuous facts of Nathaniel Boyden's public life may be recited in brief compass. The deeper springs of his action and character, and the larger meaning of his life, might well inspire an extended biography. In 1830 and again in 1880 he represented Surry County in the House of Commons, and in 1844 he represented Rowan County in the State Senate. In 1847 he was elected a member of the Thirtieth Congress, and at the expiration of the term declined a reëlection. Twenty-one years later he was elected a member of the Fortieth Congress, and in 1871, as successor to the Hon. Thomas Settle, he was appointed Associate Justice of this Court, which elevated post he held at the time of his death.

II.

Upon one occasion the Hon. William H. Bailey, in his day one of North Carolina's ablest and wittiest lawyers, was asked why he did not publish his reminiscences of the lawyers of North Carolina, which he was known to have written. "My dear friend," he replied, "it is posthumous work. If I were to publish that book during my lifetime I should be indicted for criminal libel in every county in the State." Of his law partner, Nathaniel Boyden, he could have said nothing to provoke a libel suit, for he knew him to be unsurpassed by his contemporaries in knowledge of the law, in dialectic ingenuity, and in resolute force of character. With one of those encyclopædic minds which remind one of the indicial omniscence of a card catalogue, he retained, ready for immediate use, not only the law bearing upon the case, but all the testimony, however voluminous, without feeling the need for recording it. Thrown into competition, at the outset of his legal career, with men of the stamp of Ruffin, Murphy, Nash, Settle, Yancey, and the Moreheads, he met every emergency through the extraordinary gifts with which nature and study had endowed him — vigorous intellect, perception quick as light, and an agility in mental reason well-night phenomenal. A later contemporary thus characterizes him: "He delighted in the practice of the noble profession which he so much adorned and in which he reached so high an eminence. The fine intellectual conflicts to which it gave rise possessed for him indescribable charms. They were meat and drink to his nature. His self-reliance never forsook him for a moment. His moral courage was sublime.

He never shrank from the performance of any duty nor hesitated to take any responsibility. His fidelity to his chiefs was never (820) doubted. With all these high qualities, being well grounded in the law, and thoroughly understanding its great cardinal principles, success was inevitable."

From the time of his first retirement from Congress until his elevation to the bench, at the age of 74, he was actively engaged in the practice of his profession, having a circuit of twelve counties. For more than thirty years he regularly attended the sessions of the Supreme Court of the State. Endowed with an eminently practical mind and extraordinary industry, he attained to great repute and achieved a handsome competency. Traditions of North Carolina's greatness clustered about his footsteps; for in his own yard in Salisbury was situated the tiny law office of Judge Spruce Mackay, the legal preceptor of William R. Davie and Andrew Jackson. In some reminiscences the late Charles Price, brilliant and able attorney, characterized Nathaniel Boyden as perhaps the greatest *nisi prius* practitioner who ever lived in North Carolina. "I have seen Mr. Boyden," he said; "indeed, heard him at the bar. As a lawyer he was the equal of anybody on the circuit. I heard Mr. J. M. Clement, himself one of the greatest lawyers of the State, say that Mr. Boyden had appeared in more jury trials than any other of our lawyers. He was thoroughly familiar with the English law, with all questions of practice and the rules of evidence, and saw always the point in the case at once. Mr. Boyden was an orator, too — a great wrangler — and, no matter how or when tripped, invariably lighted on his feet.

"I remember once, at Yadkin Court, when it was suggested that unless the jury agreed it would be necessary to haul them to Surry the next week. Mr. Boyden, in a moment, said there was no authority for such a course. The court (Judge Buxton) said it had been done in North Carolina, and asked Mr. Boyden, 'Why not in this case?' Mr. Boyden said the rule here was different from the English rule. There, the records were made up at Westminster and followed the judge around the circuit; here, every county had its own records, and the jury could not be separated from the record. This was so evidently correct, the jury was dismissed."

As Associate Justice of this Court, during the two and a half years of his incumbency Judge Boyden delivered opinions which, for practical wisdom, broad knowledge, and cogency in reasoning, may uniformly be cited with profit. These opinions will be found in five volumes — 65 to 69 North Carolina Reports, inclusive. The present distinguished head of this Court has written of Judge Boyden: "While on the bench he was said to have been especially

useful on questions of practice. He possessed a strong and cultivated mind, and was endowed with an extraordinary memory. A fair specimen of his style and his practical turn of mind will be found in *Horton v. Green,* 66 N.C. 596, an action for deceit and false warranty."

III.

In all the political changes, through periods of great stress (821) and ferment, in State and nation, Judge Boyden was allied with more than one political party. But as an "old-line Whig" he stood consistently for the doctrines in which he had early learned to believe. In the earlier years of his life he was a Madisonian Republican, and when the old Republican party dissolved he joined the National Republicans and supported John Quincy Adams for the presidency in 1825 and 1829. Upon its formation he became a member of the Whig party and stood steadfastly by its fortunes to the last. And when that party ceased to exist he continued to cling to the fundamental doctrines which it had taught. "Calm thought and mature reflection," said one of his contemporaries in 1873, "had led him to the firm conviction that the theory of the Constitution taught by Washington, Marshall, Webster, and Clay was the true one, and the only one, on which the Government could be maintained and the Union preserved. And he was prepared to follow out these doctrines to their legitimate consequences. With him a love of the Union predominated largely over every other political feeling. He saw no hope for the preservation of constitutional liberty in this country but in the preservation of the Union, and no hope for the preservation of the Union but in the national principles which he held. And he always had an abiding faith that they would triumph at last, and believed that a long and glorious future awaited the great American Republic."

From the very beginning of the War Between the States he never expected any other result than the final surrender of the Confederate forces to the Federal army. Yet, notwithstanding what he regarded as their great political errors, he manifested the profoundest sympathy with the Southern people, lamented the stern penalties of war, and lent his aid to the citizens of his adopted State. I was deeply impressed some time ago in reading some unpublished reminiscences of the late Rev. A. W. Mangum, professor at the University of North Carolina, in which he described the arrival at Salisbury, where he was then living, of the first news of the opening of the great conflict. "The news of the bombardment of Fort Sumter, as it flashed over the wires," he relates, "created a novel, strange and painful excitement. True, there was rejoicing when it was

known that the Stars and Stripes were lowered and South Carolinians were in possession of the stronghold; but there was an indescribable dread and foreboding that mingled with that rejoicing in the minds of all the thoughtful and sagacious. Entering *The Watchman* office on the morning the thrilling intelligence was received, I observed Hon. Mr. Boyden as he read the telegram. Dropping the paper, he exclaimed, with an emphasis I can never forget, 'We are ruined — ruined — ruined!' "

Judge Boyden was identified with the South by family
(822) ties, by interest, and by all the memories of his palmy days; and he was not, at heart, untrue to the South in opposing that which his sagacious mind considered baneful to her welfare, prosperity, and peace. He looked upon secession as disastrous to the South. But, once the die was cast, he went with the State. One may read to-day in *The Carolina Watchman* of 24 August, 1861, the list of subscriptions to the Confederate Loan — a list headed by the name of Nathaniel Boyden in the sum of $1,500, accompanied by the statement that his tobacco, as well, would be freely subscribed. He bore the sternest test of all — he gave his beloved youngest son, Archibald Henderson, to fight for the cause of the Confederacy.

One who knew him intimately has written that "No man was more opposed to the plan of Congressional reconstruction than Judge Boyden, and none labored harder to prevent it." But at the same time none realized more clearly than he the exigency, as well as the intrinsic justice, of making some sort of concession in the form of political privileges to the negro race. Along with Bedford Brown, P. H. Winston, J. M. Leach, and Lewis Hanes, Nathaniel Boyden was appointed by Governor Worth in 1866 on a commission, the main function of which was to investigate the condition of affairs and mature a rational and humane policy. With the greatest earnestness he devoted himself to these duties, and by conference with Governor Orr of South Carolina, ex-Governor Parsons of Alabama, Governor Marvin of Florida, Judge Sharkey of Mississippi, and Judge J. T. James of Arkansas, sought in Washington to effect a compromise and settlement of the vexing questions growing out of the results of the war. The plan proposed, known as the "North Carolina Plan," in the formulation of which Judge Boyden had a large share, and for its basis impartial suffrage and universal amnesty. No man who had ever voted was to be disfranchised, but thereafter all others who could read and write, or who owned $200 worth of taxable property, without distinction of race or previous condition, were to be enfranchised. In return for this concession, full and complete amnesty by Congress was to be granted, as well as the recognition of the governments then existing in the Southern

States, and the speedy admission of the senators and representatives of those States, elected in 1865, to their seats in the National Legislature. In all probability, the North Carolina plan would have been accepted by the State Legislature but for the conviction that it would be only the prelude to the imposition of deeper humiliations. Foreseeing the direful consequences to North Carolina in case of its failure, Mr. Boyden had its success deeply at heart. Upon learning of the failure of the plan, after all his arduous and sincerely patriotic efforts, the anguished man vented his deep grief in bitter tears.

At this day, in the clear light of truth, and in this room, the hall or supreme justice, it is indeed well that men should (823) consider, freely and impartially, the facts of history. At the close of the war Nathaniel Boyden was desirous for an immediate restoration of the Southern States to their former places in the Union. He was opposed to the Howard Amendment, because of its large proscriptions, which he deemed unwise and unjust, and favored a much more comprehensive amnesty than that granted by President Johnson's proclamation in 1865. When it was proposed in 1868 to furnish Southern Governors with arms, Mr. Boyden denounced the plan in the strongest terms, saying on the floor of the House of Congress: "Great God! We cannot afford to fight each other. I warn the House that if arms are sent there, we will be ruined; we cannot live there. If we need anything in the way of arms, in God's name send an army of the United States there, but do not arm neighbor against neighbor." North Carolina might well have been spared many of the horrors of the orgy of reconstruction had Lincoln lived. And this in a way and for a reason that may not be known to many in my hearing. It was related in writing by the late John A. Boyden, and is believed to be an historic fact, though never hitherto given to the public, that President Lincoln had selected Nathaniel Boyden for the post of Provisional Governor of North Carolina. The proclamation had been prepared by President Lincoln, who was assassinated on the night before it was to be published.

Three incidents in Mr. Boyden's career are deserving of more than the passing mention to which I must, perforce, limit myself here. In the Convention of 1865 he played one of the leading roles and introduced the ordinance which declared that the ordinance of 20 May, 1861, "is now, and hath been at all times, null and void." In the impeachment trial of Governor Holden he was one of the brilliant array of legal talent composing the Governor's counsel, including besides himself R. C. Badger, J. M. McCorkle, William N. H. Smith, and Edward Conigland; and his speech on 17 March, 1871, with its imposing marshalling of legal authorities, is mem-

orable as an argument on the impossibility of holding the Governor responsible for his execution of an unconstitutional law. Some verses by an unknown hand, penned during the progress of Governor Holden's trial, have been handed down for the amusement of posterity:

Graham's expounding
The law — his voice sounding
Away through the dome —
On the great writ of right
He makes a grand fight,
And surely thinks he's some.

(824)

But Boyden, the pliant,
Who will follow, defiant,
All minor themes scorns
If all else would fail him,
Why, then, he'll impale him
On horns, horns, horns.

Lastly, Mr. Boyden was consistent with his own principles, long tenaciously maintained, in transferring his allegiance, in 1868, to the Republican party. Had the Convention accepted in good faith the situation in the South as it was, and nominated Chief Justice Chase for the presidency on that platform in 1868, Mr. Boyden would have become an active opponent of General Grant for the presidency in that year. It was sincere alarm for the safety of the country, occasioned by the nomination of Seymour and Blair by the New York Convention, and the publication by the latter of his celebrated "Brodhead letter," which drove Mr. Boyden into his support of General Grant. Apart from the policy of the Republican party in reference to reconstruction, he had always held to some of its great cardinal principles.

May it please your Honors, I beg leave to present to the Supreme Court of North Carolina, to be placed upon your walls, the portrait of Nathaniel Boyden. In presenting this portrait of one who achieved honorably and filled worthily a seat upon this bench, I shall make end with some words written at the time of Judge Boyden's death by my own father:

"In all his intercourse with his fellow-men Judge Boyden was straightforward, honest, direct. He was a pattern of perfect sincerity in all that he said or did. He was manly in everything. Flattery he detested. The arts of the demagogue he despised. No man ever lived who was farther away from corruption. His integrity was never doubted by any man who came near him. His manly and straightforward course, accompanied by a certain brusqueness of manner, may have led some to suppose that he was deficient in

some of the qualities of the heart. If so, it was a great mistake. With as much of true manhood as belongs to the greatest and most powerful characters, he yet possessed all the tenderness that characterizes the gentlest of the gentler sex. None who knew him well can deny that his was a character that deserves to be held long in remembrance, especially as a bright example to the young men of the country. Let them take courage from that remarkable example, and emulate his many virtues and noble qualities, and success in whatever they undertake is within their reach."

I thank your Honors.

(825)

ACCEPTANCE BY CHIEF JUSTICE CLARK OF PORTRAIT OF JUDGE NATHANIEL BOYDEN, 20 NOVEMBER, 1917.

The Court has heard with great interest the instructive address of Professor Henderson.

Judge Boyden was born in Massachusetts in 1796. He was a soldier in the War of 1812, and the son of a soldier of the Revolution, and his son served the South with distinction in the War of 1861-'65. He came to this State in 1822 and was several times a member of the Legislature. In 1847 he was a member of Congress, and again in 1868. He was appointed to the Supreme Court in May, 1871, and served two and a half years, till his death, in November, 1873.

Admitted to the Bar in 1823, he served in his profession with great distinction for nearly half a century. During that time it was his custom to attend forty-eight courts each year, and he practiced regularly in twelve counties. Such labor as this will put to shame the most strenuous members of the Bar of these days, most of whom do not go out of their own counties.

When appointed to the Supreme Court bench, Judge Boyden was in his 75th year, being the oldest man ever appointed to this bench. Chief Justice Smith and Judge Ashe were also in their 75th year when re-elected, when there were only three judges on this bench, but Judge Smith had already been ten years on the bench and Judge Ashe eight years. These figures seem moderate, however, compared with Chief Justice Marshall's service, till he was 80, and Chief Justice Taney's, who wrote the celebrated Dred Scott decision when he was 80, and continued in service on the bench till he was 87. Still more remarkable was the appointment of John Campbell (the illustrious author of Lives of the Chief Justices and Lord Chancellors) as Lord Chancellor, for the first time, when over 80, and the career of Lord Chancellor Lyndhurst of England, who was born at Boston three years before the battle of Bunker Hill, survived till after the battle of Gettysburg, and died still in judicial service at the age of 91.

The youngest judge to ascend this bench was Judge Settle, at the age of 37. Judge Boyden was more than double that age when appointed — these being the extremes. Judge Boyden brought to this Court the accumulated learning and experience of nearly fifty years at the Bar and the intensity of energy and love of labor which had gained him success and fortune in that forum, and commanded for him a well-earned reputation here.

ACCEPTANCE OF PORTRAIT OF NATHANIEL BOYDEN.

Professor Henderson has so graphically characterized the career of Judge Boyden that nothing can be added to the (826) valuable sketch which he has given us of this remarkable man, who was truly the Nestor of the Bar in this State for so many years.

The marshal will hang his portrait in its appropriate place on the walls of this Court.

RULES OF PRACTICE

IN THE

SUPREME COURT OF NORTH CAROLINA

Revised and Adopted Fall Term, 1917.

APPLICANTS FOR LICENSE TO PRACTICE LAW

1. *When examined.*

Applicants for license to practice law will be examined on the last Monday in January and Monday preceding the last Monday in August of each year, and at no other time. All examinations will be in writing.

2. *Requirements and course of study.*

Each applicant must have attained the age of 21 years, or will arrive at that age before the time for the next examination, and must have studied:

Ewell's Essentials (3 volumes);
Clark's Code of Civil Procedure;
Revisal of 1905 (Vol. I);
Constitution of North Carolina;
Constitution of the United States;
Creasy's English Constitution;
Sharswood's Legal Ethics;
Sheppard's Constitutional Text-Book;
Cooley's Principles of Constitutional Law;
(or their equivalents).

Also some approved text-book on each of the following subjects:

Agency.	Carriers.	Equity.	Partnership and Sales.
Bailments.	Corporations.	Executors.	Negotiable Instruments.

Applicants must have read law for two years at least, and shall file with the Clerk a certificate of good moral character, signed by two members of the bar who are practicing attorneys of this Court, and also a certificate of the dean of a law school or a member of the bar of this Court, that the applicant has read law under his instruction, or to his knowledge or satisfaction, for two years, and upon examination by such instructor has been found competent and proficient in said course. Such certificate, while indispensable, will of course not be conclusive evidence of proficiency. An applicant from another State may file a certificate of good moral
(828) character, signed by any State officer of the State from which he comes.

If the applicant has obtained license to practice law in another State, in lieu of the certificate of two years reading and proficiency he can file (with leave to withdraw) his law license issued by said State.

3. Each applicant shall deposit with the Clerk the sum of $23.50 before he shall be examined, and if upon examination he shall fail to entitle himself to receive a license, the amount so deposited, except $1.50, which belongs to the Clerk, as provided by the statute, will be returned to him.

The above requirements shall apply also to lawyers from other States wishing to locate and engage in the practice here. No *formal application* is required and no application blanks will be used. The applicant must comply with above requirements before Friday preceding day of examination, either by mail or in person.

APPEALS — WHEN HEARD.

4. *Docketing.*

Each appeal shall be docketed for the judicial district to which it properly belongs. Appeals in criminal cases shall be placed at the head of the docket of each district. Appeals in both civil and criminal cases shall be docketed, each in its own class, in the order in which they are filed with the Clerk.

5. *When heard.*

The transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term seven days before entering upon the call of the docket of the district to which it belongs, and stand for argument in its order; if not so docketed, the case shall be continued or dismissed under Rule 17, if the appellee files a proper certificate prior to the docketing of the transcript.

The transcript of the record on appeal from a court in a county in which the court shall be held during the term of this Court may be filed at such term or at the next succeeding term. If filed seven days before the Court begins the perusal of the docket of the dictrict to which it belongs, it shall be heard in its order; otherwise, if a civil case, it shall be continued, unless by consent it is submitted upon printed argument under Rule 10.

Appeals in criminal cases shall each be heard at the term at which they are docketed, unless for cause or by consent they are continued: *Provided, however,* that an appeal in a civil case from the First, Second, and Third districts which is tried between first day of January and the first Monday in February, or between first day of August and fourth Monday in August, is not required to be

docketed at the immediately succeeding term of this Court,
(829) though if docketed in time for hearing at said first term, the appeal will stand regularly for argument.

6. *Appeals in criminal actions.*

Appeals in criminal cases, docketed seven days before the call of the docket for their districts, shall be heard before the appeals in civil cases from said districts. Criminal appeals docketed after the time above stated shall be called immediately at the close of argument of appeals from the Twentieth District, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

7. *Call of each Judicial District.*

Appeals from the several districts will be called for hearing on Tuesday of the week to which the district is allotted, as follows:

From the First District, the first week of the term.

From the Second District, the second week of the term.

From the Third and Fourth districts, the third week of the term.

From the Fifth District, the fourth week of the term.

From the Sixth District, the fifth week of the term.

From the Seventh District, the sixth week of the term.

From the Eighth and Ninth districts, the seventh week of the term.

From the Tenth District, the eighth week of the term.

From the Eleventh District, the ninth week of the term.

From the Twelfth District, the tenth week of the term.

From the Thirteenth District, the eleventh week of the term.

From the Fourteenth District, the twelfth week of the term.

From the Fifteenth and Sixteenth districts, the thirteenth week of the term.

From the Seventeenth and Eighteenth districts, the fourteenth week of the term.

From the Nineteenth District, the fifteenth week of the term.

From the Twentieth District, the sixteenth week of the term.

Where two districts are allotted to one week, the cases will be docketed in the order in which they are received by the clerk, but the cases in the later district in number will not be called before Wednesday of said week.

8. *End of docket.*

At the Spring Term, causes not reached and disposed of during the period allotted to each district, and those for any other cause put to the foot of the docket, shall be called at the close of argu-

ment of appeals from the Twentieth District, and each cause, in its order, tried or continued, subject to Rule 6.

At the Fall Term, appeals in criminal cases only will be heard at the end of the docket, unless the Court for special (830) reason shall set a civil appeal to be heard at the end of the docket at that term. At either term the Court in its discretion may place cases not reached on the call of a district at the end of some other district.

9. *Call of the docket.*

Each appeal shall be called in its proper order. If any party shall not be ready, the cause, if a civil action, may be put to the foot of the district, by the consent of the counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time; otherwise, the first call shall be peremptory; or at the first term of the Court in the year a cause may, by consent of the Court, be put to the foot of the docket; if no counsel appear for either party at the first call, it will be put to the end of the district, unless a printed brief is filed by one of the parties; and if none appear at the second call, it will be continued, unless the Court shall otherwise direct. Appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

10. *Submission on printed argument.*

By consent of counsel, any case may be submitted without oral argument, upon printed briefs by both sides, without regard to the number of the case on the docket, or date of docketing the appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket; but the Court, notwithstanding, may direct an oral argument to be made, if it shall deem best.

11. *If orally argued.*

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received, unless it is filed before the oral argument begins. No brief or argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel.

12. *If brief filed by either party.*

When a case is reached on the regular call of the docket, and a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there were a personal appearance by counsel.

13. *Cases heard out of their order.*

In cases where the State is concerned, involving or affecting some matter of general public interest, the Court may, upon motion of the Attorney-General, assign an earlier place on the calendar, (831) or fix a day for the argument thereof, which shall take precedence of other business. And the Court, at the instance of a party to a cause that directly involves the right to a public office, or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from refusal of the court to discharge him, or in other cases of sufficient importance, in its judgment, may make the like assignment in respect to it.

14. *Cases heard together.*

Two or more cases involving the same question may, by order of the Court, be heard together; but they must be argued as one case, the Court directing, when the counsel disagree, the course of argument.

WHEN DISMISSED.

15. *If appeal not prosecuted.*

Cases not prosecuted for two terms shall, when reached in order at the third term, be dismissed at the cost of appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may, at any time thereafter, not later than during the week allotted to the district to which it belongs at the next succeeding term, move to have the same reinstated, on notice to the appellee and showing sufficient cause.

16. *Motion to dismiss.*

A motion to dismiss an appeal for noncompliance with the requirements of the statute in perfecting an appeal must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appellee or his counsel, to that effect, or unless the Court shall allow appropriate amendments.

17. *Dismissed by appellee.*

If the appellant in a civil action shall fail to bring up and file a transcript of the record seven days before the Court begins the call of cases from the district from which it comes at the term of this Court at which such transcript is required to be filed, the appellee may file with the Clerk of this Court the certificate of the clerk of the court from which the appeal comes, showing the names of the

parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled, with his motion to docket and dismiss at appellant's cost said appeal, which motion shall be allowed at the first session of the Court thereafter, with (832) leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause.

18. *When appeal dismissed.*

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for that purpose, as allowed by Rule 17 is procured by appellee, and the case dismissed, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid or offered to pay the costs of the appellee in procuring the certificate and in causing the same to be docketed.

TRANSCRIPTS.

19. *Transcript of record.*

(1) In every record of an action brought to this Court, the proceedings shall be set forth in the order of time in which they occurred, and the several processes, or orders, etc., shall be arranged to follow each other in the order the same took place, when practicable. The pages shall be numbered.

It shall not be necessary to send as a part of the transcript, affidavits, orders, and other process and proceedings in the action not involved in the appeal and not necessary to an understanding of the exceptions relied on. Counsel may sign an agreement which shall be made a part of the record as to the parts to be transcribed, and in the event of disagreement of counsel the judge of the Superior Court shall designate the same by written order: *Provided,* that the pleadings on which the case is tried, the issues and the judgment appealed from, shall be a part of the transcript in all cases: *Provided further,* that this rule is subject to the power of this Court to order additional papers and parts of the record to be sent up.

When there are two or more appeals in one action it shall not be necessary to have more than one transcript, but the statements of cases on appeal shall be settled as now required by law and shall appear separately in the transcript. The judge of the Superior Court shall determine the part of the costs of making the transcript to be paid by each party, subject to the right to recover such costs in the final judgment as now provided by law.

(2) EXCEPTIONS GROUPED. — All exceptions relied on shall be

grouped and separately numbered immediately before or after the signature to the case on appeal. If this rule is not complied with, and the appeal is from a judgment of nonsuit, it will be dismissed.

In other cases the Court will in its discretion dismiss the ap-
(833) peal or remand to the Judge or refer the transcript to the Clerk or to some attorney to state the exceptions according to this rule, for which an allowance of not less than $5 will be made, to be paid in advance by the appellant; but the transcript will not be so referred or remanded unless the appellant file with the Clerk a written stipulation that the appeal shall be heard and determined on printed briefs under Rule 10, if the appellee shall so elect.

(3) INDEX. — On the front page of the record there shall be an index in the following or some equivalent form:

	PAGE
Summons — date	1
Complaint — first cause of action	2
Complaint — second cause of action	3
Affidavit for attachment, etc.	4

20. *Insufficient transcript.*

If any cause shall be brought on for argument, and the regulations in Rule 19, subsection 1, shall not have been complied with, the case shall be dismissed or put at the end of the district, or the end of the docket, or continued, as may be proper. If not dismissed, it shall be referred to the Clerk, or some other person, to put the record in the prescribed shape, for which an allowance of $5 will be made to him, to be paid in advance in each case by the appellant, or the appeal will be dismissed.

21. *Summary of exceptions.*

A case will not be heard until there shall be put in the record, as required by Rule 19(2), the summary of exceptions taken on the trial, and those taken in ten days thereafter, to the charge. Those not thus set out will be deemed to be abandoned.

The evidence in case on appeal shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception. When this rule is not complied with, and the case on appeal is settled by the judge, this Court will in its discretion hear the appeal, or remand for a settlement of the case to conform to this rule. If the case is settled by agreement of counsel, or the statement of the appellant is the case on appeal, and the rule is not complied with, and the appeal is from a judgment of nonsuit, the appeal will be dismissed. In other cases the Court will in its discretion dismiss the appeal, or remand for a settlement of the case on appeal.

22. *Unnecessary records.*

The cost of copying and printing unnecessary and irrelevant testimony, or any other matter not needed to explain the exceptions or errors assigned, and not constituting a part of the record proper, shall in all cases be charged to the appellant, unless (834) it appears that they were sent up at the instance of the appellee, in which case the cost shall be taxed against him.

PLEADINGS.

23. *Memoranda of.*

Memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

24. *Assigning two or more causes of action.*

Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

25. *When scandalous.*

Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the Court to be stricken from the record, or reformed; and for this purpose the Court may refer it to the Clerk, or some member of the bar, to examine and report the character of the same.

26. *Amendments.*

The Court may amend any process, pleading, or proceeding, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final judgment, or may make proper parties to any case, where the Court may deem it necessary and proper for the purpose of justice, and on such terms as the Court may prescribe. Revisal 1905, sec. 1545.

EXCEPTIONS.

27. *How assigned.*

Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When no case settled is necessary, then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or, in case of a ruling of the court at chambers and not in term-time, within ten days after notice thereof, appellant shall file the said exceptions in the office of the clerk of the court below. No

exception not thus set out, or filed and made a part of the case or record, shall be considered by this Court, other than exceptions to the jurisdiction, or because the complaint does not state a (835) cause of action, or motions in arrest for the insufficiency of an indictment. When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence competent for some purposes but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted.

PRINTING RECORDS.

28. *What to be printed.*

Twenty-five copies of the transcript sent up in each action shall be printed, except in pauper appeals: *Provided,* it shall not be necessary to print the summons, publication of summons, and other papers showing service of process, if a statement signed by counsel is printed giving the names of all the parties and stating that summons has been duly served. Nor will it be necessary to print formal parts of the record showing the organization of the court, the constitution of the jury, etc. In pauper appeals the counsel for the appellant shall furnish a sufficient number of typewritten or printed briefs for the use of the Court, giving a succinct statement of the facts applicable to the exceptions, and the authorities relied on, and *shall also furnish at least seven typewritten copies of the transcript of appeal in addition to the original transcript.* Should the appellant gain the appeal, the *cost of preparing the copies of typewritten brief and transcript shall be taxed against appellee,* if statement of such cost is given the Clerk of this Court before the decision in such cause is certified to the Superior Court.

The printed transcript shall be in the order required by Rule 19(1), shall be indexed, and shall contain the exceptions grouped and numbered as required by Rule 19(2) and (3), though for economy the marginal references in the manuscript, required by Rule 11 of the Superior Court, may be printed as subheads in the body of the record, and not on the margin. The transcript shall be printed immediately after docketing the same, unless it is sent up printed.

29. *How printed.*

The transcript on appeal shall be printed under the direction of the Clerk of this Court, and in the same type and style, and pages

of same size, as the reports of this Court, unless it is printed below in the required style and manner. If it is to be printed here, the party sending up an appeal shall send therewith a deposit in cash, for that purpose, to the Clerk of this Court, including 10 cents for the Clerk for each printed page.

When it appears that the Clerk has waived the requirement of a cash deposit by appellant to cover estimated cost (836) of printing, and the cost of printing has not been paid when the case is called for argument, the Court will in its discretion, on motion of counsel for appellee or a statement by the Clerk, dismiss the appeal.

30. *If not printed.*

If the transcript on appeal (except in pauper appeals) shall not be printed as required by the rules, by reason of the failure of the appellant to send up the transcript or deposit the cost therefor in time for it to be printed, when called in its regular order (as set out in Rule 5), the appeal shall, on motion of appellee, be dismissed; but the Court may, on motion of appellant, after five days notice, at the same term, for good cause shown, reinstate the appeal, to be heard at the next term. When a cause is called and the record is not fully printed, if the appellee does not move to dismiss, the cause will be continued. The Court will hear no cause in which the rule as to printing is not complied with, other than pauper appeals.

31. *Costs of printing transcript.*

The actual cost of printing the transcript on appeal shall be allowed to the successful party, not to exceed, however, 85 cents per page of one copy of the printed transcript, and not exceeding sixty pages of the above specified size and type, unless otherwise specially ordered by the Court, and he shall be allowed 10 cents additional for each such page paid to the Clerk of this Court for making copy for the printer, unless the transcript was printed before the case was docketed.

Judge and counsel should not encumber the "case on appeal" with evidence or with matters not pertinent to the exceptions taken. When the case is settled, either by the judge or the parties, if either party deems that unnecessary matter is incorporated, he shall have his exception noted, designating the parts deemed unnecessary, and if, upon hearing the appeal, the Court finds that such parts were in fact unnecessary, the cost of making the transcript of such unnecessary matter and of printing the same shall be taxed against the party at whose instance it was incorporated into the transcript, as required by Rule 22, no matter in whose favor the judgment is given here, except when such party has already paid the expense of

such unnecessary matter, and in that event he shall not recover it back, though successful on his appeal. Motions for taxation of costs for copying and printing unnecessary parts sent up in the manuscript shall be decided without argument.

32. *Printed briefs.*

(837) Printed briefs of both parties shall be filed in all cases (except in pauper appeals as provided in Rule 28). Such briefs may be sent up by counsel ready printed, or they may be printed under the supervision of the Clerk of this Court if a proper deposit for cost of printing is made, as specified in Rule 29. They must be of the size and style prescribed by such rule. The briefs are expected to cover all the points presented in the oral argument, though additional authorities may be cited if discovered after brief is filed.

ARGUMENT.

33. *Oral arguments.*

(1) The counsel for the appellant shall be entitled to open and conclude the argument.

(2) Counsel for appellant may be heard ten minutes for statement of case and thirty minutes in argument.

(3) Counsel for appellee may be heard for thirty minutes.

(4) The time for argument may be extended by the Court in a case requiring such extension, but application for extension must be made before the argument begins. The Court, however, may direct the argument of such points as it may see fit outside of the time limited.

(5) Any number of counsel may be heard on either side within the limit of the time above specified; but if several counsel shall be heard, each must confine himself to a part or parts of the subject-matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the Court, so as to avoid tedious and useless repetition.

34. *Appellant's brief.*

The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions, except as to an exception that there was no evidence, it shall be sufficient to refer to pages of printed transcript containing the evidence. Such brief shall contain, properly numbered, the several grounds of exception and assignments of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment; and if statutes are material, the same shall be cited by the book, chapter, and section. Exceptions in the record not set out in

appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Such briefs when filed shall be noted by the Clerk on the docket, and a copy thereof furnished by him to opposite counsel on application. If not filed by 12 o'clock noon on Tuesday of the week preceding the call of the district to which the cause belongs, the appeal will be dismissed on motion of appellee, when the call of that district is begun, unless for good cause shown the Court shall give further time to print brief. (838)

35. *Copies of brief to be furnished.*

Twenty-five copies shall be delivered to the Clerk of the Court, one of which shall be filed with the transcript of the record, one handed to each of the justices at the time the argument shall begin, one to the reporter, and one to the opposing counsel.

36. *Brief of appellee.*

The appellee shall file the same number of like briefs, except that he may omit the statement of the case, and it shall be distributed in like manner. Said briefs shall be filed before 12 o'clock noon on Saturday before the week of the call of the district to which the cause belongs, shall be noted by the Clerk on his docket and a copy furnished by him to opposite counsel on application. On failure to file said brief by that time, the cause will be heard and disposed of without argument from appellee, unless for good cause shown the Court shall give further time to present brief.

37. *Costs of briefs.*

The cost of printing briefs shall be the same as provided in Rule 31 for printing transcript.

38. *Reargument.*

The Court will, of its own motion, direct a reargument before deciding any case, if in its judgment it is desirable.

39. *Agreement of counsel.*

The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this Court.

40. *Entry of appearance.*

An attorney shall not be recognized as appearing in any case unless he be entered as counsel of record in the case. Upon his request, the Clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall

be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the Court.
(839)

CERTIORARI AND SUPERSEDEAS.

41. *When applied for.*

Generally, the writ of *certiorari*, as a substitute for an appeal, must be applied for at the term of this Court to which the appeal ought to have been taken, or, if no appeal lay, then before or to the term of this Court next after the judgment complained of was entered in the Superior Court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

42. *How applied for.*

The writ of *certiorari* and *supersedeas* shall be granted only upon petition, specifying the grounds of application therefor, except when a diminution of the record shall be suggested and it appears upon the face of the record that it is manifestly defective, in which case the writ of *certiorari* may be allowed, upon motion in writing. In all other cases the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit, and such other evidence as may be pertinent.

43. *Notice of.*

No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days' notice, in writing, of the same; but the Court may, for just cause shown, shorten the time for such notice.

ADDITIONAL ISSUES.

44. *If other issues necessary.*

If, pending the consideration of an appeal, the Supreme Court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issues shall be made up under the direction of the Court and certified to the Superior Court for trial, and the case will be retained for that purpose.

MOTIONS.

45. *In writing.*

All motions made to the Court must be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same. Such motions, not leading to

debate nor followed by voluminous evidence, may be made at the opening of the session of the Court.

ABATEMENT AND REVIVOR.

46. *Death of party.*

Whenever, pending an appeal to this Court, either party shall die, the proper representative in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in, and, on motion, be admitted to become parties (840) to the action, and thereupon the appeal shall be heard and determined as in other causes; and if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within the first five days of the ensuing term, the party moving for such order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined according to the course of the Court: *Provided,* such order shall be served upon the opposing party.

47. *When appeal abates.*

When the death of a party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

OPINIONS.

48. *When certified down.*

The Clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail, to the clerks of the Superior Courts, certificates of the decisions of the Supreme Court which shall have been on file ten days, in cases sent from said court. Revisal 1905, sec. 1549. But the Court in its discretion may order an opinion certified down at an earlier day. Upon final adjournment of the Court, the Clerk shall at once certify to the Superior Courts all of the decisions not theretofore certified.

THE JUDGMENT DOCKET.

49. *How kept.*

The judgment docket of this Court shall contain an alphabetical index of the names of the parties in favor of whom and against whom any judgment for costs or judgment interlocutory or upon the merits is entered. On this docket the Clerk of the Court will

enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money, stating the names of the parties, the term at which such judgment was entered, its number on the docket of the Court; and when it shall appear from the return on the execution, or from an order for an entry of satisfaction by this Court, that the judgment has been satisfied, in whole or in part, the Clerk, at the request of any one interested in such entry, and on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

(841)

EXECUTION.

50. *Teste of executions.*

When an appeal shall be taken after the commencement of a term of this Court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

51. *Issuing and return of.*

Executions issuing from this Court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the term of this Court next ensuing its teste. In the absence of such request, the Clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the Superior Court of said county held next after the date of its issue, and thereafter successive executions will only be issued from said Superior Court, and when satisfied, the fact shall be certified to this Court, to the end that an entry to this effect be made here.

Executions for the costs of this Court, adjudged against the losing party to appeals, may be issued after the determination of the appeal, returnable to a subsequent day of the term; or they may be issued after the end of the term, returnable, on a day named, at the next succeeding term of this Court.

The officer to whom said executions are directed shall be amenable to the penalties prescribed by law for failure to make due and proper return thereof.

PETITION TO REHEAR.

52. *When filed.*

Petitions to rehear must be filed within forty days after the filing

of the opinion in the case. No communication with the Court, or any Justice thereof, in regard to any such petition, will be permitted under any circumstances. No oral argument or other presentation of the cause to the Court, or any Justice thereof, by either party, will be allowed, unless on special request the Court shall so order.

53. *What to contain.*

The petition must assign the alleged error of law complained of, or the matter overlooked, or the newly discovered evidence; and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this Court, who have no interest in the subject-matter and have never been of counsel for either party to the suit, and each of whom shall have been (842) at least five years a member of the bar of this Court, that they have carefully examined the case and the law bearing thereon and the authorities cited in the opinion, and they shall summarize succinctly in such certificate the points in which they deem the opinion erroneous.

The petitioner shall indorse upon the petition, of which he shall file two copies, the names of the two Justices, neither of whom dissented from the opinion, to whom the petition shall be referred by the Clerk, and it shall not be docketed for rehearing unless both of said Justices indorse thereon that it is a proper case to be reheard: *Provided, however,* that when there have been two dissenting Justices, it shall be sufficient for the petitioner to file only one copy of the petition and designate only one Justice, and his approval in such case shall be sufficient to order the petition docketed.

The Clerk shall, upon the receipt of a petition to rehear, immediately deliver a copy to each of the Justices to whom it is to be referred, unless the petition is received during a vacation of the Court, in which event it shall be delivered to the Justice designated by the petitioner on the first day of the next succeeding term of Court.

The Clerk shall enter upon the rehearing docket and upon the petition the date when the petition is filed in the Clerk's office, the names of the Justices to whom the petitioner has requested that the petition be referred, and also the date when the petition is delivered to each of the Justices. The Justices will act upon the petition within thirty days after it is delivered to them, and the Clerk is directed to report in writing to the Court in conference all petitions to rehear not acted on within the time required.

There shall be no oral argument before the Justices or Justice thus designated, before it is acted on by them, and if they order the petition docketed, there shall be no oral argument thereon before

the Court (unless the Court of its own motion shall direct an oral argument), but it shall be submitted on the record at the former hearing the printed petition to rehear, and a brief to be filed by the petitioner within ten days after the petition is ordered to be docketed, and a brief to be filed by the respondent within twenty days after such order to docket. Such briefs shall not be the briefs on the first hearing, but shall be new briefs, directed to the errors assigned in the petition, and shall be printed. If not printed and filed in the prescribed time by the petitioner, the petition will be dismissed, and for default in either particular by the respondent the cause will be disposed of without such brief.

The petition may be ordered docketed for a rehearing as to all points recited by the two certifying counsel (who cannot certify to errors not alleged in the petition), or it may be restricted to one or more of the points thus certified, as may be directed by the
(843) Justices who grant the application. When a petition to rehear is ordered to be docketed, notice shall at once be given by the Clerk to counsel on both sides.

54. *Stay of execution.*

When a petition to rehear is filed with the Clerk of this Court, the Justice or Justices designated by the petitioner to pass upon it may, upon application and in his or their discretion, stay or restrain execution of the judgment or order until the certificate for a rehearing is either refused or, if allowed, until this Court has finally disposed of the case on the rehearing. Unless the party applying for the rehearing has already stayed execution in the court below, when the appeal was taken, by giving the required security, he shall, at the time of applying to the Justice or Justices for a stay, tender sufficient security for that purpose, which shall be approved by the Justice or Justices. Notice of the application for a stay must be given to the other party, if deemed proper by the Justice or Justices, for such time before the hearing of the application and in such manner as may be ordered. If a petition for a rehearing is denied, or if granted and the petition is afterwards dismissed, the stay shall no longer continue in force, and execution may issue at once, or the judgment or order be otherwise enforced, unless, in case the petition is dismissed, the Court shall otherwise direct. When a stay is granted, the order shall run in the name of this Court and be signed and issued by the Clerk, under its seal, with proper recitals to show the authority under which it was issued.

CLERK AND COMMISSIONERS.

55. *Report of funds in hands of.*

The Clerk and every commissioner of this Court who, by virtue or under color of any order, judgment, or decree of the Supreme Court in any action or matter pending therein, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term of said Court held next after the first day of January in each year, report to the Court a statement of said fund, setting forth the title and number of the action or matter, the term of the Court at which the order or orders under which the Clerk or such commissioner professes to act was made, the amount and character of the investment, and the security for same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

56. *Report recorded.*

The reports required by the preceding paragraph shall be (844) examined by the Court or some member thereof, and their or his approval indorsed shall be recorded in a well bound book, kept for the purpose, in the office of the Clerk of the Supreme Court, entitled "Record of Funds," and the cost of recording the same shall be allowed by the Court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

BOOKS.

57. *Books taken out.*

No book belonging to the Supreme Court Library shall be taken therefrom, except into the Supreme Court chamber, unless by the Justices of the Court, the Governor, the Attorney-General, or the head of some department of the executive branch of the State Government, without the special permission of the Marshal of the Court, and then only upon the application in writing of a judge of a Superior Court holding court or hearing some matter in the city of Raleigh, the President of the Senate, the Speaker of the House of Representatives, or the chairman of the several committees of the General Assembly; and in such cases the Marshal shall enter in a book kept for the purpose the name of the officer requiring the same, the name and number of the volume taken, when taken, and when returned.

CLERK.

58. *Minute-Book.*

The Clerk shall keep a Permanent Minute-Book, containing a brief summary of the proceedings of this Court in each appeal disposed of.

59. *Clerk to have opinions typewritten and sent to Judges.*

After the Court has decided a cause, the Judge assigned to write it shall hand the opinion, when written, to the Clerk, who shall cause five typewritten copies to be at once made and a copy sent in a sealed envelope to each member of the Court, to the end that the same may be carefully examined, and the bearing of the authority cited may be considered prior to the day when the opinion shall be finally offered for adoption by the Court and ordered to be filed.

LIBRARIAN.

60. *Reports by him.*

The Librarian shall keep a correct catalogue of all books, periodicals, and pamphlets in the Library of the Supreme Court, and report to the Court on the first day of the Spring Term of each year what books have been added to the Library during the year next preceding his report, by purchase or otherwise, and also what books have been lost or disposed of, and in what manner.

61. *Sittings of the Court.*

(845) The Court will sit daily, during the term, Sundays and Mondays excepted, from 10 a.m. to 2 p.m., for the hearing of causes, except when the docket of a district is exhausted before the close of the week allotted to it. The Court will sit, however, on the first Monday of each term for the examination of applicants for license to practice law.

62. *Citation of Reports.*

Inasmuch as all the volumes of Reports prior to the 63d have been reprinted by the State, with the number of the volume instead of the name of the reporter, counsel will cite the volumes prior to 63 N.C. as follows:

1 and 2 Martin, Taylor & Conf.	as	1	N.C.	9 Iredell Law	as	31	N.C.
1 Haywood	"	2	"	10 " "	"	32	"
2 "	"	3	"	11 " "	"	33	"
1 and 2 Car. Law Repository & N. C. Term	"	4	"	12 " "	"	34	"
1 Murphey	"	5	"	13 " "	"	35	"
2 "	"	6	"	1 " Eq.	"	36	"
3 "	"	7	"	2 " "	"	37	"
1 Hawks	"	8	"	3 " "	"	38	"
2 "	"	9	"	4 " "	"	39	"
3 "	"	10	"	5 " "	"	40	"
4 "	"	11	"	6 " "	"	41	"
1 Devereux Law	"	12	"	7 " "	"	42	"
2 " "	"	13	"	8 " "	"	43	"
3 " "	"	14	"	Busbee Law	"	44	"
4 " "	"	15	"	" Eq.	"	45	"
1 " Eq.	"	16	"	1 Jones Law	"	46	"
2 " "	"	17	"	2 " "	"	47	"
1 Dev. & Bat. Law	"	18	"	3 " "	"	48	"
2 " "	"	19	"	4 " "	"	49	"
3 & 4 " "	"	20	"	5 " "	"	50	"
1 Dev. & Bat. Eq.	"	21	"	6 " "	"	51	"
2 " "	"	22	"	7 " "	"	52	"
1 Iredell Law	"	23	"	8 " "	"	53	"
2 " "	"	24	"	1 " Eq.	"	54	"
3 " "	"	25	"	2 " "	"	55	"
4 " "	"	26	"	3 " "	"	56	"
5 " "	"	27	"	4 " "	"	57	"
6 " "	"	28	"	5 " "	"	58	"
7 " "	"	29	"	6 " "	"	59	"
8 " "	"	30	"	1 and 2 Winston	"	60	"
				Phillips Law	"	61	"
				" Eq.	"	62	"

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

63. *Court reconvened.*

The Court may be reconvened at any time after final ad- (846) journment by order of the Chief Justice, or, in the event of his inability to act, by one of the Associate Justices in order of seniority.

RULES OF PRACTICE

IN THE

NORTH CAROLINA SUPERIOR COURTS

Revised and Adopted by the Justices of the Supreme Court

RULES.

1. *Entries on records.*

No entry shall be made on the records of the Superior Courts (the summons docket excepted) by any other person than the clerk, his regular deputy, or some person so directed by the presiding judge or the judge himself.

2. *Surety on prosecution bond and bail.*

No person who is bail in any action or proceeding, either civil or criminal, or who is surety for the prosecution of any suit, or upon appeal from a justice of the peace, or is surety in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty of the clerks of the several Superior Courts to state, on the docket for the court, the names of the bail, if any, and surety for the prosecution in each case, or upon appeal from a justice of the peace.

3. *Opening and conclusion.*

In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

4. *Examination of witnesses.*

When several are employed on the same side, the examination, or cross-examination, of each witness shall be conducted by one counsel, but the counsel may change with each successive witness, or, with leave of the court, in a prolonged examination of a single witness. When a witness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel so offering shall state for what purpose the witness, or the evidence to be elicited, is offered; whereupon the counsel objecting shall state his objection and be heard in support thereof, and the counsel so offering shall be heard in support of the competency of the witness and of the proposed evidence in conclusion, and the argument shall proceed no further, unless by special leave of the court.

5. *Motion for continuance.*

When a party in a civil suit moves for a continuance on account of absent testimony, such party shall state, in a written affidavit,

the nature of such testimony and what he expects to prove by it, and the motion shall be decided without debate, unless permitted by the court.

6. *Decision of right to conclude not appealable.*

In any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument the court shall decide who is so entitled, and, except in the cases mentioned in Rule 3, its decision shall be final and not reviewable.

7. *Issues.*

Issues shall be made up as provided and directed in the Revisal, secs. 548 and 549.

8. *Judgments.*

Judgments shall be docketed as provided and directed in the Revisal, secs. 573 and 574.

9. *Transcript of judgment.*

Clerks of the Superior Courts shall not make out transcripts of the original judgment docket to be docketed in another county, until after the expiration of the term of the court at which such judgments were rendered.

10. *Docketing magistrate's judgments.*

Judgments rendered by a justice of the peace upon summons issued and returnable on the same day as the cases are successively reached and passed on, without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the Superior Court shall be furnished to applicants at the same time after such rendition of judgment, and if delivered to the clerk of such court on the same day, shall create liens on real estate, and have no priority or precedence the one over the other, if all are, or shall be, entered within ten days after such delivery to said clerk.

11. *Transcript to Supreme Court.*

In every case of appeal to the Supreme Court, or in which a case is taken to the Supreme Court by means of the writ of *certiorari* as a substitute for an appeal, it shall be the duty of the clerk of the Superior Court, in preparing the transcript of the record for the Supreme Court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes or orders, and they shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered,

(849) and there shall be written on the margin of each a brief statement of the subject-matter, opposite to the same. On the first page of the transcript of the record there shall be an index in the following or some equivalent form:

PAGE

Summons — date 1
Complaint — first cause of action 2
Complaint — second cause of action 3
Affidavit of attachment 4

and so on to the end.

12. *Transcript on appeal — When sent up.*

Transcripts on appeal to the Supreme Court shall be forwarded to that Court in twenty days after the case agreed, or case settled by the judge, is filed in office of clerk of the Superior Court. Revisal, sec. 592.

13. *Reports of clerks and commissioners.*

Every clerk of the Superior Court, and every commissioner appointed by such court, who, by virtue or under color of any order, judgment, or decree of the court in any action or proceeding pending in it, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action, or of any other person, shall, at the term of such court held on or next after the first day of January in each year, report to the judge a statement of said fund, setting forth the title and number of the action, and the term of the court at which the order or orders under which the officer professes to act were made, the amount and character of the investment, and the security for the same, and his opinions as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto.

The report required by the next preceding paragraph shall be made to the judge of the Superior Court holding the first term of the court in each and every year, who shall examine it, or cause it to be examined, and, if found correct, and so certified by him, it shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries.

14. *Recordari.*

The Superior Court shall grant the writ of *recordari* only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice; if with

notice, the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject (850) to appeal as in other cases; if granted without notice, the petitioner shall first give the undertaking for costs, and for the writ of *supersedeas,* if prayed for as required by the Revisal, sec. 584. In such case the writ shall be made returnable to the term of the Superior Court of the county in which the judgment or proceeding complained of was granted or had, and ten days' notice in writing of the filing of the petition shall be given to the adverse party before the term of the court to which the writ shall be made returnable. The defendant in the petition, at the term of the Superior Court to which the said writ is returnable, may move to dismiss, or answer the same, and the answer shall be verified. The court shall hear the application at the return term thereof (unless for good cause shown the hearing shall be continued) upon the petition, answer, affidavits, and such evidence as the court may deem pertinent, and dismiss the same, or order the case to be placed on the trial docket according to law.

In proper cases the court may grant the writ of *certiorari* in like manner, except that in case of the suggestion of a diminution of the record, if it shall manifestly appear that the record is imperfect, the court may grant the writ upon motion in the cause.

15. *Judgment — When to require bonds to be filed.*

In no case shall the court make or sign any order, decree, or judgment directing the payment of any money or securities for money belonging to any infant or to any person until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in that respect, and such payments shall be directed only when such bonds as are required by law shall have been given and accepted by competent authority.

16. *Next friend — How appointed.*

In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then, upon the like application of some reputable citizen; and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

17. *Guardian ad litem — How appointed.*

All motions for a guardian *ad litem* shall be made in writing, and the court shall appoint such guardian only after due inquiry as to

the fitness of the person to be appointed, and such guardian must file an answer in every case.

18. *Cases put at foot of docket.*

(851) All civil actions that have been at issue for two years, and that may be continued by consent at any term, will be placed at the end of the docket for the next term in their relative order upon the docket. When a civil action shall be continued on motion of one of the parties, the court may, in its discretion, order that such action be placed at the end of the docket, as if continued by consent.

19. *When opinion is certified.*

When the opinion of the Supreme Court in any cause which had been appealed to that Court has been certified to the Superior Court, such cause shall stand on the docket in its regular order at the first term after receipt of the opinion for judgment or trial, as the case may be, except in criminal actions in which the judgment has been affirmed. Revisal, sec. 3283.

20. *Calendar.*

When a calendar of civil actions shall be made under the supervision of the court, or by a committee of attorneys under the order of the court or by consent of the court, unless cause be shown to the contrary, all actions continued by consent, and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end of the docket for the next term, as if continued by consent, if such actions have been at issue for two years.

21. *Cases set for a day certain.*

Neither civil nor criminal actions will be set for trial on a day certain, or not to be called for trial before a day certain, unless by order of the court; and if the other business of the term shall have been disposed of before the day for which a civil action is set, the court will not be kept open for the trial of such action, except for some special reason apparent to the judge; but this rule will not apply when a calendar has been adopted by the court.

22. *Calendar under control of court.*

The court will reserve the right to determine whether it is necessary to make a calendar, and, also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set.

23. *Non-jury cases.*

When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory

orders, will be placed on the motion docket, and the judge will exercise the right to call the motion docket at any time (852) after the calendar shall be taken up.

24. *Appeals from justices of the peace.*

Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

25. *On consent continuance — Judgment for costs.*

When civil action shall be continued by consent of parties, the court will, upon suggestion that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

26. *Time to file pleadings — How computed.*

When time to file pleadings is allowed, it shall be computed from the adjournment of the court.

27. *Counsel not sent for.*

Except for some unusual reason, connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

28. *Criminal dockets.*

Clerks of the courts will be required, upon the criminal dockets prepared for the court and solicitor, to state and number the criminal business of the court in the following order:

First. All criminal causes at issue.

Second. All warrants upon which parties have been held to answer at that term.

Third. All presentments made at preceding terms, undisposed of.

Fourth. All cases wherein judgments *nisi* have been entered at the preceding term against defendants and their sureties, and against defaulting jurors or witnesses in behalf of the State.

29. *Civil and criminal dockets — What to contain.*

Clerks will also be required, upon both civil and criminal dockets, to bring forward and enter in different columns of sufficient space, in each case:

First. The names of the parties.

Second. The nature of the action.

Third. A summary history of the case, including the date
(853) of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein.

Fourth. A blank space for the entries of the term.

30. *Books.*

The clerks of the Superior Courts shall be chargeable with the care and preservation of the volumes of the Reports, and shall report at each term to the presiding judge whether any and what volumes have been lost or damaged since the last preceding term.

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 in this manner, and by the embodying of the sketch words 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 Mechanics' Liens, 3.

ABANDONMENT OF APPEALS.

See Appeal and Error, 34.

ABATEMENT.

See Nuisance, 1; Actions, 5.

ACKNOWLEDGMENT.

See Deeds and Conveyances, 8.

"ACT OF GOD."

See Carriers of Goods, 1, 5.

ACTIONS.

See Process, 2; Corporations, 6; Pleadings, 6; Guardian and Ward, 3, 4; Drainage Districts, 13; Judgments, 13; Negligence, 20.

1. *Actions—Misjoinder—Pleadings—Demurrer Ore Tenus.*—Objection to the misjoinder of parties or of causes of action must be taken by answer or demurrer in the trial court, or the objection is waived. Rev. 478. *Goodwin v. Jernigan*, 76.

2. *Actions, Joint—Withdrawal of Plaintiff—Courts—Amendments—Mistake—Statutes.*—Where A. contracts with B. for the sale of lumber manufactured by him under a contract vesting the title in B. when it had been manufactured and placed on the dry-kiln trucks, and the lumber thus placed has been destroyed by fire, upon which they bring a joint action for the recovery of the damages alleged to have been caused by the defendant's negligence, upon its developing on the trial that the destroyed lumber belonged exclusively to B., according to the contract, it is not error for the trial judge to permit A. to withdraw as plaintiff and to continue the suit and amend his complaint in respect to the mistake made in the construction of the contract. Rev., sec. 507. *McLaughlin v. R. R.*, 182.

3. *Actions, Joint—Withdrawal of Plaintiff—Courts—Defendant's Liability—Test.*—The concern of the defendant, when the court permits one of two plaintiffs suing jointly for damages alleged from defendant's negligence to withdraw from the suit is whether he will be protected from another suit growing out of the same transaction by the same parties; and when he is protected in this respect it is not error to his prejudice that the court permitted one of the plaintiffs to withdraw from the action. *Ibid.*

4. *Actions—Deeds and Conveyances—Warranties—Parties—Predecessors in Title—Statutes.*—A grantee of lands against whom a recovery has been had for a part thereof may sue his grantee for damages upon the covenants and warranty in his deed, and the successive warrantors in his chain of title, separately or in the same action, the subject-matter being the same, our Code system not favoring a multiplicity of suits. *Winder v. Southerland*, 235.

ACTIONS—*Continued.*

5. *Actions—Misnomer—Abatement—Appearance.*—A misnomer of defendant is not a ground for dismissal of the action, the remedy being by plea of abatement, giving the correct name, allowing amendment to the summons and pleadings; and where defendant has entered a general appearance, he is concluded thereby. *Drainage District v. Commissioners*, 738.

ACTIONS, JOINT.

See Limitations of Actions, 1.

ACCOUNT.

See Wills, 20; Reference, 8; Insurance, 6.

ACTUAL DAMAGES.

See Railroads, 14.

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ADOPTED CHILDREN.

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ADVERSE POSSESSION.

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AGRICULTURAL LIENS.

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ALLEGATIONS.

See Pleadings.

ALLONGE.

See Bills and Notes, 4.

AMENDMENTS.

See Appeal and Error, 13, 46; Actions, 2; Limitation of Actions, 1; Constitutional Law, 9, 10; Fraternal Orders, 1; Indictment, 2.

ANSWER.

See Verdict, 3.

APPEAL AND ERROR.

See Carriers of Goods, 2, 15; Constitutional Law, 7; Carriers of Passengers, 6; Reference, 6, 8; Courts, 1, 2, 5, 8, 11; Judicial Sales, 2; Arrest and Bail, 1; Insurance, 5; Slander, 5; Issues, 2; Partition, 1; Instructions, 4, 7, 8; Master and Servant, 19; Exceptions and Objections, 6; Evidence, 23, 24.

1. *Appeal and Error—Verdict Set Aside—Matters of Law.*—Where the trial judge sets aside a verdict as a matter of law, and not within his discretion, an appeal will lie, and the verdict reinstated when he was in error in so acting. *Graham v. R. R.*, 1.

2. *Appeal and Error—Malicious Prosecution—Punitive Damages—Objections and Exceptions—Acquiescence—Issues.*—Where, with the consent and ac-

APPEAL AND ERROR—*Continued.*

quiescence of the plaintiff in an action for malicious prosecution, the issue of punitive damages has been submitted to the jury, it is not open to his objection that defendant was permitted to testify, in diminution of the damages, that he believed the charge in the indictment to be true at the time. *Gray v. Cartwright*, 49.

3. *Appeal and Error—Objections and Exceptions—Briefs—Rules of Court.* Exceptions not set up in the appellant's brief, or in support of which no reason or argument is therein stated or authority cited, will be taken as abandoned in the Supreme Court under Rule 4. 164 N.C. 551. *Ibid.*

4. *Appeal and Error—Objections and Exceptions—Briefs.*—Exceptions not mentioned in the appellant's brief are deemed abandoned. Rule 34. *Borden v. Power Co.*, 72.

5. *Appeal and Error—Objections and Exceptions—Unanswered Questions.* Reversible error cannot be presented on appeal by exceptions to unanswered questions not showing the nature of character of the evidence sought to be elicited from the witness. *Ibid.*

6. *Appeal and Error—Improper Argument—Corrections—Objections and Exceptions—Assignments of Error.*—Exceptions should be made at the time to improper statements made by counsel to the jury in the argument before them not supported by evidence; and where objection is thus made and the judge corrects them the error is cured. *Ibid.*

7. *Appeal and Error—Verdict Set Aside—Matter of Law.*—Where the trial judge has set aside a verdict of the jury as a matter of law, upon the ground that he should have given an instruction aptly requested, his action in so doing is appealable. *Tuthill v. R. R.*, 77.

8. *Appeal and Error—Costs.*—An appeal will lie from a judgment retaxing the cost of an action when the question is not who shall pay the cost when the principal matter has been settled by compromise or otherwise, but what are the costs, or how much is due from the party taxed with it, or whether one or more items have been erroneously inserted in the bill. *Van Dyke v. Ins. Co.*, 78.

9. *Appeal and Error — Supreme Court — Compromise Judgment.* — A judgment final, by the consent of the attorneys of record with the sanction of their clients, may be entered in the Supreme Court on the appeal of the case. *Chavis v. Brown*, 122.

10. *Same—Jurisdiction—Superior Court — Trial by Jury.* — Where a compromise judgment has been entered in the Supreme Court by the consent of the attorneys of record, and certified down, the Superior Court is without jurisdiction to change or modify this judgment, upon the ground that the necessary consent of the client had not in fact been obtained, the remedy being by motion in the cause in the Supreme Court, supported by affidavits; and a trial by jury is not allowed as a matter of right, but when allowed is to be only regarded in an advisory character in ascertaining the facts at issue. *Ibid.*

11. *Appeal and Error—Supreme Court—Compromise Judgment—Presumptions—Rebuttal—Evidence.*—Where it appears that the attorneys of record, reputable and upright practitioners, have agreed to a compromise judgment, entered in the Supreme Court on appeal, and this judgment is sought to be impeached for the lack of their authority to have so acted, an affidavit to this

effect made by the client, the plaintiff in the action, and an affidavit of another witness as to a conversation between the party and one of his attorneys tending to corroborate it, is not held sufficient to overcome the presumption of the validity of the judgment, taken in connection with the affidavits of the attorneys that they had been so authorized, and stating that, upon a new trial, if granted upon the errors assigned, they could not get another verdict. *Ibid.*

12. *Appeal and Error—Exceptions—Briefs.*—Exceptions not discussed in the brief on appeal are deemed abandoned. *Martin v. Vinson*, 131.

13. *Appeal and Error—Pleadings—Amendments—Court's Discretion.*—It is discretionary with the trial court, in an action for damages to a shipment of goods by interstate carriage, to permit an amendment alleging that written notice had been given within the four months. *Gillikin v. R. R.*, 137.

14. *Appeal and Error—Carriers of Passengers—Moving Train—Contributory Negligence—Instructions—Harmless Error.*—An instruction given in this case, that if plaintiff attempted to board a moving train and received the injury complained of, he cannot recover, is not open to defendant's exception, or one of which he can complain, as boarding a moving train does not always amount to such contributory negligence as will bar a recovery. *Wallace v. R. R.*, 171.

15. *Appeal and Error—Instructions—Special Requests—Objections and Exceptions.*—The proper procedure to raise an exception that the charge to the jury was not sufficiently full or pertinent is by requested instruction, aptly tendered and refused. *Potato Co. v. Jeanette*, 237.

16. *Appeal and Error—Issues.*—Exception to the form of the issues submitted to the jury will not be sustained when they arise under the pleadings, embrace all essential questions in controversy, are sufficient to sustain the judgment, and each party has had an opportunity to present his contentions fairly and fully. *Ibid.*

17. *Appeal and Error—Evidence—Verified Account—Statute of Frauds—Debt of Another.*—In an action to recover for goods sold and delivered, where there is conflicting evidence upon the fact as to whether the defendant was sought to be charged upon his parol promise to pay for the debts of another, it is reversible error for the judge to fail in his charge to explain the statute of frauds and its effect upon the controversy, and make the answer to the issue solely depend upon whether the parol promise had been given. *Peel v. Powell*, 156 N.C. 533, cited and applied. *Worthington v. Jolly*, 266.

18. *Appeal and Error—New Trials—Motions—Newly Discovered Evidence—Superior Courts—Jurisdiction—Statutes.*—By the act of 1887, a case appealed from remains in the Superior Court, and though a motion for a new trial may be made in the Supreme Court, while the appeal is pending, it nevertheless may be made in the Superior Court at the next term after affirmation of its action and before final judgment entered therein in pursuance of the certificate. *Allen v. Gooding*, 271.

19. *Appeal and Error—Judicial Sales—Increased Bids—Proposed Bidder.*—As to whether one who has made an unaccepted offer to raise the price bid on lands at a judicial sale 10 per cent has acquired such an intent as would entitle him to appeal from the order of confirmation. *Quœre? Sutton v. Craddock*, 274.

20. *Appeal and Error—Answer to Issues—Harmless Error.*—Exception to the admission of evidence relating to issues answered by the jury in appellant's favor is immaterial on appeal. *Brimmer v. Brimmer*, 435.

APPEAL AND ERROR—*Continued.*

21. *Appeal and Error—Courts—Determinative Issues.*—When the controversy is made to depend upon the authority of a general manager of a corporation to bind the latter by his act, with evidence that it was necessary to the carrying on of the corporation's business and of its subsequent ratification, and the trial judge has failed to submit an issue properly determinative of this question, a new trial will be ordered on appeal. *Ibid.*

22. *Appeal and Error—Judgments—Nonsuit—Court's Discretion—Intimation.*—In an action alleged and tried against a principal and agent in tort, the court submitted issues to the jury directed to the liability of each defendant, and gave instructions upon the evidence relating to each; but when the jury had retired to consider their verdict, he said he would not permit a verdict to stand against the alleged principal, whereupon the plaintiff, as stated in the case on appeal, took a voluntary nonsuit as to this defendant and appealed: *Held*, the intimation of the judge was that he would set aside the verdict within his discretion, as against the weight of the evidence, and not upon a question of law, which is not appealable; and the nonsuit taken was premature, as the jury may have decided for appellant. The right of appeal upon intimation of the judge, followed by voluntary nonsuit, discussed by WALKER, J. *McKinney v. Patterson*, 483.

23. *Appeal and Error—Public Schools—Statute—Taxation—Questions of Law—Trials.*—Where the county commissioners refuse to accept the estimate of the amount of special tax required to maintain a four-months term of its public school, under the statutory requirement that action be instituted to have the necessary amount fixed by the judge presiding in the district, etc., the conclusiveness of his finding refers to facts, strictly as such, and was not intended to uphold a finding based on erroneous legal principles, presented by exceptions duly noted. *Board of Education v. Board of Commissioners*, 470.

24. *Appeal and Error—Objections and Exceptions—Evidence Competent in Part.*—A general objection and exception to the introduction of evidence competent in part will not be considered. *Phillips v. Land Co.*, 542.

25. *Appeal and Error—Jurors—Challenges—Objections and Exceptions.*—Where the court has refused to stand aside a juror challenged for cause, and the party has then peremptorily challenged him, in order to get the benefit of his exception he must exhaust his remaining peremptory challenges, and then challenge another juror peremptorily to show his dissatisfaction with the jury, and except to the refusal of the court to allow it. *Carter v. King*, 549.

26. *Same—Court's Discretion.*—Where a juror is challenged for relationship to the adverse party to the action, and erroneously and in good faith says he is not within the prohibited relationship, and is accepted without further challenge, and thereafter only the peremptory challenges are exhausted, it is within the sound discretion of the trial judge to set the verdict aside, before judgment, on the ground of relationship, which is not reviewable on appeal. *Ibid.*

27. *Appeal and Error—Judgment Set Aside—Excusable Neglect—Meritorious Defense—Findings of Fact.*—On appeal from an order setting aside a judgment for excusable neglect, it is not sufficient that the lower court has found that there was a meritorious defense, for the facts upon which this finding was based must appear of record, so that the Supreme Court may pass upon the correctness of the ruling, or the case will be remanded to that end, with leave to file additional affidavits, if the parties are so advised. *Bank v. Brock*, 547.

APPEAL AND ERROR—*Continued.*

28. *Appeal and Error—Motions—Judgments—Pleadings — Objections and Exceptions.*—Exception should be noted to the refusal of the trial judge to grant a motion for judgment upon the pleadings and reserved for final judgment and appeal, and an appeal does not presently lie. *Barbee v. Penny*, 571.

29. *Appeal and Error—Instructions—Reference—Findings—Trial by Jury —Waiver.*—Where instructions of the court to the jury are excepted to, and the case referred, a new trial will not be granted on appeal, for error, when it appears that the facts found by the referee, upon sufficient evidence, covered this phase of the controversy, the report confirmed by the judge, and the right to a trial by the jury waived by the party in failing to demand it in proper time. *Loan Co. v. Yokley*, 574.

30. *Appeal and Error—Court's Discretion—Verdict Set Aside—Evidence.*— The question as to whether a verdict of the jury should be set aside as contrary to the weight of the evidence is one in the discretion of the trial judge; and if upon sufficient evidence to support the verdict he refuses to do so, his action is not reviewable on appeal. *Riley v. Stone*, 588.

31. *Appeal and Error—Instructions—Presumptions.*—Where, on appeal, the charge of the court has not been sent up, the appellate court will assume that proper instructions upon the evidence had been given the jury. *Ibid.*

32. *Appeal and Error—Instructions—Adverse Possession—"Color."*—The adverse possession to ripen title to land under "color" by known and visible lines and boundaries is not required to be for "more than seven years next preceding the commencement of the action"; and where the court several times has repeated this error in his charge, with correct instructions in other parts thereof, so that it may not be seen which exposition of the law the jury has accepted, it will be held for prejudicial and reversible error. *Waldo v. Wilson*, 626.

33. *Same—Limitation of Actions—Evidence—Disseizin—Entry—Burden of Proof—Trials.*—A dispossession and continued adverse possession of lands for seven years under color amounts to a disseizin, and an instruction that the burden of proof is upon the party thus claiming to show "a tortious entry and actual expulsion" is reversible error. *Ibid.*

34. *Appeal and Error—Abandonment of Appeal—Presumptions—Judgments.* Where the defense of a discharge in bankruptcy is relied on as a defense to the action of debt, which the defendant fails to allege, relies upon the plaintiff's evidence, and judgment is rendered against him, from which he appeals without perfecting the appeal, his abandonment of the appeal is regarded as his acquiescence in the judgment. *Ollis v. Proffitt*, 675.

35. *Appeal and Error—Trials—Issues.*—On this appeal it is held that the issue submitted covers every phase of the controversy, and that it was answered by the jury under a correct charge of the court upon a trial without error. *Sawyer v. Pasquotank County*, 786.

36. *Appeal and Error—Vendor and Purchaser—Substantial Error.*—No substantial ground for a new trial is found upon examination of the appellant's assignments of error. *Simmons v. Grain Co.*, 787.

37. *Appeal and Error—Adverse Possession—Evidence—Instructions—Trials.* In an action involving title to lands claimed by defendant by adverse possession, testimony of plaintiff of a conversation with others, to show defendant's per-

missive occupation, but not in her presence, and without in any way showing its connection with defendant's claim is rendered reversible error by the court emphasizing this testimony in his charge to the jury in relation to the rights of the parties, when otherwise there was no evidence that the defendant's possession was permissive. *Barham v. Holland*, 779.

38. *Appeal and Error—Instructions—Contentions—Objections and Exceptions.*—Objections to the statement by the judge of the contention of a party must be made to him at the time, so that if it is erroneous he may have an opportunity to correct it. *S. v. Little*, 800.

39. *Appeal and Error—Evidence—Harmless Error.*—Upon a trial for murder, testimony of a witness that he was permitted to see the deceased after he had been shot, who told him, "Tell everybody I love them," is held irrelevant and harmless. *S. v. Coffey*, 814.

40. *Appeal and Error—Verdict Set Aside—Refusal of Judgment.*—Where judgment upon the verdict has been asked and the judge sets aside an answer to one of the issues as a matter of law, and not within his discretion, the right demanded is a substantial one, and an appeal from its refusal will presently lie, and is not fragmentary. *Grove v. Baker*, 745.

41. *Appeal and Error—Presumptions—Instructions—Record—Trials.*—The appellant must show error in the trial of the case in the Superior Court, and where, in an action involving the title to land claimed by him under a tax deed, the judge has instructed the jury to answer the issue against him, for insufficiency of evidence to locate the land, the judgment will be affirmed if the record does not show the evidence upon which the instruction was based. *Bailey v. Justice*, 753.

42. *Appeal and Error—Assignments of Error—Objections and Exceptions.*—An assignment of error, to be considered on appeal, must be based upon an exception previously taken and appearing in the record. *Ibid.*

43. *Appeal and Error—Judgments—Admissions—Ejectment.*—Where the judgment does not accord with the admission of the parties in an action for the possession of land, the judgment may be corrected on appeal to avoid further litigation, and thus corrected, affirmed. *Wilson v. Wilson*, 755.

44. *Appeal and Error—Rehearing—New Trials—Costs—Printed Record—Rules of Court.*—Where, upon a rehearing, the court grants a new trial, which was refused on the former hearing, all the costs of the appeal, including those of the rehearing, are properly taxed against the appellee. In this case, the general rule confining the costs to 60 pages of printed record, is enforced. *Waldo v. Wilson*, 767.

45. *Appeal and Error—Issues—Objections and Exceptions.*—Where the issues present every contested matter arising from the pleadings, an exception to the issues will not be sustained. *Barringer v. Foggart*, 768.

46. *Appeal and Error—Trials—Pleadings—Amendments—Cause Retained—Counter-claim.*—Where the defendant fails to plead a counter-claim to plaintiff's action, and after adverse verdict, an amendment is permitted for that purpose and the cause retained and tried at a subsequent term before another judge, with adverse verdict and judgment against the defendant, he cannot complain that the cause had been retained and subsequently tried, since it cures the error,

APPEAL AND ERROR—*Continued.*

if any, of the refusal to submit an issue as to the counter-claim on the first trial. *Ibid.*

47. *Appeal and Error—Harmless Error.*—The admission of irrelevant and incompetent evidence which does not prejudice the appellant is not reversible error. *Willis v. Williams*, 769.

48. *Appeal and Error—Court's Discretion—Verdict—Weight of Evidence.*—The refusal of the trial court to set a verdict aside as against the weight of the evidence is within his sound discretion, and will not be considered, on appeal, unless it has been abused. *Ibid.*

49. *Appeal and Error—Harmless Error—Auto Trucks—Statutes.*—The evidence in this case presented an issue of fact as to whether the driver of an auto truck failed to stop his truck upon being signaled, as required by chapter 107, Laws, 1913, or that such failure caused the injury alleged; and the exceptions to the ruling of the court upon the evidence being without significance and appreciable effect upon the verdict, no reversible error is found on appeal. *Mitchell v. Bottling Co.*, 771.

50. *Appeal and Error—Objections and Exceptions—Briefs—Rules of Court.* Exceptions that are not taken or discussed in the brief are regarded as abandoned on appeal. *McNeill v. Buie*, 773.

51. *Appeal and Error—Objections and Exceptions—Contentions—Instructions—Case.*—Objection that the judge's statement of a party's contention was not sufficiently full should be made at the time, with specific request to have them so; and exceptions to the charge upon matters of law may be taken for the first time in appellant's statement of the case for service on the appellee. *Schaeffer v. Stone Co.*, 781.

52. *Appeal and Error—Objections and Exceptions—Evidence—Vendor and Purchaser.*—In an action to recover for goods sold and delivered, a question asked a witness, if the custom for delivery and collection between the parties was not a certain arrangement, with objection, and then without objection, witness answered question and stated the custom, is not held erroneous. *Ibid.*

53. *Appeal and Error—Objections and Exceptions—Evidence—Vendor and Purchaser—Harmless Error.*—A statement by purchaser, as a witness, that he did not owe the vendor, is competent; but if otherwise, it would be harmless if the witness had theretofore made the statement, without objection. *Ibid.*

54. *Appeal and Error—Service of Case—Agreement—Time Extended—Computation.*—Time extended by consent to serve statement of case on appeal is computed from adjournment of court, or, as in this case, when the judge left the county. *Murphy v. Electric Co.*, 782.

55. *Appeal and Error—Service of Case—Time Extended—Laches—Certiorari.*—Excusable neglect is not shown in serving statement of case on appeal in this case, it appearing that the appellant had at least four days left him for the purpose after the stenographer's transcribed notes had been filed with the clerk, as directed; and appellant and his attorneys, within ready communication with the clerk's office at the county-seat, did not ascertain the fact or communicate with the stenographer, living in another town, when the copy promised them had not been received, it appearing that their copy had ben directed, by mistake, to other attorneys living in the same town; and a motion for a *certiorari* will not be allowed in the Supreme Court. *Ibid.*

APPEAL AND ERROR—*Continued.*

56. *Appeal and Error—Certiorari—Record Proper—Rules of Court—Agreement of Parties.*—The parties to an appeal, without the consent of the court, cannot waive the rule of the Supreme Court requiring that a transcript of the record proper, or all thereof that may be had, shall be filed therein as the basis for the motion for a *certiorari;* but they may, by written agreement, consent that the appeal may be docketed at the next ensuing term of the Supreme Court. *Ibid.*

57. *Appeal and Error—Refusal of Judgment—Verdict—Objections and Exceptions—Case.*—Where the trial judge erroneously sets aside an answer to an issue as a matter of law and refuses judgment upon the verdict the appellate court will reverse such action; but appellant's other exceptions if properly taken will be preserved to him. *Grove v. Baker*, 746.

APPEARANCE.

See Motions, 3; Actions, 5.

ARCHITECT.

See Mechanics' Liens, 4.

ARGUMENT.

See Appeal and Error, 6; Trials, 1.

ARREST AND BAIL.

Arrest and Bail—Bonds—Court's Discretion—Appeal and Error.—Where plaintiff, in arrest and bail, in an action for conversion of personal property, has given the bond in the amount fixed by the clerk, upon which the defendant has been arrested, and who thereafter moves in the Superior Court to vacate the order of arrest, among other things, upon the ground that the bond required of plaintiff was insufficient in law, the court, within its discretion, may increase the bond required of the plaintiff, from which order no appeal will lie, in the absence of abuse of this discretion. *Power Co. v. Lessem Co.*, 358.

ASSAULT.

See Criminal Law, 6; Insurance, 13.

ASSETS.

See Corporations, 6.

ASSENT.

See Wills, 20.

ASSESSMENTS.

See Drainage Districts, 2, 3, 4, 5; Insurance, 8; Counties, 1.

ASSIGNEE.

See Mortgages, 1.

ASSIGNMENTS.

See Insurance, 4; Mortgages, 2.

ASSIGNMENTS OF ERROR.

See Appeal and Error, 6, 10, 42.

ASSUMPTION OF RISKS.

See Master and Servant, 12, 14.

ATTORNEY AND CLIENT.

See Trials, 1.

ATTORNEYS AT LAW.

Attorneys at Law—Disbarment—Statutes.—An attorney who has had sentence suspended for violating the prohibition law with respect to the sale of vinous liquors, has afterwards been convicted, and appealed, with sentence affirmed, been pardoned by the Governor, and continued the acts of violation, will be disbarred from the practice of the law as one "unfitted to be trusted in the discharge of his profession." Revisal, sec. 211. *McLean v. Johnson*, 345.

AUTO TRUCKS.

See Appeal and Error, 49.

AUTOMOBILES.

See Pleadings, 12; Negligence, 21.

Automobiles—Negligence—Evidence—Trials — Questions for Jury. — Where there is evidence tending to show that the plaintiff's horse was frightened by the sudden, unnecessary and reckless sounding of the defendant's automobile horn, which caused the injury complained of, and also evidence that the horn was sounded only as required by the statute, the determination of the jury, under proper instructions, that it was done in the manner contended for by plaintiff, is conclusive. *Conrad v. Shuford*, 720.

ATTORNEY AND CLIENT.

1. *Attorney and Client—Venue—Presumptions—Duty of Attorney.*—An attorney, resident in an adjoining county to that of the venue of an action, 28 miles from the county-seat, with several daily trains passing between the two cities, may fairly be presumed to be a regular practitioner of that county, nothing else appearing. *Gallins v. Ins. Co.*, 553.

2. *Same—Laches of Attorney.*—Where a corporation has employed an attorney to defend an action against it, who has prepared an answer, which has been properly verified, and in his absence the agent of the defendant mails it to an adjoining county, that of the venue, and it is received by the clerk of the court in time, but remains unopened at the last day of the pleadings term until after a judgment by default has been signed, and the judge has left the courtroom: *Held*, while it was the duty of the attorney to have filed the answer in time, the defendant, not being in default, will not be held responsible for his neglect therein. *Ibid.*

3. *Attorney and Client—Defense—Bankruptcy—Excusable Neglect—Judgment.*—A client does not entirely relieve himself of all responsibility in his action by employing an attorney; and when he has sat through the trial consulting with his attorney, introduces no evidence, and judgment is rendered against him, he may not set the judgment aside upon the plea of excusable neglect in failing to plead or show a discharge in bankruptcy as a defense. *Ollis v. Proffitt*, 675.

BAILMENT.

See Judgments, 3.

BANKRUPTCY.

See Attorney and Client, 3; Evidence, 23.

BANKS AND BANKING.

See Usury, 2.

Banks and Banking — Deposit — Counterclaim — Payment of Unauthorized Checks—Burden of Proof.—Where a bank sues its depositor on a note, with

BANKS AND BANKING—*Continued.*

counterclaim set up in the answer that the bank had funds of the defendant on deposit which it had paid out on unauthorized checks, and both the execution of the note sued on and the amount of the deposit are admitted: *Held,* banks assume the responsibility for the erroneous payment of checks not drawn or authorized by the depositor, with the burden on the bank, pleading proper payment of the checks to show it. *Bank v. Thompson,* 349.

BENEFIT.

See Constitutional Law, 4; Judicial Sales, 2; Contracts, 13, 14.

BIDS.

See Appeal and Error, 19; Judicial Sales, 3.

BILLS AND NOTES.

See Contracts, 8; Partnership, 5; Corporations, 13; Judgments, 12.

1. *Bills and Notes—Negotiable Instruments—Guarantors of Payments.*—Where guarantors on a note, in consideration of receiving a certain part thereof, guarantee the payment of the note at maturity, and if it is "not paid at that time, agree to pay immediately the amount due thereon," they are guarantors, for a valuable consideration, of payment and not for collection, and are held to the express terms of their promise; and upon default of the principal it becomes their duty to immediately pay the amount then due on the note. *Farquhar Co. v. Hardware Co.,* 370.

2. *Bills and Notes—Contracts—Parol Evidence.*—The evidence tending to show that the bond sued on in this case, under a contemporaneous verbal agreement, was only to be accounted for as an advancement upon the death of the maker's father, provided sufficient funds were left for the purpose, was properly admitted by the trial judge under the authority of *Kernodle v. Williams,* 153 N.C. 475; *Kernodle v. Kernodle,* 441.

3. *Bills and Notes—Negotiable Instruments—Endorser—Denial—Burden of Proof.*—In order to constitute one a holder in due course, under the provisions of our negotiable-instrument law (Revisal, chap. 54), there muse be an endorsement to that effect, excepting instruments payable to bearer; and proof of the endorsement is required when it is denied in an action on the paper. *Security Co. v. Pharmacy,* 655.

4. *Same—Detached Paper—"Allonge."*—Where proof of endorsement is required in an action on a negotiable instrument, it must be shown to have been made on the instrument itself, or on some paper thereto physically attached, sometimes termed on "allonge." *Ibid.*

5. *Same—Defenses—Equities—Fraud.*—Where one claiming to be a holder of a negotiable instrument in due course by endorsement, brings action against the maker thereof, and shows such endorsement on a detached paper, without evidence of its having been attached, or as to the intermediate endorsements, the defendant may set up any equities he may have against the original payee; and where fraud or misrepresentations in its procurement is established, no recovery thereon can be had. *Ibid.*

BILLS OF DISCOVERY.

See Evidence, 16.

BILLS OF LADING.

See Carriers of Goods, 6, 8, 10, 13, 14; Railroads, 3.

BILLS OF PARTICULARS.

See Criminal Law.

BONDS.

See Roads and Highways, 2; 1; Arrest and Bail, 1; Constitutional Law, 12; Judgments, 15.

BONDING COMPANIES.

See Insurance, 15; Corporations, 15.

BONDS OF INDEMNITY.

See Injunctions, 3.

BOUNDARIES.

See Limitation of Actions, 9.

BREACH.

See Married Women, 1; Contracts, 5, 10, 12, 13, 14, 17; Vendor and Purchaser, 17, 18, 19, 20.

BRIEFS.

See Appeal and Error, 3, 4, 12, 50.

BUILDINGS.

See Deeds and Conveyances, 3.

BURDEN OF PROOF.

See Carriers of Goods, 2; Slander, 7; Pleadings, 1; Judgments, 1; Contracts, 4; Vendor and Purchaser, 1, 8; Evidence, 6, 11, 13; Railroads, 5, 10, 19; Banks and Banking, 1; Negligence, 14; Corporations, 7; Bills and Notes, 3; Appeal and Error, 33.

BY-LAWS.

See Corporations, 13; Fraternal Orders, 1.

BY-STANDERS.

See Jurors.

CANCELLATION.

See Vendor and Purchaser, 8; Insurance, 1, 3, 11.

CARRIERS OF GOODS.

See Vendor and Purchaser, 9.

1. *Carriers of Goods — Act of God — Sole Cause — Damages—Negligence—Contributing Cause.*—Where goods in the carrier's warehouse are destroyed solely by the destruction of the warehouse by reason of a windstorm of such unusual violence and proportions as amount to "an act of God," without evidence of any negligence on the part of the carrier as a contributing cause, an instruction is proper that, if the jury believe the evidence, no liability will attach to the carrier by reason of the destruction of the goods. *Tuthill v. R. R.*, 77.

2. *Carriers of Goods—Commerce—Damages—Notice to Carrier—Burden of Proof—Evidence—Instructions—Appeal and Error.*—In an action against the carrier for damages for failure to deliver an interstate shipment of goods, the burden is on the plaintiff to show that the required notice was given within the four

CARRIERS OF GOODS—*Continued.*

months, at the point of origin or of delivery, after a reasonable time for delivery had elapsed; and upon failure of evidence thereof the plaintiff cannot recover. *Smith v. R. R.*, 111.

3. *Carriers of Goods—Connecting Lines—Negligence—Commerce.*—Under the Carmack Amendment, a connecting carrier in an interstate shipment is liable for damages for its negligence therein, and may be sued alone at plaintiff's option; and while the initial carrier may also be held liable, a direction of the court exculpating the latter from damages does not necessarily relieve the former from liability. *Gillikin v. R. R.*, 137.

4. *Carriers of Goods—Damages—Notice—Connecting Lines—Commerce.*—Sufficient notice of damages to the initial carrier of an interstate shipment of goods is sufficient notice to the connecting carrier in the line of carriage. *Ibid.*

5. *Carriers of Goods—Negligence—"Act of God"—Trials—Evidence—Questions for Jury.*—Where the evidence is conflicting as to whether damage was caused to a shipment of perishable goods by the negligent delay of a connecting carrier, or by a storm, "an act of God," or whether the shipment would otherwise have reached its destination in time to have avoided the injury, the issue is properly left to the determination of the jury. *Ibid.*

6. *Carriers of Goods—Commerce—Bills of Lading—Live Stock—Written Notice—Waiver.*—It is necessary to give the written notice of a claim for damages to an interstate shipment car-load of live stock to the proper carrier before the animals are removed at destination and commingled with others, in order to recover such damages, the stipulation in the bill of lading to that effect having been declared reasonable and valid by the Supreme Court of the United States, the decision of which, as to interstate carriage, being controlling upon the State courts; and a verbal notice to a clerk in the carrier's office is insufficient, and his acquiescence cannot be regarded as a waiver by the company. *Bryan v. R. R.*, 177.

7. *Same—Federal Statutes—Carmack Amendment—Interstate Commerce Commission.*—In order to obtain uniformity of carriage contracts for interstate commerce, the Carmack Amendment to the Interstate Commerce Act requires the carrier to issue a bill of lading upon terms fixed by the Interstate Commerce Commission; and while a parol contract of shipment is upheld as binding, the uniform contract yet fixes its terms. *Ibid.*

8. *Carriers of Goods—Commerce—Uniform Bills of Lading—Parol Contracts.*—In an action against the carrier for damages to an interstate shipment of live stock, the carrier is obligated by law to furnish a proper car; and a parol agreement to this effect adds nothing to the carrier's duty in this regard. *Ibid.*

9. *Same—Issues.*—A negative statement to an issue as to whether a damaged interstate shipment of live stock was made under the uniform bill of lading should be disregarded; and an alleged special parol contract of shipment, under which it is claimed that the written notice as to the damage was not required, should not be considered. *Ibid.*

10. *Carriers of Goods—Federal Statutes—Bills of Lading—Live Stock—Damages—Written Notice—Cummins Amendment.*—The Cummins Amendment, approved March, 1915, restricting the right of the carrier to make certain stipulations in the bills of lading of interstate shipments, is not retroactive in effect,

CARRIERS OF GOODS—*Continued.*

and has no application to a case wherein the shipment was made and the cause of action accrued theretofore. *Ibid.*

11. *Carriers of Goods—Statute—Penalties—Parties.*—Where an intrastate shipment of goods is transported over connecting lines to its destination, it is proper for the trial court to make both roads parties to an action to recover the penalty for the failure to transport safely and within a reasonable time (Revisal, sec. 2632), the burden being upon each defendant to show that it had not failed in its duty. *Hoisery Mills v. R. R.*, 449.

12. *Same—Amount Involved—Courts—Discretion.*—Where one of a connecting line of carriers had been sued in a justice's court for the statutory penalty (Revisal, sec. 2632), in failing to transport the shipment within a reasonable time, and appealed to the Superior Court from an adverse judgment, it is proper for the court, in its discretion (Revisal, sec. 507), to order the other carrier to be made a party therein, though the amount involved was less than $200, without the necessity of remanding the case to the justice's court for that purpose. *Ibid.*

13. *Carriers of Goods—Bills of Lading—Parol Agreements—Commerce—Federal Law—Evidence.*—The relation of carrier and shipper may be created without written bill of lading, and when the shipment is interstate and the agreement of shipment rests in parol, the requisite stipulations of sale or contract as prescribed by Federal statute or valid regulations of the Interstate Commerce Commission will attach and govern the rights of the parties; but when written bill of lading has been issued it should be introduced in evidence. The effect of the Cummins Act, later enacted, was not considered. *McRary v. R. R.*, 563.

14. *Carriers of Goods—Bills of Lading—Evidence—Carrier's Memorandum—Limited Valuation—Released.*—A written memorandum made and signed by the carrier's agent stating that it was for its own filing, and that it was neither the original bill of lading nor duplicate nor copy thereof, that the signature was to acknowledge the amount prepaid for the freight charges, can only be considered, at most, as the carrier's receipt for the charges prepaid; and where the writing indicates that the shipment had been released in consideration of a certain limited valuation placed upon the goods, such does not afford substantive and sufficient evidence thereof in an action against the carrier for loss or damage thereto. *Ibid.*

15. *Same—Appeal and Error—Verdict—Judgments.*—The appellant is required to show error in the judgment below; and where the carrier contends that, as a matter of law, there is error in the amount of damages awarded for partial loss of a shipment of antique furniture in sets, on the ground that the furniture was shipped released in consideration that the value thereof did not exceed a certain amount per hundred pounds, and there is reasonable inference from the evidence that the loss of the part affected the value of the entire shipment, which would equal, at the limited valuation claimed, the amount of the verdict, the judgment will not be disturbed. The effect of the Cummins Act, later enacted, was not considered. *Ibid.*

16. *Carriers of Goods—Claims—Damages—Amount Stated—Payment—Estoppel.*—It is not required that a claimant state the amount of his loss, in his claim for damages against a carrier, and though such amount is stated it does not control his recovery in his action against the carriers, for the claim usually provided for by a clause in the bill of lading is recognized as valid

CARRIERS OF GOODS—*Continued.*

chiefly for the purpose of notifying the carrier that a claim is being made and to direct its attention to the matter at or near the time to enable it to procure evidence disclosing the real facts of the transaction; and unless there has been a payment in satisfaction or an adjustment of claim accordingly, the amount therein demanded will not operate as an estoppel. The effect of the Cummins Act, later enacted, was not considered. *Ibid.*

CARRIERS OF PASSENGERS.

See Appeal and Error, 14; Railroads; Pleadings, 4.

1. *Carriers of Passengers—Infirm Passenger—Duty of Carrier—Negligence.*—A carrier of passengers is not liable for an injury to a passenger leaving the car at his destination, caused solely by his physical infirmity, when the assistance of its employees in charge of the cars had not been requested upon opportunity thereto afforded, and in the exercise of proper care of the passengers they were in ignorance of the circumstances requiring their assistance. *Graham v. R. R.*, 1.

2. *Carriers of Passengers—Ejecting Passengers—Connecting Lines—Principal and Agent.*—A railroad agent selling a passenger a ticket to his destination, receiving the price therefor, acts as the agent of each of the connecting lines over which the ticket is sold; and where the conductor on one of them assumes to have the ticket corrected at a station on his line, and the destination is erroneously changed by him or the ticket agent there, they act as agents for the remaining lines of travel, making such connecting roads liable in damages for an ejection of the passenger caused by their error. *Creech v. R. R.*, 61.

3. *Carriers of Passengers—Ejection of Passengers—Contracts—Rights of Passengers.*—Upon the wrongful ejection of a passenger from a train, who has paid his fare to his destination, he may stand upon his rights under his contract of carriage, and it is not required that he pay any additional price for being transported the intervening distance. *Ibid.*

4. *Carriers of Passengers—Ejection of Passengers—Damages—Mental Anguish—Notice.*—Where the conductor on a passenger train has wrongfully ejected a passenger before reaching his destination, and was informed at the time by the passenger that such would prevent his getting to the corpse of his father before burial, the railroad company is liable for the consequent mental anguish thereby caused. *Ibid.*

5. *Carriers of Passengers—Intermediate Point—Leaving Train—Contract of Carriage—Negligence.*—One who has purchased his ticket to his destination on a passenger train does not relieve the railroad of its duty to him as such passenger by getting off the train during its stop at an intermediate station, without notice to its employees or objection from them, to see some person there or business. *Wallace v. R. R.*, 171.

6. *Carriers of Passengers—Evidence—Single Witness—Negligence—Declarations—Appeal and Error.*—Where there is evidence of negligence on the part of a railroad company in injuring a passenger while boarding a train at its station, and his attending physician has testified in defendant's behalf as to statements he made to him as to how the injury occurred, which, if true, would exclude his recovery, an instruction that, should the jury find the facts to be as testified to by this witness, to answer the issue as to defendant's negligence, "No," is properly refused, as such would be the singling out the testimony of

CARRIERS OF PASSENGERS—*Continued.*

one witness from that of others, relating to the facts at issue and referring to evidence not directly testified to by him; and especially so, when there is evidence that the plaintiff was then in such pain that he did not understand the meaning of his words. *Ibid.*

7. *Carriers of Passengers—Railroads—Negligence — Depots — Evidence — Trials.*—Upon evidence tending to show that the plaintiff's intestate was a passenger on defendant's train arriving at his destination after dark; that this train, unlike other passenger trains, stopped for its passengers to get off on a level with several other tracks between buildings on each side, and that plaintiff, to reach his hotel, had to go around the coaches on his train, and that the engine thereof, having detached itself from this train, ran upon and killed plaintiff's intestate after he had gone around the coaches and was upon a parallel track; that the engine was backing in excess of the speed ordinance of the town, without signal or warning or a proper lookout to warn the intestate, and that the place where the injury occurred was insufficiently lighted: *Held*, sufficient upon the issue of defendant's actionable negligence. *Dunn v. R. R.*, 254.

8. *Carriers of Passengers—Railroads—Negligence—Warnings—"Look and Listen"—Trespasses—Instructions.*—Where the evidence tends to show that plaintiff's intestate was run upon and killed by a locomotive on defendant's parallel track, while leaving the train in the usual way, upon which he had been a passenger, a charge of the court which imposes upon him an equal duty to look and listen before entering upon the track as that of the defendant to give proper signals and warnings, etc., is erroneous as to the plaintiff, but one of which the defendant cannot complain, as greater care is required of it than that of a trespasser or licensee. And the charge in this case is held to be further objectionable, as it eliminated from the consideration of the jury the evidence that the intestate was deaf, and the further circumstances tending to show that by defendant's negligence he would not have perceived the danger had he previously looked and listened. *Ibid.*

"CASE."

See Appeal and Error, 57.

CATTLE.

See Contracts, 2.

CAUSAL CONNECTION.

See Evidence, 6.

CAUSE.

See Negligence, 20; Appeal and Error, 46.

CERTIORARI.

See Appeal and Error, 55, 56.

CHALLENGE.

See Jury Drawing, 1.

CHALLENGE TO ARRAY.

See Jurors, 3.

CHARTERS.

See Cities and Towns, 1; Fraternal Orders, 1.

CHECKS.

See Banks and Banking, 1.

CHILDREN.

See Wills, 12, 19; Master and Servant, 17.

CHILD LABOR.

See Master and Servant, 8; Negligence, 1.

CIDER.

See Intoxicating Liquor, 1.

CIRCUMSTANCES OF TESTATOR.

See Wills, 13.

CITIES AND TOWNS.

See Municipal Corporations, 1, 2, 3, 5, 8, 9, 10; Municipalities, 1; Condemnation, 1; Contracts, 16.

Cities and Towns—Eminent Domain—Charters—General Statutes. — The right of eminent domain of a municipality can be exercised only in the mode pointed out in the statute conferring it; and where the method prescribed for a city or town in its character is inconsistent with or repugnant to that of chapter 136, Public Laws 1917, entitled "An act to provide for the organization and government of cities," etc., by the express terms of the later statute, the proceedings given under the municipal charter will have to be followed in condemnation of lands for the use of its streets. *Clinton v. Johnson*, 286.

CLAIMS.

See Carriers of Goods, 16.

CLAIM AND DELIVERY.

See Mortgages, 1; Judgments, 7.

Claim and Delivery—Replevy Bond—Failure to Return Property—Damages—Statutes—Common Law.—In the event of adverse judgment against a defendant under replevy bond in claim and delivery, upon the terms or conditions thereof required by statute, he is not relieved from liability for the damages in failing to return the property, by reason of its having been destroyed, while in his possession, by causes beyond his control, or solely by the act of God, etc., for the statute changes the common-law rule both as to liability on the bond required of the plaintiff and defendant in such proceedings. *Randolph v. McGowans*, 203.

CLERKS OF COURT.

See Taxation, 2; Judgments, 10, 13; Courts, 11.

CODICIL.

See Wills, 5.

COLLISIONS.

See Railroads, 19.

COMMERCE.

See Commerce, 3, 13; Carriers of Goods, 3, 4, 6, 8; Railroads, 2, 4; Telegraphs, 1; Insurance, 10.

1. *Commerce—Telegraphs—Congressional Acts — Federal Decisions — Constitutional Law.*—It is the duty of this Court to follow the decisions of the Supreme Court of the United States, upon questions involved in interstate commerce, where Congress has assumed control of the matter relating thereto, and involved in the litigation. Const., Art. I, secs. 3 and 4. *Norris v. W. U. Tel Co.*, 92.

COMMERCE—*Continued.*

2. *Commerce—Telegraphs—Congressional Acts — Mental Anguish — Negligence—Contracts.*—The contract entered into by the sender of a telegram with the company includes both the transmission and delivery of the message; and Congress having assumed the entire control of the field with relation to interstate messages by telegraph and telephone companies (act of Congress, 18 June, 1910), the decisions of the Supreme Court of the United States respecting such messages are controlling in the courts of this State; and thereunder a recovery of damages for mental anguish alone, where there was no injury to the person, property, health, or reputation of the plaintiff cannot be had, whether the negligence occurred in this State or elsewhere along the route of the transmission of the message. *Ibid.*

3. *Commerce—Telegraphs—Routing—Another State — Interstate Commerce —Supreme Court Decisions.*—A message received by a telegraph company engaged in interstate and intrastate business at one point in this State for transmission to and delivery at another point therein and routed in good faith through another State is an interstate message controlled by Congress (Act of 18 June, 1910), and under the decisions of the Supreme Court of the United States, damages for mental anguish alone arising from negligence on the defendant's part may not be recovered. The question of defendant's good faith in the routing in this case was submitted to the jury and decided in favor of the defendant. *Norris v. Tel. Co., ante,* 92; *Bateman v. W. U. Tel. Co.,* 97.

4. *Commerce—Telegraphs — Negligence — Mental Anguish — United States Supreme Court—State Courts.*—The decisions of the Supreme Court of the United States holding that mental anguish alone is not a legal ground for the recovery of damages in an action against a telegraph company for its negligence in transmitting an interstate message is controlling upon the courts of this State as to interstate messages; and the contract being for the delivery as well as for the transmission of the message, the fact that the negligence occurred in the delivery in this State can make no difference. *Askew v. Telegraph Co.,* 261.

COMMISSIONS.

See Usury, 2.

COMMISSIONERS.

See Roads and Highways, 3.

COMMON LAW.

See Claim and Delivery, 1.

COMPLAINT.

See Vendor and Purchaser, 15; Indictment, 1.

COMPLIANCE.

See Instructions, 7.

COMPRESS CHARGES.

See Contracts, 6.

COMPROMISE.

See Guardian and Ward, 1, 2; Judgments, 1; Appeal and Error, 9, 11.

COMPUTATION OF TIME.

See Appeal and Error, 54.

CONCURRING CAUSES.

See Negligence, 19.

CONDEMNATION.

See Municipal Corporations, 4; Roads and Highways, 3.

Condemnation — Municipal Corporations — Cities and Towns — Measure of Damages.—The damages recoverable by the owner for his lands taken under condemnation by a city for the widening and improvement of its streets is the difference in value of his land before and after the taking, less the special benefits derived from the increased value by reason of the improvement, but not such as are enjoyed in common with others. *Lanier v. Greenville*, 311.

CONDITIONS.

See Evidence, 3; Wills, 18.

CONDITIONS PRECEDENT.

See Deeds and Conveyances, 5.

CONFIRMATION.

See Judicial Sales, 1.

CONJECTURE.

See Evidence, 19.

CONSENT.

See Insurance, 1; Reference, 2.

CONSIDERATION.

See Guardian and Ward, 1; Vendor and Purchaser, 10; Corporations, 7; Contracts, 8, 9.

CONSTITUTIONAL LAW.

See Married Women, 1; Slander, 2; Taxation, 1; Commerce, 1; Homestead, 1; Public Schools, 1, 2, 3; Drainage Districts, 8, 11, 12; Insurance, 7; Counties, 1.

1. *Constitutional Law—Amendments, 1916—School Districts—Special Statutes—Statutes—Corporations.*—The amendment of 1916 to Article VIII, section 1, of the Constitution withdraws from the Legislature the power to create a corporation, or to extend, alter, or amend its charter by special act, and does not affect an act of the Legislature, passed since it went into effect, authorizing a school district theretofore formed under the provisions of Revisal, sec. 4115, to issue bonds for school purposes with the consent of its voters. As to whether corporations of this character come within the meaning of the amendment as *quasi*-municipal corporations, *quære? Board Education v. Commissioners*, 47.

2. *Constitutional Law—Statutes—Roads and Highways—Bonds—Counties—Townships—State Aid.*—Chapter 6, Laws of 1917, is designated to enable the State to lend its aid to road building and maintenance in counties, townships, and road districts, applying therefor in accordance with the terms of the act, the State to issue its 4 per cent bonds upon receiving a bond from the county at 5 per cent interest, intending to take care of the State's bond with interest in a designated period of years; and provides that the county bond may be put in suit to recover any deficiency, with penalty attached, section 19, establishing a limit on the amount the county may borrow; section 11, requiring the bond to obligate the county for its payment; section 20 extending its terms so as to include townships and road districts, requiring bond to be executed by the county commissioners, wherein the township and road district is situate making it their duty

to levy and the sheriff to collect the special tax: *Held,* the bond contemplated to be given to the State is that of the county and not that of the township or road district. *Commissioners v. State Treasurer*, 141.

3. *Same—Taxation Without Benefit—Equal Protection—Faith and Credit.* Section 20 of chapter 6 of the Laws of 1917, extending the provisions of the act to townships and road districts, requiring that the bond of the county be given the State upon which the latter is to issue its forty-one year 4 per cent bonds and turn over the proceeds under the scheme set forth to the township, etc., to the establishment and maintenance of the public roads of the particular township, etc., is one entirely within the township government as to the control and expenditure of the fund, without reference either to State or county benefit, and is unconstitutional as the taxing of other districts, etc., within the county, without their consent for the exclusive benefit of one of them, and is in derogation of Article I, section 17, forbidding that any person disseized of his freehold liberties and privileges, or in any manner deprived of his property, etc., "but by the law of the land," and of Article VII, section 7, prohibiting a municipality to contract a debt or pledge its credit, except for a necessary expense thereof unless with the approval of its qualified voters. *Ibid.*

4. *Same—"Necessaries"—Benefit.*—While the building of public roads has been held a necessary expense within the meaning of Article VII, section 7 of our Constitution, the application of the principle may not be extended to instances where a statute requires the county to issue its bonds for road purposes to obtain aid for a township or local taxing district therein, upon the approval of the voters of the particular district alone, and without benefit to the others. *Ibid.*

5. *Constitutional Law—Statutes—Interpretation.*—The principle that when two constructions of a statute are permissible, the courts, in favor of upholding legislation, should adopt that which is in accordance with the organic law, does not apply when such would force a departure from the plain and natural significance of the words employed in the statute, and which the meaning and purpose of the law clearly tend to confirm and support. *Ibid.*

6. *Same—Test.*—The test of the constitutionality of a statute is whether the statute authorizes an unconstitutional act, and not whether the act in a particular instance would be done with a beneficial effect. *Ibid.*

7. *Constitutional Law—Unconstitutional in Part—Courts—Appeal and Error.*—Where a portion of a legislative act is alone presented on appeal and found to be unconstitutional, the Court may not properly consider the effect thereof upon other portions of the act, as to the constitutionality of such other portions, when not necessary to the decision. *Ibid.*

8. *Constitutional Law—Witnesses—Separation — Defendant's Witnesses.*—The constitutional right of a defendant to face the witnesses against him is not violated by the judge on trial of a civil action excluding the testimony of the defendant's own witness for remaining in court contrary to the court's order that the witnesses in the case be separated. *Lee v. Thornton*, 288.

9. *Constitutional Law—Amendments.*—Whether an amendment to an act authorizing the issuance of bonds, etc., by a county for road purposes is material and required to be passed in accordance with Art. II, sec. 14, as to the separate readings on different days, upon "aye" and "no" vote, is a question of law for the court, under the facts, and not controlled by an agreement between the parties. *Wagstaff v. Highway Comrs.*, 377.

CONSTITUTIONAL LAW—*Continued.*

10. *Same—Roads and Highways—Immaterial Amendments.*—An act passed systematizing the road law of a county, allowing it to issue bonds therefor, and restricting it as to a township that had already issued bonds for the purpose under a former special act by providing that if these bonds cannot be taken care of out of the present issue, the amount of the issue should be reduced in a certain sum, is not rendered invalid (Constitution, Art. II, sec. 14) by an amendment not passed in accordance with the constitutional provision, when it does not affect the taxing or other financial features of the act, or increase either the taxes or impose any additional burden on the taxpayer. *Ibid.*

11. *Same—Townships — Equality of Taxation.* — An act systematizing the road law of a county, providing for bonds in a certain amount, and that the bonds of a certain township duly authorized and outstanding should be taken up or exchanged by the county bond issue, or the amount of the township bonds should be deducted from the authorized amount of the county issuance, does not by this provision render the act invalid, when the effect is not to require the township having issued the bonds to pay for the improvements in other townships, or other townships to be taxed without benefit. *Ibid.*

12. *Constitutional Law—Bonds—Statute.*—A statute authorizing the issuance by a county of road bonds falling due in installments of ten years, in the discretion of the county highway commission, is constitutional, but the county is without power, unless so authorized by statute, to issue bonds falling due in intervals of five years. *Ibid.*

13. *Constitutional Law—Statutes—Vested Rights.*—A vested right cannot be acquired under a statute when its terms and conditions have not been complied with; and when a contract is void thereunder, a contention that a later statute impairs a vested right, under the void contract, is untenable. *Commrs. v. Lewis*, 529.

14. *Constitutional Law—Criminal Law—Unusual Punishments — Statutes.* Our Constitution, Art. I, sec. 14, restraining in general terms the "infliction of cruel and unusual punishments," has been considered by the Supreme Court as an admonition to the judiciary in imposing sentence left to an extent within its discretion by the statutes; and while it has been decidedly intimated that a statute may be declared void for prescribing such punishment for an offense as is "cruel and unusual," the question does not arise as to punishment for assault with a deadly weapon, under our statutes. *S. v. Smith*, 804.

15. *Same—Felony.*—Our statute (Revisal, sec. 3292) defines as a felony a crime that may be punished by imprisonment in the penitentiary, and under our Constitution, Art. VI, sec. 2, one so convicted or confesses himself guilty, forfeits his rights to vote, and may only be restored to citizenship, etc., as provided by law. Hence, a sentence to the penitentiary should not be imposed except by express provision of statute. *Ibid.*

CONSTITUTION, STATE.

ART.

I, Sec. 3. Jurisdiction of recorder's court over this action of slander is tested by the question of moral turpitude of the offense charged. *Jones v. Brinkley*, 23.

I, Secs. 3 and 4. State courts will follow decision of U. S. Supreme Court in matters affecting interstate commerce. *Norris v. Tel. Co.*, 92.

CONSTITUTION, STATE—*Continued.*

I, Sec. 14. This section as to imposition of a sentence for "cruel and unusual punishments" does not apply to this case. *S. v. Smith*, 804.

II, Sec. 14. A material amendment to a bill to authorize a county to issue bonds must conform to the Constitution as to requirements of "aye" and "no" vote, and separate days, but not necessary when not affecting taxes or financial features of bill. *Wagstaff v. Highway Commission*, 377.

IV, Sec. 12. The question of recorder's court jurisdiction for slander depends, in this case, upon whether the offense charged involved moral turpitude. *Jones v. Brinkley*, 23.

VIII, Sec. 7. This does not apply to unequal taxation of townships within a county, some of them without benefit. *Commissioners v. State Treasurer*, 141.

IX, Secs. 1, 2, 3, Ch. 820, Laws of 1907, etc. Making high schools a part of the State public school system is constitutional, but not inclusive of one which is strictly under the local control of a town. *Board of Education v. Board of Commissioners*, 469.

IX, Secs. 3, 5. The four-months term of public schools is not restricted by tax levies for ordinary State and County purposes. *Board of Education v. Board of Comrs.*, 469.

X, Sec. 6. Married woman liable to breach of contract to convey land, though husband not joined in conveyance. *Everett v. Ballard*, 16.

X, Sec. 8. Husband's deed to lands without wife's joinder cannot affect homestead as against judgment liens. *Hall v. Dixon*, 319.

CONTEMPT.

See Courts, 4; Counties, 1.

CONTENTIONS.

See Municipal Corporations, 10; Appeal and Error, 38; Courts, 9.

CONTINGENCIES.

See Injunctions, 4.

CONTINGENT LIMITATIONS.

See Wills, 6, 12.

CONTRACTS.

See Vendor and Purchaser, 1, 2, 4, 7, 8, 11, 16, 19, 20; Married Women, 1; Master and Servant, 7, 8, 9; Carriers of Passengers, 3; Liens, 1; Commerce, 2; Partnerships, 1; Insurance, 1, 3, 5, 6, 7, 10, 11; Mechanics' Liens, 3; Reference, 4; Deeds and Conveyances, 5; Injunction, 1; Evidence, 5, 11; Judgments, 5, 16; Telegraphs, 1; Municipal Corporations, 6; Bills and Notes, 2; Drainage Districts, 7; Wills, 20; Insurance, 10, 11; Corporations, 17, 18; Contracts, 15, 16; Courts, 10.

1. *Contracts—Independent Contractor—Trials — Evidence — Questions for Jury.*—When the evidence is conflicting, the question of independent contractor is one for the jury. *Evans v. Lumber Co.*, 31.

2. *Contracts—Fences—Stray Cattle—Crops—Measure of Damages — Duty to Decrease.*—Where the plaintiff and defendant have entered into an agreement

CONTRACTS—*Continued.*

to surround their adjoining farm with one fence, without a divisional one, each to keep up the fence on his own land, and the plaintiff's crop has been damaged by stray hogs and cattle coming through defendant's part of the fence left in negligent condition, the measure of damages is the reasonable value of the crops destroyed; and the principle has no application that it is the duty of one sustaining damages through the negligent act of another to do what he reasonably can to decrease them, or in this instance, go upon defendant's land and repair the fence. *Dixon v. Grand Lodge*, 139.

3. *Contracts — Independent Contractor — Negligence — Liability—Dangerous Work.*—The doctrine of independent contractor relieving his principal from liability for the negligence of such contractor, does not apply when the latter assumes control and management in the prosecution of the work, or where the work to be done is inherently dangerous, as in cutting and hauling from the land, with steam locomotive power, the timber thereon, under a conveyance of such timber, giving the right to operate logging roads on the land for that purpose. *Simmons v. Lumber Co.*, 221.

4. *Contracts—Reformation of Instruments—Parol Evidence—Vendor and Purchaser—Fraud or Mistake—Correspondence—Burden of Proof.*—While the terms of a written contract may not ordinarily be varied by parol, the principle does not obtain when the writing is sought to be reformed in equity for mistake or fraud in its material part; and in this action for damages for the alleged failure of the purchaser to accept the goods from the vendor, the plaintiff's letters in the correspondence between the parties tending to show that the contract as written and signed by them failed to truly state the quality of the goods purchased; that the contract was drawn by the vendor, and the purchaser signed at his request, with the other parol evidence in the case, is held sufficient, upon the issue of mutual mistake or fraud, for the reformation of the contract in this respect, the burden being upon the defendant to establish the facts by clear, strong and convincing proof. *Potato Co. v. Jeanette*, 237.

5. *Contracts—Breach—Measure of Damage—Vendor and Purchaser—Cotton.*—Upon seller's breach of contract to deliver a definite number of bales of cotton at a certain place and time, the vendor's measure of damages is the difference between the contract price and the actual or market value of the property at the time and place of the delivery, and special damages are not recoverable when the parties have only contemplated the delivery of the cotton without further evidence. *Cooper v. Clute*, 366.

6. *Same—Compress Charges—Nominal Damages.* — Where the vendor sells his baled cotton, held in storage by a warehouseman, and the latter has had the cotton compressed and sold it another without the knowledge of the vendor, evidence that the warehouseman sold the cotton at the same price, with compress charges added, is not evidence that the purchaser had been damaged by the vendor's breach of contract. *Ibid.*

7. *Contracts—Fraud — Allegations — Pleadings — Vendor and Purchaser.*—*Semple.* the representations alleged to have been made by the vendor in this case, were sufficient upon the question of fraud, except for the absence of allegation that they were false, or were knowingly so to the vendor, or made with fraudulent intent. *Register Co. v. Bradshaw*, 414.

8. *Contracts—Written Statute of Frauds—Parol Evidence—Consideration —Bills and Notes—Seals.*—A defendant sued on his note by the original payee may show by parol that the entire transaction was not put in writing; that it

CONTRACTS—*Continued.*

was given for a certain interest in land upon the contingency of the success of the payee's action to recover the land and a complete failure of consideration arising from an unsuccessful outcome of the action, and the fact that the note was under seal does not affect the result as between the original parties. *Farrington v. McNeill*, 420.

9. *Contracts—Support—Consideration.*—A contract made between plaintiff and defendant, whereby the former should care for the mother-in-law of the parties at his home, in consideration of the defendant's furnishing servants, stated sums of money, etc., is supported by a sufficient consideration to maintain an action thereon. *Institute v. Mebane*, 165 N.C. 644, cited and applied. *Brown v. Taylor*, 423.

10. *Contract—Breach—Correspondence Schools.*—An agreement to take a correspondence course of study and to pay express charges on the "text," which the teacher should prepay and include in the account rendered to the student, does not permit the latter to declare his contract at an end and avoid performance on his part upon receiving a statement from the teacher showing that such charges amounted to $1 on the "text" that had been sent according to the contract. *University v. Ogburn*, 427.

11. *Same—Repudiation—Damages—Election.*—One who has agreed to take a course of study from a correspondence school at a certain price may not, without legal cause, declare the contract terminated during the period of its existence, and by refusing to pay compel the teacher to sue at once for the damages that had accrued to that time; for the latter, at his election, may continue to perform his part of the contract according to its terms, and then sue for damages accruing to him upon the entire contract, or upon the different installments as they mature. *Ibid.*

12. *Contracts—Breach—Entire Damage — Correspondence Schools.* — One who has agreed to take a course of study from a correspondence school, with express provision that in the event any one installment be not paid sixty days after it becomes due, etc., the unpaid balance of the contract shall immediately become due, is held to the terms of his agreement; and when he breaches his contract within the period prescribed for the course, and prevents performance by the other party, he will be held liable for the full balance of payment specified in the contract. *Ibid.*

13. *Contracts—Breach—Benefits Accepted.*—A party may not repudiate his contract by accepting the part which is beneficial to him and refusing performance of the balance. *Ibid.*

14. *Contract — Improvements — Breach — Damages — Benefits — Equity —Quantum Meruit.*—Ordinarily a party cannot recover any damages for breach of contract stipulations without averring and proving a performance of his own antecedent obligations arising on the contract or some legal excuse for nonperformance thereof, or, if the stipulations are concurrent, his readiness or ability to perform them; but this doctrine is so far modified as to permit the contractor to recover upon a *quantum meruit* upon his breach in case of building or improvement contracts when it is made to appear that the owner or other contracting party has received and continues to enjoy the contractor's work under circumstances that in equity and good conscience call for compensation. *Poe v. Town of Brevard*, 710.

15. *Same—Contracts—Specific Method.*—This right to recover on a *quantum meruit* under the circumstances indicated does not prevail where it appears

CONTRACTS—*Continued.*

from the stipulations of the contract that the parties have undertaken to provide, and the written agreement between them does provide for a special method of adjustment; and in that event, on breach, the specified method must be recognized and pursued. *Ibid.*

16. *Same—Contracts—Municipal Corporations—Cities and Towns.*—Where a city or town, under the express terms of its street-paving contract, and on default of its contractor, takes over the material and machinery furnished and being used by him, and completes the work, employing others for the purpose, furnishing them additional material, with stipulations that the contractor and his bond shall be liable for any additional expense caused the city by the contractor's default, and that the contractor shall receive no further payment under the contract until the work shall have thus been completed: *Held*, by the provisions of the contract, the idea that the contractor may only recover upon a *quantum meruit* is excluded; and in his action against the city, he is entitled to an accounting for, and may recover the profits the latter may have made in taking over and completing the work, as measured by the contract, together with compensation for the machinery and material which the city had retained or consumed in the completion of the contract. *Ibid.*

17. *Contracts—Breach—Damages—Terms of Settlement—Better Materials.* Where, upon default of a contractor for paving the streets of a city, he is, under the terms of his contract, permitted to recover the amount the latter has made by completing the contract, the extra price it has paid for material of better grade than that specified is not chargeable against the contractor in the settlement. *Ibid.*

18. *Contracts, Quantum Meruit.*—No error is found in this action to recover upon a *quantum meruit* for the value of services rendered in procuring a pardon. *Gantt v. Turner*, 775.

CONTRACTORS.

See Mechanics' Liens, 2; Husband and Wife, 1.

CONTRACT OF CARRIAGE.

See Carriers of Passengers, 5.

CONTRACT TO CONVEY LANDS.

See Taxation, 4.

CONTRADICTION.

See Partnership, 6; Evidence, 31.

CONTRIBUTORY NEGLIGENCE.

See Master and Servant, 5, 15, 21; Negligence, 1, 11, 17, 24; Municipal Corporations, 1; Issues, 2, 3; Street Railways, 1.

CONVERSATIONS.

See Evidence, 15, 21.

CONVERSION.

See Wills, 8; Equity, 4.

CORRESPONDENCE.

See Evidence, 10.

CORROBORATION.

See Evidence, 21.

CORPORATIONS.

See Telephone Companies, 1; Evidence, 17.

1. *Corporations—Judicial Sales—Purchaser — Property — Encumbrance — Franchise—Reorganization.*—In section 1238, Rev., providing for a sale of the property and franchise of a corporation and reorganization of same, in all cases where there shall be a sale under a judgment or decree of court, or under execution to satisfy a mortgage debt or other encumbrance thereon, the word "encumbrance" is not restricted, as in cases of real estate alone, to claims having specific lien on the property, but is extended to include every and all claims importing a liability to sale as a whole under judicial decree. When, therefore, in a suit by minority stockholders, a judicial sale of the entire plant, franchise, etc., is ordered, the purchaser acquires the right to reorganize under the same, on compliance with the requirements of the law. *Wood v. Staton*, 245.

2. *Same—Stockholders—Assets—Judgments—Decrees.*—When the property, including the franchise, of a corporation is sold under judicial sale, conferring on the purchaser the right to reorganize, etc., the old stockholders have a right to share in the assets, if there is a surplus; but the decree itself shuts off all their rights as such stockholders in the new corporation, and a decree which in express terms requires them to surrender their shares and have them canceled is without significance on the rights of the parties. *Ibid.*

3. *Corporations—Judicial Sales—Reorganization—Statutes — Name — Seal —Capitalization.*—Where the purchasers of the entire property of a defunct corporation under the decree of court have in other respects complied with the requirements of the statute as to reorganization, the fact that they have assumed to continue operations without changing the seal, or determine upon a different amount of capitalization, does not necessarily affect the fact of proper reorganization, there being no statutory requirement that they change them. Rev., secs. 1239, 1240. *Ibid.*

4. *Corporations de jure—Stockholders—Individual Liability—Corporations de facto—Actions—State.*—Where the purchasers of the property and effects of a corporation at judicial sale under a decree stating, in part, that the sale was to be made as "a going concern," reorganize within the requirements of the statutes (Rev., secs. 1238, 1239, 1240, 1241), except that it failed to file the certificate with the Secretary of State within one month from its reorganization (section 1240) as to whether the corporation was one *de jure*, the purchasers having acted in good faith, *Quære?* But, under the circumstances of this case, it became at least a corporation *de facto*, and the individuals cannot be held to personal liability for debts contracted in the name of the corporation, except to the extent the charter or act of incorporation provides. *Ibid.*

5. *Corporations—De jure—De facto.*—A corporation *de jure* is said to exist when persons holding a charter have made substantial compliance with the provisions of the same, looking to its proper organization, while a corporation *de facto*, is one where the parties having a charter or law authorizing it have in good faith made a colorable compliance with such requirements, and have proceeded in the exercise of the corporate powers or a part of them. *Ibid.*

6. *Same—Shareholder's Liability—Actions.*—So far as the State is concerned, the ultimate distinction between a corporation *de jure* and a corporation *de facto* is, that the former, having made substantial compliance with the charter requirements looking to the proper organization, can successfully resist the suit instituted by the State or its officers for the direct purpose of annulling the

charter, while the latter cannot; but as to private persons holding claims against them, the individual corporators, in either case, are not personally liable for debts, except and to the extent the charter and law applicable may so provide. *Ibid.*

7. *Corporations—Secret Profits—Promoters—Trusts and Trustees—Actual Value—Burden of Proof—Consideration.*—The promoters of a corporation are held to the duties of trustees and the obligation of directors, and may not take a secret or undisclosed profit in the organization by way of shares therein or otherwise; and where the business of a partnership has been incorporated, and it appears that a member of the firm has been bought out by a third person with money he has obtained from the bank on his own note, which is subsequently taken up by that of the corporation and paid by the corporation: *Held*, stock issued on the corporation to such third person is without consideration, the burden being on him to show the contrary, and he is liable to the receiver, in an action to recover the unpaid subscription. *Goodman v. White*, 399.

8. *Corporations—Subscriptions—Money Value—Directors—Statutes.*—The subscriptions to the capital stock of a corporation constitute a trust fund for the benefit of creditors, and under our statutes a money payment is required, except when stock certificates are issued for merchandise or other property, the property shall be taken at its true value as ascertained by the directors, when acting within the terms of the statute, whose judgment then shall be conclusive, in the absence of fraud. Revisal, secs. 1160-1161. *Ibid.*

9. *Corporations—Mortgages—General Manager—Principal and Agent—Directors.*—While ordinarily a general manager of a corporation is without implied authority to pledge corporate property for the payment of its debts, unless by resolution of the board of directors, the doctrine is subject to the rule that he may have such power when incidentally necessary to the carrying on of the business under his general authority, as such manager, and that acts of such character are binding upon their ratification by the company in accepting benefits thereunder. *Brimmer v. Brimmer*, 435.

10. *Same—Evidence.*—A funeral corporation was heavily endebted to a livery stable for furnishing it carriages for funerals, where its "dead wagon" was kept at the time and continuously thereafter; and to obtain further credit at the stable the manager of the corporation pledged the "dead wagon" of which the corporation received benefit with the knowldge and consent of the president. After insolvency, the receivers sued the owners of the stable for the wagon, and it is *Held*, there was evidence sufficient to bind the funeral corporation or its receiver to the pledge made by its general manager, there being evidence both as to his authority and the ratification of his act by the corporation. *Ibid.*

11. *Corporations—Mortgages—Receivers—Equity of Redemption—Liens—Priorities—Statutes.*—Under a deed to lands to a corporation, with immediate mortgage to secure the purchase price, the title passing is only for the purpose of the mortgage, and the corporation acquires only the equity of redemption; and the result is the same when it acquires land already subject to mortgage; and where such mortgages have been promptly registered and the corporation became defunct, with claims against it for torts, for labor performed within the 60 days prior to the appointment of receiver (Revisal, secs. 1131, 1206), and also cost of receivership, etc. (Revisal, sec. 1226), and the lands have since been sold, with the proceeds in court subject to distribution in accordance with the priorities, the mortgagees are entitled to be paid in full; then the cost of receivership

and then the statutory priorities for torts and labor will be distributed *pro rata*, etc. *Humphrey v. Lumber Co.*, 514.

12. *Corporations—Mortgages—Liens—Statutes.*—A mortgagee of the legal title of property of a corporation, to secure a debt, takes subject to laborers' liens, judgments for torts, and expenses of receivership, and other court proceedings to wind it up, in case of insolvency. Revisal, secs. 1131, 1206, 1207, 1226. *Ibid.*

13. *Corporations—Officers—Principal and Agent — President — Restricted Authority—By-Laws—Bills and Notes—Notes.*—It may be shown, as between the original parties, that the payee of a note of a corporation took it with knowledge that the president's authority was restricted by the by-laws requiring the counter-signature of the secretary, and that it was invalid, without consideration, and given only as accommodation paper. *Phillips v. Land Co.*, 542.

14. *Same—Deceased Persons—Statutes.*—A corporation, sued upon its note, executed by its president, defended upon the ground that it was for accommodation, therefore without consideration, and under its by-laws its validity depended upon the counter-signature of its secretary, of which the plaintiff had had previous notice. At the plaintiff's instance, the testimony of himself and of defendant's president and secretary was taken before the clerk. Revisal, secs. 865 and 866. The plaintiff died, and his administrator was made a party in his stead, and upon the trial it is held reversible error to exclude the testimony as taken before the clerk, offered by the defendant, as being a transaction or communication with a deceased person, contrary to Revisal, sec. 1631, and which tended to sustain the defense. *Ibid.*

15. *Foreign Corporations — Bonding Companies — Process — Principal and Agent—Statutes.*—A local agent receiving premiums or commissions for a bonding company doing business in this State is within the contemplation of the section 440(1) one upon whom a valid service of summons can be made on a foreign corporation, including a bonding company. *Pardue v. Absher*, 676.

16. *Foreign Corporations—Process—Service—Statutes — Insurance Commissioner.*—Service of summons on a foreign insurance company doing business in this State is not restricted to the method prescribed by Revisal, sec. 4750, but may be made in the manner stated in Revisal, sec. 1243. *Ibid.*

17. *Corporations—Contracts—Subscriptions—Corporate Acts—Board of Directors—Evidence—Ratification—Officers—Principal and Agent—Scope of Authority.*—Where a realty company proposes to lay off its land into lots for sale, and its president and two of its directors, in writing subscribe to a street railroad company to be built through the lands, the nearest one being 1½ miles distant, and upon the operation of the railway the lots are sold off at a great profit upon the original investment, amounting to much more than the sum subscribed, and upon objection to the service the railway company improved its operations accordingly, and the officers of this company saw the work in progress without at any time objecting: *Held*, sufficient evidence to be submitted to the jury on the question whether the president and directors acted within the scope of their authority in making the subscription or of the subsequent ratification of their acts by the corporation. *Duke v. Markham*, 105 N.C. 131, cited and distinguished. *Chatham v. Realty Co.*, 671.

18. *Corporations—Subscriptions—Contracts.*—Where the name of a corporation is stricken out of a subscription to an enterprise with the consent of the parties, and the subscription is thus delivered and accepted, it is binding between

CORPORATIONS—*Continued.*

the acceptor and the other subscribers, and is a valid obligation between them. *Ibid.*

CORPORATION COMMISSION.

See Telephone Companies, 1.

COSTS.

See Interpleader, 1; Appeal and Error, 8, 44; Mechanics' Liens, 5; Courts, 11.

1. *Costs—Admissions—Processioning—Title—Issue.*—Where, in proceedings to procession lands, plaintiff's title is denied, upon allegation of insufficient knowledge [Revisal, sec. 479(1)], and without objection the cause is transferred to the civil issue docket for trial, and a survey being necessary, the judge has ordered it to be made, to which defendant excepts without giving any ground; and upon trial, after survey made, it is admitted by the parties that the title to a part of the land was in plaintiff, he is entitled to recover his costs, except that of witnesses present at the trial who were neither tendered nor sworn. Revisal, sec. 1264(1). *Staley v. Staley*, 640.

2. *Costs—Ejectment—Possession—Admissions.*—In a possessory action to recover lands, the defendant is not entitled to recover costs when the verdict awards the lands to the defendant that are claimed by him and in his possession; nor is the plaintiff in better position with regard to the costs where the defendant admits that the plaintiff is the owner of the land contained in his larger boundaries, except the *locus in quo*. *Wilson v. Wilson*, 755.

COUNTIES.

Counties—Drainage District—Assessments—Judgments — Contempt — Courts —Constitutional Laws.—A judgment in proceedings for *mandamus* against the county commissioners to compel them to pay an assessment of a drainage district for benefit to the public roads therein, that the defendants pay the same, with interest and cost, out of the first moneys coming into their hands, and not otherwise appropriated, is valid and not in violation of the Constitution or statute relating to taxation; and should a rule for contempt be issued, they may show their inability, acting in good faith, to legally comply with the judgment. *Drainage District v. Commissioners*, 738.

COTTON.

See Contracts, 5.

COURTS.

See Slander, 2; Public Officers, 1; Constitutional Law, 7; Actions, 2, 3; Railroads, 3; Commerce, 4; Appeal and Error, 18, 21; Judicial Sales, 1; Instructions, 2; Telephone Companies, 1; Injunction, 1, 3; Public Schools, 1; Carriers of Goods, 12; Jurors, 4; Indictment, 2; Counties, 1; Verdicts, 3, 4.

1. *Courts—Jurisdiction—Superior Courts—Motions — New Trial — Court's Discretion—Appeal and Error.*—A motion properly made in the Superior Court for a new trial for newly discovered evidence is addressed to the sound discretion of that court, and is not reviewable on appeal unless this discretion has been abused. *Allen v. Gooding*, 271.

2. *Courts—Separation of Witnesses—Appeal and Error.*—It is within the discretion of the trial judge to order a separation of the witnesses in the case, and, in the absence of abuse, is not reviewable on appeal. *Lee v. Thornton*, 288.

COURTS—*Continued.*

3. *Courts—Discretion—Separate Witnesses—Notice—Neglect of Counsel.*—Where the judge has ordered a separation of the witnesses in the case on trial, and the attorney for a party has subpœnaed a witness, who, not having been notified, came into court and remained during the testimony of another witness, the neglect is that of the attorney to have had this witness notified; and not having done so, he is deemed to have waived his right to examine the witness in behalf of his client, and he may not complain that the judge, in the exercise of his discretion, refused to permit this witness to testify. *Ibid.*

4. *Same—Contempt of Court.*—Where an order separating the witnesses at the trial has been made and thereafter another witness has been subpœnaed, who, in ignorance of the order, attends and remains in court while another witness is testifying, he may not be adjudged in contempt of court, nor will abuse of discretion be attributable to the court in ignorance of the fact. *Ibid.*

5. *Courts—Verdict Set Aside—Discretion—Appeal and Error.*—A motion to set aside a verdict as being contrary to the weight of the evidence must be addressed to the sound legal discretion of the trial judge, and in the absence of abuse of this discretion is not reviewable on appeal. *Cooper v. Clute*, 366.

6. *Courts — Jurisdiction — Pleadings — Amount Demanded—Good Faith—Judgments.*—Objection to a judgment rendered in the Superior Court that the amount was cognizable in the court of a justice of the peace cannot be sustained when the amount demanded in the complaint, in good faith, exceeded the sum of $200. *Brown v. Taylor*, 423.

7. *Courts—Justice's Courts—Nonresidents—Process—Statutes—Time to Answer—Jurisdiction—Motions—Pleadings.*—The provision of Revisal, sec. 1451, that a justice of the peace shall not enter a judgment against a nonresident defendant unless it shall appear that process was duly served at least ten days before the return day, is not jurisdictional; and where, upon special appearance of defendant for the purpose of dismissing the action, he was given more than ten days thereafter to answer or defend, which he refused to do, the justice's judgment will not be disturbed. *Bank v. Carlile*, 624.

8. *Courts—Jurors Set Aside—Exceptions to Jurors—Prejudice—Appeal and Error.*—It is proper for the trial judge to stand aside a juror in a criminal action upon his statement that he would not convict upon the testimony of a certain witness of the State, relied on by it for conviction; but if otherwise, it would not be prejudicial, when it appears that defendant did not challenge any juror, and that, therefore the jury determining the case was satisfactory to him. *S. v. Little*, 793.

9. *Courts—Instructions—Contentions—Improper Remarks.*—In this case the State relied upon the evidence of a witness who had been employed as a detective to convict the defendant of a sale of liquor in violation of the prohibition law, with conflicting contentions upon the evidence that this witness had been previously convicted of violating the same law and was not worthy of credence. A statement of the contentions of the parties by the judge to the jury, in his own language, that "Birds of a feather will flock together": that the witness, "having been convicted of unlawful sales of whiskey before this trial, would be likely to know who sells liquor in violation of the law," is not held objectionable as an improper remark. *S. v. Little*, 800.

10. *Courts—Justice of the Peace—Jurisdiction — Contracts — Amount Demanded—Statutes.*—The justice of the peace has jurisdiction of an action upon

COURTS—*Continued.*

contract where the summons used as a complaint demands, in good faith, a recovery of $200 or less, though a greater sum could have been demanded. Revisal, sec. 1419. *Shoe Store Co. v. Wiseman*, 716.

11. *Courts—Clerks of Court—Taxing Costs—Surveyor—Statutes — Appeal and Error.*—Where a court survey of lands has been ordered and made, and the trial judge has failed to make an order allowing compensation to the surveyor, the clerk of the court has no power to make the allowance (Revisal, sec. 1504); but, on appeal from the clerk's refusal, the judge of the Superior Court should make it, upon motion made to that effect; and in this case permission to renew the motion at the next term of the Superior Court of the county is granted. *Cannon v. Briggs*, 740.

COURT'S JURISDICTION.

See Judgments, 15.

COUNTERCLAIM.

See Banks and Banking, 1; Pleadings, 5; Appeal and Error, 46.

COUNTIES.

See Constitutional Law, 2; Roads and Highways, 2; Drainage Districts, 5, 6; Statutes, 2.

COUNTY COMMISSIONERS.

See Jury Drawing, 1.

CREDITS.

See Guardian and Ward, 2.

CREDITORS.

See Partnership, 9.

CREDITOR'S BILL.

See Reference, 2.

CRIMINAL LAW.

See Indictment, 1, 2; Intoxicating Liquors, 1, 15; Verdict, 3; Constitutional Law, 14.

1. *Criminal Law—Bill of Particulars—Statutes.*—The remedy for a defendant in a criminal action, when the indictment does not sufficiently inform him of the particular charge against him to enable him to prepare his defense, is to apply to the court, acting in its discretion, to require the solicitor to furnish him a bill of particulars. Revisal, sec. 3244. *S. v. Horner*, 789.

2. *Criminal Law—Instructions—Expression of Opinion—Pleas—Not Guilty —Denial as to Evidence.*—A plea of not guilty to a criminal charge is a denial of the truth of all of the evidence introduced by the State on the trial tending to show guilt; and where defendant is tried under an indictment for the manufacture of spirituous liquors, etc., or aiding, etc., therein, prohibited by Public Laws 1917, chap. 157, it was error in the trial judge to state in his charge to the jury that the defendant had testified to material and prejudicial facts and made declarations tending to show his guilt, when such was only the evidence of the State's witnesses, whose credibility was for the jury to pass upon, and constitutes a reversible error, however inadvertently committed. *Ibid.*

3. *Criminal Law — Intimidating Witness—Suppression of Evidence.* — Evidence in a criminal action that the defendant assaulted the prosecuting witness

CRIMINAL LAW—*Continued.*

at the term the action was for trial is competent as an effort to suppress evidence or intimidate the witness, and may properly be referred to in the charge to the jury. *S. v. Little*, 794.

4. *Criminal Law—Trials—Witness—Cross-examination.*—While the solicitor, in the trial of this criminal action, may have prefaced his questions to defendant with remarks which properly should have been reserved for his address to the jury, such as, "Now, tell the truth about this, if you know how," etc., his method in so doing is *Held* not to exceed the legitimate bounds or to constitute reversible error. *Ibid.*

5. *Criminal Law—Pleas—Nolo Contendere—Admissions—Sentence—Subsequent Term.*—The plea of *"nolo contendere"* is in effect a plea of guilty so far as to permit the imposition of the sentence prescribed by the law, and where prayer for judgment has been continued upon payment of cost, it may be imposed by the court at a subsequent term, after due notice to the defendant. *S. v. Bennett*, 796.

6. *Criminal Law—Punishment—Statutes — Assaults — Deadly Weapons.* — Our statutes bearing more directly upon the punishment for an assault with a deadly weapon are Revisal, sec. 3293, making offenses punishable as common-law misdemeanors where no specific punishment is prescribed, except in certain instances wherein imprisonment in the county jail may be imposed; and Revisal, sec. 3620, leaving punishment by fine or imprisonment, or both, in the court's discretion, upon a conviction of assault with or without intent to kill or injure; and thereunder no authority is conferred on the trial judge to impose a sentence of imprisonment in the penitentiary upon a conviction of assault with a deadly weapon; and while section 3620 authorizes a punishment for assault with or without intent to kill, by fine or imprisonment, or both, within the court's discretion, the discretion referred to is within the limitation of the sentence by statute and so understood, and to that extent will not be disturbed on appeal, except in case of manifest and gross abuse. *S. v. Smith*, 805.

7. *Criminal Law—Punishment—Repealing Statutes.*—The provisions of chapter 167, Laws 1868, secs. 8 and 7, providing punishment for an assault with a deadly weapon or by means likely to kill, by imprisonment in the penitentiary, are repealed by Revisal, sec. 3620. *Ibid.*

8. *Criminal Law—Roads and Highways—Obstruction — Statutes.* — A way over the lands of another as an outlet to and from the lands of the one claiming it, cannot be established by permissive user, but by possession adverse to the true owner; and a way of this character which has not been established by the public authorities or used and kept up by the public for a sufficient length of time, does not fall within the meaning of Revisal, sec. 2686, so as to make its obstruction punishable. *S. v. Norris*, 808.

CROPS.

See Contracts, 2.

CROSS EXAMINATION.

See Criminal Law, 4.

CROSSINGS.

See Railroads, 2.

CUSTODIA LEGIS.

See Taxation, 1.

CUSTOMS.

See Descents, 3; Evidence, 11; Negligence, 24.

DAMAGES.

See Married Women, 1; Slander, 3; Process, 2; Evidence, 2, 18, 26; Drainage Districts, 1, 10, 12, 13; Malicious Prosecution, 1, 2; Carriers of Passengers, 4; Carriers of Goods, 1, 2, 4, 10, 16; Contracts, 2, 5, 6, 11, 12, 14, 17; Claim and Delivery, 1; Mechanics' Liens, 3; Reference, 4; Vendor and Purchaser, 3, 14, 18; Telegraphs, 2; Condemnation, 1; Roads and Highways, 3; Nuisance, 1; Municipal Corporations, 8; Libel, 2; Insurance, 11; Injunction, 4; Railroads, 4, 15; Negligence, 19, 20; Pleadings, 12.

DANGEROUS INSTRUMENTALITIES.

See Master and Servant, 9.

DANGEROUS WORK.

See Contracts, 3.

DEAD PERSONS.

See Evidence, 17.

DEADLY WEAPONS.

See Criminal Law, 6.

DEATH.

See Options, 1.

DEATH BY VIOLENCE.

See Insurance, 12.

DECEASED PERSONS.

See Evidence, 14; Corporations, 14.

DECISIONS.

See Commerce, 3; Trials, 1.

DECLARATIONS.

See Carriers of Passengers, 6; Instructions, 1; Evidence, 8; Deeds and Conveyances, 2; Process, 3; Evidence, 7.

DECREES.

See Corporations, 2.

DEEDS AND CONVEYANCES.

See Options, 1; Injunctions, 1; Actions, 4; Homestead, 1; Descent and Distribution, 12; Judgments, 6; Equity, 2, 3; Trusts and Trustees, 1, 2; Drainage Districts, 2, 4; Limitation of Actions, 9; Taxation, 4; Partnership, 9.

1. *Deeds and Conveyances — Definite Description — General Statements.* — Where a description to a part of a lot in a conveyance of law is by sufficient and definite metes and bounds, with the statement that one-half thereof was intended to be conveyed, the definite description in case of variance will control the general statement, and the divisional line between that and a subsequent conveyance of the remaining portion of the lot will be established accordingly. *Potter v. Bonner*, 20.

2. *Deeds and Conveyances—Descriptions—Grantor's Declarations — Parol Evidence—Statute of Frauds.*—Parol evidence may control the description given in a conveyance of lands when the parties, with the view of making the deed go upon the land, make a physical survey of the same, giving it a boundary

which is actually run and marked, and the deed is thereupon made, intending to convey the land which they had surveyed, and the mere declaration of a grantor as to a divisional line, at variance with the given description, falls within the meaning of the statute of frauds, and is inadmissible. *Ibid.*

3. *Deeds and Conveyances—Surface Lines—Overhanging Buildings—Ouster —Remedy.*—A call in a conveyance of a city lot to "a point on a line of the northern edge of" a brick store, the other lines called for being upon the surface of the ground, is to a point on the surface of the ground; and where the walls of the building appreciably incline upward over the lot conveyed, in this case four inches at the top, so as to prevent the use of the lot for an intended building, the encroachment amounts to an ouster, giving the owner a right of action. *Shrago v. Gulley*, 135.

4. *Same—Demurrer—Ascertainment of Facts.*—The specific rights in this case of the owner whose land has been encroached upon by an appreciably overhanging wall of an adjoining brick building, an appeal from a judgment sustaining a demurrer to the complaint will await the determination of the facts in the lower court. *Ibid.*

5. *Deeds and Conveyances — Timber —Contracts—Extension—Option—Condition Precedent—Time the Essence.*—A contract conveying timber on lands entered into on 18 January, 1906, with provision for cutting and removing it in ten years, but that the purchaser could extend the period a reasonable time, not exceeding ten years, upon paying, on 1 January of each of the successive years thereafter, a certain sum of money: *Held*, the renewal payment contemplated was of the essence of the contract, and a condition precedent to the exercise of the option, requiring performance in advance of the termination of the right to cut and remove the timber. *Williams v. Lbr. Co.*, 229.

6. *Deeds and Conveyances—Warranty—After-acquired Title—"Feeding an Estoppel."*—A conveyance of all the grantor's interest in a described tract of land, setting out that it is "my entire interest in my father's land, the deceased, where my mother now lives," with full covenants of seizin and warranty, and the land belonged to the mother of the grantor, who lived thereupon, and died seized and possessed thereof, and devised the grantor an interest therein: *Held*, the devise of such interest fed the estoppel under the grantor's previous deed, and he will not be allowed to recover against it. *Baker v. Austin*, 433.

7. *Deeds and Conveyances—Defeasible Title—Wills—Devises.*—A devise of lands to G. and M. in fee, defeasible upon their dying without leaving bodily heirs, and then to the heirs of the testator: *Held*, neither G. nor M., nor one of them after the death of the other, could convey an indefeasible fee simple title to the lands. *Kirkman v. Smith*, 604.

8. *Deeds and Conveyances—Delivery — Husband and Wife — Acknowledgment—Death of Wife.*—A deed to lands is only complete upon delivery, and a married woman's deed to her lands requires the written consent of her husband under the form provided for by the statute (Revisal, sec. 952), requiring that such conveyance be signed by both the husband and wife; and a deed made and signed in due form by the wife, and thereafter the husband writes in his name as a grantor, and, after her death, acknowledges its execution before the clerk, is invalid to pass title. *Hensley v. Blankinship*, 759.

DEFECTS.

See Master and Servant, 6, 10, 11, 16.

DEFENSES.

See Slander, 4; Judgments, 4; Master and Servant, 15.

DEFENSE BOND.

See Partition, 1.

DEFINITENESS.

See Limitation of Actions, 11.

DEGREES OF OFFENSE.

See Intoxicating Liquors, 4.

DELAY.

See Vendor and Purchaser, 15.

DELIVERY.

See Vendor and Purchaser, 9; Deeds and Conveyances, 8.

DEMURRER.

See Interpleader, 1; Deeds and Conveyances, 4; Roads and Highways, 1; Parties, 1; Telegraphs, 3; Pleadings, 4; Guardian and Ward, 4; Equity, 4; Actions, 1.

DENIAL.

See Criminal Law, 2.

DEPOSITIONS.

See Drainage Districts, 5, 6; Statutes, 2.

DEPOSITS.

See Banks and Banking, 1; Drainage Districts, 7.

DEPOTS.

See Carriers of Passengers, 7.

DESCENT AND DISTRIBUTION.

See Wills.

1. *Descent and Distribution—Slaves—Statutes—Marriage—Inheritance.*—The act of 1866, declaring that former slaves who "now cohabit together in the relation of husband and wife . . . shall be deemed to have been lawfully married as man and wife, at the time of the commencement of such cohabitation," deals with marriage, making the legitimacy of children and the right to inherit lands depend upon their parents' cohabitation at the birth of the issue, and its continuance to the ratification of the act; while the act of 1879, now Rule 13, sec. 1556, Canons of Descents, does not validate the cohabitation, but simply confers the right on colored children born before 1868 to inherit, and this right is limited to the estates of the parents. *Croom v. Whitehead*, 305.

2. *Descent and Distribution—Evidence—Paternity—Deeds and Conveyances.* Where the plaintiff claims the lands in controversy through his father, C., from one he alleges to be his grandfather, and the paternity of his father is denied, and claimed to be one W., it is error to admit evidence from the register of deeds' record of a deed to plaintiff's father from a stranger showing that W. had been erased and C. interlined, without evidence as to by whom it was made, when or by what authority, or that it so appeared in the original deed; and it is reversible error when the court, in his charge to the jury, upon conflicting evidence, made it material to their consideration upon the issue. *Ibid.*

DESCENT AND DISTRIBUTION—*Continued.*

3. *Same — Cohabitation — Acceptance — Retroactive Acts.* — Where former slaves have cohabited together before and at the time of the ratification of the act of 1866, their continuing in this relation thereafter is construed as their consent to the marriage therein declared to be lawful, and retroactive in the respect that it relates back to the beginning of the cohabitation, without the necessity of their having acknowledged the cohabitation before the clerk, etc., or justice, etc., as directed by the act. *Ibid.*

4. *Descent and Distribution—Slaves—Statutes—Exclusive Marriage.*—Under Revisal, sec. 1556, Rule 13 of Descents, declaring legitimate children of colored parents born at any time before 1 January, 1868, under certain conditions, it is required that cohabitation shall have existed at the birth of the child claiming the inheritance, and the paternity of the party from whom the property claimed is derived must be shown; and under this section and the Laws of 1866 the cohabitation must be exclusive, in that it was a single and not a polygamous relation. *Ibid.*

5. *Descent and Distribution—Paternity—Declarations—Evidence — Trials —Instructions.*—Where an inheritance is claimed by the relation of former slaves declared to be a lawful marriage by the act of 1866, and the evidence is conflicting as to whether the facts establish a lawful marriage within its terms, declarations of the mother as to the paternity of one through whom the claimant seeks to derive title are competent or not depending upon the establishment of the fact of marriage, and under conflicting evidence thereof, such evidence should be admitted on the trial, with instructions to the jury to disregard it if they find affirmatively upon that question. *Ibid.*

6. *Descent and Distribution—Statutes—Illegitimates.*—Rule 10 of Descents (Revisal, sec. 1556), providing that "illegitimate children shall be considered legitimate as between themselves and their representatives, and their estates shall descend accordingly in the same manner as if they had been born in wedlock," refers by express terms to Rule 6, so far as it relates to the mother of the *propositus*, which provides that where "the person last seized shall have left no issue capable of inheriting, nor brother, nor sister, nor issue of such, the inheritance shall vest in the father, if living, if not, then in the mother, if living"; and where one is claiming the inheritance through a legitimate line of ancestry and through the legitimate mother of an illegitimate *propositus*, the fact that the mother was living at the death of her illegitimate child is made a condition precedent under Rule 6 to the vesting of the estate, and the claimant cannot recover should the *propositus* have outlived the mother. *University v. Markham*, 338.

7. *Descents—Heirs at Law—Evidence — Identification.* — Where the appellants claim the *locus in quo* through their mother, M., as an heir at law of her father, C., testimony of the daughters of M. that she had told them that her father was C., and that her brother R. and her sisters were the children of C. is held sufficient under the circumstances of this case to establish their relationship. *Martin v. Vinson*, 131.

8. *Descents—Slaves—Statutes.*—In order for a child of a deceased slave to inherit the real estate of his father under chapter 30, Rule 13 of Descents of the Revisal, the paternity of the child must be shown, and that of the parents of the claimant, prior to January, 1868, lived together as man and wife and with exclusive association. *Hall v. Fleming*, 167.

9. *Same—Customs.*—The inquiry as to whether slaves who have intermarried have continued to live together exclusively as man and wife, so as to

transmit the inheritance of real property to their children as recognized by Rule 13 of Descent, Rev., sec. 1556, involves the consideration of the customs existing at the time, permitting, in certain instances, marriage with others, when one of the parties has been sold and moved to a distant locality; and upon evidence tending to show that a claimant to real property owned by the father has been born of the first marriage, and that so far as conditions and customs permitted, the slave and his wife continued to live together as man and wife, it is reversible error for the trial judge to nonsuit the plaintiff upon the ground that the parent had remarried prior to 1868 in accordance with the custom then existing. *Ibid.*

10. *Same—Paternity—Evidence.*—When an inheritance is claimed by the son of a slave marriage prior to 1868, from the father, the declarations and conduct of the father, since deceased and made *ante litem motam*, are competent upon the question of paternity, if such facts tend naturally to establish the relationship as claimed. *Hall v. Fleming*, 168.

DESCRIPTION.

See Deeds and Conveyances, 1, 2.

DEVISES.

See Deeds and Conveyances, 7; Wills, 21, 22, 23, 24.

DIRECTIONS.

See Wills, 8.

DIRECTORS.

See Corporations, 8, 9, 17.

DISBARMENT.

See Attorneys at Law, 1.

DISCRETION.

See Judicial Sales, 1; Carriers of Goods, 12.

DISCRIMINATION.

See Municipal Corporations, 9.

DISSOLUTION.

See Partnership, 2, 6; Statutes, 1.

DISTRIBUTION.

See Wills, 9; Reference, 2.

DITCHING.

See Water and Watercourses, 2.

DOWN ON TRACK.

See Evidence, 28.

DRAINAGE DISTRICTS.

See Evidence, 20; Counties, 1.

1. *Drainage Districts—Negligence—Waters—Diversion of Flow—Damages.* The judgment awarding damages to the plaintiff, not residing in a drainage district or party to the proceedings to establish it, for the diversion of the waters by improper ditches, etc., to the injury to his lands, is sustained under the former opinion of the Court, 172 N.C. 25. *Leary v. Comrs.*, 46.

2. *Drainage Districts—Assessments—Sales—Notice—Purchasers—Deeds and Conveyances.*—Where the owner of land within a drainage district dies after it is formed, and after notice given to the estate the lands are sold by the sheriff for default in payment of the annual installment of the assessment thereon, one who claims the land under an unrecorded deed executed under the will of the deceased owner may not attack the validity of the sheriff's deed, given to the purchaser of the land, for the lack of notice to himself. *Townsend v. Drainage Comrs.*, 556.

3. *Drainage Districts—Assessments—Sales—Notice—Procedure.*—The remedy of a landowner in a drainage district, whose land has been sold for default in paying the assessment, without the statutory notice, is by motion in the drainage proceedings, and not otherwise. *Ibid.*

4. *Drainage Districts — Assessments — Taxes — Sales—Deeds and Conveyances—Rights of Parties.*—Sales for default in the payment of assessments on lands in drainage districts, except as to time, must in all respects be under the law for the collection of State and county taxes (Gregory's Sup., sec. 4018), and a purchaser at such sale may, at his election, bring foreclosure suit upon the tax certificates (Revisal, sec. 2912) or proceed to acquire a deed from the sheriff under the provisions of Revisal, secs., 2899, 2907; the only remedy for the owner being to redeem upon payment of the purchase price, with the statutory interest and all subsequent taxes (Revisal, sec. 2913), and he may not question the purchaser's title without showing title in himself at the time of the sale and payment of all subsequent taxes. Revisal, sec. 2909. *Ibid.*

5. *Drainage Districts—Counties—Designated Depositories—Assessments — Public Funds—Statutes.*—Laws 1909, chap. 442, by its provisions for the collection of assessments within an established drainage district by the same officer and by the same method as State and county taxes are collected, the same to be turned into the county treasury, giving right of action by *mandamus* to holders of the bonds issued by the district against the district, or its officers, including the tax collector and treasurer, to compel the levy of special assessments, upon default in payment of the principal and interest on the bonds with liability on the bonds of the tax collector or treasurer upon default in the duty assigned to them, impress the moneys derived from the assessments, whether the organized district be regarded as a public, *quasi*-public, or private corporation, as public money of the county, to be kept in the depository designated under the statute for such funds, although the funds in question are devoted to a particular or defined use. The amendatory laws of 1911 (chapters 67 and 205) reinforces this construction. *Commrs. v. Lewis*, 528.

6. *Drainage Districts—Assessments—Depositories — Statutes — Counties — Treasurer.*—Chapter 46, section 1, Public-Local Laws 1917, abolishes the office of County Treasurer of Robeson County and substitutes therefor, as designated by the county commissioners, one or more solvent banks or trust companies located in the county of Robeson as a depository and financial agent for that county, with provision (section 3) that such bank or trust company shall perform the duties of treasurer in disbursement of the county funds; section 4, that the sheriff, as such, or *ex officio* treasurer, shall turn over all moneys of the county, from whatsoever source derived, whether belonging to the general county fund or otherwise, to the bank or trust company designated: *Held*, under these and the further pertinent provisions of the act, moneys derived from assessments of a drainage district being county funds, should be deposited, as the statute directs, with the depository lawfully designated. *Ibid.*

DRAINAGE DISTRICTS—*Continued.*

7. *Same—Deposits—Contracts—Loans.*—Where, under the provisions of statute, a drainage district may loan its money derived from its assessments until required for use in payment of the principal and interest on its bonds maturing serially for a period of 10 years, and the statute provides for a depository for these funds, the drainage commissioners may not contract with a different bank to deposit the funds there, in consideration of such bank buying at par a certain issue of such bonds that could not otherwise have been sold, except below par; nor could the transaction, contemplating a period of 10 years, be construed as such can to the bank as authorized by the statute, and the transaction is void, regarding either as a deposit of the funds or a loan thereof. Public-Local Laws 1917, chap. 447, sec. 7. *Ibid.*

8. *Drainage Districts—Constitutional Law—Due Process.*—The statute under which a drainage district is formed does not deny the district due process of law by providing for the collection and security of the assessments as other county taxes are collected and kept, etc. *Ibid.*

9. *Drainage Districts—Proceedings—Judgments—Estoppel.*—Where a drainage district has been established in accordance with the provisions of chapter 442, Laws of 1909, chapter 67, Laws of 1911, and the owner of lands has been given the statutory notice required at the hearings, filed exceptions as to the amount of the assessment against his land, obtained a partial reduction of the amount he claimed, and appealed from the final judgment, but failed to prosecute it: *Held*, the drainage acts are constitutional and valid, affording full and fair opportunity to appear before a court with power to ascertain and determine any and all matters affecting the property interest of the owner, and the judgment entered operated as an estoppel of record. *Lumber Co. v. Drainage Comrs.*, 647.

10. *Drainage Districts—Timber—Entire Damages—Judgments.*—While under the drainage acts no assessments for benefits can be made against the owner of timber interests, only the land itself being liable, the owner of the land and of timber within the district, by the provision of the statute, when made a party to the proceedings and duly notified, is required to present his claim for the entire injury, inclusive of that to his timber, and the damages to the timber should thus be included and allowed in the final judgment in the proceedings. *Ibid.*

11. *Same—Evidence—Jury of View — Constitutional Law.* — The drainage act provides that before final award is entered, a careful survey of the proposed canal and lateral branches and map thereof be made, showing plans of the entire district, the route, width of canal, and branches, the differing levels, the bottom and grade of proposed improvements, the yards of excavation, with estimated cost, and plans and specifications, thus affording the owner ample data by which a jury of view could make a fair and full estimate of his damages; and objection to the constitutionality of the act, that the claimant is required to make his claim for damages before injury is inflicted, and without means to enable the jury of view to fairly assess them, is untenable. *Ibid.*

12. *Drainage Districts—Entire Damage — Timber — Constitutional Law — Compensation.*—The drainage acts contemplate that all damage to the owner of lands shall be assessed, including the taking of his timber necessary to carry out its plans, section 24 being designed to give the owner of the timber the privilege of taking such timber if he so elects; and objection that this section is an unconstitutional taking of the owner's timber and giving it to the contractor, without compensation, cannot be maintained. *Ibid.*

DRAINAGE DISTRICTS—*Continued.*

13. *Drainage District—Negligence—Damages—Independent Action.* — While in proper instances the owner of land and timber within a drainage district may maintain his independent action to recover substantial damages for the defendant's negligent construction of its canal, it is *Held* in this case, that evidence to the effect that, in the opinion of a witness, it was possible for defendant to have cut some of the trees so as to make them fall entirely on the right of way is too indefinite for him to do so. *Ibid.*

14. *Drainage District — Findings — Evidence — Record.*—Findings made by the trial court from the record of drainage proceedings, as to certain facts as therein stated, require no further evidence than the record itself contains; and where the record sets forth that exceptions were filed and not appealed from, the burden is on the party claiming to the contrary to show it. *Drainage District v. Commrs.*, 738.

DUTY OF MASTER.

See Master and Servant, 10.

DUE PROCESS.

See Drainage Districts, 8.

EJECTING PASSENGERS.

See Carriers of Passengers, 2, 3, 4.

EJECTMENT.

See Appeal and Error, 43; Cost, 2.

ELECTION.

See Contract, 11.

ELECTRIC RAILWAYS.

See Municipal Corporations, 8.

EMBEZZLEMENT.

See Slander, 5.

EMINENT DOMAIN.

See Cities and Towns, 1.

EMPLOYEE.

See Master and Servant, 10.

EMPLOYER AND EMPLOYEE.

See Master and Servant, 3, 11, 12, 13, 14, 18, 21; Railroads, 4, 9; Insurance, 5; Slander, 8, 9; False Imprisonment, 1; Principal and Agent, 2; Negligence, 23.

EMPLOYMENT.

See Master and Servant, 7, 8.

ENCUMBRANCE.

See Corporations, 1.

ENDORSER.

See Bills and Notes, 3.

ENTRY.

See Appeal and Error, 32.

EQUAL PROTECTION.

See Constitutional Law, 3.

EQUITY.

See Wills, 8; Vendor and Purchaser, 2; Injunctions, 1, 2, 3; Mortgages, 1; Corporations, 11; Bills and Notes, 5; Contracts, 14.

1. *Equity—Suits—Mortgages—Time to Redeem—Evidence—Purchase Price —Redemption.*—Where a mortgagor has given two mortgages on the same land, to the same person, the second mortgage, embracing an additional tract, and sues to redeem, and to enjoin the sale under the second mortgage, alleging, also, payment in full, and the court has judicially determined that he still owes a certain balance to the mortgagee: *Held*, the mortgagor, having the right to redeem, upon payment of the ascertained balance and costs, is not prejudiced by the failure of the court to have considered the amount bid at the foreclosure sale, if such has been done. *Robinson v. Johnson*, 232.

2. *Equity—Deeds and Conveyances—Reformation.*—A deed will not be reformed into a mortgage in the absence of allegation and proof that it was not executed as it was intended to be, or that the clause of defeasance was omitted by reason of ignorance, mistake, fraud, or undue advantage. *Newton v. Clark*, 393.

3. *Equity—Deeds and Conveyances—Reformation.*—A deed will not be reformed into a mortgage in the absence of allegation and proof that it was not executed as it was intended to be, or that the clause of defeasance was omitted by reason of ignorance, mistake, fraud or undue advantage. *Ibid.*

4. *Equity—Conversion—Reconversion—Guardian and Ward — Pleadings — Demurrer.*—Where the ward's lands are sold by order of court under the doctrine of equitable conversion, the proceeds are to be regarded as personalty, and the doctrine of reconversion can only apply to persons of full age; and where an heir at law of the deceased ward brings action against the guardian for settlement, the allegation that the ward qualified as guardian in 1856 affords no evidence that the ward was a minor in 1861, when the lands were sold, and without further averment, a demurrer is good. *Brown v. Wilson*, 636.

ESTATES.

See Wills, 6, 12, 14, 17, 18, 22.

ESTOPPEL.

See Judgments, 2, 12, 15; Public Policy, 1; Carriers of Goods, 16; Drainage Districts, 9.

EVIDENCE.

See Master and Servant, 1, 2, 3, 6, 11, 12, 14, 19; Deeds and Conveyances, 2; Slander, 4; Contracts, 1, 4, 8; Process, 1, 3; Negligence, 3, 4, 6, 9, 11, 13, 15, 18, 21, 22, 23; Malicious Prosecution, 1, 2, 3; Municipal Corporations, 1, 10; Carriers of Goods, 2, 5, 13, 14; Pleadings, 1; Appeal and Error, 11, 17, 24, 30, 33, 37, 39, 48, 52, 53; Descents, 1, 4; Principal and Agent, 1, 3; Carriers of Passengers, 6, 7; Husband and Wife, 2; Equity, 1; Vendor and Purchaser, 2, 5, 6, 9, 10, 13, 14, 18, 20; Descent and Distribution, 2, 5; Railroads, 7, 9, 10, 12, 13, 16, 18; Judgments, 6; Corporations, 10, 17; Bills and Notes, 2; Partnerships, 3, 4, 5, 6; Hotels, 2; Libel, 2; Limitation of Actions, 8; Usury, 2, 3; False Imprisonment, 1; Insurance, 14; Drainage Districts, 11, 14; Intoxicating Liquors, 1, 5; Homicide, 1, 2; Verdict, 2, 5; Street Railways, 1; Automobiles, 1; Issues, 3.

EVIDENCE—*Continued.*

1. *Evidence—Lost Papers—Pleadings—Admissions.*—Where a check has been given credit at a bank to the payee, and the maker is sued by the bank for the amount thereof, it is reversible error for the court to enter a judgment of nonsuit against the plaintiff upon the ground there was no evidence of the loss of the check, where the execution of the check, the amount, on what bank drawn, and to whom payable, have been admitted by the answer. *Bank v. Brockett*, 41.

2. *Evidence—Lost Papers—Parol Evidence.*—Evidence that a check sued on had been received by its payee, sent to the plaintiff bank, and by it to another bank with a letter of transmittal, and by the proper employer of latter bank that it had not been received, is sufficient evidence of the loss of the check in the mail to admit parol evidence concerning it. *Ibid.*

3. *Evidence—Corroboration—Changed Conditions—Admissions — Railroads.* Evidence in corroboration of plaintiff's testimony, in his action to recover damages for a personal injury, involving the alleged negligent condition of the defendant railroad company's track at the time, that since the injury the condition of the track had been changed, is competent, when it appears that it was confined to within proper limits and was not permitted to be considered in the light of an implied admission of negligence. *West v. R. R.*, 125.

4. *Evidence—Pleadings.*—Where certain sections of the complaint are introduced in evidence, it is competent to introduce the corresponding and relevant sections of the answer; and where only fragmentary parts of sections of a pleading are introduced, the adversary party may introduce the other and explanatory parts thereof. *Potato Co. v. Jeanette*, 237.

5. *Same—Contracts—Reformation of Instruments.*—Where damages are alleged in an action against a purchaser of goods for refusal to accept them under the contract of purchase, who pleads that the contract should be reformed to show that goods of a certain quality were purchased, evidence as to the inferior quality of the goods offered is competent, this question being embraced within the scope of the pleadings. *Ibid.*

6. *Evidence—Negligence—Sickness—Causal Connection—Burden of Proof — Trials — Mosquitoes — Malaria — Hookworm—Nonsuit.* — Where damages are sought for sickness alleged to have been caused from mosquitoes bred from the standing water on the plaintiff's land whereon he resided, as a result of defendant's negligence in permitting its drain pipe to have become clogged, the burden of proof is on the plaintiff to show that his sickness was the result and proximate cause of the negligence alleged; and upon evidence tending only to show that malaria was prevalent in this locality long before the alleged act of negligence; that the kind of mosquitoes required to transmit malaria was bred in the surrounding sea water; that plaintiff had hookworms, which would produce malaria and the same general appearance, for which he had been prescribed, but did not take the treatment, and that his attending physician did not make the only test that was regarded sure to ascertain whether the malaria was caused by mosquito bites, is held insufficient, upon defendant's motion to nonsuit, something more than mere conjecture being required to take the case to the jury. *Rice v. R. R.*, 268.

7. *Evidence—Declarations—Corroborative.*—Declarations of a witness made to a party to the action, tending to corroborate the evidence he had already given, is competent for that purpose. *Wilkins v. R. R.*, 278.

8. *Evidence—Principal and Agent—Declarations—Corroboration.* — Where defendant's agent, a witness, has testified that he knew the origin of a fire which

EVIDENCE—*Continued.*

damaged the plaintiff's land, and that it did not come from the defendant's engine or right of way, it is competent, in impeachment of his testimony, and not as substantive evidence, to show that after the occurrence he had stated to the witnesses testifying, that it had come from the engine. *Ibid.*

9. *Evidence—Letters—Handwriting.*—When the contents of letters written by a party to an action are relevant to the inquiry, it is not required that the witness should have seen the person write before he is permitted to identify the letter by the handwriting, for it is sufficient if he can do so from correspondence formerly had between them. *Oil Co. v. Burney*, 382.

10. *Evidence—Lost Letters—Handwriting—Identification—Correspondence.* Where the purchaser of goods sues his vendor for damages in his failing to deliver them in accordance with his contract, and the quantity of the purchase is in dispute, and a letter previously written by the vendor to the purchaser is relevant to the inquiry, it is not required that the purchaser notify the vendor to produce a copy of this letter in order to introduce parol evidence of its contents, it appearing that the purchaser had made proper and sufficient search for the original and there is no evidence that a copy had been made. *Ibid.*

11. *Evidence—Contracts—Local Customs—Burden of Proof—Vendor and Purchaser.*—While a contract may be explained and interpreted by reference to a general custom or usage, so all-prevailing that the parties may be presumed to have contracted with reference to it, the doctrine can have no application to a purely local custom among the merchants of a town to receive goods from the carrier at the boat landing in an unusual manner, in modification of a contract repudiated, and the burden is on the party setting up the custom to show that his adversary party knew of this custom and contracted with regard to it. *Ibid.*

12. *Evidence—Statements—Statute—Correspondence Schools.* — An account for services rendered by a correspondence school comes within the meaning of Revisal, sec. 1625, and chap. 32, Public Laws 1917, and where the statute is complied with, is properly received as evidence in an action to recover them. *University v. Ogburn*, 427.

13. *Evidence—Nonsuit—Pledge—Burden of Proof—Trials.*—In an action to recover personal property, defended on the ground that it had been left with the defendant as security for a debt, the burden is on the defendant to establish his defense, and when there is evidence that title to the property is in the plaintiff, the defendant's motion to nonsuit upon the evidence is properly denied. *Brimmer v. Brimmer*, 435.

14. *Evidence—Deceased Person—Transactions, etc.—Statute.*—Evidence of an interested party that deceased had agreed to devise and bequeath all of his property upon consideration of being taken care of during his life, and that the other party to the agreement, in rendering these services, was thereunder obligated to do so, is prohibited by Revisal, sec. 1631, relating to transactions and communications with deceased persons. There were also transactions and communications between the witness and the deceased, which were prohibited by the same section. *Brown v. Adams*, 490.

15. *Same—Interest—Conversations with Third Persons.*—Where the plaintiff, in her own right and as administratrix of her mother, seeks to recover upon an alleged contract made by her mother and another person, now deceased, under which her mother performed services to such other person under his agreement that he would devise and bequeath to her all of his property, it is incompe-

tent for the plaintiff to testify to communications or transactions between her mother and such other person tending to establish her demand, for she is a party interested, within the contemplation of the statute (Revisal, 1631). *Ibid.*

16. *Evidence—Statutes—Bill of Discovery.*—The examination of an adverse party to an action, under Revisal, sec. 865, is a substitute for the former bill of discovery, and may be introduced in evidence by either party. Revisal, sec. 867. *Phillips v. Land Co.*, 542.

17. *Same—Corporations—Principal and Agent—Interest—Dead Persons.*—In an action on a corporation's note, made by the president, which was not countersigned by the secretary according to the requirement of the by-laws, the secretary is only an agent of the company, and his testimony as to notice of the by-laws does not come within the provision of Revisal, sec. 1631, as to a transaction or communication with a deceased person. *Ibid.*

18. *Evidence—Damages—Expert Evidence.*—Where there is evidence that an employee's injury was proximately caused by the employer's negligence, it may be properly shown, by the opinion of a medical expert, based upon relevant facts, if found by the jury, that the injury was of a permanent character, upon the issue of damages. *Taylor v. Power Co.*, 584.

19. *Evidence—Conjecture—Facts in Issue.*—The mere conjecture of a witness as to what one would do under given circumstances should not be received in evidence, especially when it invades the province of the jury in their determination of a fact arising from the evidence. *Mullinax v. Hord*, 607.

20. *Evidence—Drainage Districts—Lost Records—Secondary Evidence.*—In this case it is *Held* that secondary evidence of drainage proceedings was properly admitted under the evidence as to the loss of the original, the regularity of the proceedings not being questioned. *Lumber Co. v. Drainage Comrs.*, 648.

21. *Evidence—Corroboration—Conversations.*—Testimony by a witness as to his conversation with the prosecuting witness is properly admitted when in corroboration of the latter's testimony, and so confined. *S. v. Little*, 793.

22. *Evidence—Credibility—Witnesses—Jurors — Trials.* — It is within the province of the jury to weigh the testimony and to sift the true from the false, and they may believe a witness of bad character in preference to a witness of good character. *S. v. Little*, 800.

23. *Evidence—Fraud—Bankruptcy—Appeal and Error—Reversible Error.* Where a trustee in bankruptcy brings suit against the bankrupt for fraudulently investing his funds for improving his father's land in 1905 and 1906, evidence tending to show that he eventually received a large tract of land by devise from his father, and that in 1917 he was worth lands to a considerable valuation, is irrelevant, and constitutes reversible error. *Garland v. Arrowood*, 657.

24. *Evidence—Re-examination—Cross-examination—Appeal and Error—Objections and Exceptions.*—Defendant's exception to the evidence on re-examination, which is substantially the same as that given by him on cross-examination, cannot be sustained on appeal. *Goodman v. Power Co.*, 661.

25. *Evidence—Nonsuit—Trials—Motion.*—Upon a motion to nonsuit, the evidence is considered in the light most favorable to the plaintiff, and an inference in defendant's favor may not be drawn from his own evidence. *Wood v. Public Corporation*, 697.

EVIDENCE—*Continued.*

26. *Evidence — Expert Testimony — Damages—Personal Injury.—Held,* in this action to recover damages for a personal injury alleged to have been negligently inflicted by the defendant, that the expert testimony of physicians that the injury could have caused inflammation of a wen of plaintiff's back, etc., was competent. *Mule Co. v. R. R.*, 160 N.C. 252, cited and distinguished. *Conrad v. Shuford*, 719.

27. *Evidence—Nonsuit—Trials.*—Upon a motion to nonsuit, the evidence is considered most favorably for the plaintiff, giving him the benefit of all just and reasonable inferences to be drawn therefrom, and under the evidence in this case it was properly denied. *Ibid.*

28. *Evidence—Medical Experts—Railroads—Down on Track.* — When relevant to the inquiry in an action against a railroad company for negligently running over and killing plaintiff's intestate while upon the defendant's track, it is competent for a medical expert, who had made a professional examination, to testify, in answer to a question, that from the nature, condition and position of the wounds, the intestate was lying down at the time the injury causing death was inflicted. *McManus v. R. R.*, 735.

29. *Evidence—Res Ipsa Loquitur—Defendant's Control.*—The position that the doctrine of *res ipsa loquitur* cannot apply when the servant, who has received a personal injury, is in charge of the defective machinery which caused it, is inapplicable, when, upon conflicting evidence and proper instructions, the jury has found as a fact that the principal, and not the injured servant, had its supervision and management under its charge. *Nixon v. Oil Mill*, 731.

30. *Evidence—Memorandum—Examination of Witness.*—In an action to recover a balance due for services rendered in cutting wood, a copy from a lost memorandum book made by plaintiff's daughter which he saw her make, and to the accuracy of which he testified, is competent to refresh his memory on the witness-stand; but the exception loses its force when it appears that the plaintiff could not read, and the copy was only used by his counsel for the purpose of examining him. *Spaugh v. Penn*, 774.

31. *Evidence—Contradiction—Trials.*—Where the vendor, as a witness, has denied that he had made certain statements to the purchaser, the material to the controversy, it is competent for the purchaser to introduce in evidence certain envelopes, with endorsements thereon, for the purpose of contradiction. *Schaeffer v. Stone Co.*, 781.

EXCEPTIONS.

See Reference, 1, 5, 7; Appeal and Error, 12; Jurors, 3; Spirituous Liquors, 1.

EXCEPTIONS AND OBJECTIONS.

See Instructions, 6.

EXCHANGE.

See Vendor and Purchaser, 19.

EXCUSABLE NEGLECT.

See Appeal and Error, 27; Attorney's Client, 3.

EXECUTION.

See Judgments, 9.

EXECUTORS AND ADMINISTRATORS.

See Limitation of Actions, 7, 10; Partnership, 9; Options, 1.

Executors and Administrators—Surplus Fund—Guardian and Ward.—Semble, where the same person has qualified as administrator of the deceased and also as guardians of his children, and as executor has paid the debts of his testator, the law will transfer the surplus, after paying the debts, from the administrator to the guardian. *Ruffin v. Harrison,* 81 N.C. 208; *S. c.,* 86 N.C. 190. *Brown v. Wilson,* 668.

EXPERTS.

See Evidence, 28.

EXPERT EVIDENCE.

See Evidence, 18.

EXPERT TESTIMONY.

See Evidence, 2, 6.

EXPLOSIVES.

See Negligence, 8, 11; Vendor and Purchaser, 7.

EXPRESSION OF OPINION.

See Criminal Law, 2.

FACTS.

See Deeds and Conveyances, 4; Instructions, 2; Trials, 1.

FACTORIES.

See Master and Servant, 17.

FAITH AND CREDIT.

See Constitutional Law, 3.

FALSE IMPRISONMENT.

False Imprisonment—Master and Servant—Employer and Employee—Evidence—Questions for Jury—Trials.—Evidence is sufficient in an action for false imprisonment which tends to show that a saleslady in a store was accused of theft by a coemployee and detained in the store after closing hours by the employee telling her she could not go until the arrival of her employer, though she expressed a desire to go for her supper and because of a pain in her back; that upon her employer's arrival he roughly accused her of many thefts, insisted upon a confession, called in a policeman and searched her room with her forced acquiescence by threats of arrest and imprisonment, and as a result of the policeman's remarks in the presence of the employer remained in her room for several days as her choice between that and being apprehended and otherwise restrained her liberty of action. *Riley v. Stone,* 589.

FEDERAL STATUTES.

See Railroads, 4; Carriers of Goods, 13.

FEDERAL DECISIONS.

See Commerce, 4; Railroads, 3.

FEEDING ON ESTOPPEL.

See Deeds and Conveyances, 6.

FELONIES.

See Slander, 1; Constitutional Law, 15.

FELLOW-SERVANT ACT.

See Pleadings, 7; Railroads, 13; Instructions, 8.

FENCES.

See Contracts, 2; Principal and Agent, 1.

FINDINGS.

See Appeal and Error, 27, 29; Drainage Districts, 14; Limitation of Actions, 12; Verdict, 12.

FIRES.

See Partnership, 1; Railroads, 1, 5, 7, 10; Negligence, 4, 6, 7; Municipal Corporations, 11.

FLYING SWITCH.

See Negligence, 24.

FORECLOSURE.

See Injunction, 3.

FOREIGN CORPORATIONS.

See Corporations, 15, 16; Limitation of Actions, 5.

FORMS.

See Indictment, 1.

FRANCHISE.

See Corporations, 1.

FRATERNAL ORDERS.

See Principal and Agent, 1; Insurance, 8, 9, 11.

Fraternal Orders—Amendments—Charter — By-Laws — Suspending Member. Where fraternal benefit insurance societies are required to file certified copy of changes made in their constitution and by-laws with the Insurance Commission within 90 days, and fails to do so, it may not, while thus in default, suspend a member for noncompliance therewith. *Wilson v. Heptasophs*, 629.

FRAUD AND MISTAKE.

See Vendor and Purchaser, 2; Contracts, 4; Guardian and Ward, 1; Contracts, 7; Limitation of Actions, 7; Bills and Notes, 5; Evidence, 23.

FREIGHT.

See Municipal Corporations, 8.

FUNDS.

See Taxation, 2; Executors and Administrators, 1; Guardian and Ward, 3.

GOOD FAITH.

See Courts, 6.

GOVERNMENT RESERVATION.

See Taxation, 4.

GUARANTORS OF PAYMENT.

See Bills and Notes, 1.

GUESTS.

See Hotel, 2.

GUARDIAN AND WARD.

See Limitation of Actions, 4, 6; Equity, 4; Executors and Administrators, 1.

1. *Guardian and Ward—Compromise—Consideration—Fraud.* — A ward is not bound by a compromise of his general guardian of the former's claim for damages for a personal injury, unless made with the sanction of the court to which the guardian should account; and in no event when the compromise is due to the gross negligence of the guardian, or in bad faith, is manifestly unfair to the ward, and for a grossly inadequate consideration; and when such are found to be the facts, legal fraud will be inferred and the compromise will be set aside without a specific finding of actual fraud. *Bunch v. Lumber Co.*, 8.

2. *Guardian and Ward—Compromise Set Aside—Credit—Guardian's Liability.*—Where a compromise made by a general guardian of his ward's claim for damages for a personal injury has been set aside by the court, the amount paid thereon will be allowed as a credit to the defendant in the action, and made a charge against the guardian and his bondsman. *Ibid.*

3. *Guardian and Ward—Funds in Hand—Personalty—Action—Parties.*—When personal property or money in hand is the subject of the action, an heir at law of a deceased ward may not maintain an action against the guardian for a settlement in his own right, for such may only be done by the personal representative of the deceased ward. *Brown v. Wilson*, 636.

4. *Guardian and Ward—Settlement—Action—Pleadings—Demurrer.*—Where the complaint fails to allege that the proceeds of sale of certain of the ward's land came into the hands of the guardian, a demurrer thereto in an action against the guardian for a settlement thereof is good. *Ibid.*

HANDWRITING.

See Evidence, 9, 10.

HARMLESS ERROR.

See Water and Watercourses, 2; Appeal and Error, 20, 39; Master and Servant, 19.

HEIRS.

See Wills, 10, 12, 23; Descents, 1; Limitation of Actions, 7.

HEIRS OF THE BODY.

See Wills, 4, 24.

HIGH SCHOOLS.

See Public Schools, 3, 5, 6.

HOMESTEAD.

Homestead—Husband and Wife—Deeds and Conveyances—Joinder of Wife—Mortgages—Judgments — Liens — Constitutional Law. — A docketed judgment against a husband, constituting a lien on his lands, requires the laying off his homestead, and in such instance he may not make a valid mortgage, free of all homestead rights, without properly joining the wife in the instrument; and where liens by judgment exist on his lands, and he attempts to mortgage them without joining his wife, the mortgagee can acquire no superior lien to those of subsequent mortgages, duly recorded, in which the wife has joined. Const., Art. X, sec. 8. *Hall v. Dixon*, 319.

HOMICIDE.

1. *Homicide—Murder, First Degree — Evidence — Premeditation.* — Where there is evidence of previous ill-will of the defendant towards the deceased, upon trial for homicide; that the former approached the latter as he was preparing to play ball, with his hand on his right-hand hip pocket, addressed the deceased, to which the latter replied, "I will do you right; I do not want to have any trouble with you"; that deceased started into the field upon the call to play ball with nothing but a glove in his hand, the prisoner drew a pistol from his right-hand hip pocket, and used both hands while firing the fatal shot; *Held*, no particular time is required for premeditation and deliberation, and the evidence is sufficient to sustain a conviction of murder in the first degree. *S. v. Coffey*, 814.

2. *Homicide—Intoxication—Evidence—Murder.*—Evidence in this case of intoxication as a defense to a charge for murder is held inefficient to disturb the verdict for conviction in the first degree. *Ibid.*

HOTELS.

1. *Hotels—Licenses.*—One who is in a hotel for social purposes, at the invitation of one of its guests, is a licensee, at the will of its management, and may be forbidden the premises for improper conduct. *Money v. Hotel Co.*, 508.

2. *Same—Guests—Negligence—Evidence—Personal Injury — Safe Premises —Trials—Nonsuit.*—A hotel company is not liable to one, whether a licensee or a guest, for an injury received by him on the premises which was not caused by a hidden or concealed danger along or near the usual and customary route provided for entering and leaving the hotel, and without invitation, express or implied, to go where the injury occurred; and where such person has been in the room of a guest, indulging in conviviality of an intoxicating kind, and in leaving the hotel, passes the passenger elevator and stairway provided for the purpose, wanders around the hall and attempts to go down a baggage elevator at the back, on the part of the floor used exclusively for servants where he could not reasonably have been anticipated to go, the fact that the door to this elevator was insecurely fastened and he fell through to his injury, does not afford evidence of actionable negligence of the hotel company. *Ibid.*

HUMILIATION.

See Slander, 3.

HUSBAND AND WIFE.

See Homestead, 1; Judgments, 6; Wills, 24; Deeds and Conveyances, 8.

1. *Husband and Wife — Separate Property — Executory Contracts.* — Prior to the ratifications of the Martin Act, on 6 March, 1911, a married woman could not bind her separate property by her executory contract, except in limited respects, without the written consent of her husband; nor could personal judgment be rendered against her thereon. *Thompson v. Coats*, 193.

2. *Same—Principal and Agent—Evidence—Landlord and Tenant.*—The law does not imply an agency of the husband to act as such in behalf of his wife; and where the evidence in an action against her to recover for supplies furnished the tenants on her lands tends only to show that they were furnished to her husband as such tenant, and others, without direct benefit to herself; that she independently managed her own affairs and did not live on good terms with her husband, but apart from him, owing to his dissolute habits; that the supplies had been charged directly to the tenants, who farmed for a certain part of the crops raised. *Ibid.*

IDENTITY.

See Wills, 11.

IDENTIFICATION.

See Descents, 11.

ILLEGITIMATES.

See Descents, 6.

IMPEACHMENTS.

See Judgments, 1.

IMPROPER REMARKS.

See Courts, 9; Instructions, 9.

IMPROVEMENTS.

See Judicial Sales, 2; Contracts, 14.

INDEPENDENT CONTRACTOR.

See Master and Servant, 7, 9; Contracts, 1; Partnership, 1; Contracts, 3; Railroads, 7.

INDICTMENTS.

See Intoxicating Liquors, 4; Verdict, 3.

1. *Indictment—Criminal Law—Warrant—Complaint—Omissions—Forms—Judgment.*—The omission of the name of the party in the complaint, against whom a criminal offense is charged, will not of itself invalidate the indictment, when the warrant of arrest thereto attached and referred to contains his name and clearly indicates him as the person charged, the complaint and warrant being read together, and in this way they are sufficient in form to proceed to judgment upon conviction. Revisal, secs. 1467, 3254. *S. v. Poythress*, 809.

2. *Indictment—Amendments—Courts—Criminal Law.*—The policy of the law is to allow liberal amendments to the warrant of arrest, with the limitation that the amendments allowed must conform to the evidence elicited on the trial; and, in this case, on appeal from a recorder's court, and on trial in the Superior Court, under indictment for violating the State prohibition laws, the court properly allowed amendments alleging two additional counts, there being abundant evidence to sustain them. *Ibid.*

INHERITANCE TAX.

See Taxation, 5.

INJUNCTION.

See School Districts, 1; Judgments, 13, 15.

1. *Injunctions — Pleadings — Insolvency — Courts — Equity — Statutes—Receivers.*—Revisal, sec. 807, making it unnecessary to allege defendant's insolvency to enjoin a trespass continuous in its nature, or the cutting or destruction of timber trees, construed with section 809, does not deprive the courts of their discretionary power to require a bond to secure the plaintiff against damages, or to appoint a receiver, where there is a *bona fide* contention as to the title to lands or timber trees thereon. *Stewart v. Munger*, 403.

2. *Injunctions—Timber—Lands—Title—Statute—Equity.*—Where the plaintiff's action is to enjoin the impairment of his security, by mortgage on lands and timber growing thereon, in the nature of a suit to foreclose and preserve his security intact, the action, where his right is denied, involves the title to the timber,

INJUNCTIONS—*Continued.*

wherein an allegation of defendant's insolvency is not required under Revisal, secs. 807, 808, 809. *Ibid.*

3. *Injunction — Mortgage — Equity — Foreclosure — Insolvency — Pleadings—Title to Lands—Statute—Courts—Bonds of Indemnity.*—M. mortgaged land, and timber standing thereon, to L., who assigned the mortgage notes to the plaintiff to secure him as an endorser on notes of L., on which, as such surety, the plaintiff was compelled to pay large sums of money. Thereafter, M. mortgaged the same property to the plaintiff to secure a note given for borrowed money. Both of the above mortgages were duly registered, and then M. attempted to convey the property to L., subject to the second mortgage, who conveyed, or attempted to convey, it to the defendant. The defendant entered upon the land and began to cut the timber which plaintiff's action seeks to enjoin without allegation of defendant's insolvency, with averment that the value of his security consists in the standing timber and not in the land: *Held*, not an action as in tort for trespass, but in the nature of a bill in equity for foreclosure and an injunction to protect the security, which does not require an allegation of defendant's insolvency; and it appearing that plaintiff stood by and permitted defendant to make extensive and expensive preparations for cutting and removing the timber, without objecting, the judge may require that a sufficient bond be given, in lieu of an injunction, to secure plaintiff from loss, and if proper he may appoint a receiver to inspect the cutting and removal of the timber. *Ibid.*

4. *Injunction — Dissolution — Damages — Judgment — Contingencies.*—Upon dissolution of a restraining order, liability of plaintiff and his sureties on the injunction bond cannot be determined in advance of any loss or damage proven or sustained, and an adjudication thereof in certain contingencies is reversible error. *Sawyer v. Pasquotank County*, 786.

INJUNCTION, PERPETUAL.

Injunction, Perpetual—Deeds and Conveyances—Timber — Contracts — Options.—Where the facts are not in dispute, and it therefrom appears that a grantee of timber continues to cut and remove the same after his right thereto has ceased, the restraining order should be made perpetual. *Williams v. Lumber Co.*, 229.

INSOLVENCY.

See Injunctions, 1, 3.

INSPECTION.

See Master and Servant, 6; Negligence, 9, 23.

INSTRUCTIONS.

See Master and Servant, 5, 15, 16; Negligence, 3, 13; Water and Watercourses, 2; Carriers of Goods, 2; Carriers of Passengers, 8; Appeal and Error, 15, 29, 31, 32, 37, 38, 41, 51; Descent and Distributions, 5; Slander, 5; Municipal Corporations, 10; Instructions, 7; Criminal Law, 2; Courts, 9.

1. *Instructions — Negligence — Declarations — Verdict Directing — Trials—Contributory Negligence.*—A prayer for instruction that the jury should answer the issue as to defendant's negligence in the negative if they found certain declarations made by plaintiff to be true, is improper, when the declarations are not inconsistent with plaintiff's evidence which is sufficient to support an affirmative finding, and when the evidence referred to in the requested prayer properly relates to the issue as to contributory negligence. *Wallace v. R. R.*, 171.

INSTRUCTIONS—*Continued.*

2. *Instructions—Court—Improper Remarks—Undisputed Facts—Negligence.* Where it is not seriously disputed that the injury for which damages are sought in the action was caused by the bursting of a bottle of pepsicola while being handled by a purchaser for resale, and there is evidence that it had been improperly bottled by the vendor, a statement by the judge in his charge to the jury that the plaintiff was injured by the bursting of the bottle, is not improper, when he correctly tells them that it amounted to nothing unless it was caused by defendant's negligence. *Cashwell v. Bottling Works*, 324.

3. *Instructions—Requests—Issues.*—Exceptions to the refusal of the court to give requested instructions are not tenable on appeal when they have been substantially incorporated in the general charge, or where they are not properly addressed to the issues. *Talley v. Granite Quarries Co.*, 445.

4. *Instructions—Issues—Appeal and Error—Verdict Set Aside—Reference Statutes.*—In an action for an account and settlement, brought by a shareholder against a corporation, the judgment erroneously charged the jury upon one issue which affected the whole amount assessed thereunder, to the plaintiff's prejudice: *Held*, the judgment and verdict as to this issue will be set aside, and as its determination requires the ascertainment of a long account between the parties (Revisal, sec. 519), a reference is suggested unless the parties should themselves render it unnecessary by agreement as to this issue. *Ragland v. Lassiter*, 579.

5. *Same—Verdict—Courts—Volition of Parties—Agreements.*—In this action for account and settlement, brought by a shareholder against a corporation, the issues as to the value of the shares of the stock and as to a certain credit were involved, the court charging erroneously, to plaintiff's prejudice, on the second one, which involved the correctness of the first, but which, it seems, could be corrected as a matter of calculation: *Held*, the court cannot correct the verdict, which the appellee could do, in this case, on his own volition, or the plaintiff, with his consent. *Ibid.*

6. *Instructions—Exceptions and Objections—Appeal and Error.*—Exceptions to a part of the charge, though erroneous when considered as detached from other relative parts thereof, will not be held for reversible error, when the charge, considered as a whole, correctly states the principles of law applicable to the issue. *Taylor v. Power Co.*, 584.

7. *Instructions—Requested Instructions—Substantial Compliance — Appeal and Error.*—Where the trial judge substantially gives a correct request for special instructions, without weakening its effect, it is sufficient. *S. v. Horner*, 789.

8. *Instructions—Fellow-servant Act—Appeal and Error—Harmless Error.* Where the defendant is a railroad operated within the meaning of the Fellow-servant Act, an erroneous instruction on the issue as to whether the plaintiff and the one whose negligence caused the alleged injury were fellow-servants is harmless, if erroneous. *Goodman v. Power Co.*, 661.

9. *Instructions — Improper Remarks — Statutes.* — Where the jury has returned for further instructions from the court, which he fairly and impartially gives, his statement to them that they should reconcile the evidence if they could; that they were entitled to their own opinion, which he would not do anything to coerce; that if they could not, the court would "have to do something else," is not an intimation on the merits or whether "any fact has been fully and sufficiently proved," and unobjectionable under the provisions of the Revisal, sec. 536. *Nixon v. Oil Mill*, 731.

INSURANCE.

1. *Insurance—Contracts—Policies—Cancellation—Mutual Consent—Express Stipulation.*—While ordinarily it requires the consent of both parties to an existing contract to cancel it before breach of its conditions, this principle is not controlling when contrary to the express provisions that a party thereto may cancel the same without the consent of the other party; and where the insured, under a tornado policy of insurance of standard form, had, within the provision of the policy, demanded its cancellation of the insurer's agent; the policy is void thereafter, and a recovery for a subsequent loss under the policy may not be had. *Johnson v. Ins. Co.*, 201.

2. *Same—Adjustment of Premium.*—Where the insured has, within the terms of his contract, canceled a policy of tornado insurance, and the question arises as to whether the insurer has retained, on the short-term plan, a greater amount than necessary to extend the insurance beyond the time of the loss claimed, the question is only one for adjustment between the insurer and insured as to the amount of money due the latter, and cannot have the effect of continuing the policy in force beyond the time of its cancellation. *Ibid.*

3. *Insurance—Contracts—Policies — Cancellation — Physical Acts.* — Where the insured has demanded the cancellation of the policy of tornado insurance by right, under its provisions, upon which the policy should be void, the fact that the policy was not physically surrendered, and canceled cannot have the effect of continuing the policy in force. *Ibid.*

4. *Insurance—Policy—Assignments—Children of Two Marriages—Descriptio Personarium.*—Where the insured has assigned his policy of life insurance to the children of himself and his wife by a second marriage, giving his own name and that of such wife, and it appears that the time he had children by both marriages, the naming of himself and his second wife are words *descriptio personarium*, and only the children of the second marriage may take under the terms of the assignment upon the maturity of the policy by the death of the insured. *Brown v. Ins. Co.*, 336.

5. *Insurance—Employer and Employee—Policies—Contracts—Injury—Notice—Trials—Questions for Jury—Appeal and Error.*—Where, under the terms of an employer's indemnity policy of insurance, the insured was required to give "immediate written notice of any accident sustained by an employee" and "immediately" forward the summons in the action to insurer; and there is evidence that an employee had been injured and the employer did not give the notice required for about a month, not knowing that the employee was seriously injured or contemplated bringing suit, and upon ascertaining this fact sent the received notice to the insured within twenty-four hours and at once notified the insurer upon action commenced, kept it advised of the progress thereof, and its manager was present at the trial: *Held*, sufficient to be submitted to the jury upon the question as to whether the assured had complied with the requirements of the policy as to giving notice or a waiver by the insurer of its terms as to the summons, and an instruction directing a negative finding was reversible error. *Hunt v. Fidelity Co.*, 397.

6. *Insurance—Premiums—Beneficiaries—Payment—Contracts, Expressed or Implied—Accounts.*—Where one has taken out a policy of insurance on the life of another for his own benefit, under an agreement, expressed or implied, from the form and nature of the contract, and the purpose for which, and the circumstances under which, it was taken, that the premium should be paid by the beneficiary, and not by the insured, the latter, as between the parties, will not be

liable therefor; and where there is evidence that a partnership concern had taken out an insurance policy on the life of one of its members actively engaged in its business, for its own benefit, and, voluntarily and without the request of the insured, a corporation, which succeeded it, had paid the premium, in the shareholder's action for an account and settlement it is reversible error for the judge to charge the jury that the item for the premium paid was a proper charge against the plaintiff, it being a question for the jury to determine what the agreement was in this respect under proper instructions from the court. *Ragland v. Lassiter*, 579.

7. *Insurance—Policies—Contracts—Vested Rights — Constitutional Law.*—A general consent of a policy-holder in an assessment fraternal benefit society that the company may thereafter alter or amend its constitution or by-laws does not authorize the society to make such changes therein as will impair the vested right of its members and policy-holders arising under their contract of insurance with the company. *Wilson v. Heptasophs*, 628.

8. *Same—Fraternal Orders—Assessments.*—Where a member of a fraternal benefit society has taken out a life insurance policy therein under a contract that its members shall be assessed according to age, the society may not thereafter so change its plan of insurance as to divide the members prior to a certain date into a class by themselves, leaving them to take care of their losses among themselves by ever-increasing assessments in the progress of time, or at their option come in as new members to be assessed according to their increased age, and thus lose their vested rights under their policy contracts. *Ibid.*

9. *Insurance—Fraternal Orders—Policies—Lex Loci.*—Where a member of a fraternal benefit society, incorporated in another State, takes a life insurance policy therein through a subordinate lodge in this State, the policy contract is a North Carolina contract, subject to the laws of this State, which will not permit such change in the plan of insurance as will impair rights theretofore vested under the policy, whether such may be lawful in such other State or otherwise. ***Ibid.***

10. *Insurance—Commerce—Policies— Contracts — Lex Loci — Presumptions —Statutes.*—Insurance is not the subject of interstate commerce, and the presumption is that the law of the place at which a contract of insurance is made shall govern the rights of the parties, and the statute law at the time thereof applies, and not that which is later enacted. *Ibid.*

11. *Insurance—Fraternal Orders—Contracts — Policies — Vested Rights — Cancellation—Damages.*—Where a fraternal benefit society has issued a policy of life insurance to a member, and has changed its plan of business so as to impair the vested rights of the insured under his contract, and refuses to accept the proper premium, and declares the policy void, the insured may maintain his action to recover of the insurer the principal sum of money he has paid on his policy, and simple interest thereon. *Ibid.*

12. *Insurance, Accident—Death by Violence—Third Persons.*—Where a policy of life insurance provides for a double indemnity in case of death by accident, "exclusively and independent of all other cases," the word "accident" is construed as an unusual and unexpected occurrence, taking place without foresight or expectation of the insured, determined by reference to the facts as they may affect him; and the intentional killing of the insured by a third person does not alone withdraw the claim from the protection of the policy. *Clay v. Ins. Co.*, 642.

INSURANCE—*Continued.*

13. *Same—Insured the Aggressor—Murderous Assault.*—Where a policy of life insurance gives double indemnity if the death of the insured has been caused by "external, violent, and accidental means," no recovery can be had of the extra indemnity when such death is caused by the killing of the insured by a third person, and the insured was in the wrong in commencing the fight, and the aggressor, under such circumstances as would render a homicide likely as a result of his own misconduct. *Ibid.*

14. *Same—Evidence.*—Where the insured, having announced that he would kill his adversary, attacked him with a deadly weapon—a pole 3 or 4 feet long—pursued him with a pistol, which he first fired, and in the ensuing fight was killed by his adversary's pistol, fired at close range or contact, it is held that the insurer is not liable under a policy covering death by "external, violent, and accidental means." *Ibid.*

15. *Insurance—Bonding Companies — Service — Process.* — Service of summons upon the Commissioner of Insurance under Revisal 4750, does not apply to bonding companies authorized under section 4805, and the same may be made under section 440(1). *Pardue v. Absher*, 677.

INTENT.

See Wills, 2, 13, 15, 17; Vendor and Purchaser, 17; Partnership, 5.

INTERESTS.

See Judgments, 5, 14, 16; Evidence, 15.

INTERPLEADER.

Interpleader—Demurrer—Resisting Action—Costs.—Where a party claiming to be merely a stakeholder is sued, he may cause other necessary parties to come in and escape the payment of cost by preserving strict neutrality; but where he takes sides and defends the action by demurring to the complaint, and other necessary parties are made, including minors, by their guardians, who are interested in the distribution of the funds, he is liable, in case the demurrer is overruled, for all the costs of the trial, including those incurred in appointing guardians *ad litem* for the infant parties. Rev., sec. 1264. *VanDyke v. Ins. Co.*, 78.

INTESTACY.

See Wills, 15.

INTIMATION OF OPINION.

See Appeal and Error, 22.

INTOXICATION.

See Homicide, 2.

INTOXICATING LIQUORS.

1. *Intoxicating Liquors—Criminal Law—Manufacture, Aiding—Evidence—Trials—Questions for Jury.*—It is not necessary for a conviction under the provisions of Public Laws 1917, chap. 157, making the distilling or manufacturing, etc., of spirituous or malt liquors or intoxicating bitters within the State unlawful, including within its express terms those who aid, assist, or abet therein, that the liquor should have been actually manufactured or the product finished; and where there is evidence tending to show that such manufacture had been in progress, but had been suspended by the arrest of the prisoner, and that he was

aiding or assisting therein, it is sufficient to be submitted to the jury and to sustain conviction of the offense charged. *S. v. Horner*, 788.

2. *Same—Guilty Knowledge.*—Upon the evidence in this case, tending to show that the defendant went through an obscured pass with his wagon, at a propitious hour, to a place where a still had been but recently in operation; of the whistling signals he gave of his approach; that he was armed and had certain implements with him used in distilling; that when he was arrested, some one hastily removed the still and most of its accessories, leaving some beer there and some burned hoops and wood, etc., and that he had in his wagon some tow sacks to cover up or conceal the beer, and stated he had been hired to haul it away, etc.: *Held*, sufficient for the injury upon the question of defendant's guilty knowledge that in removing the beer he was participating or aiding in the unlawful manufacture and distillation of spirituous liquors prohibited by the statute. Public Laws 1917, chap. 157. *Ibid.*

3. *Same—Removal of Liquor—Innocent Intent.*—Where there is evidence of defendant's guilty knowledge in aiding in the distilling or manufacturing of intoxicating liquor prohibited by Public Laws 1917, chap. 157, by hauling it away, and also consistent with his innocence in merely hauling away the remnants after the illegal purpose had been accomplished or frustrated, without intention of taking part or aiding in its manufacture, the question of his guilt or innocence is one for the jury, under proper instructions. *Ibid.*

4. *Intoxicating Liquor—Indictment—Manufacture, Aiding—Degrees of Offense—Conviction.*—Upon a charge in an indictment for manufacturing liquor, etc., under Public Laws 1917, chap. 157, the defendant may be convicted of the second degree of the offense—*i. e.*, aiding or abetting its manufacture. *Ibid.*

5. *Intoxicating Liquors — Criminal Law — Prohibition — Unlawful Sales—Evidence—Statutes.*—Upon trial for the sale of intoxicating liquors in bottles to the prosecuting witness, in evidence in the case, it is competent for the sheriff to testify that he had found a box and sack of bottles just outside of defendant's store, corresponding in appearance and labels with the bottles the prosecuting witness testified he had purchased from the defendant, when the box and bag of bottles are also in evidence. *S. v. Manslip*, 798.

6. *Spirituous Liquors—Cider—Wines Sold on Premises, etc.—Statute—Exceptions.*—The sale of domestic wines in quantities of 2½ gallons, in sealed packages and crated, etc., on the premises where manufactured, when made from fruits grown on the lands of the manufacturer within this State, is lawful, under chapter 35, section 3, Laws 1911; and the Search and Seizure Act (chapter 44, Laws 1913, and chapter 97, Laws 1915), passed primarily to regulate shipment of spirituous, vinous, or malt liquors, contains no provision to the contrary. *S. v. Hicks*, 802.

INSURANCE COMMISSIONER.

See Corporations, 16.

INTERSTATE COMMERCE.

See Carriers of Goods, 7.

INFANTS.

See Negligence, 17.

IRREGULARITIES.

See Jury Drawing, 2.

ISSUES.

See Appeal and Error, 2, 16, 20, 21, 35, 45; Reference, 1; Carriers of Goods, 9; Judgments, 8; Instructions, 3, 4; Evidence, 19; Costs, 1; Railroads, 16; Verdicts, 4.

1. *Issues—Willful Torts—Waiver.*—In an action upon tort where one of the defendant's counsel asks that an issue be submitted as to the defendant's willfulness in committing it, and another of his counsel states that they do not desire the issue, this being acquiesced in, and nothing further being said, such issue is not submitted, the right to have had it submitted is waived, and an objection may not be taken after argument and verdict. *McKinney v. Patterson*, 483.

2. *Issues—Negligence—Contributory Negligence—Trials—Appeal and Error—Harmless Error.*—While it is desirable that issues as to negligence and contributory negligence should be separately submitted to the jury when they properly arise upon the trial of a controversy, the failure of the trial judge to submit the second issue, leaving the case to be determined under the first, it is not reversible error when it appears that the objecting party has been properly given the benefit of every position open to him on the evidence and pleadings. *Carter v. Leaksville*, 561.

3. *Issues — Evidence — Negligence — Contributory Negligence — Last Clear Chance.*—An issue as to the last clear chance is properly submitted, in an action against a street car company for damages for a personal injury alleged to have negligently been caused by defendant's street car running into the plaintiff's buggy as he was crossing the defendant's track, when there is evidence tending to show negligence, and contributory negligence, and that defendant's street car was running 20 or 25 miles an hour without sounding its gong or giving other warnings of its approach or slacking its speed, which otherwise may have warned the plaintiff in time to have avoided the injury. *Sparger v. Public Service Corporation*, 776.

JUSTICE OF THE PEACE.

See Courts, 10.

JUSTIFICATION.

See Slander, 6.

JURORS SET ASIDE.

See Courts, 8.

JURORS.

See Appeal and Error, 25; Libel, 1; Motions, 2; Evidence, 22.

JUSTICE'S COURTS.

See Courts, 7.

JUDICIAL SALES.

See Appeal and Error, 19; Corporations, 1, 3; Statutes, 1.

JURY OF VIEW.

See Drainage Districts, 11.

JURISDICTION.

See Appeal and Error, 10, 18; Courts, 1, 6, 7, 10; Telephone Companies, 1.

JUDGMENTS.

See Pleadings, 1; Appeal and Error, 9, 11, 22, 28, 34, 40, 43, 57; Taxation, 3; Reference, 3; Homestead, 1; Corporations, 2; Courts, 6; Carriers of Goods,

JUDGMENTS—*Continued.*

15; Partition, 1; Drainage Districts, 9, 10; Attorney and Client, 3; Injunction, 4; Indictment, 1; Verdict, 2; Counties, 1.

1. *Judgments—Compromise—Impeachment—Burden of Proof.*—A compromise judgment is presumed to have been rightfully entered until the contrary is made to appear, with the burden upon the one assailing its validity. *Chavis v. Brown*, 122.

2. *Judgments—Estoppel—Parties—Privies—Subject-matter.*—Where the plaintiff in a former action for damages unites with another and brings a joint action to recover damages to different property alleged to have been caused by the same negligent act, the judgment in the former action may not successfully sustain the plea of *res judicata* as to the additional plaintiff in the second action, as he was not a party or privy thereto and the subject-matters of the two actions are different. *McLaughlin v. R. R.*, 183.

3. *Same—Bailment.*—Where one of two joint plaintiffs in an action to recover damages is properly permitted to withdraw, owing to a mistake as to his joint ownership, the fact that he may have been the bailee of the other at the time of defendant's negligent act does not affect the cause of action of the continuing plaintiff. *Ibid.*

4. *Judgments, Set Aside—Motions—Meritorious Defense.*—A judgment by default will not be set aside upon defendant's motion on the ground of excusable neglect, unless his averments, made in good faith, establish the fact, if true, that he has a meritorious defense, or the facts so alleged must make out a *prima facie* defense, the ultimate and final determination of these being left to the proper tribunal, if the motion is allowed. *Crumpler v. Hines*, 283.

5. *Same—Contracts—Beneficial Interests—Pleadings.*—A beneficiary under a contract may maintain an action for its breach; and where judgment final for want of an answer has been rendered upon allegations of the complaint that the plaintiff furnished the money for the purchase of certain lands upon the agreement he was to share in the profits, etc., and that the transaction had accordingly been made and a profit obtained, but he had received nothing a motion by defendant to set the same aside, without a denial of these allegations, fails to state a meritorious defense, nothing else definitely appearing, and the motion will be denied. *Ibid.*

6. *Judgments—Evidence—Deeds and Conveyances—Husband and Wife.*—A judgment rendered in the Federal Court declaring a due from the husband to his wife fraudulent and void as to his creditors, and executed with the fraudulent knowledge of the wife, is one *in rem*, and may be received in evidence in an action brought in the State court by a different creditor attacking the due upon the same ground, though not conclusive. *Bank v. McCaskill*, 362.

7. *Judgment—Pleadings—Admissions—Verdict—Claim and Delivery—Statutes.*—In claim and delivery for a mule, alleging ownership, a wrongful withholding and damage, which the answer denies, alleging that plaintiff's claim was based on a chattel mortgage given by the defendant to secure balance of the purchase price, evidenced by a note, and setting up counterclaim for breach of warranty of the mule, and the note and mortgage are admitted by plaintiff's reply, with issue joined on the warranty, breach, and consequent damages: *Held*, upon the admissions and finding for plaintiff by the jury, allowing a deduction for defendant's counterclaim, a judgment in full adjustment of the litigation was proper, and, without valid objection by the defendant, that it embraced a recovery

JUDGMENTS—*Continued.*

for the plaintiff on the mortgage note. *Semble*, plaintiff, in strictness, should have set forth his special interest in the property. Revisal, sec. 791. *Cooper v. Evans*, 412.

8. *Judgments—Issues.*—An affirmative finding of an issue that plaintiff is entitled to the proceeds of sale of personal property claimed by the defendant in an action to recover it, as a pledge for plaintiff's debt, is sufficient for judgment that plaintiff recover such sum. *Brimmer v. Brimmer*, 435.

9. *Judgments—Torts—Execution Against Person—Verdict.*—Before execution against a tort feasor can issue it is necessary that the jury find affirmatively upon an issue as to whether the tortious act was done willfully—that is, voluntarily and of set purpose, or of free will, without yielding to reason. *McKinney v. Patterson*, 483.

10. *Judgments by Default—Pleadings, Filing—Clerks of Court.*—Pleadings should be filed with the clerk of the court of the proper county, and when a proper answer to a complaint has been mailed in time to reach the clerk, and he has failed to get his mail on that day, the last one of the term, and it was in the clerk's office, on his desk, unopened, when the judge signed judgment for plaintiff by default, the neglect, if any, was that of the clerk, for which the defendant is not responsible, and upon a *prima facie* case of meritorious defense shown, the judgment should be set aside. *Gallins v. Ins. Co.*, 553.

11. *Judgments by Default—Meritorious Defense—Prima Facie Case—Issues.* To set aside a judgment for default of an answer, it is necessary that defendant show only *prima facie* that he has a meritorious defense; and where the proposed verified answer has been filed in support of the motion, raising an issue of fact necessarily to be determined before judgment can be rendered, it is sufficient. *Ibid.*

12. *Judgments—Estoppel—Bills and Notes—Separate Transactions.*—Where notes are given in different and unconnected transactions between the same parties, a judgment in an action on one of them is not an estoppel to an action on the other; and the same is true when the benefit from the only matter involved in both is disclaimed by the party sought to be estopped, and the former judgment amply protects the party setting up the estoppel. *Loan Co. v. Yokley*, 574.

13. *Judgments—Payment—Actions—Clerks of Court—Injunctions.*—Where a foreign bonding corporation has voluntarily paid off a judgment rendered against it without protest and with full knowledge of the facts, and the judgment has been canceled accordingly, it may not recover back the money it has so paid in the absence of fraud or deceit, or restrain the clerk from paying it to him. *Pardue v. Absher*, 677.

14. *Judgments—Torts—Interest.*—Where action in tort is brought for fraudulently inducing the plaintiff to buy a stock of merchandise, and a recovery against the vendor is had, interest is chargeable on the judgment from the term at which the action was tried. *Hoke v. Whisnant*, 658.

15. *Judgments—Injunctions—Bonds—Court's Jurisdiction—Parties — Estoppel.*—Where a restraining order has been issued against W. C. M. from cutting timber on certain lands, and an order is entered entitled as against W. C. M., Jr., permitting him to continue cutting upon his giving a certain bond with surety, which is given by W. C. M., Jr., as principal and another as surety, who afterwards is permitted to withdraw his answer, and judgment for damages entered

JUDGMENTS—*Continued.*

against W. C. M.: *Held*, W. C. M., Jr., by filing answer, entered a general appearance in the former action, and the court also having jurisdiction of the subject-matter, and thus acquiring jurisdiction of the parties, properly entered judgment against the principal, W. C. M., Jr., and the surety on the bond, and execution under the judgment may not be restrained by the obligors of the bond. Void and voidable judgments and proceedings to set them aside, etc., discussed by ALLEN, J., citing *Doyle v. Brown*, 72 N.C. 396; *Carter v. Rountree*, 109 N.C. 32, and other cases. *Moore v. Packer*, 665.

16. *Judgments—Contracts—Interest—Statutes.*—Where the controversy is made to depend upon whether a written agreement of a certain date to subscribe to plaintiff's enterprise in a sum certain was binding upon the defendant corporation, the affirmative answer of the jury to the issue carries with it interest on the subscription from the date it was due, as a matter of law, and judgment should be rendered accordingly; and not from the date of its rendition, as in tort. Revisal, sec. 1954. *Chatham v. Realty Co.*, 671.

JUDICIAL SALES.

1. *Judicial Sales—Courts—Private Sales—Increased Bids—Confirmation—Court's Discretion.*—In an action to sell land affected with a contingent interest, under section 1590 of the Revisal, the court, acting within its equity powers, may order a private sale, where the interest of the parties will thereby be best promoted; and whether the sale made under the decree be public or private, the question of confirmation is vested in the sound legal discretion of the presiding judge; and while it is customary to refuse confirmation and order a resale in case of a responsibility and increased bid, as much as 10 per cent, this course is not always obligatory; chapter 146, Laws 1915, not applying to judicial sales of this character. *Sutton v. Craddock*, 274.

2. *Same—Improvements—Benefit of Parties—Appeal and Error.*—Where all the parties at interest in lands affected with a contingent interest unite in requesting the court to confirm a sale privately made under a decree, and it is found as a fact by the trial judge that such would best subserve the interest of all parties, and that the purchaser had entered into possession, and by his personal effort and the expenditure of money increased the value of the land equal to or more than the amount of an increased bid made by a proposed purchaser, on appeal it is held that the action of the trial judge in confirming the sale was proper. *Ibid.*

3. *Judicial Sales—Partition—Increased Bid—Statutes—Rights of Purchaser.* Where the court has sold lands upon petition of tenants in common, and no objection to the price the lands brought, or increase of the bid has been made within the twenty days allowed by the statute (Revisal, sec. 2513), and the purchaser moves promptly for confirmation, an increased bid, made thereafter and subsequent to the purchaser's motion to confirm the sale, does not defeat the purchaser's right to his deed, and his motion should be allowed, as a matter of right, under the express terms of the statute. *Upchurch v. Upchurch*, at this term, cited and applied. *Ex Parte Garrett*, 343.

JURORS.

1. *Jurors—Court's Discretion—Discharge of Jurors—Retaining Juror—Tales Jurors.*—The trial judge, in his discretion, may discharge any jurors or jury, and is not required to reserve one juror of the original panel to "build to," before directing the sheriff to summons tales jurors as authorized by Revisal, sec. 1967, amended by chapter 15, Laws 1911; chapter 210, Laws 1915. *S. v. Manslip*, 798.

JURORS—*Continued.*

2. *Same—Bystanders.*—Where the regular jurors have been discharged by the trial judge for the term, evidently under the impression that the business of the court was over, and on the following day there remains a criminal case regularly coming up for trial on a defect of jurors, the judge, within his discretion, is authorized to direct the sheriff to summons "other jurors, being freeholders within the county," whether within or without the courthouse. Revisal, sec. 1967, amended by chapter 15, Laws 1911; chapter 210, Laws 1915. *Ibid.*

3. *Jurors—Motions—Exceptions—Challenge to Array.*—Where the regular jurors have been discharged for the criminal term, and talesmen have been summoned to try another case regularly for trial at that term, a denial of defendant's motion for continuance, and forcing him into trial with the jury thus constituted, does not constitute a challenge to the array. *Ibid.*

4. *Jurors—Selection—Right of Party—Discharge of Jurors—Courts.*—The right of a defendant in a criminal action is to reject jurors and not to select them, and he cannot complain that the court has discharged jurors on the day preceding the trial of his case, unless it is made to appear that he has in some legal way been prejudiced. *S. v. Little*, 800.

JURY DRAWING.

1. *Jury Drawing—County Commissioners—Sheriff, etc.—Challenge to Panel—Statutes.*—Revisal, section 1963, providing for the drawing of a jury by the sheriff, clerk of the board of county commissioners, and two justices of the peace contemplates this to be done on the failure of the county commissioners to draw the jury for the term of court at least twenty days before its commencement, under Revisal, section 1959; and were it otherwise, and a jury were drawn within twenty days before the term commenced (section 1963), the statute would be regarded as directory; and where the parties have not been prejudiced, the irregularity would not entitle the party to disregard the verdict upon challenge to the panel. *Lanier v. Greenville*, 311.

2. *Same—Deputy Sheriffs—Ministerial Duties—Prejudice—Irregularities.* The provision of the Revisal, section 1963, that the "sheriff," etc., in the "presence of and assisted by two justices of the peace of the county, shall draw such jury in the manner above described," refers to sheriffs in the generic sense, including deputies within its meaning to perform a duty of a ministerial nature in the sheriff's name; and where the deputy thus acts at the request of the sheriff, a challenge to the panel on that account alone will not be sustained. *Ibid.*

KNOWLEDGE.

See Intoxicating Liquors, 2.

LACHES.

See Attorney and Client, 2; Appeal and Error, 55.

LANDS.

See Injunctions, 2; Partnership, 9.

LANDLORD AND TENANT.

See Negligence, 21; Husband and Wife, 2.

LAPSED DEVISES.

See Wills, 6.

LAPSED LEGACIES.

See Wills, 1.

LARCENY.

See Malicious Prosecution, 3.

LAST CLEAR CHANCE.

See Railroads, 11, 16, 17; Issues, 3.

LEAVING TRAIN.

See Carriers of Passengers, 5.

LESSOR AND LESSEE.

See Railroads, 1, 8.

LETTERS.

See Evidence, 9.

LEX LOCI.

See Insurance, 9, 10.

LIABILITY.

See Municipal Corporations, 7; Corporations, 4.

LIBEL.

1. *Libel—Slander—Jurors.*—Words, oral or written, which tend to impeach the honesty and integrity of a jury in determining their verdict are actionable; and where a party at interest in a controversy wherein the jury disagreed, one to eleven, publicly stated that there was one man on the jury who was not bribed, and in a letter to the attorney of the adverse party stated, "I note what you say about the jury standing eleven to one, this was due entirely to whiskey, and the appeal made to their prejudice": *Held*, the spoken and written words were actionable, *per se*, and the evidence thereof carried the case to the jury. *Carter v. King*, 549.

2. *Same—Damages—Mitigation—Evidence.*—Where libelous words are published of the plaintiff as one of eleven jurors in a former action, it is incompetent to show, in mitigation of damages, that the plaintiff knew that the answer contained a disavowal of any personal reference to him. *Ibid.*

LIENS.

See Homestead, 1; Corporations, 11, 12.

Liens, Agricultural—Form—Statutes—Interpretation—Contracts.—Our statute, Revisal, sec. 2055, requires no particular form for the written instrument creating a valid agricultural lien but that it be substantially according to that therein prescribed; and our courts in construing it will look to the substance rather than the form and regard the entire writing with the view of ascertaining and effectuating the intention of the parties; and an instrument expressing itself to be an agricultural lien and given in consideration of money or goods to be advanced for the purpose of making crops on certain land for the current year, with certain other property pledged as additional security, is sufficient without further designation, it appearing that the parties intended it to be one. The rules for interpreting contracts discussed and applied by WALKER, J. *Jones v. McCormick*, 82.

LICENSEES.

See Hotels, 1.

LIMITATIONS.

See Wills, 22.

LIMITATION OF ACTIONS.

See Wills, 7; Appeal and Error, 33.

1. *Limitation of Actions—Actions, Joint—Withdrawal of Party—Negligence —Pleadings—Amendments.*—Where damages are sought by joint plaintiffs upon the alleged negligence of the defendant, the cause of action is such negligence; and where one of them is permitted to withdraw and the other to amend, owing to a mistaken construction of a contract as to the joint ownership of the property damaged, the amendment referring to the same alleged negligent act does not create a new cause of action, but, being upon the same cause, relates back to the issuance of the summons, and when that was done in time the statute of limitations will not have run against it. *McLaughlin v. R. R.*, 182.

2. *Limitation of Actions—Nonsuit—Statutes.*—Where a nonsuit is taken in an action brought within the time prescribed by the statute, the statute of limitations will not have run if suit is again brought within a year from the time of nonsuit. Rev., sec. 370. *Hines v. Lbr. Co.*, 294.

3. *Limitations of Actions—Nonsuit—Statutes.*—In action to recover lands wherein the plaintiff depends upon a nonsuit in a former action to repel the bar of the statute of limitations, Revisal, sec. 370, it is necessary for him to bring himself within the meaning of the statute and show identity of parties, cause of action, and title, or that he is the "heir at law or representative" of the former plaintiff, the second action being regarded as a continuance of the writ in the first one, and it is insufficient if the plaintiff in the second action was a grantee of the plaintiff in the first one before the latter commenced his action. *Quelch v. Futch*, 395.

4. *Limitations of Actions—Guardian and Ward—Surety.*—An action against a guardian and his bondsman, where no final account has been filed, is barred after three years from the time of default and, at farthest, within three years from the ward's coming of age. Rev., sec. 395, subsec. 6. *Anderson v. Fidelity Co.*, 417.

5. *Limitations of Actions—Foreign Corporation—Process — Service — Statutes—Pleas in Bar.*—Where foreign corporations come into the State to do business after the enactment of a statute providing a method of personal service on them, reasonably calculated to give them full notice of the pendency of suits against them, the statutory provisions are regarded as conditions on which they are allowed to do business within the State, and their doing so here, thereafter is an acceptance by them of the statutory method and in recognition of its validity to confer jurisdiction on our courts by service thereunder. *Ibid.*

6. *Same—Guardian and Ward—Process—Service—Pleas in Bar.*—Under the provisions of Revisal, section 1243, requiring foreign corporations doing business within the State to have an officer here upon whom process can be served, etc., of section 440, providing that service of process may be made on certain officers or agents of such corporation, and of section 4750 "authorizing service on the Insurance Commissioner," etc.: *Held*, the statute of limitations is not suspended against the surety on a guardian bond by reason of such surety being a foreign corporation (section 395) when it is shown that it continuously had a general agent within the jurisdiction of our courts for executing judicial bonds and collecting premiums thereon for the company and had complied with section 440 authorizing service of process on the Insurance Commissioner. *Ibid.*

7. *Limitation of Actions—Statutes—Executors and Administrators—Frauds —Heirs at Law.*—While the law invests an administrator with a certain discre-

tion as to pleading the statute of limitations, it is required of him that he act in perfectly good faith, free from coercion, undue influence or collusion; and where fraud and collusion are therein shown by and between him and a creditor of the estate, the heirs at law may set aside the judgment accordingly rendered and plead the state in their own behalf. *McNair v. Cooper*, 566.

8. *Same—Evidence—Trials.*—Fraud may be inferred from the facts and circumstances established, and evidence is sufficient upon the question of failure of an administrator to plead the statute of limitations against a judgment rendered against his intestate in the intestate's lifetime, in fraud and collusion with the judgment creditor, which tends to show that the administrator was the justice of the peace who rendered the judgment, and was then, and has continued to be, directly and indirectly, in the employment of the judgment creditor; that he permitted a judgment to be rendered against the estate on the former judgment which could have been collected at any time, at the suggestion of the plaintiff's attorney, a few hours after the summons had been issued, without investigating as to payment, though suggested by the justice of the peace at the time, and that he had assumed the correctness of the plaintiff's statements in regard to the matter and had not mentioned it to the heirs at law, which he could readily have done, who did not have an administrator appointed because they had been told by the intestate that he had no debts. *Ibid.*

9. *Limitation of Actions—Adverse Possession — Deeds and Conveyances — Outer Boundaries—Constructive Possession.*—Where, in an action to recover lands, the defendant introduces evidence tending to show actual occupancy and possession of a small part of the lands claimed under color of a sufficient instrument, giving metes and bounds, with evidence that the possession extended to the outer boundaries given, the question is one for the jury, under a correct charge from the trial judge. *Waldo v. Wilson*, 626.

10. *Limitation of Actions—Executors and Administrators—Repealing Statutes.*—Where one has qualified as administrator of the intestate in 1856, and there is evidence that funds came into his hands as such; that in 1884 he died without making final settlement, leaving a will, and his executor duly qualified, advertised for creditors, etc., and made final settlement; that in 1916 the plaintiff qualified as administratrix *d. b. n.*, and brings action for an accounting: *Held*, the limitations of actions in force prior to 1868 under the Code of 1863, secs. 136, 137, do not apply by reason of the repealing act of chap. 113, Laws of 1891, and the statute has run as a complete bar to the plaintiff's cause of action. *Edwards v. Lemmond*, 136 N.C. 330, cited as controlling. *Brown v. Wilson*, 668.

11. *Limitations of Actions—Written Promise to Pay—Definiteness.*—A written reply of an endorsee of a note to a letter describing the note and demanding payment, directing the payee to file the claim in the bankrupt court against the maker, "get your share, what is left I will pay," is a sufficient and definite promise to pay a sum certain under the principle "that is certain which can be rendered certain"; and the statute of limitations will not commence to run until the ascertainment of the sum promised has been made in accordance with the method prescribed by the promissor. *Shoe Store Co. v. Wiseman*, 716.

12. *Limitation of Action—Adverse Possession—Reference — Findings—Appeal and Error.*—In this action to recover land, the title to the *locus in quo* depending upon the true divisional line between the adjoining lands, the referee's finding in defendant's behalf approved and accepted by the trial judge, with defendant's possession and cultivation of the lands, such as it was capable of for thirty years, is sustained on appeal. *NcNeill v. Buie*, 773.

LIVESTOCK.

See Carriers of Goods, 6, 10.

LOAN.

See Wills, 3; Drainage Districts, 7.

LOGGING ROADS.

See Negligence, 4.

"LOOK AND LISTEN."

See Carriers of Passengers, 8.

LOST LETTERS.

See Vendor and Purchaser, 2; Evidence, 10.

LOST PAPERS.

See Evidence, 1, 2.

LOST RECORDS.

See Evidence, 20.

LUMBER ROADS.

See Railroads, 7, 8.

MARL.

See Partnership, 7.

MALARIA.

See Evidence, 6.

MALICIOUS PROSECUTION.

See Appeal and Error, 2.

1. *Malicious Prosecution—Malice—Evdience—Damages—Trials.*—Where the evidence is sufficient for the recovery of punitive damages in an action of malicious prosecution, testimony of the defendant that he believed the charge in the indictment to be true at the time is properly admitted on the question of the absence of malice and in diminution of the damages recoverable. *Gray v. Cartwright*, 49.

2. *Malicious Prosecution—Punitive Damages—Actual Malice—Evidence—Trials.*—In order to recover exemplary or punitive damages in an action for malicious prosecution, the plaintiff must show actual malice on the part of the defendant in prosecuting the criminal action against him, importing an evil intent or wish or design to vex, annoy, or injure him. *Ibid.*

3. *Malicious Prosecution—Larceny—Other Thefts—Evidence—Criminal Intent—Trials.*—In an action to recover damages for malicious prosecution of a criminal action for the larceny of a cow, evidence is competent to show that the defendant in the criminal action and the plaintiff in the civil one had taken at other times cattle to his premises, under similar circumstances, when relevant to his criminal intent in the matter under consideration in the present action. *Ibid.*

MANUFACTURE, AIDING.

See Intoxicating Liquors, 1, 4.

MARRIAGE.

See Descent and Distribution, 1.

MARRIED WOMEN.

Married Women—Separate Realty—Contracts—Breach—Damages — Constitutional Law—Statutes.—A married woman is liable in damages for the breach of her written contract to convey her separate realty made with the written consent of her husband. Const., Art. X, sec. 6; Laws of 1911, ch. 109. *Everett v. Ballard*, 16.

MASTER AND SERVANT.

See Negligence, 1, 23; Railroads, 2, 4, 9; Slander, 8, 9; False Imprisonment, 1.

1. *Master and Servant—Safe Place to Work—Nonsuit—Evidence—Negligence—Proximate Cause—Trials.*—When the evidence tends only to show that a coemployee of the plaintiff had a pair of pliers in his pocket a few minutes before it fell upon and injured the latter at work at the foot of an iron water tank 100 feet high, at the top of which the former was painting; that the master had not furnished the coemployee a safety belt, with nothing to show that such were in common use for this kind of work, it is held that the negligence, if any, was that of a fellow-servant upon which no recovery could be had; and that were such belts required, there was nothing to show that the omission to furnish one on this occasion was the proximate cause of the injury received, and defendant's motion to nonsuit was properly granted. *Brown v. Scofields Co.*, 4.

2. *Master and Servant—Negligence—Safe Place to Work—Changing Conditions—Evidence.*—Where the evidence tends only to show that plaintiff, at work near the bottom of an iron water tank, was struck and injured by a pair of pliers falling from a coemployee at work painting the tank near the top, the rule requiring the master to furnish the servant a safe place to work has no application, the situation being one of changing conditions and relative positions known as well to the servant as to the master, and with which the latter is not required to keep informed. *Ibid.*

3. *Master and Servant—Employer and Employee—Negligence—Evidence—Trials.*—Evidence is sufficient upon the issue of actionable negligence which tends to show that the defendant employed the plaintiff, inexperienced in such work, to sweep and clean the shavings from his planing machines; that within the week, the plaintiff was injured by having his arm drawn through a vent or aperture of an old and defective hood, which could readily have been replaced or made safe, to an old and infrequently used planer, caused by a powerful suction to carry off the shavings, augmented by the swiftly revolving knives within the hood, and while removing from the hood an accumulation of shavings which stuck to and concealed the defect in the hood of which he was unaware. *Bunch v. Lumber Co.*, 8.

4. *Same—Inspection—Duty of Master—Notice.*—It is evidence of gross negligence for an employer to permit a planing machine to remain out of order for years and subject his employees thereat to the danger of the exposed and rapidly revolving knives; and notice of the defects will be implied from their long continuance, which a performance of his duty to inspect would reasonably have revealed. *Ibid.*

5. *Master and Servant—Contributory Negligence—Trials — Instructions.*—When the evidence is conflicting as to whether the defendant had furnished the plaintiff, his employee, a safe appliance to remove the shavings from a planer and had instructed him to use it, and that the injury complained of was caused by the failure of the plaintiff to obey this instruction, a charge to the jury is not open to the defendant's objection, that the plaintiff cannot recover should the

MASTER AND SERVANT—*Continued.*

jury find that the plaintiff violated this instruction, and such caused the injury complained of or contributed to it. *Ibid.*

6. *Master and Servant—Negligence—Ordinary Tools—Defects—Inspection —Trials—Evidence—Nonsuit.*—The rule relieving an employer from liability for a personal injury caused by a defective implement of an ordinary kind to be used in an ordinary way, furnished by him to his employee for the work required of him, has no application when he knew, or should have known, of the defects by reasonable inspection, and that its use threatened substantial injury; and where an employer furnished an inexperienced employee a defective cant hook, under his protest, to unload heavy logs from a flat car, and the employee was injured shortly thereafter by reason of the breaking of the implement which he had been instructed to use, a judgment of nonsuit is improperly granted, and the issue of defendant's actionable negligence is for the determination of the jury. *Rogerson v. Hontz*, 27.

7. *Master and Servant—Contracts—Independent Contractor—Employment at Will—Hiring Employees.*—One who is employed by the owner of a lumber manufacturing plant to cut laths from lumber furnished by the owner with machinery at his mills, at so much per thousand, the employment terminable at the will of the owner, is not an independent contractor within the meaning of the principle that the owner is not liable for the negligence of his independent contractor causing injury to the latter's employees, and the fact that the contractor hired and discharged the employees is not controlling. *Evans v. Lumber Co.*, 31.

8. *Master and Servant—Negligence—Statutes—Child Labor—Employment.* It is negligence on the part of the owner of a lumber manufacturing plant to allow a boy ten years of age to work in his power-driven mill, at a dangerous place, where the live rollers to carry the lumber to the various machines were left unboxed and exposed, causing the injury complained of, which occurred while the boy was engaged at his work with the knowledge of his superintendent, who made no objection. *Ibid.*

9. *Master and Servant—Independent Contractor—Contracts—Negligence—Dangerous Instrumentalities.*—The master's nonliability for the acts of an independent contractor does not obtain when the work engaged in is inherently dangerous, and the injury complained of was caused by the negligence of the master himself in respect to conditions under his control. *Ibid.*

10. *Master and Servant—Negligence—Ordinary Tools—Defects—Duty of Master—Employer and Employee.*—When plaintiff has been employed as fireman for the defendant's stationary engine, with duty to keep the fire going, shake the grate, etc., to which latter a rod or bar was attached on which was an iron "spigot," or peg, which worked through a slot on a detached bar of iron 3 feet long, used as a handle for the purpose of shaking the grate beneath the boiler; and there is evidence that this spigot had been broken off or bent so that the regular handle or bar would not fit; that the plaintiff's boss furnished him and required him to do this work with an iron bar taken from the engine 3½ feet long, weighing 10 or 15 pounds, with a slot too large for the spigot, giving it play, making its use dangerous for the purpose, and the plaintiff was injured in consequence of its slipping from the spigot, and that the boss had previously been warned of the danger in its use, and had failed in his promise to make it safe: *Held*, the principle that the employer is not held responsible for defects of ordinary tools to be used in the ordinary way has no application, and the evi-

MASTER AND SERVANT—*Continued.*

dence presents the issue of actionable negligence for the determination of the jury. See *Rogerson v. Hontz, ante,* 27. *King v. R. R.,* 39.

11. *Master and Servant—Employer and Employee—Safe Place to Work—Defects—Trials—Evidence—Questions for Jury.*—It is the duty of the master to provide his servant a safe place to work in the performance of his duties, and where there is evidence tending to show that an inexperienced employee was directed by his employer to remove the tin from the roof of a closely sheathed shed, which fell with and injured him by reason of the fact that only the tin attached to the adjoining building held the shed and kept it from falling over, of which fact the employer was unaware and could not reasonably have seen, and the shed fell without his knowing why: *Held,* it is sufficient upon the issue of defendant's actionable negligence. *Atkins v. Madry,* 187.

12. *Master and Servant—Employer and Employee—Safe Place to Work—Assurance of Master—Assumption of Risks.*—Where the place furnished by the master on which the servant is required to work in the course of his employment has a hidden defect therein of which the servant was unaware and which he could not have reasonably ascertained, and which caused an injury, the subject of his action for damages; and the employer instructed the employee to do this particular work, assuring him, upon his inquiry, of the safety of the place and of the work to be done thereon: *Held,* the direction thus given, with the assurance of the master of its safety, relieved the employee of assuming the risk in doing the work, there being nothing in the appearance of the place which would have caused a man of reasonable prudence to have refused to do the work thereon. *Ibid.*

13. *Master and Servant—Employer and Employee—Safe Place to Work—Evidence—Opinion—Trials—Questions for Jury.*—Where damages in an action are sought for the failure of the master to provide a safe place for his employee to work, testimony of witnesses that the place was a safe one is incompetent, that being a question for the court and jury upon conflicting evidence. *Ibid.*

14. *Master and Servant—Employer and Employee—Railroads—Negligence—Evidence—Trials—Assumption of Risks.*—Where there is evidence that a railroad company has furnished its employee insufficient help to replace the cross-ties under its rails with heavy ones, and upon complaint its roadmaster had ordered the employee to do the work, saying that he (the employee) could himself employ proper help, which the conditions and circumstances rendered impossible for him to do: *Held,* sufficient to sustain a finding in the negative upon the issue as to assumption of risks, and to sustain a finding upon the issue as to defendant's actionable negligence. *Cherry v. R. R.,* 263.

15. *Master and Servant—Safe Appliances—Contributory Negligence—Defenses—Instructions.*—It is the duty of an employer to furnish his employee a reasonably safe place to work, and implements and appliances reasonably safe with which to do it, which are known, approved and in general use; but ordinarily his failure to have done so will not of itself cut him off from the defense of contributory negligence on the part of his employee being injured in pursuance of the work required of him, a case of this kind not falling within the principle of the *Greenlee* and *Troxler* cases, wherein the injury was caused by the failure of the defendant railroad companies to supply automatic car couplers. *Hines v. Lumber Co.,* 294.

16. *Same—Defects—Push Cars—Instructions—Continuing Negligence—Appeal and Error.*—Where the evidence is conflicting as to whether the plaintiff,

MASTER AND SERVANT—*Continued.*

an employee of the defendant, was riding, in the course of his employment, on a push car, or bogie, used chiefly for hauling steel rails for track construction, whether the car should have had a plank bottom or timbers across to lessen the aperture, whether the injury for which the damages are sought was caused by the plaintiff carelessly losing his balance, or by a tree negligently left on the right of way, it is reversible error for the trial judge to charge the jury that if the defendant was negligent in furnishing an antiquated appliance or equipment, hazardous to life and limb, and this was the proximate cause of the injury, the negligence would be continuing and cut off the defense of contributory negligence, unless the plaintiff's negligence amounted to recklessness. Ibid.

17. *Master and Servant—Contributory Negligence—Factories—Children—Statute—Presumptions.*—In favor of an employee, not an apprentice, at defendant's factory, under the age of 13 years, contrary to the provisions of the statute (Pell's Revisal, sec. 1981b), and injured through its negligence, there is a *prima facie* presumption that he was not guilty of contributory negligence, and in such case it is the duty of the trial judge to instruct the jury that in determining the issue the evidence should be considered and passed upon in reference to that presumption, and a charge which fails to recognize such presumption, or ignores it and instructs the jury on the issue according to the principles of law ordinarily applied to cases of adults, is reversible error. *Hauser v. Furniture Co.*, 463.

18. *Master and Servant—Employer and Employee—Negligence—Safe Place to Work.*—The duty of the master to furnish his servant a reasonably safe place to work cannot be delegated by him to another, so as to escape liability for not performing it; and a failure to exercise due care in performing this duty is negligence, and actionable, if the proximate cause of an injury to the servant. *Taylor v. Power Co.*, 583.

19. *Same—Appeal and Error—Evidence—Harmless Error—Negligence.*—Where the evidence, in an action by the servant to recover damages of the master for a personal injury, is that the servant, in the performance of his work, went upon an elevator frame to nail braces thereon, with insufficient standing-room for the purpose; that the elevator was not usually run on such occasions, but, while he was in the proper position necessary to do the work, it was operated, without warning, by an inexperienced employee, struck him on the head and caused the injury complained of, it was sufficient to be submitted to the jury upon the issue of defendant's actionable negligence. *Ibid.*

20. *Same—Changed Conditions.*—Where the evidence tends to show that the plaintiff received the personal injury complained of by the negligent running of defendant's elevator, on the occasion, contrary to custom in such instances, testimony that another employee thereafter, on that day, had done the same kind of work, when the elevator was not running, at his request, is not objectionable, on the principle applying to alterations of machinery, or appliances, made by the master after an injury has been inflicted. *Ibid.*

21. *Master and Servant—Employer and Employee—Disobedience of Orders—Contributory Negligence.*—Where an employee unnecessarily disobeys the order of his employer, and for that sole reason has met his death in coming into contact with electric wires of another company, his contributory negligence will bar a recovery in an action for damages for his wrongful death. *Murphy v. City of Charlotte*, 771.

MATERIALS.

See Mechanics' Liens, 1, 2; Contract, 17.

MEASURE OF DAMAGES.

See Water and Watercourses, 1; Damages.

MEMORANDUM.

See Evidence, 30.

MENTAL SUFFERING.

See Slander, 3.

MENTAL ANGUISH.

See Carriers of Passengers, 4; Commerce, 2, 4; Telegraphs, 1.

MERGER OF LIENS.

See Mortgages, 2.

MERITORIOUS DEFENSE.

See Judgments, 11.

MECHANICS' LIENS.

See Reference, 2, 4; Pleadings, 9.

1. *Mechanics' Lien—Materials—Notice—Statutes — Waiver.* — An itemized statement made to the owner for materials furnished the contractor for the building, and used therein, in the form of an account with the contractor, giving the dates, kind of materials, and the prices, etc., with items: "25 September, 1914, to furnishing hardware, as per contract; 14 August, 1914, $270; 30 September, sash, doors, weights and cords, as per contract; 18 July, 1914, $1,225," etc., is a sufficient notice to establish the statutory lien; and were it otherwise, the owner waives any objection by accepting it and paying money to the claimant accordingly. *Corporation v. Jones*, 57.

2. *Mechanics' Liens—Materials—Notice — Amount Due Contractor — Pro Rata.*—One who has furnished material to the contractor, which has been used in the building, is entitled to his *pro rata* part of whatever sum the owner owes the contractor on his contract at the time of notice given him. *Ibid.*

3. *Mechanics' Liens—Building Contracts—Abandonment—Damages.*—Where a contractor abandons his contract for the erection of a building in his own wrong as to the remaining executory features thereof, he cannot maintain an action for its breach, it being required that he allege and prove a performance of his own antecedent obligations. *West v. Laughinghouse*, 214.

4. *Same—Breach—Waiver—Architect.*—Where a nonresident architect, in full charge of the erection of a building, whose duty it was to visit the building for the purpose of supervision, whenever he deemed it necessary, within a few days after an acknowledged and material departure from the contract by the contractors, notified the contractor that the building would not be accepted unless the breach were remedied, which the contractor refused to do, the mere fact that the breach was with the knowledge of the local representative of the architect, who made no protest, will not be considered as a waiver of the terms of the contract. *Ibid.*

5. *Same—Penalty—Additional Costs.*—Where the contractor for the erection of the building abandons it in his own wrong, thereby causing an additional expense to the owner, arising from extra services required of his architect, and a delay has occurred in the completion of the building, for which a stipulated sum per day was agreed to be allowed the owner, this sum so allowed, on the facts of the present case, is to be regarded as in the nature of a penalty, and the legal rate on the capital invested was properly allowed the owner, together with the amount due the architect for the extra services thus required of him. *Ibid.*

MINORS.

See Negligence, 17.

MISDEMEANORS.

See Slander, 1.

MISJOINDER.

See Actions, 1.

MISNOMER.

See Actions, 5.

MISTAKE.

See Actions, 2.

MONEY.

See Telegraphs, 3.

MORTGAGES.

See Equity, 1; Homestead, 1; Injunction, 3; Corporations, 9, 11, 12.

1. *Mortgages, Chattel—Assignee of Mortgage—Claim and Delivery—Right of Possession.*—The assignee of a chattel mortgage may maintain proceedings in claim and delivery for the possession of the mortgaged property or for its value, etc., in his own name and right, after the note secured by the mortgage is overdue and remains unpaid. *Johnson v. Bray*, 176.

2. *Mortgages—Legal Title—Assignments — Outstanding Equities — Merger Liens.*—Where the mortgagee of lands has assigned the notes secured by the mortgage to another to obtain his endorsement as surety on a note, and the latter has been required to make payments, as such surety, the fact that subsequently, the principal on the note acquired the mortgagor's equity in the lands, does not affect a merger of the equitable and legal title so as to defeat the superior rights of a holder of one of the notes secured by the mortgage to have the mortgage foreclosed and to enforce his lien. *Stewart v. Munger*, 403.

3. *Mortgage—Lands—Timber—Trusts and Trustees.*—Where one has acquired land and timber growing thereon, subject to the equitable rights existing under a prior registered mortgage, in an action to prevent the cutting of the timber, and the consequent impairment of the security, he is to be regarded as a trustee of the creditor to the extent of this equitable right of the latter. *Ibid.*

MOSQUITOES.

See Nuisance, 1.

MOTIONS.

See Parties, 1; Appeal and Error, 18, 28; Courts, 1, 7; Judgments, 4; Pleadings, 8, 11; Partition, 1; Jurors, 3; Verdict, 1; Evidence, 25.

1. *Motions—New Trials—Verdict—Court's Discretion.*—A motion for a new trial after verdict on the ground that a petit juror in the case had also served on the grand jury is to the discretion of the trial judge, and not reviewable on appeal. *S. v. Little*, 794.

2. *Motions—Jurors—Verdict—New Trials—Court's Discretion.*—Where it appears that the trial judge had on the preceding day stated to several jurors who stood for an acquittal of a defendant of violating the prohibition law, that "they hindered the machinery of justice in holding out against a verdict of guilty," etc., it affords no legal ground to set aside a verdict convicting the defesdant of a like offense in an unrelated case, when none of the evidence in the former case appears of record; and when made after verdict, it is to the unreviewable discretion of the trial judge. *Ibid.*

MOTIONS—*Continued.*

3. *Motions—Process—Service—Special Appearance.*—A special appearance for the purpose of a motion to strike out the return of service on a summons, on the ground that the endorsement was unlawfully made, is the proper procedure. *Brown v. Taylor*, 423.

MUNICIPALITIES.

Municipalities—Cities and Towns—Speed Ordinances — Negligence — Proximate Cause.—Where a person driving at night on a city's streets is injured by the negligence of the defendant in not having the customary red light to warn persons traveling thereon of the dangerous condition of the street, the fact that he was violating an ordinance regulating the speed of vehicles will not bar his recovery on the ground of contributory negligence, in the absence of evidence that this was the proximate cause. *Hardy v. Construction Co.*, 321.

MUNICIPAL CORPORATIONS.

See Condemnation, 1; Contracts, 16.

1. *Municipal Corporations — Cities and Towns — Negligence — Defects in Streets—Contributory Negligence—Trials—Evidence.*—Upon evidence tending to show, and *per contra*, that the plaintiff's injury was caused by the defendant town leaving for months a ditch across its street 18 inches deep and about the same width, into which his horse, hitched to a buggy, fell or stumbled when being driven about 7 miles an hour, after dark; that the place was unlighted, he could not see the ditch or reasonably know of its existence: *Held*, sufficient upon the issue of defendant's actionable negligence, and the evidence of plaintiff's previous knowledge of the ditch some months before, and his belief that it had since been fixed, under the circumstances, was also properly submitted to the jury upon the issue of contributory negligence. *Duke v. Belhaven*, 95.

2. *Municipal Corporations—Cities and Towns—Negligence—Principal and Agent—Committees—Ordinance.*—Where the aldermen of a town, to prepare for a festival occasion, have appointed a committee consisting of the mayor and manager, to act with others, which committee, without further authority, permits a third person to erect a stand of seats in a public park for the convenience of spectators, without obstructing the streets, suggesting a certain charge per seat; and there is an ordinance of the town prohibiting such use, the town not participating in the profits or having supervision of the seats, is not responsible to a spectator who was injured by the falling of the stand from faulty construction or overcrowding. *Morgan v. Tarboro*, 104.

3. *Municipal Corporations—Cities and Towns—Public Occasions—Parks—Seats—Nuisance—Negligence.*—The permission of a town to erect stands of seats in its public park, without obstructing the streets, for the convenience of those attending a gala occasion, does not partake of the character of an authorized nuisance, and falls within the principle that where a town licenses a person to commit within its limits an act not unlawful in itself or inherently dangerous, and an injury is occasioned merely in consequence of the manner in which the act is performed, the municipality is not liable. *Ibid.*

4. *Municipal Corporations—Condemnation—Trial by Jury.*—A provision in a municipal charter for an appeal from the appraised valuation of land, taken by it in condemnation, giving the owner the right to a trial by jury, is valid. *Clinton v. Johnson*, 286.

5. *Municipal Corporations—Cities and Towns—Dangerous Conditions—Negligence—Implied Notice.*—Municipal authorities are charged with the duty of

keeping its streets in a reasonably safe condition, and to exercise a careful supervision over them to that end, and while having street improvements made to see to it that proper lights are placed at night at excavations, piles of dirt and other obstructions incident to such work, so as to warn those passing of the dangerous conditions there. *Hardy v. Construction Co.*, 320.

6. *Same—Contracts—Lights.*—A contractor to make street improvements for a municipality is liable for his negligence in not placing lights at night to warn the users of the street of dangerous conditions existing there; and where both the contractor and the city have had ample notice to put up the proper lights, and fail to do so, they are each liable to one who has been injured in consequence of their neglect. *Ibid.*

7. *Same—Joint Liability.*—Where a contractor for making street improvements for a municipality digs a ditch across one of its streets, and the location is so filled by a heavy rainfall during the day that the ditch is completely covered and concealed by the water standing there, and it appears that a red light is customarily placed at such points of danger at night, and that a white light indicates that vehicles are to be driven around it: *Held*, a person driving around the white light and, in the absence of the red light, falling into the ditch, may maintain an action against both the contractor and the city to recover damages for a personal injury resulting from the negligent acts, when ample notice had previously been given to the city of the absence of the light. *Ibid.*

8. *Municipal Corporations—Cities and Towns—Streets—Electric Railway—Freight—Additional Servitude—Damages.*—The use of the streets of a city, under legislative authority and charter right given by the municipality, for the transportation of freight in electrically driven cars on street railroad tracks, from a steam-railroad depot to factories, etc., within the city limits, does not impose an additional burden upon the streets for which compensation may be allowed to the owners of lots abutting thereon. *Turner v. Public Service Corporation*, 522.

9. *Municipal Corporations — Cities and Towns — Water-works — Flat and Meter Rates—Ordinances—Discrimination.*—An ordinance of a municipality furnishing water to its residents upon a flat rate, according to the faucets in the house, payable quarterly in advance, and also upon the meter plan, whereby the consumer pays only for the water used, which provides that "water meters will be used whenever in the judgment of the board they should be attached," is reasonable and valid; and where the city, at its own expense, has changed a consumer, at his request, from a flat to a meter rate, its refusal to change him back to the flat rate is reasonable and not necessarily discriminative, because there are small consumers upon the flat-rate basis. *Richardson v. Greensboro*, 540.

10. *Municipal Corporations—Cities and Towns—Bridges—Negligence—Instructions—Contentions—Evidence—Trials.*—The proper authorities of an incorporated town are required to construct and maintain bridges upon its streets of sufficient strength to bear up the weight of any vehicle of transit that could reasonably be expected in the vicinity where it is placed; and where there is evidence that the plaintiff's loaded motor truck, damaged by the giving away of a bridge on the street of defendant town, was greater in weight than that which could reasonably have been anticipated there, it is not error for the trial judge to state the defendant's contention as to this phase of controversy, that the plaintiff knew or had reason to know when he drove upon the bridge that it could not stand the strain. *Carter v. Leaksville*, 561.

11. *Municipal Corporations—Water-works—Fires—Negligence.*—Where, under its charter, a municipality furnishes water to its inhabitants for private use

upon compensation, and also water with connections and appliances for extinguishing fires from its public funds, without charging its inhabitants therefor, in the latter instance there is no contractual relations between the municipality and its inhabitants but the exercise of a governmental function, and the municipality cannot, in the absence of statutory provision, express or implied, be held liable to one whose house has been destroyed by fire through its negligence in failing to maintain adequate water mains or to supply a sufficient water pressure. As to whether liability would attach if compensation were charged, *Quœre? Harrington v. Greenville*, 159 N.C. 632, cited as controlling. *Howland v. Asheville*, 749.

MURDER.

See Homicide, 1, 2.

NECESSARIES.

See Constitutional Law, 4.

NEGLECT.

See Courts, 3.

NEGLIGENCE.

See Carriers of Passengers, 5, 6, 7, 8; Master and Servant, 1, 2, 3, 6, 8, 9, 10, 14, 16, 17, 18, 19; Drainage Districts, 1, 13; Carriers of Goods, 1, 3, 5; Commerce, 2, 4; Municipal Corporations, 1, 2, 3, 5, 10, 11; Railroads, 1, 5, 6, 8, 10, 11, 12, 13, 15, 17, 18, 19; Roads and Highways, 1; Instructions, 1, 2; Limitation of Actions, 1; Contracts, 3; Evidence, 6; Telegraphs, 1; Municipalities, 1; Pleadings, 4; Hotels, 2; Issues, 2; Principal and Agent, 2, 3; Street Railways, 1; Automobiles, 1.

1. *Negligence—Child Labor—Manufacturing Plants—Statutes—Master and Servant—Contributory Negligence.*—The provisions of our statutes, Rev., sec. 1981 (a), forbidding employment of children under 12 years of age at any factory, etc., and Rev., sec. 3366, amended in 1907, making it a misdemeanor for such factory to knowingly and willfully employ a child under that age, include within their provisions the working of children under the forbidden age at such places with the actual or special knowledge of the owner or his superintendent; making it negligence *per se* when such child is injured, with the presumption that it was not guilty of contributory negligence. *Evans v. Lbr. Co.*, 31.

2. *Negligence—Landlord and Tenant—Damages—Joint Cause—Proximate Cause.*—Where under the terms of his lease the landlord has assumed the responsibility of making repairs of the leased premises with diligence and has charge thereof, through his employee or janitors, and has rented an office over a store therein, with a defective or choked drain pipe, to a dentist, which he had for years failed to inspect; in an action by the lessee of the store against him and the lessee of the office, evidence that the dentist had provided an insufficient outlet for the water flowing from his cuspidor, and that he had permitted the overflow from the cuspidor to continue all night, and from this and the choked condition of the drain the water overflowed and went through the floor and injured plaintiff's stock of goods, is sufficient to sustain a verdict against both defendants jointly, the negligence of each, if established being the proximate cause of the injury. *Rucker v. Willey*, 42.

3. *Same—Evidence—Instructions—Trials.*—Where there is evidence of negligence on the part of a landlord in failing to properly repair a drain pipe in the office of his tenant, and of negligence on the part of the tenant, a dentist, in failing to make proper connection therewith for the waste water flowing from his

cuspidor, and that he negligently permitted the water to continue to flow all night and damage was caused to the plaintiff's goods, the lessee of the store beneath, in an action by the lessee of the store against the landlord and his codefendant, the dentist, a charge is proper, that if the codefendant installed a system for the waste that was unsafe, which a reasonably prudent man would not have done and which was the proximate cause of the injury, the jury should render a verdict against him. *Ibid.*

4. *Negligence—Fires—Causal Connection—Evidence—Railroads—Logging—Roads.*—Evidence tending to show that defendant, in cutting and removing timber from lands under a timber conveyance, operated a steam train on tramroads through the lands, on the right of way of which straw and other combustible matter had been left by them; that a fire occurred thereon near a locomotive which was fired up and stood at one of these places; that the defendants' employees were seen trying to put out the fire which was spreading from the direction of the locomotive, on both sides thereof, is sufficient upon the issue of defendant's actionable negligence, the causal connection between the fire and its supposed origin, creating a reasonable inference from which the jury may find the issue against, especially when the evidence tended to show that the only fires on the land were those used by the defendant's employees in the operation of the locomotive. *Simmons v. Lumber Co.*, 220.

5. *Same—Presumptions—Res Ipsa Loquitur.*—Where the evidence tends to show that a fire was set out by defendant's locomotive, standing on its tramroad with an inflammable right of way, which spread to plaintiff's land and damaged it, and defendant's employees were the only ones present when the fire originated, the burden is on the defendant to go forward with its proof, if he would show the absence of negligence, which, under the circumstances, is presumed, at least, *prima facie*, the matter being peculiarly within its own knowledge and the engine under its control; and the doctrine of *res ipsa loquitur* applies. *Ibid.*

6. *Negligence—Fire Damage—Evidence—Direction of Wind.*—Where the evidence is conflicting as to whether fire damages claimed in an action against a railroad company came from defendant's locomotive or from another fire for which it is not responsible, plaintiff's testimony as to the direction of the wind at the time, tending to sustain his contention is competent. *Wilkins v. R. R.*, 278.

7. *Negligence—Fire Damage—Cause—Two Fires—Evidence—Trials—Nonsuit.*—Where the plaintiff's evidence tends to show, in an action to recover fire damage to his lands, that the fire originated from defendant's locomotive, and on defendant's behalf, that it was caused by a fire on the west side of the right of way, for which it was not responsible, and that it had put out the fire it had caused, which the plaintiff denied, an instruction is held correct, that if the fire from the west side of the track burned the land, or if the two fires met, and the fire from the engine would not have gone on the land but for the fire from the west side, in either event to answer the issue of negligence in the negative; and a judgment of nonsuit on the theory that the jury could not ascertain which fire caused the injury, is properly denied. *Ibid.*

8. *Negligence—Explosives—Pepsi-Cola—Res Ipsa Loquitur.*—The fact that a bottle of pepsi-cola, filled under pressure, bursted while being handled by a purchaser for resale, and injured him, does not of itself make out a *prima facie* case of negligence against the vendor who had bottled the pepsi-cola, under the doctrine of *res ipsa loquitur*, in the absence of evidence that he had failed in his duty to exercise proper care and attention in selecting the bottles to

be thus used and in subjecting them to the pressure required for the purpose. *Cashwell v. Bottling Works*, 324.

9. *Same—Inspection—Evidence—Prima Facie Case—Trials.*—Where there is evidence that a bottle of pepsi-cola exploded in the hands of a purchaser for resale, and other bottles of the vendor had bursted under similar circumstances; that it was the duty of the vendor's employee, engaged in such work, to inspect the bottles before subjecting them to the pressure required, and it appears that an explosion of bottles so filled does not occur in the largest majority of instances: *Held*, sufficient upon the defendant's actionable negligence in failing to exercise due care in regard to filling and selecting the bottle which exploded and caused the injury, and to raise a *prima facie* case of negligence for the defendant to meet with his proof; and a motion to nonsuit upon the evidence will be denied. *Ibid.*

10. *Same—Change of Management—Appeal and Error.*—Where, upon sufficient evidence, the jury has found that the plaintiff was injured by the defendant's negligence in furnishing him pepsi-cola improperly bottled, testimony admitted in plaintiff's behalf that the management had since been changed, without suggestion that it was because of the negligence of the former manager, who had nothing to do with the bottling of the mixture, is not sufficient to disturb the verdict on appeal. *Ibid.*

11. *Negligence—Contributory Negligence—Evidence—Explosives—Pepsi-Cola.* Where the seller of pepsi-cola has failed in his duty to properly bottle the mixture, and an injury is thereby caused to a purchaser for resale by an explosion of one of the bottles, the circumstances of the injury thus caused are insufficient alone as evidence of contributory negligence on the part of the purchaser. *Ibid.*

12. *Negligence—Proximate Cause.*—Proximate cause does not relate merely to time and space, but is defined to be the natural and continuous sequence of events, unbroken by any new and independent cause, producing the event, and without which it would not have occurred. *Dunn v. R. R.*, 255.

13. *Same—Evidence—Instructions.*—Evidence tending to show that defendant's locomotive ran upon and killed plaintiff's intestate while it was exceeding the speed permitted by the town ordinance, and that otherwise the intestate would have reached a place of safety beyond the track, is sufficient upon the question of proximate cause, and under the circumstances of this case: *Held*, the charge of the court did not prejudice defendant in this regard. *Ibid.*

14. *Negligence—Proximate Cause—Burden of Proof.*—In order to recover damages for an alleged negligent act of another, the plaintiff must show that the defendant was guilty of the act alleged, and that it was the proximate cause of the injury, or from which the damages immediately resulted as the *causa causans*, without which it would not have occurred. *Chancey v. R. R.*, 351.

15. *Negligence—Breach of Duty—Evidence.*—In order to recover damages arising from the alleged negligent act of another, the party injured must show a breach of duty owed to him by the other party. *Money v. Hotel Co.*, 508.

16. *Negligence—Physicians—Surgeons — Skill Required — Rule of Prudent Man.*—The law requires a physician or surgeon, in the practice of his profession, to have and apply that degree of care and skill ordinarily possessed by members of his profession; and he is liable in damages to his patient for any injury proximately caused by his lack of the requisite knowledge and skill, or the omission

to exercise reasonable care, or failure to use his best judgment in his treatment which a practitioner of ordinary prudence would have exercised under the same circumstances. *Mullinax v. Hord*, 607.

17. *Negligence—Contributory Negligence — Parent and Child — Infants — Minors.*—Where a minor sues a physician and surgeon to recover for injuries caused by his alleged want of attention and unskillfulness in treating a wound he had received, contributory negligence on the part of the father, who had called in the surgeon and was acting as father in behalf of his son, cannot be attributed to the latter; and an issue as to contributory negligence resting solely on this ground is not a proper one to be submitted to the jury. *Ibid.*

18. *Same—Evidence—Questions for Jury—Trials.*—In an action against a surgeon for damages alleged to have been caused by his failure to properly treat a patient who had been shot in the foot, evidence tending to show that after he had treated the foot he said no further visit was necessary; that he failed to probe the wound for foreign substances; that a few days thereafter pieces of shoe leather and several shot worked their way out of the wound, causing inflammation, and suppuration ensued, attended with great pain; that, contrary to his diagnosis, the toes of the foot did not properly grow in their natural position, but caused a deformity, and that he did not attend the patient after the first visit, is sufficient to be submitted to the jury upon the question of the defendant's actionable negligence. *Ibid.*

19. *Negligence—Concurring Causes—Damages.*—Where a negligent act, committed by a shipper within a custom permitted by the railroad company, together with the negligent acts of the railroad, concurrently and proximately cause an injury to the latter's employee engaged at the time within the scope of his employment, an action may be maintained against the railroad for the entire damage suffered. *Mumpower v. R. R.*, 742.

20. *Negligence—Separate Parties—Concurrent Cause—Entire Damage—Actions.*—Where the negligence of two parties proximately and concurrently cause a personal injury to a third person, free from blame, he may maintain an action against either of the others for the entire damage. *Wood v. Public Corporation*, 697.

21. *Negligence—Evidence—Other Occurrences—Automobiles.* — Where there is evidence tending to show that the negligent and reckless driving of defendant's automobile caused the plaintiff's horse to throw him from his buggy and injure him, it is competent to show that at the same time and place another horse, being driven ahead of the plaintiff's horse, also became frightened from the same cause, as corroborative evidence that the defendant's automobile was then being negligently and recklessly driven, and as a circumstance tending to show that it was in a manner that would frighten animals. *Conrad v. Shuford*, 719.

22. *Negligence—Evidence—Res Ipsa Loquitur—Trials—Questions for Jury.* The plaintiff was employed by the defendant oil company, among other things, to relieve its power-driven elevator, consisting of a chain with small cups thereon, enclosed in a box, from becoming chocked by overfeed, the method being to remove the excess by hand through a small opening in the box. There was evidence tending to show that whenever the elevator chocked it would throw the belt operating it from the shaft pulley and stop the elevator, but at the time of the injury it failed to do so, owing to defective condition in the fastening of the pulley to the shaft, and caused the injury, the subject of the action, while the

NEGLIGENCE—*Continued.*

plaintiff was removing the seed in the manner indicated. There was conflicting evidence as to whether the plaintiff was in charge of the shafting and pulley, or only required to replace the belt to start the elevator in motion. *Held*, under the evidence and the doctrine of *res ipsa loquitur* applying thereto, the issue of defendant's actionable negligence was for the determination of the jury, and, having been answered by them in plaintiff's favor, under a proper charge, a cause of action is established. *Nixon v. Oil Mill*, 730.

23. *Negligence—Master and Servant—Evidence—Employer and Employee—Inspection—Trials.*—Where there is evidence tending to show that the plaintiff, an employee, was injured by the unexpected running of a piece of machinery connected by belt to a pulley on defendant's power-driven shaft, which was caused by the pulley not revolving with the shaft because the fastening had become ineffective from service; that plaintiff's foreman inspected the machinery daily, which was so placed that he could have seen the defect: *Held*, sufficient to fix the defendant with notice of the imperfection, and hold him responsible for his negligent failure to have known it. *Ibid.*

24. *Negligence—Railroads—Customs—Flying Switch — Contributory Negligence—Trials—Questions for Jury.*—Where a railroad company uses its spur track to manufacturing plants frequently during the day for switching purposes, and upon which for ten years it has permitted employees of its users there to go in between detached cars standing thereon, or to move the same, as required by their shipping; and there is evidence that, in conformity with this custom, and in the course of his duties, one of these employees, after assuring himself of his safety, is injured while moving one of these cars, by defendant's locomotive making a "flying switch" and shunting cars upon that on which he was so engaged, without signal or warning of any kind, and without a man on the car: *Held*, in the employee's action against the railroad, the question of plaintiff's contributory negligence is properly submitted to the jury. under a proper charge, approved in this case, upon the principle that the plaintiff had the right to assume that the defendant's employees on the locomotive would not violate the duty they owed him, or be guilty of negligent acts in this respect that would cause him injury. *Wyatt v. R. R.*, 156 N.C. 313; *Hudson v. R. R.*, 142 N.C. 198, cited and applied. *Wilkinson v. R. R.*, 761.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes, 1, 3.

NEXT OF KIN.

See Wills, 6.

NEWLY DISCOVERED EVIDENCE.

See Appeal and Error, 18.

NEW TRIALS.

See Appeal and Error, 18, 44; Courts, 1; Motions, 1, 2.

NOLO CONTENDERE.

See Criminal Law, 5.

NON RESIDENT.

See Process, 4; Courts, 7.

NONSUIT.

See Master and Servant, 1, 6; Evidence, 6, 13, 25, 27; Railroads, 5, 6, 16; Negligence, 7; Limitation of Actions, 2, 3; Vendor and Purchaser, 20; Appeal and Error, 22; Hotels, 2.

NOTICE.

See Master and Servant, 4; Mechanics' Liens, 1, 2; Carriers of Passengers, 4; Carriers of Goods, 2, 4, 6, 10; Railroads, 3; Municipal Corporations, 5; Courts, 3; Insurance, 5; Drainage Districts, 2, 3; Partition, 1.

NOTICE TO CREDITORS.

See Partnership, 7.

NUISANCES.

See Municipal Corporations, 3.

Nuisance—Abatement—Special Damages—Sickness—Mosquitoes.—An action by an individual to abate a nuisance cannot be successfully resisted on the ground that no special damage to the plaintiff has been shown, when it appears that the nuisance complained of was by defendant causing water to be ponded on adjoining lands, which bred fever-carrying mosquitoes, thereby inflicting sickness on the plaintiff and his family, though others in the community suffered sickness from the same cause. Revisal, sec. 825. *Pruitt v. Bethell,* 454.

OBJECTIONS AND EXCEPTIONS.

See Appeal and Error, 2, 3, 4, 5, 6, 15, 24, 25, 28, 38, 42, 45, 50, 51, 52, 53, 57; Evidence, 24.

OFFICERS.

See Corporations, 1, 13, 17.

OMISSIONS.

See Indictment, 1.

OPINION.

See Master and Servant, 13.

OPTIONS.

See Deeds and Conveyances, 5; Injunctions, Perpetual, 1.

Options—Death of Optionor—Deeds and Conveyances—Statutes—Executors and Administrators.—Where the optionor under contract to convey land or timber thereon dies within the time granted for the optionee to exercise his right to purchase thereunder and before he has done so, the title descends to the heirs at law or the devisee of the optionor; and where the optionee, after the death of the optionor and within the time prescribed, desires to exercise his right to purchase, he must make the proper offer to comply with the conditions of his option to the heirs at law of the optionor, or his devisee in case of a will, and a deed made by the administrator, or executor, without power delegated by the will does not fall within the provisions of Revisal, sec. 83, the statute contemplating conveyance of a bilateral nature, where both parties are bound to its performance by its term. *Mizell v. Lbr. Co.,* 68.

ORDERS.

See Principal and Agent, 2; Master and Servant, 21.

ORDINANCE.

See Municipal Corporations, 2, 9; Railroads, 6; Municipalities, 1.

OUSTER.

See Deeds and Conveyances, 3.

PARENT AND CHILD.

See Negligence, 17.

PARKS.

See Municipal Corporations, 3.

PAROL AGREEMENT.

See Carriers of Goods, 13.

PAROL CONTRACT.

See Carriers of Goods, 8.

PAROL TRUSTS.

See Trusts and Trustees, 1, 2.

PATERNITY.

See Descents and Distributions, 2, 4, 5.

PARTIES.

See Judgments, 2; Reference, 2; Actions, 4; Process, 4; Carriers of Goods, 11; Drainage Districts, 4; Trusts and Trustees, 3; Guardian and Ward, 3.

Parties, Unnecessary—Motions to Strike Out—Demurrer.—Where one who is not a necessary party has been made a defendant to an action upon a warranty in deed, his remedy is on motion to strike out his name, and not by demurrer; and a demurrer by two defendants, with a good cause of action stated as to one, is bad. *Winders v. Southerland*, 235.

PARTITION.

See Judicial Sales, 3.

Partition—Sole Seizin—Defense Bond—Waiver — Motions — Notice — Judgments—Time Extended—Appeal and Error.—Where, upon plea of sole seizin before the clerk, in proceedings to partition lands, the defendant in possession is allowed to file answer without objection, and no demand for the defense bond is made, and the cause has been transferred to the civil issue docket for trial, the defendant is entitled to notice of a motion to strike out the answer and for judgment by default, and when notice has not been given and the motion for judgment allowed, it will be ordered stricken out on appeal and a reasonable time given for the filing of the bond required by law. *Gill v. Porter*, 569.

PARTNERSHIP.

See Vendor and Purchaser, 5.

1. *Partnership—Railroads—Contracts—Timber—Independent Contractor — Fires.*—Where a party owning a timber contract, with the right to operate a railroad thereon, enters into a contract with another to furnish the railroad track and equipment, and with yet another to do the cutting and hauling of the timber, the liability for negligence of the latter in causing damages by fire to the plaintiff's land is not confined solely to him, notwithstanding a clause in the tripartite agreement that he was to do this work as an independent contractor, it appearing therein that each was to be compensated out of the profits, and the liability of each is that arising under a partnership. *Mitchell v. Lumber Co.*, 119.

2. *Partnership—Dissolution—New Agreement — Profits — Individual Liability.*—Where a partnership, A. & B., has been dissolved by the mutual consent of the parties, who thereupon enter into another written agreement, assuming some of the contracts of the former partnership, and changing its name to A. & Co.,

giving the management to A. and providing specifically that B. shall receive "his *pro rata* share of the net profits" of the business, the new arrangement having been signed by both of them, but is in many respects ambiguous or unintelligible: *Held*, by the clear provision of the contract, a partnership has been created, making B. liable for the debts incurred in the business, there being nothing to show the profits were looked to only as a method of compensating B. for services rendered. *Machine Co. v. Morrow*, 198.

3. *Partnership—Evidence of Partnership—Admissions of Partner.*—Where, in an action upon a note given by a partnership, one of the defendants denies he was a member of the firm, his declarations to the contrary made to the witness are competent, as also the testimony of a partner to prove the personnel of the firm, that defendant was a member thereof. *Bank v. Hall*, 477.

4. *Partnership—Evidence—Statement of Solvency.*—Where a defendant denies he was a member of a partnership sued on a note, his letter given to the plaintiff bank making statement showing the solvency of the partnership is competent evidence. *Ibid.*

5. *Partnership—Evidence—Bills and Notes—Renewal — Payment — Intent.* Where defendant denies he was a member of a partnership at the time the firm's note was given, the subject of the action, it is competent, when relevant, to show that the note in controversy was a renewal note, for a renewal note is not a payment of the old note unless so intended by the parties at the time. *Ibid.*

6. *Partnership—Dissolution—Withdrawal of Partner—Evidence — Contradiction.*—Where a partnership note is sued on, and one of the defendants denies that he was ever a partner of the firm, it is competent, in contradiction, to show that he had advertised the dissolution by his withdrawal from the partnership. *Ibid.*

7. *Same—Notice of Creditors—U. S. Mail—Presumptions.*—Where defendant denies liability on a partnership note, the subject of the action, by its having previously been dissolved, and that he had mailed personal notice of its dissolution to the plaintiff, with return card on the envelope, and the letter had not been returned, an instruction is correct, upon the evidence, that if the defendant properly addressed and mailed the notice, it established only a *prima facie* case of that fact. *Ibid.*

8. *Partnership—Requisites.*—It is required, to make a partnership, that two or more persons should combine "their property, effects, labor, or skill," in a common business or venture, under an agreement to share the profits and losses in equal or specified proportions, constituting each member an agent for the others in matters appertaining to the partnership and within the scope of its business. *Gorham v. Cotton*, 727.

9. *Same—Deeds and Conveyances—Lands—Tenants in Common—Executors and Administrators—Distribution—Creditors—Statutes.*—Where two or more persons purchase lands and take a conveyance to the undivided lands to themselves, and have procured the purchase money from a bank on their joint note, with joint and several liability under our statutes (Revisal, sec. 412, 413), in the absence of other evidence, a partnership in the land has not been established, and they take it as tenants in common; and where one of the parties has died insolvent, and his administrator has sold the land to make assets, the other party, having paid his *pro rata* part of the note, may not maintain that the proceeds of the sale was a partnership asset, to be first applied to the partnership debt, for such proceeds are for *pro rata* distribution among the creditors of the intestate, including the plaintiff, under the statutes applicable. *Ibid.*

PASSENGERS.

See Street Railways; Carriers of Passengers.

PAYMENT.

See Reference, 3; Banks and Banking, 1; Carriers of Goods, 16; Insurance, 6; Judgments, 13.

PENALTY.

See Process, 2; Mechanics' Liens, 5; Reference, 4; Carriers of Goods, 11.

PERSONALTY.

See Wills, 8; Guardian and Ward, 3.

PLEADINGS.

See Evidence, 1, 4; Actions, 1; Roads and Highways, 1; Appeal and Error, 13, 28, 45; Limitation of Actions, 1; Judgments, 5, 7, 10; Railroads, 5; Telegraphs, 3; Injunctions, 1, 3; Contracts, 7; Courts, 6, 7; Guardian and Ward, 4; Equity, 4.

1. *Pleadings — Admissions — Judgments — Evidence — Burden of Proof — Trials.*—Where the owner of lands has contracted to convey them, and received a payment on the purchase price, and rendered his performance of his contract impossible by conveying the lands to another; and in the purchaser's action to recover the amount so paid, the payment and amount is admitted by the pleadings; and also therein, that the seller had paid the purchaser a stated smaller sum: *Held*, the doctrine that the burden of proof rests upon each of the parties to sustain their respective allegations, does not extend to admissions, and upon failure of each to introduce evidence, a judgment for the difference in the two amounts is properly rendered for the plaintiff. *Adams v. Beasley*, 118.

2. *Pleadings—Relief—Facts Alleged.*—Under our system of pleadings, the relief demanded in the complaint does not necessarily control the remedy, but it will be ascertained and granted upon the facts alleged and proved. *Shrago v. Gulley*, 135.

3. *Pleadings—Proof—Variance—Statutes.*—In the case of a variance between the allegations of the complaint and the proof upon the trial, the defendant must pursue the remedy prescribed in Revisal, sections 515 and 516, or the variance, under our liberal practice of construction, will be deemed immaterial, under the former section. The allegations of the complaint in this case are held sufficient. *Simmons v. Lumber Co.*, 221.

4. *Pleadings—Demurrer—Carriers of Passengers—Negligence — Proximate Cause.*—Where, in an action to recover damages of a railroad company, the complaint alleges as the ground of the action the defendant's failure to properly light the cars of the train on which he was a passenger; that they were overcrowded, which caused the plaintiff to be robbed of a certain sum of money, the statements made are insufficient to show that the unlighted and overcrowded cars were the cause of the robbery, and it being upon the plaintiff to allege facts from which the proximate cause would appear, and not merely his own opinion, a demurrer to the complaint is good. *Chancey v. R. R.*, 351.

5. *Pleadings — Counterclaims — Interpretations — Allegations, Sufficient — Vendor and Purchaser.*—Upon the principle that, under our Code practice, pleadings should be liberally construed and sustained when it can be seen from their general scope that a party has a good cause of action or defense, though imperfectly alleged, it is held in this action, to recover of the purchaser a balance due

on a cash register, that an answer setting up a counterclaim that it was understood by the parties that it could be used and of service in keeping accounts, but in fact it was worthless and could not be properly worked: *Held*, there is an implied warranty that the machine should be of some value and fit for use, and the counterclaim was sufficiently alleged. *Register Co. v. Bradshaw*, 414.

6. *Pleading—Proof — Substantial Variance — New Cause of Action.* — The liberal construction given to pleadings under our Code system does not avoid the necessity that the proof must correspond with the allegation, for proof without allegation is as unavailing as allegation without proof; and where the difference between the allegation of the pleading and the proof is substantial, so as to grossly mislead the other party, amounting to alleging one cause of action and proving another, it is not allowed. *Talley v. Granite Quarries Co.*, 445.

7. *Same—Fellow-servant—Act—Railroads.*—Where the plaintiff's recovery for damages for a personal injury is confined by the pleadings to an alleged negligent order given by defendant's foreman to plaintiff's coemployees, he will not be permitted to recover upon the theory that defendant had failed to furnish sufficient help for the work then being done; nor, except in suits against railroads, can a recovery be had for damages for a personal injury solely arising from the negligent acts of a fellow-servant. *Ibid.*

8. *Pleadings, Inconsistent—Motions—Procedure.*—Where the plaintiff's reply to the answer is entirely inconsistent with his allegations in the original complaint, the defendant's remedy is by motion to strike out the offending parts of the reply, and usually the objection will not be considered after verdict. *Lindsey v. Mitchell*, 458.

9. *Same—Mechanics' Liens—Vendor and Purchaser.*—One, who, under an agreement with the owner of a building, has had lumber shipped to himself and paid the draft therefor, and the lumber has been used in the building, acquires ownership of the lumber to an extent sufficient to protect his payments; and an allegation of this kind, in his reply to an answer, is not inconsistent with averments in his original complaint to enforce his claim that he had supplied building material which had been used in the building. *Ibid.*

10. *Pleadings — Several Defendants — Admissions as to Some — Trials.* — Where some of the *cestuis que trustent* have acquiesced in a contract made by the donees of a power under a will, and thereafter they bring action to set the transaction aside, on the ground that the power had been exceeded, in which the other *cestuis que trustents* are afterwards made parties defendant and admit the allegations of the complaint: *Held*, the admissions made by the defendants, *cestuis que trustents*, do not bind their codefendant, and the latter are entitled to have the jury pass upon the issues raised by them. *Barbee v. Penny*, 571.

11. *Pleadings—Definiteness—Motions.*—Where the complaint sufficiently alleges the negligent acts of the defendant, concerning which damages are claimed in an action to recover for a personal injury, the defendant should ask that the pleadings be made more definite or certain, if such information is required for his defense. *Mullinax v. Hord*, 607.

12. *Pleadings—Special Damage—Allegations—Automobiles.*—While special damages are required to be pleaded, the rule is not so restrictive as to necessitate special averment of all the particulars of a general damage from an injury alleged to have been negligently inflicted; and where the plaintiff alleges that the negligent or reckless driving of the defendant's automobile frightened his horse

PLEADINGS—*Continued.*

and caused him to be thrown from his buggy, severely injuring his back, etc., it is sufficient for the introduction of his evidence that a wen on his back was bruised by the fall and became inflamed and very painful and troublesome, and should the defendant desire a more definite statement he should ask for a bill of particulars. *Conrad v. Shuford,* 719.

PLEAS.

See Criminal Law, 4; Limitation of Actions, 5, 6.

PLEDGE.

See Evidence, 13.

POLICIES.

See Insurance, 1, 3, 4, 7, 9, 10, 11.

PONDING WATER.

See Water and Watercourses, 1.

POSSESSION.

See Mortgages, 1; Limitation of Actions, 9; Costs, 2.

POWERS.

See Wills, 20; Trusts and Trustees, 3.

PRECATORY WORDS.

See Wills, 16.

PREJUDICE.

See Jury Drawing, 1; Courts, 8.

PREMEDITATION.

See Homicide, 1.

PREMIUM.

See Insurance, 2.

PRESUMPTIONS.

See Process, 1; Appeal and Error, 11, 31, 34, 41; Negligence, 5; Partnership, 7; Master and Servant, 17; Insurance, 10; Railroads, 12, 19; Verdicts, 5.

PRIMA FACIE CASE.

See Vendor and Purchaser, 5, 9; Judgments, 11.

PRINCIPAL AND AGENT.

See Carriers of Passengers, 2; Municipal Corporations, 2; Husband and Wife, 2; Evidence, 8, 17; Vendor and Purchaser, 9; Corporations, 9, 13, 15, 17.

1. *Principal and Agent—Evidence—Fraternal Orders—Scope of Agency—Fences.*—The defendant, a fraternal order, owned a farm enclosed with the same fence as that of plaintiff, without a division fence, which had remained so for a number of years. The farm of defendant was managed by a board of non-resident trustees, except one, who acted as managing agent thereof. *Held,* evidence of an agreement made by the defendant's managing agent that defendant was to maintain the fences around its part of the property and plaintiff was to do likewise as to the fence on his own land is competent to bind the defendant thereto, the same being within the ostensible scope of the authority of defend-

PRINCIPAL AND AGENT—*Continued.*

ant's agent, without the necessity of a specific resolution to that effect passed by the defendant fraternal order. *Dixon v. Grand Lodge*, 139.

2. *Principal and Agent—Vice-Principal—Negligence—Orders—Employer and Employee.*—A negligent order of a vice-principal which proximately causes an injury to an employee in its execution, without contributing cause on his part, may be actionable against the employer, though the machinery and place of work may be all that is required; and the negligent omission of the vice-principal to warn the employee of a danger apparent to him and not to the employer, having opportunity to do so, may also become actionable against the employer. *Howard v. Oil Co.*, 651.

3. *Same—Evidence—Questions for Jury—Trials—Contributory Negligence.* An inexperienced employee at a cotton-oil mill was injured while at work at a linter machine for preparing the cotton seed for manufacture into oil, by passing them through rapidly revolving power-driven circular saws on a cylinder, protected by an outer covering, operated by levers when the clyinder is removed for the purpose of sharpening the saws. In the employee's action against the company there was evidence tending to show that he and his vice-principal were preparing to remove the cylinders, the plaintiff not being in position to see that the saws were revolving; that the vice-principal's position was such that he could see them when he said, "Let's get them out," and in consequence the plaintiff put his hand into the machine and received the injury complained of: *Held*, sufficient of defendant's actionable negligence to take the case to the jury, and, if the facts are found in accordance with the evidence, to free the plaintiff of the charge of contributory negligence. *Ibid.*

PRINCIPAL AND SURETY.

See Public Policy, 1.

PRINTED RECORD.

See Appeal and Error, 44.

PRIORITY.

See Reference, 3.

PRIVIES.

See Judgments, 2.

PRIVILEGE.

See Slander, 6.

PROCESS.

See Limitation of Actions, 5, 6; Motions, 3; Courts, 7; Insurance, 15; Corporations, 15, 16.

1. *Process—Summons—Sheriff's Returns—Presumptions—False Returns—Evidence—Statutes.*—The sheriff's return showing service of summons on defendant in an action, in this case proceedings to establish a drainage district, is taken as *prima facie* correct, and may not be successfully attacked by motion in the cause, except by clear and unequivocal evidence, requiring the testimony of more than one person, to overturn the official return of the officer. Revisal, sec. 1529. *Commrs. v. Spencer*, 36.

2. *Process—Summons—False Returns—Penalty—Damages—Actions.*—For making an incorrect or false return of service of summons, the sheriff is liable to an action by the injured party for the penalty of $500 and for damages. *Ibid.*

3. *Process—Summons—Sheriff's Returns—False Returns—Declarations—Evidence.*—Declarations of a party defendant that a summons in an action had

PROCESS—*Continued.*

not been served on him, contrary to the sheriff's returns, is incompetent as hearsay evidence and insufficient to overturn the endorsement of service made by the sheriff, and especially is such evidence incompetent when it is in the negative form. *Ibid.*

4. *Process—Nonresidence—Parties—Service in State.*—The principle which protects nonresident suitors and witnesses from service of civil process while in attendance on the courts of this forum is for the purpose of enabling the courts the better to administer full and adequate justice in a cause pending before it, and does not extend to cases where the litigant or witness comes within the jurisdiction for his own private purposes or personal advantage, as where, after the issues have been determined, the party has returned to attend a judicial sale to protect his interest thereat. *Brown v. Taylor*, 423.

PROCESSIONING.

See Costs, 1.

PROFITS.

See Partnership, 1; Corporations, 2.

PROHIBITION.

See Intoxicating Liquors, 5.

PROMISE TO PAY.

See Limitation of Actions, 11.

PROMOTERS.

See Corporations, 7.

PROOF.

See Pleadings, 3, 6; Evidence, 2, 20.

PROXIMATE CAUSE.

See Master and Servant, 1; Negligence, 2, 12, 14; Municipalities, 1; Pleadings, 4; Railroads, 15.

PUBLIC OFFICERS.

Public Officers—Qualifications, Recommendatory—Statutes — Courts. — The provision in a statute that township highway commissioners shall be selected for their fitness, and not for political faith, and to remove the position from partisan politics, one each of the two members to be elected shall, "so far as feasible and practicable, come from each of the two leading political parties of the township," is too indefinite and uncertain to affix a qualification to the position, being recommendatory only to the voters, whose action is not reviewable by the courts. *Cole v. Sanders*, 112.

PUBLIC POLICY.

See Vendor and Purchaser, 1.

Public Policy—Contracts—Statutes — Principal and Surety — Estoppel. — A bond guaranteeing the performance of a "trade expansion contract" which is contrary to our statute against lotteries and gift enterprises (Rev., 3726), and the public policy of our State *(Mfg. Co. v. Benjamin's Sons*, 172 N.C. 53) is as unenforcible against the surety thereon as the contract upon which it is founded, and the defendant surety, in an action on the land cannot be estopped, in pleading his defense, upon the ground that by reason of the endorsement of the surety the plaintiff was induced to part with his money. *Basnight v. Mfg. Co.*, 206.

PUBLIC ROADS.

See Roads and Highways.

PUBLIC SCHOOLS.

1. *Public Schools—Taxation—Statutes—Judicial Questions—Courts — Constitutional Law.*—Where the amount required by special tax levy for the maintenance of a four-months term of public school is in dispute between the county board of education and the county commissioners, which, by proper action, is left to the determination of the judge holding the courts of the district, etc., the powers conferred on the judge is of a judicial nature to determine a disputed fact relevant to a pending issue between the two boards, to be levied and collected by the usual and ordinary administrative and executive officers of the county government, and such power does not render the statute unconstitutional. *Board of Education v. Board of Commissioners*, 469.

2. *Public Schools—Taxation—Special Tax — Constitutional Law.* — The requirement of Article IX, sec. 3, of the Constitution, for a four-months term of public schools are imperative, and not restricted by section 5 as to the amount of tax levies for ordinary State and county purposes. *Ibid.*

3. *Public Schools—High Schools—Special Tax — Statutes — Constitutional Law.*—Chapter 820, Laws 1907, and subsequent amendatory acts, under the provisions of which high schools may be established and made a part of our public-school system, under regulation and control of the public-school authorities, and extending to all portions of the State, is within the intent and meaning of our Constitution, Art. IX, sec. 1, declaring that knowledge is necessary to good government and happiness, and that "schools and means of education should be forever encouraged"; section 2, directing taxation by the Legislature "for a general and uniform system of public schools," free of charge to the children of the State, "between the ages of 6 and 21," etc.; and such act is therefore constitutional and valid. *Ibid.*

4. *Same—Uniform System.*—The requirement of section 2, Article IX of our Constitution, that our public-school system shall be uniform by legislative authority, relates to the uniformity of the "system," and not to the uniformity of the class or kind of the "schools"; and thus qualifying the word "system," it is sufficiently complied with where, by statute or authorized regulation of the public-school authorities, provision is made for establishment of schools of like kind throughout all sections of the State and available to all of the school population of the territories contributing to their support. *Ibid.*

5. *Same—County High Schools.*—County high schools, which are parts of our public-school system, within the meaning of our Constitution, are entitled to have a special allowance made to them in the yearly estimate of the county board of education for a four-months term (Constitution, Art. IX, sec. 3); but it is otherwise as to a school which is in strictness one of a town or city, governed by local authority and accessible only to the school population of the specified district, for such is not a part of our public-school system; and this class of high schools may only receive their *per capita* or *pro rata* share of the estimate according to average and actual attendance and according to the provision of the statute: or authoritative regulations applicable. *Ibid.*

6. *Same—City or Town High Schools.*—The provisions of chapter 820, Laws 1907, that for towns or cities of more than 1,200 inhabitants a public high school may be approved by the county board of education, under contract, to be again approved by the State Board of Education, stipulating, among other things, that the school shall be available to students resident outside the district, etc., must

PUBLIC SCHOOLS—*Continued.*

be shown to exist, for such schools receive the benefit of the special tax in conducting a four-months term of the school. *Ibid.*

PUBLIC SERVICE.

See Telephone Companies, 1.

PUNISHMENTS.

See Criminal Law, 6, 7.

PUNITIVE DAMAGES.

See Malicious Prosecution, 2; Appeal and Error, 2; Railroads, 14.

PURCHASE.

See Wills, 23.

PURCHASER.

See Corporations, 1; Statutes, 1; Judicial Sales, 3.

PURCHASE PRICE.

See Equity, 1.

QUALIFICATIONS.

See Public Officers.

QUANTUM MERUIT.

See Contracts, 14, 18.

QUESTIONS FOR JURY.

See Contracts, 1; Carriers of Goods, 5; Master and Servant, 11, 13; Vendor and Purchaser, 4, 10, 17; Insurance, 5; Railroads, 10, 12, 18; Usury, 3; Street Railways, 1; Negligence, 18, 22, 24; False Imprisonment, 1; Principal and Agent, 3; Automobiles, 1.

QUESTIONS OF LAW.

See Appeal and Error, 23.

QUO WARRANTO.

See School Districts, 1.

RAILROADS.

See Carriers of Goods; Carriers of Passengers; Evidence, 3; Negligence, 4, 24; Master and Servant, 14; Pleadings, 7; Street Railways, 1.

1. *Railroads—Lessor and Lessee—Negligence—Fires.*—Where the owner of a railroad on the lands of another under a timber contract agrees that yet another should cut the timber and haul the same over the railroad, and have control over its operation, fixing the compensation of each out of the profits, the arrangement amounts to a lease of the railroad property, making the lessor responsible in damages caused by lessee's negligence in setting fire to the plaintiff's lands.—*Mitchell v. Lumber Co.*, 119.

2. *Railroads—Master and Servant—Public Crossings—Flagman—Interstate Trains—Commerce.*—The plaintiff was employed by the defendant railroad company to warn with flags by day, and with a lantern by night, pedestrians of approaching trains at a public crossing in a town, and by signaling to the engineer of an approaching train, and to coöperate with him in the movement of the train before making the crossing, so as to prevent injury to the persons on the train and the people using the crossing. There was conflicting evidence, and the

plaintiff, having thus coöperated with the conductor on an interstate train, was injured by the defendant's negligence when he had crossed the platform on this train and was on the lowest step of the car in the performance of his duty on the other side, with reference to a second track there. Upon the trial in the State Court under the Federal Employers' Liability Act, the evidence is sufficient upon the question of employment in interstate commerce, and to sustain a verdict in plaintiff's favor thereunder, or under our own statute of like effect. Laws of 1913, chap. 6. *West v. R. R.*, 125.

3. *Railroads—Commerce—Bills of Lading — Stipulations — Written Notice —Federal Decisions—State Courts.*—A stipulation in an interstate bill of lading for a shipment of furniture, requiring that a claim for loss or damage must be made in writing to the carrier at the point of delivery or at the point of origin, within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed, is held reasonable and valid, following the decision of the highest Federal Court, which is controlling, in such instances, in the State courts; and when such notice has not been given within the time stated, damages for injury to the shipment will be denied in the courts of the State; and a notation by checking on the freight receipt, made by the agent of the delivering carrier and given to the consignee, is not a compliance with the stipulation stated. *Taft v. R. R.*, 211.

4. *Railroads—Employer and Employee — Master and Servant — Commerce —Repairing Track—Federal Act.*—An employee injured by defendant's negligence while engaged in replacing cross-ties in a spur track of a railroad used in interstate commerce, the spur leading to a warehouse from which such shipments were received for transportation, and at the time a train of this character awaited the use of the spur, is held to be engaged in interstate commerce at the time of the injury, within the meaning of the Federal statute, and may maintain his action thereunder. *Cherry v. R. R.*, 263.

5. *Railroads—Negligence—Fire Damage — Pleadings — Burden of Proof — Nonsuit.*—In an action for damages against a railroad company for negligently setting fire to plaintiff's lands, allegations in the complaint that the fire started from defendant's locomotive on its foul right of way, etc., is sufficient to include, as its origin, sparks thrown from the engine cab, and a judgment of nonsuit will not be granted upon the ground that such acts of defendant's employees were unauthorized, for the burden in such respect is upon defendant to show the exercise of due care to avoid the injury. *Wilkins v. R. R.*, 278.

6. *Railroads—Carriers of Passengers—Ordinances—Speed Limits — Negligence—Nonsuit—Trials.*—The running of a train within a town at a speed in excess of that allowed by law is negligence *per se*, and not merely evidence thereof; and where the intestate of plaintiff has been killed by the train while violating such ordinance, a judgment of nonsuit depending upon the absence of defendant's negligence alone, will be denied. *Dunn v. R. R.*, 254.

7. *Railroads—Lumber Roads—Independent Contractors—Evidence—Fires.* In an action to recover fire damages to lands, defended under the doctrine of independent contractor in operating a steam-driven train, the principle relied on can have no application if the fire originated by sparks from the locomotive falling upon a foul right of way of the defendant, and especially is the doctrine not applicable when the jury have found under the evidence and a proper instruction that under an agreement between them the defendants were coprincipals. *Bryant v. Lumber Co.*, 360.

RAILROADS—*Continued.*

8. *Railroads—Lumber Roads—Lessor and Lessee—Negligence.*—A lumber road used for hauling logs, etc., operated under a *quasi*-public franchise, hauling freight for third persons, for hire, may not be leased to another so as to relieve the lessor of responsibility for the negligence of the lessee in its operation, except by express legislative sanction. *Ibid.*

9. *Same—Master and Servant—Employer and Employee—Scope of Employment—Evidence.*—Where there is evidence that defendant's defective locomotive, traveling over defendant's foul right of way, set out sparks by which fire damage was caused to plaintiff's land, and that at the time it was in charge of defendant's general manager and answering an urgency call from another of defendant's engines to aid in putting out fires on other lands, it is sufficient to show that the employees on the train were acting within the scope of their employment, especially when there are pertinent facts in evidence which permit the inference that in helping their neighbors they were also acting in protection of the defendant's own property. *Ibid.*

10. *Railroads—Negligence—Fires—Evidence—Questions for Jury—Trials—Burden of Proof.*—Evidence tending to show that a fire started on top of an embankment the height of a locomotive smokestack, and a short distance from the track, the wind blowing therefrom, soon after defendant railroad company's train had passed; that there was no other fire on the opposite side of the track, is sufficient to be submitted to the jury upon the defendant's negligence in setting out the fire; and if the jury should find accordingly, it would be incumbent on defendant to satisfy them that its engine was equipped with a proper spark-arrester, in good condition, properly operated by a competent engineer, and that the right of way where the fire started was reasonably clear and free from combustible matter. *Broadfoot v. R. R.*, 410.

11. *Railroads—Street Railways—Concurring Negligence—Pedestrians—Last Clear Chance—Contributory Negligence.*—A pedestrian should be observant for his own safety before crossing a street car track; and where he is familiar with the car schedules and the location of the track, and walks along the track and turns into contact with a rapidly running car, with a headlight and lights within the car, his negligence, if the car was running at an excessive speed, concurs with that of the company's negligence, if any, continuing to the time of the injury, and will bar his recovery; and the doctrine of the last clear chance has no application. *Ingle v. Power Co.*, 172 N.C. 751, cited and distinguished. *Boyles v. R. R.*, 621.

12. *Railroads — Negligence — Presumptions—Statutes—Evidence—Trials — Questions for Jury.*—The statutory presumption that the killing of plaintiff's cow by a backing railroad train was negligently done, when action has been begun in six months, is not eliminated by evidence tending to show the cow, separated from the herd, ran into the train, and the question is for the determination of the jury, in an action to recover the resulting damages. *Briley v. R. R.*, 785.

13. *Railroads—Evidence—Fellow-servant Act — Negligence.* — A standard-gauge railroad track, over which defendant's contractor hauls material to be used in building a large manufacturing plant for defendant by means of a "dinkey," and over which the defendant uses a "speeder," the size of a hand-car and operated by gasoline, to carry its employees to and from their work, is a railroad, in contemplation of the Fellow-servant Act; and where an employee has been injured by the negligence of the one operating the speeder, the defense that the injury was caused by the alleged negligence of a fellow-servant and no recovery can be had, is not available. *Twiddy v. L. Co.*, 154 N.C. 237, cited and distinguished. *Goodman v. Power Co.*, 661.

RAILROADS—*Continued.*

14. *Railroads—Flag Stations—Failure to Stop Train—Actual Damages—Punitive Damages.*—The failure of a freight train to stop upon signal at a flag station for passenger trains only will not render the railroad company liable in damages; and where such are allowable, punitive damages cannot be recovered unless the engineer willfully refused to stop upon being signaled, or failed to do so under circumstances showing gross negligence. *Brown v. R. R.*, 694.

15. *Railroads—Flag Stations—Failure to Stop Train—Damages—Proximate Cause—Negligence.*—The actual damages recoverable upon the negligent failure of a train to stop upon being signaled at a flag station must be those proximately caused by the defendant's negligence; and where the plaintiff has knowingly, on a dark night, returned along the railroad track and was injured by falling into a cattle-guard, which is often necessary to be maintained (Revisal, 2601), instead of taking a public road conveniently located, her falling into the cattle-guard will be attributable to her own negligence, and the defendant will not be held responsible for the resulting injury. *Ibid.*

16. *Railroads—Evidence—Nonsuit — Issues — Last Clear Chance.* — Where there is evidence tending to show that the plaintiff's intestate had been employed by the contractor of defendant railroad company for the building of a temporary bridge over a river for the passage of its trains; that owing to a break in the coffer dam the plaintiff was required to work until 4:25 in the morning, when he laid some boards from a chute to the main track, and was lying down thereon, either asleep or dulled by fatigue, when he was run over and killed by defendant's train, approaching at the speed of 4 miles an hour upon a straight track for 300 or 400 feet, with a dim headlight, upon the lighted bridge: *Held*, a motion to nonsuit was properly denied, and the case was correctly submitted to the jury upon the issues of negligence, contributory negligence, and the last clear chance. *McManus v. R. R.*, 735.

17. *Railroads—Negligence—Last Clear Chance.*—In the application of the doctrine of the last clear chance to railroads when the injury complained of has been received by a person down upon the track in front of an approaching train, it does not require that the person so injured should have been unconscious at the time, for it may be presented, in proper instances, when the claimant is in a position of such peril that ordinary efforts on his part will not avail to extricate him. *Ibid.*

18. *Railroads—Negligence—Evidence—Questions for Jury—Trials.*—Where there is evidence tending to show that the plaintiff's intestate, an engineer on defendant's locomotive, was killed by a runaway car from defendant's siding, on a steep mountain grade, coming into collision with his train on the main line; that the car got away from a shipper on the siding when moving it according to an established custom; that the brake-shoes on this car were insufficient, and the defendant had provided a defective derailer, which failed to work, and that the intestate's train was running backward for the failure of defendant to provide a "wye" or turn-table, and without proper lookout to warn him of the danger, which he could probably have averted by jumping, had the train been properly run with the locomotive ahead, or upon warning given: *Held*, sufficient, upon the issue of defendant's actionable negligence. *Mumpower v. R. R.*, 742.

19. *Railroads—Negligence—Collisions—Presumptions—Burden of Proof.*—The death of plaintiff's intestate, an engineer on defendant's locomotive, caused by a collision with another car running wild into his train from a siding, raises a presumption of defendant's negligence, with the burden on defendant to disprove it, and carries the case to the jury. *Ibid.*

REFERENCE.

1. *Reference—Exceptions—Trial by Jury—Issues—Waiver.*—A party who has excepted to a compulsory reference and to the report of the referee must also file the issues upon which he demands a trial by jury; and when he does so after the report has been filed and received, without leave of court, it is too late to preserve the right to a jury. *Godwin v. Jernigan*, 76.

2. *Reference—Consent—Agreements—Mechanics' Liens — Creditors' Bill — Parties—Contracts—Amounts Due—Pro Rata Distribution—Statutes.*—Where, in an action by the contractor against the owner of the building to recover an amount alleged to be due him, the matter is referred, with the consent of the parties, containing a provision that any amount due by or in the hands of the defendant shall be applied to the debts incurred in the construction and completion of the building, arising out of labor, services or material that went into such construction, etc.: *Held*, the claimants enumerated, by presenting and filing their claims with the referee, made themselves parties, as in a creditor's bill, and thereafter could acquire no preference by filing their claims with the owner (Rev., secs. 2019, 2020, 2021, 2022, 2023), and are bound by the agreement making the amount ascertained to be due into a trust fund for *pro rata* distribution. *West v. Laughinghouse*, 215.

3. *Same — Priority — Payment — Confirmation—Final Judgment —Owner's Risk.*—Where it is agreed in a consent reference that the amount ascertained to be due a contractor for the building shall be distributed *pro rata* among the laborers, material men, etc., the report of the referee is subject to modification before its confirmation, and before final judgment to be set aside for good cause shown; and the owner paying out the funds in preference to some of the creditors contrary to the terms of the agreement, does so at his own proper risk. *Ibid.*

4. *Reference—Consent Order—Agreement—Mechanics' Lien — Contracts — Penalty—Damages—Lienors.*—Where, under a consent reference, binding upon the parties, it has been agreed that the amount due from the owner under the building contract to the contractor, shall constitute a fund to be divided between claimants, who furnished material and laborers on the building, etc., and there is provision for damages to the owner for delay in the completion thereof, by the express terms of the agreement to refer, the owner is entitled to his damages before the distribution of the funds, and the claimants may not successfully contend that this damage was a personal charge against the contractor, and that it should not be allowed in preference to their claims. *Ibid.*

5. *Reference—Exception—Waiver.*—Where a party to an action excepts to a compulsory reference, he must specifically except in apt time to each of the findings of the referee, and demand a trial by jury thereon, when he desires such trial, and submit issues upon which he demands the trial by jury, or he will be deemed to have waived such right. *Robinson v. Johnson*, 232.

6. *Same—Confirmation Order—Appeal and Error.*—Exceptions taken alone to the rulings of the trial judge upon exceptions to the referee's report, without exception aptly and properly taken to the referee's findings, will not be considered on appeal. *Ibid.*

7. *Reference—Exceptions—Trial by Jury—Waiver.*—A party who has excepted to the report of a referee may not have the judge pass upon his exceptions, without objection, and then demand that proper issues covering his exceptions be submitted to the jury for determination if the decision is unfavorable, for such is a waiver of his constitutional right thereto. *Loan Co. v. Yokley*, 574.

REFERENCE—*Continued.*

8. *Reference — Account — Statutes — Trial by Jury — Appeal and Error.* — Where the controversy involves the taking of a long account, it should be referred under the provisions of Revisal, sec. 519; but where, as in this case, it has otherwise been tried, without error or prejudice to the appellant, the judgment of the lower court will not be disturbed. *Ragland v. Lassiter*, 579.

RATIFICATION.

See **Corporations, 17.**

REBUTTAL.

See Appeal and Error, 11.

RECEIVERS.

See Corporations, 11.

RECONVERSION.

See Equity, 4.

RECORDS.

See Drainage Districts, 14; Appeal and Error, 41.

RECORDER'S COURT.

See Slander, 2.

REDEMPTION.

See Equity, 1.

REFERENCE.

See Appeal and Error, 29; Instructions, 4; Limitation of Actions, 12.

REFORMATION.

See Equity, 2, 3; Vendor and Purchaser, 2; Contracts, 4; Evidence, 5.

REHEARING.

See Appeal and Error, 44.

RELEASE.

See Carriers of Goods, 14.

RELIEF.

See Pleadings, 2.

REMAINDERMAN.

See Wills, 14, 23.

REMARKS.

See Instructions, 2.

RENEWAL.

See Partnership, 5.

REORGANIZATION.

See Corporations, 1, 3; Statutes, 1.

REPLEVY BOND.

See Claim and Delivery, 1.

REPRESENTATIONS.

See Vendor and Purchaser, 1.

REPUDIATION.

See Contracts, 11.

RES IPSA LOQUITUR.

See Negligence, 5, 8, 22; Evidence, 29.

RESIDUARY LEGATEE.

See Wills, 6.

RETURNS.

See Process, 2, 3.

REQUESTS.

See Instructions, 3.

REVISAL.

(See various headings of subjects for greater accuracy.)

SEC.

83. Optionee under contract to convey timber must make proper tender to optionor's heirs or devisee of land after the latter's death, and deed of personal representative is ineffectual. *Mizell v. Lumber Co.*, 68.

132. Widow of deceased son, in the distribution of the proceeds of lands sold under the will, is regarded an heir, in the absence of children, and entitled to one-half of her deceased husband's share. *Everett v. Griffin*, 106.

211. An attorney may be disbarred upon repeatedly violating the Prohibition Law. *McLean v. Johnson*, 345.

370. Grantee of plaintiff in action for lands is insufficient after nonsuit to repel bar of statute. *Quelch v. Futch*, 395.

370. The statute giving one year after nonsuit is in addition to the statute of limitation applicable to the action. *Hines v. Lumber Co.*, 294.

395(b). Action against guardian filing no final account is barred, at farthest, three years after ward's coming of age or three years from default. *Anderson v. Fidelity Co.*, 417.

412, 413. Persons giving joint note to bank for purchase money of lands does not alone create a partnership. *Gorham v. Cotton*, 727.

440. Statute not suspended against surety on guardian bond upon which statutory service could have been made. *Anderson v. Fidelity Co.*, 417.

440(1). Service made on bonding companies authorized by section 4805. *Pardue v. Absher*, 676.

478. Objection for misjoinder must be taken by answer of demurrer. *Godwin v. Jernigan*, 76.

479(1). Upon denial of title in processioning proceedings, and cause transferred without objection, and plaintiff's title admitted, he may recover costs, including witnesses', except those neither tendered or sworn. *Staley v. Staley*, 640.

507. Where plaintiffs alleges joint ownership of lumber and sue for damages for its destruction, the court may permit one of them to withdraw upon finding the other was the owner, and permit the latter to amend pleadings and continue with the case. *McLaughlin v. R. R.*, 182.

507. The Superior Court, on appeal, has power to make another carrier a party, in action for penalty, though amount claimed is less than $200. *Hosiery Mills v. R. R.*, 449.

515, 516. The statutory remedy must be followed upon variance between allegation and proof. *Simmons v. Lumber Co.*, 220.

519. Judgment will not be disturbed when case should have been referred, but has properly been tried. *Ragland v. Lassiter*, 579.

REVISAL—*Continued.*

SEC.

536. An instruction that the jury should reconcile the evidence, and if they could not agree "the court would have to do something else," is not an expression of opinion. *Nixon v. Oil Mill*, 731.

791. In claim and delivery with counterclaim, courts may make adjustment. *Semble*, plaintiff should set forth special interest in property. *Cooper v. Evans*, 412.

807, 808, 809. These sections do not deprive the courts of power to require a bond in injunction to preserve mortgage securities against trespass for cutting timber trees, etc. *Stewart v. Munger*, 402.

825. Special damages are shown from ponding water which breeds mosquitoes, causing sickness in plaintiff's family, though sickness is thus caused to others. *Pruitt v. Bethell*, 454.

836. Injunction in *quo warranto* will not be permitted to try title to public office. *Rogers v. Powell*, 388.

865, 867. Examination of adverse party to an action may be introduced by either party. *Phillips v. Land Co.*, 542.

952. Married woman's deed to her lands, and only acknowledged by her husband as grantor after her death, etc., is inoperative. *Hensley v. Blankinship*, 759.

1131. A deed to a corporation with mortgage immediately taken to secure the purchase price, and lands conveyed to corporations with mortgage thereon, the mortgages are superior to statutory liens for labor, etc. *Humphrey v. Lumber Co.*, 514.

1160, 1161. Money payment is ordinarily required for certificates of stock in corporation on organization, except true value of property taken in judgment of directors, the value thus formed being conclusive in absence of fraud. *Goodman v. White*, 399.

1206, 1207. Deed to corporation with immediate mortgage to secure purchase price, or the deed subject to prior mortgage, the mortgage is superior to statutory liens. *Humphrey v. Lumber Co.*, 514.

1226. Lands of corporation acquired subject to mortgage, the mortgage is superior to cost of receivership. *Ibid.*

1238, 1239, 1240, 1241. Purchaser at sale under decree of court may acquire the corporate franchise as an asset, and continue business thereunder without changing seal or determining upon a different amount of capital; and when continued as corporation *de facto* there is no individual liability. *Wood v. Staton*, 245.

1243. Service on foreign insurance company may be made under this section and not restricted by section 4750. *Pardue v. Absher*, 676.

1243. Statute not suspended against surety on corporation on guardian bond upon whom statutory service of process may have been made. *Anderson v. Fidelity Co.*, 417.

1264. A stakeholder who demurs to complaint and does not preserve strict neutrality is liable for costs, including costs for guardians *ad litem* for infant parties. *Van Dyke v. Ins. Co.*, 78.

1264(1). Upon denial of title in processioning proceedings and cause transferred without objection, and plaintiff's title admitted, he may recover costs, including witnesses', except those neither tendered or sworn. *Staley v. Staley*, 640.

REVISAL—*Continued.*

SEC.

1318(7). Township boundaries are under statutory control of county commissioners, and ch. 6, sec. 20, Laws of 1917, does not create the commissioners as agents of townships to give the bond of the township. *Commissioners v. State Treasurer*, 141.

1419. Justice of the peace has jurisdiction in contract when summons demands, in good faith, $200, though greater amount may have been demanded. *Shoe Store Co. v. Wiseman*, 716.

1451. This section is not jurisdictional to justice of the peace courts as to nonresident and giving ten days on special appearance, with refusal, the justice of the peace may enter valid judgment. *Bank v. Carlile*, 624.

1467. Omission of defendant's name in complaint does not render indictment invalid if complaint and warrant, read together, are sufficient. *S. v. Poythress*, 809.

1504. Clerk has no power, upon survey made in action, to make allowance for surveyor, but the court may thereafter do so. *Cannon v. Briggs*, 740.

1529. Sheriff's endorsement of service on summons requires unequivocal evidence to show to contrary or the testimony of more than one person. *Commissioners v. Spencer*, 36.

1556. Rule 13, does not validate cohabitation of former slaves, but permits colored children born before 1868 to inherit from parents. *Croom v. Whitehead*, 305.

1556. In the transmission of inheritance from an illegitimate *propositus* to a collateral relation through the mother, the survival of the mother is a condition precedent. *University v. Markham*, 338.

1578. A devise limiting an estate to the "heirs of the body," etc., held in this case to come within the provisions of this section. *White v. Goodwin*, 723.

1590. Superior Courts, in equity, may order sale of contingent interests of infants in land and preserve proceeds in conformity with donor's intent, etc. *Smith v. Witter*, 616.

1625. This section includes account rendered by correspondence school. *University v. Ogburn*, 427.

1631. Testimony of transaction with deceased that the latter was to be taken care of in consideration of a devise of lands is incompetent. *Brown v. Adams*, 490.

1798. Clerks of courts may not order sale of contingent interests of minors in lands. *Smith v. Witter*, 616.

1859, 1863. Jury drawn twenty days before commencement of term under the former section will not avoid verdict where parties have not been prejudiced, being irregular at most. *Lanier v. Greenville*, 311.

1863. Sheriff is used in generic sense, including deputies. *Ibid.*

1896, 1897. Clerks of court may not order sale of contingent interests of lunatics in lands. *Smith v. Witter*, 616.

1951. Taking illegal rate of interest, or reserving it, with corrupt intent is usury. *Loan Co. v. Yokley*, 573.

1954. Interest in subscription to stock in proposed corporation runs from the time payment is due. *Chatham v. Realty Co.*, 671.

1967. Judge may direct sheriff to summons a tales jury to try a case coming up after the regular panel for the term has been discharged. *S. v. Manship*, 798.

REVISAL—*Continued.*

SEC.

1981(a). Employment of children under 12 years of age at factory with knowledge of owner or superintendent is a misdemeanor, and the presumption is against contributory negligence. *Evans v. Lumber Co.*, 31.

1981(b) (Pell's). An instruction which ignores the *prima facie* presumption that 13-year-old employee is not guilty of contributory negligence is erroneous. *Hauser v. Furniture Co.*, 46.

2019, 2020, 2021, 2022, 2023. Lienors who come into a reference in action between contractor and owner, agreeing that amount due be prorated, can acquire no preference under the statutes. *West v. Laughinghouse*, 214.

2055. No particular form is required for agricultural lien, but substantial conformity and intent of instrument is sufficient. *Jones v. McCormick*, 82.

2061. A cattle-guard maintained by railroad affords no evidence of its negligence. *Brown v. R. R.*, 694.

2081. Widow dissenting takes as if her deceased husband died intestate. *Corporation Commission v. Dunn*, 679.

2151 (ch. 54). Proof of endorsement of negotiable instrument must be shown when denied. *Surety Co. v. Pharmacy*, 655.

2553. An increased bid made after motion of purchaser for confirmation does not defeat his right to the deed. *Ex Parte Garrett*, 343.

2632. Connecting carriers may be jointly sued for the penalty, with burden on each to show its nonliability. *Hosiery Mills v. R. R.*, 449.

2686. A way by permissive user alone is not indictable for its obstruction. *S. v. Norris*, 808.

2899, 2907, 2909, 2913. Purchaser at sale of drainage district land for assessment may take sheriff's deed, the owner's remedy being to redeem, etc., and he may not question purchaser's title without showing his own title. *Townsend v. Drainage District*, 556.

2912. Purchaser at sale assessment of land in drainage district may bring foreclosure suit. *Ibid.*

3138. An estate upon contingency upon the first taker die without leaving bodily heirs vests in him a defeasible fee. *Kirkman v. Smith*, 603.

3142. A lapsed devise will not fall within residuary clause contrary to testator's intent. *Howell v. Mehegan*, 64.

3144. A devise to a brother does not come within the provision of this section. *Ibid.*

3254. Omission of defendant's name in complaint does not render indictment invalid if complaint and warrant read together are sufficient. *S. v. Poythress*, 809.

3291, 3293. Defamatory matter sufficient for indictment of crime involving moral turpitude will support action for slander. *Jones v. Brinkley*, 23.

3292. A penitentiary sentence should not be imposed except by express statutory provision. *S. v. Smith*, 804.

3293. Assault with deadly weapon is not a felony. *Ibid.*

3366. Employment with knowledge of children under 12 years is a misdemeanor, with presumption against contributory negligence. *Evans v. Lumber Co.*, 31.

3620. Assault with deadly weapon is not a felony. *S. v. Smith*, 804.

3726. Bond given for performance of contract contrary to public policy is unenforcible. *Basnight v. Mfg. Co.*, 206.

REVISAL—*Continued.*

SEC.

4018 (Gregory Supp.). Sale for assessment of drainage district lands are regulated by law for collection of State and county taxes. *Townsend v. Drainage Commissioners*, 556.

4750. This section does not restrict service on foreign fire insurance company under section 1243. *Pardue v. Absher*, 676.

4750. This section does not apply to bonding companies. *Ibid.*

4570. Statute not suspended against surety on guardian bond upon which statutory service could have been made. *Anderson v. Fidelity Co.*, 417.

4805. Service on bonding companies may be made under section 440(1). *Pardue v. Absher*, 676.

ROADS AND HIGHWAYS.

See Constitutional Law, 2, 10; Criminal Law, 8.

1. *Roads and Highways—Public Roads—Township Commissioners—Negligence—Personal Liability—Pleadings—Demurrer.*—Personal liability will not attach to supervisors of the public roads of a township for an injury received from their failure to keep the roads in proper repair, etc., in the absence of allegations and proof that the acts complained of were either corrupt or malicious; and a demurrer to a complaint in such action which fails to make these necessary alleagtions is good. *Ruffin v. Garrett*, 134.

2. *Roads and Highways—Statutes—Counties—Townships — Bonds — State Aid—Adequate Security.*—Section 20, chapter 6, Laws of 1917, cannot be construed so as to require the county commissioners, as agents for the township, to give the township bond to the State upon which the latter shall issue its 4 per cent bond to aid the township in the construction, etc., of its public roads, for apart from the express language, the statute contemplates more adequate security than a township bond would afford, the size and boundaries of the townships being under the statutory control of the commissioners and subject to be changed by them. Rev., sec. 1318, subsec. 7. *Commissioners v. State Treasurer*, 142.

3. *Roads and Highways—Road Commissioners—Condemnation—Damages —Individual Liability—Statute.*—The action of the road commissioners in meeting as a board and adopting a route through plaintiff's land and appropriating it for a public road is a legal condemnation and appropriation of the land for a public use; and where the board has not exceeded the authority conferred by statute, no liability can attach either to the county or to its individual members, for the plaintiff's remedy is in accordance with the procedure provided by the statute, which affords adequate compensation for the damages sustained by him. Chapter 20, Public Laws of 1917. *Marshall v. Hastings*, 480.

RULES OF COURT.

See Appeal and Error, 3, 44, 50, 56.

RULE OF PRUDENT MAN.

See Negligence, 16.

RULE IN SHELLEY'S CASE.

See Wills, 4, 12, 14.

SAFE APPLIANCES.

See Master and Servant, 15.

SAFE PLACE TO WORK.

See Master and Servant, 1, 2, 11, 12, 13, 18.

SALES.

See Judicial Sales, 1; Drainage Districts, 2, 3, 4; Intoxicating Liquors, 5.

SCHOOL DISTRICTS.

See Constitutional Law, 1; Statutes, 2.

School Districts—Board of Trustees—Injunction—Quo Warranto—Statute. Individuals claiming to comprise the board of trustees of a school district *de jure* may not enjoin those in possession under a colorable claim of right as such board, from their performance of their duties, as such, and require the defendants to turn over to them the school buildings, etc., and not interfere with them in the control and management of the property, and thus determine collaterally the question of title, for the interests of the public are involved; nor would remedy by injunction be permitted in *quo warranto* proceedings, where the title to office is directly involved. Revisal, sec. 836; *Salisbury v. Croom*, 167 N.C. 223, cited and distinguished. *Rogers v. Powell*, 388.

SEALS.

See Contracts, 8.

SECURITY.

See Roads and Highways, 1.

SENTENCE.

See Criminal Law, 5.

SERVICE.

See Limitation of Actions, 5, 6; Motions, 3; Process, 4; Insurance, 15; Corporations, 16; Appeal and Error, 54, 55.

SETTLEMENT.

See Guardian and Ward, 4; Contracts, 17.

SHERIFFS.

See Jury Drawing, 1, 2.

SHERIFF'S RETURNS.

See Process, 1.

SICKNESS.

See Nuisance, 1.

SLANDER.

See Libel.

1. *Slander—Moral Turpitude—Statutes—Felonies—Misdemeanors.*—Actionable slander does not depend upon whether the defamatory matter would have subjected the plaintiff, if true, to a conviction of a felony, or a misdemeanor if the offense be infamous, Revisal, secs. 3291, 3293, or of petty larceny, the amount being under $20, for it is sufficient if it would subject the party to an indictment for a crime involving moral turpitude, as, in this case, for the larceny of a gallon of ice cream at a church festival, in charge of the plaintiff, of the value of one dollar. *Jones v. Brinkley*, 23.

2. *Same—Inferior Courts—Recorder's Courts—Constitutional Law.*—While the constitutionality of a recorder's court given jurisdiction of the offense of petty larceny, *i. e.*, of goods not less than $20, is upheld, Art. IV, sec. 12, not re-

SLANDER—*Continued.*

quiring a trial by jury or indictment by grand jury when appeal is given, Const., Art. I, sec. 3, the test of actionable slander upon acquittal does not depend upon the question of jurisdiction, but upon whether the offense charged involved moral turpitude. *Ibid.*

3. *Slander—Mental Suffering—Humiliation—Damages.*—A consequent humiliation of plaintiff's feelings may be the grounds for special damages in an action for slander, as where the plaintiff, a woman, was falsely charged with larceny of a gallon of ice cream at a church festival under her charge, which prevented her going to church or elsewhere. *Ibid.*

4. *Slander—Defenses—Truth of Charge—Evidence.*—The defense in an action for slander charging the plaintiff with larceny is in establishing the truth of the accusation. *Ibid.*

5. *Slander — Embezzlement — Trials — Instructions — Appeal and Error — Harmless Error.*—In an action for slander, alleging defendant had charged plaintiff with the crime of embezzlement, etc., defended upon the plea of justification, a charge to the jury that there must be a wrongful taking is erroneous, but the error is not prejudicial when it appears that the court further charged there was no evidence to support the charge of a wrongful taking, and correctly as to the only question in controversy, whether the plaintiff actually appropriated the money to his own use. *Lovelace v. Graybeal*, 503.

6. *Slander—Justification—Privilege.*—Words charging another with a theft are actionable *per se* unless they are true or privileged, and if false and not privileged, the one having spoken them is liable in an action for slander. *Riley v. Stone*, 588.

7. *Same—Burden of Proof—Trials.*—Slanderous words falsely uttered are actionable *per se* and imply malice, and where the jury have found under the evidence and proper instructions that they were false, upon the plea of justification, the law holds them to be false, and the plaintiff in an action is entitled to recover his damages unless spoken under a qualified privilege and then the plaintiff is required to further show that the defendant did not act in good faith, but with malice, or took advantage of the occasion to injure the plaintiff in his character or standing. *Ibid.*

8. *Same — Qualified Privilege — Master and Servant — Employer and Employee.*—Where an employer charges his employee with theft, and calls in a policeman, his communications to the policeman, upon his investigation made in good faith, are of a qualified privilege; but where, from the character of the statements, the manner in which they were uttered and the circumstances, as in this case, malice may be properly inferred, it is sufficient to be submitted to the jury, with the burden on the plaintiff to show malice, or whether the defendant had exceeded his privilege. *Ibid.*

9. *Slander—Master and Servant—Employer and Employee—Ratification.*—Where, in an action for slander, an employer is sought to be made responsible for the acts of his employee, his approval of the acts of the employee is equivalent to prior authority to do them. *Ibid.*

SLAVES.

See Descents.

SOLVENCY.

See Partnership, 4.

SPIRITUOUS LIQUORS.

See Intoxicating Liquors.

STATE AID.

See Roads and Highways, 12.

STATEMENTS.

See Evidence, 12.

STATUTES.

See Married Women, 1; Slander, 1; Master and Servant, 8, 17; Negligence, 1; Process, 1; Constitutional Law, 1, 2, 5, 13, 14; Taxation, 1, 5; Mechanics' Liens, 1; Wills, 1, 4, 10, 22, 23, 24; Options, 1; Liens, 1; Public Officers, 1; Roads and Highways, 2, 3; Descents; Carriers of Goods, 7, 10, 11; Actions, 2; Claim and Delivery, 1; Public Policy, 1; Reference, 2; Pleadings, 3; Vendor and Purchaser, 5, 6; Appeal and Error, 18, 23, 49; Cities and Towns, 1; Jury Drawing, 1; Corporations, 3, 8, 11, 12, 14, 15, 16; Limitation of Actions, 2, 3, 5, 7, 10; Telephone Companies, 1; Judicial Sales, 3; Attorneys at Law, 1; School Districts, 1; Trusts and Trustees, 1, 2, 3; Injunctions, 1, 2, 3; Judgments, 7, 16; Evidence, 12, 14, 16; Public Schools, 1, 3; Drainage Districts, 5, 6; Usury, 1, 3; Reference, 8; Instructions, 4, 9; Insurance, 10; Courts, 7, 10, 11; Criminal Law, 1, 6, 7, 8; Railroads, 12; Intoxicating Liquors; Partnership, 9.

1. *Statutes—In Pari Materia—Corporations—Dissolutions—Reorganization —Judicial Sales—Purchasers.*—Chapter 147, Laws 1913, authorizing a decree of dissolution of corporations, with certain exceptions, upon petition of minority stockholders owning as much as one-fifth of the capital stock, when dividends had not been paid as therein specified, and upon proper notice to shareholders and creditors, for their winding up and the distribution of their assets, should be construed with the provisions of the various sections of the Revisal, entitled "Reorganization," being sections 1238, 1239, 1240, 1241; and when thus construed, the purchaser at the sale under a decree of the court, duly entered, acquires the right to reorganize, in accordance with the terms imposed by the sections referred to, and carry on the business as a new corporation, acquiring the franchise of the old corporation as an asset included in his purchase. *Wood v. Staton*, 245.

2. *Statutes—Repealing Statutes—Counties—Depositories—School Districts.* Chapter 645, Public-Local Laws 1911, and chapters 581 and 674, Public-Local Laws 1915, relating to the deposit of public funds of Robeson County, etc., are repealed by section 24, chapter 46, Public-Local Laws 1917. *Comrs. v. Lewis*, 528.

STATUTE OF FRAUD.

See Deeds and Conveyances, 2; Vendor and Purchaser, 6; Appeal and Error, 17; Contracts, 8.

STOCKHOLDERS.

See Corporations, 2, 4.

STREETS.

See Municipal Corporations, 1, 8.

STREET RAILWAYS.

See Railroads, 11.

Street Railways—Alighting Passengers— Negligence — Evidence — Contributory Negligence—Trials—Questions for Jury—Railroads.—A street car company owes the duty to its passengers to use a high degree of care to see that they safely alight from its cars when they stop at the regular stopping points; and

STREET RAILWAYS—*Continued.*

where there is evidence tending to show that automobiles usually passed the place where plaintiff was injured at the rate of one or two a minute, and by the exercise of care, a street car conductor could have seen the approach, at high speed of one of them, and failed to warn a passenger of her danger, for which she had looked and failed to see, and that she was struck and sustained the injury complained of while she was alighting or immediately thereafter, it is sufficient upon the issue of defendant's actionable negligence, and the plaintiff will not be held, as a matter of law, to be barred of her right to recover upon the issue of contributory negligence. *Wood v. Public Corporation*, 698.

SUBSCRIPTIONS.

See Corporations, 8, 17, 18.

SUITS.

See Equity, 1.

SUMMONS.

See Process, 1, 2, 3.

SUPERIOR COURTS.

See Appeal and Error, 10.

SUPPRESSION OF EVIDENCE.

See Criminal Law, 3.

SURETY.

See Limitation of Actions, 4.

SURGEONS.

See Negligence, 16.

SURVEYOR.

See Courts, 11.

SUSPENDING MEMBER.

See Fraternal Orders, 1.

TAXATION.

See Constitutional Law, 3, 11; Public Schools, 1, 2; Appeal and Error, 23.

1. *Taxation—Funds—Custodia Legis—Statutes—Constitutional Law.* — The taxation of funds in *custodia legis* is regulated by the Legislature, subject to constitutional provisions. *Hyatt v. Walston*, 55.

2. *Taxation—Funds—Clerks of Courts.*—The clerk of the court is both a "receiver" and "accounting officer" of funds paid into his hands in the course of litigation, within the meaning of the statute, and thereunder should properly list such funds for taxation on May first of each year, when no adjudication as to the rightful owners has been made. *Ibid.*

3. *Same—Claimants—Title—Judgment.*—Where the proceeds of the sale of the property of an insolvent corporation have been paid into the office of the clerk of the Superior Court awaiting adjudication as to its distribution among first and second mortgagees, bondholders and others claiming a superior lien, the duty of the clerk to list the fund for taxation on May first, as the statute requires is not affected by the fact that some of the bondholders have listed their bonds for taxation which others claim to be exempt, for they can acquire no title to, or control over the funds or a part thereof until the matter has been determined. *Ibid.*

TAXATION—*Continued.*

4. *Taxation—Government Reservation—Contracts to Convey Land—Deeds and Conveyances.*—A contract to convey lands to the United States Government reservation, under the Federal statute, does not vest the title in the Government until survey made, acreage determined, purchase price paid, or conveyance made and title approved by the Attorney-General, and until then the land is subject to State, etc., taxes under the State statutes. *Land Co. v. Comrs.*, 634.

5. *Taxation—Statutes—Interpretation—Inheritance Tax.*—Laws imposing an inheritance tax are liberally construed to effectuate the intention of the Legislature, and the exemptions to be allowed to rest in its power and discretion. *Corporation Commissioners v. Dunn*, 679.

6. *Same—Dower.*—The right to dower in the husband's land rests upon statute, and does not grow out of the contractual relations of the marriage, and, being in the nature of property which passes "by the intestate laws of this State," is subject to taxation, under chapter 201, section 6, Laws 1913, providing an exemption of $10,000; and the inheritance-tax law of 1911 (chapter 46, section 6) completely exempting such tax, is repealed by this later statute. The origin, history, and nature of the widow's right of dower discussed by CLARK, C.J., *Ibid.*

7. *Same—Widow's Dissent.*—Where a widow dissents from her husband's will and claims her dower right in his lands, she takes such interest "as if he had died intestate" (Revisal, sec. 2081), and it is subject to the inheritance tax. Chapter 201, sec. 6, Laws, 1913. *Ibid.*

TAXES.

See Drainage Districts, 4.

TELEGRAPHS.

See Commerce, 1, 2, 3, 4.

1. *Telegraphs—Negligence—Contracts—Torts—Mental Anguish — Interstate Messages—Commerce.*—An action will lie against a telegraph company failing in its public duty to promptly transmit and deliver a telegram, both in contract or tort; and where the message is intrastate, mental anguish is a legal ground for recovery of actual damages. *LeHue v. Telegraph Co.*, 332.

2. *Same—Measure of Damages.*—In an action against a telegraph company to recover damages for its negligent delay in the transmission of a message, the injured party may sue either in contract or tort, the measure of damages in the former being confined to such as were in the reasonable contemplation of the parties at the time the contract was entered into; and in the latter, such as were reasonably probable under the relevant facts existent at the time of tort committed. *Ibid.*

3. *Same — Transmittal of Money — Pleadings — Demurrer.* — In an action against a telegraph company to recover damages for its negligent delay in transmitting by telegraph money sent by a husband to his wife with which to return home by train, it was alleged in the complaint that the defendant had been informed through its agents that the wife was away from home without money; that the telegram had been promptly transmitted, and while it was in the defendant's office at the terminal point, the wife, the plaintiff in the action, received another message from the defendant, transmitted from a different place from that of the first message, but in the same line of travel, announcing the death of her mother, stating the time and place of burial; that she would have attended the funeral of her mother except for the negligence of the defendant in

TELEGRAPHS—*Continued.*

not giving her the money, and that she had had a conversation with defendant's agent after the telegram of transmittal had been received and in time to have attended the funeral: *Held*, a case for the jury as to whether there was negligence by defendant, the proximate cause of plaintiff's injury. *Ibid.*

TELEPHONE COMPANIES.

Telephone Companies—Public-service Corporations—Statutes — Courts — Jurisdiction—Corporation Commission.—A telephone company, serving the public, must discharge its duties impartially and without discrimination; and where, in violation of this duty, it refuses to install a telephone instrument and connection in the residence along its lines for one applying for the same, who offers to pay in advance for the same service rendered to others, a *mandamus* will lie; and the statute giving general control of such companies to the Corporation Commission does not oust the court of its jurisdiction to compel the company to perform a public duty it owes to an individual. *Walls v. Strickland*, 298.

TENANTS IN COMMON.

See Wills, 24; Partnership, 9.

"TERM."

See Criminal Law, 5.

TEST.

See Constitutional Law, 6.

TIMBER.

See Partnership, 1; Deeds and Conveyances, 5; Injunction, Perpetual, 1; Injunctions, 2; Mortgages, 3; Drainage Districts, 1, 12.

TIME EXTENDED.

See Appeal and Error, 54, 55.

TIME THE ESSENCE.

See Deeds and Conveyances, 5.

TITLE.

See Taxation, 3; Injunction, 2, 3; Mortgages, 2; Deeds and Conveyances, 6, 7; Costs, 1.

TORTS.

See Telegraphs, 1; Judgments, 9; Issues, 1.

TOWNSHIPS.

See Constitutional Law, 2; Roads and Highways, 2, 11.

TOWNSHIP COMMISSIONERS.

See Roads and Highways, 1.

TRAINS.

See Railroads, 14, 15.

TRANSACTIONS.

See Evidence, 14.

TREASURER.

See Drainage Districts, 6.

TRESPASSERS.

See Carriers of Passengers, 8.

TRIALS.

See Master and Servant, 1, 3, 5, 11, 13, 14; Contracts, 1; Negligence, 3, 7, 9, 18, 22, 23, 24; Malicious Prosecution, 1, 2, 3; Water and Watercourses, 2; Instructions, 1; Vendor and Purchaser, 4, 17, 20; Evidence, 6, 13; Descents, 5; Carriers of Passengers, 7; Railroads, 6, 10, 12, 18; Insurance, 5; Appeal and Error, 23, 33, 35, 37, 41; Slander, 5, 7; Hotels, 2; Municipal Corporations, 10; Issues, 2; Limitation of Actions, 8; Pleadings, 10; Usury, 2, 3; False Imprisonment, 1; Principal and Agent, 3; Intoxicating Liquors, 1; Criminal Law, 4; Street Railways, 1; Automobiles, 1.

Trials—Attorney and Client—Law—Argument to Jury—Decisions—Facts. It is proper for an attorney, in arguing his case to the jury, to read the facts in an opinion of the Supreme Court in another case to the extent necessary to apply the principle of law involved in that case to the facts of the case at bar. *Cashwell v. Bottling Works*, 324.

TRIAL BY JURY.

See Reference, 1, 7, 8; Appeal and Error, 10, 29; Municipal Corporations, 4.

TRUSTS AND TRUSTEES.

See Wills, 20, 21; Corporations, 7; Mortgages, 3.

1. *Trusts and Trustees—Deeds and Conveyances—Parol Trusts—Statute.* Parol evidence that a deed to lands was made upon agreement to reconvey the lands to the grantor upon a certain contingency is incompetent to establish a parol trust in the grantors' favor, and is inadmissible under the statute of frauds. *Newton v. Clark*, 393.

2. *Trusts and Trustees—Excess of Powers—Parties—Statutes—Cestui Que Trustents.*—Where the question involved in the controversy is whether the trustee of an express trust has exceeded his authority, it is necessary to join the *cestuis que trustent* in the action, and Revisal, sec. 404 has no application. *Barbee v. Penny*, 571.

TRUSTEES.

See School Districts, 1.

UNUSUAL PUNISHMENT.

See Constitutional Law, 14.

USE.

See Wills, 21.

USURY.

1. *Usury—Statutes.*—An express or implied loan, upon the understanding that the money shall be returned, at a greater interest rate than the statute allows, whatever the form of the transaction, and with corrupt intent on the part of the lender, is usury, under our statute, the corrupt intent consisting in "taking, receiving, reserving, or charging" a greater rate than that allowed by law. Revisal, sec. 1951. *Loan Co. v. Yokley*, 573.

2. *Same—Commissions—Banks and Banking—Certificate of Deposit—Trials—Evidence.*—Under an agreement made with a bank, an insurance company deposited money upon a 6 per cent certificate of deposit, which the bank loaned to its customer upon his note, bearing the legal rate upon its face, which was pledged to the insurance company as additional collateral to its certificate. The bank charged its customer a greater rate of interest than allowed by statute (Revisal, sec. 1951), in which the insurance company did not participate, looking only to the bank for the rate of interest stated on the certificate. In an action on the note the maker pleaded the usury statute, the plaintiff bank claiming

USURY—*Continued.*

the difference as its commission in negotiating the loan: *Held*, the transaction between the bank and its customer was usurious, as a matter of law. *Ibid.*

3. *Usury—Statutes—Commission—Evidence—Trials — Questions for Jury.* Where, in an action upon a note, the defendant pleads the usury statute (Revisal, sec. 1951), and the evidence is sufficient to sustain a verdict that the excess of interest was a proper charge made for negotiating the loan, the question should be submitted to the jury. *Ibid.*

VARIANCE.

See Pleadings, 3, 6.

VENDOR AND PURCHASER.

See Contracts, 4, 5, 7; Evidence, 11; Pleadings, 5, 9; Appeal and Error, 36, 52, 53.

1. *Vendor and Purchaser—Contracts—Public Policy—Immoral Use.*—When the sale of goods is lawful in itself, the fact that they are used in an immoral place does not affect its validity when such use is not participated in by the vendor; and where a phonograph is sold to a woman of bad character, keeping an immoral place, known to the vendor, the mere fact of the vendor's knowledge thereof, will not prevent his recovering the purchase price or the enforcement of his vendor's lien thereon. *Fineman v. Faulkner*, 13.

2. *Vendor and Purchaser—Contracts—Parol Evidence—Lost Letters—Fraud and Mistake—Equity—Reformation of Instruments.*—The contents of a lost letter of the purchaser specifying the quality of the goods contemplated to be purchased, and referred to in a subsequent letter of the seller connecting it with the transaction in a material respect, may be shown by a parol in defense of an action against the purchaser for damages in failing to accept the goods under a written contract of purchase executed in pursuance of the correspondence, upon allegation that the contract was executed by mistake or fraud, and that the goods were not of the quality or kind of those agreed upon. *Potato Co. v. Jeanette*, 236.

3. *Same—Damages.*—In an action to recover damages of the purchaser of goods for refusing to accept them, wherein it is claimed that the goods offered were not of the quality of those purchased, and asking a reformation of the written contract for mistake or fraud, evidence as to the quality of the goods refused is competent, at least, upon the issue of plaintiff's damages. *Ibid.*

4. *Vendor and Purchaser—Contracts, Breach—Ready to Comply—Trials—Questions for Jury—Burden of Proof.*—Where the purchaser is sued for damages for failure to accept the goods under the terms of his contract, the question of whether the seller was ready, able and willing to perform his part thereof is one for the jury, with the burden on the plaintiff. *Ibid.*

5. *Vendor and Purchaser—Statutes—Verified Account—Evidence—Prima Facie Case—Partnership.*—The statutory statement of an account of goods sold and delivered, received as *prima facie* evidence in a court of a justice of the peace, is sufficient if verified by a partner in plaintiff's firm and in conformity with the statute. *Worthington v. Jolly*, 266.

6. *Vendor and Purchaser—Statutes—Verified Account—Evidence—Prima Facie Case—Statute of Frauds—Debt of Another.*—The itemized and verified account allowed by the statute in actions begun in the court of a justice of the peace affords *prima facie* evidence of the sale and delivery of the goods; and

upon trial on appeal in the Superior Court, in which the defendant claims he is not liable under the statute of frauds, upon the ground that he is sought to be bound by his parol promise to be charged with the debt of another, it is reversible error to submit to the jury the verified account whereon was written the name of the defendant as "responsible." *Ibid.*

7. *Vendor and Purchaser—Contracts—Explosives—Pepsi-Cola—Duty Implied.*—Under a contract of sale of pepsi-cola bottled by the vendor, the duty is implied that the seller of the mixture, put up in the bottles and heavily charged with carbonic acid gas, would use care therein proportionate to the risks to others, so as to avoid inflicting a personal injury on them from an explosion of the bottles. *Cashwell v. Bottling Works*, 324.

8. *Vendor and Purchaser—Contracts—Proposed Purchaser—Cancellation—Acquiescence—Burden of Proof.*—The purchaser may not receive from the vendor goods he has agreed to purchase, and then return them to the vendor and cancel the contract without the latter's consent; and where the purchaser contends that he had made the vendor a proposition of this character, and that he had received and kept the goods, it is incumbent upon him to prove such facts. *Saw Co. v. Bryant*, 355.

9. *Same—Carriers of Freight—Principal and Agent—Personal Delivery—Evidence.*—A contract of carriage by freight is not one of personal delivery to the consignee, and the fact that a purchaser of goods redelivered them to the carrier, under its ordinary bill of lading, properly addressed to the vendor, is not sufficient evidence of a redelivery to the vendor, upon the defense that the vendor had received the goods and kept them under the purchaser's proposition to cancel the contract of sale, the carrier in receiving the reshipment being regarded as the agent of the purchaser. *Ibid.*

10. *Vendor and Purchaser—Consideration of Worthless Goods—Evidence—Questions for Jury.*—In the vendor's action to recover upon notes given for a certain machine, the purchaser may not avoid payment upon the ground that the machine was worthless and the contract failed for want of consideration, when the machines are shown to do the work when properly handled; and upon conflicting evidence, the question is one for the jury. *Hall Furniture Co. v. Cram Mfg. Co.*, 169 N.C. 41; *Bland v. Harvester Co., id.*, 418, cited and distinguished. *Farquhar Co. v. Hardware Co.*, 369.

11. *Vendor and Purchaser—Contracts, Written—Warranty—Forms.*—When the contract for the sale of certain machines provides that the purchaser shall have one week in which to make complaints, and there is evidence tending to show that the machines were delivered to him for inspection, and that he kept them several weeks without complaint; that he had paid a part of the purchase price after delivery, and given notes, the subject of the suit, for the balance, without effort on his part to test the machines or offer to return them, in the vendor's action to recover the purchase price the defense that the machines were worthless is not available. *Ibid.*

12. *Same—Waiver.*—Where the vendor of a certain machine is released from liability, under the terms of his contract, for imperfections therein, he does not waive his contractual rights by rendering gratuitous services to the purchaser in an effort to give him perfect satisfaction. *Ibid.*

13. *Same—Parol Evidence.*—Where the terms of a contract of sale of a certain machine provides that the purchaser shall make whatever complaint he has within a week, notifying the vendor of defects which he agrees to remedy,

VENDOR AND PURCHASER—*Continued.*

and that it will not be taken back except in case of imperfection which it fails to correct, and that no officer or agent had the power to change this warranty, etc.: *Held*, parol evidence of promises or representations by the vendor's officers or agents tending to contradict the writing is inadmissible, and the purchaser is held to a compliance with the written terms of the contract. *Ibid.*

14. *Vendor and Purchaser—Measure of Damages—Evidence—Damages Minimized.*—Where the vendor sold a large quantity of cotton seed, being informed by the purchaser that orders for a manufactured product therefrom would be taken against this specific purchase, and the purchaser breaches this contract and is sued for the difference in the price agreed and that required to get the cotton seed elsewhere, and there is evidence that this was done on the open market at the then prevailing prices: *Held*, while the purchaser is required to exercise reasonable business prudence to minimize his loss, evidence as to a price offered another by the vendor, less than the contract price, without indication to exact time or price or quantity, is too indefinite, and, on appeal, it being incumbent on defendant to show prejudicial error, an exception to the ruling out of the evidence will not be sustained. *Oil Co. v. Burney*, 383.

15. *Vendor and Purchaser—Worthless Goods—Complaint—Delay Explained.* The delay of the purchaser of a cash registering machine in making complaint that the machine was unfit and worthless may be explained by his continuous effort to have the vendor remedy the defects and comply with his contract, and the latter's unfulfilled promises to do so. *Register Co. v. Bradshaw*, 414.

16. *Vendor and Purchaser — Representations — Contracts — Warranties.*—Where, in the sale of a horse, the vendor represents to the purchaser that the animal was sound and all right for the latter's purposes, it is not open to the vendor's objections that the court left the question of warranty and breach thereof to the jury upon conflicting evidence under proper instructions. *Kime v. Riddle*, 442.

17. *Same—Breach—Intent—Trials—Questions for Jury.*—Where the statement of the vendor to the purchaser of a horse as to the animal's condition, relied on as a warranty, is in dispute, it is for the jury to determine the fact in regard thereto; and where the statement is admitted, the question of warranty often depends upon the intent with which it was uttered, presenting a mixed question of law and fact for the jury; but where the statement is admitted and the intent is clear and unequivocal, it may be construed as a warranty, as a matter of law. *Ibid.*

18. *Vendor and Purchaser—Warranty—Breach—Measure of Damages—Evidence.*—Upon vendor's breach of warranty in the sale of a horse, the purchaser's measure of damages, unless in exceptional cases of special damage, is the difference between the value of the animal as warranted and as delivered, and evidence as to its condition and value may be competent and relevant to the questions of warranty and damages. *Ibid.*

19. *Vendor and Purchaser—Warranty—Contracts — Breach — Exchange — Waiver.*—Where a vendor has breached his warranty to take back the horse sold, and the purchaser has in consequence exchanged the animal for another, such exchange is not a waiver by the purchaser of his right to recover his damages arising from the vendor's breach. *Ibid.*

20. *Vendor and Purchaser—Contract—Breach—Trials—Nonsuit—Evidence.* Where a contract for the sale of certain machines for the life of the contract provides that the vendor will ship such as he is able to supply, and will not be

VENDOR AND PURCHASER—*Continued.*

liable in damages for failure to fill any order, the purchaser must abide by the terms of the agreement; and where the vendor has shipped second-hand machines painted over, which the purchaser has refused, and has paid freight charges, which he has been repaid by the vendor, in the former's action to recover damages for the alleged breach of contract, the rejection of the second-hand machines by the purchaser was substantially the same as if the defendant had not filled the order, and the court's order of nonsuit was properly entered. *Hardware Co. v. Machine Co.*, 481.

VENUE.

See Attorney and Client, 1.

VERDICT.

See Judgments, 7, 9, 15; Instructions, 5; Motions, 1, 2; Appeal and Error, 48, 57.

1. *Verdict—Weight of Evidence—Motions—Court's Discretion.*—A motion to set aside a verdict as not in conformity with the evidence is addressed to the discretion of the trial judge, when the evidence is conflicting, and will not be considered on appeal. *Hoke v. Whisnant*, 658.

2. *Verdict—Evidence—Judgments.*—Where there is evidence that a business was worth the price the vendor received for it, and that the loss was sustained by the purchaser's mismanagement, the verdict of the jury awarding a less amount than claimed by the purchaser in his action for tort cannot be set aside as a matter of law, and the amount he claims substituted therefor—*i. e.*, the amount of the purchase price. *Ibid.*

3. *Verdict—Criminal Law—Indictment—Several Counts—General Answer.* Where there are several counts in a bill of indictment charging a violation of the State prohibition law, with evidence as to each, and the court has instructed the jury, if they acquitted the defendant on any one or more of the counts, to so specify, a general verdict of guilty is not objectionable, though it were better for the jury to answer as to each count, the verdict meaning that the defendant had been found guilty under all of them. *S. v. Poythress*, 809.

4. *Verdicts—Answer to Issues—Definiteness—Courts—Findings of Fact.*—Where on a trial in ejectment a court map has been introduced and used by the parties and referred to in the court's instruction to the jury, and the true divisional line between the lands is in dispute, an answer to the issue that the line is between "4 to 3" is sufficiently definite upon which to render judgment, it being found as a fact by the trial judge that the response referred to these figures upon the official map. *Grove v. Baker*, 746.

5. *Same—Waiver—Presumptions—Evidence.*—Where a verdict is rendered in open court, a party should then object to the indefiniteness of an answer to an issue, so the judge could submit it to the jury again, or he will be deemed to waive his objection; and when this course has not been taken and the judge has found sufficient facts upon which its definiteness is made to appear on appeal, his finding will be presumed to have been upon sufficient evidence, nothing else appearing. *Ibid.*

VERDICT DIRECTING.

See Instructions, 1.

VERDICT SET ASIDE.

See Appeal and Error, 1, 7, 30, 40; Courts, 5; Instructions, 4.

VERIFIED ACCOUNT.

See Vendor and Purchaser, 5; Appeal and Error, 17.

VESTED RIGHTS.

See Constitutional Law, 13; Insurance, 7, 11.

WAIVER.

See Mechanics' Liens, 1, 4; Reference, 1; Carriers of Goods, 6; Vendor and Purchaser, 12, 19; Issues, 1; Appeal and Error, 29; Verdict, 5.

WARNINGS.

See Carriers of Passengers, 8.

WARRANTS.

See Indictment, 1.

WARRANTIES.

See Actions, 4; Vendor and Purchaser, 11, 16, 18, 19; Deeds and Conveyances, 6.

WATERS.

See Drainage Districts, 1.

WATER AND WATERCOURSES.

1. *Water and Watercourses—Ponding Water—Measure of Damages.*—The measure of damages to the owner of lands for wrongfully ponding water upon them are the damages present, past, and prospective, being the difference between the value of the lands before and after the act causing the injury complained of, and taking into consideration evidence of the uses to which it might have been applied and those for which it was adopted or used. *Borden v. Power Co.*, 72.

2. *Same—Ditching—Trials—Instructions—Conflict—Harmless Error* —One who has been damaged by the wrongful ponding of water upon his lands is not required to lessen the damages thereby caused by cutting drainage ditches thereon; and where the court has instructed the jury correctly thereon, but adds that the plaintiff is ousted of the right to recover damages for loss or depreciation because of failure to so ditch the land, unless such ditching was useless by reason of the water backing on it, the conflict, if any, in the instruction was not to defendant's prejudice. *Ibid.*

WATER-WORKS.

See Municipal Corporations, 9, 11.

WEIGHT OF EVIDENCE.

See Verdict, 1.

WIDOW.

See Wills, 10.

WITHDRAWAL OF PARTNER.

See Partnership, 6.

WITHDRAWAL OF PARTY.

See Actions, 3.

WILLS.

See Deeds and Conveyances, 7.

1. *Wills—Death of Devisee—Lapsed Legacies—Statutes.*—A devise to a brother who dies before the testator does not come within the provision of Re-

visal, sec. 3144, as to "a child or other issue of the testator," and lapses by reason of his prior death to that of the testator. *Howell v. Mehegan*, 64.

2. *Same—Residuary Clause—Contrary Intent.*—A lapsed devise of lands will not fall within the residuary clause of a will, under the statute, Revisal, sec. 3142, where a contrary intent appears from the construction of a will itself; and where the testator has specifically devised his lands, making ample provision for his widow, and gives her, in the residuary clause, "all other property not herein specified," the use of the word "property," with the expression "not herein specified," shows the testator's intent that a lapsed devise of the realty should not fall within the residuary clause, but will go to the testator's next of kin instead of those of the widow or her devisees under her will. *Ibid.*

3. *Wills—Devises—"Loan."*—The use of the word "lend" in a devise of land will pass the property to which it applies in the same manner as the use of the word "give" or "devise," unless a contrary intent is manifested by the terms of the instrument. *Cohoon v. Upton*, 88.

4. *Same—Heirs of the Body—Statutes—Rule in Shelley's Case.*—Under a devise or "loan" of lands to S. and E. "their natural lives, and give to their begotten heirs of their body," etc.: *Held*, the words "heirs of the body" are equivalent to the words "heirs general" (Revisal, sec. 1548), no contrary intention appearing in the other expressions used in the will. *Ibid.*

5. *Wills—Codicils—Interpretation.*—A codicil should be construed with the will, as an addition, explanation, or alteration thereof, in reference to some specified particular, the law not favoring a revocation by implication, but that the other parts of the will shall stand unless a different intent be gathered by construing the will and codicil as a whole. *Baker v. Edge*, 100.

6. *Same—Lapsed Devises — Estates — Contingent Limitations — Residuary Legatees—Next of Kin.*—A devise of certain lands with specific bequests to named grandsons of the testator, John and Jesse, in case of either dying without issue, the estate and personalty to go to the other; and in the event of the death of both without issue, then to their "next of kin in equal degree," etc., with codicil revoking only the devise of the lands to John, and instead, giving him another tract of land since acquired. After the death of both John and Jesse without issue: *Held*, the codicil revoking only the devise of the land to John, did not impliedly revoke, and was not intended to revoke, the limitation over to "the next of kin" of Jesse's undivided portion, and the contingency having happened, John's undivided part became lapsed, and came within the residuary clause freed from the limitations, while Jesse's such portion went to the "next of kin" upon the happening of the contingency, as directed by the will. *Ibid.*

7. *Same—Limitation of Actions.*—Where lands are devised with limitation over upon the death of the two devisees, without issue, and by codicil the portion of one has fallen within the residuary clause of the will, and that of the other has gone to the "next of kin" upon the happening of the contingency, the statute of limitations begins to run against the residuary legatees by adverse possession under color at any time since the death of the testator, and against the next of kin only from the happening of the contingency. *Ibid.*

8. *Wills—Directions—Sale of Lands—Equity—Conversion — Personalty.* — A direction by will to sell lands, the proceeds to be "divided between all my children, the heirs of such of my children as may not be living at my death to receive such child's portion," is an equitable conversion of the devise into personal property, under the doctrine that equity regards that as done which ought

to be done, and the proceeds of the sale pass to the beneficiaries as such. *Everett v. Griffin*, 106.

9. *Same—Distribution.*—When no contrary intent appears from the will, and the testator uses the word "heirs" in connection with the distribution of his personal property, it refers to those who take as such under the statute as distributees thereof. *Ibid.*

10. *Same—Heirs—Widow—Statutes.*—A devise of lands to be sold and the proceeds to be distributed among designated children of the testator, as personalty, under the equitable doctrine of conversion, "the heirs of such of my children as may not be living at my death to receive such child's portion": *Held*, the widow of a deceased son of the testator is regarded as an "heir" under our statute, and in the event of no child of the marriage, etc., she is entitled to one-half of the property her husband would have taken. Rev., sec. 132, subsec. 3. *Ibid.*

11. *Wills—Devises—Locus in Quo—Identity.*—The testator devised to his son C. a known and designated 100-acre tract of land. C. died intestate, leaving him surviving two daughters and a son, R. The appellants claim an interest in the *locus in quo* through their mother, a daughter of C. and a sister of R. The lands in controversy were devised by R., to the children of F. and as "the tract of land on which their mother lived at the time of her death and came by my father": *Held*, the devise of R. being of the tract of land, and not of his interest therein, is not sufficient evidence in itself to identify the land as that devised to his father C. and in which the appellants claim an interest as the heirs at law of their mother, the sister of R. *Martin v. Vinson*, 131.

12. *Wills—Devises—Estates—Defeasible Fee—Heirs—Children—Contingent Limitations—Rule in Shelley's Case.*—Where a testator, by separate devises, gives to each of his three daughters, who are his only heirs at law, a certain tract of his land, with provision in each item, "to her and the lawful heirs of her body in fee simple forever, and if she should die without a lawful heir of her body, then the property to go to the other surviving heirs": *Held*, by the expression, "lawful heirs of her body," in the connection used, the testator intended "child" of his daughters, and they took a fee-simple title to the designated lands, subject to be defeated upon their dying without child; and where all of them have died without child, at different times, the successive survivor or survivors took a fee-simple title in the land of their predeceased sister or sisters, and so on to the last, at whose death the title derived through her sisters descended to her heirs at law; but as to the devise made directly to her, she could not take a fee simple under the will, and this part descended to the heirs of the testator, as intended by him, the Rule in *Shelley's* case not applying. *Kornegay v. Cunningham*, 209.

13. *Wills—Interpretation—Intent—Circumstances of Testator.*—The primary object in interpreting a will is to ascertain the intent of the testator from the context thereof, and in proper instances there will be considered the condition of the testator's family and the circumstances surrounding him; and where the intent is clear, words may be supplied, transposed, or changed to effectuate this intent. *Crouse v. Barham*, 460.

14. *Same—Adopted Children—Remaindermen—Estates.*—Where the testator, owning not only one tract of land, devises land "on which I now reside" to his wife in one item, immediately followed in another item by a devise to his adopted children, "Lester Crouse and Mary E. Barham, and Mary E. Barham to have," etc., to be divided between them "by three disinterested persons at my

wife's death": *Held,* though the will was obscurely drawn, the intent of the testator, as gathered from the language of the will and circumstances surrounding the testator, was evidently to devise the remainder in fee in the lands, upon his wife's death, to his adopted children specifically named by him in his will. *Ibid.*

15. *Wills—Intent—Intestacy.*—In construing a will, the courts do not favor an interpretation which leads to intestacy in part. *Ibid.*

16. *Wills—Devise—Precatory Words.*—A devise of land under metes and bounds to a son, with balance of testator's lands to his four daughters, by name, to be equally divided among them, with provision that no one of the daughters shall sell her interest until she becomes 21 years of age, "then should she desire to sell, she shall give my son the preference," etc., with further item, that it was testator's last wish that the old home shall remain intact, and his son shall eventually own it by buying his sister's interest: *Held, precatory* words are not construed as imperative unless the contrary intent appears in construing the will, and the intent of the testator was that the son and each of the daughters should own their land in fee, giving each of the daughters the right to sell her interest, independently of the other, upon becoming 21 years of age. *Hardy v. Hardy,* 505.

17. *Wills—Devises—"Children"—Estates for Life—Rules of Construction—Intent.*—A devise of land to "children" does not include "grandchildren," and the principle ordinarily applicable to the construction of a devise to survivors after a life estate, that it is determined as of the death of the life tenant, and not the death of the testator, is but a rule of interpretation to ascertain the intent of the testator, and will not be permitted to defeat it when the intent otherwise appears by proper construction. *Taylor v. Taylor,* 537.

18. *Same — Existing Conditions — Early Vesting of Estates — Words Employed—Interpretation.*—The condition of the testator and his family, and all the attendant circumstances, may be considered when relevant in the interpretation of his will to ascertain his intent, the law favoring an early vesting of estates; and when words are used with a certain significance in one part of the will they will be construed in other parts thereof to have the same significance, unless a contrary intent appears. *Ibid.*

19. *Same—"My Living Children."*—A testator who died leaving a wife and twelve children surviving devised certain of his lands to his wife for life, and "at the expiration of my wife's interest in land and property, divide it equally among my living children"; and by another item, "the balance of my estate to be divided equally among my living children." He was predeceased by a son, who had married contrary to his wishes, of which marriage there are living children: *Held,* the intent of the testator, by the use of the words, "my living children," was to designate his own children who should survive him. *Ibid.*

20. *Wills—Donee of Power—Excess of Power—Contracts—Assent of Cestui Que Trust—Expenditures—Account—Compensation—Trusts.*—A power in a will given the executors to sell off a tract of land, dividing it into smaller lots, etc., does not authorize the executors to enter into contract with real estate dealers to lay off land into streets and lots, nor will authority likewise conferred by the other beneficiaries permit the executors to exceed the power given them in the will; but where the land company has expended money to lay off the land into streets and lots, with expenditure of money enhancing the value of the whole, under the contract with the executors, with the approval of some of the bene-

WILLS—*Continued.*

ficiaries, in an action brought by the latter, in which the others are subsequently joined, all being of full age, the land company is entitled to just compensation upon account taken. *Barbee v. Penny*, 571.

21. *Wills—Devises—Shifting Use—Defeasible Fee—Trusts and Trustees.*—A devise of lands to K. "his lifetime, then to go to" G. and M., "and if they should die without leaving bodily heirs, then to go to the Flow heirs": *Held*, after the falling in of the life estate, G. and M. take the fee in the remainder (Revisal, sec. 3138), defeasible upon their dying without leaving "bodily heirs," in which event it would go to the ultimate devisees, upon the principle of a shifting use operating by way of an executory devise. *Kirkman v. Smith*, 603.

22. *Wills—Devises — Defeasible Fee — Estates — Limitations — Statutes.*—When G. and M. take, by devise, the fee simple in lands, defeasible upon their dying without leaving bodily heirs, the event determining the estate they shall take is whether they have children living at the time of their death or born within ten lunar months thereafter, "unless the intention of such limitation be otherwise, and expressly and plainly declared in the face" of the will. *Ibid.*

23. *Wills—Estates—Remaindermen—Testator's Heirs—Devise—Purchase—Descents—Statutes.*—Where a testator devises a fee-simple title to his lands to his two sons, defeasible upon their dying without leaving bodily heirs, naming the Flow heirs as his ulterior devisees (Revisal, sec. 1556; Rule 4 of Descents), providing that on failure of lineal descendants, etc., the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who are of the blood of the ancestor, has no application, and cannot confine the heirs who will take under the will to those who are also the heirs of his two sons to whom the devise was made; for the Flow heirs would take directly under the will as purchasers, upon the happening of the contingency. *Ibid.*

24. *Wills—Devise—Husband and Wife—Tenants in Common—"Heirs of Body"—Statutes—Rule in Shelley's Case.*—A devise of land to testator's son-in-law, J., and to his daughter, R.; his wife, "after the death of R., the lands to be equally divided between J. and the heirs of R.'s body": *Held*, the intent of the testator, as gathered from the will, was to give to each of the beneficiaries, J. and R., an undivided equal interest in the lands to be held in common, excluding the construction they were to take the estate in entireties; the survivor, as between husband and wife, taking the whole; and should the proper construction be to give a life estate in the land to R., the same result would follow, the words "heirs of her body," being manifestly used to separate and mark the estate of the remaindermen from that of J., the other tenant in common, the words employed being considered as "heirs general," under the statute (Revisal, sec. 1578), converting R.'s estate into a fee simple. *Ford v. McBrayer*, 171 N.C. 421, cited and distinguished. *White v. Goodwin*, 723.

WINES.

See Intoxicating Liquors.

WITNESS.

See Carriers of Passengers, 6; Courts, 2, 3; Constitutional Law, 8.